Model Jury Charges

Civil and Criminal

Foreword

With the approval of the Supreme Court, the New Jersey State Bar Association has made these Model Jury Charges available to the bar at cost. The materials were prepared by the Supreme Court Committee on Model Jury Charges (Civil) and the Supreme Court Committee on Model Jury Charges (Criminal). They are *not* "official" and have *not* been reviewed or approved by the Supreme Court or the Administrative Office of the Courts.

The Model Jury Charges are intended solely as a guide; they are not complete; and at most may be a research beginning point for trial judges preparing charges and attorneys preparing requests to charge. They may be revised and supplemented by these Supreme Court Committees from time to time, and the New Jersey State Bar Association will make such revisions and supplements available periodically. Although reliance upon the model charges should be limited for the stated reasons, it is believed that they will be a valuable timesaver for lawyers and judges.

Suggested modifications of the materials should be forwarded to the Administrative Office of the Courts, 402 State House Annex, Trenton, New Jersey 08625 for routing to the committees, and typographical corrections may be furnished to the New Jersey State Bar Association, 172 West State Street, Trenton, New Jersey 08608 for routing to the printer.

Joseph M. Nolan
President,
New Jersey State Bar Association

Arthur J. Simpson, Jr.
Judge, Superior Court, App. Div.
Acting Administrative Director
of the Courts

New Jersey State Bar Association

Printed in the United States of America by
NEW JERSEY APPELLATE PRINTING COMPANY, INC.
399 Pearl Street, Woodbridge, N. J. 07095

TABLE OF CONTENTS

MODEL JURY CHARGES—CRIMINAL

DEFENSES

ADDITIONAL CHARGES

MODEL JURY CHARGES
CRIMINAL

Introduction

This set of model jury charges for use in criminal cases is intended to replace the 1969 revision and its yearly supplements of 1970-1972. The charges in this book have been authored and adopted by the members of the Supreme Court's Committee on Model Jury Charges, Criminal. They have not been reviewed or approved by the Supreme Court.

As a general word of caution, the Committee would like to point out that these charges are intended for use as guides only. They are not considered to be capable of universal application. The complexities of each case will mandate close examination of the relevance and propriety of individual sections of most model charges. As a further precaution, you are urged to stay abreast of the changes in our decisional criminal law in order to make such modifications in the model charges as may become necessary.

It is hoped that you will find this set of charges to be of distinct value in your charge preparation. Should you have any suggestions or comments regarding these charges or charges not presently included in the model set, please send them to the Administrative Director of the Court. All comments and suggestions will be then forwarded to the Committee for its consideration.

Hon. John L. Ard
Hon. Joseph N. Donatelli
Hon. William H. Huber
Hon. Paul R. Kramer
Hon. John A. Marzulli
Hon. Arthur S. Meredith
Hon. Leon S. Milmed
Hon. Thomas S. O'Brien
Hon. William E. Peel
Hon. Charles M. Morris, Jr. CHAIRMAN

NOTE:

Since the introduction set forth above was written in September of 1973, the Committee on Model Jury Charges—Criminal has issued four supplements to the September 1973, version. Those supplements contain revisions of existing charges and additional charges not included in the September, 1973, version. Those charges in the September, 1973, version, which have since been revised, have been deleted, and the revised charges and new charges inserted in this package.

Members of the 1975-1976 Committee on Model Jury Charges—Criminal include:

Hon. John E. Bachman
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Hon. John A. Marzulli, CHAIRMAN

1.100 BASIC CRIMINAL CHARGE—SHORT FORM

MR. FOREMAN AND MEMBERS OF THE JURY:

The defendant(s) stands before you on an indictment found by the Grand Jury charging him (or them) with . . . .

The indictment is not evidence of the guilt of the defendant(s) but merely a formal charge, an informative pleading evidencing a step in the proceedings to bring the matter before a court and jury such as this for final disposition as to the question of whether the defendant(s) is to be found guilty or not guilty.

1.101 FUNCTION OF COURT AND JURY

In the trial of the case the function of the court is to instruct the jury with respect to the principles of law governing the case and the jury is required to accept and be controlled by the law as stated by the court.

On the other hand, you are the sole judges of the facts, the weight of the testimony, the credibility of the witnesses, the inferences to be drawn from the testimony, and the ultimate conclusions to be reached upon all the facts.

It is, however, proper for the Judge to comment on the evidence or parts of the evidence, but you will understand and remember that the comments of the court on the evidence are not binding in any sense on the jury, because it is the exclusive function of the jury to decide the facts. You will understand also that the Judge does not and cannot undertake to say what the evidence is or is not, but can only state his recollection of it. This recollection is not to be accepted by the jury, but is to be disregarded, except where it coincides with their recollection. The same thing is true with respect to the comments of counsel during summation. Their comments on the facts represent only their recollection of the testimony. If it does not agree with your recollection, you are under duty to disregard it and rely exclusively on your own recollection.

During this trial, motions and objections have necessarily been made by both the State and the defendant. However, you are bound by the rulings of the Court, and any evidence excluded by the Court must not be considered by you in your deliberations. The actions and rulings of the Court should not in any way be taken by you as indicating how the Court may feel this case should be decided. Trial procedural matters are the responsibility of the Court as the sole judge of the law.

I charge you that the fact that the Court saw fit in some instances to direct questions to certain of the witnesses in the case must not influence you in any way in your deliberations. The fact that the Court saw fit to direct such questions does not indicate any opinion of the Court one way

or the other as to the testimony given by such witnesses. The credit and belief for the defense, must be determined by you and by you alone. Any remarks made by the Court to counsel, or counsel to the Court, or between counsel, are not evidence and should not affect or have any part in your deliberations.

1.102 PRESUMPTION OF INNOCENCE

This defendant(s), as are all defendants in criminal cases, is presumed to be innocent until proven guilty beyond a reasonable doubt. That presumption continues throughout the whole trial of the case and even during your deliberations unless and until you have determined that the State has proven his guilt beyond a reasonable doubt.

1.103 BURDEN OF PROOF

The burden of proof is on the State, and it never shifts; it remains on the State throughout the whole trial of the case. No burden with respect to proof is imposed on the defendant. He is not obliged to prove his innocence. Unless the State has proved the crime charged and each of its elements beyond a reasonable doubt, the defendant is entitled to an acquittal.

1.104 REASONABLE DOUBT

Reasonable doubt is not a mere possible or imaginary doubt, because, as you may well know, everything relating to human affairs or depending upon oral evidence is open to some possible or imaginary doubt. A reasonable doubt is an honest and reasonable uncertainty as to the guilt of the defendant existing in your minds after you have given full and impartial consideration to all of the evidence. It may arise from the evidence itself or from a lack of evidence.

The indictment reads in pertinent part as follows:

(Read indictment)

The pertinent part of the statute on which this indictment is based reads as follows:

(Read statute)

(Describe substantive law pertinent to statute, including definitions)

(Charge elements of the crime involved)

(Discuss law pertinent to defenses)

(Comment on facts, if desirable)

(Requests to charge, if granted, should be incorporated in the main charge)

Since this is a criminal case, your verdict must be unanimous; all twelve jurors deliberating must agree. You should decide the case on the evidence without any bias, prejudice or sympathy and without reference to any suspicion or conjecture.

(Set forth possible verdicts)

(Hear objections to charge in open court and out of presence of jury. State rulings on requests to charge on record)

(Select alternates if more than twelve have been chosen)

(Swear officers)

Note:

If it is proposed to submit the indictment to the jury, see the precautions to be observed as delineated in *State v. Begyn*, 58 N.J. Super. 185, 195 (App. Div. 1959).

2.050 ABDUCTION

Ladies and gentlemen, the defendant has been charged with the crime of abduction pursuant to *N.J.S.A.* 2A:86-2 which provides:

> "Any person who takes or detains a female against her will, with intent to compel her by force, threats, persuasion, menace or duress, to marry him or to marry any other person, or to be defiled is guilty of a . . . [crime]."

In order to sustain its burden of proof the State must prove each and every one of the following elements beyond a reasonable doubt:

1. there must be a taking or a detaining of the female, and
2. such taking or detaining must be against her will; and
3. the defendant at the time of the taking or detention must be shown to have had the intent to compel her by force, threats, pursuasion, menace or duress to marry him or to marry any other person; or, the defendant must be shown to have had the intent to defile or or the intent that she should be defiled by another.

What does each element mean?

To constitute a taking no force, actual or constructive, need be exercised. The taking may be effected by pursuasion, enticement, or inducement. And it is not necessary that the victim be taken from the control or against the will of those having lawful authority over her. However, the State must prove conduct by the defendant indicating a control, complete or partial, of her person.

By detaining is meant to check, to delay, to hinder, to hold, to keep in custody, to retard, to restrain from proceeding, to stay, to stop. A detention occurs when by any means the defendant interferes with the free locomotion on the part of the female, even for a very brief period of time.

Either a taking or detaining constitutes the first element.

The second element is that such taking or detaining be against the will of the female. This element can be defined as a lack of consent on the part of the female.

Consent, however reluctant, negates this offense. If a woman taken or detained is physically and mentally able to resist, is not terrified by threats, and is not in a place and position such that resistance would have been useless, it must be shown that she did, in fact, resist the taking or detaining. This resistance must be by acts and not by mere words, and must be reasonably proportionate to the victim's strength and opportunity. It must be in good faith and without pretense, with an active determination to prevent the taking or detaining of her person, and must not be merely passive and perfunctory. However, the fact that a victim finally submits does not necessarily imply that she consented. Submission to a compelling force, or as a result of being put in fear, is not consent. Resistance is necessarily relative. It is only required that the female resist as much as she possibly can under the circumstances, and the circumstances and conditions surrounding the parties at the time of the alleged offense are to be considered in determining whether adequate resistance was offered.

The third element is the intent of the defendant at the time of the alleged taking or detaining.

(INSERT INTENT CHARGE)

To be guilty of this offense, the intent of the defendant must be such that he intended by the use of force, threats, persuasion, menace or duress to compel the female to marry himself or another or that he intended that the female be defiled by himself or another.

Where a person takes or detains a female for a prohibited purpose against her will, his failure or inability to consummate such purpose, while relevant on the question of his intent does not relieve him of responsibility.

The allegation of force is established by evidence showing that her resistance was overcome by physical force, or that her will was overcome by fear.

Defile means the commission of acts, such as touching which tend to debauch, deflower, or corrupt the chastity of a woman.

Debauchery means sexual immorality or excesses. Such corruption occurs if defendant's acts are motivated solely by lust that forces or induces the woman to lower her moral principles.

The offense of abduction is complete if the female is taken or detained for any one of the above prohibited purposes, even though the statute prohibits a taking or detaining of a female for several different purposes.

In conclusion, I charge you that in determining whether or not the crime has been proven you will ask yourself whether the State has proven beyond a reasonable doubt each of these three elements namely:

1. A taking or detention;
2. That said taking or detention was against the will of the female;
3. The intent on the part of the defendant to compel the female by force, threats, persuasion, menace or duress to marry him or any other person or to defile the female or in order that she should be defiled by another.

See also:

1. 1 C.J.S. *Abduction* §§ 1-35 (1936)
2. *Black's Law Dictionary* 17 (4th ed. 1968)
3. 1 Am. Jur. 2d *Abduction and Kidnapping* §§ 1-35 (1962)
4. As to consent element see *State v. Terry*, 89 N.J. Super. 445, 449-450 (App. Div. 1965)
5. As to the coexistence of abduction and kidnapping statutes *see State v. Gibbs*, 79 N.J. Super. 315 (App. Div. 1963)

2.100 ARSON

(*N.J.S.A.* 2A:89-1)*

The indictment reads in pertinent part as follows:

READ INDICTMENT

The statute on which this indictment is based reads as follows:

"Any person who willfully or maliciously burns or consents to the burning of a dwelling house, whether it be his own or that of another, or a structure that is a part of or belongs to or adjoins such dwelling house, or any other building, by means whereof a dwelling house shall be burnt, whether it be his own or that of another, is guilty of . . . [a crime]." *N.J.S.A.* 2A:89-1.

* NOTE: This charge relates to common law arson. However, there are several other statutes dealing with other burnings. See *N.J.S.A.* 2A:89-2, 2A:89-3, 2A:89-4, 2A:89-5 and 2A:89-6.

You will note that the statute refers to a person who acts willfully or maliciously. Willfully means voluntarily, knowingly and intentionally. Maliciously means wrongfully, intentionally and without justification or excuse.

To find the defendant guilty the State must prove each of the following elements beyond a reasonable doubt:

1. He willfully or maliciously burned or consented to the burning of a dwelling house or a structure that was part of or adjoining a dwelling house or any other building;

2. And as a result of which a dwelling house was burned.

There can be no finding of guilty unless a dwelling house was actually burned, but the extent of the damage resulting from the burning is immaterial. If any part of a dwelling house, however small, is consumed it is sufficient. A structure is not considered burned within the meaning of the law relating to arson when it is merely scorched or smoked or discolored by heat. The offense is committed if, as a result of burning, any part of the structure is charred, or if the fiber or texture of the wood is altered or destroyed.[1] With regard to wood, charring means reducing wood to charcoal by burning. Under no circumstances, however, can the burning of personal property be regarded as arson.[2] As I have already explained to you, the statute deals only with the burning of a dwelling house or a structure that is part of or adjoins such dwelling house, and not with personal property therein. Personal property could include items like rugs, books, tables or curtains, etc. The mere burning of these or like items does not constitute the crime of arson under this statute if no part of the structure is damaged.

1. *State v. Schnek*, 100 N.J. Super. 122 (App. Div. 1968).

2. *Id.*

2.101 ASSAULT AND BATTERY UPON LAW ENFORCEMENT OFFICER IN PERFORMANCE OF DUTIES (N.J.S.A. 2A:90-4) AND PHYSICAL RESISTANCE BY AN OFFENDER TO AN ARREST (N.J.S.A. 2A:85-1)

This indictment charges the defendant with having violated the provisions of New Jersey Statutes 2A:90-4 and thereby with having committed the crime of assault and battery upon a law enforcement officer acting in the performance of his duties. The pertinent part of this statute reads as follows:

(HERE READ APPLICABLE PART OF STATUTE BELOW. THAT PART APPLICABLE IN MOST CASES IS IN ITALICS)

"Any person who commits an assault and battery upon:

(a) *Any state, county or municipal police officer,* or any public school law enforcement officer, *or any other law enforcement officer, acting in the performance of his duties while in uniform or exhibiting evidence of his authority;* or

(b) Any paid or volunteer fireman acting in the performance of his duties while in uniform, or while riding in or upon a fire engine, hook and ladder truck or other fire-fighting apparatus or equipment, or while actively engaged in abating or quelling a fire, or while otherwise clearly identifiable as being engaged in the performance of the duties of a fireman; or

(c) Any member of an ambulance, rescue, first-aid or emergency squad or corps; or any physician, nurse, medical assistant, or employee of a hospital, clinic, or ambulance service; acting in the performance of his duties while in uniform; or while wearing an armband or other clearly visible identification indicating his status as a person engaged in emergency, first-aid, or medical services; or while riding in or upon, or entering or leaving, any clearly identifiable ambulance or other emergency vehicle—*is guilty of" (a crime).*

In every criminal case the burden is on the State to prove all of the essential elements of the crime charged to your satisfaction beyond a reasonable doubt. In this case there are three such essential elements which must be so proved by the State before you may find the defendant guilty. They are:

First: That the defendant in fact committed an assault and battery. An assault is an attempt or offer with unlawful force or violence to do intentionally a bodily hurt or physical injury to another. A battery is the actual doing of any bodily hurt or physical injury to another. No particular degree of force or violence or injury is necessary to constitute an assault or battery, and, therefore the slightest touching or striking the body of another person against his will is sufficient.

Second: That the defendant intended to commit the assault and battery. Intent, you must realize, is a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing.

However, it is not necessary, members of the jury, that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all the surrounding circumstances.

Third: That the assault and battery was committed upon a state, county or municipal police officer or other law enforcement officer.

Fourth: That the said law enforcement officer was the victim of an assault and battery while either:

(*a*) Acting in the performance of his duties while in uniform, or

(*b*) Acting in the performance of his duties while exhibiting evidence of his authority.

(NOTE: IF A DIFFERENT TYPE OF LAW ENFORCEMENT OFFICER IS INVOLVED THAN ONE COVERED BY THE ITALICIZED PORTION OF THE STATUTE ABOVE, THEN SUBSTITUTE THE APPLICABLE LANGUAGE FROM THE STATUTE IN THE *SECOND* AND *THIRD* ESSENTIAL ELEMENTS ABOVE).

If you find that any of these three essential elements of this crime has not been proved by the State beyond a reasonable doubt, it is your duty to return a verdict of not guilty. However, if you are satisfied beyond a reasonable doubt that the defendant did violate the statute and all the elements thereof, you must find the defendant guilty.

The defendant also is charged with resisting arrest under New Jersey Statute 2A:85-1.

To constitute a violation of this statute, the State has the burden of proving beyond a reasonable doubt that the defendant knew or should have known that an attempt was being made to arrest him and that the defendant actively resisted such an attempt. The first essential element of this offense is that you must find beyond a reasonable doubt that the police officer was in the course of or had placed the defendant under arrest, which was known by the defendant or should have been known by him at the time. Arrest is defined as the depriving of a person of his liberty by legal authority or the seizing of a person and detaining him in the custody of the law. It includes not only the initial apprehension of the person but any subsequent detention in order to assure that he be present to answer an alleged charge against him.

The second necessary element that must be proved by the State beyond a reasonable doubt is that the defendant resisted arrest. Resisting arrest is defined as the use of physical force or the threat of use of physical force to prevent an arrest. It is something more than the mere use of words.

The final necessary element of the offense which must be proved by the State beyond a reasonable doubt is that the defendant intended to resist arrest. You will recall that I have already defined intent in connection with my charge on assault and battery on an officer.

Under our law, no person has the right to resist arrest, whether the arrest is legal or not, provided that the arrest is made by a law enforcement

officer acting in the performance of his duties while in uniform or while exhibiting evidence of his authority, *or where the citizen knows or has reason to believe that he is a police officer engaged in the performance of his duties.** Every person is under an obligation to submit to an arrest and to refrain from using force to resist either the original apprehension or any continued detention in the custody of a law enforcement officer. If a person is illegally arrested or held in custody, he is obliged to use legal remedies to obtain his release rather than to resort to force.

The duty of a law enforcement officer to arrest carries with it the right to use force when reasonably necessary to apprehend a person and to detain him in the custody of the law. Therefore, it is no defense to a charge of resisting arrest or assault and battery upon a law enforcement officer that the defendant was acting to resist or defend himself against the use of reasonable force by a law enforcement officer who was acting in the performance of his duties by apprehending the defendant or by holding the defendant under his custody and control.

(IF THE DEFENDANT, IN ADDITION TO HIS GENERAL DENIAL, ALLEGES THE LAW ENFORCEMENT OFFICER USED EXCESSIVE FORCE AND THAT THE DEFENDANT ACTED ONLY IN SELF-DEFENSE, ADD THE FOLLOWING CHARGE).

The defendant contends he is entitled to an acquittal on the charges against him on the ground that even if you find that he did resist arrest or commit an assault and battery upon a law enforcement officer acting in the performance of his duties, his conduct was justified because he acted not for the purpose of resisting arrest but in self-defense of his person from an unlawful attack by the law enforcement officer who was using excessive force upon the defendant which was not justified under the circumstances.

If a law enforcement officer uses such force as is reasonably necessary to arrest a person or to hold him in custody, such person so arrested or held cannot, under our law, use force to resist. However, if a law enforcement officer uses excessive force, that is force not justified under the circumstances, then the person arrested or held may use such degree of force as is reasonably necessary to defend himself. If, in turn, the person being arrested or held uses more force than is reasonably necessary to defend himself, that is, excessive force, then he becomes the aggressor and his conduct can no longer be justified as lawful self-defense. *If the citizen knows that if he desists from his physically defensive measures and submits to the arrest that the officer's excessive force would cease, the citizen must stop defending himself or lose the privilege of self-defense.*** It is for you

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* *State v. Koonce*, 89 N.J. Super. 169, 184 (App. Div. 1965).

** *State v. Mulvihill*, 57 N.J. Super. 151, 157 (1970).

to determine what is reasonable force and what is excessive force from the evidence in this case.

As to the burden of proof with respect to self-defense, I charge you that while the defendant raises the issue of self-defense in the case (and produces evidence in support of this allegation that he acted only in lawful self-defense), this in no way shifts the burden of proof from the State, for as I previously explained to you, the State bears the burden of proving to your satisfaction beyond a reasonable doubt every element of the crime charged against the defendant and that burden never shifts from the State but remains upon the State throughout the entire trial of the case. Therefore, the burden is upon the State to prove beyond a reasonable doubt that the defense of self-defense is untrue. The defendant has neither the burden nor the duty to show that he acted in lawful self-defense. You must determine, therefore, whether the State has proved each and every element of the offense charged including the absence of self-defense.

If after a consideration of all the evidence, including that relating to the subject of self-defense, you have a reasonable doubt as to whether the defendant acted in self-defense, or as to any of the other essential elements of the offenses charged, you should return a verdict of not guilty. If, however, after considering all the evidence, you are convinced beyond a reasonable doubt that the defendant did not act in self-defense, and have concluded that the State has proved each and every element of the offenses charged in the indictment beyond a reasonable doubt, then you should return a verdict of guilty as charged. *You must consider each offense separately and return a separate verdict on each, bearing in mind that lawful self-defense is a defense to both assault and battery on an officer and resisting arrest.*

Cases:

Common law rule that person has right to resist an illegal arrest not New Jersey law. *State v. Koonce,* 89 N.J. Super. 169 (App. Div. 1965).

Defense of self-defense available on charge of assault and battery upon a law enforcement officer where law enforcement officer uses excessive force. *State v. Mulvihill,* 57 N.J. 151 (1970).

Correction officers held to be law enforcement officers. Words "law enforcement officer" used in statute held not to be unconstitutionally vague. *State v. Grant,* 102 N.J. Super. 164 (App. Div. 1968).

Citizen intervening in restraint of officer must justify his conduct by adequate supporting evidence that it reasonably appeared to him and he so reasonably believed that officer, though uniformed, was not engaged in bona fide performance of his duties but was actually committing an unlawful assault. State v. Montague, 55 N.J. 387, 405 (1970).

See also:

State v. Montague, 101 N.J. Super. 483 (App. Div. 1968). *State v. Bell*, 102 N.J. Super. 70 (App. Div. 1968). *State v. Owens*, 102 N.J. Super. 187 (App. Div. 1968).

2.102 ASSAULT WITH OFFENSIVE WEAPON OR INSTRUMENT

The defendant is charged with violating the provisions of New Jersey Statute *N.J.S.A.* 2A:90-3, the pertinent parts of which read as follows:

> Any person who willfully or maliciously assaults another with an offensive weapon or instrument . . . [is guilty of a violation of the law].

The following definitions will aid you in arriving at an understanding of this statute:

1. "Willfully." The word "willfully" means intentionally or voluntarily.
2. "Maliciously." Malice in the law connotes, "the intentional doing of a wrongful act to the injury of another without just cause or excuse."
3. "Assaults." An assault is an attempt or offer with unlawful force or violence to do a corporal (bodily) hurt or physical injury to another. For example, if I were to raise a club at you in a theatening manner, this would be an assault. With regard to assault, if you determine that the defendant had the *apparent present ability* to carry out his design, this is sufficient to support a finding of guilt provided all other elements of the crime are proven. It is not necessary for the State to prove that the defendant did have the *present ability* to carry out the attempt or offer to injure another."
4. "Offensive weapon or instrument." "Offensive" means capable of being used for purposes of aggression. "Weapon or instrument" connotes an object, appliance, tool or implement which may be used for the purpose of injuring, disabling or destroying another.[1]

Therefore, in order to convict the defendant, the State has the burden of providing beyond a reasonable doubt each of the following elements:

1. That the defendant assaulted the victim.
2. That an offensive weapon or instrument was used.
3. That the defendant's conduct was voluntary or intentional.

Whereas here an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words, or acts. Intent means a

purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that the witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all the surrounding circumstances.

See *State v. Drayton*, 114 N.J. Super. 490, 492-493 (App. Div. 1971).

NOTE:

Possession or carrying any offensive weapon *with intent to assault* any person is a disorderly persons offense under New Jersey law. See *N.J.S.A.* 2A:170-3. The crucial words in the statute are, "with intent to assault." *State v. States*, 44 N.J. 285, 289 (1965).

The statute does not require that the weapon be in a person's hands or clothing. The Legislature intended to reach those with forbidden weapons at hand, within reach and immediately available for intended unlawful use. *State v. Danziger*, 121 N.J. Super. 44, 46-47 (App. Div. 1972), *certif. den.* 62 N.J. 191 (1972).

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1. There is an apparent conflict between the terms used to describe *N.J.S.A.* 2A:90-3 and the words employed within the statute itself. The statute is entitled, "Assault with dangerous weapon . . . ," but the words within the statute are "offensive weapon or instrument." In reference to the definition of an offensive weapon it has been stated that it is, "as occasionally used in criminal law and statutes, a weapon primarily meant and adapted for attack and the infliction of injury, but *practically the term includes anything that would come within the description of a 'deadly' or 'dangerous' weapon.*" *Black's Law Dictionary* 1233 (4th ed. 1968) [Emphasis supplied]. See also *State v. Danziger*, 121 N.J. Super. 44, 46-47 (App. Div. 1972). With this view in mind, Model Charge 2.251, Possession of a Dangerous Knife, might be revised to fit situations presented under *N.J.S.A.* 2A:90-3. This proposed revision would be as follows:

> Whether a .... is a dangerous (offensive) weapon or instrument depends on the totality of the facts and circumstances surrounding the possession of the .... and its intended use as those facts and circumstances appear from the evidence.
>
> The concept of an offensive weapon contemplates a weapon capable of being used for aggression (the concept of a dangerous weapon contemplates a weapon dangerous to life or human safety, one by use of which a fatal wound may probably or possibly be given). If the purpose of carrying the weapon or instrument is its use as a vehicle of assault, the person so using it is in violation of the terms of the statute. Purpose means an intent to accomplish a certain thing. Whether a person regards the .... as an offensive weapon or instrument or as a defensive weapon or instrument is of no consequence. It is sufficient if he regards it as a weapon and uses it in a manner which is prohibited by the statute.
>
> There is no precise standard whereby a determination can be made as to whether a given .... is a dangerous (offensive) weapon or instrument. Indeed, the very same .... may be considered a dangerous (offensive) weapon or instrument

under one set of circumstances and not be considered as such under other circumstances. Therefore, you should consider all of the attendant facts and circumstances such as the size, shape, and condition of the ..... If, upon a consideration of the total circumstances you conclude that the purpose in carrying the weapon or instrument was to use it in assaulting another and such, in fact, was the result, such combined actions constitute a violation of the law.

2.103 ATROCIOUS ASSAULT AND BATTERY

The Grand Jury of this County has returned an indictment against the defendant ..... charging him with atrocious assault and battery. The statute on which the indictment for atrocious assault and battery is based reads as follows:

> "Any person who shall commit an atrocious assault and battery by maiming or wounding another shall be guilty of a" . . . violation of the criminal laws.

An assault is an intentional attempt (or offer), with unlawful force or violence, intentionally to do a bodily hurt or physical injury to another. For example, if I were to point a gun at you in a threatening manner or raise a club at you in a threatening manner, that would be an assault.

> (HERE INSERT DEFINITION OF INTENT USING MODEL CHARGE 4.181)

A battery is the actual doing of any physical hurt, however slight, to another.

An atrocious assault and battery is one which is savagely brutal or outrageously or inhumanly cruel or violent which results in a maiming or wounding of another. It is an intentional act, one in which a person acting with intent to do bodily harm, deliberately commits an atrocious assault and battery on another person. The nature of the attack is of paramount importance in determining whether this crime has been committed, and the kind and severity of the injuries inflicted are other factors to be taken into consideration.

To maim means to cripple or mutilate in any way, that is, to inflict any injury which deprives a person of the use of a limb or member of the body, or renders him lame or defective in bodily function; it means to inflict bodily injury, to seriously wound, disfigure or disable.

To wound here means an injury to the body of a person caused by violence. It may be cuts, lacerations, fractures or bruises. Breaking of skin is not necessary in order for there to be a wounding.

The injuries need not be permanent but they must, nevertheless, be substantial rather than superficial. The nature and extent of the injuries should be considered in conjunction with the character of the assault made.

Intent, as I have stated, is a necessary element of this crime. If the act is unintentional or accidental, it is not a criminal offense. However, if the assault and battery is intentional, but the maiming or wounding is accidental or unintentional, the defendant is still responsible for it if the maiming or wounding is the natural or probable consequence of the act or acts that the defendant intended to perform.

(If the evidence in the case warrants it, "accident" may be defined in the following manner)

> An accident is something which happens unexpectedly, wholly without design, and completely by chance. It is an unforseen event, misfortune, act, or omission which is not the result of negligence or misconduct. Where a person commits an act or makes an omission through misfortune or by accident under circumstances that show no evil design, intention or culpable negligence, he does not thereby commit a crime.

State v. Edwards, 28 N.J. 292 (1958); *State v. Riley*, 28 N.J. 188 (1958); *State v. Currie*, 41 N.J. 531 (1964); *State v. Chiarello*, 69 N.J. Super. 479 (App. Div. 1961); *State v. Abbott*, 36 N.J. 63 (1961); *State v. Zelichowski*, 52 N.J. 377 (1968); *State v. Provoid*, 110 N.J. Super. 547 (App. Div. 1970); *State v. Bonano*, 59 N.J. 515 (1971).

NOTE 1. If the defendant interposes a defense of self-defense refer to Model Charge 3.280.

NOTE 2. Your attention is directed to *State v. Saulnier*, 63 N.J. 199 (1973). This case overrules *State v. McGrath*, 17 N.J. 41 (1954). Under *Saulnier* the Court should determine whether there exists a rational basis in the evidence for finding that the defendant might not be guilty of the higher offense including a non-indictable lesser included offense. Therefore, it may be appropriate in an atrocious assault and battery case to submit to the jury the alternative lesser included offense of assault or assault and battery under the Disorderly Persons Act (*N.J.S.* 2A:170-26).

2.104 ASSAULT WITH INTENT TO COMMIT ROBBERY

The defendant is charged in the Indictment with assault with intent to commit robbery in violation of *N.J.S.A.* 2A:90-2. The pertinent part of the statute reads:

> "Any person who commits an assault with intent * * * to commit * * * roberry * * * is guilty of a [crime] * * *."

To find the defendant guilty, the State must prove each of the following elements beyond a reasonable doubt:

1. An assault.
2. An intention by the defendant to commit robbery at the time of the assault.

An assault is defined as an attempt or offer with unlawful force or violence to do a corporal hurt or physical injury to another, under such circumstances as create a well-founded fear of imminent peril, coupled with an apparent present ability to execute the attempt if not prevented.[1]

Robbery is defined as the unlawful taking of money, personal goods or chattels from the person or presence of another by force or violence, or by putting him in fear, and with the intent to permanently deprive the owner or person in custody of said money or property. "Force" or "violence" are synonymous words and include any application of force, even though it might entail no pain or bodily harm. Fear is the apprehension of harm.[2]

An essential element of this charge concerns the intent of the defendant to commit robbery. Where as here an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be fathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

It is the burden of the State to prove beyond a reasonable doubt that the defendant did commit an assault and, at the time of the assault, that the defendant did intend to commit robbery. Thus, it must be shown beyond a reasonable doubt that an assault and an intent to commit robbery existed concurrently.

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1. *State v. Still*, 112 N.J. Super. 368, 370 (App. Div. 1970), *certif. denied*, 57 N.J. 600 (1971).
State v. Staw, 97 N.J.L. 349, 350 (E. & A. 1922).

2. *State v. Butler*, 27 N.J. 560, 589-590 (1958).
State v. Turco, 99 N.J.L. 96, 101-102 (E. & A. 1923).

2.110 BOOKMAKING

Defendant is charged with the crime of bookmaking. The statute in question, *N.J.S.A.* 2A:112-3 reads in pertinent part as follows:

> "Any person who, habitually or otherwise . . . makes or takes what is commonly known as a "book," upon the running, pacing, or trotting, either within or without this State, of any horse, mare or gelding, or conducts the practice commonly known as "bookmaking" . . .

> is guilty of . . . a violation of the gambing laws. This section shall not be construed to apply to pari-mutuel betting at race meetings as authorized by the Constitution of this State or any statute passed in pursuance thereof."

Bookmaking is the intentional making of a book of bets on horse races, sporting events, and the like. This means the intentional making or taking and recording or registering of bets or wagers on races, ball games, fights and kindred contests.

A wager or bet is what we commonly understand it to be. It is a transaction where a sum of money is laid, staked, pledged or put-up, as between two parties, the bettor and the bookmaker, upon the event or outcome of a race or contest or any contingent issue. The person with whom the bet is placed or who takes the bet is called the "bookmaker." The bookmaker in accepting or taking the bettor's money, agrees to pay back a certain sum of money if the bettor is successful in predicting the outcome of the contingency. For example, a certain horse winning a certain race, a certain team defeating its opponents in a given contest, a particular prize fighter being successful in a fight, or whatever the case may be.

I will now inform you of a few things about the law on bookmaking which may not be clear to you from my reading of the statute.

First, the offense of bookmaking resides in the gambling aspect of the bookmaker's operation rather than the method whereby he keeps track of bets. It makes no difference whether the bets are committed to memory or to paper. It is not necessary for the State to prove that a complete tangible record or any tangible record was made.

Next, you should understand that the statute forbids bookmaking "habitually or otherwise." "Habitually or otherwise" as used in this statute means that the bookmaking took place "on at least one occasion." *

Further, I must inform you that under our law it is immaterial whether the odds are quoted by the bookmaker or fixed by the official pay-offs under the legal parimutuel system after the race is run, or in some other fashion as it may pertain to other types of sporting events, contests, or contingencies. In any event, the statute is violated by the bookmaker.

Finally, it is to be noted that while the bookmaker commits a criminal offense by taking a bet, the act of the bettor in making the bet is not illegal.

These explanations are designed to aid you in your understanding of *N.J.S.A.* 2A:112-3.

What I am about to explain to you is how the laws on "aiding or abetting" apply to the offense of bookmaking.

It is not necessary in order to sustain its burden of proof that the State show, through the evidence, that the defendant made or accepted the bet or bets as the principal, or had the responsibility of paying off the winners of any bets that may have been made with him. It is sufficient to warrant a conviction if the proof shows to you beyond a reasonable doubt that the defendant intentionally aided or abetted or participated in the prohibited practice of bookmaking. Under our statutes, anyone who intentionally aids, abets, assists or participates in the making of book is guilty as a principal. The word "aid" means to assist, support, or supplement the efforts of another. The word "abet" means to encourage, counsel, incite, or instigate.

(Here insert Model Charge on Intent 4.181)

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* *State v. Clark*, 137 N.J.L. 12 (1948).

State v. Bogen, 13 N.J. 137 (1953).

(Note: See *State v. Adreano*, 117 N.J. Super. 498 (App. Div. 1971). Held that where a person acts as a mere conduit or courier of another's bets which are to be made, or are made at a lawful place of betting on races, he is not guilty of bookmaking. The test here appears to be whether or not this "middleman" gains a benefit from the transaction.

See also: *State v. Juliano, et al.*, 52 N.J. 232 (1968) which deals with indictments containing multiple counts of alleged bookmaking; and, *State v. Kuznitz*, 36 N.J. Super. (App. Div. 1955) which discusses aiding and abetting in the bookmaking area and also throws some light on the problem of the structure of the gambling operation in relation to this statute.

2.111 BREAKING AND ENTERING OR ENTERING— N.J.S.A. 2A:94-1

The indictment charges that the defendant willfully or maliciously broke and entered the ..... of ..... with intent to steal in violation of the provisions of *N.J.S.A.* 2A:94-1.

The criminal law upon which this charge is based reads as follows:

"Any person who willfully or maliciously breaks and enters (or enters without breaking) any ..... with intent to steal is guilty of a violation of the law."

Accordingly, you are to determine whether the state has proven to you beyond a reasonable doubt each of the following elements which make up this offense:

1. That there *was* a breaking and entering. With respect to this element you must note that it is not necessary for the state to prove a breaking if it proved entering without breaking.

2. That the breaking and entering (or entering without breaking) was either willful or malicious.

3. That at the time of the breaking and entering (or entering without breaking) the defendant intended to steal. The intent to steal must coexist with the act of breaking and entering (or entering without breaking).

I will now attempt to define for you some of the terms used in each of these three elements.

With respect to *breaking and entering* (or entering without breaking) I repeat to you that this element is proven if the state proves either of the alternatives. So far as a breaking is concerned any act of physical force however slight—such as lifting up a latch—is sufficient for a finding that there was a breaking within the wording of the statute. On the other hand, if you consider that the state has not proven beyond a reasonable doubt that there was a breaking, and you are therefore considering whether or not there was an entering, then you must know that an entry is accomplished if any part of the body, an arm, a hand, a finger or a foot, or even if an instrument was inserted into the building (or as the case may be).

With respect to the second element of the crime, that is, whether or not it was either *willful or malicious,* for your purposes I charge you that these terms are synonymous and that in considering this element, willfulness or maliciousness, you will ask yourself whether the state has proven to you beyond a reasonable doubt that the defendant acted voluntarily to accomplish a wrongful purpose.

Finally, with respect to the third element you will ask yourself whether the state has proven to you beyond a reasonable doubt that the defendant at the time he broke and entered or entered without breaking *intended to steal,* that is, that he intended to take and carry away someone else's property without any claim of right and with the intent to wholly deprive the owner of the property. I further charge you that with respect to this third element, that is the intent to steal, you may gather such intent from his acts and conduct and from all that was said and done at the particular time and place and from all the surrounding circumstances. In other words, intent is a condition of the mind which cannot be seen but can only be determined by inferences, from conduct, words or acts. Logically then it is not necessary for the state to prove that the defendant ever said he had a certain intent at the time and place concerned.

In conclusion I charge you that in determining whether or not the crime has been proven, you will ask yourself whether the state has proven beyond a reasonable doubt each of these three elements, namely: a breaking and entering, or in the alternative an entering without breaking; willfulness or maliciousness, that is, whether the act was done voluntarily and to accomplish a wrongful purpose; and finally, the intent to steal at that time.

State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954); *State v. Tasiello*, 75 N.J. Super. 1 (App. Div. 1962) aff'd 39 N.J. 282 (1963); *State v. Simmons*, 98 N.J. Super. 430 (App. Div. 1968); *State v. Martinez*, 112 N.J. Super. 552 (App. Div. 1970); *State v. Wilbely*, 122 N.J. Super. 463 (App. Div. 1973).

2.112 BRIBERY OF A PUBLIC OFFICIAL

The indictment charges the defendant with bribery in violation of common law or appropriate statute.[1]

The essential elements of this offense are:

(1) defendant offered or gave any money, real estate or thing of value

(2) to any person in a public office

(3) that the defendant knew the official character of the person to whom he offered or gave value

(4) with the intent to influence the officer's behavior in office and incline him to act contrary to the known rules of honesty and integrity.[2]

The amount of the bribe is not material. Anything may serve as a bribe so long as it is of sufficient value in the eyes of the person bribed.[3] Also it is not essential that immediate action or inaction is called for.[4] It is immaterial whether the taker of the bribe lives up to his corrupt promise.[5] The offense is complete when the offer is made.[6] It is immaterial that the bribe is refused.

In order to constitute bribery, one must have made the offer to a public official. However, it is not necessary that the act requested be one which the official has authority to do.[7] It is sufficient if he has official power, ability, or apparent ability to bring about or contribute to the desired end.[8]

In order to find one guilty of bribery, it is imperative that the corrupt intent be established. The necessary intent requires only an intent to subject the official action of the recipient to the influence of personal gain or advantage rather than the public welfare since the social interest demands that official action should be free from improper motives of personal advantage.[9] A corrupt intent need not be shown to both parties to the transaction.[10] It is sufficient if it is established with respect to the party who is the defendant in the trial.[11]

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1. Bribery is an indictable misdemeanor in New Jersey. Our statutes against bribery merely define and fix the punishment for the offense in certain cases; they do not repeal or abrogate or otherwise alter the common law. 1 *Schlosser, Criminal Laws of N.J.* § 25:1. See also *St. v. Begyn*, 4 N.J. 35, 167, A.2d 161; *St. v. Ellis, supra* 1868; 33 N.J.L. 102. The specific statutes are *N.J.S.A.* 2A:93-1, Bribery of judge or magistrate, 2A:93-2, Bribery of legislators, 2A:93-4, Soliciting or receiving reward

for official vote, 2A:9-6, Bribery in connection with government work, 2A:93-7, Bribery of a labor representative, 2A:93-8, Bribery of fireman, 2A:93-10 & 11, Bribery of participant in a sporting event. Except for 2A:93-1 and 2A:93-2 which made bribery a high misdemeanor, all other bribery is a misdemeanor.

2. 1 *Schlosser, Crim. Laws of N.J.* 5390 (1953), *St. v. Begyn*, 34 N.J. 35, 47, 167 A.2d 161 (1961).

3. *Wharton Crim. Law & Procedure*, § 1386.

4. *Wharton Crim. Law & Procedure*, § 1380.

A bribe may be given to purchase particular official conduct on the possibility of a certain event happening in the future. *St. v. Ellis* (N.J.), *supra.*

5. *St. v. Begyn, supra.*

6. *St. v. Ellis, supra.*

(A) The offense is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote if procured would have produced the desired result.

7. *St. v. Begyn, supra.*

8. *St. v. Begyn, supra.*

St. v. Ellis.

It need not be averred that the vote if procured would have produced the desired result, nor that the official or the body of which he was a member had authority by law to do the thing sought to be accomplished.

9. *St. v. Begyn, supra.*

10. *Wharton's Criminal Law & Procedure*, § 1381.

11. *Wharton's Criminal Law & Procedure*, § 1381.

Wharton, § 1384 states:

At Common Law, bribery and an attempt to bribe are both misdemeanors. Hence, apart from statute any distinction between bribery and an attempt to bribe is of no practical importance.

2.120 CARNAL ABUSE

In this case the defendant has been indicted on the charge of Carnal Abuse which is a violation of *N.J.S.* 2A:138-1. provides in pertinent part as follows:

> "Any person who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child (under the age of 12 years,) (of the age of 12 years or over, but under the age of 16 years,) with or without her consent, is guilty of a" violation of the law.

"Carnal Abuse" is an act of assault or debauchery of the female sexual organs by the genital organ of a male which may fall short of actual penetration; and it is not necessary to show injury to the genital organs of the female victim in order to constitute a violation of the statute in question.

It is immaterial whether the abuse was with or without the consent of the girl. The law throws its protection about the child who is under the statutory age by providing that she cannot, in law, consent, i.e., she cannot by her consent relieve a person taking advantage of her immaturity of the responsibility for his acts in that respect.

The State must affirmatively prove that the girl was (between the ages of 12 and 16) (under the age of 12 years) and that the defendant carnally abused her.

Debauchery includes any touching of or physical contact with the female sexual organs by the genital organ of the male. There must be a physical touching and contact by the genitalia of the defendant with, against or into the vagina of the female. Sexual penetration need not be shown. It is not necessary to show that any physical injury has been caused to the female organs of the victim.

Thus, if the State has proven beyond a reasonable doubt that the defendant unlawfully and carnally abused the female in question, as indicated in the indictment, and that he did so when she was (under 12 years of age) (of the age of 12 years or over, but under the age of 16 years), then the State has sustained its burden of proof even though there may have been evidence to indicate that the girl consented to the act.

In such a case, consent by the female does not excuse the defendant. In the eyes of the law, a girl under the statutory age is incapable of giving consent to any act of carnal knowledge or abuse.

It is not a defense to the charge in question that the defendant did not know the age of the female; that he acted in good faith and believed that she was above the prohibitive age; or that he was misled by some representation or by her appearance.

See the following:

State v. Moore, 105 N.J. Super. 567 (App. Div. 1969), certif. den. 54 N.J. 502 (1969); *State v. Lefante,* 12 N.J. 505 (1953); *State v. LeFante,* 14 N.J. 584 (1954); *Farrell v. State,* 54 N.J.L. 416 (Sup. Ct. 1892); *State v. MacLean,* 135 N.J.L. 491 (Sup. Ct. 1947); *State v. Huggins,* 83 N.J.L. 43 (Sup. Ct. 1912), aff'd. 84 N.J.L. 254 (E. & A. 1913).

2.121 CARRYING FIREARM

(This charge is directed to carrying a pistol or revolver in an automobile, but it may be altered to apply to other factual situations involving other types of weapons and weapons being carried other than in an automobile.)

The relevant New Jersey Statute which the defendant is charged with having violated and the citation for which is contained in the indictment is

entitled *N.J.S. 2A:151-41, Carrying Weapons Without Permit or Identification Card,* and it reads as follows:

> "Except as hereinafter provided, *any person who carries, holds or possesses in any automobile,* carriage, motor cycle or other vehicle, or on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area:
>
> a. *A pistol or revolver without first having obtained a permit to carry the same in accordance with the provisions of this chapter; or*
>
> b. A rifle or shotgun without first having obtained a firearms purchaser identification card in accordance with the provisions of this chapter; or
>
> c. Any dangerous instrument of the kinds known as a blackjack, slung shot, billy, sandclub, sandbag, bludgeon, metal knuckles, cestus or similar leather band studded with metal for fitting on the knuckles, loose wool impregnated with metal filings, or razor blades imbedded in wood slivers, dagger, dirk, dangerous knife or knife as defined in chapter 5 of the laws of 1952 (C. 2A:151-62), stiletto, grenade, bomb or other explosive, other than fixed ammunition, except as such person may be licensed to carry, hold or possess explosives under the provisions of Title 21 of the Revised Statutes and amendments thereto, *is guilty of a (crime) high misdemeanor.*"

This statute, paraphrased to eliminate those portions which are not applicable to this case, reads as follows:

> "Any person who carries, holds or possesses in any automobile, a pistol, or revolver without first having obtained a permit to carry the same in accordance with the provisions of this chapter is guilty of a (crime) high misdemeanor."

Every crime contains certain essential elements which the State must prove to the satisfaction of the jury beyond a reasonable doubt in order to obtain a conviction. The crime with which the defendant in this case is charged with having committed contains two essential elements, which are: *First,* that there was a pistol or revolver; and *Second,* that the defendant carried, held or possessed the pistol or revolver in an automobile.

The first essential element is that there was a pistol or revolver. Another section of the statute defines a pistol or revolver as including any firearm with an overall length of less than 26 inches, or a shotgun having a barrel or barrels of less than 16 inches or a rifle having a barrel length of less than 16 inches, and therefore I charge you that Exhibit S- . . . in evidence is a pistol or revolver within the meaning of these terms and therefore this first essential element has been established as a matter of law and need not be determined by you.

The second essential element is that the pistol or revolver, Exhibit S-. . . . in evidence, was in the possession of the defendant in an automobile.

(INSERT HERE, MODEL CHARGE ON "POSSESSION")

You will recall that the statute provides that a person is not guilty of a violation of the statute if he has obtained a permit to carry the pistol or revolver. The State is not required to prove that no permit had been issued to the defendant. If a person charged with a violation of this statute did obtain such a permit, that fact lies more immediately within his knowledge and then the burden would be on such person to produce the permit or prove the issuance thereof. This, of course, in no way affects the burden of the State to prove the guilt of the defendant beyond a reasonable doubt. There is no evidence in this case from which you could conclude that the defendant obtained a permit to carry a revolver, so this exception in the statute is not applicable. Therefore, if you find the other essential elements of the crime charged have been proved to your satisfaction beyond a reasonable doubt as to the defendant, then the defendant is guilty.

NOTES:

N.J.S. 2A:151-7 providing for presumptive evidence of possession by all persons in vehicle in which firearm is present should not be mentioned to the jury. *State v. Humphreys,* 54 N.J. 406 (1969).

There is no burden on the State to prove that the defendant did not have a permit to carry the weapon. *State v. Blanca,* 100 N.J. Super. 241 (App. Div. 1968); *State v. Humphreys,* 101 N.J. Super. 539 (App. Div. 1968) reversed on other grounds 54 N.J. 406 (1969), but see *State v. Hock,* 54 N.J. 526 (1969). *State v. Rabatin,* 25 N.J. Super. 24 (1953).

Where there is more than one occupant in the automobile and it can be reasonably inferred they were on a criminal mission and knew of the presence of the weapon in the automobile, aiding and abetting statute *N.J.S.* 2A:85-14 may be charged to jury as to occupants not in actual physical possession of the weapon. *State v. Humphreys,* 54 N.J. 406 (1969).

Unnecessary to charge exceptions to statute set forth in *N.J.S.* 2A:151-42 and 43 when issue not raised by defendant and/or no request to charge same. *State v. Thomas,* 105 N.J. Super. 331 (1969).

See also: *State v. DiRienzo,* 53 N.J. 360 (1969); *State v. Labato,* 7 N.J. 137 (1951); *State v. Lewis,* 93 N.J. Super. 212 (1966).

2.122 CONSPIRACY

NOTE:

There follow two charges on conspiracy. The charge designated B is more lengthy and detailed than the charge designated A. This is the only difference between the two charges; they are both generally applicable to the same types of conspiracy offenses. The Committee on Criminal Charges decided to make both available to the judges who could then choose whichever they preferred.

2.122-A CONSPIRACY

NOTE:

This charge deals only with the offense of conspiracy to commit a crime under *N.J.S.A.* 2A:98-1(a). There are other subsections, (b) through (h), involving conspiracies to do other things.

In view of 2A:98-2, the portions of the charge in parentheses should only be included where the conspiracy is to commit a crime other than arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery, sodomy, or where the parenthesized portion of the charge is otherwise applicable.

CHARGE

Under the ..... count of the indictment, the defendants are charged with conspiracy to commit the crime of .....

— OR —

Under the ..... count of the indictment, the defendant is charged with the crime of conspiring with others (another), who are (is) not before you for trial, to commit the crime of ..... The fact that there is (are) no other defendant(s) on trial does not matter, if you find the defendant guilty of the crime of conspiracy beyond a reasonable doubt.

N.J.S.A. 2A:98-1 as applicable provides as follows:

Any two or more persons who conspire: (a) to commit a crime * * * are guilty of . . . conspiracy.

(And *N.J.S.A.* 2A:98-2 which provides in pertinent part as follows:

No person shall be convicted * * * for conspiracy unless some act be done to effect the object thereof by one or more of the parties thereto.)

A conspiracy to commit a crime is a separate and distinct crime from the actual commission of the substantive offense. In other words a defendant may be found guilty of the crime of conspiracy regardless of any guilt or innocence as to the (specify substantive crime). In order to find the defendant guilty of the crime of conspiracy, the State need not prove the defendant actually committed the crime of .....; the State must only prove the defendant conspired with someone else to commit that crime.

The State does not have to prove each and every element of the substantive crime, in order to find the defendant guilty of conspiracy. However, it is necessary for you to know the essential elements of the substantive offense so you may determine whether or not there was a conspiracy to commit the crime of ..... The essential elements of the substantive offense are as follows: (or will be explained to you later in this charge)

(HERE REFER TO MODEL CHARGE ON THE PARTICULAR CHARGE)

The crime of conspiracy itself is an agreement or combination between two or more persons to commit a crime (and an overt act done by one or more of them in furtherance of that agreement). The agreement itself may be proved from direct evidence or it may be proved by circumstances from which the jury might infer such an agreement. The State is not required to prove an actual meeting at which a formal agreement was made or spoken. Likewise, it is not essential that there be direct contact between all the parties to the conspiracy or that all enter into the conspiratorial agreement at the same time. The State is required to prove beyond a reasonable doubt that the defendant joined knowingly and intentionally in some manner or way in the scheme, plan or agreement with another person (or persons) to (specify particular crime here).

