1600 SERVANT: DRIVER OF AUTOMOBILE (PRESUMPTION FROM OWNERSHIP OF VEHICLE)

Uncontradicted evidence has been received in this case that _____ was the owner of the automobile driven by _____. From this fact alone, a presumption arises that (driver) was the servant of (owner). Other evidence has been introduced, however, for the purpose of showing that (driver) was not the servant of (driver) at the time of the accident.

A "servant" is a person employed to perform a service for another and who, with respect to (his) (her) physical conduct in the performance of the service, is subject to the other's control or right to control. The term "servant" as used in this instruction is not used in the ordinary sense, that is as only applying to domestic help.

In analyzing the relationship between (owner) and (driver) to determine whether (driver) was a servant, you should consider: (1) why (driver) was operating the vehicle; (2) the general understanding of the parties and their conduct which tend to characterize their relationship; and (3) the control which (owner) had over the use of the vehicle by (driver).

For (driver) to be the servant of (owner): (1) there must have been some agreement by (driver) to act on (owner)'s behalf or for (owner)'s benefit; (2) some benefit to (owner) must have resulted from (driver) operating the vehicle; and (3) (owner) must have the right to control (driver) and direct (driver) in accomplishing (owner)'s purpose. Benefit to (owner) is not confined to an undertaking conducted for financial gain. It includes any benefit to the owner, including the owner's own pleasure. The element of control by the owner does not mean the actual or physical operation of the vehicle but rather control as applied to the use of the automobile by (driver) to accomplish the owner's purpose.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (driver) was not the servant of (owner), then you must find that (driver) was the servant of (owner). The burden is on (owner) to convince you that (driver) was not the servant of (owner) at the time of the accident and that the answer to the question should be "no."

SPECIAL VERDICT

At the time of the accident, was (driver) the servant of the (owner)?

Answer:_____

Yes or No

COMMENT

This instruction and comment were approved in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The above special verdict question is an exception to the general rule that questions should frame the issue for the jury so that the burden of proof is placed on the person having the affirmative of the issue (i.e., a "yes" answer). See Wis JI-Civil 200, Burden of Proof. The common law presumption which this instruction covers provides that a driver of a vehicle is presumed to be the servant of the owner. The evidence code, Wis. Stat. § 903.01, states that once the basic fact (ownership) is found to exist, a presumption "imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." In this case, the presumed fact is that the driver was the owner's servant. Based on this evidence rule, the owner has the burden of affirmatively showing that it is more probable that the driver was not his or her servant. The committee feels that it would be confusing and awkward to ask the jury: At the time of the accident, was the (driver) not the servant of (owner)? Instead, the question should simply ask: Was (driver) the servant of the (owner)? The last paragraph of the instruction tells the jury that (owner) has the burden of showing that the question should be answered "no."

This instruction deals with the imputation of negligence to the owner of a vehicle which has been operated negligently by a nonowner. Often, this imputed negligence is termed "vicarious liability." Prosser, Torts, 4th Ed. (1971), § 69, p. 458. Under this concept of liability, a person (in this instruction, the owner of the vehicle) is held liable for damages resulting from the negligence of another because of a legal relationship between two persons. This instruction deals with the legal relationship of master-servant.

The distinction between being an "agent" and a "servant" is crucial in determining whether the principal is vicariously liable. An agent may or may not be a servant and, in most circumstances, the principal

is not vicariously liable for the negligent physical conduct of an agent who is not a servant. Where the negligent actor is a servant, however, a master can be held liable under the doctrine of respondent superior for harm caused by the torts of his or her servants. A finding of agency, therefore, is not a sufficient basis upon which to predicate a principal's vicarious liability in tort.

Because an agent who is not a servant is not subject to any right of control by his or her employer over the details of his or her physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which the agent may commit. Prosser, Torts, § 70, p. 467.

Prior to Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978), older cases, dealing with the imputation of negligence to the owner, consistently adhered to the rule that a driver is presumed to be the agent of the owner. Hoeft v. Friedel, 70 Wis.2d 1022, 235 N.W.2d 918 (1975); Enea v. Pfister, 180 Wis. 329, 192 N.W. 1018 (1923); Laurent v. Plain, 229 Wis. 75, 281 N.W. 660 (1938); Sevey v. Jones, 235 Wis. 109, 292 N.W. 436 (1940); Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369 (1937); Strupp v. Farmers Mut. Automobile Ins. Co., 14 Wis.2d 158, 109 N.W.2d 660 (1961); Cochran v. Allyn, 16 Wis.2d 20, 113 N.W.2d 538 (1962); Ruby v. Ohio Casualty Ins. Co., 37 Wis.2d 352, 155 N.W.2d 121 (1967); Gervais v. Kostin, 48 Wis.2d 190, 179 N.W.2d 828 (1970).

In Hoeft v. Friedel, the court said with respect to the common law presumption:

> Appellants correctly state the rule in this state that the driver of a motor vehicle is presumed to be the agent of the owner. Where this presumption is not rebutted, the rules of agency dictate that the driver's negligence be imputed to the owner. 70 Wis.2d at 1033.

Later in its opinion, the court, in Hoeft v. Friedel, explained the policy reason for the creation of the presumption:

> The presumption which arises with respect to the actual owner is attached as a matter of policy based upon the principle that "whether the car was at the time being operated in the prosecution of the defendant's [owner's] business is a matter peculiarly within the knowledge of the defendant [owner] and one upon which it is at times exceedingly difficult for the plaintiff to obtain proof." Enea v. Pfister, supra. If the evidence presented demonstrates that an agency relationship exists between the driver and someone other than the record owner, there is no reason not to apply the rule of imputation. 70 Wis.2d at 1034.

These passages from Hoeft typify what the court in Arsand v. City of Franklin described as "a confusion too often seen in the field of agency." 83 Wis.2d at 56.

The court in Arsand and subsequently in Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 415 n. 12, 331 N.W.2d 585 (1983), noted that the terms "agent" and "servant" are often incorrectly used synonymously and interchangeably. In particular, the court in Arsand stated:

> Our prior opinions reveal a confusion too often seen in the field of agency, a confusion which has caused error here and which should be avoided in the future. Our opinions in cases involving the law of agency have not used the terms "agent," "independent contractor" and "servant" in a consistent fashion. Although our prior

> cases and the Wisconsin Civil Jury Instructions cite the Restatement and incorporate the concepts and standards set forth in the Restatement we have, in tort cases involving vicarious liability, used the term "agent" where, according to the usage required by Meyers v. Matthews, supra, we should have employed the term "servant." In several cases involving the liability of the defendant for the negligent conduct of another, we have stated that liability depends on whether the actor was an "independent contractor" or "agent." We should have said liability depends on whether the actor was an "independent contractor" or "servant." 83 Wis.2d at 56.

Based on the court's holdings in Arsand and later in Geise v. Montgomery Ward, Inc., and Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983), the Committee has revised this instruction to make it clear that the jury's determination is whether a master-servant relationship existed at the time of the accident and not simply whether the driver was an agent of the owner.