AGENCY--FAMILY PURPOSE ISSUE.[1]

This issue reads:

"Was *(name driver)* driving the *(describe vehicle)* for a family purpose of the defendant *(name defendant)* at the time of [the collision] [*(describe other occurrence)*]?"

You will answer this issue only if you have answered the issue as to the negligence of *(name driver)* in favor of the plaintiff.[2]

A person is not liable for the negligent operation of a vehicle by another merely because *he* owns it or has the right to control its use. However, under the family purpose doctrine, when, with his knowledge, approval and consent, a member of *his* (family and)[3] household drives a vehicle provided by *him* for the use, convenience and pleasure of the members of *his* (family and) household, *he* may be held liable for the negligence of the driver.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the existence, at the time of [the collision] [*(describe other occurrence)*], of all four of the following things:

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[1]Should the family purpose doctrine be involved on the contributory negligence issue or on a counterclaim, this instruction may be adapted by substituting plaintiff for defendant throughout. For application of the doctrine on the issue of contributory negligence, see Price v. R.R., 274 N.C. 32 (1968).

[2]As this implies, there should be an issue as to the negligence of the driver, comparable to that where there is a regular agency issue. See N.C.P.I.--Civil 102.10.

[3]In the light of the authorities cited in footnote 8, this parenthetical phrase, appearing here and later, should be omitted when the evidence tends to show that the driver was a member of the household but not, in the sense of kinship, a member of the family.

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First, that the defendant *(name defendant)* had the right to control the vehicle. The owner of a vehicle ordinarily has the right to control its use; but here it is not necessary to prove ownership. The test is who has the right to control. One may have the right to control and direct the use of a vehicle without being the owner; and if he has that right it makes no difference that he did not actually exercise the right on the particular occasion.[4]

Second, that the defendant *(name defendant)* provided the vehicle for the use, convenience and pleasure of the members of *his* (family and) household. If the vehicle was so provided, it makes no difference that the driver was using it for *his* own convenience or pleaseure. It is not necessary that *his* use have been for some purpose directly benefiting the defendant *(name defendant)* or the (family and) household as a unit.[5]

Third, that *(name driver)* was driving with the knowledge, approval and consent of the defendant *(name defendant)*. It is not necessary that the defendant *(name defendant)* have had knowledge of, or have given express approval and consent to, the particular trip. Knowledge, approval and consent may be implied from conduct or from the circumstances, such as the habitual or

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[4]For right to control, as distinguished from ownership, as the test, see Smith v. Simpson, 260 N.C. 601 (1963); Chappell v. Dean, 258 N.C. 412 (1963).

[5]The doctrine applies though the driver was "using the car for his own purposes." The question is "whether the child was using the car for one of the purposes for which it was provided." Grier v. Woodside, 200 N.C. 759 (1931).

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customary use of the vehicle by *(name driver)*.[6] However, if there was neither express nor implied approval and consent, the defendant *(name defendant)* would not be liable for the negligence of *(name driver)*.[7]

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[6]To the effect that knowledge, as well as approval and consent, may be implied, see Chappell v. Dean, supra footnote 4. This is implicit in many of the other cases involving this doctrine. See, e.g., Grier v. Woodside, supra footnote 5. While "knowledge" is repeatedly mentioned in the cases, apparently all that it really means is that the defendant must have had knowledge that the vehicle would be used from time to time by the driver. Cf. Goode v. Barton, infra footnote 8; Tart v. Register, 257 N.C. 161 (1962). Of course, in some cases, the evidence shows actual knowledge.

[7]Chappell v. Dean, supra footnote 4.

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Fourth, that *(name driver)* was a member of the household[8] of the defendant *(name defendant)*.

Finally, as to this family purpose issue, on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence, that at the time of [the collision] [*(describe other occurrence)*] the defendant *(name defendant)* had the right to control the *(describe vehicle)*; that the defendant *(name defendant)* provided the vehicle for the use, convenience and pleasure of the members of *his* (family and) household; that *(name driver)* was operating

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[8]In McGee v. Crawford, 205 N.C. 318 (1933), there is a definition of family or household member which indicates that the driver must: (1) live in the household; (2) be dependent upon the defendant; and (3) be subject to the defendant's "general management and control." While (1) is satisfied in the ordinary case, strictly contemporary residence in the household is apparently not required. See Goode v. Barton, 238 N.C. 492 (1953), where the driver's family lived in New Jersey, but he was a student at The University of North Carolina at Chapel Hill and the accident occurred when he and fellow students were returning from a trip to Asheville.

As to (2) and (3), they seem in conflict with the statement in Smith v. Simpson, supra footnote 4: "The doctrine is not confined to situations involving parent and minor child . . . . It applies with equal force when the child is an adult . . . . A person may be liable under the doctrine for damage caused by the negligence of spouse, parent, brother, sister, nephew, niece, grandchild or other of more remote kinship, or of one not of kin, provided he is a bona fide household member." The opinion also states: "The question here . . . does not relate to his right to control his minor son, but his legal right to control the use of the 1960 Chevrolet."

The McGee case, along with some others, also indicates that the defendant must be the head of the household. This is ordinarily the situation, but that it is a requirement seems most doubtful. See Small v. Mallory, 250 N.C. 570 (1959), applying the doctrine where the household consisted of husband and wife, the working husband was driving, and the car belonged to the non-working wife. See also Lynn v. Clark, 252 N.C. 289 (1960). Rationally (since the doctrine is supposedly based on principles of agency), if the defendant, though not the head of a household, in fact supplied a car for the use of the household, the doctrine should apply. No distinction may be drawn on the basis of legal obligation, since the head of a household is under no legal obligation to supply a car. See Smith v. Simpson, supra.

If the vehicle was taken by a member of the household, but he allowed another to drive it, see Rector v. Roberts, 264 N.C. 324 (1965).

Where husband and wife are joint owners and one is driving, nothing else appearing, the doctrine does not apply. Rushing v. Polk, 258 N.C. 256 (1962).