Whether the conspiracy succeeds or fails makes no difference. (Even if you determine beyond a reasonable doubt that the State has proven that the defendant entered into an agreement or combination to commit a crime, you cannot bring in a verdict of guilty unless you also determine beyond a reasonable doubt that the State has proven an overt act, as specified in the indictment, which overt act has been committed by one or more of the alleged conspirators in furtherance of the agreement or combination. An overt act means an affirmative act done in furtherance of the object of conspiracy).

(CHARGE WHERE APPLICABLE)

(The elements of knowledge and willfulness will be discussed later; however, you must remember that one who merely happens to associate with another, or happens to be present at a particular time or place, or happens to act in a way to further the object of the conspiracy, but who does not have knowledge of the conspiratorial purpose does not thereby become a conspirator).

(An overt act, in furtherance of the conspiracy which has been proven against one (or more) of the co-conspirators named in the indictment, whether a defendant or not, may be deemed the act(s) of all. Thus, the State is not required to prove an overt act by each and every one of the alleged co-conspirators, and it is not obliged to prove every overt act set out in the indictment).

(HERE DISCUSS OVERT ACTS SET FORTH IN THE INDICTMENT)

It takes at least two persons to be in a conspiracy, and you should not bring in a verdict of guilty unless you determine beyond a reasonable doubt that at least two of the conspirators specified in the indictment, (whether one of them is a defendant or not) participated in the conspiracy (and that

at least one of the conspirators performed at least one act in furtherance of the conspiracy). Before you can find a defendant guilty of the charge of conspiracy, you must be satisfied by the evidence beyond a reasonable doubt, that the defendant knowingly and willfully participated in the conspiracy with the intent to advance or further the agreement.

To participate knowingly and willfully means to act voluntarily and with a full understanding that the law forbids that which is being planned. If the defendant intentionally and with knowledge encouraged, advised or assisted any other person for the purpose of furthering the common scheme or design, he is a conspirator.

(CHARGE WHERE NECESSARY)

(But, if a person has no knowledge of a conspiracy but simply happens to be present or to act in a way that furthers the object of that conspiracy, he does not thereby become a conspirator for the reason that he is lacking the necessary knowledge and intent).

Thus, members of the jury, if you are satisfied beyond a reasonable doubt that the defendant did knowingly and willfully reach or have an understanding or agreement with some person (or persons) to (here specify crime) (and such defendant or any co-conspirator performed an overt act in furtherance of this understanding), then you must find defendant guilty of the crime of conspiracy.

If you are not satisfied beyond a reasonable doubt that this defendant did knowingly and willfully reach or have such an understanding or agreement, or that an overt act was performed by this defendant or any co-conspirator in furtherance of such understanding, then you must find this defendant not guilty of the crime of conspiracy.

During the course of the charge I have been referring to the words Intent and Knowledge.

(HERE CHARGE STANDARD CHARGE ON INTENT AND KNOWLEDGE)

Query—are the enumerated common law or statutory crimes?

See *State v. Butler,* 27 N.J. 560, 588 (1958) ; *State v. Blinsinger,* 114 N.J. 318 (App. Div. 1971)

1. *State v. O'Brien,* 136 N.J.L. 118 (1947).
2. *State v. Lennon,* 3 N.J. 337 (1949).
3. *State v. Carbone,* 10 N.J. 329 (1952).
4. *State v. Oats,* 32 N.J. Super. 435 (App. Div. 1954).
5. *State v. Dennis,* 43 N.J. 418 (1964).

6. *U.S. v. Natale,* 250 F. Supp. 381 (1966).
7. *State v. Carroll,* 51 N.J. 102 (1968).
8. *State v. Moretti,* 52 N.J. 182 (1968).

It should be noted that if a factor unknown to the conspirators makes it impossible for them to complete their intended crime, this in no way lessens the degree of culpability involved in the criminal combination.

State v. Moretti, 52 N.J. 182, 187 (1968).

Essential elements of statutory crime of "conspiracy" are the criminal agreement and an overt act in furtherance thereof.

State v. Moretti, 52 N.J. 182, 187 (1968)

When uncorroborated testimony of co-conspirator is offered to prove conspiracy, issue before jury is one of credibility and it is up to jury to determine what weight should be attributed to it.

State v. Burgess, 97 N.J. Super. 428, 435 (App. Div. 1967)

State may not carve up single conspiracy into smaller conspiracies for purposes of multiple prosecutions.

State v. Ferrante, 111 N.J. Super. 299, 303 (App. Div. 1970)

Gist of offense of conspiracy is the criminal agreement which may be established by inferences drawn from the circumstances. Do not need direct contact with the parties.

State v. Yormark, 117 N.J. Super. 315, 330 (App. Div. 1971)

"A conspiracy . . . has generally been defined . . . as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

State v. Collins, 120 N.J. Super. 48, 50 (Law Div. 1972)

It is plain and therefore reversible error even without an objection from defendant's counsel, for the trial judge to fail to instruct the jury that out-of-court declarations of the defendant's alleged co-conspirators which were not made in the defendant's presence and which inculpated defendant are inadmissible and should not be considered as to the defendant's guilt unless and until the jury finds on the basis of other evidence the defendant's participation in the conspiratorial scheme.

U.S. v. Rodrigues, 491 F.2d 663 (3rd Cir. 1974)

"This Court has held that where a conspiracy is shown to exist, the acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against any other conspirator. The rule is applicable where it is charged that a crime was committed in pursuance of a conspiracy, whether or not the indictment contains a count for such conspiracy."

State v. Louf, 64 N.J. 172, 177 (1973)

2.122-B CONSPIRACY

NOTE: This charge deals only with the offense of conspiracy to commit a crime under *N.J.S.A.* 2A:98-1(a). There are other subsections, (b) through (h), involving conspiracies to do other things.

In view of 2A98-2, the portions of the charge in parentheses should only be included where the conspiracy is to commit a crime other than arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery, sodomy, or where the parenthesized portion of the charge is otherwise applicable.

CHARGE

Under the . . . . count of the indictment, the defendants are charged with conspiracy to commit the crime of . . . .

—OR—

Under the . . . . count of the indictment, the defendant is charged with the crime of conspiring with others (another), who are (is) not before you for trial, to commit the crime of . . . . The fact that there is (are) no other defendant(s) on trial does not matter, if you find the defendant guilty of the crime of conspiracy beyond a reasonable doubt.

N.J.S.A. 2A:98-1 as applicable provides as follows:

> Any two or more persons who conspire: (a) to commit a crime * * * are guilty of . . . conspiracy.

(And *N.J.S.A.* 2A:98-2 which provides in pertinent part as follows:

> No person shall be convicted * * * for conspiracy unless some act be done to effect the object thereof by one or more of the parties thereto.)

A conspiracy to commit a crime is a separate and distinct crime from the actual commission of the substantive offense. In other words a defendant may be found guilty of the crime of conspiracy regardless of any guilt

or innocence as to the (specify substantive crime). In order to find the defendant guilty of the crime of conspiracy, the State need not prove the defendant actually committed the crime of . . . ; the State must only prove the defendant conspired with someone else to commit that crime.

The State does not have to prove each and every element of the substantive crime in order to find the defendant guilty of conspiracy. However, it is necessary for you to know the essential elements of the substantive offense so you may determine whether or not there was a conspiracy to commit the crime of . . . . The essential elements of the substantive offense are as follows: (or will be explained to you later in this charge).

(HERE REFER TO MODEL CHARGE
ON THE PARTICULAR CHARGE)

The crime of conspiracy itself is an agreement or combination between two or more persons to commit a crime (and an overt act done by one or more of them in furtherance of that agreement. The agreement itself may be proved from direct evidence or it may be proved by circumstances from which the jury might infer such an agreement. The State is not required to prove an actual meeting at which a formal agreement was made or spoken. Likewise, it is not essential that there be direct contact between all the parties to the conspiracy or that all enter into the conspiratorial agreement at the same time. The State is required to prove beyond a reasonable doubt that the defendant joined knowingly and intentionally in some manner or way in the scheme, plan or agreement with another person (or persons) to (specify particular crime here).

What the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common unlawful plan.

You are instructed, however, that suspicion, however strong, is never proof under our concept of law, and you may not substitute suspicion for evidence.

Whether the conspiracy succeeds or fails makes no difference. (Even if you determine beyond a reasonable doubt that the State has proven that the defendant entered into an agreement or combination to commit a crime, you cannot bring in a verdict of guilty unless you also determine beyond a reasonable doubt that the State has proven an overt act, as specified in the indictment, which overt act has been committed by one or more of the alleged conspirators in furtherance of the agreement or combination. An overt act means an affirmative act done in furtherance of the object of conspiracy).

(CHARGE WHERE APPLICABLE)

(The elements of knowledge and wilfulness will be discussed later; however, you must remember that one who merely happens to associate with another, or happens to be present at a particular time or place, or happens to act in a way to further the object of the conspiracy, but who does not have knowledge of the conspiratorial purpose does not thereby become a conspirator).

(An overt act, in furtherance of the conspiracy which has been proven against one (or more) of the co-conspirators named in the indictment, whether a defendant or not, may be deemed the act(s) of all. Thus, the State is not required to prove an overt act by each and every one of the alleged co-conspirators, and it is not obliged to prove every overt act set out in the indictment).

(HERE DISCUSS OVERT ACTS SET FORTH IN THE INDICTMENT)

(The State alleges that it has offered proof of these overt acts beyond a reasonable doubt. It is necessary for you to conclude, beyond a reasonable doubt, that at least one of these overt acts was done either by one of the defendants or one of the co-conspirators named in the indictment or one of the alleged other unnamed persons, to effect the object of the conspiracy, although it is not necessary that the State prove all of the overt acts alleged in the indictment).

It takes at least two persons to be in a conspiracy, and you should not bring in a verdict of guilty unless you determine beyond a reasonable doubt that at least two of the conspirators specified in the indictment, (whether one of them is a defendant or not), participated in the conspiracy (and that at least one of the conspirators performed at least one act in furtherance of the conspiracy). Before you can find a defendant guilty of the charge of conspiracy, you must be satisfied by the evidence beyond a reasonable doubt, that the defendant knowingly and wilfully participated in the conspiracy with the intent to advance or further the agreement.

To participate knowingly and willfully means to act voluntarily and with a full understanding that the law forbids that which is being planned. If the defendant intentionally and with knowledge encouraged, advised or assisted any other person for the purpose of furthering the common scheme or design, he is a conspirator.

(CHARGE WHEN NECESSARY)

(But, if a person has no knowledge of a conspiracy but simply happens to be present or to act in a way that furthers the object of that conspiracy, he does not thereby become a conspirator for the reason that he is lacking the necessary knowledge and intent).

Thus the elements that the State must prove to you, beyond a reasonable doubt, in order for you to find a defendant guilty of the crime of conspiracy as alleged in this indictment are as follows:

1. The existence of an agreement or combination between two or more persons to commit a crime.

2. That the defendant knowingly became a member of the conspiracy with knowledge of its objectives.

Whether the defendant acted intentionally and knowingly may be proven by circumstantial evidence; it rarely can be established by another means; since intent refers to the state of mind with which the defendant acted.

While witnesses may see and hear, and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. In determining the issue as to intent and knowledge you jurors may take into consideration any statements made and acts done by the defendant and all the surrounding facts and circumstances in evidence which may aid in determination of these states of mind.

The jury will remember that the defendant is not to be convicted on mere suspicion or conjecture. So it is not enough that the jury might suspect or surmise that the defendant should have known that any acts or statements made by him were made in furtherance of a common plan or conspiracy. You must find beyond a reasonable doubt that this defendant had actual knowledge of the conspiracy and actual knowledge of its objects and purposes and that the conduct of the defendant was not a result of negligence, error or honest mistake in judgment.

The crime of conspiracy is distinct from the substantive offense which the conspirators plotted to commit. The essence of the statutory crime of conspiracy is the joining together of the conspirators with an unlawful intent. It is this unlawful purpose upon which they agreed which makes a conspiracy a crime (once any overt act is committed in furtherance of it).

The crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation. As I stated earlier, the gist of the offense is the criminal agreement and focuses primarily on the intent of the defendants.

(3. The third element is that one of the conspirators knowingly committed at least one of the overt acts charged in the indictment.

4. The fourth element is that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged).

Thus, members of the jury, if you are satisfied beyond a reasonable doubt that the defendant did knowingly and willfully reach or have an understanding or agreement with some person (or persons) to (here specify crime) (and such defendant or any co-conspirator performed an overt act in furtherance of this understanding), then you must find defendant guilty of the crime of conspiracy.

If you are not satisfied beyond a reasonable doubt that this defendant did knowingly and willfully reach or have such an understanding or agreement, or that an overt act was performed by this defendant or any co-conspirator in furtherance of such understanding, then you must find this defendant not guilty of the crime of conspiracy.

During the course of the charge I have been referring to the words Intent and Knowledge.

(HERE CHARGE STANDARD CHARGE ON INTENT AND KNOWLEDGE)

(CHARGE WHEN NECESSARY)

(A separate crime or offense is charged against the various defendants in each of the counts of the indictment as I have just explained to you. Each offense and each defendant, and the evidence pertaining to the offense and to that defendant, should be considered separately. The fact that you may find one or more of the defendants guilty or not guilty on one or more of the offenses charged against him, should not control your verdict as to the other offenses charged against that particular defendant or as to the charges against the other defendants).

(CHARGE WHEN NECESSARY)

(In determining whether or not a particular defendant was a member of the conspiracy, you cannot consider what others may have said or done. Membership in a conspiracy must be established by the evidence in the case as to that defendant's own conduct, what he himself willfully said or did, and cannot be based on so-called constructive notice because of facts known to others.

You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of some of the defendants was received on a tentative basis in evidence. This testimony was received subject to independent proof of the existence of the conspiracy, and the absent defendants knowing participation in the conspiracy. If you do not find on in-

dependent proof, that a conspiracy existed and that the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to such absent defendant.

At the time such testimony was received, the court instructed you that the evidence was received only as to certain of the defendants or that such evidence could not be considered by you as to other of the defendants.

Hearsay statements are those made out of the presence of a defendant, and normally are not admissible into evidence as to such defendant. There is an exception to this rule which permits such hearsay statements to be received into evidence as admissible against a defendant where at the time the statement was made the defendant and the person making the statement were participating in a plan to commit a crime, and the statement was made in furtherance of that plan.

This rule of evidence is based upon the legal principle that acts and statements made by co-conspirators in furtherance of a conspiracy are admissible against all the conspirators, since they are deemed the acts and declarations of all. This would apply even to those statements made before a particular defendant joined the conspiracy. This is because once a person joins an existing conspiracy, he is bound by all of the statements and actions of his co-conspirators in furtherance of that conspiracy before, as well as after, his having joined that conspiracy.

However, the existence of a conspiracy and of a defendant's knowing and willful participation in that conspiracy, must be shown by independent proof, exclusive of such hearsay statements before acts and statements made by co-conspirators out of the presence of that defendant are binding upon him.

The determination, by the court in ruling upon the admissibility of this evidence, is in no way to be taken by you as a conclusive determination that such a conspiracy did in fact exist, and that any one or more of these defendants were participants in that conspiracy).

Query—are the enumerated common law or statutory crimes?

See *State v. Butler*, 27 N.J. 560, 588 (1958); *State v. Blinsinger*, 114 N.J. Super. 318 (App. Div. 1971)

1. *State v. O'Brien*, 136 N.J.L. 118 (1947).
2. *State v. Lennon*, 3 N.J. 337 (1949).
3. *State v. Carbone*, 10 N.J. 329 (1952).
4. *State v. Oats*, 32 N.J. Super. 435 (App. Div. 1954).

5. *State v. Dennis,* 43 N.J. 418 (1964).
6. *U.S. v. Natale,* 250 F. Supp. 381 (1966).
7. *State v. Carrol,* 51 N.J. 102 (1968).
8. *State v. Moretti,* 52 N.J. 182 (1968).

It should be noted that if a factor unknown to the conspirators makes it impossible for them to complete their intended crime, this in no way lessens the degree of culpability involved in the criminal combination.

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Essential elements of statutory crime of "conspiracy" are the criminal agreement and an overt act in furtherance thereof.

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When uncorroborated testimony of co-conspirator is offered to prove conspiracy, issue before jury is one of credibility and it is up to jury to determine what weight should be attributed to it.

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State may not carve up single conspiracy into smaller conspiracies for purposes of multiple prosecutions.

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Gist of offense of conspiracy is the criminal agreement which may be established by inferences drawn from the circumstances. Do not need direct contact with the parties.

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"A conspiracy . . . has generally been defined . . . as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

State v. Collins, 120 N.J. Super. 48, 50 (Law Div. 1972)

It is plain and therefore reversible error even without an objection from defendant's counsel, for the trial judge to fail to instruct the jury that out-of-court declarations of the defendant's alleged co-conspirators which were not made in the defendant's presence and which inculpated defendant are inadmissible and should not be considered as to the defendant's guilt

unless and until the jury finds on the basis of other evidence the defendant's participation in the conspiratorial scheme.

U.S. v. Rodrigues, 491 F.2d 663 (3rd Cir. 1974)

"This Court has held that where a conspiracy is shown to exist, the acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against any other conspirator. The rule is applicable where it is charged that a crime was committed in pursuance of a conspiracy, whether or not the indictment contains a count for such conspiracy."

State v. Louf, 64 N.J. 172, 177 (1973)

2.123 CONTRIBUTING TO DELINQUENCY OF A CHILD

(Defendant not having custody or control)

This defendant stands before you charged with the crime of contributing to the delinquency of a child. The state charges that (defendant) did on or about . . . (set forth facts of the case).

The statute which defendant is charged with violating reads in pertinent part, as follows:

"Any person . . . who, by any willful act, encourages, causes or contributes to a child's delinquency," is guilty of a violation of the law. The law defines a "child" for the purposes of this statute, as being any person who is under the age of eighteen years at the time of the offense.

The state must prove that (child) was in fact under eighteen. The fact that the child may have appeared to be eighteen years of age or over, is not a defense to the charge.

The state must also prove that the willful act or conduct of the defendant encouraged or had a tendency to cause the child's delinquency or resulted in the child's becoming or remaining delinquent. It is not necessary for the state to prove that defendant's conduct actually resulted in the child becoming a delinquent. A delinquent child is one who engages in an illegal or immoral act; that is, an act which either is in violation of the law or which is not consistent with good morals. By willful is meant an intentional and knowing act, one which is purposeful.

It is no defense to the charge that the child may have consented to the act or conduct of the defendant.

State v. Blount, 60 N.J. 23 (1972); *State v. Montalbo,* 33 N.J. Super. 462 (Hudson Co. Ct. 1954); *State v. Raymond,* 74 N.J. Super. 434 (App. Div. 1962).

2.124 DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCE

The pertinent part of the statute upon which this indictment is based, reads as follows:

N.J.S.A. 24:21-19A (1)

Except as authorized by this act, it shall be unlawful for any person: To * * * distribute * * * a controlled dangerous substance.

The various kinds of substances are defined in another part of our Controlled Dangerous Substances Act. (*Heroin*) is a dangerous substance proscribed by the statute. (The defendant does not claim legal authorization, so the exceptions in the statute are not applicable in this case).

The statute, read in conjunction with this indictment, discloses the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant of this charge. They are as follows:

1. (*S-1*) in evidence is (*heroin*).

2. The defendant distributed the (*heroin*) to (*names*) on (*date*).

"Distribute" means to deliver, that is, the actual transfer (constructive or attempted)[1] from one person to another of a controlled dangerous substance.

3. Defendant intended to deliver or distribute the (*heroin*) to (*name*) knowing what he delivered was in fact (*heroin*).

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find unlawful distribution on the part of the defendant you must first find intent, that is, that he intended to distribute the (*heroin*). And in addition to intent, distribution requires knowledge, that is, knowledge by the defendant of the character of that which he allegedly distributed.

Remember that both intent and knowledge are conditions of the mind which cannot be seen. It is not necessary for the State to prove the existence of such mental states by direct evidence such as a statement by the defendant that he had such intent and knowledge. Intent and knowledge as separate propositions of proof do not commonly exist. They must ordinarily be discovered as other mental states are from circumstantial evidence, that is by reference to the defendant's conduct, words or acts in all the surrounding circumstances.

NOTE: If possession is an element, see model charge on possession.

NOTE: Mens rea is not an element of the offense charged. *State v. Gibson,* 92 N.J. Super. 397 (App. Div. 1966).

1 To be used where appropriate

2.125 UNLAWFUL POSSESSION OF A NARCOTIC DRUG

(Controlled Dangerous Substances)

The indictment reads in pertinent part as follows:

(Read indictment).

The pertinent part of the statute on which this indictment is based reads as follows:

N.J.S.A. 24:21-20.

> "It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance * * * ."

The various kinds of drugs and dangerous substances are defined in another section of our drug law (Controlled Dangerous Substances Act) and that section includes the drug named in the indictment. The jury is thus instructed that (heroin, marijuana, etc.) is a controlled dangerous substance (narcotic drug) proscribed by the statute.

The statute read in conjunction with this indictment discloses the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant of said charge.

It is the burden of the State to prove:

(1) That exhibit .... is (heroin, marijuana, etc.);

(2) That defendant knew exhibit .... was (heroin, marijuana, etc.);

(3) That defendant possessed or obtained exhibit .....

I will define some of the terms used in the elements of the crime.

To obtain means to acquire, to get, to procure.

Intentionally means a purpose to accomplish a certain thing.

Knowingly simply means with knowledge of what one is doing.

The knowledge required by law may be shown by circumstantial evidence; it may be proved by the circumstances attending the possession and any other fact or circumstance which the jury finds would demonstrate the necessary knowledge.

CHARGE DEFINITION OF POSSESSION

(Actual-Constructive-Joint)—see Model Criminal Charges

State v. Labato, 7 N.J. 137 (1951); *State v. Salernitano,* 27 N.J. Super. 537, 542-543 (App. Div. 1953); *State v. Reed,* 34 N.J. 554 (1961); *State v. Brown,* 67 N.J. Super. 450 (App. Div. 1961); *State v. Campisi,* 42 N.J. Super. 138 (App. Div. 1956), reversed on other grounds, 23 N.J. 513 (1957); *State v. Puckett,* 67 N.J. Super. 365 (App. Div. 1960), *aff'd* 34 N.J. 574 (1961); *State v. Thomas,* 105 N.J. Super. 331, 335 (App. Div. 1969) (dissenting opinion); *State v. Kimbrough,* 109 N.J. Super. 57 (App. Div. 1970).

Federal Jury Practice and Instructions, §10.09, "Possession"—Defined.

California Jury Instructions, No. 41.

2.126 POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED DANGEROUS SUBSTANCE

The pertinent part of the statute upon which this indictment is based, reads as follows:

N.J.S.A. 24:21-19A(1)

Excerpt as authorized by this act, it shall be unlawful for any person: * * * to possess or have under his control with intent to distribute * * * a controlled dangerous substance.

The various kinds of substances are defined in another part of our Controlled Dangerous Substances Act. (*Heroin*) is a dangerous substance proscribed by the statute. (The defendant does not claim legal authorization, so the exceptions in the statute are not applicable in this case).

The statute, read in conjunction with this indictment, discloses the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant of this charge. They are as follows:

1. *S-1* in evidence is (*heroin*).
2. The defendant possessed, or had under his control (*heroin*).
3. The defendant knew what it was he possessed.
4. The defendant intended to possess it.
5. The defendant possessed the (*heroin*) with the intent to distribute it.

(REFER TO MODEL CHARGE ON POSSESSION AND USE THOSE PORTIONS WHICH APPLY TO YOUR CASE)

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find possession on the part of the defendant you must first find intent, that is, that he intended to exercise control over the (*heroin*). And in addition to intent, possession requires knowledge, that is, knowledge by the defendant of the character of that which he possessed. It is possible to possess something without knowing it, but such possession is not possession within the meaning of the law.

Remember that both intent and knowledge are conditions of the mind which cannot be seen. It is not necessary for the state to prove the existence of such mental states by direct evidence such as a statement by the defendant that he had such intent and knowledge. Intent and knowledge as separate propositions of proof do not commonly exist. They must ordinarily be discovered as other mental states are from circumstantial evidence,

that is by reference to the defendant's conduct, words or acts in all the surrounding circumstances.

The final element of the charge is that the defendant possessed the (*heroin*) with the intent to distribute it to others.

Distribute means to deliver, that is, the actual transfer (constructive or attempted) [1] from one person to another of a controlled dangerous substance.

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1 To be used where appropriate

NOTE: Mens rea is not an element of the offense charged. *State v. Gibson,* 92 N.J. Super. 397 (App. Div. 1966).

2.130 DEATH BY RECKLESS DRIVING

(N.J.S. 2A:113-9)

The pertinent provisions of the statute (N.J.S. 2A:113-9) on which the charge made against the defendant is based states that: "Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of a violation of the law.

In order for the defendant to be convicted of the crime charged in this case, the State must first prove to your satisfaction beyond a reasonable doubt:

1. That he operated his motor vehicle in such a manner as to constitute a reckless indifference to and disregard of human life; and

2. That he caused the death of (the decedent named in the indictment) by careless and heedless driving in wanton disregard of the rights or safety of others.

To establish that the defendant's conduct was wanton, it is incumbent upon the State to prove to your satisfaction beyond a reasonable doubt that with knowledge of existing conditions or circumstances, or both, and conscious from such knowledge that there was a high degree of probability of producing harm from his conduct, and with reckless indifference to the consequences, the defendant consciously and intentionally did some wrongful act in the operation of his vehicle, or omitted to discharge some duty in the operation of his vehicle, which resulted in the death of the decedent.

It is not necessary for the State to prove that the defendant showed ill will toward, or a positive intent to injure, the decedent, or any other person, in order to establish that a motor vehicle was driven by the defendant in willful or wanton disregard of the rights or safety of others.

If you find that the defendant did not drive his motor vehicle with reckless indifference, or that he did not know of any circumstances or

conditions which would make him conscious of a high degree of probability that his operation of the motor vehicle would produce harm, injury or death to the decedent, or anyone else, then you must find the defendant not guilty.

The defendant in driving his automobile at the time in question was under a duty to exercise such care and skill and have his car in such reasonable control as a reasonably prudent person would, under the conditions existing at the time of the collision.

In addition, the defendant was under a duty to observe the provisions of the Motor Vehicle and Traffic Act of this State.

(Here insert the provision or provisions of the Motor Vehicle and Traffic Act alleged to have been violated, e.g.: One of the sections of this Act provides in part that:

> "No driver of a vehicle . . . shall enter upon or cross an intersecting street marked with a 'stop' sign unless he has first brought his vehicle . . . to a complete stop at a point within 5 feet of the nearest crosswalk or stop line marked upon the pavement at the near side of the intersecting street and shall proceed only after yielding the right of way to all traffic on the intersecting street which is so close as to constitute an immediate hazard. . . ." (R.S. 39:4-144)

It is the intent of this section of the Motor Vehicle and Traffic Act to have the motorist bring his car to a full stop for the very purpose of compelling him to look carefully for oncoming traffic as he enters and crosses the intersecting street.

There is testimony produced by the State that the defendant passed a stop sign on (location) without stopping his car and proceeded into the intersection of and Streets, where the collision occurred).

Now the mere neglect of the defendant to use the care which I have charged you he was under an obligation to use, and the mere neglect or failure to observe a provision of the Motor Vehicle and Traffic Act are not sufficient to form the basis of a conviction under this indictment. They are circumstances to be considered together with all the other facts and circumstances of the case. The defendant's neglect must be more than mere carelessness or negligence. It must, under all the facts and circumstances, go to such an extent, as I have indicated to you, as to constitute and evince a reckless indifference to and disregard of human life.

NOTE:

If it is alleged that the decedent was contributorily negligent, the following additional paragraphs are suggested:

The defendant says that the decedent was contributorily negligent. Contributory negligence may be defined as the failure to exercise, in the given circumstances, that degree of care for one's own safety which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.

Contributory negligence by the decedent is not a defense as in civil damage suits. However, evidence of negligence on the part of the decedent is admissible in this case and should be considered by the jury on the question of whether the death of the decedent was due to criminal negligence on the part of the defendant (that is, by the defendant driving a vehicle carelessly and heedlessly, in wanton disregard of the rights or safety of others) or to some other cause. If the defendant is shown beyond a reasonable doubt to have been guilty of the acts prohibited by the statute, resulting in the death of the decedent, it matters not that the decedent would have escaped the fatal consequences had he, himself, not been negligent. An accused under this statute may not avoid the consequences of his own wrong by showing the negligence of the decedent.[1]

If, however, you find from all of the evidence that the decedent's conduct at the time of the accident was the efficient producing cause of his death, you must find the defendant not guilty of the crime charged in the indictment even though he was driving at the time in willful or wanton disregard of the rights of the public generally.[2]

NOTE:

(When appropriate, the following may be included;)

The offense condemned by the statute may be committed by the driver of a motor vehicle who causes the death of another when there inheres in his driving the high probability of causing harm because of conditions known to him which actually impair, or potentially have the capacity to impair, his faculties for vigilance and care.

NOTE:

If the defendant claims that he was blinded by headlights of cars driven in the opposite direction, the following instruction is suggested:

The defendant claims that he was blinded by the headlights of cars coming in the opposite direction. No man is entitled to operate an automobile through a public street blindfolded. A person whose vision is admittedly destroyed is under a duty to stop his car and endeavor to

1. *State v. Kellow,* 136 N.J.L. 1, 4 (Sup. Ct. 1947) *aff'd,* 136 N.J.L. 633 (E. & A. 1948).

2. *State v. Shoopman,* 20 N.J. Super. 354, 359-360 (App. Div. 1952) *aff'd,* 11 N.J. 333 (1953).

adjust his means of vision so that his vision might be restored. If, instead of doing this, the defendant took the chance of finding the way clear and for that reason ran into the deceased, he cannot be excused by the mere fact that the oncoming headlights blinded him. If you find as a fact that the defendant was blinded by the oncoming headlights at or near the scene of the accident and that he, nevertheless, failed to stop or slow down and endeavor to adjust his means of vision so that it was restored, then those would be facts to be considered by you together with all of the evidence in the case in deciding whether this defendant is guilty of the crime with which he is charged.[1]

Statute:

N.J.S. 2A:113-9

Cases:

In Re Lewis, 11 N.J. 217 (1953); *State v. Donley*, 85 N.J. Super. 127 (App. Div. 1964); *State v. Shoopman*, 20 N.J. Super. 354 (App. Div. 1952), aff'd, 11 N.J. 333 (1953); *State v. Oliver*, 37 N.J. Super. 379 (App. Div. 1955); *Cresse v. Parsekian*, 81 N.J. Super. 536, 545 (App. Div. 1963) aff'd, 43 N.J. 326 (1964).

NOTE:

"'Willful' and 'wanton' have substantially the same meaning. Indeed, the phrase 'willful or wanton' might well be read 'willful and wanton.'" *State v. Donley, supra*, at 85 N.J. Super. p. 133.

"***True, conduct which is willful or wanton, unlike conduct which is merely negligent, does import intent. 38 *Am. Jur., Negligence, sec.* 48, p. 692. However, the element of intent to harm is supplied by a constructive intention as to consequences, which entering into the intentional act which produces harm, namely, the driving of the vehicle, the law imputes to the actor, so that conduct which otherwise would be merely negligent becomes, by reason of reckless disregard of the safety of others, a willful or wanton wrong. See *King v. Patrylow*, 15 N.J. Super. 429 (App. Div. 1951). The emphasis is upon the reckless indifference to consequences of the intentional act of driving the motor vehicle in the face of known circumstances presenting a high degree of probability of producing harm. *State v. Hedinger*, 126 N.J.L. 288 (Sup. Ct. 1941), affirmed 127 N.J.L. 564 (E. & A. 1942); *State v. Linarducci*, 122 N.J.L. 137 (Sup. Ct. 1939), affirmed 123 N.J.L. 228 (E. & A. 1939); *Annotation*, 160 A.L.R. 515." *In Re Lewis, supra*, at 11 N.J. pp. 221-222.

"***while the contributory negligence of the deceased is not a defense to the indictment, yet his conduct at the time of the accident may be

1. *State v. Kellow*, 136 N.J.L. 1, 5 (Sup. Ct. 1947) *aff'd*, 136 N.J.L. 633 (E. & A. 1948).

shown and if that conduct is found by the jury to have been the efficient, producing cause of the death, the defendant is entitled to an acquittal even though he was driving at the time in willful or wanton disregard of the rights of the public generally. *State v. Kellow*, 136 N.J.L. 1 (Sup. Ct. 1947), affirmed, 136 N.J.L. 633 (E. & A. 1948); *State v. Oliver*, 107 N.J.L. 319 (E. & A. 1931)." *State v. Shoopman, supra*, at 20 N.J. Super. pp. 359-360.

2.140 EMBEZZLEMENT

(N.J.S. 2A:102-5)

The statute (N.J.S. 2A:102-5) upon which the charge set forth in the indictment is predicated, insofar as it is pertinent here, states that:

> Any (employee), (agent), (consignee), (factor), (bailee), (lodger) [or] (tenant) who embezzles or, with intent to defraud, takes money or receives, retains or appropriates to his own use or the use of another, any property or the proceeds of the sale of the same, or any part thereof, belonging to his (employer), (principal), (consignor), (bailor) [or] landlord, is guilty of a violation of the law.

Embezzlement is the intentional and fraudulent appropriation of the property or money of another by a person into whose hands it has lawfully come or to whom it has been entrusted.[1]

In order to justify a conviction for the crime charged in the indictment, the State must first prove to your satisfaction beyond a reasonable doubt five essential elements. These five elements are:

First: That the particular relationship between (name of the complainant) and the defendant, as charged in the indictment, during the period mentioned in the indictment, was that of (state the alleged relationship), that is, that the defendant was the (employee) (agent) (consignee) (factor) (bailee) (lodger) [or] (tenant) of (the complainant).[2]

> (An employee is a person who works for a salary, wages or commissions for an employer and is engaged in services for his employer.)[3]
>
> (An agent is a person authorized by another, called a principal, to act for him.)[4]
>
> (A consignee is a person to whom goods are shipped for sale.)[5]
>
> (A factor is a commercial agent, employed by a principal to sell merchandise consigned to him for that purpose, for and in behalf of the principal, but usually in his own name, being intrusted with the possession and control of the goods, and being remunerated by a commission.)[6]
>
> (A bailee is a person to whom personalty has been delivered for some particular purpose, or on mere deposit, under a mutual understanding with the person making the delivery that after the purpose has been fulfilled

the personalty shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.)[7]

(A lodger is an occupant who has mere use without actual or exclusive possession; a tenant of part of another's house.)[8]

(A tenant is a person who has the temporary use and occupation of real property owned by another person (called the "landlord,") the duration and terms of his tenancy being usually fixed by an instrument called a lease.)[9]

Second: The (money) (property) (describe) alleged to have been embezzled must have been the (money) (property) of (the complainant) while the defendant had possession of it.

Third: The (money) (property) must have been received by or entrusted to the defendant by reason of (here state relation of defendant to complainant).

Fourth: There must be an intentional and fraudulent appropriation by the defendant to his own use of the (money) (property) which he, the defendant, received or which was entrusted to him.

It is not essential that the State prove the exact amount of money wrongfully appropriated. It may be more than or a portion of the amount set forth in the indictment.[10]

Fifth: The conversion, that is, the wrongful appropriation by the defendant to his own use of the (money) (property) must have been done with intent to defraud.

As to what is an intent, I charge you that it is a condition of the mind which cannot be seen, and can only be determined by reference to conduct or from inferences from conduct, words or acts. It means the purpose to do something or resolve to do a particular act or to accomplish a certain thing. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he allegedly engaged in a particular act. His intention may be gathered from his acts and his conduct, if any, and from all of the surrounding circumstances that existed at the time and place.

Intent (See Model Charges) as a separate proposition for proof does not commonly exist. It must ordinarily be discovered, as other mental states are, in the evidence of the defendant's conduct in the surrounding circumstances.[11]

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1. *State v. Bobbins,* 35 N.J. Super. 494, 479 (App. Div. 1955), aff'd, 21 N.J. 338 (1956), appeal dismissed 352 U.S. 920, 77 S. Ct. 220, 1 L.Ed. 2d 157; *State v. Daly,* 38 N.J. 1, 7 (1962); *State v. Hubbs,* 70 N.J. Super. 322, 329 (App. Div. 1961); *State v. Butler,* 134 N.J.L. 122 (Sup. Ct. 1946).

2. *State v. Hubbs, supra,* at 70 N.J. Super. pp. 332-333.

3. Black's Law Dictionary, 4th Ed. (1951) p. 617.

4. Id., p. 85.

5. Id., p. 380.

6. Id., p. 707.

7. Id., p. 178; 9 *Williston on Contracts,* 3rd Ed., Sec. 1030, pp. 875-876; *State v. Carr,* 118 N.J.L. 233 (E. & A. 1937).

8. Black's Law Dictionary, *supra,* at p. 1091.

9. Id., p. 1635.

10. *State v. Hubbs, supra,* at 70 N.J. Super. p. 330.

11. *State v. Costa,* 11 N.J. 239, 246-247 (1953).

Texts:

1 *Schlosser, Criminal Laws of New Jersey,* 3rd Ed. (1970) Sections 42:11 and 42:12, pp. 483-484.

II *Wharton's Criminal Law and Procedure* (1957) Chapter 19, pp. 187-238.

SUPPLEMENT TO MODEL CHARGE ON EMBEZZLEMENT

(N.J.S. 2A:102-5)

NOTE:

In *State v. Bobbins,* 35 N.J. Super. 494, 497 (App. Div. 1955), aff'd, 21 N.J. 338 (1956), appeal dismissed 352 U.S. 920, 77 S. Ct. 220, 1 L.Ed. 2d 157, Judge Francis (now Justice) in his Opinion for the Appellate Division, referring to the statute (N.J.S. 2A:102-5) and the word "embezzles" contained therein, points out (at 35 N.J. Super. p. 497):

> "The suggestion is that use of the word 'embezzles,' which did not signify a crime at common law, without specific definition as to what is being made criminal, renders it necessary for the public to speculate about the nature and elements of the crime. Further it is said that in the context 'embezzles' stands alone disconnected from the remainder of the sentence, so that no answer is provided for such questions as: 'Embezzles what?' and 'Embezzles from whom?'
>
> "We find no legal merit in these criticisms. Although the construction and perhaps the punctuation of the sentence could be improved, the implication is plain so far as the present case is concerned. An employee, agent, consignee, factor, bailee, lodger or tenant is guilty of embezzlement if (a) he embezzles money belonging to his employer, principal, consignor, bailor or landlord, or (b) if with intent to defraud he takes money belonging to his employer, principal, consignor, bailor or landlord that has come into his possession lawfully.
>
> "Moreover the connotation of the word 'embezzles' is obvious. It has had a settled significance in the law from the time of the first judicial dec-

laration that conversion or misappropriation of money or property of an employer or principal by a servant or agent which had been entrusted to him by another, did not constitute common-law larceny. Since then embezzlement has meant generally the intentional and fraudulent appropriation of the property or money of another by a person into whose hands it had lawfully come or to whom it had been entrusted. *State v. Carr,* 118 N.J.L. 233 (*E. & A.* 1937); *State v. Woodward,* 99 N.J.L. 49 (*Sup. Ct.* 1923); *State v. Egan,* 84 N.J.L. 701 (*E. & A.* 1913); 29 C.J.S., *Embezzlement,* § 1; 2 *Wharton, Criminal Law* (12th ed. 1932), p. 1568, § 1258; 2 *Burdick, The Law of Crime* (1946), § 562; *Webster's New International Dictionary.****"

NOTE: Additional definitions suggested:

The word "fraudulent" means that the appropriation of the property or money of another was "done, made, or effected with a purpose or design to carry out a fraud." *Black's Law Dictionary* 4th Ed. (1951) p. 789.

The word "personalty" means "personal property; movable property; chattels." *Black's Law Dictionary,* 4th Ed. (1951) p. 1301.

NOTE:

The former State Supreme Court in *State v. Reynolds,* 65 N.J.L. 424 (Sup. Ct. 1900) pointed out:

"If there is any difference, legally, between fraudulent converting and converting with intent to defraud, it is not discernable***." (65 N.J.L. at p. 427).

And, at 65 N.J.L. p. 431 stated:

"It should be said, however, that a demand and refusal does not of itself, in any case, establish fraudulent conversion, or conversion by a defendant to his own use, but that it is only evidence to go to the jury upon the question of the defendant's fraudulent conversion."

2.141 ESCAPE (N.J.S.A. 2A:104-6)

We are dealing with the crime of escape. In its ordinary dictionary sense escape is the act of breaking loose from or getting free of. On the other hand our criminal law is somewhat more specific and provides for different types of escape.

Our New Jersey criminal statute *N.J.S.A.* 2A:104-6 reads as follows:

"Any person imprisoned or detained in a place of confinement, or being in the lawful custody or control of a penal or correctional institution or of an officer or other person, upon any charge, indictment, conviction or sentence for any crime, or upon any writ or process in a civil action or proceeding, or to await extradition, why by force or fraud escapes or attempts to escape from such place of confinement or from such custody

or control, or leaves the building or grounds of his place of confinement without the consent of the officer in charge, is guilty of a misdemeanor."

Accordingly, what are the elements or facts which the State must prove?

The State must prove beyond a reasonable doubt *each* of the following:

1) That the defendant was imprisoned or detained in a place of confinement (that the defendant was in the physical custody or control of a correctional institution or of an officer).

2) That the defendant was under a charge, indictment, conviction or sentence (that the defendant was being held pursuant to a civil writ or other process) (that the defendant was awaiting extradition).

3) That the defendant intentionally broke loose or got free (that the defendant attempted* to break loose or get free) (that the defendant left the building or grounds without the consent of the officer in charge).

4) That the defendant did so by either force, fraud or intentional departure without consent of the officer in charge.

In determining whether or not the state has proven each of these four elements or facts beyond a reasonable doubt you will keep in mind the following aspects of our criminal law governing escape:

(Charge so many as are applicable under the evidence of the particular case)

1) An escape takes place when the defendant obtains more liberty than the law allows although he remains in custody. For example, if a prisoner were to leave the area assigned to him, his cell, and got outside into a locked corridor he has escaped even though he still does not have his freedom.

2) The escape must be intentional. You would not have escape, of course, if the act was done through mistake or ignorance.

3) There can be no escape if the defendant is being held illegally, that is, if there is no valid charge made against him or no valid sentence imposed upon him. Of course there is still an escape—even though the defendant claims he is innocent—so long as a valid charge was taken by a proper official or a proper sentence imposed by a judge.

4) It is not a valid defense to the crime of escape for the defendant to contend that the terms or conditions of his custody or confinement were improper, i.e., that the food was bad, the cell unsanitary, that his jailors were visiting improper punishment upon him.

* The standard charge as to Attempt will, of course, be given if that situation is being presented.

5) It is no defense to the crime of escape that the defendant did not get very far or that he was free of his restraint only for a short time.

6) When we are dealing with the custody of a police officer—as distinguished from one held in a jail—the State does not have to prove that the defendant was handcuffed or chained. It is enough if the defendant understands that he is being detained by the officer.

2.142 EXTORTION BY A PRIVATE PERSON

The crime of extortion by a private person is defined by *N.J.S.A.* 2A:105-3 which provides in its pertinent part—

> Any person who orally or by knowingly sending or delivering any letter or writing, whether signed, or unsigned, or signed with a fictitious name:
>
> (a) threatens to accuse any person of an indictable crime, with intent to extort any money or valuable thing, *or*
>
> (b) demands money or other valuable thing under threat of injury to person or property is guilty of a violation of the law.

To constitute the offense, it is imperative that you find that a threat that would create alarm was made. The test of such is whether the threat in itself or as affected by the attendant circumstances is such as may reasonably be regarded as capable of moving an ordinary firm or prudent person to comply with the offender's extorsive demand.[1] [Here it would be appropriate to charge circumstances of the particular case]. No precise words are necessary in order to constitute a threat in violation of this statute. Such a threat may be by innuendo or suggestion and the circumstances under which the threat is uttered and the relations between the parties may be taken into consideration.[2]

The crime is committed by either a knowing oral or written declaration. If written it is immaterial whether the threat was signed, unsigned, or signed with a fictitious name. The threat may be of an indictable crime or threat of injury to person or property.

One must also find that there was an intent on the part of the defendant to extort money or other thing of value at the time of making the threat. It is immaterial whether the facts which the defendant threatens to disclose are true or false.[3] If one finds the threats were made merely to annoy or harass with no intent to extort money, or or other thing of value, the offense is incomplete and the defendant must be acquitted.

The second part of Statute *N.J.S.A.* 2A:105-3 makes it a crime to send threatening letters. The statute reads:

> Any person who knowingly sends or delivers any letter whether signed or unsigned or signed with a fictitious name threatening to injure, maim,

> wound, kill, or murder any person or to burn, destroy, or injure his property or to do any civil injury to any person or to his property, though no money or other valuable thing be demanded is guilty of a violation of the law.

The elements are:

(1) a party who knowingly

(2) sends or delivers any letter or writing

(3) signed or unsigned, or signed with a fictitious name

(4) threatening to injure, maim, wound, kill or murder any person *or* to burn, destroy or injure his property or to do any civil injury to any person or to his property

(5) though no money or other valuable thing be demanded.

For this offense, it is immaterial whether or not any demand is made for money or any other item of value. The crime is complete if the offender has knowingly sent or delivered a threatening letter.[4]

1. *State v. Morrisy*, 11 N.J. Super. 298, 302.

2. *Wharton Criminal Law*, S 1398.

3. *Wharton Criminal Law & Procedure*, S 1397.

4. *Wharton* S 1399. The character of the letter is to be determined from all the surrounding circumstances. If the meaning of the letter is ambiguous it is a jury question whether it is a threatening letter. If there is no ambiguity, it is a question for the Court.

Note: The question usually is resolved by the jury but where it is clearly a threat, the Court may decide the issue.

2.143 EXTORTION BY PUBLIC OFFICIAL

The crime of extortion is defined in *N.J.S.* 2A:105-1 which provides in its pertinent part as follows:

> Any . . . public officer who by color of his office receives or takes any fee or reward not allowed by law for performing his duty is guilty of a crime.

To sustain a violation of this statute, it must be shown that the defendant was

(1) an officer

(2) who by color of his office

(3) accepted money (or something else of value)

(4) that was not due him.

[Here it would be appropriate to charge circumstances of the particular case].

An officer under this statute encompasses any person who is placed within a governmental system recognized by the law of the state which either directly or by delegated authority assigns to that person the performance of certain public duties.[1] (See footnote 2).

By color of office, it is meant that the official position of the defendant gave others the appearance of his having authority to do or refrain from doing the act in question.[2]

A person takes money not due to him in violation of this statute when he knowingly receives a fee or reward to which he is not legally entitled by reason of or in connection with his official duties.[3] It is imperative that the officer have acted with a corrupt intent. In this respect, proof of receipt of a knowing unlawful payment in connection with an officer's duties is enough and furnishes the necessary criminal intent. It is not necessary for the taking to precede the performance or non-performance.[4]

It is immaterial whether the officer actually carries out the undertaking or not. It is equally criminal to accept money under an understanding to perform a certain act and not to do it as it is to actually perform the agreement.

Extortion in the sense of this statute does not necessarily involve the use of threats.

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1. *St. v. Weleck*, 10 N.J. 355 (1952).

2. An official character, either de facto or de jure is essential to the offense and the crime can be committed only by an officer. 1 *Schlosser*, S 44:2. The accused may be an officer of another state. *St. v. Barts*, 32 N.J.L. 74, 38 A.2d 838.

2. It does not mean that the taking must have preceded the performance of the duties and does not mean that there must have been a coercive or aggressive use of powers of the office for the purpose of taking the money or that if the payment is after the performance of the services there must have been a definite understanding prior to the services that the money would be paid. *St. v. Matule*, 54 N.J. *Supra*, 326 (1959).

3. *St. v. Weleck*, 10 N.J. 355 (1952).

4. *St. v. Begyn*, 34 N.J. 35, 47.

This present concept of the crime thus overlaps the offense of bribery since extortion is committed even where the object of the payment is in reality to influence an officer in his official behavior or conduct without such having to be established.

2.144 EMBRACERY

The indictment which I have read to you is based upon *N.J.S.* 2A:103-1 which provides as follows:

> Embracery and any attempt to corrupt or influence a jury or juror, or in any way to incline a jury or juror to be more favorable to the one side than to the other by promises, persuasions, entreaties, threats, letters, money, entertainment or other sinister means; any indirect, unfair and fraudulent practice, art and contrivance to obtain a verdict, or any attempt to instruct a jury or juror beforehand at any place or time, or in any manner or way, except in open court at the trial of the cause, by the strength of the evidence, the arguments of the parties or their counsel, or the opinion or charge of the court, is a . . . [crime].

Embracery is defined as an unlawful attempt to influence a juror or a jury to one side by promises, persuasions, entreaties, money, entertainment and the like.[1]

The gravamen, i.e., the gist of the offense of embracery consists of an attempt to exert corruptly an influence upon a jury or juror for the purpose of securing the favoritism of such person or persons in a case. The crime is consummate when such attempt has been made, a successful attempt not being a requisite of the offense. Guilt is incurred by the endeavor to exercise a corrupt influence; success may aggravate, but is not a condition of the offense. In other words, the corrupt attempt is the substance of embracery, and it is immaterial whether the corrupt influence is effectual to influence the verdict.[2] To put this more simply, any attempt to influence a juror, even if unsuccessful, is embracery. The bare attempt completes the crime.[3]

The word "attempt," as used in the foregoing statute and discussion of the offense of embracery, describes any effort or essay, i.e., try to accomplish the evil purpose that the statute was enacted to prevent.[4] And it is the law of New Jersey that any person who solicits and attempts to persuade another to see and talk to trial jurors in his favor is guilty of embracery.[5]

INTENT—Model Charges 4.181

The necessary intent required in the crime of embracery is that the individual have as a purpose the wrongful or corrupt communication with a juror, that is, a purpose to subject the juror's decision to personal influences or gains rather than the principles of justice and the interest of society.[6]

Thus, the elements of the offense of embracery, each of which the State must prove beyond a reasonable doubt, are:

1. A communication with trial jurors (or) an attempt to intervene or communicate with trial jurors;
2. With the intent, and for the purpose of influencing their decision in his favor;
3. In a corrupt or wrongful manner.

Hence, applying the foregoing to the case before us, if you conclude, after considering all of the evidence, that the State has proved beyond a reasonable doubt that the defendant, between the dates of .... and ...., attempted to intervene or communicate with trial jurors, ... Name(s) .... (or either of them/or all of them) (through .... (Agents) ....) for the purpose of influencing the decision of said trial jurors in his favor, corruptly, it is your duty to return a verdict of guilty as charged.

On the other hand, if after considering all of the evidence, or if by reason of a lack of evidence you conclude that the State has not proven beyond a reasonable doubt that between the dates mentioned in the indictment that the defendant attempted to intervene or communicate with said trial jurors (through .... (Agents) ....) for the purpose of influencing the decision of the said trial jurors in his favor, corruptly, it is your duty to return a verdict of not guilty.

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1. 1 Schlosser, Criminal Laws of New Jersey § 25:26 (3d ed. 1970).

2. 1 Schlosser, Criminal Laws of New Jersey § 25:27 (3d ed. 1970).

3. 26 Am. Jur. 2d *Embracery* § 1 (1966).

4. *Osborn v. United States*, 385 U.S. 323 (1966). (This is a bribery case with principles applicable to the charge).

5. *State v. Lavine*, 96 N.J.L. 356 (Sup. Ct. 1921); aff'd 97 N.J.L. 583 (E. & A. 1922).

6. Cf. *State v. Begyn*, 34 N.J. 35, 48 (1961). (This is a case involving misconduct in office which treats principles applicable to this charge).

2.150 FALSE SWEARING

(Read the Indictment)

N.J.S.A. 2A:131-4 the statute referred to in the Indictment, reads in pertinent part as follows:

> "Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing ***."

The term "willful" is defined in a later section of the statute (*N.J.S.A.* 2A:131-7) as follows:

> "'Willful' shall, for the purposes of this article, be understood to mean intentional and knowing the same to be false."

As a result, these statutes make it a crime for a person to willfully and intentionally make a statement of belief or opinion (in any judicial proceeding while under oath or affirmation), (before any person authorized

by any law of this state to administer an oath who is acting within his authority), which is known by the declarant to be false.

ONLY CHARGE THE APPROPRIATE LANGUAGE AND RELATE IT TO THE FACTS IN YOUR CASE. SEE *N.J.S.A.* 41:2-1 *et seq.* AS TO PERSONS AUTHORIZED BY LAW TO ADMINISTER AN OATH, i.e., (Name) was a Notary Public who is a person authorized by law. to administer an oath).

A "judicial proceeding" is a proceeding which takes place in or under the authority of a court of justice, or which relates in some way to the administration of justice. It is any proceeding at which legal rights and liabilities are determined. (ONLY CHARGE IF APPROPRIATE AND RELATE TO THE FACTS IN YOUR CASE, I.E., A TRIAL IS A JUDICIAL PROCEEDING).

The word "swears" means to assert or make a promise or statement while under oath.

An "oath" is an outward pledge given by a person that his attestation or promise is the whole truth.

The *first element* that the state must prove is that the defendant knowingly made a "false" statement. The word "statement" includes promises. For a statement to be "false" it must be proven to be untrue, a statement which is inconsistent with the truth. The word "false" carries an implication of a purpose to deceive. It implies a wrong, and signifies a knowing untruth. Falsity as used in this section means that the promise or statement must not only be false in fact, but that the defendant knew it was false.

The *second element* that the state must prove is that the false statement was made "willfully." This means that the state must prove that the defendant knew that he was making a false statement and that he made the statement intentionally. "Intent" and "knowledge," you must realize, are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. "Intent" means a purpose to accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing. However, it is not necessary that the state produce witnesses to testify that the defendant said he had a certain intent and knowledge when he made the false statement. His intent and knowledge can be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all the surrounding circumstances.

The *third element* that the state must prove is that the defendant made the false statement, (during a "judicial proceeding" while he was under

"oath or affirmation" as I have already defined those terms to you) (before any person who is authorized by any law of this state to administer an oath and who was acting within his authority).

(ONLY CHARGE THE APPROPRIATE LANGUAGE AND RELATE IT TO THE FACTS IN YOUR CASE).

To repeat, the elements that the state must prove, beyond a reasonable doubt, are:

(1) That defendant knowingly made a false statement;

(2) That such false statement was made willfully and intentionally;

(3) That such false statement was made (during a judicial proceeding while he was under oath) (before any person who is authorized by any law of this state to administer an oath and who was acting within his authority).

(ONLY CHARGE THE APPROPRIATE LANGUAGE AND RELATE IT TO THE FACTS IN YOUR CASE).

Cases:

1. *State v. Browne,* 43 N.J. 321 (1964)
2. *State v. Doto,* 16 N.J. 397 (1954), cert. denied 349 U.S. 912 (1955)
3. *State v. Engels,* 32 N.J. Super. 1 (App. Div. 1954)
4. *State v. Eisenstein,* 16 N.J. Super. 8 (App. Div. 1951), affirmed 9 N.J. 347 (1952)
5. *State v. Fuchs,* 60 N.J. 564 (1972)
6. *State v. Williams,* 59 N.J. 493 (1971)
7. *State v. Siegler,* 12 N.J. 520 (1953)

2.151 FORGERY

The indictment reads in pertinent part as follows:

(Read indictment).

The pertinent part of the statute on which this indictment is based reads as follows:

N.J.S.A. 2A:109-1.

"Any person who, with intent to prejudice, injure, damage or defraud any other person:

"a. Falsely makes, utters, forges or counterfeits any record or any other authentic paper of a public nature or character, or any printed or written instrument or endorsement, acceptance, transfer or assignment thereof" is guilty of a violation of the law.

Forgery is the false making or materially altering, with intent to fraud, of any writing, which, if genuine, might apparently be of legal significance, or the basis of a legal obligation. Forgery may be committed by executing a written instrument in a fictitious or assumed name with intent to defraud.

The essential elements of the offense of forgery, each of which the State must prove beyond a reasonable doubt, are:

(1) That the writing in question was falsely made or altered by the defendant; and

(2) That the defendant so acted with specific intent to defraud; and

(3) That the falsely made or altered writing was apparently capable of effecting a fraud; and

(4) That the writing, if genuine, would operate as the basis of another's liability (or the evidence of his right).

To establish the first essential element of the offense, it is not necessary that the whole instrument has been falsified or altered, but only that it have contained some material misrepresentation of fact.

[Thus, even though the signature on the instrument be the genuine signature of the complainant, if you find that the name of the payee or the amount were not written by the complainant or were not filled in by someone at the direction of the complainant or with his consent, then you may find that the instrument (check) was falsely made or altered].

(USE BRACKETED LANGUAGE IF APPROPRIATE)

To establish the second essential element, it is not necessary that anyone have actually been defrauded, or that the defendant have had the intent to defraud any particular person, individual or a bank. It is necessary that the defendant have had the intent to defraud someone. [DEFINE INTENT WHERE NECESSARY].

To establish the third essential element, it is necessary that the falsely made or altered writing have been reasonably adapted to deceive another person into relying on the writing as true and genuine. It is not necessary that the false writing have been accurate enough to deceive a bank or the payor of the writing, but if the false writing was such that no person of ordinary intelligence could reasonably have been deceived by it, this element of the offense is lacking.

To establish the fourth essential element, it is necessary that the State prove that the check (instrument or document) would operate as the basis of another's liability (or would operate as evidence of another's right or title).

It is not necessary that anyone have actually suffered loss.

State v. Berko, 75 N.J. Super. 283 (App. Div. 1962); *State v. Ruggiero,* 43 N.J. Super. 156 (App. Div. 1956); *State v. Longo,* 132 N.J.L. 515 (1945); *Rohr v. State,* 60 N.J.L. 576 (1897); *State v. Redstrake,* 39 N.J.L. 365 (1877).

2.180 INCEST—N.J.S.A. 2A:114-1 (PROHIBITED MARRIAGE)

The indictment charges the defendant with a violation of *N.J.S.A.* 2A:114-1. That statute in its pertinent parts may be paraphrased as follows:

> Persons who intermarry within the degrees prohibited by law, or who being related within such degrees, together commit fornication or adultery, are guilty of incest.

A reading of the indictment together with the statute will indicate the essential elements of the crime.

1. The parties must be related by blood within the prohibited degree (HERE SPECIFY THAT THE RELATIONSHIP OF ..... and ..... FALLS WITHIN THE DEGREE PROHIBITED BY LAW).

2. That ..... had sexual intercourse with ....

3. An intent on the part of the defendant to have sexual intercourse of .....

(IF APPLICABLE CHARGE STANDARD INTENT CHARGE)

Sexual intercourse requires the penetration of the female sexual organ by the sexual organ of the male. Sexual intercourse between persons related within the degree wherein marriage is prohibited by law is the crime. That act is criminal even though voluntarily consented to by both parties.

NOTES:

1. Carnal knowledge is an essential element—*State v. Masnik,* 123 N.J.L. 335 (1939) Aff'd 125 N.J.L. 34 (1940); *State v. Columbus,* 9 N.J. Misc. 512 (1931).

2. Conviction may be had under this section even if there was consent and no force was used. *State v. Columbus, supra; State v. Hughes,* 108 N.J.L. (1931) Rev'd on other grounds 109 N.J.L. 189 (1932).

3. Incest—falls within preview of the sex offenders act *N.J.S.A.* 2A:164-3.

4. Even though legal elsewhere cohabitation in New Jersey within prohibited degree constitutes incest. *Bucca v. State,* 43 N.J. Super. 315 (Ch. 1957).

5. *N.J.S.A.* 37:1-1, requires the relationship to be of the half or whole blood; and sets forth prohibited degrees of relationship.

2.181 INCEST—N.J.S.A. 2A:114-2

The indictment charges the defendant with a violation of *N.J.S.A.* 2A:114-2. The statute reads as follows:

> A parent who commits incest, fornication, adultery or lewdness with, or an act of indecency towards, or tending to debauch the morals and manners of a child of such parent, or who makes any infamous proposal to a child of his own flesh and blood, with intent to commit adultery or fornication with the child . . . is guilty of a crime.

A reading of the indictment together with the statute will indicate the essential elements of the crime. The State must prove beyond a reasonable doubt:

1. That defendant is the natural parent of .....
Name of child

2. That defendant (CHARGE AS FACTS INDICATE)

a. Had sexual intercourse with his/her child, and/or

b. Committed act(s) of indecency towards, or tending to debauch the morals and manners of his/her child, and/or

c. Made infamous proposal(s) with the intent to commit sexual intercourse with his/her child.

3. An intent on the part of defendant to (refer to offense charged in #2 in the present tense)

The State has offered the following proof of paternity:

(GO INTO FACTS: IF PATERNITY NOT IN ISSUE OMIT) WHERE CHARGED WITH OFFENSE AS OUTLINED IN:

I) 2(a) Charge as follows:

Sexual intercourse means a penetration by the sexual organ of the male into the sexual organ of the female. The act of sexual intercourse between a natural parent and child is the criminal act forbidden. Even a voluntary act of intercourse, submitted to by the child willingly, with consent, and without force, is the act prohibited.

II) 2(b) Charge as follows:

The acts prohibited by the statute are those motivated solely by lust that force or induce the child to do or submit to an act that corrupts the sexual moral principles of the child.

III) 2(c) Charge as follows:

The making of infamous proposal(s) is/are the act(s) by the defendant, with the intent to have sexual intercourse with the child is/are the act(s) prohibited. Actual sexual intercourse is not required.

[IF APPLICABLE, CHARGE STANDARD INTENT CHARGE, INCORPORATING ALLEGED OFFENSE–ALSO CONSIDER CHARGE ON FRESH COMPLAINT WHERE APPROPRIATE].

The laws of our State do not require the testimony of the complaining witness be corroborated. The defendant may be convicted on the uncorroborated testimony of his/her child provided you find such testimony to be credible, trustworthy and believable.

* * * *

NOTES:

1. Carnal knowledge is an essential element—*State v. Masnik,* 123 N.J.L. 335 (1930) aff'd 125 N.J.L. 34 (E. & A. 1940); *State v. Columbus,* 9 N.J. Misc. 512 (Sup. Ct. 1931).

2. Conviction may be had under this section even if there was consent and no force was used. *State v. Columbus, supra, State v. Hughes,* 108 N.J.L. 64 rev'd on other grounds 109 N.J.L. 189 (E. & A. 1932).

3. Incest—falls within preview of the sex offenders act. *N.J.S.A.* 2A:164-3.

4. Even though legal elsewhere cohabitation in New Jersey within prohibited degree constitutes incest. *Bucca v. State,* 43 N.J. Super. 315 (Ch. 1957).

5. *N.J.S.A.* 37:1-1, requires the relationship to be of the half or whole blood; and sets forth prohibited degrees of relationship.

6. *State v. Garcia,* 83 N.J. Super. 345 (App. Div. 1964), corroboration not necessary.

7. Reported acts prohibited under this section:

   a. Sexual intercourse, *Masnik, supra.*

   b. Fellatio, *State v. Arnwine,* 67 N.J. Super. 483 (App. Div. 1963).

   c. Infamous proposals (separate from act of sexual intercourse) *Hughes, supra.*

2.200 KIDNAPPING (WHILE ARMED)

The indictment which I've read to you charges the defendant with the crime of kidnapping (while armed) and is in two counts. The first count is based upon N.J.S. 2A:118-1, which provides in pertinent part as follows:

> Any person who kidnaps or steals or forcibly takes away a man, woman or child, and sends or carries, [or with intent to send or carry] such man, woman or child to any other point within this State, or into another State, territory or country, is guilty of a crime.

In order to establish the guilt of the accused, ..., under this indictment, it is necessary that the State prove beyond a reasonable doubt each of the following elements of the offense:

1. That the accused, ..., did kidnap, or steal or forcibly take away the alleged victim, ..., from one point within this State to another point within this State [or into another State, territory or country.]

2. That such action was done by the defendant without lawful authority, and

3. That such action was done by the defendant willfully or maliciously.

The terms "kidnap or steal or forcibly take away" all convey a similar meaning. The action condemned by the statute is kidnapping which may be defined as the taking away of a person forcibly from one point to another point without lawful authority. It is the fact of, or the existence of a forcible removal which constitutes kidnapping, and the crime's occurrence does not depend on the distance that the victim is taken. In other words, the sending, carrying or transporting of the victim to a specific destination is not essential to the offense, as long as the taking of the victim was "forcible." When we speak of forcible, we mean against one's will, so that if a person is taken anywhere against his/her will, the taking away may be said to be forcible.

In this case, there is no contention, nor any evidence, to support a contention that the claimed kidnapping or stealing or forcible taking away of the victim was under lawful authority so that you need not concern yourselves with that element [where evidence would support a contention of a taking under lawful authority, the applicable law should be inserted].

As to the terms willful and malicious:

Willfully—the word "willfully" when applied to the intent with which an act is done implies a purpose or willingness to commit the act in question. The word "willful" does not require, in its meaning, any intent to violate a specific law, it refers rather to an intent to commit the act alleged, namely the alleged forcible taking away of the victim from one point to another.

Maliciously—the word "maliciously," when applied to the intent with which an act is done imports an intent to do a wrongful act.

The second count of the indictment charges that the crime of kidnapping was committed by the defendant while armed with a ..... . This count is based upon N.J.S. 2A:151-5 which in pertinent part provides in effect as follows:

> Any person who commits a kidnapping when armed with or having in his possession any ....., shall in addition to the punishment provided for the crime of kidnapping, be punish additionally by the Court upon conviction. (Where a crime is perpetrated by more than one person, the weapon possessed by one is, within the statute, deemed to be possessed by all who participate in the crime.)

Consequently, when reaching your verdict as to the defendant's guilt or innocence, you must first decide whether the kidnapping was committed by the defendant, and if you find the kidnapping was committed by him, you must further decide whether the State has proved beyond a reasonable doubt he was armed at that time with a ..... (within the meaning of the statute) as alleged in this count of the indictment. If you determine in your deliberations that the State has not proven the defendant guilty of kidnapping beyond a reasonable doubt, then your verdict is to be one of not guilty of the kidnapping alleged. Then it naturally follows that such verdict of not guilty applies to the charge of being armed. For, if the defendant is not guilty of kidnapping it follows he cannot be guilty of kidnapping while armed.

There are two counts to (charges made in) this indictment, each of which counts (charges) requires a verdict of guilty or not guilty—hence two verdicts are required.

As to the first count (charge) of the indictment charging kidnapping, your verdict shall be either guilty or not guilty.

As to the second count (charge) of the indictment charging kidnapping while armed with a ....., your verdict shall be either guilty or not guilty.

Bear in mind my earlier instruction—if you find the defendant not guilty of kidnapping that you will find him likewise not guilty of kidnapping while armed with a .....

2.210 LARCENY

N.J.S.A. 2A:119-2, which is a law of the State of New Jersey, provides in its pertinent part that any person who steals any money, goods, chattel or other personal property of another is guilty of a violation of law.

You cannot find the defendant guilty unless you determine that the State has proved the following three elements beyond a reasonable doubt:

1. That the defendant had an intent to take the property of another.
2. That the defendant had an intent to convert the property of another.
3. That there was an unlawful taking by the defendant of the property of another.

With regard to the element of intent " ..... " (Here insert model charge on intent).

With regard to the requirement of proof of an intent to convert, you are instructed that the word "convert" as used here means the unauthorized assumption and exercise of the right of ownership over goods or property of another. In other words, an intention to convert means an intention to deprive another permanently of his property.

Concerning the requirement of the State to prove an unlawful taking, you are instructed that an unlawful taking means complete and independent possession and control of property adverse to the rights of the owner. If such possession is determined by you to have occurred, the length of time of such possession is immaterial. In order to prove an unlawful taking, the State need not prove that the property was carried out of the place in which it was kept, but only that it was moved or taken from its original location.

NOTE:

N.J.S.A. 2A:119-2 provides that the offense is a misdemeanor if the price of value of the property be under $500., and a high misdemeanor if $500. or over. Therefore, if the price or value of the property is in dispute, the jury should be instructed as follows:

> Since the value of the property involved determines the severity of the offense, if you find the defendant guilty, you should then indicate whether you find the property involved to be under $500. or $500. or over.

State v. South, 28 N.J.L. 28 (N.J. Sup. Ct. 1859).

2.211 PUBLIC LEWDNESS

The indictment before us charges the defendant with the crime of public lewdness. The statute upon which the indictment is based reads in pertinent part as follows:

> "Any person who commits open lewdness or a notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners of the people * * * is guilty of a violation of . . . [the law]." [1]

In order to establish the guilt of the defendant, the burden is upon the State to prove beyond a reasonable doubt, each of the following elements of the offense charged in the indictment. They are that on .... (Date) .... in the .... (Place) .... the defendant committed an act:

1. which is indecent
2. was open and notorious
3. tends to debauch the morals and manners of the people, and

4. that such act was done with the intent to debauch the morals and manners of the people, i.e., the defendant intended his act to be seen.[2]

Lewdness within the concept of the statute imports some degree of sexual aberration or impurity.[3] It signifies open and public indecency.[4] An act that is indecent is an act that is offensive to common propriety or offending against modesty and delicacy; an act that is grossly vulgar.[5]

For an act to amount to open lewdness or to a notorious act of public indecency it must be done in a public place. However, the place is a public one if the act is such as to be seen by another and likely to be seen by a number of casual observers if they had looked. Within the meaning of the statute the act is done openly or publicly when committed in a private yard and visible from the windows of inhabited dwellings, or when committed in a store and visible from the street; or when done in a theatre; or in an automobile standing on a public street; [6] or parking area.[7]

The word debauch means to corrupt or mar or spoil,[8] hence an act which tends to debauch the morals and manners of the people is one which tends to corrupt, mar or spoil the morals and manners of the people.

To be criminal, the act must be done intentionally and not accidentally,[9] and with the intent that the act be seen by another or others.[10]

(HERE CHARGE INTENT–Model Charges 4.181)

1. *N.J.S.A.* 2A:115-1.
2. *State v. Beckett,* 56 N.J. 267, 269 (1970); *State v. Way,* 131 N.J. Super. 422 (App. Div. 1974).
3. *State v. Brenner,* 132 N.J.L. 607, 610 (E. & A. 1945).
4. 2 Schlosser, Criminal Laws of N.J. § 61:1.
5. Black's Law Dictionary, 909 (4th ed. 1968).
6. 2 Schlosser, Criminal Laws of N.J. § 61:6.
7. *State v. Beckett, supra,* at 268.
8. Black's Law Dictionary, 489 (4th ed. 1968).
9. *Van Houten v. State,* 46 N.J.L. 16, 18 (Sup. Ct. 1884).
10. *State v. Beckett, supra,* at 270.

2.220 MAINTAINING A GAMBLING RESORT

The defendant has been indicted for violating the provisions of New Jersey State Statute 2A:112-3, the pertinent parts of which read as follows:

"Any person who, habitually or otherwise . . . . keeps a place to which persons may resort for engaging in . . . gambling in any form, is guilty of a . . ." crime.

The plain meaning of the quoted language is that any person who purposefully or intentionally keeps a place where any of the prohibited forms of gambling may be pursued is guilty of a violation of this statute. In other words, the gist of this crime is the purposeful or intentional act of making available a place outfitted in some way to accommodate gamblers.

In line with this purpose, it must be noted that the State need not prove gambling activities actually were conducted, or that persons actually frequented the premises for the purpose of gambling, or even that the alleged operator of the gambling resort made any profit from his activities.[1] In short, this statute seeks not to punish gambling or gamblers, but rather the person or persons who intentionally keep a place where such activities may go on.

Before the defendant can be convicted, however, you must find the State has sustained its burden of proving, beyond a reasonable doubt, each and every one of the following elements in this offense:

1. The defendant, on at least one occasion, had in his *control*, a premises where gambling may be pursued.[2]

2. The defendant *knew* the premises may be used for gambling. *Knowledge* means a conscious awareness as opposed to mere lack of care or regard. *Knowledge* is not required to be proven by direct evidence, but rather, knowledge may be inferred from the defendant's conduct, actions, and statements as well as the surrounding circumstances.

   The term "gambling" as used here is intended to be understood as signifying or relating to something more than a mere game of chance undertaken for one's mere amusement. That is, the "gaming" or "gambling" as used here must embody the further elements of (a) *chance*, (b) *price or cost*, and (c) *prize*. A *price* must be paid and a *prize* won or lost based on a game of *chance*.[3]

3. The defendant *intended* that persons *should* resort to the premises for gambling purposes. Intent means a purpose; a resolve to do a certain thing or to accomplish a certain objective or end. It is a condition of the mind which cannot be seen and can only be determined as other mental states are determined by reference to conduct, words, or acts of the defendant in the existing circumstances.

Once again then, the essential elements are:

1. *Control* of the premises, which means the exercise of authority to manage or supervise or govern or oversee. (Note: if ownership is a proven fact, it may be considered as it relates to evidence of control. See supplemental charge re control, *infra*).

2. *Knowledge* which implies a conscious awareness rather than a mere lack of care or regard. But, mere knowledge is not sufficient; it must be coupled with intent, and

3. *Intent* which means a purpose, a resolve to facilitiate or accomplish a certain objective or end.

With regard to *wager and reward* or a price paid and a prize won or lost based upon a game of chance, it is not necessary that the State prove money actually passed on the premises. It is sufficient if it be shown that there was an understanding that later payments of amounts won or lost would be made.[4]

It is further not necessary to prove that actual betting occur on the premises; it is sufficient if the premises is a "clearing house" where bets made elsewhere are collected and processed.[5]

With regard to the concept of resorting to a place for gambling purposes, it must be understood that resort does not necessarily mean personal attendance; this requirement in the statute is satisfied by any form of communication therewith, including the telephone.[6]

The essence of this crime is an intent that persons should resort to a premises for the purpose of gambling. Intent need not be proven by direct evidence, that is, by the production of witnesses who testify that defendant said he had a certain intent, but rather, circumstantial evidence is sufficient. In other words, you may infer the defendant's intent from all the surrounding circumstances and references to his conduct, words, or acts under those circumstances.

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1. *State v. Sachs,* 69 N.J. Super. 566 (App. Div. 1961).

2. *State v. Clark,* 137 N.J.L. 614 (E. & A. 1948) and *State v. Bogen,* 13 N.J. 137 (1953) (define "habitually or otherwise").

3. *O'Brien v. Scott,* 20 N.J. Super. 132 (Ch. Div. 1952) and *State v. Western Union Telegraph Co.,* 12 N.J. 468 (1953).

4. *State v. Sachs,* 69 N.J. Super. 566 (App. Div. 1961).

5. *State v. Puryear,* 52 N.J. 81 (1968). (*Note:* It would appear, however, that if the State could prove neither actual gambling nor actual attendance, it would be necessary that it produce gambling paraphernalia found on the premises. *Note also:* Distinguish premises from mere warehousing of gambling paraphernalia.)

6. *Ames v. Kirby,* 71 N.J.L. 442 (Sup. Ct. 1904).

Note: Supplemental charge re "Control" (to be used when control of premises is disputed. Insert the following for that which appears under #1 on Page 2 of charge).

"1. Control of the premises which means the exercise of authority to manage or supervise or govern or oversee. What you are to be concerned with here is the *actual* control, management or supervision of the premises at the time of the alleged offense. Naturally, legal ownerships of the premises may be considered by you in your determination of whether or not the defendant was in control of the premises. However, legal ownership is not conclusive proof of control for

the purposes of this statute. For example, one co-owner of property who knows nothing of illegal activities on the property being carried on by the other co-owner would not be "in control of the premises," for the purposes of this statute; nor would an unknowing hotel owner be responsible for the actions of his guest, or an unknowing landlord for the actions of his tenant, or an unknowing employer for the actions of his employee. (See generally 38 *C.J.S. Gaming 99 and 15 A.L.R. 1204*).

2.221 MANSLAUGHTER

(WHERE THERE IS A SEPARATE INDICTMENT FOR MANSLAUGHTER, USE THE FOLLOWING:)

The indictment charges a violation of *N.J.S.A.* 2A:113-5. This statutory provision reads in part as follows:

> "Any person who commits the crime of manslaughter shall be punished by . . . ."

and then it states what the maximum penalty is.

There is no claim on the part of the State that the defendant committed the crime of murder. The State does claim, however, that defendant committed the crime of manslaughter.

(REFER TO MODEL FORM MURDER CHARGE FOR SPECIFIC TYPE OF MANSLAUGHTER).

ANNOTATION: MANSLAUGHTER

The manslaughter charge should be divided into two categories. Although there is no statutory distinction between involuntary and voluntary manslaughter (*N.J.S.A.* 2A:113-5), the instances of manslaughter do arise in these two distinct factual categories.

Voluntary manslaughter, committed in the heat of passion upon provocation is well described in the current charge.

Involuntary manslaughter, although dealt with in the charge, does not adequately deal with the factual pattern in which this type of manslaughter usually arises—culpable negligence although it may be useful when the facts indicate.

State v. Weiner, 68 N.J. Super. 468 (App. Div. 1961) is an appeal contesting the temporary suspension of the doctor's license to practice medicine and surgery pending the outcome of a manslaughter indictment. Under *N.J.S.A.* 45:9-16, the State Board of Medical Examiners may suspend a license upon proof satisfactory to the Board that the holder of such a license has been *convicted* of crime involving moral turpitude. The Board,

in this case, used this as implied authority to temporarily suspend the doctor pending the outcome of the indictment. The court didn't find it necessary to decide whether manslaughter involved a crime of moral turpitude, because there was no statutory authority to suspend a license because of the pendency of an indictment. The court did however outline the arguments and policy considerations.

In discussing whether manslaughter was a crime involving moral turpitude, the Appellate Division said:

> . . . . It may be voluntary as a felonious and intentional killing ordinarily committed in a sudden heat of passion, caused by adequate legal provocation, *State v. Zellers*, 7 N.J.L. 220, 243 (Sup. Ct. 1824), 1 Wharton supra, § 274, p. 580, or involuntary, in the commission of an unlawful act or by culpable negligence in performing a lawful act or omitting to perform a legal duty. *State v. Blaine*, 104 N.J.L. 325 (E. & A. 1928); *State v. Brown*, 22 N.J. 405, 411 (1956); 1 Wharton, supra, § 289, p. 605. The only specific intent required is the intent to do the act resulting in the death, rather than intent to do a harm. *State v. Diamond*, 16 N.J. Super. 26, 31 (App. Div. 1951). In the area of medical malpractice, manslaughter may be deduced from criminal negligence on the part of a physician or surgeon through gross ignorance of the science practiced and the effect of the remedies employed, gross negligence in the application and selection of remedies, lack of proper skill in the use of instruments, or failure to give proper instructions to the patient as to the use of the medicines.

In the prosecution for manslaughter in *State v. Weiner*, 41 N.J. 21 (1963) criminal negligence was discussed. In distinguishing civil and criminal negligence the court said that for negligence to be criminal it must be an outrage to the state. The standard set down at page 26 is that:

> Negligence to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death.

The majority reversed the conviction because the State, although it proposed four theories on which the 15 deaths could have been predicated, failed to relate a criminal failure on the part of the defendant to the deaths.

The dissent by Justice Haneman was not based upon the definition of criminal negligence but upon the matter of causation.

In his discussion of criminal negligence, he expands upon the definition above:

> . . . . Wharton's supra, 611, reads as follows:
>
> "It involves a reckless disregard for human life and is the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof.

> There must be negligence of a gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of conscious indifference to consequences, or which shows such wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them."
>
> In *Staub v. Public Service Railway Co.*, 97 N.J.L. 297 (E. & A. 1922), the court said, at p. 300:
>
> "To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result."

Besides medical malpractice, culpable negligence may arise in child neglect cases. *State v. Watson*, 77 N.J.L. 299, 301 (1909); *State v. Pickles*, 46 N.J. 542, 555 (1966).

In *Pickles*, both parents were prosecuted for statutory neglect and the mother for giving the child a punitive hot bath and subsequent failure to provide medical treatment. The standard to be used at retrial was to be whether her failure to obtain medical attention "constituted conduct of such a reckless or wanton character as to indicate an utter indifference on her part to the life of her son."

The same standard of culpable negligence, is, of course, applicable in a case of gross negligence where there is a death. *State v. Harrison*, 107 N.J.L. 213, 215 (1930). The defendant was a crossing gateman who failed to lower crossing gates for an approaching train to pass. The elements which had to be proved beyond a reasonable doubt:

1. Legal duty.
2. Breach of that duty amounting to gross negligence "in other words, negligence evincing a reckless indifference to or disregard of human life."
3. Injuries were proximately caused.
4. Death was caused by such injuries.

2.222 MISCONDUCT IN OFFICE—N.J.S.A. 2A:85

Misconduct in office or official misconduct as it is sometimes called is a crime in New Jersey.

Misconduct in office is corrupt misbehavior by a public officer in the exercise of the duties of his office or while acting under color of his office.[1] The offense is committed if the officer, in the exercise of the duties of his

office or while acting under color of his office, does any act which is wrongful in itself [malfeasance]; does any otherwise lawful act in a wrongful manner [misfeasance]; omit to do any act which is required of him by the duties of his office [nonfeasance].[2] [CHARGE APPROPRIATE OFFENSE].

In order for you to find one guilty of misconduct in office, you must find beyond a reasonable doubt that defendant

(1) was a public official; i.e., a (describe office)

(2) who acted with a corrupt intent engaged in (describe alleged conduct)

(3) while acting in the exercise of the duties of his office or while acting under color of his office.

By a public official, it is meant one who holds a position of public trust. Public officials are under an inescapable obligation to serve the public with the highest fidelity.[3]

It is the burden of the state to show beyond a reasonable doubt that a corrupt intent existed on the part of the official. However, the necessary corrupt intent may be found from the use of an opportunity to perform a public duty as a means of acquiring an unlawful (personal) benefit or advantage. It is immaterial whether or not the public official actually completed the agreement. It is sufficient if it is proven beyond a reasonable doubt that the officer acted or agreed to act in a corrupt manner.[4] However, if you find that the officer was merely guilty of an error in judgment exercised in good faith, the officer is not guilty of a crime.[5]

[Charge STANDARD INTENT CHARGE]

The prescribed duties of an office are nothing more nor less than the duties cast by law on the incumbent of the office. The duty may be either prescribed by a special or private law, by the legislature, or may arise out of the very nature of the office itself.[6]

By color of office it is meant either he has official power, ability, or apparent ability to perform the required task.[7]

[Circumstances of Case].

[Here it would be appropriate to charge the contention of the parties].

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1. *St. v. Begyn*, 34 N.J. 35, 48 (1961).

2. *St. v. Begyn*, 34 N.J. 35, 49 (1961).

3. 2 SCHLOSSER, CRIMINAL LAWS OF NEW JERSEY, § 740 (1953).

4. *St. v. Begyn*, 34 N.J. 35, 51 (1961).

5. *Wharton, Criminal Law & Procedure,* § 1405.

Perkins, p. 411 goes further. Even if his act was the result of ignorance it is not a crime so long as it was done in good faith no matter how erroneous.

6. *St. v. Weleck,* 10 N.J. 355, 366 (1952).

7. *St. v. Begyn,* 34 N.J. 35, 49 (1961).

2.223 a. MURDER

(Willful, Deliberate and Premeditated)
First Degree and *Second Degree*

Murder is the unlawful killing of one person by another with malice and without reasonable provocation or justifiable cause or excuse. Malice in this connection does not connote hatred, ill will, or malevolence, although one or more of these may be present. Malice, as I have used the word, means that there must be a concurrence of an evil meaning mind with an evil doing hand.

Malice means either one or both of the following states of mind preceding or co-existing with the act by which death is caused, and it may exist even where that act is unpremeditated:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; or

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.[1]

In New Jersey the crime of murder is divided into two degrees; that is to say, murder in the first degree and murder in the second degree. The statute provides that murders in the first degree are murders which are perpetrated by means of poison, which is not the situation here, or by lying in wait, which is not the situation here, or by any other kind of willful, deliberate and premeditated killing; and other specifically designated unlawful killings not here pertinent. The State contends that this killing was intentional and that it was willful, deliberate and premeditated. Whether it was is for you to decide. I will explain those terms, willful, deliberate and premeditated, to you in a moment. Under the statute all other kinds of murder are murder in the second degree.

The statute provides that the jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree. The law presumes that all unlawful homicides or killings are murder in the second degree. That presumption, of course, is a rebuttable

one and it is your province as jurors to determine whether or not the presumption of murder in the second degree has been rebutted, assuming of course you find the defendant committed an unlawful homicide.

Before the presumption arises, however, the State must prove a murder. Murder requires proof of a malicious killing which is unlawful, that is, a killing without justification or excuse. "Without justification" means that the killing may not have occurred at the command, or with the permission, of the law (as when a police officer kills in discharge of his duties). "Without excuse" means that the killing may not have occurred by accident or in self-preservation. Only when the essential elements of murder have been proved beyond a reasonable doubt does the presumption of murder in the second degree arise.[2] The State's burden of proving, beyond a reasonable doubt, that the homicide was murder includes the burden of proving, beyond a reasonable doubt, that the killing was not accidental, justified or excusable or manslaughter. The State must bear this burden throughout the entire trial and the presumption of murder in the second degree comes into play only after the State has satisfied this mandate.[3]

Now the presumption that an unlawful killing is second degree murder can be rebutted in two ways, upward and downward. It can be rebutted upward by the State showing beyond a reasonable doubt that the killing was first degree murder. It is rebutted downward if the evidence shows that indeed it was not second degree murder but no more than manslaughter.

Now, if the State proposes to raise the criminal responsibility for an unlawful homicide from murder in the second degree to murder in the first degree, the State must sustain the burden of proving beyond a reasonable doubt that the killing of the decedent by the defendant was willful, intentional, and that it was deliberate and premeditated.

Now, what do we mean by a "willful, deliberate and premeditated killing" which the statute describes as murder in the first degree? The statutory language is actually a statement in reverse order of the natural sequence of the required mental operations. The first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word deliberate does not here mean "willful" or "intentional" as the word is frequently used in daily conversation or parlance. Rather it conveys the meaning of "deliberation" and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word "willful" signifies an intentional execution of the plan to kill which had been conceived and deliberated upon.

The law does not require that any particular length of time shall intervene between the formation of the design to kill and its ultimate execution. It requires that the design to kill be conceived, that it be

deliberated upon, and be willfully executed. If these mental operations did in fact occur, the period of time involved is of no significance; the killing is murder in the first degree.[4]

Whether these three mental operations which I have just described were performed by the defendant are questions of fact for you, the jury, to determine.

Intent to kill is not by itself sufficient to raise second degree murder to first degree murder. All of the other elements—premeditation, deliberation and willfulness—must, in addition to intent to kill, be present in order to constitute murder in the first degree.[5]

Now, the intent to take life is not a necessary element required to constitute the crime of murder in the second degree. The intent to do grievous bodily harm is sufficient. If the intent was merely to do the deceased grievous bodily harm, or if the intent was to kill the deceased but the killing was not deliberate or premeditated, then the crime is murder in the second degree.

Murder in the second degree includes all cases of murder which do not constitute first degree. It is distinguished by the absence of one or more of the mental operations of willfulness, deliberateness or premeditation required by the law to constitute murder in the first degree. Thus, where the design or plan is to do grievous bodily harm without an intent to take life, or if the killing be intentionally done but without deliberation or premeditation, or where the act is done in the heat of anger but without reasonable provocation, the crime is murder in the second degree.[6]

[Where the indictment charges murder and the evidence requires the issue of voluntary manslaughter to be sent to the jury, insert the charge on voluntary manslaughter].

As I have indicated, in order to find the defendant guilty of any of the offenses I have mentioned, the State must prove all the essential elements of that offense beyond a reasonable doubt. The State, however, is not required to prove a motive. If the State has proved the essential elements of any of the offenses beyond a reasonable doubt, the defendant must be found guilty of that offense regardless of his motive or the lack of a motive. If the State, however, has proved a motive, you may of course consider that insofar as it gives meaning to other circumstances.[7] On the other hand, the absence of motive may be considered in weighing whether or not the defendant participated in the crime charged.

You will note that I have mentioned the word "intent". The nature of the intent with which the defendant acted toward the decedent is a question of fact for the jury to decide. Intent is a condition of mind. It is not necessary for the State to produce a witness or witnesses who

could testify that the defendant stated, for example, that he intended to kill or that he intended to inflict grievous bodily harm. It is within the power of the jury to find that proof of intent has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and circumstances surrounding the conduct under investigation—such things as the place where the acts occurred, the weapon used, the location, number and nature of the wounds inflicted, and all that was done or said by the defendant preceding, connected with, and immediately succeeding the events leading to the death of the decedent are among the circumstances to be considered.

[(Insert where appropriate) Now, some of the evidence introduced in this case is circumstantial. Circumstantial evidence may be sufficient to convict; indeed in many instances it may be more certain, satisfying and persuasive than direct evidence.

Circumstantial evidence, of course, should be scrutinized carefully, but a conviction may be based on circumstantial evidence alone provided you are convinced of the defendant's guilt beyond a reasonable doubt.[8]]

The essential determination for you to make in regard to murder in the first degree is whether the killing was accomplished with deliberation and premeditation. The State contends that the defendant's action indicated an intent to take life and willfulness, deliberation, and premeditation. These mental operations may be performed at any time along the sequence of events. If they are performed prior to the time the fatal wound was inflicted then a case of first degree murder is made out. The State contends that shortly before the killing, the defendant . . . (here insert the State's contentions).

If, after a consideration and comparison of all the evidence, you are convinced beyond a reasonable doubt that prior to inflicting the fatal wound the defendant conceived a design to kill, deliberated upon it, and willfully executed this design to kill, then he is guilty of murder in the first degree.

If any of the mental operations did not occur, then the crime committed would not be murder in the first degree and your attention should then be directed to whether the defendant is guilty of murder in the second degree or manslaughter.

If you conclude beyond a reasonable doubt that the killing was done by the defendant willfully, but so suddenly as to preclude premeditation or deliberation, then the degree would be murder in the second degree.

[(Insert where appropriate) As I have already indicated to you, a section of our statutes relative to homicide, provides in its pertinent parts as follows:

> Any person who kills another by misadventure or in his own defense
> * * * is guiltless and shall be totally acquitted and discharged.

No burden of proof is cast upon the defendant in this regard. The burden of proof is upon the State to prove its case beyond a reasonable doubt. If a reasonable doubt as to the guilt of the defendant arises from a consideration of any issue of misadventure, that is, accident, or the issue of self-defense, that doubt must be resolved in favor of the defendant. If you find that such a reasonable doubt exists, there must be an acquittal.

On the other hand, if you are persuaded beyond a reasonable doubt that the killing was not the result of misadventure, or in the defendant's own defense, then you shall consider the remaining issues of the case and determine, on the basis of my instructions to you, what verdict should be returned.]

A homicide or a killing with a deadly weapon, such as (describe the deadly weapon used) in itself justifies a factual presumption that there was an intention to take life. A deadly weapon is one liable to produce death or great bodily injury.[9] In your deliberations you may consider the weapon used and the manner and circumstances of the killing, and if you are satisfied beyond a reasonable doubt that the defendant (shot) (stabbed) and killed the decedent with a (gun) (knife) you may draw an inference from the weapon used, that is, the (gun) (knife) and from the manner and circumstances of the killing, as to deliberation and premeditation.[10]

If you find this defendant guilty of murder, your verdict must designate whether you have found him guilty of murder in the first degree or murder in the second degree (or manslaughter, where appropriate).

NOTE:

In *Mullaney v. Wilbur,* 421 U.S. 684 (1975) the Supreme Court ruled that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, including the absence of heat of passion on sudden provocation when the issue is properly presented. Thus, when the indictment charges murder, but the evidence requires that the issue of voluntary manslaughter be presented to the jury, the burden of proof does not shift to the defense on the issue of adequate provocation; once an arguable issue of provocation arises from the proofs, the burden is on the State to disprove it beyond a reasonable doubt.

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1. *State v. Gardner,* 51 N.J. 444, 458 (1968).

2. *State v. Gardner,* 51 N.J. 444, 457, 459 (1968).

3. *State v. Bess,* 53 N.J. 10, 17 (1968).

4. *State v. Reyes,* 50 N.J. 454, 464 (1967).
   State v. Washington, 60 N.J. 170, 173 (1972).
5. *State v. Ernest,* 32 N.J. 567 (1960); *State v. Smith,* 27 N.J. 433 (1958).
6. *State v. Mathis,* 47 N.J. 455, 466 (1966).
7. *State v. Beard,* 16 N.J. 50, 60 (1954).
8. *State v. Fiorello,* 36 N.J. 80 (1961).
   State v. Dancyger, 29 N.J. 76, 84 (1959).
9. *State v. Jones,* 115 N.J.L. 257, 262 (E. & A. 1935).
10. *State v. Bucanis,* 26 N.J. 45, 54 (1958);
    State v. Beard, 16 N.J. 50, 61 (1954).

2.223 b. VOLUNTARY MANSLAUGHTER[a]

Although the crime of voluntary manslaughter is not mentioned in the indictment, you have a right and a duty to consider that offense.

Voluntary manslaughter is an unlawful intentional homicide, that is, an unlawful intentional killing of a person, done in sudden passion or heat of blood, resulting from a reasonable provocation, without malice aforethought.[1] You will notice, members of the jury, malice distinguishes murder from manslaughter.[2] In manslaughter there is no malice and in murder (whether murder in the first degree or murder in the second degree) there is malice, and I have explained to you what malice is.

If you find beyond a reasonable doubt that the defendant did intentionally kill the deceased but that the killing occurred during the heat of a passion resulting from a reasonable provocation—a passion which effectively deprived the defendant of the mastery of his understanding—a passion which was acted upon before a time sufficient to permit reason to resume its sway had passed—then the crime is mitigated or reduced from murder to manslaughter.[3]

In this connection, you must keep in mind that provocation in law has a fixed meaning. If there was provocation of such character as is recognized by the law and it was acted upon under circumstances which the law recognizes, then the crime is manslaughter.

Now, what does the law recognize as provocation which would permit you jurors to find that the offense is manslaughter rather than murder in the second degree? First, mere words alone, or looks or gestures no matter how abusive, threatening or insulting are never such provocation.[4]

Provocation in law must be such as in the opinion of the jury would probably throw the mind of an average man of ordinary self-control

a. Where the indictment charges murder and the evidence requires the issue of voluntary manslaughter to be sent to the jury.

into a state of uncontrolled rage or anger. The provocation must be so gross as to cause the ordinary reasonable man to lose his self-control and to use violence with fatal results, and the defendant must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime while so deprived.[5]

The provocation must be of such character and so close upon the act of killing that for the moment the defendant could not be considered as the master of his own understanding. If such an interval of time elapsed between the provocation and the killing as is reasonably sufficient for reason to resume control, the offense may not then be considered reduced to manslaughter. Whether the provocation was sufficient or not, and whether the time which elapsed between the provocation given and the act of killing was sufficient or not for the accused to subdue or control his emotions are questions of fact to be determined by the jurors on consideration of all the evidence in the case.[6]

You will note that I have referred to voluntary manslaughter as an "intentional homicide," that is, an "intentional" killing.

As to what is an intent, I charge you that is a condition of the mind which cannot be seen, and can only be determined by reference to conduct or from inferences from conduct, words or acts. It means the purpose to do something or resolve to do a particular act or to accomplish a certain thing. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he allegedly engaged in a particular act. His intention may be gathered from his acts and his conduct, if any, and from all of the surrounding circumstances that existed at the time and place.

Intent (See Model Charges) as a separate proposition for proof does not commonly exist. It must ordinarily be discovered, as other mental states are, in the evidence of the defendant's conduct in the surrounding circumstances.[7]

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1. *State v. Bonano*, 59 N.J. 515, 523 (1971);
   1 *Wharton, Criminal Law and Procedure* (Anderson ed. 1957), Sec. 272.
2. *State v. Brown*, 22 N.J. 405, 410-411 (1956).
3. *State v. King*, 37 N.J. 285, 300 (1962);
   State v. Fair, 45 N.J. 77, 96 (1965);
   State v. Bonano, 59 N.J. 515, 523 (1971).
4. *State v. King*, 37 N.J. 285, 301 (1962);
   State v. Bonano, 59 N.J. 515, 524 (1971).
5. *State v. McAllister*, 41 N.J. 342, 353 (1964).
6. *State v. King*, 37 N.J. 285, 300 (1962);
   State v. Guido, 40 N.J. 191, 209 (1963);
   State v. Smith, 43 N.J. 67, 76 (1964);
   State v. Gosser, 50 N.J. 438, 453 (1967).
7. *State v. Costa*, 11 N.J. 239, 246-247 (1953).

2.223 c. INVOLUNTARY MANSLAUGHTER[a]

Although the crime of manslaughter is not mentioned in the indictment, you have a right and duty to consider that offense.

Manslaughter is defined as the unlawful killing of another human being without malice.

Manslaughter is distinguished from the crime of murder by the absence of malice as that term has already been defined. Malice is the very essence of the crime of murder, whether it be first or second degree murder, and it is essential that the State prove malice beyond a reasonable doubt in order for you to find the defendant guilty of any type of murder; but the State has no obligation to prove malice in order to establish the crime of manslaughter.

(IF INVOLUNTARY MANSLAUGHTER NOT INVOLVING GROSS NEGLIGENCE, STATE THE FOLLOWING:)

The crime of manslaughter is the unlawful killing of a person where the death results unintentionally so far as the person charged with the crime is concerned from an act committed by him with the intention to do *less* than great bodily harm and that would necessarily mean *less* than the intent to kill. Accordingly, if you find beyond a reasonable doubt that defendant did kill the deceased but that it was done when he had the intention to do *less* than great bodily harm and that would necessarily mean *less* than the intent to kill, the crime is manslaughter and you should find the defendant guilty of manslaughter.

(IF INVOLUNTARY MANSLAUGHTER INVOLVING GROSS NEGLIGENCE, STATE THE FOLLOWING:)

The crime of manslaughter is the unlawful killing of a person where death results unintentionally so far as the person charged with the crime is concerned from a grossly negligent act on his part. For the defendant to be guilty of manslaughter he must have the specific intent to do the act resulting in death but he need not have the specific intent to do harm.

Accordingly, to find the defendant guilty of manslaughter, you must find, beyond a reasonable doubt, that the defendant intended to do the act which resulted in death,[1] that the act in question did in fact cause the decedent's death, and that the act which resulted in death was one that was grossly negligent, that is, the negligence must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death.[2-3]

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a. If there is a separate manslaughter indictment, see separate charge on manslaughter.

1. *State Board of Medical Examiners v. Weiner*, 68 N.J. Super. 468, 486 (App. Div. 1961).

2. *State v. Watson*, 77 N.J.L. 299, 301 (1909) (Failure to provide medical attendance to child)

State v. Pickles, 46 N.J. 542, 555 (1966) (Child neglect, utter indifference to the life of her son)

State v. Weiner, 41 N.J. 21, 26, 43-4 (1963) (Medical Malpractice)

State v. Harrison, 107 N.J.L. 213, 215 (1930) (Railroad crossing guard—negligence evincing a reckless indifference to or disregard of human life)

3. Refer to proximate cause charge, if needed (civil charge 7.11 et seq.). In some cases the focus may be exclusively on gross negligence and further explanation of causation need not be made. In other cases a full charge on causation and intervening cause may be necessary. See *State v. Weiner*, 41 N.J. 21, 36 (1966).

2.224 FELONY (ROBBERY) MURDER

The State contends that the defendant was at the time (engaged in the commission of) (aiding and abetting another or others in the commission of) a robbery. A homicide or killing which occurs while a person is perpetrating a robbery is commonly known as a felony murder. Under the statutes of our State, such a killing constitutes murder in the first degree.

In regard to the State's contention that the homicide or killing of the decedent was committed while the defendant (and another or others) (was) (were) committing a robbery: A New Jersey Statute (N.J.S. 2A:113-1) insofar as it is here pertinent, reads in part, as follows:

> if any person, in committing or attempting to commit robbery, or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, kills another, or if the death of any one ensues from the committing or attempting to commit any such crime or act, then such person so killing is guilty of murder.[1]

Another section of the New Jersey Statutes (2A:113-2) provides in pertinent part as follows:

> Murder which is committed in perpetrating or attempting to perpetrate robbery, is murder in the first degree.

[(Insert where appropriate) Now, another section of our criminal law (N.J.S. 2A:85-14) provides in pertinent part as follows:

> Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.

This provision means that not only is the person who actually commits the criminal act responsible for it, but those who are aiding and abetting are also responsible.

The word "aid" as contained in the statute means to assist, support or supplement the efforts of another, and the word "abet" means to encourage, counsel, incite or instigate the commission of a crime. If you find that the defendant willfully and knowingly aided or abetted another or others in the commission of the offense you must consider him a principal.

Concerted action does not have to be proved by direct evidence of a formal plan to commit a crime, verbally concurred in by all that are charged. The proof may be circumstantial. Participation and acquiescence can be established from conduct as well as spoken words.

If you find beyond a reasonable doubt that the defendant and another or others, (namely), acted in concert with intent to rob the decedent at (place) on (date) and that one or more of them did in fact rob the decedent, that is, did in fact commit a robbery there, then the act or acts of the others in the commission of the robbery are chargeable to the defendant].

I will now explain to you the law applicable to a murder alleged to have been committed in the perpetrating of a robbery. In doing this, I will first explain to you what the law means by the term "robbery."

Robbery is defined by our statute as a forcible taking from the person of another of money or personal goods and chattels, of any value whatever, by violence or putting him in fear. To constitute robbery, therefore, there must be a forcible taking of the money or property of another from his person or from his custody with intent to steal, that is, with intent to permanently deprive him of the money or property, and the taking must be by means of violence or such demonstration or threats as will create in the victim a reasonable apprehension of bodily injury if he should resist. To satisfy this latter requirement it is enough that so much force or threats or demontrations were used as to create in the victim an apprehension of danger to induce him to part with money or property against his will. It is essential that the defendant accomplish the taking of the property by means of force or violence or by intimidating or putting the victim in fear. The requirement is stated in the disjunctive so that the offense is committed if violence or fear is present, though not both.

There are three elements which the State must prove to your satisfaction beyond a reasonable doubt in order to establish that this defendant was engaged in the commission of a robbery at the time this killing took place:

1. That on (date) at (place) in this County, the defendant willfully and knowingly (forcibly took) (aided and abetted ..... in forcibly taking) from the person of the decedent, money, (or other property) the property of the decedent;

2. That this forcible taking of this money (property) was against the will of the decedent and was accomplished by violence or putting the decedent in fear; and

3. That this money (property) was taken and carried away with intent on the part of the (defendant) (participants) to deprive the decedent of his money (property) permanently.

You will notice that I have used the phrase "with intent." As to what is an intent, I charge you that it is a condition of the mind which cannot be seen, and can only be determined by reference to conduct or from inferences from conduct, words or acts. It means the purpose to do something or resolve to do a particular act or to accomplish a certain thing. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he allegedly engaged in a particular act. His intention may be gathered from his acts and his conduct, if any, and from all of the surrounding circumstances that existed at the time and place, that is, on (date) in (place).

Intent must ordinarily be discovered, as other mental states are, in the evidence of the defendant's conduct in the surrounding circumstances.[2]

When a killing occurs in the commission of a robbery, it is murder in the first degree, even though death was not intended. Therefore, in such a case, the state is not under any duty to prove a willful, deliberate, and premeditated killing.

In order for you to find the defendant guilty of murder in the first degree, the state must prove all of the essential elements of a felony murder beyond a reasonable doubt. Accordingly, before you can find the defendant guilty of murder in the first degree, the state must prove to your satisfaction beyond a reasonable doubt that a robbery of the decedent occurred at (place) on (date); that the defendant willfully and knowingly (committed) (aided and abetted ..... in committing) the robbery; and that the fatal wounding of the decedent occurred sometime within the course of the robbery, including its aftermaths of escape and concealment efforts.[3]

It is your duty and your function to determine what was in the mind of the defendant at the time this alleged murder took place. If you *do not* find that at the time of the alleged murder the defendant had formed the intent to rob the decedent, then it follows that the State has failed to prove the defendant guilty of a felony murder and the defendant could not then be found guilty of a felony murder.

In a felony murder, when two or more persons agree to rob another and only one strikes the fatal blow, all are guilty. All actually taking part in the perpetration of the felony, that is, the robbery, are treated alike,

even though one be not physically present at the scene, and every person aiding and abetting in its commission is responsible for the consequences as a principal to the same extent as the actual murderer.[4]

When, incident to a robbery, one of the robbers kills the victim after the victim's money is taken from his possession, the killing being done in an attempt to conceal the crime and protect the robbers in the possession of the loot and facilitate their flight, the killing is murder committed in the perpetration of a robbery within the meaning of the statute and is consequently murder in the first degree.[5]

1. 2A:113-1.
2. *State v. Costa*, 11 N.J. 239, 246-247 (1953).
3. *State v. Holland*, 59 N.J. 451, 458 (1971).
4. *State v. Smith*, 32 N.J. 501, 521 (1960).
5. *State v. Holland*, 59 N.J. 451, 458 (1971).

2.240 OBTAINING MONEY OR PROPERTY BY FALSELY PRETENDING TO BE POOR OR UNEMPLOYED (N.J.S.A. 2A:111-2) [WELFARE FRAUD]

This statute makes it a crime for any person to knowingly or designedly obtain money (property or other thing of value) for himself or for any other person, from any agency or organization (of the type listed in the statute) (such as a County Welfare Board) under the pretense that he, or such other person is poor and needy (or out of employment) by means of either one or both of two separate and distinct types of conduct.

The first type is by means of any false statement whether made orally or in writing; and the second type is by means of concealing or failing to disclose a material fact which it is his duty to reveal.

If you find that the defendant did knowingly or designedly obtain money (property or other thing of value) for himself, or for any other person from (the County Welfare Board) under the false pretense that he or such other person was poor and needy (or out of employment) by either type of means, the crime has been committed.

The first type of means is accomplished when the defendant has made an affirmative statement, either orally or in writing, which was false. "Falsity" in this section means that the statement must not only be false in fact but that the defendant knew that it was false. The second type of means is accomplished when a defendant has concealed or failed to disclose a material fact which it was his duty to reveal. In order for you jurors to find the defendant guilty of using the second means, you must find beyond a reasonable doubt:

(a) That the defendant had a duty to reveal such fact;

(b) That such fact was a "material" fact, which word as used in this statute means something important, a significant fact upon which the agency relied in dispensing its money or property; and

(c) That the defendant knowingly and designedly concealed or failed to disclose such fact.

The terms "knowingly" and "designedly" include an intent to cheat or defraud even though not stated in the statute.

(NOTE: ONLY CHARGE IN ACCORDANCE WITH THE MEANS ALLEGED IN THE INDICTMENT, I.E., IF THE MEANS ALLEGED IS FALSE STATEMENT, DO NOT CHARGE CONCEALING OR FAILING TO DISCLOSE A MATERIAL FACT, ETC. AND VICE VERSA)

Therefore, from a reading of the statute and the indictment, we see that the elements that the State must prove beyond a reasonable doubt in order for you to find this defendant guilty are as follows:

1) That the defendant obtained money (property or other thing of value) from the (County Welfare Board or other appropriate agency) for (himself, herself and/or for any other person) under the pretense that (he, she or they) was (were) poor and needy (or out of employment). A "pretense" is a claim made or implied; one especially not supported by fact. Thus, a "false pretense" is such a designed or purposeful misrepresentation of an existing fact or condition as induces the party or agency to whom it is made to part with its property;

2) That the defendant made a false statement or statements, orally or in writing; or that the defendant concealed or failed to disclose a material fact which it was his or her) duty to reveal as those terms have been defined and explained to you; (only charge the appropriate means)

3) That the defendant made the false statements, or concealed or failed to disclose the material fact, knowingly and designedly. "Knowingly" means that the defendant had a conscious awareness of what (he or she) was doing as opposed to a mere lack of regard or care. It refers to the state of mind of the defendant; that (he or she) did the acts complained of with awareness and knowledge of what (he or she) was doing. "Designedly" means purposely, that is, willfully, intentionally and voluntarily of defendant's own free will. It means to conceive and plan out in the mind; that it was a deliberate project or scheme which was planned out in the defendant's mind. The State contends that the defendant made such false statements and/or concealed or failed to disclose such material facts knowingly and designedly

with intent to cheat or defraud the (County Welfare Board). An intent to cheat or defraud is a necessary element which the State must prove beyond a reasonable doubt before you can find the defendant guilty.

Whether the defendant's conduct was knowing and designed and whether (he or she) intended to cheat or defraud, are all conditions of the mind. In other words "knowledge", "design" and "intent" all involve the state of mind of the defendant. Such proof ordinarily can only be established by the words, acts and conduct of the defendant. It is not necessary that witnesses be produced to testify that the defendant said that (he or she) had a certain knowledge or acted with a certain design, or had a certain intent to cheat or defraud, when (he or she) engaged in the particular act. The defendant's knowledge, design and intent may all be gathered from (his or her) acts, words and conduct; from all that (he or she) said and did and from all of the surrounding circumstances before, during and after the events in question;

(Here refer to some of the facts that go to the question of knowledge, design and intent).

4) That the (County Welfare Board or the appropriate agency) relied upon the false statements made by the defendant and/or the concealment or failure by the defendant to disclose material facts which the defendant was under a duty to reveal and that the (County Welfare Board) was thereby deceived into giving the defendant the sum of money (property or other thing of value) that (he or she) was not entitled to receive. While the amount of money alleged to have been received by the defendant is set forth in the indictment, it is not essential that you find the specific amount actually received, so long as you find that some amount was received by the defendant that (he or she) was not entitled to receive.

Welfare Fraud—Cases:

1. *State v. Kaufman,* 18 N.J. 75 (1955)
2. *State v. Allen,* 53 N.J. 250 (1969) affirming Judge Collester's dissent at 100 N.J. Super. 407, 419 (App. Div. 1968)
3. *State v. Greco,* 29 N.J. 94 (1959)
4. *State v. Zweillmon,* 112 N.J. Super. 6 (App. Div. 1970)
5. *State v. Graves,* 60 N.J. 441 (1972)
6. *State v. Lamoreaux,* 13 N.J. Super. 99 (App. Div. 1951)

2.241 OBTAINING MONEY, PROPERTY, ETC. BY FALSE PRETENSE (N.J.S.A. 2A:111-1)

The defendant is charged with a violation of *N.J.S.A.* 2A:111-1 which provides that any person who, knowingly or designedly, with intent to

cheat or defraud any other person, obtains any money, property, security, gain, benefit, advantage or other thing of value by means of false promises, statements, representations, tokens, writings or pretenses, is guilty of a violation of the law.

In this prosecution for obtaining money by false promises (pretenses) the State has the duty of showing that this defendant obtained the sum of $....., or some part of that sum, from the complaining witness by means of false promises (pretenses), that is, that he would waterproof the complaining witness's basement (or as the case may be), and that such promises (pretenses) were made knowingly and designedly with intent to cheat and defraud the complaining witness of the money.

A violation of this statute arises from the existence of an intention not to perform that was present when the promise (pretense) is made. Consequently, in a prosecution of this type, it must be established beyond a reasonable doubt that at the time of entering into the transaction the accused intended to cheat the complaining witness by taking his money with full awareness that he had no intention of performing the contract.

A conviction for obtaining money under false promises (pretenses) can not rest upon the mere failure of the accused to perform a contract after receiving money. There must be evidence beyond a reasonable doubt pointing to the falsity of the promises (pretenses) at the time they were made and on the basis of which the money was obtained, that is, that he had no intention of performing the work (or as the case may be). An intention not to perform formulated after the promise (pretense) and after receipt of the consideration therefor would not create the criminal liability contemplated by the statute. Therefore, a fraudulent intent is necessary to ripen a mere misrepresentation into a criminal act. Further, the State must establish reliance thereon by the complaining witness, that is, you must be satisfied that the complaining witness believed the representation made by defendant and that he was influenced by it to part with his money.

(Here Insert Basic INTENT Charge)

A "promise" within this section is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future; it is normally a stipulation for some future conduct by the promisor and is an express undertaking or agreement to carry a purpose into effect, and is necessarily an assertion of an existing state of mind and a present intention to perform. The statutory crime based upon a false promise refers to the existing adverse state of mind of the promisor, i.e., the present intention or existing state of mind of the declarant not to perform. A "false pretense" within this section is such a designed misrepresentation of an existing fact or condition as induces the party to whom it is made to part with his money.

"Falsity" in this section means that the statement was not only false in fact but was false to the knowledge of the defendant, and the burden of proving guilty knowledge is on the prosecution. "Knowledge" means a conscious awareness as opposed to mere lack of care or regard. Knowledge need not be proven by direct evidence, but rather knowledge may be found from the defendant's conduct, actions and statements as well as the surrounding circumstances.

To summarize, the State must prove beyond a reasonable doubt all of the following elements:

1. That a representation was made;
2. That the representation was false when made;
3. That the representation was made with knowledge that it was false;
4. That the representation was made with the intention to deceive the person to whom it was made and to induce that person to part with his money;
5. That such person to whom the representation was made relied on it and was, in fact, deceived; and
6. That such person was, as a direct result, influenced to part with his money.

2.250 POSSESSION OF BURGLAR'S TOOLS

The State accuses the defendant of the crime of possessing [or manufacturing]* burglar's tools. *N.J.S.A.* 2A:94-3 states:

> "Any person who manufactures or knowingly possesses any engine, machine, tool or implement adapted or designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted or designed for such purpose, with intent to use or employ or allow the same to be used or employed for that purpose is guilty of" a violation of law.

Before you may find the defendant guilty, you must find beyond a reasonable doubt, the existence of all of the following essential facts:

(1) That on or about the ..... day of ....., 19.., and in ....., N.J., the defendant had in his possession an engine, machine, tool or implement. The possession may be actual or constructive. I will define actual and constructive possession later.

(2) That the particular implement was adapted *or* designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property.

* Where appropriate substitute "manufacture" for "possession."

The terms "adapted" or "designed" mean capable of use in breaking and entering, and such tools must either be "adapted," that is, capable of being used in breaking and entering, or must be "designed," that is, contrived or suitable to be employed for such purpose.

(3) That the defendant had knowledge at the time and place of such possession of the character of such implements, that is, the defendant knew they were adapted or designed for the purpose of breaking and entering for the unlawful purpose just described to you.

(4) That the defendant possessed the implements, with the actual specific intent to use or employ, or allow the same to be used or employed for the purpose of cutting through, forcing or breaking open any building, room, vault, safe or other depository in order to steal therefrom money or other property. Stealing here means the unlawful taking by one person of the money or property of another without the right to do so and without the consent of the owner, with the intent to deprive the owner of the property permanently. There must be proof of some circumstance or circumstances, in addition to the proof of the possession of the implement itself, for you to draw a legitimate inference of the required intent.

You will note that the acts charged in the indictment are alleged to have been done "knowingly." The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reason.

(5) CHARGE SPECIFIC INTENT—See Model Criminal Charges.

(6) CHARGE DEFINITION OF—POSSESSION—See Model Criminal Charges.

ANNOTATIONS: POSSESSION OF BURGLAR'S TOOLS

Possession of burglar's tools may be either a high misdemeanor, *N.J.S.A.* 2A:94-3 or a disorderly person's offense, *N.J.S.A.* 2A:170-3.

The disorderly person's offense, *N.J.S.A.* 2A:170-3, requires for a finding of guilt that the tool be on the person of the defendant with the intent to break and enter any building.

The high misdemeanor, *N.J.S.A.* 2A:94-3, requires for a finding of guilt that the tool be in the possession of the defendant, and that possession may be actual or constructive, with the intent to cut through, force or break open any building, room, vault, safe or other depository in order to steal money or other property.

2A:94-3. MANUFACTURING OR POSSESSING BURGLAR'S TOOLS

Any person who manufactures or knowingly possesses any engine, machine, tool or implement adapted or designed for cutting through, forcing or breaking open any building, room, vault, safe or other *depository,* in

order to steal therefrom any money or other property, knowing the same to be adapted or designed for such purpose, with intent to use or employ or allow the same to be used or employed for that purpose, is guilty of a high misdemeanor.

State v. Klein, 91 N.J. Super. 509 (App. Div. 1966) held that an automobile fell within the "other depository" phrase of the statute.

2A:170-3. CARRYING WEAPONS OR BURGLAR TOOLS WITH INTENT TO BREAK AND ENTER OR ASSAULT; PRESENCE IN OR NEAR BUILDINGS OR OTHER PLACES WITH INTENT TO STEAL

Any person who has upon him any picklock, key, crow, jack, bit or other implement, with intent to break and enter into any building, or has upon him any offensive or dangerous weapon, with intent to assault any person, or is found in or near any premises used for dwelling, business or storage purposes, or in any place of public resort or assemblage for business, travel, worship, amusement or other lawful purpose, with intent to steal any goods or chattels, is a disorderly person. *State v. Wean,* 86 N.J. Super. 283 (App. Div. 1965) dealt with this statute.

Any device adapted or designed for use in effecting burglarious entry, and knowingly manufactured or possessed for that unlawful purpose, is a burglary tool. A putty knife is such a tool, *State v. Agnesi,* 92 N.J.L. 53 (Sup. Ct. 1918), aff'd. per cur. 92 N.J.L. 638 (E. & A. 1918); a jimmy is a burglary tool, *State v. Walsh,* 9 N.J. Super. 43 (App. Div. 1950); a key opener or key turner; an instrument which will turn a lock without a key; a tool which will open the latch in windows; three screwdrivers in one; a jimmy capable of opening drawers or doors; a bunch of skeleton keys for opening any door and a bunch of common keys, all contained in a bag in possession of the accused were ruled to be burglary tools, *Brown v. Menzel,* 136 N.J.L. 233 (Sup. Ct. 1948).

A jimmy, a sledge hammer, a chisel, a small cold chisel and two small crowbars, all in the actual or constructive possession of two intended burglars, have been held to be burglary tools, *State v. Salernitano,* 27 N.J. Super. 537 (App. Div. 1953). A sharpened screwdriver, five car keys and a house key are burglar's tools, *State v. Klein,* 91 N.J. Super. 509 (App. Div. 1966).

Useful material on this subject may be found in *Criminal Laws of New Jersey* (3rd Edition), § § 26:19-26:26; *Wharton's Criminal Law & Procedure,* § 437; and in an Annotation: "Construction and application of statute relating to burglars' tools," 103 A.L.R. 1313, which deals with two kinds of statutes, the first requiring only a general intent to burglarize, the latter requiring a specific intent and it should be noted that New Jersey falls into the second category.

2.251 POSSESSION OF A DANGEROUS KNIFE

The defendant is charged with the offense of possession of a dangerous knife.

The pertinent part of the statute upon which this indictment is based, reads as follows:

> . . . [a]*ny person who carries, holds or possesses in any automobile, carriage, motor cycle or other vehicle, or on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area:*
>
> * * *
>
> c. *Any* dangerous instrument of the kinds known as a blackjack, slung shot, billy, sandclub, sandbag, bludgeon, metal knuckles, cestus or similar leather band studded with metal for fitting on the knuckles, loose wool impregnated with metal filings, or razor blades imbedded in wood slivers, dagger, dirk, *dangerous knife* or knife as defined in chapter 5 of the laws of 1952 (C. 2A:151-62), stiletto, grenade, bomb or other explosive, other than fixed ammunition, except as such person may be licensed to carry, hold or possess explosives under the provisions of Title 21 of the Revised Statutes and amendments thereto, *is guilty of a* . . . [crime]. *N.J.S.A.* 2A:151-41 (Emphasis added).

In order for a defendant to be found guilty of this charge it is necessary that the State prove each element of the offense beyond a reasonable doubt. The elements are:

(1) That the defendant intentionally possessed the knife in evidence, (See note).*

(2) That State's Exhibit ..... is a dangerous knife.

(IF POSSESSION IS AN ISSUE IN THE CASE, INSERT HERE THE STANDARD CHARGE ON POSSESSION)

(IF NECESSARY DEFINE INTENT)

Obviously, ladies and gentlemen of the jury, the possession of a knife is not automatically a criminal offense. There are various kinds of knives which are commonly carried for personal utility, convenience or for some other lawful purpose and this would not be in violation of the law.

Whether a particular knife is a dangerous knife under the statute depends upon the purpose of possession and that purpose can only be determined from the facts and circumstances surrounding the possession of that knife.

A knife, which is not dangerous in and of itself, becomes a "dangerous knife" if the purpose of its possession is its use as a weapon. Whether the possessor regards the knife as a defensive weapon or an offensive weapon is of no consequence.

Therefore, whether possession of a knife is a prohibited act under the statute depends upon a determination of the purpose of such possession at the time and place in question.

If the purpose is its use, at any time as a weapon against another person, then its possession is a crime. Purpose means an intent to accomplish something, a resolve to do a particular act or to accomplish a certain thing.

As I have instructed you, under one set of circumstances a knife may constitute a dangerous knife and under another set of circumstances its possession may be lawful. Therefore, you must consider all of the surrounding circumstances and facts in evidence such as the size, shape and condition of the knife, including any alterations thereto; the nature of its concealment, if any; the time, place and actions of the defendant when found in his possession.

If, upon a consideration of the total circumstances you conclude that the purpose in carrying the knife was to use it as a weapon, it then would be a dangerous knife within the meaning of this statute.

Therefore, in order to warrant a conviction you must be satisfied beyond a reasonable doubt, from all the facts and surrounding circumstances, that the defendant intentionally possessed the knife in question and secondly that the purpose of possession was its use as a weapon.

*(NOTE: Possession of a dangerous knife under *N.J.S.A.* 2A:151-41 is prohibited in any place, public or private. *State v. Johnson,* 125 N.J. Super. 344 (App. Div. 1973), *rev. in part and modified in part,* 65 N.J. 388 (1974).

State v. Green, 62 N.J. 547 (1973); *State v. Howard,* 125 N.J. Super. 39 (1973); *State v. Ebron,* 122 N.J. Super. 552 (App. Div. 1973), *certif. denied* 63 N.J. 250 (1973); *State v. Horton,* 98 N.J. Super. 258 (App. Div. 1967); *State v. Edwards,* 120 N.J. Super. 46 (Law Div. 1972).

2.252 POSSESSION OF LOTTERY SLIPS

The defendant has been charged with a violation of a provision of our statutes pertaining to lotteries. That statute (*N.J.S.A.* 2A:121-3) provides in part:

> Any person who:
>
> *** (b) Knowingly possesses any paper, document, slip or memorandum that pertains in any way to the business of lottery or lottery policy, so-called, whether the drawing has taken place or not *** is guilty of a . . . [crime].

In order for you to find the defendant guilty, you must be satisfied that the State has proven, beyond a reasonable doubt, each of the following essential elements of the offense charged:

1. That the (paper) (document) (slip) (memorandum) marked as an exhibit pertained in some way to the business of lottery or lottery policy, so-called; and
2. That the defendant possessed, or had under (his) (her) control the (paper) (document) (slip) (memorandum); and
3. That the defendant intended to possess the (paper) (document) (slip) (memorandum); and
4. That the defendant knew that the (paper) (document) (slip) (memorandum) pertained to the business of lottery or lottery policy.

The term "lottery" means a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing. Slips pertaining to the numbers game are lottery slips within the meaning of the statute. (*N.J.S.A.* 2A:121-6). It is not necessary for the State, in order to sustain its burden, to prove an actual particular lottery.

(IF POSSESSION IS IN ISSUE, REFER TO MODEL JURY CHARGE ON POSSESSION (4.251) AND USE THOSE PORTIONS WHICH APPLY TO YOUR CASE)

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find possession on the part of the defendant you must first find intent, that is, that (he) (she) intended to exercise control over the (paper) (document) (slip) (memorandum) in evidence. In addition to intent, for you to find possession on the part of the defendant you must also find that the defendant had knowledge of the character of that which he possessed. It is possible to possess something without knowing it but such possession is not possession within the meaning of the law.

Intent and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. It is not necessary that the State produce witnesses to testify that defendant said (he) (she) had a certain intent and knowledge when (he) (she) engaged in a particular act. Intent and knowledge may be proven and inferred from circumstantial evidence, including the nature of the exhibits in evidence, and by reference to defendant's conduct, words, or acts, and from all of the surrounding circumstances.

If you find that the State has failed to sustain its burden of proving each and every one of the elements of the offense as I have stated them to be beyond a reasonable doubt, then the defendant must be acquitted.

The defendant is guilty of the above offense whether (he) (she) was the person who took the money wagered on the outcome of a lottery, that is, a lottery operator or runner, or was the person responsible for paying off the winners, if any. In addition, if you find that the papers

in evidence do pertain to the business of lottery, the mere fact that one who knowingly possesses them is a bettor will not absolve him. The focus is on the character of the paper, document, slip, or memorandum and not upon the role of the possessor. In other words, in a lottery situation, the statute does not distinguish between takers of bets and bettors.

Recent Casenotes:

(1) "Possession of lottery slips" [*N.J.S.A.* 2A:121-3(b)] and "working for a lottery" [*N.J.S.A.* 2A:121-3(a)] are separate and distinct offenses. *State v. Sims*, 65 N.J. 359, 375 (1974); *State v. Siebert*, 126 N.J. Super. 534, 537 (App. Div. 1974).

(2) "[P]ossession of lottery slips is not dependent on proof that the person is knowingly engaged in clerical operations in furtherance of a lottery. Possession requires an intent to exercise control over an object and the effective realization of that attitude. This attitude may be realized if the person is in actual control of the material or has the present ability to exercise control to the exclusion of others. ***The existence of clerical wagers, is not an integral part of the offense of possession." *State v. Siebert, supra*, at 537-38.

Definitions

"Possession"

State v. Reed, 34 N.J. 554, 557 (1961)
State v. Siebert, 126 N.J. Super. 534, 537 (App. Div. 1974)

"Lottery"

State v. Brown, 67 N.J. Super. 450, 454-55 (App. Div. 1961)
State v. Rucker, 46 N.J. Super. 162 (App. Div. 1957), *certif. denied*, 25 N.J. 102 (1957)
State v. Gattling, 95 N.J. Super. 103 (App. Div. 1967) *certif. denied*, 50 N.J. 91 (1967)

"Bettor"

State v. Purdy, 51 N.J. 303 (1968)
State v. Melamed, 93 N.J. Super. 573 (App. Div. 1967) aff'd 51 N.J. 303 (1968)

2.270 RAPE

The indictment reads in pertinent part as follows:

READ INDICTMENT

The pertinent part of the statute on which this indictment is based reads as follows:

"Any person who has carnal knowledge of a woman forcibly against her will or while she is under the influence of any narcotic drug . . . is guilty of [a crime]. . . ." *N.J.S.A.* 2A:138-1.

(INTERPOLATE WORDING OF STATUTE AS REQUIRED BY FACTS OF CASE.)

"Carnal knowledge" means sexual intercourse between a male and a female. To convict the defendant of rape the jury must find that he had sexual intercourse with the female forcibly and against her will. To complete the crime of rape there must be penetration by the sexual organ of the male into the sexual organ of the female. The slightest penetration is sufficient.

The essential elements of the crime of rape are carnal knowledge by force by the male and nonconsent thereto by the female. Consent, however reluctant, negates rape. If a woman assaulted is physically and mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the assault. This resistance must be by acts and not by mere words, and must be reasonably proportionate to the victim's strength and opportunity. It must be in good faith and without pretense, with an active determination to prevent the violation of her person, and must not be merely passive and perfunctory. However, the fact that a victim finally submits does not necessarily imply that she consented. Force includes not only physical violence but also duress or the threat of physical violence. Submission to a compelling force, or as a result of being put in fear, is not consent. It is only required that the female resist as much as she possibly can under the circumstances, and the circumstances and conditions surrounding the parties at the time of the alleged offense are to be considered in determining whether adequate resistance was offered. The allegation of force is established by evidence showing that her resistance was overcome by physical force, or that her will was overcome by fear. In either case the allegation is complete, even if the female ceases to offer resistance before the penetration of her body is finally consummated.

N.J.S.A. 2A:138-1

State v. McPherson, 135 N.J. Super. 203 (App. Div. 1975).
State v. Riley, 49 N.J. Super. 570, 584, *affirmed*, 28 N.J. 188 (1958).
State v. Orlando, 119 N.J.L. 175, 183 (Sup. Ct. 1937).
State v. Terry, 89 N.J. Super. 445, 449-450 (App. Div. 1965).
State v. Harris, 70 N.J. Super. 9, 16-17 (App. Div. 1961).
State v. Conner, 97 N.J.L. 423, 427 (Sup. Ct. 1922).
State v. Provet, 133 N.J. Super. 432 (App. Div. 1975).
See *State v. Bono*, 128 N.J. Super. 254, *certif. denied*, 65 N.J. 572 (1974).

[You are instructed that the use of a deadly weapon by the defendant either to injure or to threaten his victim may be considered by you as proof of both force and non-consent].*

[Finally, you are reminded that a conviction for rape may be sustained on the uncorroborated testimony of the complainant as long as you are satisfied that the elements of the crime and the defendant's participation in the crime have been established beyond a reasonable doubt].**

NOTE: Bracketed material may be used where pertinent.

* *McMillan v. State of New Jersey*, 408 F.2d 1375 (1969).
** *State v. Garcia*, 83 N.J. Super. 345 (App. Div. 1964).

2.271 RECEIVING STOLEN PROPERTY

(BEFORE YOU GIVE THIS CHARGE TO A JURY REFER TO ALL NOTES WHICH MAY BE APPLICABLE TO YOUR CASE)

The indictment charges the defendant with receiving stolen property in violation of a statute or law of the State of New Jersey (*N.J.S.A.* 2A:139-1) which provides as follows:

"Any person who receives or buys any goods or chattels, or choses in action, or other thing of value stolen from any other person or taken from him by robbery or otherwise unlawfully or fraudulently obtained, or converted contrary to law, whether the stealing or robbery was committed either in or out of this state, and whether the property was received or bought from the thief or robber, or from another person . . . is guilty of a [crime]. . . ."

(If there is a dispute over the value of the property, that question should be submitted to the jury).

The mere receiving of stolen property is not in and of itself a crime in New Jersey by virtue of this statute, but receiving of stolen property knowing that it has been stolen is a crime, and the statute must be considered as if the word "knowingly" were contained therein.

In order to meet its burden of proof, the State must prove each of the following three elements beyond a reasonable doubt:

1. That the property in question was stolen.
2. That the defendant either received or bought the stolen property.
3. That at the time the defendant received or bought the stolen property, he knew it had been stolen.

As to the first element, property is considered stolen if illegally taken from another person without his permission and with the intent wrongfully to deprive the owner of his property permanently. If you determine that the property in question was stolen, the identity of the thief is immaterial.

As to the second element requiring the State to prove that the defendant received the stolen property, the identity of the person from whom the defendant may have obtained the stolen property is immaterial,

but the State must prove that the defendant was in possession of the property (*NOTE:* HERE USE MODEL CHARGE ON POSSESSION, INCLUDING CONSTRUCTIVE OR JOINT POSSESSION, IF APPLICABLE).

The third element requires that the State prove that when the defendant received the stolen property, he knew it to have been stolen. Now, how are you to determine whether the defendant had such knowledge? The State does not have to prove that the defendant was told that the property was stolen nor that he said that he knew it to have been stolen. Knowledge is a state of mind, and it may be proved by circumstantial evidence—that is, by all the surrounding circumstances including the defendant's actions and statements. (If the evidence explains how the defendant came into possession of the property you may desire to charge as follows: Knowledge may be found by you to have existed if you determine that the defendant received the property under such circumstances that a man of ordinary caution and intelligence would believe it to have been stolen. Mere suspicion that the property had been stolen would not be enough, but suspicious circumstances may be part of the whole picture from which you may determine knowledge on the part of the defendant that the property had been stolen.)

(*NOTE:* Use the next two paragraphs when the proofs indicate possession within one year of the theft, or in automobile cases in accordance with *State v. Bott*, 53 N.J. 391 (1969).)

Under our law, you may infer guilty knowledge on the part of a person who has possession of stolen property within a reasonably short time from the theft itself.

Although possession of stolen property within a limited time from the theft is not in and of itself a crime, since it is possible under our law to possess such goods and remain innocent, such possession within a reasonably short time after the theft may be found sufficient by you to establish guilty knowledge unless the evidence shows to your satisfaction that the property was acquired by the defendant under his belief that his acquisition of the property was legal.

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of his constitutional rights the accused need not take the witness stand and testify.

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused. Thus, if you find that the State has proved possession of the property, and that the property had been recently stolen, you may find the defendant guilty in the absence of a satisfactory explanation from the evidence as to the circumstances surrounding the possession of the property. You will recall that I have already charged you as to what constitutes possession within the law.

As I have previously mentioned, possession by a person of stolen property within a reasonably short time after it was stolen raises a permissible inference of guilty knowledge. However, this is a permissible inference only, and not a mandatory inference. That is, you may accept or reject such inference after considering all the other evidence in the case. If you accept the inference, you should weigh it in connection with all the other evidence, keeping in mind that the burden of proof is upon the State to prove guilt beyond a reasonable doubt. The permissible inference to which I have referred does not shift that burden of proof.

(NOTES for this charge on following pages)

NOTES:

Do not charge the jury as to the five specific categories in *N.J.S.A.* 2A:139-1 which authorizes an acquittal despite a showing of a knowing possession of the stolen property within one year from the date of the theft. In *State v. DiRienzo,* 53 N.J. 360 (1969), the court said: ". . . nothing is gained by reading them to the jury. . . . [W]e believe that any reference . . . ought to be omitted." 53 N.J. at 382.

The jury must be informed that guilty knowledge is essential even though the statute does not so state. A literal reading of the statute would indicate that a conviction is permitted without regard to such proof, which, of course, would make the statute vulnerable to constitutional attack. Receiving stolen goods is traditionally a crime which requires proof of defendant's state of mind as an element of the State's case and this includes both intentional possession and guilty knowledge, i.e., knowledge that the goods were stolen and an intent to deprive the rightful

owners of their possession. *State v. DiRienzo, supra; State v. Laster,* 69 N.J. Super. 504 (App. Div. 1961); *State v. Hudson County News Co.,* 35 N.J. 284 (1961).

Intentional control and dominion over the stolen goods is required, and this is to be distinguished from guilty knowledge. *State v. Labato,* 7 N.J. 137, 148-49 (1951). Intentional control and dominion means merely that the defendant was aware of his possession: "one who has the physical control of a chattel with the intent to exercise such control either on his own behalf or on behalf of another is in possession of the chattel." *Restatement Second, Torts Section 216, Comment b.*

The statutory inference that unexplained possession of stolen property within one year is sufficient to authorize a conviction does not curtail the trial judge's traditional power, and if he finds, in analyzing the evidence before him, that the inference of guilty knowledge is so weak in the factual context of the particular case that the case should not be submitted to the jury, he may grant a dismissal motion. *State v. DiRienzo, supra.*

In charging the inference of guilt from possession of the stolen goods, it must be made clear that the inference is permissive in nature and not conclusive, that possession of stolen goods within a limited time from their theft is not, in and of itself, a crime, that it is possible for a man to possess such goods and be innocent, that the inference must be considered along with all the other evidence in the case in determining whether the possession was unlawful, and that the inference in no way shifts the burden of proof from the State to the defendant. *State v. DiRienzo, supra.*

The language used by the court in charging the above inference must make it clear that the defendant is under no compulsion to come forward *personally* and explain his possession so that there is no violation of defendant's protection against compulsory self-incrimination. *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed. 2d 653 (1964), or the prohibition against adverse comment by judge and prosecutor on a defendant's failure to testify. *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed. 2d 106 (1965).

Defendant is not limited to the five statutory defenses but may assert any other defense he desires which shows he received the property innocently. *State v. Laster, supra; State v. DiRienzo, supra.*

It is unnecessary that State establish guilt as to all of the goods or chattels set forth in the indictment as long as guilt as to some of them are so established. *State v. Bozeyowski,* 77 N.J. Super. 49 (App. Div. 1962).

For further discussion of possession and constructive possession see: *Restatement Second, Torts Section 216, Comment b; State v. DiRienzo, supra; State v. Labato, supra; State v. Thomas,* 105 N.J. Super. 331 (App. Div. 1969); particularly dissenting opinion, *State v. Reed,* 34 N.J. 554 (1961); *State v. Bozeyowski, supra.*

Mere suspicion by defendant that the goods were stolen is not sufficient; the State must establish actual knowledge. *State v. Goldman,* 65 *N.J.L.* 394 (S. Ct. 1901), and defendant must have had such knowledge at the time he received the same rather than having obtained such knowledge at a subsequent time. *State v. Werner,* 2 N.J. Misc. 180 (1924).

However, suspicious circumstances may be part of the circumstances from which knowledge that the goods were stolen may be inferred. *State v. Vitale*, 35 N.J. Super. 568 (App. Div. 1955).

Where motor vehicle is the alleged stolen property the indictment must allege violation of *N.J.S.A.* 2A:139-3 and not *N.J.S.A.* 2A:139-1. *State v. Bott*, 53 N.J. 391 (1969). In such a case defendant cannot be convicted on mere proof that he was a passenger in the stolen vehicle. *State v. Serrano*, 53 N.J. 356 (1969); *State v. Kimbrough*, 109 N.J. Super. 57 (App. Div. 1970). A passenger in a stolen automobile can be convicted of receiving stolen property under *N.J.S.A.* 2A:139-3 under proper proofs. Possession need not be exclusive possession. "One has possession as soon as he intentionally obtains a measure of control or dominion over the custody of the stolen property even though physical possession is in another." *State v. Kimbrough, supra.* However, possession of the motor vehicle within a reasonable time after its theft furnishes a rational basis for a permissible, but not mandatory, inference that the acquisition of the vehicle was accompanied by knowledge of the theft. *State v. Bott, supra.*

An inference that a possessor of stolen goods had knowledge that the goods were stolen usually comports with common experience if the goods are possessed shortly after the theft. *Morisette v. U.S.*, 342 U.S. 246 (1952); *State v. DiRienzo, supra; State v. Cannaro*, 53 N.J. 388 (1969).

One cannot be guilty of both larceny and receiving stolen goods as the offenses are mutually exclusive. *State v. Shelbrick*, 33 N.J. Super. 7 (App. Div. 1954); *State v. Bell*, 105 N.J. Super. 238 (App. Div. 1969). If indictment is drawn in the alternative, jury should be instructed that defendant cannot be guilty of both but only of one. *State v. Fioravanti*, 46 N.J. 109 (1965), *cert. denied*, 384 U.S. 919, 86 S. Ct. 1365, 16 L.Ed. 2d 440 (1966).

See also: *State v. D'Adame*, 84 N.J.L. 386 (1913) and *State v. Giordano*, 121 N.J.L. 469 (1939).

See *State v. Scott* (App. Div. A.3746-72, Decided 12/9/74). In that case the court indicated that the jury should be advised that the defendant is under no compulsion to testify and that absent a request from the defendant to omit instructions on this point his right not to testify should be included in the court's charge. (It might be advisable before trial or before the case or before the defendant begins, if the defendant does not intend to take the stand that he be requested to advise the court whether he desires the court to instruct the jury as to his constitutional rights in accordance with *State v. Smith*, 100 N.J. Super. 420 (App. Div. 1968).

See also: *Barnes v. U.S.*, 412 U.S. 837, 93 S. Ct. 2357, 37 L.Ed. 2d 830 (1973).

2.272 DEMAND OF MONEY OR PERSONAL GOODS BY MENACES, FORCE OR VIOLENCE (ROBBERY)

The defendant was indicted for violating the provisions of our State Statute 2A:90-3, the pertinent part of which reads as follows:

"Any person who by menaces, force or violence demands of another any money or personal goods and chattels with intent to rob such other person is guilty" . . . [of a crime].

The following definitions will aid you in arriving at an understanding of this statute:

(1) "menaces" means threats, words, gestures, or both, showing a disposition or determination by the defendant to inflict evil. To menace is to act in a threatening manner.

(2) "force or violence"—these words are synonymous and include any application of force even though it entails no pain or bodily harm and leaves no mark.

(3) "demands" means a command or order, expressed or implied.

(4) "personal goods" and "chattels" are personal property.

(5) "with intent to rob" means voluntarily or intentional.

Where, as here, an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

The intent of the defendant must be to rob, that is, to forcibly take from the person or custody of another by force or intimidation, money or personal goods and chattels with intent to permanently deprive the owner of same.

Therefore, in order to convict the defendant, the State has the burden of proving beyond a reasonable doubt each of the following elements:

(1) That the defendant used menaces, force or violence;

(2) That the defendant made a demand;

(3) That this demand was for money or personal goods and chattels from the person of another;

(4) That the above occurred concurrently with the intent to rob.

NOTES:

1. For cases dealing with the term "menaces", see generally 27 Words and Phrases, *Menace* (1961); *State v. Brunswick*, 91 N.E.2d 553, 559 (Ohio Ct. of App. 1949); *State v. Cruitt*, 200 Kan. 372, P.2d 870, 874 (1968).

2. For definition of "force or violence", see *Falconiero v. Maryland Cas. Co.*, 59 N.J. Super. 105 (Cty. Ct. 1960).

3. As to necessity of showing intent, see *State v. Jackson*, 90 N.J. Super. 306 (App. Div. 1966).

2.273 ROBBERY

The defendant is charged in the Indictment with robbery in violation of *N.J.S.A.* 2A:141-1, which states:

> "Any person who forcibly takes from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, is guilty of a [crime]. . . ."

To find the defendant guilty, the State must prove each of the following elements beyond a reasonable doubt:

1. a forcible taking from the person of another of money, or personal goods or chattels;
2. the forcible taking must be accomplished by violence or by putting the victim in fear; and
3. an intent to rob.

The phrase "from the person of another" has been broadly construed to include the taking of personalty of any value whatsoever from the custody of, or from the constructive possession of, or which is subject to the protection of, another. Thus, the taking of the personalty can be from either the person or presence of another. The crime involves no specific reference to the element of ownership. Thus it is enough that the cash or personalty belongs to someone other than the thief.[1]

It is an essential element of the offense that the taking of the property be accomplished by force or violence or by putting the victim in fear. Although force implies personal violence, the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property. The taking of the property by means of intimidation or putting the victim in fear would satisfy the definition of this element. There is no exact standard by which to determine when an unlawful taking has been accompanied by putting in fear. It is enough that so much force, or threatening by word or gesture, be used as might create an apprehension of danger, or induce a person to part with his property without or against his consent.[2]

The intent to rob is a necessary element of the offense. The intent to rob is basically a larcenous intent, that is an intent to steal.[3] Stealing is the unlawful taking away of personalty of another with the intent to permanently deprive the owner of it. For liability to attach, the intent to rob must exist concurrent with the act and must be proved.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

It is the burden of the State to prove all of the elements of robbery beyond a reasonable doubt. Should you find that the State has failed to prove any one or more of the essential elements of the crime of robbery beyond a reasonable doubt, you must return a verdict of not guilty.

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1. *State v. Bowden*, 62 N.J. Super. 339, 345 (App. Div. 1960), *certif. denied*, 33 N.J. 385 (1960).
State v. Butler, 27 N.J. 560, 589 (1958).
State v. Ford, 92 N.J. Super. 356, 363 (App. Div. 1966).
State v. Cottone, 52 N.J. Super. 316, 323 (App. Div. 1958), *certif. denied*, 28 N.J. 527 (1959).

2. *State v. Woodworth*, 121 N.J.L. 78, 85 (Sup. Ct. 1938).
State v. McDonald, 89 N.J.L. 421, 422 (Sup. Ct. 1916) aff'd 91 N.J.L. 233 (E. & A. 1918).
State v. Culver, 109 N.J. Super. 108, 111 (App. Div. 1970), *certif. denied*, 56 N.J. 473 (1970).

3. *State v. Mayberry*, 52 N.J. 413, 431 (1968), *certif. denied*, 393 U.S. 1043, 89 S. Ct. 673, 21 L. Ed. 593 (1969).

2.280 SODOMY (WITH ANIMAL)

The defendant was indicted for violating the provisions of our State Statute *N. J.S.A.* 2A: 143-1, the pertinent provisions of which read as follows:

> "Any person who commits the prohibited act of sodomy, or the infamous crime against nature, with man or beast is guilty."

Now what is sodomy:

> "Sodomy is defined as the penetration by the penis, in any manner, into the body of an animal. (*State v. Morrison*, 25 N.J. Super. 534).

There are certain elements to this crime, each of which must be proved beyond a reasonable doubt in order for you to return a finding of guilty.

First, you must satisfy yourself that there was penetration, in any manner, of the body of the animal by the penis of the defendant. (*State v. Morrison, supra*).

Second, it is not necessary that the penetration shall be to any particular distance, the least penetration being sufficient (See *Schlosser*, 2 Criminal Law of New Jersey 3d, §95:4).

Third, emission of semen is not a required element. (*State v. Taylor*, 46 N.J. 316 at 334).

So, if you find that the State has proved beyond a reasonable doubt that this defendant ..... penetrated the body of . (animal) . in the manner just described to you, then the defendant is guilty of this indictment.

NOTE:

Even in a jurisdiction where sodomy between persons is confined to copulation per anum, (the law in New Jersey) it has been held that when the offense is committed between man and animal it is complete whether the penetration be vaginal or anal. (*People v. Smith*, 117 Cal. App. 2d 698). Further, it has been held that carnal knowledge by man or woman in any manner with a beast constitutes sodomy. See *People v. Smith, supra* and *Prindle v. State*, 21 S.W. 360, 31 Tex. Cr. 551. This authority would indicate that an offense committed between man and animal where penetration is *per os* (oral) would fall within the definition of sodomy.

2.281 SODOMY (WITH HUMANS)

The defendant was indicted for violating the provisions of our State Statute *N.J.S.A.* 2A:143-1, the pertinent provisions of which read as follows:

"Any person who commits the prohibited act of sodomy, or the infamous crime against nature, with man or beast is guilty."

Now what is sodomy:

"Sodomy" is defined as the penetration by the penis into the anus of another person. (*State v. Morrison*, 25 N.J. Super. 534).

There are certain elements to this crime, each of which must be proved beyond a reasonable doubt in order for you to return a finding of guilty.

First, you must satisfy yourself that there was penetration of the anus of the subject by the penis of the defendant. (*State v. Morrison, supra*).

Second, that penetration must be through the anus of (insert name of victim). (*State v. Morrison, supra*).

Third, it is not necessary that the penetration shall be any particular distance, the least penetration being sufficient. (See *Schlosser*, 2 Criminal Law of New Jersey 3d, §95:4).

Fourth, emission of semen is not a required element. (*State v. Taylor*, 46 N.J. 316, at 334).

So, if you find that the State has proved beyond a reasonable doubt that this defendant ..... penetrated the body of .. (subject) .. in the manner just described to you, then the defendant is guilty of this indictment.

NOTE:

Consent of the subject to the act of sodomy makes the consenting person an accomplice and equally guilty with the actor. (*Schlosser*, 2 Crim. Law 3d §95.5). Such consent is not a defense to the charge of sodomy.

2.290 THREAT TO KILL BY SPEECH N.J.S.A. 2A:113-8(b)

The indictment is based upon a Statute, *N.J.S.A.* 2A:113-8(b), which in pertinent part, provides: "Any person who, in public or private, by speech . . . threatens to take or procure the taking of the life of any person . . . is guilty of * * * [a violation of the law]."

A threat to kill has been defined as a declaration of an intent or determination to kill. In this case the defendant is alleged to have said, "..... ....."

(HERE INSERT WORDING ALLEGED TO HAVE BEEN USED BY DEFENDANT.)

Your first consideration should be as to whether or not the evidence satisfies you beyond a reasonable doubt that the defendant in fact used the words attributed to him or the equivalent thereof. If you are not so satisfied, then you need deliberate no further. You should declare the defendant not guilty.

However, if you find that the defendant spoke these words, or their equivalent, then you must determine secondly whether or not, in the context of the conversation and under the circumstances in which said remarks were made, such remarks did constitute a threat to take or procure the taking of the life of ..... The words used must be of such a nature as to convey menace or fear to the ordinary hearer. It is not necessary for the State to prove that the defendant actually intended to carry out the threat then or at some future time, nor that ..... actually felt menaced or fear.

It is to be noted that idle talk or joking will not constitute the crime. Words said in jest, or words which represent an expression of desire, or words which constitute mere idle talk or exaggeration or words that state a political opposition to the person said to have been threatened no matter how crude, offensive, or vituperative, are not true threats. To warrant a

conviction the words used under the circumstances presented must be found by you to have the clear capacity to convey to the ordinary person a sense of menace or fear. Unless this element has been proven beyond a reasonable doubt the defendant must be acquitted.

The third element of this offense is intent, not the intent to carry out the threat, but rather the intent to convey menace or fear to the hearer.

(HERE GIVE THE BASIC CHARGE ON "INTENT")

To summarize, if you find beyond a reasonable doubt (1) that the words, or their equivalent, were spoken by the defendant to the complaining witness; and (2) that these words are of such a nature as to convey menace or fear to the ordinary hearer under the circumstances present as those circumstances are found to have existed by you from the evidence; and (3) that the defendant intended by speaking the words to convey menace or fear to the hearer, you shall convict the defendant. On the other hand, if you find that the State has failed to prove all three elements of the offense, and each of them, beyond a reasonable doubt, you shall acquit him.

State v. Kaufman, 118 N.J. Super. 472 (App. Div. 1972), certif. den., 60 N.J. 467 (1972); *State v. Schultheis,* 113 N.J. Super. 11 (App. Div. 1971), certif. den., 58 N.J. 390 (1971); *State v. Green,* 116 N.J. Super. 515 (App. Div. 1971), modified, 62 N.J. 547 (1973); *State v. Montague,* 101 N.J. Super. 483 (App. Div. 1968), modified, 55 N.J. 387 (1970).

2.300 UTTERING OF A CHECK

The indictment reads in pertinent part as follows:

(Read indictment.)

The pertinent part of the statute on which this indictment is based reads as follows:

N.J.S.A. 2A:109-1.

> "Any person who, with intent to prejudice, injure, damage or defraud any other person:
>
> "b. Utters or publishes as true any such false, altered, forged or counterfeited matter, knowing the same to be false, altered, forged or counterfeited is guilty of a violation of the law."

As used in the statute, the word "utter" means to put or send into circulation. The word "publish" as used in the statute means the same thing, to put forth. To utter and publish is to declare or assert, directly or indirectly, by words or actions that an instrument is good with an intention or offer to pass it.

The essential elements of the offense of uttering a forged check, each of which the State must prove beyond a reasonable doubt are:

(1) That the check in question was falsely made or altered; and

(2) That the defendant passed or attempted to pass the check; and

(3) That the defendant knew the check to be falsely made or altered; and

(4) That the defendant passed or attempted to pass the check with specific intent to defraud; and*

(5) That the falsely made or altered check was apparently capable of effecting a fraud.

*[DEFINE INTENT WHERE NECESSARY]

State v. Sabo, 86 N.J. Super. 508 (App. Div. 1965); *State v. Berko*, 75 N.J. Super. 283 (App. Div. 1962); *State v. Redstrake*, 39 N.J.L. 365 (1877).

2.400 WORKING FOR LOTTERY

The defendant has been charged with a violation of a provision of our statutes pertaining to lotteries. That statute (*N.J.S.A.* 2A:121-3) provides in part:

> Any person who:
>
> (a) Knowingly engages as a messenger, clerk or copyist, or in any other capacity in or about an office or room in any building or place where lottery slips or copies of numbers or lists of drawings of a lottery, drawn or to be drawn *** are printed, kept or used in connection with the business of lottery or lottery policy, so-called *** is guilty of a [crime].

In order for you to find the defendant guilty, you must be satisfied that the State has proven, beyond a reasonable doubt, each of the following essential elements of the offense charged:

1. That the defendant intended to and did engage as a messenger, clerk or copyist, or in any other capacity for a lottery or lottery policy operation or business.

2. That the defendant knew that the business in which (he) (she) was involved, employed or engaged was a lottery or lottery policy operation or business.

3. That the office, room or place* where defendant was so knowingly involved, employed or engaged was in fact used in connection with a lottery or lottery policy operation or business.

The term "lottery" means a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing.

It is not necessary for the State, in order to sustain its burden, to prove the existence of an actual, particular lottery.

In order for the defendant to be convinced, you must be satisfied that the State has proven beyond a reasonable doubt that the defendant knew that the operation in which (he) (she) was involved, employed or engaged was the business of lottery or lottery policy and that defendant knew the nature of the business for which (he) (she) worked. In addition, the defendant must be shown to have known that the office, room, or place in or about which (he) (she) worked was used for the business of lottery or lottery policy.

Intent and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. It is not necessary that the State produce witnesses to testify that defendant said (he) (she) had a certain intent and knowledge when (he) (she) engaged in a particular act. Intent and knowledge may be proven and inferred from circumstantial evidence, including the nature of the exhibits in evidence, and by reference to defendant's conduct, words or acts, and from all of the surrounding circumstances.

If you find that the State has failed to sustain its burden of proving each and every one of the elements of the offense as I have stated them to be beyond a reasonable doubt, then the defendant must be acquitted.

The activity which constitutes the offense under this statute is one where a person knowingly engages as a messenger, clerk or copyist, or acts or performs any other activity in any other capacity in connection with a lottery or lottery policy operation or business. That is, the statute prohibits any activity or involvement which is in furtherance of any aspect of a lottery operation such as the writing of numbers, the pick-up and delivery of numbers, the sorting of slips with numbers, the keeping or making of records of numbers, assisting in the maintenance or operation of a lottery office or bank, the preparation of ribbon tallies on an adding machine, the counting or keeping of money in connection with a lottery, the receiving of calls for the placement of wagers or bets on horses, races, or numbers, or the receiving and recording of the results of a lottery.

> The word "place" in the statutory language is a general term and encompasses those factual situations in which the lottery business is conducted outside of an "*** office or room in any building***." *N.J.S.A.* 2A:121-3. This term "*** should be construed broadly in the light of the criminal activity [the lottery statute] was designed to control and in accordance with the clear and long-standing comprehensive policy against unauthor-

ized gambling." *State v. Soto,* 119 N.J. Super. 186, 188 (App. Div. 1972); see also *State v. Puryear,* 52 N.J. 81 (1968).

DEFINITION:

"Lottery"

State v. Rucker, 46 N.J. Super. 162 (App. Div. 1957) *certif. denied,* (1957)
State v. Brown, 67 N.J. Super. 450, 454-55 (App. Div. 1961)
State v. Gattling, 95 N.J. Super. 103 (App. Div. 1967) *certif. denied,* 50 N.J. 91 (1967)

3.100 ALIBI

The defendant as a part of his denial of guilt contends that he was not present at the time and place that the crime was alleged to have been committed, but was somewhere else and therefore could not possibly have committed or participated in the crime. Where the presence of the defendant at the scene of the crime is essential to show its commission by him, the burden of proving that presence beyond a reasonable doubt is upon the State. The defendant has neither the burden nor the duty to show that he was elsewhere at the time and so could not have committed the offense. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that of the defendant's presence at the scene of the crime and his participation in it.

If, after a consideration of all of the evidence, including the evidence of the defendant's whereabouts at the time of the offense, you have a reasonable doubt as to the presence of the defendant at the time and place of the crime, or as to whether he committed or participated in it, you must acquit the defendant. If, however, after considering all of the evidence, you are convinced beyond a reasonable doubt of the defendant's presence at the scene of the crime and have concluded that the State has proved each and every element of the offense charged in the indictment beyond a reasonable doubt, it is your duty to return a verdict of guilty as charged.

State v. Garvin, 44 N.J. 268, 272 *et seq.* (1965).
State v. Ravenell, 43 N.J. 171, 187 (1964).
State v. Driver, 38 N.J. 255, 290 (1962).
State v. Mucci, 25 N.J. 423, 431 (1957).

Note:

Use of the pejorative word "alibi" has been avoided. See *State v. Peetros,* 45 N.J. 540, 553 (1965).

If the facts warrant it, defendant is entitled to the charge even in the absence of a request. *State v. Searles,* 82 N.J. Super. 210 (App. Div. 1964).

3.130 DRUNKENNESS

(To be used when the State seeks a conviction for first degree murder.)

There has been testimony in this case that indicates the consumption of alcoholic beverages (the use of drugs) by the defendant prior to the time he is alleged to have committed the offense charged. This testimony was received in evidence as bearing on the question of whether or not the defendant in fact performed the mental operations necessary to raise a murder from second degree to first degree.

In considering this question you must discriminate between the condition of mind merely excited by intoxicating drink (or drugs) and yet capable of premeditating and deliberating, and the condition in which these mental faculties are overcome thereby rendering a person incapable of committing first degree murder.

If you find that at the time is alleged to have committed the offense charged, the defendant had in fact consumed alcoholic beverages (used drugs) and that as a result of that consumption (use) he was incapable of performing the mental operations that are required for first degree murder, then the defendant could not be found guilty of first degree murder. But the influence of liquor (drugs), no matter how pervasive that influence may be, is not a defense to the crime of murder in the second degree, and therefore, has no bearing on the guilt or innocence of the defendant for that crime.

See:

State v. Maik, 60 N.J. 203, 215 (1972)

> "*** the voluntary use of liquor or drugs has been held to be relevant in determining whether the defendant in fact performed the mental operations necessary to raise a murder from second degree to first degree. But the influence of liquor or drugs thus voluntarily taken, no matter how pervasive that influence may be, will not lead to an acquittal. It cannot reduce the crime below murder in the second degree, and this because of the demands of public security. *** This is equally true as to a felony homicide. Thus a defendant who in fact participated in the felony in which the homicide occurred, can seek nothing more favorable than a conviction of murder in the second degree by proof that he could not, on that account, form the intent to commit the felony.

Note:

Stated as a general proposition, voluntary intoxication is not a defense to criminal conduct. The Supreme Court in *State v. Maik, supra,* at p. 214, noted:

> "*** a defendant will not be relieved of criminal responsibility because he was under the influence of intoxicants or drugs voluntarily taken. This principle rests upon public policy, demanding that he who seeks the influ-

ence of liquor or narcotics should not be insulated from criminal liability because that influence impaired his judgment or his control. The required element of badness can be found in the intentional use of the stimulant or depressant. Moreover, to say that one who offended while under such influence was sick would suggest that his sickness disappeared when he sobered up and hence he should be released. Such a concept would hardly protect others from the prospect of repeated injury."

If there is testimony indicating the consumption of alcoholic beverages or use of drugs, the court should charge the following:

"Intoxication is no defense to the charge in this case. The jury is not to consider the evidence as to the use of intoxicating beverages (drugs) on the issue of the defendant's guilt or innocence."

Exception:

If the voluntary use of liquor or drugs results in a state of insanity, although temporary, there is authority for the proposition that intoxication will be a defense to the commission of the crime. See *State v. Maik*, 60 N.J. 203, 215 (1972).

"*** if the use of liquor or drugs though voluntary, results in a fixed state of insanity after the immediate influence of the intoxicant or drug has spent itself, insanity so caused will be a defense if it otherwise satisfied the *M'Naghten* test."

3.131 DRUNKENNESS

(To be used in other than murder cases)

There has been testimony that indicates the voluntary consumption of alcoholic beverages (the use of drugs) by the defendant prior to the time he is alleged to have committed the offense charged. This in no way should be construed as relieving the defendant of criminal responsibility for the crime charged.

This principle rests upon the sound public policy which holds all men accountable for acts voluntarily undertaken.

In this case, if you find that the alcohol was voluntarily taken, and the acts charged were actually committed by the defendant, you may infer that the defendant acted intentionally in committing those acts with which he is charged.

State v. Maik, 60 N.J. 203, 214-215 (1972)

Note:

It should be remembered that under certain circumstances voluntary drunkenness or the use of drugs can serve to reduce first degree murder to second degree murder under proper circumstances. See *State v. Maik*, *supra*.

3.180 INSANITY

Apart from his general denial of guilt the defendant maintains that he is not guilty of the crime charged by reason of insanity.

If you find that the State has failed to prove beyond a reasonable doubt any essential element of the offense, or the defendant's participation in the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity.

If you find that the State has proved beyond a reasonable doubt each essential element of the offense, and the defendant's participation in the offense, you must then consider the evidence as to the defendant's insanity.

First of all, the law entertains no prejudice against the defense of insanity. On the contrary, if the defense of insanity be sufficiently established, the law allows the defendant the benefit of it by an acquittal of all criminal responsibility. To consider this defense it is necessary that you understand the law's concept of criminal responsibility. Our society and our law recognize that some people may be bad and some people may be sick. A hostile act, that is, an illegal act, may in one case spring from wickedness and in another from some infirmity or sickness of the mind which the individual did not design. It is society's moral judgment, recognized by our law, that a forbidden act should not be punished criminally unless done with a knowledge of wrongdoing.

The law, however, from considerations of public policy, the welfare of society and the safety of human life, proceeds with the greatest of care, requiring the proof of such a defense of insanity be established consistent with a standard recognized by the law. Under our law all persons are assumed to be sane, and, therefore, responsible for their conduct until the contrary is established. Insanity is an affirmative defense and the burden of proving it by a preponderance of the evidence is on the defendant who asserts the defense. If there is no preponderance of evidence of insanity, the defense of insanity fails; and the defendant stands in the position of a sane man responsible on all the evidence in the case for his acts, whatever you may find them to have been.

Let me define insanity for you. The law adopts a standard of its own as a test of criminal responsibility, a standard not always in harmony with the views of psychiatrists. Many of the forms and degrees of mental disease which in the judgment of medical men would be regarded as insanity are rejected by the law in the administration of criminal justice. An accused is legally insane if at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong.

As you can see the law regards insanity as a disease of the mind. It may be temporary or permanent in its nature but the condition must be a mental disease.

An accused may have the most absurd and irrational notions on some subject; he may be unsound in mind, and be a fit subject for confinement and treatment in a hospital for the insane; but, if on an accusation like this, he had, at the time of the deed, the mental capacity to distinguish right from wrong and to understand the nature and quality of the act done by him, he is amenable to the criminal law. These principles must necessarily be the governing principles in the administration of the criminal law, or the most heinous crimes would be those which would not be punishable, for such crimes are almost always committed under the influence of an impulse which overcomes and sets at naught the restraint which usually prevents the commission of a crime.

Therefore, to establish insanity as a defense to the criminal charge in this case the defendant must prove, by a preponderance of the evidence, that he was laboring under such a defect of reason from a disease of the mind as not to know the nature and quality of the act, or if he did know it, that he did not know what he was doing was wrong.

The term "fair preponderance of the evidence" means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to your minds.

Keep in mind, however, that although the burden rests upon the defendant to establish the defense of insanity by a preponderance of the credible evidence, the burden of proving the defendant guilty of murder, or any degree thereof, beyond a reasonable doubt is always on the State, and that burden never shifts.

The question is not whether the accused, when he engaged in the deed, in fact actually thought or considered whether the act was right or wrong, but whether he had sufficient mind and understanding to have enabled him to comprehend that it was wrong if he had used his faculties for that purpose.

To determine whether the defendant has established by the preponderance of the evidence that, at the time of the commission of the alleged offense, he was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong, you should consider all of the relevant and material evidence having a bearing on his mental condition, including his conduct at the time of the alleged act, his conduct since, any mental history, any lay and medical testimony which you have heard from the witnesses who have testified

for the defense and for the State, and such other evidence by the testimony of witnesses or exhibits in this case, that may have a bearing upon and assist you in your determination of the issue of his mental condition.

There is a conflict of medical testimony, and you will have to determine where the truth lies. As is true with all issues of fact, the issue is for you to resolve after a careful consideration, comparison and evaluation of all the evidence which is material to, or relevant on, the issue of the defendant's sanity. The jury is the sole judge of the weight to be given to lay and psychiatric testimony. Generally speaking, no distinction is made between expert testimony and evidence of another character. The same tests that are applied in evaluating lay testimony must be used in judging the weight and sufficiency of expert testimony. You are the sole judges of the credibility of the medical witnesses, as well as all other witnesses, and the weight to be accorded to their testimony. You saw and you heard them. You had the opportunity to observe their attitude and demeanor on the witness stand. You had the opportunity to hear their means of obtaining knowledge of the facts, and to notice their power of discernment, their candor or evasion, if any, and their general and special professional and expert qualifications and background. These factors, the possible bias in favor of the side for whom he testifies, and any other matters which serve to illuminate his statements may all be considered by you in determining the credibility of this expert testimony and the weight to be accorded to it or any part of it.

The medical experts have testified that statements were made to them by the defendant which statements were part of the history they secured from the defendant. As I have previously instructed you, these statements should not be considered as substantive evidence against the defendant relating to his guilt or innocence of the alleged offense, but only as evidence tending to support the ultimate expert conclusion of the psychiatrist receiving the history on the test of insanity. The witness, in effect, is not saying that such history is true. He is merely testifying that the statements comprising the history were made to him. You may, in fact, determine from the evidence in the case that the facts set forth in such history are true, or are not true, and, in the light of such findings, decide what effect such determination has upon the weight to be given to the opinion of the expert which was based thereon.

However, if a medical expert has testified that his opinion hinges upon the truth of the matter asserted by the defendant at the time the defendant gave the history to the doctor, rather than simply that it was said, the jury is instructed that the probative value of the psychiatrist's opinion will depend upon whether there is, from all of the evidence in the case, a finding that those facts are true. If the doctor has testified that he accepts as true certain facts upon which he bases his opinion, the jury should understand

that, to some extent, your acceptance or rejection of the doctor's opinion will be based on your findings as to the truth of these facts.

You will shortly be advised of all the possible verdicts in this case. If you find that the State has failed to prove beyond a reasonable doubt each essential element of the offense, or the defendant's participation in the offense, you must find the defendant "not guilty," and your deliberations need go no further. If you find, however, that the State has proved all of the elements of the crime and the defendant's participation in the crime and also find that the defendant has established his defense of insanity by a preponderance of the credible and believable evidence, the form of your verdict must be "not guilty by reason of insanity." If your verdict is "not guilty by reason of insanity" your deliberations are not concluded, and you have to make an additional determination.

The law of our State to which I refer provides as follows:

> "If, upon the trial of any indictment, the defense of insanity is pleaded and it shall be given in evidence that the person charged therein was insane at the time of the commission of the offense charged in such indictment and such person shall be acquitted, the jury shall be required to find specially by their verdict whether or not such person was insane at the time of the commission of such offense and to declare whether or not such person was acquitted by them by reason of the insanity of such person at the time of the commission of such offense, and to find specially by their verdict also whether or not such insanity continues . . ." *N.J.S.A.* 2A:163-3.

Thus our law provides that if on the trial of any indictment a defendant is acquitted because he was insane at the time of the commission of the offense, the jury shall so declare and shall find "specially by their verdict also whether or not such insanity continues."

Therefore, if you find the defendant "not guilty by reason of insanity" you are to determine the question of whether or not the insanity continues to date. In making this determination I call to your attention an extremely important distinction you must make in evaluating the proofs. When considering the defendant's mental condition at the time of the alleged crime you were instructed that the defendant must prove that he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act, or if he did know it, that he did not know what he was doing was wrong. But when considering the question whether the insanity continues or whether he has presently been restored to reason the standard is different. Your determination is whether the defendant still suffers from the underlying condition which manifested or showed itself at the time of the alleged crime. It is the underlying or latent mental disease, and not merely the psychotic episode which emerged from it, which is relevant to this inquiry. An offender is not restored to reason unless he

is so freed of the underlying illness that his "reason" can be expected to prevail. A temporary abatement is not sufficient. The legal requirement for restoration to reason is not met so long as the underlying illness continues. Therefore, if you find that after the commission of the offense the defendant's condition lessens in severity or is free of symptoms of the mental disease but the underlying latent disease remains, then the defendant is not restored to reason within the meaning of the law, and you must find that his insanity continues.

If on the other hand you are satisfied that the defendant no longer suffers from the underlying disease, you are to find specially that the insanity no longer continues, thus indicating that the defendant has been restored to reason and is to be freed.

CITATIONS:

State v. Lynch, 130 N.J.L. 253 (E. & A. 1943); *State v. Cordasco,* 2 N.J. 189 (1949); *State v. Lucas,* 30 N.J. 37 (1959); *State v. Vigliano,* 43 N.J. 44 (1964); *State v. Sikora,* 44 N.J. 453 (1965); **State v. Maik,* 60 N.J. 203 (1972); *State v. Bell,* 102 N.J. Super. 70 (App. Div. 1968), *certif. den.* 52 N.J. 485, *cert. den.* 394 U.S. 911 (1969); ***State v. DiPaglia,* 64 N.J. 288 (1974); *State v. Carter,* 64 N.J. 382 (1974); *N.J.S.A.* 2A:163-3.

NOTE:

* The trial judge is cautioned that the law with respect to the standard used by the jury in determining whether the insanity continues is less than definitive. The majority of the committee feel that the controlling case is *Maik* and further feel that the subsequent *Carter* case does not change the commitment standard. The model charge reflects the standard enunciated in *Maik.*

** It should also be noted that this recommended instruction has eliminated the expression "presumption of sanity" as recommended by *State v. DiPaglia, supra.*

3.220 MISADVENTURE

The defendant as part of his denial of guilt contends that the killing alleged to have been committed was a misadventure, that is, accidental and unintentional.

A section of our statutes relative to homicide, *N.J.S.* 2A:113-6, provides in its pertinent parts as follows:

> "Any person who kills another by misadventure *** is guiltless and shall be totally acquitted and discharged."

Homicide by misadventure, which is excusable, is the accidental killing of another, where the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct.

To find that this homicide was excusable by reason of misadventure you must find the existence of all of the following facts or elements:

(1) The act resulting in death must be a lawful one.

(2) It must be done with such reasonable care and due regard for the lives and persons of others so as not to constitute criminal negligence.

(3) The killing must be accidental and not intentional, or without evil design or intention on the part of the slayer.

If you find that any one of these facts or elements do not exist the homicide was not by misadventure. If you find all of them do exist then the homicide was by misadventure and the defendant must be acquitted.

The defendant has neither the burden nor the duty to show that the homicide was by misadventure. The State has the burden of proving beyond a reasonable doubt that the killing was *not* by misadventure—i.e., that at least one of the facts or elements I listed do not exist.

I will now discuss in detail each of the three elements which make a homicide one by misadventure.

The first element which you must find to find misadventure is that the act resulting in the homicide must be lawful.

Even though the homicide is unintentional, it is not excusable where it is the result or incident of an unlawful act, such as pointing or presenting a gun, pistol or other firearm at another person in such a manner as to constitute an offense under the laws of this State, (a description of the appropriate law should be given at this point), or unlawfully striking another with an intent to hurt although not with an intent to kill.

The second element which you must find to find misadventure is that the act resulting in death was done without criminal negligence—that is, that the act was one that is not reckless and wanton or of such character as shows an utter disregard for the safety of others under circumstances likely to produce death.[1]

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1. *State v. Watson*, 77 N.J.L. 299, 301 (1909) (Failure to provide medical attendance to child)

States v. Pickles, 46 N.J. 542, 555 (1966) (Child neglect, utter indifference to the life of her son)

State v. Weiner, 41 N.J. 21, 26, 43-4 (1963) (Medical Malpractice)

State v. Harrison, 107 N.J.L. 213, 215 (1930) (Railroad cross guard—negligence evincing a reckless indifference to or disregard of human life)

The third element which you must find to find misadventure is simply that the killing must be accidental and not intentional, or without evil design or intention on the part of the slayer.

If you believe from the evidence in this case that the defendant was engaged in a lawful act without any intention of killing anyone, but unfortunately, by misadventure, and while acting with such reasonable care and due regard for the lives and persons of others as I've defined it for you, killed ....., the deceased, at the time and place charged in the indictment, the killing would be excusable homicide or misadventure and your verdict should be "NOT GUILTY."

No burden of proof or duty to show misadventure is cast upon the defendant. The burden of proof is upon the State to prove its case beyond a reasonable doubt. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that the killing was *not* the result of misadventure.

If, after a consideration of all of the evidence, including the evidence as to the issue of misadventure, you have a reasonable doubt as to the guilt of defendant because of the existence of misadventure or as to any element of any offense covered by the indictment which I've described, you must acquit the defendant.

On the other hand, if you are persuaded beyond a reasonable doubt that the killing was not the result of misadventure, then you shall consider the remaining issues of the case and determine, on the basis of my instructions to you, what verdict should be returned with respect to the various offenses covered by the indictment that I've described. If you find that the State has proved each and every element of a specific offense beyond a reasonable doubt, you should return a verdict of guilty of that offense. If as to any such offense you find the State has not proved any one element of that offense beyond a reasonable doubt, you should, of course, acquit defendant of that offense.*

NOTE:

Presently there are only two cases in New Jersey which even obliquely refer to the defense of 'misadventure.' *State v. Scott,* 104 N.J.L. 544 (E. & A. 1928); *State v. Reyes,* 50 N.J. 454, 458 (1967). The above charge represents the holdings of the vast majority of our sister states. More particularly, the charge is based on the following: 1 *Wharton, Criminal Law,* §212, pp. 463-4; *Pavillard v. Commonwealth of Pa.,* 421 Pa. 571, 220 A. 2d 807 (Pa. 1966); 2 *Hemphill Ill. Jury Instr.,* §3939, p. 221. See the recent case of *State v. Burt,* 107 N.J. Super. 390 (App. Div. 1970), which involves misadventure.

* This last paragraph assumes the short form murder indictment. If the indictment is solely for manslaughter, it should be modified.

3.280 SELF-DEFENSE

DEFINED

You are instructed that self-defense is the right of a person to defend himself (and those subject to his custody and control) against any unlawful force or seriously threatened unlawful force, actually pending or reasonably apprehended.[1]

This right arises only when one acts under a reasonable belief that he is in imminent danger of bodily harm, and the privilege is limited to the utilization of that amount of force which the defender reasonably believes necessary to overcome the risk of harm.[2]

Therefore, if the force used, in a claim of self-defense, was unnecessary in its intensity, such claim may fall.[3]

A person may kill in self-defense when the act of killing is necessary or reasonably appears to be necessary in order to preserve his own life or to protect himself from serious bodily harm. Whether the act of killing was necessary or reasonably appeared to be necessary is to be determined by you.[4] The ultimate question for your consideration is whether the defendant acted as a reasonable man under the circumstances at the time of the homicide.[5]

RETREAT

The issue of retreat arises only if the defendant resorted to a deadly force. Deadly force means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. It is not the nature of the force defended against which raises the issue of retreat, but rather the nature of the force which the accused employed in his defense. If he does not resort to a deadly force, one who is assailed may hold his ground whether the attack upon him be of a deadly or some lesser character.[6]

Specifically, one who is attacked may hold his ground and resist the attack, but he may not resort to the use of deadly force, that is, force which he knows will create a substantial risk of causing death or serious bodily harm, if an opportunity to retreat with complete safety is at hand and he is consciously aware of this fact.[7] In your inquiry as to whether a defendant who resorted to deadly force knew that an opportunity to retreat with complete safety was at hand, the total circumstances including the attendant excitement must be considered.[8]

LIMITATIONS ON THE DUTY TO RETREAT

No duty to retreat is imposed upon a person who, free from fault in bringing on a difficulty, is attacked at or in his dwelling house.

One who is assaulted in his dwelling house (and this would include a porch or other similar appurtenance) need not retreat but can stand his

ground and use reasonable force to repel the assault, even though this may result in the death of the assailant. Before applying this principle you will examine all of the evidence in the case to determine from the evidence, whether the defendant was attacked in his home (or on a porch or other similar appurtenance thereof), and if he was, whether he used reasonable force to repel the attack, that is, such force as he believed necessary to protect himself (and members of his family or household therein) in the circumstances as they reasonably appeared to him.[9]

However, if the assailant is not an intruder but is himself entitled to be on the premises, the obligation to retreat still exists.[10]

If you believe from the evidence before you that the defendant was in his dwelling house (or on a porch or other similar appurtenance thereto), that the decedent approached and drew (a weapon) and threatened to kill the defendant or appeared to want to seriously harm the defendant, and that the defendant reasonably believed he was in danger of losing his life or suffering serious bodily harm, the defendant was under no duty to retreat but might stand his ground and resist the attack even to the extent of employing deadly force.[11]

BURDEN OF PROOF—ON ISSUES OF SELF-DEFENSE AND RETREAT

The burden is upon the State to prove beyond a reasonable doubt that the defense of self-defense is untrue, and hence there must be an acquittal if there is a reasonable doubt as to whether the defendant did act in self-defense within the definition of that defense.[12]

In regard to the issue of retreat, if the State does prove beyond a reasonable doubt that a defendant who resorted to deadly force knew that he could have retreated with complete safety, then, in that situation, the use of deadly force is not justifiable.

The burden is upon the State to prove beyond a reasonable doubt that the defendant knew he could have retreated with complete safety, and if a reasonable doubt regarding this question should exist, then the issue of retreat must be resolved in favor of the defendant.[13]

DEFENSE OF ANOTHER

The issue of whether a party may rightfully intervene in defense of a third person is determined by the subjective intent of the intervener, subject only to the qualification that the jury objectively find that he reasonably arrived at the conclusion that the apparent victim was in peril, and that the force he used was necessary. In applying this test in order to determine whether the defendant rightfully intervened in the defense of a third person you are instructed that you are to disregard any finding that the person in whose behalf the defendant intervened was in fact the

aggressor or that no defensive measures on his behalf were actually necessary.[14]

SELF-DEFENSE NOT APPLICABLE

You are instructed that the defendant cannot avail himself of a self-defense claim if you find beyond a reasonable doubt that the necessity for such defense was of the defendant's own creation.[15]

NOTE:

Care should be taken to select only those of the above instructions that are pertinent to the case. The charge should be anchored to the factual setting. See, *State v. Abbott*, 36 N.J. 63, 74-75 (1961).

1. *State v. Brown*, 46 N.J. 96 (1965).
2. *State v. Fair*, 45 N.J. 77, 91 (1965).
3. *State v. Abbott*, 36 N.J. 63, 68 (1961).
4. *State v. Hippleworth*, 33 N.J. 300, 316 (1960).
5. *State v. Bess*, 53 N.J. 10, 16 (1968).
6. *State v. Abbott*, *supra* at p. 71.
7. *State v. Abbott*, *supra* at pp. 71-72;
   State v. Bonano, 59 N.J. 515, 518 (1971).
8. *State v. Abbott*, *supra* at p. 72.
9. *State v. Goldberg*, 12 N.J. Super. 293, 307 (App. Div. 1951);
   State v. Bonano, *supra* at p. 519;
   1 *Wharton, Criminal Law and Procedure* (Anderson ed. 1957) Sec. 239.
10. *State v. Pontery*, 19 N.J. 457, 475 (1955);
    State v. Abbott, *supra* at pp. 67-68.
11. *State v. Bonano*, *supra* at p. 521.
12. *State v. Abbott*, *supra* at pp. 72-73.
13. *State v. Abbott*, *supra* at p. 73.
14. *State v. Fair*, *supra* at pp. 92-93.
15. *State v. Agnesi*, 92 N.J.L. 53, 56-57 (Sup. Ct. 1918), affirmed 92 N.J.L. 638 (E. & A. 1918).

4.100 "ACCOMPLICE" TESTIMONY[1]

....., one of the defendants, has admitted his guilt and has testified on behalf of the State.

(Applies to co-defendant)

OR

....., a witness herein, has testified to facts which may show some involvement on his part in the criminal situation out of which the indictment and trial of the defendant arose.

(Applies to witness other than co-defendant)

The law requires that the testimony of such a witness be given careful scrutiny. In weighing his testimony, therefore, you may consider whether he has a special interest in the outcome of the case and whether his testimony was influenced by the hope or expectation of any favorable treatment or reward, or by any feelings of revenge or reprisal.

If you believe this witness to be credible and worthy of belief, you have a right to convict the defendant on his testimony alone, provided, of course, that upon a consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendant's guilt.

State v. Spruill, 16 N.J. 73, 78 *et seq.* (1954)
State v. Begyn, 34 N.J. 35, 54 *et seq.* (1961)

Note 1: Use of the word accomplice should be avoided.
State v. Sullivan, 43 N.J. 209, 222-223 (App. Div. 1963)
State v. Mangrella, 86 N.J. Super. 404, 408 (App. Div. 1965)

AIDING AND ABETTING[1]

4.101 ACTING IN CONCERT

Caveat: Do not confuse the concept of Aiding and Abetting with Conspiracy.

The State contends that the defendants were aiding and abetting each other in the commission of the crime charged.

A section of our criminal law, *N.J.S.* 2A:85-14, provides, in its pertinent parts as follows:

> "Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal."

This provision means that not only is the person who actually commits the criminal act responsible for it, but those who are aiding and abetting are also responsible.

The word "aid" as contained in the statute means to assist, support or supplement the efforts of another, and the word "abet" means to encourage, counsel, incite or instigate the commission of a crime. If you find that the defendant (defendants) willfully and knowingly aided or abetted another (others) in the commission of the offense, you must consider them principals. Aiding or abetting does not have to be proved by direct evidence of a formal plan to commit a crime, verbally agreed to by all that are charged. The proof may be circumstantial. Participation and agreement can be established from conduct as well as spoken words. However, one cannot be held as an aider or abettor unless you find as a fact that he shared

1. This charge may be used even though the defendant is named as a principal in the indictment. *State v. Fiorello*, 36 N.J. 80 (1961).

the same intent required to be proved against the person who actually committed the act.

[DEFINE INTENT]

Note: Presence at the Scene

Mere presence at or near the scene of a crime does not make one a participant in the crime, nor does the failure of a spectator to interfere make him a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he was present as an aider or abettor, but presence is not in itself conclusive evidence of the fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt there must exist a community of purpose and actual participation—an aiding and abetting—in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

Note:

In a murder case the charge on aiding and abetting must take into account the fact that while each participant may be guilty as a principal under the statute, he is not necessarily guilty in the same degree. If two or more parties enter into the commission of a crime with the same intent and purpose, each is guilty to the same degree; but each may participate in the criminal act with a different intent. Thus, each defendant may be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind. *State v. Fair,* 45 N.J. 77, 95 (1965).

State v. Madden, 61 N.J. 377 (1972); *State v. Mayberry,* 52 N.J. 413 (1968); *State v. Sullivan,* 43 N.J. 209, 236 (1964); *State v. Smith,* 32 N.J. 501, 521 (1960); *State v. Ellrich,* 10 N.J. 146 (1952); *State v. Fox,* 70 N.J.L. 353 (Sup. Ct. 1904).

4.102 ATTEMPT

OPENING COMMENT:

ALTERNATIVE (1)

(At this point, the jury should be instructed as to the definition of the specific crime charged in the indictment.)

In this case, the State charges the defendant attempted to commit the crime of .....

ALTERNATIVE (2)

(If the facts in the trial of a crime specifically charged raise an issue as to whether the crime was completed, the jury should be instructed to "turn to a consideration of whether an *attempt* to commit the crime has been established." An attempt is a lesser included offense. See *State v. O'Leary*, 31 N.J. Super. 411, 417 (App. Div. 1954), cf. *State v. Mathis*, 47 N.J. 455, 463 (1966).

In this case the State charges that the defendant committed the crime of ..... If you are not satisfied that the commission of the crime of ..... has been made out beyond a reasonable doubt then you should consider whether an attempt to commit the crime has been established.

An attempt to commit a crime is an overt act done with intent to commit the crime but falling short of its actual commission. In other words, there cannot be a conviction for attempt unless the following three elements exist:[1]

1. An intent to commit the crime.
2. Performance of some overt act towards the commission of the crime, and
3. Failure to consummate or complete the commission of the crime.

The first element is the intent to commit the crime itself. Intent is a condition of the mind which, of course, cannot be seen but can only be determined by inference from conduct, words or acts. Intent means a purpose to do something, a resolve to do a particular act or to accomplish a certain end or result. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in the act. Intention may be gathered from acts and conduct. That is, you may find that the defendant intended to commit the crime on the basis of all that was said and done at the particular time and place, and from all the surrounding circumstances.

The second element of the crime is the performance of some overt act towards the commission of the crime. Something more than mere preparation is essential. The act or acts must be such as would normally result in the usual and natural course of events in the commission of the crime itself had it not been for the intervention of outside causes.

The third element is the failure to consummate the commission of the intended crime. In other words, the accomplishment of the intended

criminal purpose must have been thwarted because of some outside reason.

It is no defense that a person could not have succeeded in reaching his intended criminal goal because of circumstances unknown to him.[2] However, there cannot be a conviction for an attempt to commit a crime unless the attempt, if completed, would have constituted a crime.[3]

Note:

At present, there appears to be no New Jersey cases dealing directly with the defense of abandonment and the crime of attempt. The following language in California cases may be helpful if abandonment is raised:

"There can be no doubt that mere intent by a single individual to commit a crime is not sufficient to amount to a criminal act. However, it is also unquestionable that after the intent has been coupled with an overt act toward the commission of the contemplated offense, the abandonment of the criminal purpose will not constitute a defense to a charge of attempting to commit a crime."

People v. Robinson, 180 Cal. App. 2d 745, 4 Cal. Rptr. 679, 682 (1960).

See also: *People v. Staples,* 6 Cal. App. 3d 61, 85 Cal. Rptr. 589, 594 (1970).

As to when abandonment is a defense, see the following:

"Abandonment of intent is only a defense if the attempt to commit the crime is freely and voluntarily abandoned *before* the act is put in the process of final execution."

People v. Claborn, 224 Cal. App. 2d 38, 36 Cal. Rptr. 132, 134 (1964).

State v. Weleck, 10 N.J. 355, 373 (1952); *State v. O'Leary,* 31 N.J. Super. 411, 417 (App. Div. 1954); *State v. Schwarzbach,* 84 N.J.L. 268 (E. & A. 1913); *State v. Mathis,* 47 N.J. 455 (1966); *State v. Meisch,* 86 N.J. Super. 279, 281 (App. Div. 1965), *certif. denied,* 44 N.J. 583 (1965); *State v. Blechman,* 135 N.J.L. 99, 102 (Sup. Ct. 1946).

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1. *State v. Swan,* 131 N.J.L. 67, 69 (E. & A. 1943).

2. *State v. Moretti,* 52 N.J. 182, 188-191 (1968), *cert. denied* 393 U.S. 952, 89 S. Ct. 376 (1968).

3. *State v. Weleck,* 10 N.J. 355, 372 (1952).

4.120 TESTIMONY OF CHARACTER WITNESS

Evidence of good character or reputation of an accused is always competent in the trial of a criminal action, and is entitled to be considered by you.

You, the jury, should consider all of the relevant testimony, including that relating to the defendant's good character or reputation, and if, on such consideration, there exists a reasonable doubt of his guilt, even though that doubt may arise merely from his previous good repute, he is entitled to an acquittal; but if, from the entire evidence in this case, including that relating to good character, you believe the defendant guilty beyond a reasonable doubt, he should be convicted and the evidence of good character should not alter the verdict.

State v. Randall, 95 N.J.L. 452 (E. & A. 1921); State v. Siciliano, 21 N.J. 249, 262 (1956).

4.121 CIRCUMSTANTIAL EVIDENCE

You, as jurors, should find your facts from the evidence adduced during the trial. Evidence may be either direct or circumstantial. Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Indeed, in many cases, circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence.

However, circumstantial evidence should be scrutinized and evaluated carefully. A conviction may be based on circumstantial evidence alone or in combination with direct evidence, provided, of course, that it convinces you of a defendant's guilt beyond a reasonable doubt.

Notes:

1. Insert the following if facts of the particular case warrant, and if an affirmative defense which can be proved by circumstantial evidence has been raised by the defendant:

> "Conversely, a defendant may be found not guilty by circumstantial evidence if the evidence raises in your mind a reasonable doubt as to the defendant's guilt."

2. In some cases, giving a simple illustration of circumstantial and direct evidence may be helpful in clarifying the different concepts for the jury. The following is one set of possible illustrations:

The problem is proving that it snowed during the night:

a) *Direct Evidence:* Testimony indicating that the witness observed snow falling during the night.

b) *Circumstantial Evidence:* Testimony indicating that there was no snow on the ground before the witness went to sleep, and that when he arose in the morning, it was not snowing, but the ground was snow-covered.

The former directly goes to prove the fact that the snow fell during the night; while the latter establishes facts from which the inference that it snowed during the night can be drawn.

3. For cases dealing with circumstantial evidence, see: *State v. Corby,* 28 N.J. 106 (1958); *State v. Fiorello,* 36 N.J. 80 (1961); *State v. Ray,* 43 N.J. 19, 30-31 (1964); *State v. Mills,* 51 N.J. 277, 287 (1968); *State v. Franklin,* 52 N.J. 386, 406 (1968); *State v. Mayberry,* 52 N.J. 413, 436-437 (1968); *State v. Graziani,* 60 N.J. Super. 1, 13-14 (App. Div. 1959), aff'd 31 N.J. 538 (1960), *cert. denied* 363 U.S. 830 (1960); *State v. Hubbs,* 70 N.J. Super. 322, 328-329 (App. Div. 1961); *State v. Papitsas,* 80 N.J. Super. 420, 424 (App. Div. 1963).

4.130 DEFENDANT'S ELECTION NOT TO TESTIFY

(To be used only when requested by defendant)

It is the constitutional right of a defendant to remain silent. The defendant in this case chose not to be a witness, and therefore elected to exercise that right.

I charge you that you are not to consider for any purpose or in any manner in arriving at your verdict, the fact that the defendant did not testify, nor should that fact enter into your deliberations or discussions in any manner or at any time.

A defendant is entitled to have a jury consider all of the evidence and he is entitled to the presumption of innocence even if he does not testify as a witness. Therefore, you may not draw any inferences of guilt from the fact that the defendant did not testify.

(NOTE: The defendant's individual consent to giving this charge should be obtained.

Ordinarily this can be discussed with the defendant and his counsel at the end of the State's case when the Court is in the process of explaining to the defendant his right to make an election as to whether or not he wishes to testify and the ramifications thereof.)

Griffin v. California, 380 U.S. 609 (1965).

Malloy v. Hogan, 378 U.S. 1 (1964).

U.S. v. Kelly, 349 F.2d 720, 769 (2 Cir. 1965), *cert. den.* 384 U.S. 947 (1966).

U.S. v. Garguillo, 310 F.2d 249, 252 (2 Cir. 1962).

N.J.S.A. 2A:84A-17(1).

State v. Angeleri, 51 N.J. 382 (1968).

State v. De Stasio, 49 N.J. 247, 252 (1967), *cert. den.* 389 U.S. 830 (1967).

State v. Gray, 101 N.J. Super. 490 (App. Div. 1968), *certif. den.* 52 N.J. 484 (1968).

State v. Smith, 100 N.J. Super. 420 (App. Div. 1968).

State v. McLaughlin, 93 N.J. Super. 435, 439 (App. Div. 1967).

4.150 FALSE IN ONE—FALSE IN ALL

If you believe that any witness or party wilfully or knowingly testified falsely to any material facts in the case, with intent to deceive you, you may give such weight to his or her testimony as you may deem it is entitled. You may believe some of it, or you may, in your discretion, disregard all of it.

State v. Ernst, 32 N.J. 567, 583 (1960); *State v. DiIllopito,* 22 N.J. 318, 324 (1956); *State v. Sturchio,* 127 N.J.L. 366, 369 (Sup. Ct. 1941); *State v. Samuels,* 92 N.J.L. 131, 133 (Sup. Ct. 1918).

The same charge applies to the civil side.

Lawnton v. Virginia Stevedoring Co., 50 N.J. Super. 564, 581 (App. Div. 1958); *Hargran v. Stocklors,* 127 N.J.L. 262, 266; *Coleman v. Public Service Co-ordinated Transport,* 120 N.J.L. 384, 387 (Sup. Ct. 1938).

For a full discussion of the use and application of the maxim see, Vol. 3A Wigmore on Evidence (1970) Sec. 1008 et. seq.

4.151 FIREARM—OPERABILITY

In determining what constitutes a revolver, you must look at *N.J.S.A.* 2A:151-1, which defines a firearm as follows:

> Firearm or firearms includes any pistol, revolver, rifle, shotgun, machine gun, automatic and semiautomatic rifle, or other firearm as the term is commonly used, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectile, ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances.
>
> It shall also include, without limitation, any firearm which is in the nature of any air gun or pistol, carbon dioxide or compressed air gun or pistol, or other weapon of a similar nature in which the propelling force is a spring elastic band, carbon dioxide, compressed or other gas, or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than 3/8 of an inch in diameter, with sufficient force to injure the person.

From the above definition of a firearm, it is obvious that the firearm be operable or fireable.

Where it is alleged that the "weapon" is in fact not a "weapon" or is so defective because of a mechanical defect that it cannot be fired

so that it does not come within the definition of a firearm, as I have defined that term to you, it is necessary that you first determine if in fact the alleged "weapon" is in fact of the character prohibited by law. To aid in this decision you should remember that a firearm is no less a firearm if it is rendered temporarily inoperable because of a missing and easily replaceable part or by need of some minor repair or adjustment.

A deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment, (if the parts, with reasonable preparation, may be easily assembled so as to be effective. What constitutes "reasonable preparation," within this rule, depends on the time required, changes to be made, parts to be inserted, and all other attendant factors.) A weapon designed for firing projectiles may be so defective or damaged that it loses its initial character as a firearm, but that character is not lost when a relatively slight repair, replacement, or adjustment will make it an effective weapon.

A weapon not ready for immediate use can still be "operable" if it can readily be made capable of being fired.

The scope of the statute incompasses those "inoperable" weapons which without undue effort or an inordinate amount of time can be made operable.

See *State v. Morgan*, 121 N.J. Super. 217 (App. Div. 1972)—operability.

When someone testifies that, based on his experience and his observation of just the handle of a gun, that the gun was "real," this testimony amounts to a rational inference tantamount to legal proof of the fact, that he gun was capable of being fired. *State v. Schultheis*, 113 N.J. Super. 11, 16 (App. Div. 1971).

4.152 FLIGHT

There has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defendant denies any flight (or, the defendant denies that the acts constituted flight). The question of whether the defendant fled after the commission of the crime is another question of fact for your determination. If you find that the defendant, fearing that an accusation would be made against him or that he would be arrested, took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of consciousness of guilt.

OR

(The following should be used where the defendant has not denied flight but has offered an explanation)

There has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defendant has offered the following explanation:

(Set forth facts testified to by defendant).

If, after a consideration of all the evidence, you find that the defendant, fearing that an accusation would be made against him on the charge involved in the indictment or an arrest by reason thereof, took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of a consciousness of guilt.

State v. Petrolia, 45 N.J. Super. 230 (App. Div. 1957).

State v. Centalonza, 18 N.J. Super. 154, 161 (App. Div. 1952).

Note: Mere departure from the scene is distinguished from flight.

See: *State v. Sullivan,* 43 N.J. 209 (1964).

State v. Jones, 94 N.J. Super. 137 (App. Div. 1967).

Note: *State v. Wilson,* 57 N.J. 49 (1970) states:

"You the jury must first find that there was a "departure" from the scene and then you must also find a motive which would turn the departure into flight." This charge may be necessary to include contingent upon the right factual context.

4.153 FRESH COMPLAINT

Generally, crimes involving sex are not perpetrated in public view. They frequently happen in seclusion and in the shadows; and by reason of these circumstances usually the only witnesses are the accuser and the accused.

Consequently, the court is often faced with directly conflicting testimony and so has adopted the rule of permitting testimony of a "fresh complaint" to bolster the credibility of the abused female.

The reason for allowing such testimony is based on the nature of the indignity. A female undergoing such an act would be expected to complain to a parent or other person of authority to whom she would probably turn to vent and express her feelings because of the insult* to her dignity.

Such evidence, though hearsay, is permitted *but only for the purpose of supporting the credibility of the victim's complaint and not a corroboration of the alleged offense.*

You may consider the circumstances and time when the complaint was made, i.e., whether or not it was made within a reasonable time,

the demeanor and emotional condition of the victim while making the complaint, as well as her physical appearance, marks of violence, and other like indications, if any, that are confirmatory of her testimony.** All of these factors go to the question of credibility to be accorded to alleged victim's complaint.

SEE:

4 Wigmore, § 1134 et seq. (3rd Ed. 1940); *State v. Balles,* 47 N.J. 331, 338 (1966) (Appeal dismissed).

If the complaint is part of the res gestae, the details of the complaint are admissible. Balles holds: "where the doctrine's requirement is met; here the details are admissible and impeachment is not material". *State v. Balles, supra,* at page 338. 4 Wigmore, § 1139.

State v. Hintenberger, 41 N.J. Super. 597 (App. Div. 1956) (*cert den.*); *State v. Gambutti,* 36 N.J. Super. 219 (App. Div. 1955); *State v. Saccone,* 7 N.J. Super. 263 (App. Div. 1950).

* "But the exception has come to us as a matter of ancient tradition and practice. Wigmore says: "The tradition went back by a continuous thread to the primitive rule of hue and cry. (§ 1135, p. 219). See State v. Gambutti, 36 N.J. Super. 219 (App. Div. 1955).

** See State v. Saccone, 7 N.J. Super. 263, 266.

4.180 IDENTIFICATION

NOTE:

Whether or not a separate charge on the subject of identification is necessary depends upon the situation presented in an individual case. The Committee recognizes that in a simple case the issue may be submitted to the jury wholly within the framework of a charge on credibility generally. However, where the issues presented are multi-faceted and somewhat complex consideration should be given to an in-depth charge. The Committee is of the view that a model charge fit for universal application is impossible of formulation. The following suggested charge is intended as a tool and should not be delivered without some forethought.

The defendant as part of his general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense. Where the identity of the person who committed the crime is in issue the burden of proving that identity is upon the State. The State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each

and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.

In order to meet its burden with respect to the identification of the culprit the State has presented the testimony of the witness ..... You will recall that this witness identified the defendant in court as the person who committed the offense. According to the witness, his identification of the defendant in court is based upon the observations and perceptions which he made of the defendant on the scene at the time the offense was being committed. It is your function as jurors to determine what weight, if any, to give to this testimony. You must decide whether it is sufficient reliable evidence upon which to conclude that this defendant is the person who committed the offense charged.

In going about your task you should consider the testimony of the witness in the light of the customary criteria concerning credibility as I have explained them to you. It is particularly appropriate that you consider the capacity or the ability of the witness to make observations or perceptions as you gauge it to be and that you consider the opportunity which the witness had at the time and under all of the attendant circumstances for seeing that which he says he saw or that which he says he perceived with regard to his identification of the person who committed the alleged offense.

(Here consider briefly reviewing the conflicting contentions of the State and the defendants relating to the above)

Unless the in-court identification results from the observations or perceptions of the defendant by the witness during the commission of the crime rather than being the product of an impression gained at the out-of-court identification procedure it should be afforded no weight. Thus the ultimate issue of the trustworthiness of an in-court identification is for you to decide.

If, after a consideration of all of the evidence, you have a reasonable doubt as to the identity of the defendant as the person present at the time and place of the crime you must acquit him. If, however, after a consideration of all of the evidence you are convinced beyond a reasonable doubt of his presence at the scene you will then consider whether the State has proved each and every element of the offsense charged beyond a reasonable doubt.

See *Trial Problems In Administration Of "Wade" Rules On Identification* by Hon. Milton B. Conford, July 1970, distributed by the Administrative Director. Note particularly paragraph (8) on page 3.

See Supplement thereto dated October 1972.

4.181 INTENT

Intent, you must realize, is a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts.

Intent means a purpose to accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing.

However, it is not necessary, members of the jury, that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

State v. Monahan, 15 N.J. 34, 49, 50 (1954).

Motive is to be distinguished from intent.

See: *Mass. v. Forbes,* 24 N.J. 341 (1957).

4.250 POLYGRAPH

In New Jersey, the general rule is that regardless of the results, neither party may offer evidence of a polygraph or lie-detector test. The results obtained are not considered as conclusive. Both parties in this case have agreed to the administering of a polygraph test and to the submission into evidence of the results thereof.

I instruct you that the examiner's testimony does not tend to prove or disprove any element of the crime with which this defendant is charged but at most tends only to indicate that at the time of the examination, the defendant (was not telling the truth) [WHERE OFFERED BY STATE] (was telling the truth) [WHERE OFFERED BY DEFENSE]. Again, I remined you that this test is not conclusive. Further, it is for you to determine what corroborative weight and effect such testimony should be given.

State v. McDavitt, 62 N.J. 36, 47 (1972); *State v. Valdez,* 91 Ariz. 274, 371 P.2d 894, 901 (Sup. Ct. 1962).

4.251 POSSESSION

ACTUAL POSSESSION

A person is in actual possession of a particular article or thing when he knows what it is, that is, he has knowledge of its character and knowingly has it on his person at a given time.

CONSTRUCTIVE POSSESSION

The law recognizes that possession may be constructive instead of actual. A person who, with knowledge of its character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

Constructive possession means possession which the property, though not physically on one's person, is so located that he is aware of the presence of the property and is able to exercise intentional control over it.

A person who, although not in actual possession, with knowledge of its character, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

JOINT POSSESSION

The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint, that is, if they knowingly share control over the article.

NOTE:

There are numerous criminal statutes which include "possession" as an element. The foregoing is suggested as a basis for the judge to formulate an instruction involving a particular statute. The following are some of the criminal statutes which contain "possession" as an element of the crime.

2A:94-3	Possessing Burglar's Tools
2A:109-2	Possessing Counterfeit Notes, etc.
2A:109-3	Possessing Plate for Counterfeiting, etc.
2A:109-7	Possessing Counterfeit Coins
2A:115-2	Uttering Obscene Pictures; see also 2A:115-3.2
2A:119A-4	Control over Records of Prohibited Loan
2A:121-3	Possessing Lottery Paraphernalia
2A:123-2	Hydrocyanic Acid Gas—Possession Without Permit
2A:127-3	Possessing Motor Vehicle with Trade-mark or Serial Numbers Altered
2A:139-1	Receiving Stolen Property
2A:144-1	Possession of Stink Bombs
2A:151-2	Pawnbrokers—Weapons
2A:151-5	Additional Sentence for Armed Criminals
2A:151-14	Silencers Forbidden
2A:151-41	Carrying Weapon Withou Permit
2A:151-41.1	Possession on School Premises
2A:151-56	Unlawful Use of Dangerous Weapons

2A:151-58	Possession of Bombs; see also 2A:151-59
2A:151-60	Possession of Explosives
2A:151-62	Switchblades, etc.
24:21-20	Unlawful Possession of Narcotics

4.270 REASONABLE DOUBT

Reasonable doubt is not a mere possible or imaginary doubt, because everything relating to human affairs or depending upon oral evidence is open to some possible or imaginary doubt.

A reasonable doubt is an honest and reasonable uncertainty as to the guilt of the defendant existing in your minds after you have given a full and impartial consideration to all of the evidence. It may arise from the evidence itself or from a lack of evidence.

Source:

Committee on Standard Jury Instructions, State of Ohio, 3 *O.J.I. Criminal* 3.50

Illinois Jury Instructions, Criminal, Sec. 4561 *et seq.*

Holland v. United States, 348 U.S. 121, 140 (1954)

4.280 STATEMENT OF DEFENDANT

There is for your consideration in this case a certain written (or oral) statement alleged to have been made by the defendant.

It is your function to determine whether or not such statement was actually made by the defendant and, if made, whether such statement or any portion thereof is credible.

(HERE DISCUSS THE STATEMENT)

In considering whether or not the statement allegedly made by the defendant is credible, you should take into consideration the circumstances and facts surrounding the giving of the statement, as well as all other evidence in the case.

(HERE DISCUSS ANY PROOF ADDUCED BEFORE THE JURY WHICH FORMERLY WENT TO DEFENDANT'S MIRANDA RIGHTS OR THE STATEMENT'S VOLUNTARINESS)

If, after consideration of all of these factors you determine that the statement was not actually made (given) or that the defendant's alleged statement is not credible then you must disregard the statement completely.

If you find that the statement was made (given) and that part or all of the statement is credible, you may give such weight to that portion of the statement you have found to be truthful and credible as you deem it should be accorded in your deliberations.

State v. Smith, 32 N.J. 501 (1960), *cert. denied* 364 U.S. 936 (1961); *State v. Hampton*, 61 N.J. 250 (1972).

NOTES:

(1) *State v. Hampton*, 61 N.J. 250 (1972) holds that we return to the orthodox rule with respect to statements against the penal interest of a defendant, thus requiring the judge to decide the competency in the sense of satisfaction of *Miranda* requirements and the Fifth Amendment demand for voluntariness of the confession, while the jury after evaluating all the factual proof will decide its credibility if the statement is admitted into evidence by the judge.

(2) It is to be noted that Rule 8(3) of the Rules of Evidence still requires the judge's function to be handled out of the presence of the jury.

(3) The judge shall not inform the jury that he has made a preliminary finding of admissibility–Rule 8(3) of Evidence.

4.281 STATEMENT BY DEFENDANT (WHERE ADMISSIBLE FOR CREDIBILITY PURPOSES ONLY)

We have in this case an oral/written statement (MARKED EXHIBIT . . . .) alleged to have been made by the defendant.

This statement has been introduced by the prosecution not as evidence of defendant's guilt of the crime charged, but to affect his credibility on condition that the jury first determine that the statement was made.

(HERE DISCUSS THE STATEMENT)

So you can see ladies and gentlemen of the jury, prior to your considering this statement for the limited purposes of affecting the defendant's credibility as a witness, you must determine whether the statement was actually given. In considering whether or not the statement was made by the defendant you may take into consideration the circumstances and facts surrounding the giving of the statement.

(HERE DISCUSS FACTS AND CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT)

If you find that the statement was made it may be considered solely to determine the defendant's credibility if you believe it does, in fact, affect such credibility and not as evidence of his guilt. In this regard in all fairness you will want to consider all of the circumstances under which

of satisfaction of *Miranda* requirements and the Fifth Amendment demand for voluntariness of the confession, while the jury after evaluating all the factual proof will decide its credibility if the statement is admitted into evidence by the judge.

(4) It is to be noted that Rule 8(3) of the Rules of Evidence still requires the judge's function to be handled out of the presence of the jury.

(5) The judge shall not inform the jury that he has made a preliminary finding of admissibility—Rule 8(3) of Evidence.

4.281 STATEMENT BY DEFENDANT (WHERE ADMISSIBLE FOR CREDIBILITY PURPOSES ONLY)

(Approved 9/1/76)

We have in this case an oral/written statement (MARKED EXHIBIT . . .) alleged to have been made by the defendant.

This statement has been introduced by the prosecution not as evidence of defendant's guilt of the crime charged, but to affect his credibility on condition that the jury first determine that the statement was made.

(HERE DISCUSS THE STATEMENT)

So you can see ladies and gentlemen of the jury, prior to your considering this statement for the limited purposes of affecting the defendant's credibility as a witness, you must determine whether the statement was actually given. In considering whether or not the statement was made by the defendant you may take into consideration the circumstances and facts surrounding the giving of the statement.

(HERE DISCUSS FACTS AND CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT)

If you find that the statement was made it may be considered solely to determine the defendant's credibility if you believe it does, in fact, affect such credibility and not as evidence of his guilt. In this regard in all fairness you will want to consider all of the circumstances under which the claimed prior inconsistent statement occurred; the extent and importance or lack of importance of the inconsistency on the overall testimony of the defendant as bearing on his/her credibility, including such factors as where and when the prior statement occurred and the reason, if any, therefore.

If you find that the statement was not made then you must not consider it for any purpose. If you find that only part of the statement was made then you may only consider that part as it may affect defendant's credibility.

The extent to which defendant's credibility is affected by such inconsistencies, if any, is for you to determine. Consider the materiality and relationship of such contradictions to the entire testimony and all the evidence in the case.

Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971); *State v. Kimbrough*, 109 N.J. Super. 57 (App. Div. 1970); *State v. Hampton*, 61 N.J. 250 (1972)

State v. Miller, 67 N.J. 229 (1975)

Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975)

NOTES:

(1) *State v. Miller*, 67 N.J. 229, 233 (1975) interpreting Harris, holds that:

"An in-custody statement taken from an accused by the police without first complying with the *Miranda* rule is not admissible in evidence as part of the State's main case. However, if it otherwise satisfies standards of admissibility, it may be used to impeach the defendant's credibility as a witness should the defendant take the witness stand and give testimony which is at variance with what was said in the statement to the police. But the jury should be instructed as to the limited consideration it may give to the statement and its contents."

(2) See also *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L.Ed.2d 570 (1975).

4.320 WITNESS IMMUNITY

(Approved 9/1/76)

....., a witness for the State, has testified that he has been granted immunity in return for his testimony.

What do we mean by immunity? Generally in any criminal proceeding before a court or Grand Jury a person may refuse to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby if there is a basis for his refusal. In New Jersey we have a law whereby under certain conditions the court may order the witness to testify, and the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. However, none of his testimony or any information derived directly or indirectly from his testimony which was compelled by the court order may be used against the witness in any criminal case, except, as with any other witness, a prosecution for perjury or for giving a false statement.

The fact that the witness has been granted immunity with respect to any testimony which might incriminate him is a factor which you should consider in evaluating his testimony and in determining the weight you will give to the testimony. The testimony of such a witness should be given careful scrutiny. In weighing his testimony, therefore, you may consider whether in order to obtain the immunity, for himself, he is telling a lie to you or whether, having been granted immunity, he is telling the truth.

If you believe this witness to be credible and worthy of belief, you have a right to accept his testimony in the same manner as any other witness' testimony.

It is important that you understand, however, that the immunity granted the witness is not immunity from prosecution, but simply immunity from the use of his testimony against him in a criminal proceeding. In other words, what he is saying in court or any information derived directly or indirectly from what he says in court may not be used against him in a criminal proceeding by the State, but the State is not precluded from prosecuting him for a crime on other evidence that is not derived directly or indirectly from his evidence given here in court.

N.J.S.A. 2A:81-17.3 as amended and eff. May 7, 1973. P.L. 1973, c.112.

NOTE:

Young v. Paterson, 132 N.J. Super. 170 (App. Div. 1975) holds that a Grand Jury witness, granted immunity pursuant to *N.J.S.A.* 2A:81-17.3, is not immunized in connection with a civil departmental hearing pertaining to or involving the offense which was the subject matter of his grand jury testimony.

In re Addonizio, 53 N.J. 107 (1968)

State v. Sotteriou, 123 N.J. Super. 434 (App. Div. 1973)

4.322 TAMPERING WITH OR DAMAGING MOTOR VEHICLES N.J.S.A. 2A:127-5

(Approved 9/1/76)

The indictment also charges defendant(s) with willfully and maliciously damaging a motor vehicle.

The statute or law involved here is *N.J.S.A.* 2A:127-5, which in pertinent part reads as follows: "Any person who willfully and maliciously tampers with, breaks, cuts, damages or makes improper or faulty adjustment to the motor, mechanism, brakes, tires, or any part or parts of any motor vehicle with the intent to cause the operation of such motor vehicle

to be unsafe and dangerous to the lives of others, is guilty of a . . . [crime]."

In order to convict defendant(s) of a violation of this criminal statute, the State must prove each of the following elements beyond a reasonable doubt:

1) that the defendant(s) in this case *willfully* and *maliciously* tampered with, broke, etc. (use appropriate alleged violation of the statute) of a motor vehicle; and,

2) that the defendant(s) in this case by his (their) act or acts intended to cause the operation of such motor vehicle to be unsafe and dangerous to the lives of others.

N.B.—I do not feel it necessary for me to describe what a motor vehicle or automobile is. It is conceded in this case that the object in question is in fact a motor vehicle as referred to in the statute which I have just cited.

In reference to the meaning of the words "willfully" and "maliciously" as used in the first element to be proved by the State beyond a reasonable doubt; "willfully" means voluntarily or knowingly with evil intent or without reasonable grounds for believing the act to be lawful, while "maliciously" means wrongfully, intentionally and without just cause or excuse.

In reference to the meaning of the word intent or intentionally as used in the first and second elements to be likewise proved by the State beyond a reasonable doubt;

Whereas here an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

In addition, the State of course must prove beyond a reasonable doubt that defendant(s) by his (their) acts intended (within the definition of intent as I have previously explained it to you) to cause the operation of the motor vehicle in question to be unsafe and dangerous to the lives of others.

See *Schlosser, Criminal Laws of N.J.*, Vol. 2, section 70.23.

Richard Nayduch, Jeffrey Alas and three others stopped at defendant's home in order that Nayduch repay the defendant a $15 debt. Nayruch went inside while the others waited outside. After waiting outside for twenty minutes Alas rang the bell and was about to enter the house when Gallicchio told Nayduch and the others to stay away so Gallicchio would avoid trouble with his wife. Nayduch told Alas, but Alas entered the apartment anyway. An argument and fight ensued in which Alas was injured.

Gallicchio was arrested for assault and battery and told police "what would you do if somebody were fooling around with your wife."

Alas died from hemorrhaging the next day. The charge against Gallicchio was changed to murder.

Nayduch testified at the trial that Alas punched Gallicchio and Nayduch joined in, on the side of Alas. Gallicchio pushed Alas to the floor and was defending himself against Nayduch. At this point Nayduch saw Alas going toward defendant with a knife.

The police had a prior contradictory statement of Nayduch saying that Gallicchio had the knife and that he saw Gallicchio's hand with a knife in it going toward Alas' body. The trial court accepted the state's claim of surprise and permitted the prior statement to neutralize the trial testimony which was adverse to the proponent's case.

The court instructed the jury four times as to the effect of neutralization.

4.320 WITNESS IMMUNITY

....., a witness for the State, has testified that he has been granted immunity in return for his testimony.

What do we mean by immunity? Generally in any criminal proceeding before a court or Grand Jury a person may refuse to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby if there is a basis for his refusal. In New Jersey we have a law whereby under certain conditions the court may order the witness to testify, and the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. However, none of his testimony or any information derived directly or indirectly from his testimony which was compelled by the court order may be used against the witness in any criminal case, except, as with any other witness, a prosecution for perjury or for giving a false statement.

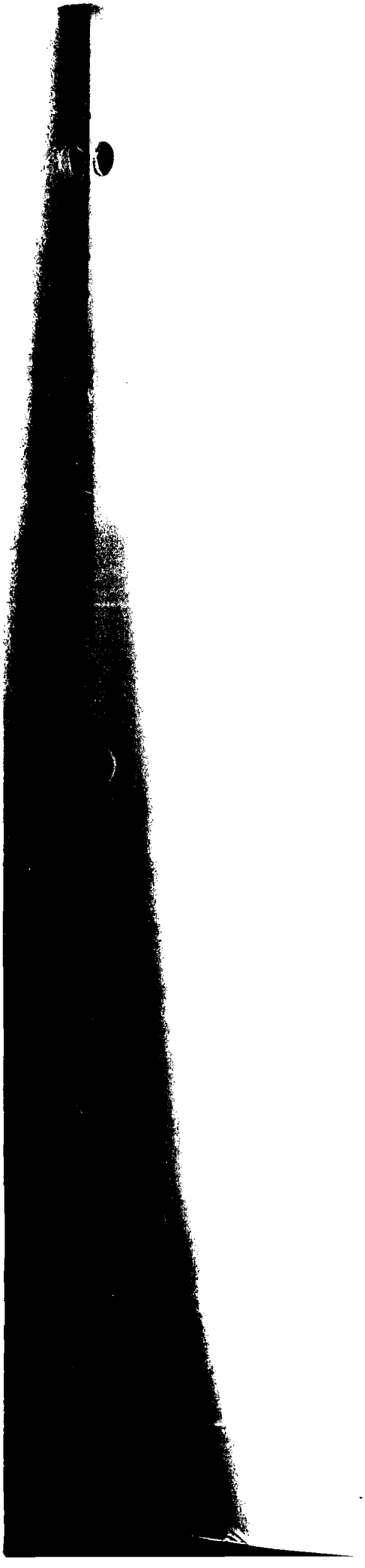
The fact that the witness has been granted immunity with respect to any testimony which might incriminate him is a factor which you should consider in evaluating his testimony and in determining the weight you

will give to the testimony. The testimony of such a witness should be given careful scrutiny. In weighing his testimony, therefore, you may consider whether in order to obtain the immunity for himself, he is telling a lie to you or whether, having been granted immunity, he is telling the truth.

If you believe this witness to be credible and worthy of belief, you have a right to accept his testimony in the same manner as any other witness' testimony.

It is important that you understand, however, that the immunity granted the witness is not immunity from prosecution, but simply immunity from the use of his testimony against him in a criminal proceeding. In other words, what he is saying in court or any information derived directly or indirectly from what he says in court may not be used against him in a criminal proceeding by the State, but the State is not precluded from prosecuting him for a crime on other evidence that is not derived directly or indirectly from his evidence given here in court.

N.J.S.A. 2A:81-17.3 as amended and eff. May 7, 1973. P.L. 1973, c.112.



MODEL JURY CHARGES,

CIVIL

FOREWORD

This compilation of Model Jury Charges (Civil) is current as of August 15, 1973. Included are those charges distributed June 1, 1969, as well as revisions and new changes approved from 1969 to date.

Any suggestions or comments with respect to these charges should be directed to the Administrative Office of the Courts.

PRELIMINARY AND CAUTIONARY INSTRUCTIONS

1.10 IN GENERAL

Members of the jury, you have been picked to serve as a jury for the trial of this case. As such, you will be the sole judges of the facts. Your determination as to the facts is to be based solely upon the evidence admitted during the course of this trial. This will consist, generally, of the testimony of the witnesses on the stand, any depositions or answers to interrogatories which may be read to you, any exhibits which are received into evidence and which you will have with you when you go into the jury room. During the trial, I will rule on the admission or rejection of evidence and will pass on any questions of law that may arise. At the close of the entire case, I will charge you as to the law which applies. In arriving at your ultimate determination, you are to apply the law as charged to you, to the facts as you find them to be.

IN THE EVENT THAT A JURY OF 14 IS DRAWN, THE FOLLOWING MAY BE ADDED.

You will note that a jury of 14 has been drawn in this case. At the conclusion of all of the evidence and the charge of the court, there will be a new drawing in which 12 jurors will be selected from the 14 present. These 12 will then deliberate and return a verdict. Thus jurors numbers 13 and 14 in the box may be among the 12 jurors who are finally selected, and all jurors should pay equal attention to the evidence as it is presented, and to the court's rulings which are applicable to the case.

N.B. The above may be enlarged or modified to cover special situations. It is not intended to substitute for a preliminary statement by the judge on *voir dire*. It does not replace the orientation instructions which should be given at the beginning of the term of service of each jury.

1.11 JURORS NOT TO VISIT SCENE

As I have previously advised you, your decision in this case must be based solely upon the evidence admitted during the course of the trial. You are, therefore, not to visit the scene of the accident which gave rise to this case. As you can well understand, the physical surroundings, highway markings or other features, may have been changed during the time which has intervened between the happening of the accident and the present.

N.B. The above, while worded to cover an automobile negligence case, may be adapted to cover other situations.

Cases:

Wimberly v. Paterson, 75 N.J. Super. 584, 607 (App. Div. 1962), certification denied, 38 N.J. 340 (1962); *Capozzi v. Butterivei*, 2 N.J. Super.

593 (Law Div. 1949); *DeGray v. N. Y. & N. J. Tel. Co.*, 68 N.J.L. 454 (Sup. Ct. 1902); *Deacon v. Shreve*, 22 N.J.L. 176 (Sup. Ct. 1849).

1.12 JURORS TO PAY ATTENTION BUT NOT TO TAKE NOTES

During the trial of this case it will be your duty to pay careful attention to all the testimony. If you are unable to hear any witness, I would ask that you so indicate to me in order that I may instruct the witness to speak louder or more clearly.

Individual jurors are not permitted to take notes on the evidence unless otherwise directed by the court. The principal reasons for this rule are that to do so is distracting, that few jurors would take complete notes—and fragmentary notes would be apt to result in attaching undue weight during the jury's deliberations to certain facts or circumstances, to the disregard or slighting of other facts or circumstances of equal significance. Experience has shown that it is better to depend upon the combined recollections of all of the jurors than upon notes taken by one or more of them.

N.B. While there is no New Jersey case which so states in so many words, trial judges generally prohibit the taking of notes by individual jurors. It is suggested that the cautionary instructions regarding the taking of notes be given only when deemed necessary.

Cases:

See *Commonwealth v. Fontaine*, 183 Pa. Super. 45, 128 A.2d 131 (Sup. Ct. 1956); *Thornton v. Weaber*, 380 Pa. 590, 112 A.2d 344 (Sup. Ct. 1955); *United States v. Davis*, 103 F. 457 (W.D. Tenn. 1900) affirmed 107 F. 753 (6 Cir. 1901); but see: *United States v. Carlisi*, 32 F. Supp. 479 (E.D.N.Y. 1940); *Chicago & N.W. Ry. Co. v. Kelly*, 84 F.2d 569 (8 Cir. 1936); *Harris v. United States*, 261 F.2d 792 (9 Cir. 1958); *Toles v. United States*, 308 F.2d 590 (9 Cir. 1962); *United States v. Campbell*, 138 F. Supp. 344 (N.D. Iowa 1956); *Commonwealth v. Tucker*, 189 Mass. 457, 76 N.E. 127 (Sup. Ct. 1905); *Thomas v. State*, 90 Ga. 437, 16 S.E. 94 (Sup. Ct. 1892); *Denson v. Stanley*, 17 Ala. App. 198, 84 So. 770 (Ct. of App. 1919), reversed on other grounds 203 Ala. 408, 84 So. 770 (Ct. of App. 1918); reversed on other grounds, 203 Ala. 408, 84 So. 773 (Sup. Ct. 1919).

1.13 JURORS NOT TO DISCUSS CASE OR OTHERWISE JEOPARDIZE VERDICT

As you can well surmise, this case is important to both sides, and each party to the suit is entitled to your full and fair consideration. You are not to fraternize or associate in any way with the parties, their attorneys, agents or witnesses. You are likewise not to discuss the case with anyone, or permit anyone to discuss the case with you, whether within or without the courthouse, during the course of the trial. In the event that anyone attempts

to discuss the case with you or to influence your decision, you will report it to me promptly. You are not even to discuss the case among yourselves until you retire to the jury room to deliberate at the close of the entire case and you are not to form or express any opinion on the case until you have heard all of the testimony and have had the benefit of the court's instructions as to the law which applies to the case.

Cases:

Tomlin adsm. Den, ex. dem. Cox, 19 N.J.L. 76 (Sup. Ct. 1842); *Jones v. Vail*, 30 N.J.L. 135 (Sup. Ct. 1862); *Douglass v. Kabalan*, 22 N.J. Misc. 200, 203, 36 A.2d 140 (Sup. Ct. 1944).

1.14 INSTRUCTIONS TO JURY IN CASES IN WHICH THE DIRECTOR OF MOTOR VEHICLES IS IMPLEADED AS A DEFENDANT IN HIT AND RUN CASES

In this case June D. Strelecki, the Director of the Division of Motor Vehicles of the State of New Jersey is designated as the defendant. In that capacity she is a nominal defendant only. She was not involved personally in any way in the events which gave rise to this lawsuit. She is named as the defendant because the plaintiff charges that the accident in which he sustained injuries was caused by the negligence of an unknown and unidentified driver, who, therefore, cannot be named as the defendant.

In such a situation the law provides that the Director of the Division of Motor Vehicles be named as the defendant in place of the (alleged) unknown and unidentified driver as a means by which plaintiff's claim may be litigated. This case must therefore be tried as any other negligence case must be tried and just as though the (alleged) unknown and unidentified driver was the defendant.

Note:

In the *Dalton v. Gesser*, 72 N.J. Super. 100 (App. Div. 1962) reference in the opening to the jury by counsel that he was appearing for the Unsatisfied Claim and Judgment Fund of the State of New Jersey was held prejudicial error because he thereby indirectly informed the jury that the defendant was not insured and that any verdict against such defendant was to be paid out of a public fund.

The above charge was formulated to cover hit and run cases in which the Director is impleaded as the defendant pursuant to the statutory right to do so (*N.J.S.A.* 39:6-78 and 79) and is intended to explain why the Director is a defendant.

It is suggested that the above instructions may be given before counsel open to the jury in order to satisfy the natural curiosity of the jurors who are about to hear a case involving the Director of Motor Vehicles as a defendant.

It is also suggested that prior to opening, the court caution counsel, out of jury's hearing, to make no reference to the "Fund", or to the fact that any judgment against the Director is payable from the "Fund".

The word "alleged" may be added in the second paragraph if the existence of an unknown and unidentified driver who was involved in the accident is in dispute.

1.15 INSTRUCTIONS TO JURY IN CASES WHICH ONE OR MORE DEFENDANTS HAVE SETTLED WITH THE PLAINTIFF

When this action was started the plaintiff alleged in the complaint that the joint or concurring negligence of [named defendant(s)] was a proximate cause of the accident. Before the trial started [during the trial] [named defendant(s)] settled with the plaintiff in a sum of money, the amount of which is of no concern to you.

Your first duty is to determine whether or not the defendants remaining were individually or concurrently negligent proximately causing the accident. If you find that any one of the defendants or all of the defendants were guilty of negligence and that such negligence was a proximate cause of the accident, it then becomes your duty to determine the amount of damages you should award to the plaintiff to compensate him fairly and reasonably for his injuries.*

In computing these damages you must not be concerned with the number of defendants who were originally in the case nor with the number of defendants remaining. You must not be concerned with those defendants who have made settlements with the plaintiff. You must not speculate as to what the plaintiff may or should have received in those settlements.

If you find from the evidence that one or more of the remaining defendants were guilty of negligence proximately causing the accident, damages to compensate the plaintiff for his fair and reasonable damages in full should be awarded in your verdict as a lump sum of money, so many dollars.* Under no circumstances should you attempt to apportion your verdict or to reduce the amount of fair and reasonable damages by a fraction based upon the number of defendants who have made settlements with the plaintiff. If you return a verdict in favor of the plaintiff, you should award the total damages to which the plaintiff is entitled as the amount of your verdict. If these damages are to be apportioned it is the duty of the Court to apportion them according to principles of law which the Court must apply.

Cases:

Theobald v. Angelos, 44 N.J. 228 (1965); *Theobald v. Angelos,* 40 N.J. 295 (1963); *Oliver v. Russo,* 29 N.J. 418 (1959); *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 N.J. 67, 92 (1954); *Sattelberger v. Telep,* 14 N.J. 353 (1954); *Gottfried v. Temel's Restaurant, Inc.,* 69 N.J. Super. 163 (App. Div. 1961).

* If contributory negligence is an issue adapt change by inserting the requirement of lack of proof of contributory negligence.

Notes:

Apportionment by the Court would be *pro rata,* unless a defendant who has settled has been adjudicated not guilty of negligence, in which case apportionment would be *pro tanto* but not exceeding *pro rata* share.

The Court may submit a special interrogatory as to the negligence of a defendant who has settled with the plaintiff, but has remained in the case because of a cross-claim for contribution against him. *R.R.* 4:50.

Compare *Nilson v. Moskal,* 70 N.J. Super. 389 (Cty. Ct. 1961) holding that a defendant in tort who joined two others as third-party defendants and then settled with the plaintiff, is barred from any right of contribution against the third-party defendants, in the absence of any adjudication that he himself was liable to the plaintiff.

1.16 WITNESS—FAILURE OF A PARTY TO PRODUCE

(A) WHERE COURT DETERMINES THAT THERE IS AN ISSUE OF FACT AS TO ONE OR MORE OF THE CRITERIA.

During the course of this trial, reference has been made to .... as a witness in this matter (as having information relevant to the matter before you) and that the plaintiff/defendant has failed to call him to testify. If you find that ..... is a person whom you would naturally expect the plaintiff/defendant to produce to testify, you have a right to infer from the non-production of this witness that his testimony would be adverse to the interests of the plaintiff/defendant.

The basis for this rule is that where a party fails to produce a witness who probably could elucidate certain facts in issue, it raises a natural inference that the non-producing party fears that the testimony of the witness on that issue would be unfavorable to him.

However, an adverse inference should not be drawn:

(1) If ..... is not a witness whom the plaintiff/defendant would naturally be expected to produce; nor

(2) If there has been a satisfactory explanation for his non-production; nor

(3) If he is equally available to both parties; nor

(4) If his testimony would be comparatively unimportant, cumulative in nature or inferior to that which you already have before you.

Whether or not an adverse inference should be drawn is for your determination based upon the principles I have just set forth.

Comments

The appropriate criteria may be selected by the Judge and molded to fit his particular case. Various criteria must be considered by the Court

in determining whether or not any of the alternative charges should be utilized. In addition to the aforementioned, the Court should also take into consideration the expense involved and imposition on the time or profession of the witness as compared with the importance of his testimony and the value of the litigation.

Wild v. Roman, 91 N.J. Super. 410, 414-419 (App. Div. 1966); *Parentini v. S. Klein Dept. Stores,* 94 N.J. Super. 452 (App. Div. 1967).

Judge Gaulkin in *Wild v. Roman, supra,* discussed the following principles in determining whether or not the absent witness charge should be given (91 N.J. Super. at p. 414):

"In *Clawans* the Court stressed the 'peculiar facts' before it. Therefore we doubt that *Clawans* always compels the giving of such a charge when a possible witness does not appear, even upon request and even if the rules laid down in *Clawans* and hereafter discussed are complied with. Be that as it may, *Clawans* did not hold that the charge was to be given merely because a person who apparently knew something about some facet of the case did not appear and testify. We think *Clawans* made it abundantly clear that (1) the charge is not to be given unless the judge is first satisfied that giving it is clearly justified as to a particular witness or a particular class of witnesses, and (2) the charge, if given, must identify the witness or class of witnesses in question and the issues upon which their testimony might have been helpful. See *Clawans,* at p. 173, and Justice Francis's dissenting opinion therein, at pp. 175-176.

"*Clawans* restated the conditions precedent for such a charge. It must appear that it was within the power of the party to produce the witness. The inference' is based not on the bare fact that a particular person is not produced as a witness * * * but on his non-production when it would be natural for the party to produce the witness.' (citation omitted.) It must appear reasonably probable that the witness 'could testify to specifically identifiable facts.' (citation omitted.), and, even then, that his evidence would not be merely cumulative, but 'superior to that already utilized in respect to the fact to be proved.' (Citation omitted.) The inference is not proper if the witness is available to both parties or 'by his position would be likely to be so prejudiced against the party that the latter could not be expected to obtain the unbiased truth from him * * * .'"

NOTES:

(1) *Specify Witnesses Involved*

Since the absent witness charge should not be given as to all absent witnesses, to avoid confusion the charge should be related specifically to those witnesses to whom it applies. *Biruk v. Wilson,* 50 N.J. 253, 261 (1967).

As stated above a different charge may be required with respect to the absence of different witnesses. As to some absent witnesses an adverse inference may be drawn, but as to others the only inference that may be drawn is that witness' testimony would not have specifically contradicted the evidence offered by an adversary

and would not have materially aided a given party's case. In some cases no adverse or other inference can be drawn.

(2) *Procedure Before Giving Charge*

A party desiring an adverse inference charge should advise the trial judge and counsel out of the jury's presence at the close of his adversary's case of his intention to request the adverse inference charge as to particular persons not called and the reasons why the charge should be given. The adversary should then be given the opportunity to either call the designated witness or demonstrate to the court "by argument or proof" the reason for the failure to call.

Depending upon the circumstances disclosed, the trial court may decide that the failure to call the witness raises no inference, or an unfavorable one, and whether reference in the summation or charge is warranted. *State v. Clawans,* 38 N.J. 162, 172 (1962).

(3) *Construction of "Equally Available" to Both Parties*

An adverse inference does not arise as to the ordinary witness whose testimony would likely be as favorable to one party as to the other. Whether a witness is "equally available" is not to be determined from mere physical presence, but the court should consider the relationship of the witness to a party and other factors related thereto. *Hickman v. Pace,* 82 N.J. Super. 483, 492 (App. Div. 1964). Defendant testified that the witnesses were out of state, that he had asked them to come in, and testify as witnesses for him, but they had refused. See also, *Michaels v. Brookchester, Inc.,* 26 N.J. 379, 391 (1958).

(4) *Failure to Take Depositions of Unavailable Witnesses*

See, *O'Neil v. Bilotta,* 18 N.J. Super. 82, 87 (App. Div. 1952) *aff'd* 10 N.J. 308 (1952) as to the effect of not taking the deposition of an out-of-state witness.

(B) WHEN COURT HAS DETERMINED THAT THE ADVERSE INFERENCE MAY BE DRAWN

Reference has been made to ..... (as a person who has information relevant to the matter before you) and that the plaintiff/defendant has failed to call him to testify.

The rule is that where a party (plaintiff/defendant) fails to produce as a witness a person whom that party would naturally be expected to call to testify, you have a right to infer that had the witness been produced he would have testified adversely to the interests of that party (plaintiff/defendant).

The reason for this rule is that where you would normally expect a party to call a person as a witness and that party, without reasonable explanation, fails to do so, it leaves a natural inference that the non-producing party fears exposure of facts which would be unfavorable to him.

See,

State v. Clawans, 38 N.J. 162 (1962); *Michaels v. Brookchester, Inc.,* 26 N.J. 379 (1958); *O'Neil v. Bilotta,* 18 N.J. Super. 82 (App. Div. 1952); *aff'd* 10

N.J. 308 (1952); *Hickman v. Pace*, 82 N.J. Super. 483, 490 (App. Div. 1964).

(C) WHERE COURT HAS DETERMINED TO CHARGE NO ADVERSE INFERENCE CAN BE DRAWN

During the course of this trial reference has been made to .... The Court has determined that the non-production of ..... as a witness is excusable as a matter of law. Therefore, you should not speculate as to what his testimony would be had he been called to testify. Nor may you draw any inferences against or in favor of either party from his failure to testify.

COMMENTS:

In *Wild v. Roman*, 91 N.J. Super. 410, 416 (App. Div. 1966) it was said that it is "nearly always for the judge alone to decide" whether the circumstances warrant an adverse inference or an inference of no material aid to a party's case. The court said that it is rare that a factual dispute as to the factors involved should be left for the jury. Obviously, the court must first determine whether or not to give an adverse inference charge as to a designated absent witness and whether the charge of "no material aid" (see *Parentini, supra.*) should be given.

(D) WHERE TESTIMONY IS NOT OF A MATERIAL AID

From the testimony it would appear that ..... (Dr. .....) is a person who has information relative to the (medical) issues involved, and that the plaintiff/defendant has failed to call him as a witness. The failure of a party to produce as a witness a person whom that party would naturally be expected to call does not necessarily permit the inference that the testimony of that witness would have been unfavorable to that party.

In the circumstances of this case, however, you may infer that this witness would not have specifically contradicted the testimony of witnesses (Dr. .....) called by the plaintiff/defendant and that the evidence of the absent witness would not have materially aided plaintiff/defendant's case.

Comments:

In *Parentini v. S. Klein Dept. Stores*, 94 N.J. Super. 452 (App. Div. 1967), a false imprisonment case, plaintiff produced two doctors who testified as to the causal relation between the episode and the psychiatric condition of plaintiff and as to permanency. A neurologist examined plaintiff for defendant but was not called. Defendant offered no medical testimony.

The court held that the usual adverse inference charge was error. The court noted that medical experts are often not called because their testimony would not be helpful enough to warrant the expense or intrusion on professional time, or the opinion offered may not be helpful to that party even though it is not adverse to that party. In the circumstances it was held that the trial court *in its discretion* could have charged that the jury could infer from the non-production of defendant's medical expert that his testimony "would not have specifically contradicted that of plaintiff's experts and it would not have materially aided defendant's case." (at p. 457).

1.19 VERDICT—AGREEMENT OF 10 JURORS

This being a civil case and not a criminal case, unanimous agreement by all jurors on all issues is not required, but your verdict may be reached by agreement of 10 or more jurors. When any 10 of you agree upon a verdict you may announce that as the verdict in the case. Your verdict may be by agreement of 10 to 2, or 11 to 1, or by unanimous agreement of all jurors. As soon as (any) 10 jurors agree on each issue in the case, you may reach your verdict and announce that verdict to the court.

THE FOLLOWING MAY BE ADDED FOR A MORE DETAILED INSTRUCTION

It is not necessary that the same 10 jurors agree upon all issues. Whenever at least 10 jurors agree on any issue, that issue has been decided and you may move on to consider the remaining issues in the case. All 12 jurors should participate fully in deliberating on the remaining issues, not only the 10 or more jurors who have agreed on a previously considered issue. A juror who has been outvoted on any issue should accept the outcome thereof and continue to deliberate with the other jurors honestly and conscientiously to decide the remaining issues. He must not, of course, hold out improperly on any remaining issues, out of spite, to force a compromise result in violation of his oath to render a true verdict according to the evidence. This means, for example, that if 10 of 12 jurors agree on the issue of liability and determine that plaintiff should recover, then all 12 jurors should deliberate together on the issue of damages, including the two jurors who do not agree that plaintiff should recover at all. The issue of damages can then be determined by agreement of any 10 of 12 jurors.

Case:

In *Ward v. Weekes*, 107 N.J. Super. 351 (App. Div. 1969), the court said: "In the future, to avoid possible error, it may be advisable for trial judges to specifically charge juries, where applicable, that their verdicts are proper if each dispositive issue to be decided is agreed upon by any ten of them, and they should participate fully in determining all issues."

Notes:

R. 1:8-2(b) provides for a verdict in civil actions by less than 12 jurors, *R.* 1:8-9 requires at least 5/6ths agreement and *R.* 1:8-10 requires that the jury be polled if the verdict is not unanimous. If the poll discloses that the verdict was not reached by 5/6ths of the jury, the jury may be directed to retire for further deliberations or may be discharged.

Where it is determined that there is not unanimous agreement on a verdict and that different jurors disagreed on one or more issues, it would seem desirable that a special verdict or a general verdict accompanied by answers to interrogatories be used in accordance with *R.* 4:39-1 or *R.* 4:39-2. Written answers should be required not only as to the issues decided but also to indicate which jurors disagreed on each issue.

1.20 SUPPLEMENTAL INSTRUCTION AS TO FURTHER DELIBERATIONS BY JURY

You have informed the court of your inability to reach a verdict in this case. The court does not wish to know, and you are not to indicate, how you stand or whether you entertain a predominant view.

At the outset the court wishes you to know that although you have a duty to reach a verdict, if that is possible, the court has neither the power nor the desire to compel agreement upon a verdict.

The purpose of these remarks is to point out to you the importance and the desirability of reaching a verdict in this case, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. That oath places upon each of you as individuals the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusions of your fellow jurors.

However, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to reach a verdict by a comparison of views and by a consideration of the proofs with your fellow jurors.

During your deliberations you should be open-minded and consider the issues with proper deference to and respect for the opinions of each other and you should not hesitate to re-examine your own views in the light of such discussions.

You should consider also that this case must at some time be decided; that you are selected in the same manner and from the same source from which any future jury must be selected; that there is no reason to suppose that the case will ever be submitted to 12 persons more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will ever be produced on one side or the other.

You may retire now, taking as much time as is necessary for further deliberations upon the issues submitted to you for determination.

Notes:

The above is suggested for use following an announcement by the jury that it has been unable to agree. *In making inquiry as to the possibility of a verdict, the trial court should admonish the jury at the very outset, not to indicate how they stand as to conviction or acquittal or whether they entertain a predominant view.* The foreman may be asked only if he believes the jury might reach a verdict after further deliberation, and if it appears that the jury may do so, the charge may be given.

See *In Re Stern*, 11 N.J. 584 (1953); *State v. Williams*, 39 N.J. 471 (1963); *State v. DiModica*, 40 N.J. 404 (1963); *State v. Cottone*, 52 N.J. Super. 316 (App. Div. 1958); *Rosetti v. Public Service*, 53 N.J. Super. 293 (App. Div. 1958); and 8 *Rutgers L. Rev.* No. 2, p. 417.

The leading federal case is *Allen v. United States*, 164 U.S. 492 (1896). See also *Railway Express Agency v. Mackay*, 181 Fed. 2d 257 (1950); *Hyde v. United States*, 225 U.S. 347 (1911); *Mills v. Tinsley*, 314 F.2d 311 (1963).

This suggested charge, adapted to civil cases, is primarily based upon the philosophy of the *Stern* and *Williams* cases although some of the admonitions contained in the Federal cases, a bit softened, are included. Some of the members of the committee prefer the form set forth:

Alternate Form

I charge you now that it is the duty of each juror, while the jury is deliberating upon its verdict, to give careful attention and consideration to the views on the testimony of his fellow jurors. A juror should not shut his ears and stubbornly stand upon the position he first takes, regardless of what may be said by his fellow jurors. It should be your collective objective to arrive at a common conclusion whether that be innocent or guilty, and to that end you should deliberate together with calmness. It is your duty to agree upon a verdict, if that is possible. The law contemplates that you shall by discussion harmonize your views, if possible, but not that you shall compromise, divide and yield your personal convictions for the purpose of arriving at an agreement.

Note:

The above charge is taken from the opinion of the Supreme Court in *State v. Hutchins, et al.*, 43 N.J. 85 (1964). It may be utilized when the court feels that further deliberation may produce a proper verdict. *In making inquiry as to the possibility of a verdict the trial court should admonish the jury at the very outset, not to indicate how they stand as to conviction or acquittal or whether they entertain a predominant view.* The foreman may be asked if he believes the jury might reach a verdict after further deliberation, and if it appears that the jury may do so, the charge may be given.

3.10 ASSAULT AND BATTERY

(A) DEFINITION

An assault is an attempt or offer to touch or strike the person of another with unlawful force or violence. A battery necessarily includes a preceding assault and in addition extends to the actual touching or striking of the person, with the intent to do so, with unlawful force or violence.

The terms violence and force mean the same thing when used in relation to assault and battery and include any application of force to the person of the plaintiff even though it entails no pain or bodily harm and leaves no mark. No particular degree of force or violence is necessary for an assault and battery and therefore the least touching or striking of the body of the plaintiff* without legal justification against his will constitutes an assault and battery.

Cases:

State v. Maier, 13 N.J. 235, 242 (1953); *State v. Adamo,* 9 N.J. Super. 7, 9 (App. Div. 1950); *Clayton v. New Dreamland Roller Skating Rink, Inc.,* 14 N.J. Super. 390, 398 (App. Div. 1951); *Falconiero v. Maryland Cas. Co.,* 59 N.J. Super. 105, 109 (App. Div. 1960).

An assault which is unknown to the other person is not actionable unless accompanied by a battery. *Restatement, Torts,* Secs. 18, 21.

(B) SELF DEFENSE—BURDEN OF PROOF

The defendant denies that he should be called upon to pay damages to the plaintiff on the ground that whatever injury was sustained by the plaintiff was inflicted by the defendant in defense against an assault being made upon him by the plaintiff. Thus he raises what is known in the law as the defense of self defense. Since it has been introduced by the defendant the law imposes upon the defendant that burden of proving this defense according to the standard of burden of proof which I have set out in this charge.

Fundamentally, no person has a lawful right to lay hostile and menacing hands on another. However, the law does not require anyone to submit meekly to the unlawful infliction of violence upon him. He may resist the use or threatened use of force upon him. He may meet force with force, but he may use only such force as reasonably appears to him to be necessary under all the circumstances for the purpose of self protection. Accordingly, if you find that the defendant in this case has succeeded in proving that he was under attack by the plaintiff, and that the jury sustained by the plaintiff

* Where appropriate add: ". . . in an angry, revengeful, rude or insolent manner . . ." *State v. Maier, supra,* p. 242.

was inflicted by the defendant's having used only such force as, under all the circumstances, was necessary or reasonably appeared to have been necessary for his own protection, then the defense of self defense has been proven, and you must find in favor of the defendant and against the plaintiff. Should you find, however, that the defendant was not under attack, or, if he was under attack, that he used more force than reasonably appeared necessary to defend himself, or that he continued the use of force after the apparent necessity for self defense had ceased, then the defense of self defense has not been proven.

You may bear in mind, however, that one is not ordinarily expected to exercise the same refined degree of judgment at times of great stress or excitement that he would under more placid circumstances. And so the degree of force actually used by the defendant should not be appraised by you from the standpoint of one who has the leisure to make a calm, unhurried judgment. The conduct of the parties at the moment of conflict should be evaluated by you from their perspective at that time and in the light of the judgment of which they were then reasonably capable.

Cases:

State v. Goldberg, 12 N.J. Super. 293, 303, 307 (App. Div. 1951); *Hagopian v. Fuchs*, 66 N.J. Super. 374, 379 (App. Div. 1961); *State v. Black*, 86 N.J.L. 520, 524 (Sup. Ct. 1914).

(C) SELF DEFENSE—SERIOUS BODILY HARM

Where serious bodily harm is inflicted by the defendant upon the plaintiff, or where a means of defense is employed which is intended or likely to cause death or serious bodily injury, you may find that the defendant acted in self defense only if the defendant satisfies you by the greater weight of the believable evidence that he reasonably believed that he himself was in peril of death or serious bodily harm which he could have averted only by the immediate use of such a self defensive measure. You must therefore determine from the evidence whether the circumstances which were known to the defendant, or which should have been known to him, were such as would lead a reasonable man, one of ordinary firmness and courage, to entertain an apprehension that he was in danger of death or serious bodily harm.

The term "serious bodily harm" is used to describe a bodily harm, the consequence of which is so grave or serious that it is different in kind and not merely in degree from other bodily harm. A harm which creates a substantial risk of death is a "serious bodily harm," and is a harm involving the permanent or protracted loss of the function of any important member or organ.

Cases:

State v. Hipplewith, 33 N.J. 300, 316-317 (1960); *State v. Abbott,* 36 N.J. 63, 70-72 (1961); *Hagopian v. Fuchs,* 66 N.J. Super. 374, 381-382 (App. Div. 1961).

Injuries amounting to mayhem, *N.J.S.* 2A:125-1, also constitute "serious bodily harm"; *Hagopian v. Fuchs, supra,* p. 381.

(D) SELF DEFENSE—DUTY TO RETREAT

The plaintiff maintains, however, that even should you find that the defendant reasonably apprehended that he was in danger of death or serious bodily harm, still the defendant was not justified in using a deadly force upon the plaintiff. For under the circumstances disclosed by the evidence, the plaintiff contends, the defendant had a duty to retreat which he did not fulfill, and that his use of a deadly weapon was, accordingly, not privileged.

I charge you that the use of a deadly force is not justifiable when an opportunity to retreat with complete safety is known by the defendant to be at hand. By a deadly force is meant a force which is used for the purpose of causing, or which is known by the defendant to create a substantial risk of causing, death or serious bodily harm. The use of such force is not justifiable if the defendant knew that it could have been avoided with complete safety to himself by retreating. Where these conditions are present the defendant has a duty to retreat, and his use of a deadly force under these circumstances cannot be justified as an act of self defense. In resolving the question of whether the defendant knew that the opportunity to retreat existed and whether it would have afforded him complete safety, the total attendant circumstances, including the excitement of the occasion, must be considered.

If you find from all of the testimony on this issue that the defendant had a duty to retreat which he did not fulfill, you have determined that the defendant did not act justifiably in self defense.

Cases:

State v. Abbott, 36 N.J. 63, 71 (1961); *Hagopian v. Fuchs,* 66 N.J. Super. 374, 381 (App. Div. 1961).

(E) DEFENSE OF ANOTHER

In this case the defendant denies that he should be required to pay damages to the plaintiff for the reason that whatever injury was sustained by the plaintiff was inflicted by the defendant in defense of a third party who reasonably appeared to have been in peril of death or serious bodily harm at the hands of the plaintiff.

I charge you, therefore, that one may justifiably intervene in defense of any person who is in actual or apparent imminent danger of death or serious bodily harm, and in so doing he may use such force as he has reason to believe, and does believe, necessary under the circumstances. The defendant must be reasonable in his belief that the third party is in dire peril of death or serious bodily harm. He must also have a reasonable basis to believe that the force he uses is necessary to protect the apparent victim from the threatened harm.

Whether the defendant was reasonable in both these respects, that is, his belief that the apparent victim was in peril of death or serious bodily harm and that the force used was necessary are questions which you must resolve. Your conclusions must be arrived at on the basis of the facts which were known to the defendant at the time, not those known only to the plaintiff and the third party, unless you further conclude that the defendant could and reasonably should have apprised himself of those facts before acting as he did.

The defendant has the burden of proving to you that he inflicted the injuries complained of while acting in defense of the third party within the foregoing principles.

You may bear in mind that one is not ordinarily expected to exercise the same refined degree of judgment at times of stress and great excitement that he would under more placid circumstances. Thus, the defendant's evaluation of the gravity of the danger threatening the third party and his estimate of the degree of force necessary to protect the third party should not be weighed by you from the standpoint of one who has the leisure to make a calm, unhurried judgment. Defendant's conduct at the moment of conflict should be evaluated by you from his perspective at that time and in light of the judgment of which he was then reasonably capable.

Case:

State v. Chiarello, 69 N.J. Super. 479, 492 (App. Div. 1961).

3.11 SLANDER PER QUOD

A. GENERAL CHARGE AS TO ELEMENTS

To recover from the defendant for slander it must be shown that he made a false and defamatory oral statement heard and understood by a third person to relate to the plaintiff and that the plaintiff suffered financial or material loss as a proximate result.

A defamatory statement is one which is injurious to the reputation of the plaintiff, or which exposes him to hatred, contempt or ridicule, or to a loss of the good will and confidence entertained toward him by others, or which has a tendency to injure him in his trade or business.

For the making of a slanderous statement the defendant must respond to the plaintiff in damages, even though the defendant's purpose in making the statement was well intentioned and even though [in the absence of a privilege]* the statement was the result of an honest mistake of fact on the part of the defendant.

Where the statement is not slanderous per se the plaintiff must prove special damage as part of his cause of action. With respect to slander, as distinguished from libel, there are only four categories of defamation which are actionable per se and without proof of special damages. They are those (1) imputing commission of crime, (2) imputing loathsome diseases, (3) tending to harm the victim in his business trade, profession or office, (4) imputing unchastity to a woman. *Gnapinsky v. Goldyn,* 23 N.J. 243, 250, 252 (1957); *Arturi v. Tiebie,* 73 N.J. Super. 217, 222 (App. Div. 1962); *Harper and James, The Law of Torts,* Sec. 5.9, page 372 *et seq.;* 3 *Restatement, Torts,* Sec. 575, p. 435.

As to elements of the charge see also authorities listed under general charge for elements of libel.

As to requirement for communication see *Gnapinsky v. Goldyn, supra,* pp. 252-53.

* Add bracketed language where privilege is later to be charged.

3.11 SLANDER PER SE

B. GENERAL CHARGE AS TO ELEMENTS

To recover from the defendant for slander it must be shown that he made a false and defamatory oral statement heard and understood by a third person to relate to the plaintiff.

A defamatory statement is one which is injurious to the reputation of the plaintiff, or which exposes him to hatred, contempt or ridicule, or to a loss of the good will and confidence entertained toward him by others, or which has a tendency to injure him in his trade or business.

For the making of a slanderous statement the defendant must respond to the plaintiff in damages, even though the defendant's purpose in making the statement was well intentioned and even though [in the absence of a privilege]* the statement was the result of an honest mistake of fact on the part of the defendant.

(See notes regarding SLANDER PER QUOD—3.11 A)

* Add bracketed language where privilege is later to be charged.

3.12 LIBEL

A. ELEMENTS

To hold him answerable for libel it must be found that the defendant published a false and defamatory statement in writing of and concerning

the plaintiff. A defamatory statement is one which is injurious to the reputation of the plaintiff, or which exposes him to hatred, contempt or ridicule, or to a loss of the good will and confidence entertained toward him by others, or which has a tendency to injure him in his trade or business. For the publication of a statement proved libelous the defendant must respond to the plaintiff in damages, even though the defendant's purpose in publishing the statement was well intentioned and even though, [in the absence of a privilege,]* the statement was the result of an honest mistake of fact on the part of the defendant.

Cases:

Kelley v. Hoffman, 137 N.J.L. 695, 698 (E. & A. 1948); *Mosler v. Whelan*, 28 N.J. 397, 399-400 (1958); *Leers v. Green*, 24 N.J. 239, 251 (1957); 3 *Restatement, Torts*, Sec. 558, 559; 33 *Am. Jur.*, Libel and Slander, Sec. 3, p. 38.

A defamation is "published" when it is communicated to a third person who understands it to relate to the plaintiff. *Gnapinsky v. Goldyn*, 23 N.J. 243, 252-3 (1957).

B. TRUTH OF UNPRIVILEGED STATEMENT LIBELOUS PER SE—BURDEN OF PROOF

In this case the court has already determined that the statement in question, which the defendant concedes he published of and concerning the plaintiff, is defamatory in and of itself as a matter of law. This issue is, accordingly, withdrawn from your deliberations and the controversy which you must resolve is narrowed to the question of whether the statement, although defamatory, is actually false. The defendant denies that the statement published by him was false. He maintains that his statement was true in substance, that it is therefore nonlibelous, and that he is thus not answerable in damages for whatever adverse consequences it may have produced for the plaintiff.

Regarding the truth of falsity of the statement evidence has been introduced by both parties which is contradictory and from which conflicting inferences may be drawn. It will be your function as jurors to determine from the evidence whether the conduct attributed to the plaintiff by defendant's publication was truthfully of falsely stated. Since the defendant has interposed this issue of truth as an affirmative defense he must carry the burden of proving the truth of his statement.

I charge you that if you find the statements concerning the plaintiff in defendant's publication were substantially true then you must find in favor of the defendant, regardless of the defamatory nature of the statement, regardless of the defendant's motive in publishing them, and regardless also that the plaintiff may have suffered damage as a result thereof.

* Add where privilege is later to be charged.

On the other hand, should you find that the defendant has failed to carry his burden of proving the truth of the statement in question then you must find in favor of the plaintiff and against the defendant, regardless, as I have said, of the good intentions of the defendant in publishing the statement aforesaid, and regardless of the fact that the defendant honestly believed in the truth of the statement published.

Cases:

Burden of proving truth is on defendant. *Hartley v. Newark Morning Ledger Co.*, 134 N.J.L. 217, 220 (E. & A. 1946); *Nusbaum v. Newark Morning Ledger Co.*, 86 N.J. Super. 132, 151 (App. Div. 1965); 33 *AM. JUR.* Libel & Slander, 274, p. 256. Truth is a complete defense. *Neigel v. Seaboard Finance Co.*, 68 N.J. Super. 542, 552 (App. Div. 1961).

C. DEFAMATORY OR NONDEFAMATORY CHARACTER OF FALSE STATEMENT–BURDEN OF PROOF

I call to your attention that the statement which the defendant concedes he (falsely) published of and concerning the plaintiff may be interpreted as to convey either of two different meanings. On the one hand it may be understood to mean ..... Such a meaning, I charge you, is clearly defamatory to the plaintiff since it exposes him to the contempt and ridicule of others, and it is in this sense that the plaintiff contends that it was generally understood. On the other hand, the statement may be construed to mean nothing more than ..... In this sense, of course, the statement is innocent and nondefamatory and it is in this sense that the defendant contends it was generally understood.

By reason of this ambiguity–that is, the double meaning of the language employed–the law imposes upon the plaintiff the burden of proving that the words used, in light of the circumstances disclosed by the evidence and the entire context of the writing, were in fact understood in their defamatory sense by the average reader who saw them. To discharge his burden plaintiff has produced as witnesses persons who testified that when they read the publication they understood it only to carry the defamatory meaning ascribed to it by the plaintiff.

If, members of the jury, you find from the evidence that the plaintiff has carried his burden of proving that the false publication was taken in its defamatory sense by the average reader who saw it then you must find your verdict in favor of the plaintiff and against the defendant. If, on the other hand, you find that the plaintiff has not carried his burden of proving that the publication was actually understood in its defamatory sense by the average reader who saw it, then you shall find your verdict in favor of the defendant and against the plaintiff.

In resolving this dispute, although you are, of course, free to take into consideration the common and ordinary meaning of the words in the context of the statement, bear in mind that your deliberations are not to be governed solely by what you yourselves believe to be the meaning of the language used nor, indeed, by what you personally believe the defendant intended to be understood. The test, as I say, is what you find from all the evidence the words were actually understood to mean by the average reader who saw them.

Cases:

Neigel v. Seaboard Finance Co., 68 N.J. Super. 542, 552-3 (App. Div. 1961); *Mosler v. Whelan*, 28 N.J. 397, 404-5 (1958); *Leers v. Green*, 24 N.J. 239, 253 (1957); 33 *AM. JUR.*, Libel and Slander, sec. 294, p. 277; 3 *Restatement, Torts*, Secs. 613, 614.

The court must preliminarily determine whether the language used may reasonably bear a defamatory meaning. *Mosler v. Whelan, supra*, p. 404.

The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express. *Sokolay v. Edlin*, 65 N.J. Super. 112, 122 (App. Div. 1961).

D. QUALIFIED PRIVILEGE, APPLICABILITY, BURDEN OF PROOF

It has been found by the court that the statement in question which the defendant concedes he published of and concerning the plaintiff was both false and defamatory to the plaintiff as a matter of law. I charge you, therefore, that the published statement is in and of itself libelous, and this issue is not to occupy your deliberations further.

Notwithstanding the libelous character of defendant's publication defendant contests plaintiff's right to recover damages on the ground that the statement was the subject of what is known in the law as a qualified privilege. Such a privileged statement in the law of libel is one which, though otherwise libelous, is protected by the law for reasons of policy against claims for damages.

Now, just as the law has an interest in protecting the good name and reputation of one who has been libelously disparaged, and to provide for him a remedy in damages, so the law also recognizes that there are occasions in the affairs of commerce or government or journalism when men must feel free to communicate their honest understanding of the facts without fear of being held answerable in damages should the facts turn out to be mistakenly reported. The rule by which the law attempts to accommodate these interests when they come into contention, and which you must apply to the evidence before you, is as follows: A written communication is privileged when it is made in good faith—that is, with an honest belief in its

truth—upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, so long as it is made to a person having a corresponding interest or duty. And this privilege applies even though the statement contains defamatory matter which, without the privilege, would be libelous and ground for the recovery of damages. The fundamental test is the good faith with which the communication is made, and it is not privileged when the person making it has full knowledge of its untruthfulness, or where he lacked any basis upon which to rest a belief in its truthfulness. [Here the privilege in question should be outlined and its underlying policy explained.]

Although defendant has adduced evidence tending to show that he was privileged to publish the statement involved in this proceeding, the plaintiff disputes the claim of privilege and, in particular, contends that as a matter of fact defendant had no legitimate interest in the subject matter of the publication—an interest which is recognized by the law as appropriate for privileged status. Furthermore, the plaintiff argues from the evidence that the persons to whom the statement was communicated had no legitimate interest in the subject matter of the statement so that for this reason too the defendant's claim of privilege should not prevail.

These factual conflicts you must resolve subject to the guiding principle that since the defendant has made this claim of privilege he must bear the burden of proving the privilege and its applicability to the facts hereof. Should you find that the defendant has carried his burden of proving his legitimate interest and that of the persons to whom he addressed his communication in the subject matter of the publication and that its libelous content resulted only from an honest mistake of fact, then the communication is privileged and you must find your verdict in favor of the defendant and against the plaintiff. If, however, you should find that defendant has failed to carry his burden of proving these elements of his claim of privilege then you must find in favor of the plaintiff and against the defendant and enter an award of damages subject to the rules governing the measure of damages as these will be explained to you shortly.

Cases:

Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557-8 (1955); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 375 (1959); *Jorgensen v. Pennsylvania R.R. Co.*, 25 N.J. 541, 564 (1958); *Neigel v. Seaboard Finance Co.*, 68 N.J. Super. 542, 549-50 (App. Div. 1961); *Swede v. Passaic Daily News*, 30 N.J. 320, 332 (1959).

Note:

A showing of merely suspicious circumstances is not enough to invalidate the privilege. Nor is negligence in ascertaining the true facts. Nothing less than a showing of "full knowledge" or of the falsity by the defendant will suffice. *Sokolay v. Edin*, 65 N.J. Super. 112, 126 (App. Div.

1961); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 730 (1964).

The existence of privilege is basically a question of law for the court, subject to the exercise of the jury's traditional function where the facts are in dispute. *Coleman v. Newark Morning Ledger Co., supra*, p. 376.

E. QUALIFIED PRIVILEGE, ACTUAL, MALICE, BURDEN OF PROOF

Although privilege is a defense to an action for damages based upon falsely defamatory statements its protection does not extend beyond the limits of the public or private interest entitled to protection. In this case the plaintiff contends that the defamatory statement of which he complains so far exceeded the bounds of the privileged occasion as to make the privilege unavailable as a defense to his claim for damages.

Accordingly, I charge you that a qualified privilege is available as a defense to a claim for damages arising from defamation only where the damaging statement is made primarily for the purpose of furthering the interest which is entitled to protection under the law. Where there is a privilege there must be a reason which gives rise to the privilege. To come within its protection a defamatory falsehood must be made for the reason that gave rise to the privilege. Thus, if the defendant is chiefly motivated by feelings of ill will or malice towards the plaintiff, or if the statement was made for another reason other than that for which the privilege was created, such a statement lies outside the protection of the privilege and the defendant possesses no immunity from liability for defamation. But the privilege may not be defeated merely because the defendant may have held feelings of ill will or malice toward the plaintiff so long as the primary purpose of publishing the offending statement was one which the law protects. To defeat the privilege it must be found that the publication was primarily motivated by defendant's feelings of malice or ill will or by some other reason which does not enjoy privileged status.

Hence, the plaintiff argues that you should infer from the evidence presented that the publication in question primarily originated not from a bona fide intent on the part of the defendant to fulfill his privileged interest, but from a malicious desire on the part of the defendant to harm the plaintiff in the pursuit of his lawful occupation. In support of this contention plaintiff argues that you should infer a malicious motivation in the defendant sufficient to defeat the privilege from the following evidence . . . . . .

I point out to you that since the plaintiff has made this allegation of malice on the part of the defendant it is the plaintiff who must bear the burden of proving this fact to you. Should you find that the plaintiff has successfully carried this burden of proof then the defendant's claim of

privilege cannot prevail and you must find your verdict in favor of the plaintiff. If, however, the plaintiff has not carried his burden of proof in this respect then he cannot recover from the defendant, notwithstanding that the statement published by the defendant was both falsely defamatory and resulted in harm to the plaintiff.

Cases:

King v. Patterson, 49 N.J.L. 417, 419 (E. & A. 1887); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 374-375 (1959); *Sokolay v. Edlin*, 65 N.J. Super. 112, 127 (App. Div. 1961); *Jorgensen v. Pennsylvania Railroad Co.*, 38 N.J. Super. 317, 346 (App. Div. 1955).

". . . if a man deliberately makes a false statement concerning another, with full knowledge of its untruthfulness at the time he makes it, the conclusion is almost irresistible that he was impelled to do so by a malicious motive." *Lawless v. Muller*, 99 N.J.L. 9, 11 (Sup. Ct. 1923), cited in *Jorgensen v. Pennsylvania Railroad Co., supra*, p. 346.

F. PUBLIC OFFICIAL, ACTUAL MALICE, BURDEN OF PROOF

In the case before you the evidence is uncontradicted that the plaintiff, during the period between January 1, 1958, and December 31, 1959, hold public office in the town of ....., and that the alleged false and defamatory statement made of and concerning the plaintiff by the defendant related to plaintiff's discharge of his official duties. Therefore, I charge you, in addition to what I have already said, that where a defendant in a libel case is shown only to have circulated a publication for the sole purpose of giving what he believed to have been truthful information concerning the plaintiff in his capacity as a public official, the plaintiff may not recover from the defendant even though the contents of the article published may have been untrue in fact and derogatory to the plaintiff. In order to recover damages for a defamatory falsehood relating to his official conduct the plaintiff must also prove to you that the offending statements were made with actual malice—that is, that they were made with knowledge that they were false or with a reckless disregard of whether they were false or not.

Cases:

New York Times v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 696, 84 S. Ct. 710, pp. 726-7, (1964). *E. g. Garrison v. Louisiana*, 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209, (1964) (Criminal libel).

G. FAIR COMMENT—FACT OR OPINION—BURDEN OF PROOF

In this case the court has already determined that the situation which formed the subject matter of the defendant's publication was properly a

matter of public interest and concern. Therefore, the defendant was free to write about it, to express his honest opinions about it, and even to criticize the plaintiff's part in it harshly and with severity. But although the defendant enjoyed exceedingly wide latitude within which to express his opinions this freedom was not entirely unlimited. He did not have the right to make false and defamatory assertions of fact about the plaintiff. Criticism may not be used as a cloak for mere invective, nor may personal attacks be made which are not warranted by the facts.

These principles which I have just stated to you form the basis of the rule of "fair comment" within the law of libel. The defendant maintains that the writing in question, which he concedes was derogatory to the plaintiff, is, under the rule of fair comment, non-libelous, for the reason that the publication consisted only of criticism and adverse opinions which he was free to express.

The plaintiff, on the other hand, argues that the publication was not merely criticism, that it went beyond the expression of opinion even though phrased in commentary form. It is the plaintiff's contention that the writing falsely implied facts which exposed him to the contempt and scorn of the public and that for this reason the defense of fair comment should not prevail.

Specifically, the defendant claims that the writing only commented that it was disgraceful for moneys to have been unaccounted for in the department under the plaintiff's supervision. But the plaintiff urges that this comment was expressed in such fashion as to imply that plaintiff had personally diverted the missing money to his own use.

Hence, the question which you will have to resolve is whether the publication was an assertion of fact or whether it was merely a commentary upon the plaintiff's part in a matter of public interest.

The distinction, members of the jury, between statements of fact and expressions of opinion is not always perfectly clear. The determining factor in your judgment must be the effect the language used, taken within context, in its ordinary meaning, produced upon the average person who read the matter complained of. If you find that to such a reader the defendant's publication was understood as an assertion of fact which was both false and defamatory to the plaintiff then the defense of fair comment has not been made out.

Since the plaintiff has alleged that the language in question was understood as stating defamatory facts falsely the plaintiff must carry the burden of proving this claim. Therefore, should you find that he has not succeeded in proving this contention by the weight of the evidence then he cannot prevail against the claim of fair comment.

NOTES:

If fair comment, the impunged statement, under the New Jersey rule, is non-libelous. It is not merely a privilege. *Leers v. Green*, 24 N.J. 239, 253 (1957); *Mick v. American Dental Assn.*, 49 N.J. Super. 262, 280 (App. Div. 1958); *Dressler v. Mayer*, 22 N.J. Super. 129, 135 (App. Div. 1952). Cf. 3 *Restatement, Torts*, Sec. 606; *Harper & James, The Law of Torts*, Sec. 5.28, p. 457. The distinction is significant where the plaintiff attempts to avoid the defense by showing actual malice.

Whether the matter commented on is of public concern and whether there is any evidence of unfairness in the comment are primarily questions of law for the court. The jury must decide whether the words form allegations of fact or expressions of opinion. *Mick v. American Dental Assn., supra*, p. 282; *Leers v. Green, supra*, p. 255.

The burden of proving the recipient's understanding of the publication's meaning rests on the plaintiff. The defendant must show the character of the subject matter of the defamatory comment is of public concern. 3 *Restatement, Torts*, Sec. 613(1) (d), (e) and (2)(c), E.g., *Mossler v. Whelan*, 28 N.J. 397, 405 (1958).

See also *Leers*, p. 251, and *Mick* at p. 281.

H. FAIR COMMENT—FACTS TRULY STATED—BURDEN OF PROOF.

Before determining whether defendant's publication actually constituted fair comment you must first determine whether the comment was based upon true facts which were either stated by the defendant in the publication or at least identified by the defendant by clear reference or were in some other fashion already known to the recipients of the publication. The underlying requirement is that the readers of the publication must know in some manner the factual basis of the defendant's opinion so that they may judge for themselves the extent to which the defendant's opinion is or is not well founded.

With respect to this aspect the rule of fair comment the burden of proof rests upon the defendant. Therefore, should you find that the defendant has failed satisfactorily to prove that his comment was based on true facts which were either stated by him in the publication or in some other manner clearly identified by reference or which were already known by the readers of his publication, then the defense of fair comment cannot prevail. If, on the other hand, the defendant has succeeded in proving these conditions by the weight of the evidence then you may consider further whether the defense of fair comment has been proven.

Notes:

Comment must be based on true facts either truly stated by the defendant in the publication, identified by clear reference, or else otherwise known already by the recipient of the publication. *Mick v. American Dental Assn.*, 49 N.J. Super. 262, 281 (App. Div. 1958); *Leers v. Green*, 24 N.J. 239, 251 (1957); *Rogers v. Courier Post Co.*, 2 N.J. 393, 400 (1949). It is also said that fair comment may rest upon privileged facts. *Harper and James, The Law of Torts*, Sec. 5.28, p. 456; 3 *Restatement, Torts*, Sec. 606.

The burden of proving that the comment rested either upon true facts, stated or otherwise identified or known to the recipient, rests on the defendant. *Nusbaum v. Newark Morning Ledger Co.*, 86 N.J. Super. 132, 151 (App. Div. 1965); *O'Reegan v. Schermerhorn*, 25 N.J. Misc. 1, 13 (Sup. Ct. 1946).

I. FAIR COMMENT—EXTENT OF PROTECTION—PUBLIC CONDUCT

Once you determine that the underlying conditions of fair comment have been met you then turn to the question of whether the defendant's expressed observations and opinions about the plaintiff were in fact "fair" comment upon the stated or known facts.

In order to enjoy the protection of the fair comment rule the views expressed by the defendant need not necessarily be sound views or well reasoned ones. Nor do we mean by the term "fair comment" only views or opinions with which you find yourself in agreement or which appeal to your sense of logic or experience. What is required in order to qualify the writing as fair comment is that the language used represent the defendant's honest opinion and be based upon facts truly stated. Even though you do not agree with the defendant's conclusions, if you find that considered in context their substance bears some relationship to the stated or known facts then their expression is protected as fair comment. And this protection bars a recovery by the plaintiff against the defendant even though the defendant's opinions are incorrect and even though they were stated in exaggerated, critical, sarcastic or even prejudiced language.

But the rule of fair comment does not protect the expression of opinions which have no connection with the stated or known facts or are out of all proportion to those facts, or serve to introduce new and independent defamatory matter unrelated to the facts. Accordingly, should you conclude that the opinions expressed fall outside the scope of fair comment as thus defined then this defense cannot prevail.

Notes:

Leers v Green, 24 N.J. 239, 254-5, 259 (1957); *Mick v. American Dental Assn.*, 49 N.J. Super. 262, 282 (App. Div. 1958); *Merrey v. Guardian Pub. Co.*, 79 N.J.L. 177, 185 (Sup. Ct. 1909); *affirmed* 81 N.J.L. 632 (E. & A. 1911); *Harper & James, The Law of Torts*, Sec. 5.28, p. 460.

The Restatement differentiates between criticizing the public conduct of a public person and criticizing him for his private conduct. In the former case the criticism need not be reasonably warranted by the facts. It may even be "fantastic" so long as it has "some relation to the facts upon which it is made." But it may not imply the existence of other undisclosed defamatory facts. In the case of private conduct the criticism "must not be so fantastic that a man of reasonable judgment and intelligence

The burden of proving that the comment rested either upon true facts, stated or otherwise identified or known to the recipient, rests on the defendant. *Nusbaum v. Newark Morning Ledger Co.*, 86 N.J. Super. 132, 151 (App. Div. 1965); *O'Reegan v. Schermerhorn*, 25 N.J. Misc. 1, 13 (Sup. Ct. 1946).

I. FAIR COMMENT–EXTENT OF PROTECTION–PUBLIC CONDUCT

Once you determine that the underlying conditions of fair comment have been met you then turn to the question of whether the defendant's expressed observations and opinions about the plaintiff were in fact "fair" comment upon the stated or known facts.

In order to enjoy the protection of the fair comment rule the views expressed by the defendant need not necessarily be sound views or well reasoned ones. Nor do we mean by the term "fair comment" only views or opinions with which you find yourself in agreement or which appeal to your sense of logic or experience. What is required in order to qualify the writing as fair comment is that the language used represent the defendant's honest opinion and be based upon facts truly stated. Even though you do not agree with the defendant's conclusions, if you find that considered in context their substance bears some relationship to the stated or known facts then their expression is protected as fair comment. And this protection bars a recovery by the plaintiff against the defendant even though the defendant's opinions are incorrect and even though they were stated in exaggerated, critical, sarcastic or even prejudiced language.

But the rule of fair comment does not protect the expression of opinions which have no connection with the stated or known facts or are out of all proportion to those facts, or serve to introduce new and independent defamatory matter unrelated to the facts. Accordingly, should you conclude that the opinions expressed fall outside the scope of fair comment as thus defined then this defense cannot prevail.

Notes:

Leers v Green, 24 N.J. 239, 254-5, 259 (1957); *Mick v. American Dental Assn.*, 49 N.J. Super. 262, 282 (App. Div. 1958); *Merrey v. Guardian Pub. Co.*, 79 N.J.L. 177, 185 (Sup. Ct. 1909); *affirmed* 81 N.J.L. 632 (E. & A. 1911); *Harper & James, The Law of Torts*, Sec. 5.28, p. 460.

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could not entertain it"—it may not be "altogether unreasonable." 3 *Restatement, Torts,* Sec. 606, and see comments at pp. 277 and 279.

There may be occasional difficulty in distinguishing between comments which have no relation to the facts and those which are merely not reasonably warranted by the facts. Harper & James suggest that the test is whether independent defamatory matter is introduced, in which case the comment would have "no relation to the facts. Sec. 5.28.

Where the comment implies corrupt or dishonorable motives to the person whose conduct or work is criticized the imputation must be warranted by the facts. *Leers v. Green, supra,* p. 254.

3.13 LIBEL AND SLANDER—DAMAGES

A. LIBEL AND SLANDER–DAMAGES–IN GENERAL

For the injury to his reputation caused by the defendant's alleged defamatory statement the plaintiff seeks to recover both compensatory and punitive damages–that is, he asks to have the money value of his loss restored to him and, in addition, to have the defendant punished for his wrongful act by the imposition of a further award to the plaintiff over and above the amount of plaintiff's loss.

For a (libelous) (slanderous) statement the defendant must compensate the plaintiff for all the detrimental consequences flowing from its effect on the plaintiff's reputation which were reasonably to be foreseen and which were the result, in the usual order of things, of the (libelous) (slanderous) statement. Damages awarded for such injuries are broadly classed as compensatory, and are further sub-classified into what are known as special damages and general damages.

King v. Patterson, 49 N.J.L. 417, 432 (E. & A. 1887). *Bock v. Plainfield Courier-News,* 45 N.J. Super. 302, 309 (App. Div. 1957).

B. LIBEL AND SLANDER–SPECIAL DAMAGES

Special damages are those particular material or financial losses suffered directly by the plaintiff as the proximate result of the injury to the plaintiff's reputation caused by the defamatory words. Such items of damage are not presumed. They must be specified by the plaintiff and proved by the evidence. The plaintiff must show you what his special loss was and by what connected sequence of events it was produced by the defamatory words. In this case the plaintiff claims that he was caused to suffer special damage consisting of the following elements by the (publication) (making) of the (libelous) (slanderous) statement: (Here the trial judge should outline the claimed special damage and discuss the parties' respective contentions concerning the evidence).

Arturi v. Tiebe, 73 N.J. Super. 217, 222 (App. Div. 1962); *Bock v. Plainfield Courier-News,* 45 N.J. Super. 302, 309 (App. Div. 1957).

Harper and James, The Law of Torts, sec. 5.14; 33 *AM. JUR.*, Libel and Slander, sec. 200, p. 189.

C. LIBEL AND SLANDER—GENERAL DAMAGES.

In addition to the direct financial loss which the plaintiff claims was caused by the defendant's wrongful act—the special damage—the plaintiff also asks for the recovery of general damages. General damages are those which the law presumes to follow necessarily from the (publication of a libel) (utterance of a slander) and which are recoverable by the plaintiff without proof of causation [and without proof of special injury]* This is so because the law recognizes that the damage to reputation caused by a defamation may not always lend itself to proof by objective evidence. The door of opportunity may be closed to the victim without his knowledge. His business or professional career may be limited by the operation of forces that he cannot identify but which, nevertheless, were set in motion by the defamatory statement. In fact, it has been said these general damages which are presumed from the (publication) (Statement) of (libelous) (slanderous) matter, while not capable of being accurately measured, are, in many ways, more substantial and real than those which can be proved and measured accurately by the dollar standard.

These considerations are taken into account by the law and you are therefore permitted to award general damages to compensate the plaintiff for injury to his reputation which you reasonably believe he sustained.

In determining the amount of general damages you may take into consideration the manner in which the defamation was disseminated and the extent of its circulation, the kind of reputation the plaintiff enjoyed before the (libel) (slander) and the anguish and mental suffering experienced by the plaintiff. You may also take into consideration the nature of the plaintiff's occupation and the extent to which he may reasonably be expected to find that the defamation has interfered with his successful pursuit of that occupation. Of course, you may also take into consideration the probable effect of whatever effort you find was made by the defendant to reduce the impact of the defamation upon the plaintiff's reputation, including the effect of any public retraction you find was made.

Walsh v. Trenton Times, Inc., 124 N.J.L. 23, 24 (E. & A. 1939); *Bock v. Plainfield Courier-News*, 45 N.J. Super. 302, 311 (App. Div. 1957); *Kelly v. Hoffman*, 9 N.J. Super. 422, 426 (Law Div. 1950); *Harper and James, The Law of Torts*, sec. 5.30 p. 468; 3 *Restatement, Torts*, sec. 621, p. 313; 33 *AM. JUR.*, Libel and Slander, sec. 200, p. 189.

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* Do not charge bracketed language in slander cases unless statement is defamatory per se.

D. LIBEL AND SLANDER—EMOTIONAL SUFFERING—GENERAL DAMAGES.

I remind you that the foundation of an action for defamation is the injury to reputation. Hence, any award you choose to make as part of the general damages may only be to redress consequences which followed from injury to plaintiff's reputation. In connection with the plaintiff's claimed emotional distress I caution you, therefore, that plaintiff may be compensated by you for such ill effects only if you find that he experienced them because of the damage done to his reputation. But if you find that his emotional suffering was caused only by his having (read the libel) (Heard the slander) himself, and not by the publication's impact upon his reputation, then you may not take such suffering into consideration in arriving at the amount of general damages you choose to award the plaintiff.

Cole v. Richards, 108 N.J.L. 356, 357 (E. & A. 1932); *Arturi v. Tiebe*, 73 Super. 217, pp. 222-23 (App. Div. 1962).

E. LIBEL AND SLANDER—PUNITIVE DAMAGES

In addition to his claim for special and general compensatory damages plaintiff also asks that he be awarded punitive damages. Punitive damages differ from compensatory damages in that it is not their purpose to restore to the plaintiff the amount of any loss he sustained because of the defamation. Instead, when allowed, they are imposed to punish the defendant for his wrongful and malicious conduct, to teach him not to do it again, to deter others from following his example, and to vindicate the rights of the plaintiff in substitution for personal revenge.

Whereas compensatory damages must be measured in terms of the hurt suffered by the plaintiff, the amount of the punitive damages should relate to the degree of malice shown by the defendant in delivering the hurt.

By malice is meant express malice—that is, his motivation to (publish and libelous) (make the slanderous) statement by an actual desire to harm the plaintiff as distinguished, let us say, from a desire to publish a statement which he honestly believed to be true. But express malice may be found by you only from affirmative proof separate from the mere act of (making) (publishing) the defamatory statement which indicates ill feeling or such a want of feeling as to impute a bad motive.

Whether punitive damages are allowable in this case, and, if so, the amount thereof are questions which are confided to your sound discretion. In the exercise of this discretion you may take into account the evidence adduced by the plaintiff which he says proves defendant's malicious intent to inflict injury upon the plaintiff by willfully defaming him. You may also consider the evidence supporting the defendant's contention that he

believed in the truth of his statement and that the defamation resulted from his honest desire to report the truth.

You are also free to consider the financial resources of the defendant so that the award you may choose to return will be in an amount sufficient to make the defendant conscious of your intent to inflict punishment upon him, and yet not in so large a sum as to be outrageously harsh or senselessly destructive.

(Here the trial judge should review the evidence, the parties' contentions, and illustrate how the principles of law should be applied.)

Having thus examined the facts as you find them, and having given such weight and consideration to each of the various factors involved to the extent that such weight and consideration is merited, and having found that injury has been done to the fame, reputation and character of the plaintiff, you are then authorized to award to the plaintiff such additional sum over and above the compensatory damages as reflects your sense of the maliciousness of the defendant in offering the insult and the injury, your belief in the groundlessness of the charge, and your desire to vindicate the character of the plaintiff.

Berg v. Reaction Motors Div., 37 N.J. 396, 413 (1962); *Cabokov v. Thatcher*, 37 N.J. Super. 249, 259 (App. Div. 1955); *Winkler v. Hartford Acc. & Ind. Co.*, 66 N.J. Super. 22, 29 (App. Div. 1961); *Hoffman v. Trenton Times*, 17 N.J. Misc. 339, pp. 341-342 (Sup. Ct. 1939); *Hulbert v. Arnold*, 83 N.J.L. 114, 116 (Sup. Ct. 1912); *Schwarz Bros. Co. v. Evening News Publishing Co.*, 84 N.J.L. 486, 497 (Sup. Ct. 1913); *Weir v. McEwan*, 94 N.J.L. 92, 94 (Sup. Ct. 1919); *Neigel v. Seaboard Finance Co.*, 68 N.J. Super. 542, pp. 553-55 (App. Div. 1961).

Although *Jorgensen v. Pennsylvania Railroad Co.*, 38 N.J. Super. 317, 346 (App. Div. 1955) holds that "some evidence of express malice arises" from the publication of a libel per se, the point was made with respect to the express malice sufficient to rebut the defense of privilege. It did not deal with the rule of *Weir v. McEwan, supra*, that proof of malice "beyond the act of publishing" is required for punitive damages.

F. SLANDER PER QUOD—SPECIAL DAMAGE RULE.

In this case there can be no finding of slander in the absence of proof that the plaintiff suffered a financial or material loss as a result of the defamatory statement. Such a loss is known as special damage. Unless the plaintiff has proved that the statement proximately caused him to suffer financial or material loss the charge of slander has not been proved, and in such an event you must find in favor of the defendant—no matter how defamatory the words spoken, no matter how much emotional physical suffering was thereby caused the plaintiff, and regardless also of the malicious motive of the defendant.

Special damages, as I say, are those particular material or financial losses suffered by the plaintiff as the proximate result of the damage to the plaintiff's reputation caused by the defamatory words. They must be specified by the plaintiff and proved by the evidence. The plaintiff must show you what his special loss was and by what connected sequence of events it was produced by the defamatory words. In this case the plaintiff claims that he was caused to suffer special damage composed of the following details. (Here the trial judge should outline the claimed special damage and discuss the parties' respective contentions concerning the evidence.)

I remind you that should you find no special damage proved by the plaintiff then the charge of slander has not been proved, and you must then return your verdict in favor of the defendant. If, on the other hand, you find special damages have been proved you should agree upon their amount and you may thereafter consider plaintiff's further claims for general and punitive damages.

Arturi v. Tiebe, 73 N.J. Super. 217, pp. 222-23 (App. Div. 1962). The per se—per quod distinction applies only to slander cases as far as the requirement for special damages is concerned. Where libel is proved, even though reference to extrinsic facts is necessary to reveal the defamatory nature of the publication, general damages are presumed, as in the case of any libel. *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420, 446, (App. Div. 1958), decision adhered to, 49 N.J. Super. 551 (App. Div. 1958), distinguishing *dicta* contra in *Bock v. Plainfield Courier-News*, 45 N.J. Super. 302, 309 (App. Div. 1957) and *Leers v. Green*, 24 N.J. 239, 251 (1957).

3.14 MALICIOUS PROSECUTION

ELEMENTS OF A MALICIOUS PROSECUTION ACTION BASED UPON A PRIOR CRIMINAL PROCEEDING.

An action at law for malicious prosecution based upon a prior criminal judicial proceeding consists of several elements.

First. The plaintiff must establish the existence of a criminal judicial proceeding against him. On this subject the (undisputed) facts are (state the nature of the criminal charge instituted against the plaintiff, the name of the judicial tribunal in which it was instituted, etc.)

Second. The plaintiff must establish that the defendant was responsible for or caused that proceeding to be instituted against him.

On this subject the (undisputed) facts are (state what the defendant did to initiate the criminal judicial proceeding against the plaintiff such as signing a complaint, etc.)

Third. The plaintiff must establish the criminal proceeding terminated favorably to him or in a manner not adverse to him.

On this subject the (undisputed) facts are (state facts relating to the nature of the termination, such as a termination in his favor, a failure of the grand jury to indict, a failure of the magistrate to find a *prima facie* case, a voluntary withdrawal or abandonment, etc.)

Fourth. The plaintiff must establish a lack of reasonable or probable cause for the criminal prosecution.

(On this subject there is sharp conflict in the proofs.)

The plaintiff contends that there was a lack of reasonable or probable cause and the defendant contends that there was reasonable or probable cause for instituting the criminal action against the plaintiff.

In cases of criminal prosecution reasonable or probable cause exists where there are reasonable grounds for suspicion or belief that an offense was committed, and there are circumstances, sufficiently strong in themselves, to warrant an ordinarily cautious person to believe that the accused committed it. However, conjecture or unfounded suspicion do not constitute reasonable or probable cause.

Whether probable cause existed does not depend upon a consideration of what the facts actually were, but rather upon a consideration of what the facts were as they appeared to or were known by or were believed to be by the defendant when he instituted the criminal proceeding against the plaintiff.

It was not necessary that the defendant have actual cause to prosecute the plaintiff; it was necessary only that he have reasonable or probable cause for so doing.

If you find that the defendant had reasonable or probable cause to believe that plaintiff was guilty of the charge it is immaterial that the plaintiff was in fact innocent. Even if you believe that plaintiff was innocent of the crime, he cannot recover if you find that the defendant had reasonable or probable cause to believe that he was guilty. Nor can you draw an inference of lack of reasonable or probable cause just because the criminal prosecution ended by (here state how prosecution ended).

On the other hand, if you find that the defendant did not have an honest belief that the plaintiff was guilty and the charges were thereby falsely brought, you must conclude that there was no reasonable or probable cause.

(Here review the facts dealing with the conflicting contentions as to reasonable or probable cause.)

Fifth. The plaintiff must establish that the defendant was activated by a malicious motive in prosecuting the criminal complaint against him.

The malice contemplated by this element is not malice in the sense that the word is sometimes used. The kind of malice I speak of means the intentional doing of a wrongful or unlawful act without just cause or excuse. Such malice is an intentional act which an ordinarily cautious man would realize that under ordinary circumstances damage would result to one's person or property, and which does in fact damage another's person or property. The element of malice may be inferred from a lack of reasonable or probable cause.

Sixth. The last element that must be proved is that the plaintiff suffered damage, as I shall later define that term, as a proximate result of a malicious prosecution.

(See Charge on "Damage in a Malicious Prosecution Action Based on a Prior Criminal Proceeding.")

(If the defense of advice of counsel is within the issues of the case the following should be added.)

In this case the defendant has raised the defense of advice of counsel. This is an affirmative defense and the burden of establishing it by a preponderance of the credible evidence is upon the defendant.

If you find that the defendant truthfully communicated to his attorney all of the material facts of the case and then relied upon the advice of his attorney to institute the criminal prosecution against the plaintiff, the plaintiff cannot recover even if you find that he has proved all the necessary elements to establish malicious prosecution.

On the other hand, the advice of an attorney will not protect a party who consults an attorney unless all the material facts within his knowledge are fully and truthfully stated to the attorney. If you find from the evidence that in seeking the advice of counsel the defendant did not make a full, fair and complete disclosure of all material facts within his knowledge to his counsel, the advice of counsel is no defense to this action.

Notes:

The law does not look with favor upon actions for malicious prosecution; it does not encourage them. The reason is embedded deeply in our jurisprudence. Extreme care must be exercised to avoid the creation of a reluctance to seek redress for civil or criminal wrong for fear of being subjected to a damage suit if the action results adversely. *Mayflower v. Thor,* 15 N.J. Super. 139 (1951), *aff'd* 9 N.J. 605 (1952); *Toft v. Ketchum,* 18 N.J. 280 (1955).

PLAINTIFF MUST ESTABLISH EXISTENCE OF A CRIMINAL JUDICIAL PROCEEDING INSTITUTED AGAINST HIM BY THE DEFENDANT

The general rule is that a malicious prosecution action must be predicated upon the institution of a proceeding before a judicial tribunal. See *Toft, supra.*

Under certain circumstances, however, a malicious prosecution action may be founded upon the institution of other than a judicial proceeding, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests. See *Toft, supra.* and cases cited therein, which involved a proceeding against an attorney before a county ethics and grievance committee. See also *Ranier Dairies v. Raritan Valley Farms Inc.*, 19 N.J. 552 (1952) which involved a complaint before the director of milk industry for revocation of license.

PLAINTIFF MUST ESTABLISH THAT THE CRIMINAL PROCEEDING TERMINATED FAVORABLY TO HIM OR IN A MANNER NOT ADVERSE TO HIM.

The weight of authority in this country, including New Jersey, is to the effect that the original proceeding must have terminated before an action for malicious prosecution can be instituted. This is a condition precedent to the existence of the cause of action and must be pleaded. See *Mayflower, supra.*

Although the rule is generally stated that the action must have terminated favorably to the plaintiff in the malicious prosecution action, all that is necessary is that there be a termination not adverse to the plaintiff coupled with additional proof of malice and lack of probable cause. *Mayflower, supra.*

(a) Voluntary withdrawal or abandonment supports cause of action. *Shoemaker v. Shoemaker,* 11 N.J. Super. 471 (App. Div. 1951); *Hammill v. Mack International Truck Corp.*, 104 N.J.L. 551 (E. & A. 1911).

(b) Failure of Grand Jury to indict is sufficient. *Weisner v. Hansen,* 81 N.J.L. 601 (E. & A. 1911).

(c) Failure of magistrate to find *prima facie* case is sufficient. *Shoemaker v. Shoemaker,* 11 N.J. Super. 471 (App. Div. 1951).

(d) Nolle Prosequi is sufficient. *MacLaughlin v. Lehigh Valley R.R. Co.*, 93 N.J.L. 263 (Sup. Ct. 1919).

REASONABLE OR PROBABLE CAUSE

Probable cause has been defined as a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense. It must be more than mere conjecture or unfounded suspicion. *Galafaro v. Kuenstler,* 53

N.J. Super. 379 (App. Div. 1958); *Dombrowski v. Metropolitan Life Ins. Co.*, 18 N.J. Misc. 240, *aff'd* 126 N.J.L. 545 (E. & A. 1941). See *Earl v. Winne*, 14 N.J. 119 (1953); *Shoemaker v. Shoemaker, supra; Little v. Little*, 4 N.J. Super. 352 (App. Div. 1949); *Lane v. Pennsylvania R.R. Co.*, 78 N.J.L. 672 (E. & A. 1910).

Where the facts involving probable cause are not in dispute, the question of probable cause is one of law to be determined by the court. *Shoemaker v. Shoemaker, supra; Vladar v. Klopman*, 89 N.J.L. 575 (E. & A. 1916).

Even an actual determination on the merits against the defendant in the prior proceedings of itself, has no probative force as evidence of want of probable cause. There must be some independent proof of the other elements. *Mayflower, supra; Shoemaker, supra.*

On the other hand, a judgment favorable to the person who initiated the proceedings is generally conclusive of probable cause even though subsequently reversed on appeal. *Toft v. Ketchum*, 18 N.J. 280 (1955), *affirmed* 18 N.J. 611 (1955) citing *Restatement of Torts*, s675, comment (b), s 680, comment (b) (1938).

The holding over by a magistrate is strong evidence of probable cause, though it is not in itself dispositive of the question. Where the accused is committed or held to bail by a magistrate or indicted by the Grand Jury, that constitutes *prima facie* evidence of probable or reasonable cause. *Galafaro v. Kuenstler, supra.*

The failure of the Grand Jury to indict is not, however, considered conclusive on the question of probable cause. *Galafaro v. Kuenstler, supra.*

Proof of malice and want of probable cause may be established by proof circumstantial in nature since usually direct evidence is not obtainable. *Mayflower, supra.*

MALICE

Malice in this connection means the intentional commission of a wrongful act without just cause or excuse. *Brennan v. United Hatters*, 73 N.J.L. 72 (E. & A. 1906); *Kamm v. Flink*, 113 N.J.L. 583 (E. & A. 1934); *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552 (1955).

In *Brennan v. United Hatters, supra,* the court said:

> ". . . But malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse. . . And what is a wrongful act without the meaning of this definition? We answer, any act which in the ordinary course will infringe upon the rights of another to his damage is wrongful, except it be done in exercise of an equal or superior right. In *Mogul Steamship Co. v. McGregor*, 23 Q.B. Div. pp. 598-613, Lord Justice Bowen said: 'Now intentionally to do which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse, is what the law calls a malicious wrong.'"

Malice may be inferred from a lack of probable cause. *Galafaro v. Kuenstler, supra; Hammill v. Mack International Truck Corp.*, 104 N.J.L. 551 (E. & A. 1928).

DEFENSE OF ADVICE OF COUNSEL

It would appear that the defense of advice of counsel is an affirmative defense and the burden should be upon the defendant in the malicious prosecution action to establish it by a preponderance of the credible evidence. See *Cabakov v. Thatcher*, 37 N.J. Super. 249 (App. Div. 1955).

If the jury determines that the defense has been established it is a complete defense and a bar to the action. *Galafaro v. Kuenstler, supra., Dombrowski v. Metropolitan Life Ins. Co.*, 126 N.J.L. 535 (E. & A. 1941).

The rule requires that a party who requests the advice of counsel must communicate fully all the material facts within his knowledge and must not state matters that he knows are false. *Cabakov, supra; Mayflower, supra; Dombrowski, supra.*

STATUTE OF LIMITATIONS

An action for malicious prosecution must be instituted within six years from the date the cause of action arose. *Earl v. Winne*, 14 N.J. 119 (1953). Since the action is personal in nature, a wrong against a person's feelings and reputation, it abates on death. *Patrick v. Esso Standard Oil Co.*, 156 F. Supp. 336 (D.C.N.J. 1957).

MALICIOUS PROSECUTION ACTIONS BY PROFESSIONAL PERSONS

In *Toft v. Ketchum, supra,* our Supreme Court held that the filing of a groundless complaint with an ethics and grievance committee does not allow an attorney to predicate a malicious prosecution or similar action upon it. To overcome the Toft holding the Legislature enacted the following statute. *N.J.S.* 2A:47A-1:

> "Any person who falsely and maliciously and without probable cause makes a complaint, orally or in writing of unprofessional conduct against a member of any profession requiring a license or other authority to practice such profession, to any court or to any ethics and grievance committee, or to any board or other public body authorized to and having the right to hear such complaint and to act thereon or to recommend action thereon and to take or recommend the taking of disciplinary action against the person complained of, such as disbarment or suspension in the case of an attorney-at-law, or the revocation or suspension of a license of other professional persons, shall be liable for any and all damages suffered and sustained by the member of a profession so complained of, to be recovered in a civil action in the nature of an action at law for malicious prosecution. In any such action, exemplary or punitive damages may be awarded."

In the only case interpreting this statute, the court, in a very brief opinion in *Black v. Koener*, 44 N.J. 140 (1965), said that the malice required by this statute to support a malicious prosecution action is "malice in fact."

"Malice in fact" seems to be equatable with the kind of malice necessary to establish punitive damages and is different from the common law ingredient of malice necessary to establish the malicious prosecution action. See *Brennan v. United Hatters, supra.*

STATUTE ON SHOPLIFTING

In malicious prosecution cases arising out of shoplifting situations the Legislature provided statutory immunity to merchants who feel the need to reasonably detain individuals whom they have cause to believe are concealing or stealing unpurchased merchandise. This law provides further protection if a merchant causes the arrest of a shoplifter. The statute *N.J.S.* 2A:170-100 is as follows:

"A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover such merchandise by taking the person into custody, may for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for not more than a reasonable time. Such taking into custody by a law enforcement officer or special officer or merchant shall not render such law enforcement officer, special officer or merchant criminally or civilly liable in any manner or to any extent whatsoever.

Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting as defined in section 1 of this act.

A merchant who causes such arrest as provided for in this section, of a person for shoplifting shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting."

DAMAGES IN A MALICIOUS PROSECUTION ACTION BASED UPON A PRIOR CRIMINAL ACTION

In this case you must consider two categories of damages, compensatory damages and punitive damages.

I shall first deal with compensatory damages.

A. Compensatory damages are those which you find plaintiff sustained as a proximate result of the malicious prosecution and consist of injury or loss to reputation, fame or character, time spent in jail or in custody, humiliation, physical and mental suffering, distress, embarrassment, nervous shock, impairment of social and business standing, loss of earnings, and reasonable costs and counsel fees incurred in defending the action maliciously brought.

In this connection the word "proximate" means that the malicious prosecution must have been the efficient, producing cause of such injury or loss.

(Discuss testimony relating to proof of damages and to out of pocket items such as wage loss, medical and hospital bills, counsel fees in defense of the prosecution, etc.)

Your evaluation of plaintiff's claim for compensatory damages must be expressed in terms of one lump sum for all of the elements that you find comprise that claim.

B. Punitive damages may be awarded by you against the defendant under conditions that I will explain to you, as punishment for the wrong done by the defendant.

I have already spoken to you about the malice necessary to support the claim for malicious prosecution. Such malice, as I said, means the intentional doing of a wrongful or unlawful act without just cause or excuse.

That kind of malice would not justify an award for punitive damages. However, if in addition to finding that kind of malice, you also find by a preponderance of the credible evidence that the criminal complaint was initiated by the defendant with actual malice, or actual ill will, or with a willful intention of injuring plaintiff, or that the criminal complaint was instituted under circumstances or oppression, wantonness or a reckless disregard of the plaintiff's rights, or such a want of feeling as to impute a bad motive, then you have the right to award punitive damages, in such sum as in your judgment is justified in the proper administration of justice as punishment for the malicious wrong done to the plaintiff.

If you find a verdict for plaintiff and assess damages for compensatory and punitive damages you must return a separate judgment for each.

Notes:

A. *Compensatory Damages*

Malicious prosecution is a tort action and if the right of action is established, the damages recoverable would be those which proximately flowed from the plaintiff's wrongdoing. *Gierman v. Toman*, 77 N.J. Super. 18 (Law Div. 1962); *Dombrowski v. Metropolitan Life Ins. Co.*, 18 N.J. Misc. 240, *affirmed* 126 N.J.L. 545 (E. & A. 1941).

Specifically such damages include:

(a) Reasonable costs and counsel fees incurred in defending the action maliciously brought. *Mayflower v. Thor*, 15 N.J. Super. 139 (1951), *affirmed* 9 N.J. 605 (1952).

(b) Impairment of social and business standing. *Dombrowski, supra.*

(c) Arrest and detention in jail until released on bail. *Dombrowski, supra.*

(d) Mental suffering. *Dombrowski, supra.*

B. *Punitive Damages*

"Courts have recognized awards above full compensation 'for the purpose of punishing the defendant, or teaching him not to do it again, and of deterring others from following his example.'" See *Prosser on Torts,* p. 9 (2nd Ed. 1955). *Berg v. Reaction Motors,* 37 N.J. 396 (1962), *Price v. Phillips,* 90 N.J. Super. 480 (App. Div. 1966).

The following recent cases indicate the appropriate standard for punitive damages in tort cases and would seem to be equally applicable to malicious prosecution actions.

(a) The cases would seem to indicate that one of these factors must be found before punitive damages can be awarded in a suit for trespass to real property, viz. (1) actual malice, or (2) wanton and willful disregard for the rights of another.

"Professor McCormick suggests that in order to satisfy the requirement of willfulness or wantonness there must be a 'positive element of conscious wrongdoing' . . . Our cases indicate that the requirement may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *LaBruno v. Lawrence,* 64 N.J. Super. 570 (App. Div. 1960).

(b) "In *Spiegel v. Evergreen Cemetery Co.,* 117 N.J. 90 (Sup. Ct. 1936), the court held:

'A reckless disregard by the wrongdoer of the legal rights of the victim is properly classable as an intentional infringement—a willful wrong . . . it warrants the imposition of exemplary damages.'" *Winkler v. Hartford Acc. and Ind. Co.,* 66 N.J. Super. 22 (App. Div. 1961).

(c) "In *King v. Patrylow,* 15 N.J. Super. 429 (App. Div. 1951), court said:

'The emphasis is upon the reckless indifference of consequences of the deliberate act or omission in the facts of known circumstances and the high degree of probability of producing the harm. To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. *Staub v. Public Service Ry. Co.,* 97 N.J.L. 297 (E. & A. 1922).'" *Tidewater Oil v. Camden Securities,* 49 N.J. Super. 155 (Chan. Div. 1958).

Note:

Financial Capacity and Punitive Damages

If the plaintiff presents sufficient proof from which the jury can find the suit was maliciously instituted then he is entitled to present evidence on the defendant's financial capacity upon the issue of punitive damages.

Gierman v. Toman, 77 N.J. Super. 18 (App. Div. 1962); See *Neigel v. Seaboard Finance Co.,* 68 N.J. Super. 542 (App. Div. 1961).

SEPARATE JUDGMENTS SHOULD BE RETURNED FOR COMPENSATORY AND PUNITIVE DAMAGES

The wiser practice is to require two separate awards where punitive and compensatory damages are being returned. This may save a new trial, at least in part, where there is error going only to one element of damages. *Gallichio v. Gumina*, 35 N.J. Super. 442 (App. Div. 1955).

ELEMENTS OF A MALICIOUS PROSECUTION ACTION BASED UPON A PRIOR CIVIL PROCEEDING.

An action at law for malicious prosecution based upon prior civil judicial proceeding consists of several elements.

First. The plaintiff must establish that the defendant instituted or caused to be instituted a civil suit against him and that he suffered special grievance thereby. (Here state the nature of the special grievance such as whether plaintiff was arrested in connection with said suit or whether his property or business was interfered with by the appointment of a receiver, the granting of an injunction, by writ of replevin, by the filing of a *lis pendens,* etc.).

Second. The plaintiff must establish that the civil suit terminated favorably to him or in a manner not adverse to him.

On this subject the (undisputed) facts are (state facts relating to the nature of the termination, such as a termination in his favor, a voluntary withdrawal or abandonment, etc.)

Third. The plaintiff must establish lack of reasonable or probable cause for the civil suit.

(On this subject there is a sharp conflict in the proofs.)

The plaintiff contends that there was a lack of reasonable or probable cause and the defendant contends that there was reasonable or probable cause for instituting the civil action against the plaintiff.

In cases of civil actions reasonable or probable cause exists where there are reasonable grounds for belief that a cause of action exists, supported by circumstances sufficient to warrant an ordinarily prudent man in believing that it exists.

Whether probable cause existed does not depend upon a consideration of what the facts actually were, but rather upon a consideration of what the facts were as they appeared to or were known by or were believed to be by the defendant when he instituted the civil suit against the plaintiff.

It was not necessary that the defendant have actual cause to sue the plaintiff; it was necessary only that he have reasonable or probable cause for so doing.

If you find that the defendant had reasonable or probable cause to believe that plaintiff was civilly liable it is immaterial that the plaintiff was in fact not liable. Even if you believe that plaintiff was not civilly liable, he cannot recover if you find that the defendant had reasonable or probable cause to believe that he was liable. Nor can you draw an inference of lack of reasonable or probable cause just because the civil suit ended by (here state how the suit ended).

On the other hand, if you find that the defendant did not have an honest belief that the plaintiff was liable and the suit was thereby falsely instituted you must conclude that there was no reasonable or probable cause.

(Here review the facts dealing with the conflicting contentions as to reasonable or probable cause.)

Fourth. The plaintiff must establish that the defendant was activated by a malicious motive in instituting the civil suit against him.

The malice contemplated by this element is not malice in the sense that the word is sometimes used. The kind of malice I speak of means the intentional doing of a wrongful or unlawful act without just cause or excuse. Such malice is an intentional act which an ordinarily cautious man would realize that under ordinary circumstances damage would result to one's person or property, and which does in fact damage another's person or property. The element of malice may be inferred from a lack of reasonable of probable cause.

Fifth. The last element that must be proved is that the plaintiff suffered damage, as I shall later define that term, as a proximate result of a malicious prosecution. (See Charge "Damages in a Malicious Prosecution Action Based on a Prior Civil Action.")

(If the defense of advice of counsel is within the issues of the case following should be added.)

In this case the defendant has raised the defense of advice of counsel. This is an affirmative defense and the burden of establishing it by a preponderance of the credible evidence is upon the defendant.

If you find that the defendant truthfully communicated to his attorney all of the material facts of the case and then relied upon the advice of his attorney to institute the civil suit against the plaintiff, the plaintiff cannot recover even if you find all the necessary elements to establish malicious prosecution.

On the other hand, the advice of an attorney will not protect a party who consults an attorney unless all the material facts within his knowledge are fully and truthfully stated to the attorney. If you find from the evidence

that in seeking the advice of counsel the defendant did not make a full, fair and complete disclosure of all material facts within his knowledge to his counsel, the advice of counsel is no defense to this action.

Notes:

"Originally, no cause of action was recognized in the law for the wrongful institution of a civil action irrespective of the fact that it was brought maliciously and without probable cause. The recovery of costs by the defendant was considered sufficient redress. However, the inadequacy of this remedy asserted itself and as early as 1816 our Supreme Court established an exception to the doctrine. In *Potts v. Imlay,* 4 N.J.L. 382 (Sup. Ct. 1816), it was declared that an action for malicious prosecution could not be maintained for prosecuting a civil suit *unless the defendant in that suit was 'arrested without cause and deprived of his liberty or made to suffer other special grievance different from an superadded to the ordinary expense of a defense.'* (Original emphasis). This rule has never been changed or criticized and it still represents the law of this State. *Bitz v. Meyer,* 40 N.J.L. 252 (Sup. Ct. 1878); *Schneider v. Mueller,* 132 N.J.L. 163 (E. & A. 1944)." *Mayflower Industries v. Thor Corp.,* 15 N.J. Super. 139, 151 (1951), affirmed 9 N.J. 605 (1952).

A special grievance may consist of disbarment proceedings; *Toft v. Ketchum,* 18 N.J. 280 (1955) of license revocation proceedings before the Director of Milk Industry, *Rainier Dairies v. Raritan Valley Farms, Inc.,* 19 N.J. 552 (1955) and where plaintiff's property or business has been interfered with by appointment of receiver, granting of injunction or restraining order or filing of *lis pendens. Mayflower Industries v. Thor Corp.,* 15 N.J. Super. 139 (1951), *affirmed* 9 N.J. 605 (1952).

Whether the special grievance pleaded is actionable, as a matter of law, is for the Court's determination.

"The action for malicious prosecution of a civil suit is governed by the same rules governing such an action arising out of a criminal prosecution.[1] *Prosser on Torts,* s97, p. 885. In order to succeed, it must appear (1) that the suit was brought without reasonable or probable cause; (2) that it was actuated by malice, and (3) and it has terminated favorably to the plaintiff. *Shoemaker v. Shoemaker, supra.* These elements must be established in addition to the special grievance already mentioned.

Malice in this connection means the intentional commission of a wrongful act without just cause or excuse. *Brennan v. United Hatters,* 7 N.J.L. 729 (E. & A. 1906); *Kamm v. Flink,* 113 N.J.L. 583 (E. & A. 1934).

In *Brennan v. United Hatters, supra,* Justice Pitney, for the Court, said:

'But malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse.

And what is a wrongful act within the meaning of this definition? We answer, any act which in the ordinary course will infringe upon the rights of another to his damage is wrongful, except it be done in the exercise of an equal or superior right. In *Mogul Steamship Co. v. McGregor,* 23 Q.B. Div. 589-613, Lord Justice Bower said: "Now, intentionally to that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when

1. Since these actions are governed essentially by the same rules, consult the notes dealing with malicious prosecution of a criminal action for any elements not discussed herein.

done without just cause or excuse, is what the law calls a malicious wrong.' (pp. 744-745).

Reasonable or probable cause for the institution of a civil suit is the presence of reasonable ground for belief that the cause of action exists supported by circumstances sufficient to warrant an ordinary prudent man in the belief that it exists." *Mayflower v. Thor,* 15 N.J. Super. 139, 152-153 (Chan. Div. 1951).

COUNTERCLAIM

"If in a civil suit the defendant files a counterclaim alleging that the main suit constitutes malicious prosecution it may well be that under our present liberal practice rules the filing of the counterclaim would be allowed, but trial thereon withheld pending disposition of the original action." See *Mayflower, supra,* and cases cited therein.

A. *Compensatory Damages*

Compensatory damages are those which you find that plaintiff sustained as a proximate result of the defendant's wrongdoing. (In cases in which an arrest was made in connection with a civil suit, compensatory damages consist of injury and loss to reputation, fame or character, time spent in jail or custody, humiliation, physical and mental suffering, distress, embarrassment, nervous shock, impairment of social and business standing, loss of earnings, and reasonable costs and counsel fees incurred in defending the action maliciously brought. In cases where no arrest but other special grievance is shown, damages would include business losses and the like, and reasonable costs and counsel fees).

In this connection the word "proximate" means that the malicious prosecution must have been the efficient, producing cause of such injury or loss.

(Discuss testimony relating to proof of damages and to out of pocket items such as wage loss, medical and hospital bills, counsel fees in defense of the prosecution, etc.).

Your evaluation of plaintiff's claim for compensatory damages must be expressed in terms of one lump sum for all of the elements that you find comprise that claim.

B. *Punitive Damages*

Punitive damages may be awarded to plaintiff under conditions that I will explain to you, as punishment for the wrong done by the defendant.

I have already spoken to you about the malice necessary to support the claim for malicious prosecution. Such malice, as I said, means the intentional doing of a wrongful or unlawful act without just cause or excuse.

That kind of malice would not justify an award for punitive damages. However, if in addition to finding that kind of malice, you also find by a preponderance of the credible evidence that the civil suit was brought by

the defendant with actual malice, or actual ill will, or with a willful intention of injuring plaintiff, or that the civil suit was instituted under circumstances or oppression, wantonness or a reckless disregard of the plaintiff's rights, or such a want of feeling as to impute a bad motive, then you have the right to award punitive damages, in such sum as in your judgment is justified in the proper administration of justice as punishment for the malicious wrong done to the plaintiff.

If you find a verdict for plaintiff and assess damages for compensatory and punitive damages you must return a separate judgment for each.

3.16 FALSE IMPRISONMENT AND FALSE ARREST

GENERALLY

False imprisonment is the unlawful detention of an individual. In this context the word "detention" means the unlawful restraint of a person's personal liberty or freedom of movement and the word "unlawful" means without legal authority.

Such unlawful restraint may result from actual force or by threats consisting of words or conduct which induce a reasonable apprehension of force.

The unlawful detention need not be for more than an appreciable length of time as even a brief restraint of a person's freedom is sufficient to constitute false imprisonment.

The restraint must be against the plaintiff's will. If he agreed of his own free choice to surrender his freedom of motion or personal liberty there is no false imprisonment.

To constitute a false imprisonment the act of the defendant in confining the plaintiff must have been done with the intention of causing a confinement. A purely accidental confinement without the intent to confine is not a false imprisonment; nor is a confinement due to the negligence of defendant a false imprisonment.

It is not a necessary ingredient in a cause of action based upon false imprisonment that the defendant be motivated by malice in the sense of ill will or a desire to injure, although, as I shall explain shortly, the presence or absence of malice may be shown in aggravation or mitigation of damages.

(Here discuss facts relied upon by plaintiff to establish the false imprisonment. If the defendant denies that plaintiff was, in fact, falsely imprisoned or alleges that it was not intentional, or that it was voluntary on plaintiff's part, etc., such issue should be submitted to the jury as a fact question. If the detention was under assertion of legal authority the appropriate section of the following should be added).

DEFENSE OF LEGAL AUTHORITY FOR CONFINEMENT

It is a complete defense, however, to the charge of false imprisonment if the defendant restrained or arrested the plaintiff with legal authority. If the defendant was exercising his rights according to law then the imprisonment was justifiable.

A. *Citizens arrest without warrant for Misdemeanors.*

It is the law of this State that a private citizen may lawfully arrest another person without a warrant if he knows that a misdemeanor has actually been committed and that there is probable or reasonable cause to fairly suspect that the person he arrested did it.

When such an arrest without a warrant is made the prisoner must be taken without unnecessary delay before the nearest available magistrate, a complaint filed forthwith and a warrant issued thereon.

The crime for which it was alleged that the defendant arrested the plaintiff was ..... This is equitable with a common law felony for which a citizen's arrest may be made. (Here discuss facts of arrest and detention). If you find that the defendant had actual knowledge that that crime was committed and reasonable or probable cause for believing that plaintiff did it, you still must consider whether he restrained the plaintiff for a reasonable period of time before bringing him to the magistrate or whether he confined the plaintiff for a length of time that was unnecessary under the circumstances. A reasonable time for confinement under the circumstances is the time that an ordinarily cautious man would take to bring the plaintiff into the jurisdiction of the magistrate in the situation that faced the defendant. The reasonableness of this time would be affected by the availability of the magistrate, the location of the arrest, the time of day, the problem of confining the plaintiff, available means for reaching the magistrate and any other factors that you might think had a bearing on the amount of time. If the defendant imprisoned the plaintiff for an unreasonable time then notwithstanding the original legality of the confinement the unreasonable detention would constitute false arrest. On the other hand, if the arrest was legal and the confinement reasonable according to the rules of law I have explained, then you must find for the defendant.

B. *Arrest without warrant or process by a constable, police officer or private person for offenses under the disorderly persons act.*

It is the law of this State (*N.J.S.* 2A:169-3) that whenever an offense is committed in his presence, a constable, police officer or any other person may apprehend without warrant or process any disorderly person and take him before any magistrate of the county where apprehended without unnecessary delay.

The offense for which it was alleged that the defendant arrested the plaintiff was ..... This offense is one of those enumerated in the disorderly persons law for which an arrest may be made without a warrant by a citizen, a police officer or a constable.

The essential element of an arrest without a warrant for the commission of a disorderly persons offense is that it must have been committed in the presence of the person making the arrest. (Here discuss facts of arrest). If you find that the offense was committed in the defendant's presence and by reason thereof he apprehended the plaintiff, you still must consider whether he restrained the plaintiff for a reasonable period of time until he could bring him to the magistrate or whether he confined the plaintiff for a length of time that was unnecessary under the circumstances. A reasonable time for confinement under the circumstances is the time that an ordinarily cautious man would take to bring the plaintiff into the jurisdiction of the magistrate in the situation that faced the defendant. The reasonableness of this time would be affected by the availability of the magistrate, the location of the arrest, the time of day, the problem of confining the plaintiff, available means for reaching the magistrate and any other factors that you might think had bearing on the amount of time. If the defendant imprisoned the plaintiff for an unreasonable time then notwithstanding the original legality of the confinement the unreasonable detention would constitute false arrest. On the other hand, if the arrest was legal and the confinement reasonable according to the rules of law I have explained, then you must find for the defendant.

C. *Police Arrest Without a Warrant*

A police officer may arrest an individual without a warrant if he has a reasonable basis to believe that a misdemeanor is being or has been committed, and that the person to be arrested is committing the crime or has committed it, even though it is not being or has not been committed in his presence. Such reasonable basis in this regard means that the facts and circumstances known to the defendant police officer were such as to lead an ordinarily cautious man to believe that a misdemeanor was being committed or had been committed and that the accused had committed it. Such a reasonable basis must be more than mere conjecture or unfounded suspicion. Since the crime defendant alleges he observed is a misdemeanor, if you find that he had reasonable grounds to believe that it had been committed and that the plaintiff committed it, you must conclude that it was a valid police arrest. In considering the reasonableness of the defendant's judgment you may consider that a man acting under the pressures of being a policeman cannot make decisions with the same precision as a man making a cautious study of the same facts at home in his armchair. Also, you may consider that an officer of the law has no right to intrude

upon the rights of citizens because he has an unfounded hunch that something is wrong. A police officer is required to follow the laws guiding his behavior.

If you find that the defendant had proper grounds to make such an arrest, you still must consider whether he restrained the plaintiff for a reasonable period of time before he could take him before a magistrate and secure a warrant for his arrest or whether he confined the plaintiff without bringing him before the nearest magistrate for a length of time that was unnecessary under the circumstances. A reasonable time to take an arrested man before the nearest magistrate would be the time it would take an ordinary diligent police officer to do that task under the circumstances that faced the defendant. The reasonableness of this time would be affected by the availability of the nearest magistrate considering the location of the arrest and the nearest available magistrate, the time of day, the problem of confining the plaintiff, the available means for reaching such magistrate and any other factors that you might think would have a bearing on the amount of time. If the defendant imprisoned the plaintiff for an unreasonable time before bringing him to the nearest magistrate that would constitute false imprisonment, notwithstanding the initial legality of the confinement. If the confinement is in all respects legal according to the rules of law as I have explained them, then you must find for the defendant.

D. *Shoplifting Statute* (*N.J.S.* 2A:170-97-101).

It is the law of this State (*N.J.S.* 2A:170-100) that a law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover such merchandise by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for not more than a reasonable time.

Probable cause in this regard means that the facts and circumstances known to the officer or merchant were such as to warrant an ordinarily cautious person to believe that a person had intentionally or willfully concealed unpurchased merchandise, and that he could attempt to recover such merchandise by taking that person into his custody and control. Such probable cause must be more than mere conjecture or unfounded suspicion. The finding of such merchandise concealed upon the person or among the belongings of such person is evidence for consideration by you, from which you may draw an inference of willful concealment, although you are not required to do so. If you draw such an inference, it becomes a factor which remains in the case for your consideration together with all of the other facts in the case.

A detention for a reasonable time and in a reasonable manner means the amount of time and the manner that an ordinarily cautious person, under the circumstances, would take or use in attempting the recovery of the unpurchased merchandise by placing a person into custody.

The reasonableness of the time and manner of detention would be affected by the type and size of object allegedly concealed, the cooperation or the lack of cooperation of the person detained in effecting the recovery, the place and manner in which he was detained, and any other factors that you might think had a bearing on the reasonableness of the time and manner of detention.

If you believe that the defendant had probable cause to believe that the plaintiff had willfully concealed unpurchased merchandise and that he could attempt to recover such merchandise by taking the defendant into custody, and that the defendant took the plaintiff into custody for this purpose and that he detained the plaintiff in a reasonable manner for a reasonable time, then you must find that the detention was lawful.

If you find that the defendant lacked probable cause either to believe that the plaintiff had willfully concealed unpurchased merchandise or that he could attempt to recover such merchandise by taking him into custody; or that he took the plaintiff into custody in an unreasonable manner or for an unreasonable time, then you must conclude that the detention was unlawful.

The terms false imprisonment and false arrest are synonymous. They are different names for the same tort. *Price v. Phillips,* 90 N.J. Super. 480 (App. Div. 1966).

The gist of an action for false imprisonment is unlawful detention, without more. *Jorgensen v. Pennsylvania R.R.*, 38 N.J. Super. 317 (App. Div. 1955) *reversed* on other grounds 25 N.J. 541 (1957); *Pine v. Olzewski,* 112 N.J.L. 429 (E. & A. 1933); *Earl v. Winne,* 14 N.J. 119 (1953); *Cannon v. Kratowitch,* 54 N.J. Super. 93 (App. Div. 1959).

The malicious filing of a false complaint which causes the issuance of a warrant upon which one is arrested does not give rise to a cause of action for false imprisonment. The action must be one for malicious prosecution. *Genito v. Rabinowitz,* 93 N.J. Super. 225 (App. Div. 1966).

The tort of false imprisonment has been defined to include the following elements: *Harper & James "The Law of Torts,"* 3rd Ed. p. 226.

1. There must be a Detention.

A. A detention is an unlawful restraint of a person's liberty or freedom of movement. *Pine v. Olzewski,* 112 N.J.L. 429 (E. & A. 1933), *supra.*

B. The Detention Need Not Be Forcible. Threats of force by conduct or words coupled with the apparent ability to carry out threats are sufficient. *Jorgensen v. Penn. R.R., supra; Earl v. Winne, supra.*

In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence is used. Where no force is used, submission must be by reason of an apprehension of force or other unlawful means, mere moral persuasion not being sufficient. *Harper & James, "The Law of Torts"*, Vol. I, p. 227, *Prosser on Torts,* 3rd Ed., p. 57.

C. The Detention Must Be Total, I.E., It Must Be Within Boundaries.

The restraint must be a total one rather than a mere obstruction of the right to go where the plaintiff pleases. Thus, it is not imprisonment to block the plaintiff's passage in one direction only, or to shut him in a room with a reasonable exit open. *Prosser on Torts,* 3rd Ed., p. 54.

Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own. Accordingly, although there are cases to the contrary, the most authoritative modern view is that the plaintiff must be completely confined and any reasonable means of egress known to him will prevent an imprisonment. *Harper & James, "The Law of Torts"*, Vol. I, p. 227. See also *Pine v. Olzewski, supra.*

D. The Detention Must be for an Appreciable Time, however Short.

The actual amount of time required to establish that a detention is unlawful has not been decided by our courts. In *Pine v. Olzewski, supra,* our former Court of Errors and Appeals said that a false imprisonment is *any* restraint of the personal liberty of another; *any* prevention of his movement from place to place. *Harper & James, "The Law of Torts"*, defines the requirement of time as "any appreciable time, however short." Vol. I, p. 226. *Prosser on Torts,* 3rd Ed., p. 55, says that the tort is complete with even a brief restraint of the plaintiff's freedom.

In *Cannon v. Kratowitch, supra,* the Attorney General filed a brief on how long a suspected person may be detained by police authorities in order to investigate whether he actually committed a crime. Although the Court found it unnecessary to make a determination of this issue, the authorities referred to in the brief are stated in the opinion at p. 100.

2. The Detention must be Unlawful.

A detainer pursuant to lawful authority or legal justification cannot support a false imprisonment action. *Genito v. Rabinowitz,* 93 N.J. Super. 225 (App. Div. 1966); *Cannon, supra; Jorgensen, supra; Earl, supra; Lakutis v. Greenwood,* 9 N.J. 101 (1952); *Pine, supra; Collins v. Cody,* 95 N.J.L. 65 (Sup. Ct. 1920); *Shaefer v. Smith,* 92 N.J.L. 267 (Sup. Ct. 1919).

3. The Act of the Defendant in Confining the Plaintiff must have been done with the Intention of Causing a Confinement.

The purely accidental confinement, without the intent to confine is not a false imprisonment; nor is a confinement due to the negligence of the defendant a false imprisonment. *Price v. Phillips, supra.*

But a mistake in identity is not a defense. His intention to confine another person will make him liable to the person actually confined

although there is no desire or intent on the part of the defendant to harm the plaintiff. *Harper & James, "The Law of Torts"*, Vol. I, p.228.

Although intent to confine the individual is necessary, it need not be with knowledge of who he is; and, as in the case of other intentional interferences with person or property, an innocent and quite reasonable mistake as to his identity will not avoid liability. There may be liability although the defendant believed in good faith that the arrest was justified or that he was acting for the plaintiff's own good. *Prosser on Torts,* 3rd Ed., p. 61.

4. The Detention must have been Against the Plaintiff's Will. *Earl v. Winnie, supra; Hebrew v. Pulis,* 73 N.J.L. 621 (E. & A. 1906).

If the plaintiff agreed of his own free will to surrender his freedom of motion or personal liberty, it is not false imprisonment. *Pine, supra.*

The plaintiff may submit to the confinement without resistance and if the submission is not voluntary, there is an imprisonment. *Hebrew, supra.*

MALICE IS NOT AN INGREDIENT IN THE TORT OF FALSE ARREST

Prosser on Torts, 3rd Ed., p. 61 says "although intent is necessary, malice in the sense of ill will or a desire to injure is not. There may be liability although the defendant believed in good faith that the arrest was justified or that he was acting for the plaintiff's own good. Nor is probable cause a defense except insofar as it may serve to validate the arrest itself or to justify a defense of person or property."

Harper & James, "The Law of Torts", Vol. I, p. 228 says: "Malice or ill will or bad motive, however, is unnecessary."

In actions for false imprisonment malice is not an essential element of the right of action, as in malicious prosecution. *Baldwin v. Point Pleasant Beach & Surf Club,* 3 N.J. Super. 284 (Law Div. 1949); *Altana v. McCabe,* 132 N.J.L. 12 (Sup. Ct. 1944).

CITIZEN'S ARREST

A citizen has the right to arrest without a warrant where it appears that a felony had actually been committed, and that there was probable or reasonable cause to fairly suspect the person arrested to be guilty. *Brown v. State,* 62 N.J.L. 666 (E. & A. 1898) *affirmed* 175 U.S. 172; *Reuck v. McGregor,* 32 N.J.L. 70 (Sup. Ct. 1866). Although New Jersey law does not categorize crimes as felonies, for the purpose of arrest law a common law felony corresponds to a misdemeanor for which a person may be incarcerated for more than one year in a State prison.

To supplement the citizen's common law right of arrest, the Legislature has granted additional authority to the individual to make warrantless arrests where a disorderly persons offense has been committed in his presence. *N.J.S.* 2A:169-3 provides:

> "Whenever an offense is committed in his presence any constable or police officer shall, and any other person may, apprehend without

warrant or process any disorderly person, and take him before any magistrate of the county where apprehended."

Recent Legislation in the sensitive area of shoplifting has further extended the citizen's authority to arrest where he is a merchant or the employee of a merchant. *N.J.S.* 2A:170-99-100 states:

"A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover such merchandise by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for not more than a reasonable time. Such taking into custody by a law enforcement officer or special officer or merchant shall not render such law enforcement officer, special officer or merchant criminally or civilly liable in any manner or to any extent whatsoever.

"Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting as defined in section 1 of this act.

"A merchant who causes such arrest as provided for in this section, of a person for shoplifting shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting." (*N.J.S.* 2A:170-100).

"The finding of such merchandise concealed upon the person or among the belongings of such person shall be *prima facie* evidence of willful concealment." (*N.J.S.* 2A:170-99).

Instructions of court should not include phrase *"prima facie"* in speaking of evidential impact of proof of possession (gambling paraphernalia). *State v. Ruggiero,* 41 N.J. 4 (1963).

ARREST BY LAW ENFORCEMENT OFFICERS

The right of law enforcement officers to arrest without a warrant exists when a felony has been committed in his presence or when he has a reasonable basis to believe that a felony is being or has been committed, and when he has a reasonable basis to believe that the person to be arrested is committing or has committed the felony. *State v. Doyle,* 40 N.J. 320 (1963). A felony corresponds to a misdemeanor for which a person may be incarcerated for more than one year in a State prison as indicated *supra.*

The authority for a law enforcement officer's warrantless arrest for offenses of lesser gravity than misdemeanors is the same as for the citizen as prescribed by the statutes quoted above. An officer may make a warrantless arrest for a disorderly *supra.* He may also arrest a shoplifter or detain a person whom he reasonably believes is willfully concealing unpurchased merchandise. *N.J.S.* 2A:170-100, *supra.*

A law enforcement officer further has the right to make a warrantless arrest when he observes a violation of the motor vehicle laws. *N.J.S.A.* 39:5-25. And he may make reasonable detentions pursuant to his administration of these laws. See *Atty. Gen. F.O.* 314 (1958); *Pine v. Olzewski, supra.*

Even when an arrest is justified, these common law and statutory rights are not licenses to exercise an unlimited detention. A law enforcement officer may not detain a person for an unreasonable time, after arrest, without taking him before the nearest magistrate. *Cannon v. Krakowitch, supra.*

A private citizen has the same duty as a law enforcement officer to take the arrested party before a magistrate within a reasonable time. See *State v. Ferraro,* 81 N.J. Super. 214 (Cty. Ct. 1963); *Nelson v. Eastern Airlines, Inc.,* 128 N.J.L. 46 (E. & A. 1942); *Jackson v. Miller,* 84 N.J.L. 189 (Sup. Ct. 1913); *N.J.S.* 2A:169-3).

If the arrest by the law enforcement officer is made with a warrant based on a proper complaint being made and a hearing held before a magistrate, then an action for false arrest cannot be maintained. *Gierman v. Toman,* 77 N.J. Super. 18 (Law Div. 1962); *Baldwin v. Pt. Pleasant Beach & Surf Club,* 3 N.J. Super. 284 (Law Div. 1949).

It is interesting to note that even if the arrest should prove illegal, a private citizen has no right to use force to resist arrest against one he knew or had reason to know was an authorized police officer engaged in the performance of his duties. *State v. Koonce,* 89 N.J. Super. 169 (App. Div. 1965). In such a situation, a defendant law officer may be able to avail himself of a counterclaim for assault and battery.

DAMAGES IN A FALSE IMPRISONMENT CASE

If you find that the defendant is liable for false imprisonment you must determine whether or not such false imprisonment was a proximate cause of the injuries for which the plaintiff complains. Proximate cause is that which, in the natural and continuous sequence, unbroken by any new cause, produces an event and without which the event would not occur. Even if there was false imprisonment, if the false imprisonment was not a proximate cause of the injuries complained of there cannot be any recovery for compensatory damages. If you find that the false imprisonment was a proximate cause of the plaintiff's injuries, he would be entitled to a verdict for compensatory damages in such an amount as would constitute reasonable compensation for loss of time, any physical injuries sustained by him and for mental and emotional stress resulting from the indignity to which he was subjected. (Discuss facts relating to proof of damage).

Regardless of the amount of compensatory damages you may assess, and even if you return no verdict for compensatory damages, the plaintiff would be entitled to a judgment for punitive damages, in such sum as in your judgment is justified in the proper administration of justice as punishment for the wrong done to the plaintiff.

In assessing damages you should consider whether the act of defendant in falsely imprisoning the plaintiff was maliciously motivated or not. The presence of malice may be the basis of an increased damage award whereas the absence of malice may be made the basis of a lower damage award.

If you find a verdict for the plaintiff and assess damages for compensatory and punitive damages you must return a separate judgment for each.

Notes:

(Damages in a False Imprisonment Case)

The plaintiff is entitled to reasonable compensation for physical injuries sustained by him and for humiliation as well as mental and emotional stress resulting from the indignity to which he was subjected. *Cone v. Central R.R. Co.*, 62 N.J.L. 99 (Sup. Ct. 1898); *Price v. Phillips*, 90 N.J. Super. 480 (App. Div. 1966).

In false imprisonment cases, the gravamen of which is deprivation of the essential human right of physical liberty, an injured party is entitled to an award of punitive damages, regardless whether he merits compensatory damages since the right inheres in the wrong. *Barber v. Hohl*, 40 N.J. Super. 526 (App. Div. 1956); *Hesse v. Clark*, 6 N.J. Misc. 421 (Sup. Ct. 1928). *Cf. Price v. Phillips, supra; Altana v. McCabe*, 132 N.J.L. 12 (Sup. Ct. 1944).

If there is any distinction, it is that false imprisonment, being derived from the action of trespass, may be maintained without proof of actual damage, while in such other actions proof of some damage may be required. *Prosser on Torts*, p. 55.

An absence of malice may be shown in mitigation of damages. *Harper & James "The Law of Torts,"* 3rd Ed., p. 228.

The presence or absence of malice may, however, be shown in aggravation or mitigation of damages. *Prosser on Torts*, p. 61.

The wiser practice is to require two separate awards where punitive and compensatory damages are being returned. This may save a new trial, at least in part, where there is error going only to one element of damages. *Gallichio v. Gumina*, 35 N.J. Super. 442 (App. Div. 1955).

3.18 (A) UNLAWFUL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

The right of a person to pursue a lawful business and to enjoy the fruits and advantages of one's industry or efforts are rights which the law protects against unjustified and wrongful interference by another person.

Thus, the law protects a person's interest in reasonable expectations of economic advantage.

In order that the plaintiff may recover damages for a wrongful act, such wrongful act must be found to have interfered with a reasonable expectancy of economic advantage or benefit on the part of the plaintiff.

Thus, plaintiff must prove the following elements:

1. The existence of a reasonable expectation of economic advantage or benefit belonging or accruing to the plaintiff;
2. That the defendant had knowledge of such expectancy of economic advantage;

3. That the defendant wrongfully and without justification interfered with plaintiff's expectancy of economic advantage or benefit;

4. That in the absence of the wrongful act of the defendant it is reasonably probable that the plaintiff would have realized his economic advantage or benefit (i.e., effected the sale of the property and received a commission); and

5. That the plaintiff sustained damages as a result thereof.

It is for you to determine, therefore, whether the plaintiff has established by a preponderance of the evidence all of the elements outlined above. If you so find, then you should return a verdict in favor of the plaintiff. Otherwise, you should find for the defendant.

Related Cases:

Harris v. Perl, 41 N.J. 455 (1964); *Middlesex Concrete, etc., Corp. v. Carteret Industrial Ass'n.*, 37 N.J. 507 (1962); *Raymond v. Cregar*, 38 N.J. 472 (1962); *Rainier's Dairies v. Raritan Val. Farms*, 19 N.J. 552 (1955); *Myers v. Arcadio, Inc.*, 73 N.J. Super. 493 (App. Div. 1962); *Independent Dairy Workers Union of Hightstown v. Milk Drivers, etc., Local No. 680*, 30 N.J. 173 (1959); *Restatement Torts*, sec. 766 (1939).

3.18 (B) TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS (REALTY BROKER V. THIRD PARTY)

The right to pursue a lawful business is a property right which the law protects against unjustified and wrongful interference by another person.

Thus, a person who unjustifiably interferes with the contract of another is guilty of a wrong.

The plaintiff must prove the following elements before he can recover damages against the defendant:

1. The existence of an agreement between the plaintiff and ....., under which ..... agreed to pay plaintiff a commission;

2. That the defendant ..... had knowledge of the agreement between the plaintiff and .....;

3. That the defendant wrongfully and without justification interfered with the contractual relationship existing between plaintiff and ....., and intentionally induced, procured or caused (a breach) (or termination) of the agreement between plaintiff and .....;

4. That in the absence of the wrongful act of the defendant it is reasonably probable that the plaintiff would have effected the sale of the property and received a commission; and

5. That the plaintiff sustained damages as a result thereof.

It is for you to determine, therefore, whether the plaintiff has established by a preponderance of the evidence all of the elements outlined above. If you so find, then you should return a verdict in favor of the plaintiff. Otherwise, you should find for the defendant.

Related Cases:

Harris v. Perl, 41 N.J. 455 (1964), suit by broker against purchaser and others, involving interference with contractual relations and interference with reasonable expectations of economic advantage; *George H. Beckmann, Inc. v. Charles H. Reid & Sons, Inc.,* 44 N.J. Super. 159 (App. Div. 1957), broker had oral listing from seller and recovered damages from purchaser; *Sustick v. Slatina,* 48 N.J. Super. 134 (App. Div. 1957); *Wear-Ever Aluminum, Inc. v. Townecraft, etc., Inc.,* 75 N.J. Super. 135 (Ch. Div. 1962); *Kurtz v. Oromland,* 33 N.J. Super. 443 (Ch. Div. 1955), "malice" as necessary element of action for malicious interference with contract, meant intentional commission of wrongful act without just cause or excuse; as to suit against owner see *Brenner and Co. v. Perl,* 72 N.J. Super. 160 (App. Div. 1962), motion for summary judgment denied; *Louis Schlesinger Co. v. Rice,* 4 N.J. 169 (1956); *Louis Kamm, Inc. v. Flink,* 113 N.J.L. 582 (E. & A. 1934).

Notes:

For distinction between the tort of interference with contractual relations, and interference with the opportunity to enter into an advantageous business relationship, see *Fitt v. Schneidewind Realty Corp.,* 81 N.J. Super. 497 (Law Div. 1963), involving suit by broker against purchaser.

The mere fact that a contract is unenforceable between the parties affords no justification for the act of a third person who, for his own purposes, takes steps which prevent its performance by one of the parties to it, who, although not bound to execute it, is willing and anxious to do so.

Cases:

Prosser, Tort (2nd Ed.) Sec. 726; 1 *Harper & James,* Sec. 6.7 (1956); *AALFO Co., Inc. v. Kinney,* 105 N.J.L. 345, 347 (E. & A. 1929); *Louis Kamm, Inc. v. Fink,* 113 N.J.L. 582, 591 (E. & A. 1934); *George H. Beckman, Inc. v. Charles H. Reid & Sons, Inc.,* 44 N.J. Super. 159 (App. Div. 1957) at p. 165; *Harris v. Perl,* 41 N.J. 455 (461), and cases therein cited.

But see:

Tanenbaum v. Sylvan Builders, 50 N.J. Super. 342 (App. Div. 1958) which holds that an unlicensed broker cannot sue for tortious interference with a real estate commission contract, affirmed in 29 N.J. 62 (1959) but modified to permit the cooperating New Jersey broker to sue on his commission agreement.

Myers v. Arcadio, Inc., 73 N.J. Super. 493 (App. Div. 1962); *C. B. Snyder Realty Co., Inc. v. Seaman Bros., Inc.,* 79 N.J. Super. 88 (App. Div. 1963); *Sustick v. Slating,* 48 N.J. Super. 134 (App. Div. 1957); *Fitt v. Schneide-*

wind Realty Corp., 81 N.J. Super. 497 (Law Div. 1963); *Harper and James Law of Torts* (1956), sec. 6.11, p. 510; *Di Cristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244 (App. Div. 1957); *Weinstein v. Clementsen*, 20 N.J. Super. 367 (App. Div. 1952), (as to competing real estate brokers).

3.18 (C) UNLAWFUL INTERFERENCE WITH CONTRACTUAL RELATIONS, etc. WRONGFUL ACT—DEFINITION

In determining whether the defendant committed a wrongful act, the ultimate inquiry is whether defendant unjustifiably interfered with plaintiff's fair opportunity to conduct his legitimate business affairs.

Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry and skill, free from unjustified and wrongful interference. (He has no right to be protected against fair and legitimate competition).

Thus, the law protects a person in the pursuit of his livelihood. (True, he cannot complain of every disappointment; others too, may further their equal interests, if the means are fair).

If the act complained of does not rest upon some legitimate interest, or if there is sharp dealing or over-reaching, or other conduct below the behavior of fair men similarly situated, the ensuing loss to the plaintiff should be redressed.

Hence one who unjustifiably interferes with the contract (or reasonable expectation of economic advantage) of another has committed a wrongful act.

Cases:

Harris v. Perl, 41 N.J. 455 (1964); *Louis Schlesinger Co. v. Rice*, 4 N.J. 169, 181 (1950), "a *wrongful act* is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right"; *Raymond v. Cregar*, 38 N.J. 472, 480 (1962), "Malicious interference is the intentional doing of a wrongful act without justification or excuse."; *Sokolay v. Edlin*, 65 N.J. Super. 112, 128 (App. Div. 1961), to sustain the allegations that defendant maliciously interfered with plaintiff's employment there must be proof of (1) actual interference by defendant, and (2) the malicious nature of such interference;

3.19 ABUSE OF PROCESS

The plaintiffs in this action allege that the defendant is liable for abuse of process. The defendant denies the allegation.

There are two basic elements necessary to sustain the cause of action of abuse of process. They are (1) that the defendant made an improper, illegal and perverted use of the legal procedure, that is to say, his resort

to the legal process was neither warranted nor authorized by law,* and (2) that the defendant had an ulterior motive in initiating the legal process. In other words, abuse of process is the misuse or misapplication of the legal procedure in a manner not contemplated by law.

Specifically, the plaintiff contends that the defendant utilized the legal process to intimidate, harass and coerce the plaintiff in order to obtain a collateral advantage. In other words, the plaintiff contends that the defendant invoked the legal process to accomplish some unlawful end, namely, to compel the plaintiff to do some collateral thing which he could not legally be compelled to do.

The defendant denies this allegation and asserts that he, the defendant, made a regular and legitimate use of the process. The defendant contends that he employed the legal process to have his claims adjudicated or to enforce legitimate claims.

In short, in order for the plaintiff to prevail in this action, he must prove by a preponderance of the evidence that the defendant made an improper, illegal, and perverted use of the process and that there existed an ulterior motive or purpose on part of the defendant.

If you find that the use of the process was a proper one, then I charge you as a matter of law that the motive is immaterial. The legal pursuits of one's rights, no matter what may be the motive of the promoter of the action, cannot be deemed either illegal or inequitable. It is the misuse of the process, though properly obtained, which constitutes the misconduct for which liability is imposed.

If you find, therefore, that the defendant made a perverted use of legal procedure for which it was not designed, with an ulterior purpose, then I charge you as a matter of law, the law provides a redress and the defendant is thereby liable to the plaintiff.

Notes:

See *Ash v. Cohn,* 119 N.J.L. 54 (E. & A. 1937) in which the Court distinguishes malicious abuse of process from an action for malicious use of process:

> "An action for malicious abuse of process is distinguished from an action for malicious use of process in that the action for abuse of process lies for the improper, unwarranted and perverted use of process after it has been issued while that for the malicious use of it lies for causing process to issue maliciously and without reasonable or probable cause. *Grainger v. Hill,* 4 Bing. N.C. 212. Thus it is said, is substance, that the distinction between malicious use and malicious abuse of process is that the malicious use is the employment of process for its ostensible purpose, although without reasonable or probable cause, whereas the malicious abuse is the employment of a process in a manner

* The Court may explain the phrase "neither warranted nor authorized by law" in the factual context of the particular case.

not contemplated by law. Another fundamental distinction is that in the case of malicious use it is necessary to allege that the action in which the process was used has terminated favorably to the plaintiff whereas in the case of the malicious abuse no such allegation is necessary. *Saliem v. Glovsky* (1942), 132 Me. 402; 172 Atl. Rep. 4; 50 C.J. 512, sec. 373." 119 N.J.L. at p. 58.

Prosser comments on the distinction between these causes of action in his treatise as follows:

"Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause. It is often said that proof of 'malice' is required; but it seems well settled that, except on the issue of punitive damages, this does not mean spite or ill will, or anything other than the improper purpose itself for which the process is used, and that even a pure spite motive is not sufficient where process is used only to accomplish the result for which it was created. Thus if the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process." *Prosser on Torts*, Chap. 22, sec. 121 at 856-857 (4th ed. 1971).

See also:

Earl v. Winne, 14 N.J. 119, 135 (1953); 34 N.J. Super. 605, 616 (Cty. Ct. 1955), and *Gambocz v. Apel, et al.*, 102 N.J. Super. 123, 128-130 (App. Div. 1968) pet. for cert. den. 52 N.J. 485.

3.20 FRAUD—DECEIT

Plaintiff seeks to recover damages which he claims he sustained as a result of a misrepresentation made to him by the defendant. One who represents as true that which is false with the intent to deceive the person to whom the representation is made is liable to that person if he, believing the representation to be true (acts, refrains from acting) in justifiable reliance upon it and suffers damage as a result.

The burden of proof is on the plaintiff to establish by a preponderance of the credible evidence each of the following elements. First, that defendant made a false representation of fact to him. Second, that defendant knew or believed it to be false. Third, that defendant intended to deceive plaintiff. Fourth, that plaintiff believed and justifiably relied upon the statement and was induced by it to (action taken or omitted). Fifth, that as a result of plaintiff's reliance upon the statement, he sustained damage.

The first question for you to determine is what defendant said to the plaintiff. If it was a statement of opinion rather than a statement of fact,

defendant cannot be held responsible, for opinions are matters of judgment for which under the circumstances of this case, the law does not impose liability and your verdict will be for the defendant. If on the other hand you find that defendant stated in words or substance that (recite the representations claimed) your finding will be that defendant made a representation of fact.

If you find that defendant made a representation of fact, you will next consider whether that representation was true or false. If you find it was true, your verdict will be for the defendant. If you find it was false, you will then determine whether defendant knew or believed it was false and made the representation with intent to deceive the plaintiff. A false statement is made with intent to deceive if it is made with knowledge that it is false.

Whether the plaintiff was justified in relying on the representation depends upon whether the fact represented is one that a reasonable man would consider important in reaching a decision in the transaction in question. Even though it is not such an important fact, reliance may be justified if the defendant in making the representation knew that the plaintiff considered it important and would rely upon it.

If you ultimately conclude that there was no justifiable reliance by the plaintiff or even if there was not a substantial factor in plaintiff's decision to enter into the transaction, your verdict will be for the defendant.

If you find that a reasonable person would have considered the representation important in deciding whether to proceed with the transaction or that defendant knew that plaintiff considered the fact important and would rely on it, and you find that plaintiff's belief of the representation was a substantial factor in his decision to engage in the transaction, your verdict would be for the plaintiff and your attention would then turn to the nature and extent of plaintiff's damage.

Sources:

Prosser, Law of Torts, p. 700 (3rd ed. 1964), *Louis Schlesinger Co. v. Wilson,* 22 N.J. 576, 585-586 (1956), *Fischetto Paper Mill Supply Inc. v. Quigley Co., Inc.,* 3 N.J. 149, 152-153 (1949), *Ocean Cape Hotel Corp. v. Masefield Corp.,* 63 N.J. Super. 369, 379-380 (1960).

4.1 CONTRACTS—DEFINITION

A contract is an oral or written agreement enforceable by law to do or not to do a particular thing. The agreement must be reached by a meeting of the minds of the parties, express or implied, but cannot be based upon the secret intention or understanding of one party not conveyed to the other. A contract to be enforceable must be based upon a consideration,

that is to say, a promise to do something in exchange for something which is a detriment to the other party or a benefit to the first party.

Cases and Comment:

To attempt a definition of "contract" by analysis of its elements would require a treatise on contract law. A contract may be "bilateral", i.e., promise for promise, [1 *Corbin on Contracts,* (1965) Sec. 13, p. 29] or "unilateral", i.e., a promise for performance. *Friedman v. Tappan Development Corp.,* 22 N.J. 523, at p. 533 (1956); 1 *Corbin on Contracts,* supra, Sec. 63, p. 262; *Restatement of Contracts,* (1932) Sec. 12, p. 10. "A promise is an undertaking, however expressed, either that something shall, or that something shall not happen, in the future." *Restatement of Contracts,* supra, Sec. 2, p. 3. The undertaking may be in the form of words or of acts. *Corbin on Contracts,* supra, Sec. 18.

A contract results in an obligation enforceable at law, but it is distinguished from tort obligations, and quasi-contractual obligations, by the fact that it is promissory in nature, and the result of a "bargain", an 'exchange of equivalents". *Corbin on Contracts,* supra, Sec. 10. See *West Caldwell v. Caldwell,* 26 N.J. 9 at p. 28 (1958).

In connection with a choice between recovery based upon express contract and *quasi-contract* note *Power-Matics v. Ligotti,* 79 N.J. Super. 294 (App. Div. 1963), *Shapiro v. Solomon,* 42 N.J. Super. 377 (App. Div. 1956), and *C. B. Snyder Realty Co. v. Nat. Newark, etc., Banking Co.,* 14 N.J. 146, 162 (1953). These cases draw the lines between express contract, *quantum meruit,* and *quasi-contract.* An express contract may be one made in *haec verbis,* or inferred from the conduct of the parties. *Quantum meruit* is a contract implied by law. *Quasi-contractual* recovery is permitted to prevent unjust enrichment. Alternative pleading is permitted (*Shapiro,* supra), but there may not be recovery in *quantum meruit,* where an express contract is pleaded unless the express contract has been rescinded. *C. B. Snyder Realty Co.,* supra. However, there may be recovery in *quasi-contract* to prevent unjust enrichment, for reasonable value, where the plaintiff does not succeed on the express contract. *Power-Matics,* supra; *Shapiro,* supra.

Further, the promise may be enforceable by reason of "promissory estoppel", a promise reasonably inducing definite and substantial action, *Restatement of Contracts,* supra, Sec. 90; *Friedman,* supra, at p. 535; *E. A. Coronis Assocs. v. M. Gordon Constr. Co.,* 90 N.J. Super. 69 (App. Div. 1966).

A third party beneficiary of a contract may sue upon it, or use it as a matter of defense. *N.J.S.A.* 2A:15-2.

The definition used is a synthesis of *Corbin, Friedman,* supra, at p. 531, *Restatement of Contracts,* Sec. 1, and the Uniform Commercial Code, Sec. 1-201 (11) [*N.J.S.A.* 12A:1-201 (11)].

N.J.S.A. 12A:2-601, et seq., has made many changes in contract law in cases involving sale of goods. For a comprehensive discussion see *Graulich Caterer Inc. v. Hans Holterbosch,* 101 N.J. Super. 61 (App. Div. 1968).

4.2 TIME OF PERFORMANCE WHERE CONTRACT IS SILENT

When a contract is silent as to the time within which a promise is to be performed, the law will require it to be performed within a "reasonable time." What is a "reasonable time" is a question of fact for you to determine from the evidence. The question you must decide is what reasonable time for performance the parties intended, bearing in mind the subject matter of the contract, the surrounding circumstances, and what the parties had in mind when the contract was made.

Cases and Comment:

This charge is intended to be used where performance promised is something other than payment of money. "Where no time for payment is expressed in a promissory note or other instrument for the payment of money, the law adjudges that the parties meant that the money should be payable immediately." *City of Camden v. South Jersey Port Com'n,* 2 N.J. Super. 278, 299 (Ch. Div. 1949), aff. and mod. on other grounds, 4 N.J. 357 (1950).

I. MAY NOT BE A JURY QUESTION

"While the question is to what is a reasonable time, depending as it does upon the surrounding circumstances, is ordinarily for decision by the jury or fact-finder, yet when the facts are undisputed and different inferences cannot reasonably be drawn thereform, the question is for the court." *Miller v. Zurich Gen. Accident and Liability Ins. Co.,* 36 N.J. Super. 288, 296 (App. Div. 1955).

For support for the principles set forth in the charge see *West Caldwell v. Caldwell,* 26 N.J. 9, 28 (1958); *Wemple v. B. F. Goodrich Co.,* 126 N.J.L. 465, 469 (E. & A. 1941); *Corbin on Contracts,* (1965) Sec. 96, p. 416; 17 Am. Jur. 2d, *Title Time,* Sec. 329, p. 764; 17A *C.J.S. Title Contracts,* Sec. 503 (1), p. 779.

4.3 BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE OF BUILDER

A builder who has fully performed a contract in all its details is entitled to recover the entire contract price. Where a builder has substantially performed the contract, although there are some defects or omissions in his performance, he is entitled to recover the contract price minus a fair allowance for the defects or omissions in performance. Substantial performance has occurred when:

1. There has been such an approximation to complete performance that the owner obtains substantially what is called for by the contract; and

2. The defects in performance are not so serious as to deprive the owner of the intended use of the property.

The builder has the burden of proof as to substantial performance. The owner has the burden of proof as to the amount of fair allowance for defective work or omissions for which the owner is entitled to credit.

Cases and Comment:

The builder in a construction contract is entitled to recover upon proof of substantial performance. *R. Krevoline & Co., Inc. v. Brown*, 20 N.J. Super. 85 (App. Div. 1952); *Winfield, etc., Corp. v. Middlesex*, 39 N.J. Super. 92 (App. Div. 1956); *Damato v. Leone Construction Co.*, 41 N.J. Super. 366 (App. Div. 1956); *Jardine Estates v. Donna Brook Corp.*, 42 N.J. Super. 332 (App. Div. 1956); *Power-Matics, Inc. v. Ligotti*, 79 N.J. Super. 294 (App. Div. 1963).

However, the burden of proof as to substantial performance and that the defects were not so serious as to deprive the owner of the intended use of the property is upon the builder. *Power-Matics*, supra, at p. 303. The burden of proving the amount of allowance for defective work is upon the owner. *Winfield*, supra, at p. 97; *Globe Home Improvement Co. v. Michnisky*, 120 N.J.L. 233 (Sup. Ct. 1938).

4.4 BUILDING CONTRACTS—EXTRAS

I. WHERE THE CONTRACT IS SILENT AS TO CHANGES OR EXTRAS.

Where "extras" are claimed by the builder the first issue to be resolved is whether the items claimed as extras were included within the terms of the basic contract between the owner and the builder. If they were, the builder is not entitled to additional compensation. If they were not included within the basic contract the builder is entitled to additional compensation only if the extras were requested or authorized by the owner.

If the extras were requested or authorized by the owner, and if there was an agreement between the parties as to the price to be paid for such extras, the builder is entitled to receive the agreed price.

If the extras were requested or authorized by the owner, and there was no agreement as to price, the builder is entitled to be paid the reasonable value of the extras.

Cases and Comment:

Whether a builder is entitled to compensation for extras is determined by basic contract principles. The issue is whether there was an agreement express or implied that the builder be paid. If what the builder did was comprehended within the construction contract, there are no extras. See *Terminal Construction Corp. v. Bergen County, etc., District Authority*, 18 N.J. 294 (1955). *Moses v. Edward H. Ellis, Inc.*, 4 N.J. 315 (1950) is an illustration of the rule. The controversy there was between contractor and sub-contractor. The issue was whether the sub-contractor was entitled to payment for pouring concrete into uneven rock in order to bring it to

"pay" lines [lines set out in drawings]. He was held entitled to payment, but as specified in the contract, although this was in a sense "extra work". If the work was performed without the owner's request or authorization, and the owner has not agreed to pay, he is not liable. 17A *C.J.S., Contracts,* Sec. 371 (1), p. 401. If the owner has requested or authorized the work, he is liable. 3 *Corbin on Contracts,* Sec. 564, p. 296 (1965).

If there has been an agreement as to price, that agreement would control. *Sbaraglio v. Vicarisi,* 110 N.J.L. 280 (E. & A. 1933). In the absence of agreement *quantum meruit* would be the only means for determining the amount of compensation. *Kolmetsky v. Pellicoff,* 6 N.J. Misc. 315, 141 Atl. 10 (Sup. Ct. 1928); aff'd, 105 N.J.L. 240 (E. & A. 1928); See also *Shapiro v. Solomon,* 42 N.J. Super. 377 (App. Div. 1956).

II. WHERE THE CONTRACT PROHIBITS CHANGES WITHOUT WRITTEN AUTHORITY.

Since this contract contains a provision that the owner shall not be liable for extra work unless he has authorized it in writing, the builder cannot recover for services rendered or materials supplied in addition to those specified in the contract unless the builder proves that there has been a new and subsequent contract that he be paid for such additional work or materials (extras). This subsequent contract may be an oral agreement or may be implied from the conduct of the parties. It must show an agreement by the parties that the extra work was to be done and an agreement by the owner to pay for it.

Cases and Comment:

Both cases and texts have spoken in terms of waiver of the provision requiring extras to be authorized in writing. 13 *Am. Jur.* 2d, Building Contracts, Sec. 22, p. 24. However, the issue involved is whether there was a subsequent contract for adequate consideration covering the work. 3A *Corbin on Contracts,* Sec. 756, p. 505 (1963). The governing rule is that, "Parties to an existing contract may, by mutual consent, modify it." *Bohlinger v. Ward & Co.,* 34 N.J. Super. 583, 587 (App. Div. 1955), aff'd. 20 N.J. 331 (1956). The parties cannot be prevented from entering into a new contract, written or oral, by a provision that a subsequent agreement not in writing shall not be binding. *Headley v. Cavileer,* 82 N.J.L. 635 (E. & A. 1912); *Guizzette v. Katrek,* 124 N.J.L. 461 (Sup. Ct. 1940); *Lord Construction Co. v. United States,* 28 F.2d 340 (CA 3, 1928); *In Re Fleetwood Motel Corp.,* 335 F.2d 863 (CA 3, 1964); *Sheyer v. Pinkerton Construction Co.,* 59 Atl. (462 N.J. E. & A. 1904); *Denoth v. Carter,* 85 N.J.L. 95 (Sup. Ct. 1913); *Rizzolo v. Poysher,* 89 N.J.L. 618 (E. & A. 1916), *Fortunato v. Cicalese,* 93 N.J.L. 461 (E. & A. 1919).

4.5 BUILDER FAILS TO PROVE SUBSTANTIAL PERFORMANCE, AND SUES IN QUASI-CONTRACT

Even if the builder in a construction contract fails to prove substantial performance, and even if his default under the contract is willful, he may recover compensation if the benefit which he conferred upon the owner

exceeds the harm which he caused the owner, provided the owner accepted or retained the benefit of the partial performance. In such case the builder is entitled to recover the reasonable value of the work performed by the builder after deducting from it the reasonable cost of completing the contract in accordance with its terms. However, the reasonable value which the builder may recover for the work he has performed may not be greater than the proportion of the contract price which the reasonable value of the work completed bears to the reasonable value of all the work contemplated by the contract. From this sum is deducted the reasonable cost of completing the contract according to its terms.

Cases and Comment:

It was so held in *Power-Matics, Inc. v. Ligotti,* 79 N.J. Super. 294 (App. Div. 1963). There, the builder failed to prove substantial performance, but the Court reversed for a determination as to the amount of recovery to which the builder was entitled in quasi-contract.

4.10 ANTICIPATORY BREACH OF CONTRACT

I. BY RENUNCIATION OR REPUDIATION.

A total breach of contract has occurred when a person who has promised to render performance under a contract thereafter has stated or indicated to the person to whom he has promised the performance either that he will not or cannot perform that which he has promised. Therefore, if you find as a fact that . . . . promised that he would perform the contract, and that he thereafter stated or indicated to . . . . that he would not, or could not perform the contract then . . . . has committed a total breach of contract.

Cases and Comment:

This charge follows the rule set out in *Restatement, Contracts* (1932) Sec. 318(a). The Restatement language is similar to that in *Samel v. Super,* 85 N.J.L. 101 (Sup. Ct. 1913) in which the Court held that whether seller's refusal to perform a contract for the sale of a retail food business constituted an anticipatory breach was a fact question for the jury. In the course of its opinion the Court quoted from *O'Neill v. Supreme Council,* 70 N.J.L. 410 (Sup. Ct. 1904):

> "Where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or repudiates in advance his obligations under the contract and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may, at his option, treat the contract as terminated for all purposes of performance, and maintain an action at once for the damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant." (at p. 103).

See *Parker v. Pettit,* 43 N.J.L. 512 (Sup. Ct. 1881); *Stopford v. Boonton Molding Company, Inc.,* 56 N.J. 169 (1970); *Scoredisc Service Corp. v. Feldman,* 10 N.J. Misc. 228 (Sup. Ct. 1932). Conduct indicating repudiation of a contract has the same effect as language. *Ross Systems v. Linden Dari-Delite, Inc.,* 35 N.J. 329, 340 (1961); *Ferber v. Cona,* 89 N.J.L. 135 (Sup. Ct. 1916), aff. 91 N.J.L. 688 (E. & A. 1918); *Stein v. Francis,* 91 N.J.E. 205 (Ch. 1919); *Storms v. Corwin,* 7 N.J. Misc. 931 (Sup. Ct. 1929).

The anticipatory breach must be a "material breach" to discharge the other party. *Ross Systems,* supra, at p. 341; *Restatement, Contracts* (1932), Sec. 397.

As to the remedy for anticipatory breach, see *Stopford,* supra (1970) where the anticipatory breach was discontinuance of a pension plan in which plaintiff-employee had vested rights. Discussing the question of damages, Justice Francis said:

> "Here, the plaintiff was presented with a clear choice of alternative remedies, i.e., specific performance which would produce periodic payments or a lump sum recovery which he chose to pursue." (at p. 195).

Where defendant repudiates the contract, after plaintiff has performed, plaintiff may be entitled to restitution of what he gave, as an alternative remedy. *Shea v. Willard,* 85 N.J. Super. 446, at p. 451 (App. Div. 1964).

II. WHERE PROMISOR MAKES PERFORMANCE IMPOSSIBLE

When ..... has agreed to perform a certain thing and prior to the time for performance he has rendered by his conduct substantial performance of that thing impossible, he has committed a total breach of contract.

Cases and Comment:

This charge is based upon *Restatement, Contracts* (1932), Sec. 318(b) and (c). In *Parker v. Pettit,* 43 N.J.L. 512 (Sup. Ct. 1881) defendant agreed to deliver straw to plaintiff. His conduct in selling the straw to a third party was held evidence of an anticipatory breach. In *Stopford v. Boonton Molding Company, Inc.,* 56 N.J. 169 (1970) the anticipatory breach was discontinuance of a pension plan. See in accord: *McCloskey v. Mineveld Steel,* 22 F.2d 101 (3d Cir. 1955); *Scaduto v. Orlando,* 381 F.2d 587 (2d Cir. 1967).

Where the contract involves the sale of goods the rights of the parties are governed by *N.J.S.* 12:2-610. As to anticipatory breach of installment sales contracts, the court said in *Graulich Caterer Inc. v. Hans Holterbosch,* 101 N.J. Super. 61 (App. Div. 1968):

> "Replacing considerations of anticipatory repudiation and the material injury with the test of substantial impairment, *N.J.S.* 12A:2-612 adopts a more restrictive seller-oriented approach favoring 'the continuance of the contract in the absence of an overt cancellation.' See Comment to Sec. 12A:2-612, par. 6; also New Jersey Study Comment, par. 2;

Hawkland, supra, 3, c. (3), p. 116. To allow an aggrieved party to cancel an installment contract, *N.J.S.* 12A:2-612 (3) requires (1) the breach be of the whole contract which occurs when the nonconformity of 'one or more installments substantially impairs the value of the whole contract;' and (2) that seasonable notification of cancellation has been given if the buyer has accepted a nonconforming installment." (at p. 75).

Note that under *N.J.S.A.* 12A:2-508 a defective tender of goods subject to the Sales Act (*N.J.S.A.* 12A:2-101 et seq) which may have been an anticipatory breach, as in *Parker*, supra, may be "cured" by reasonable notice of intent to render proper performance.

4.20 BAILMENT

Note:

Recovery in bailment depends on proof of failure to exercise the requisite degree of care which proximately results in loss or damage to the bailed articles. The degree of care required depends on the relationship between the parties. In addition to the proposed charges you will probably use other general charges, such as definition of negligence, proximate cause, preponderance of the evidence, etc.

1. DEFINITION OF BAILMENT

Note:

Under the Uniform Commercial Code "bailee" is defined as "the person who by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them." *N.J.S.A.* 12A:7-102(1)(a). Subsection (h) defines "warehouseman" as a person "engaged in the business of storing goods for hire."

As to duty of care of a warehouseman and carrier, see Cases and Comments under II, paragraph A (Mutual Bailment) below.

A contract of bailment exists when a person turns over an article of property for a particular purpose of merely for safekeeping to another person who accepts the property with the understanding that it will be returned or kept until reclaimed or otherwise disposed of in accordance with the understanding of the parties.

Parties to a bailment contract are called the bailor and bailee. The bailor is the party who surrenders the property and the bailee is the party who receives the property. For a bailment contract to exist the bailee must be given physical possession and control over the property. The bailee must know that the property has been delivered to him and he must have an intention, express or implied from the circumstances, to exercise control over the property.

The contract of bailment may be expressly agreed upon, in writing or verbally, or it may be implied from the circumstances of the transaction and the conduct of the parties.

The standard of care for the safety of the property that must be exercised by the bailee, the person who has received the property, depends upon the purpose of the bailment, namely, whether it is for the benefit of the bailee alone, or the bailor alone, or for their mutual benefit. (For example, if a car is stored in a parking garage where the garageman will receive a fee for parking, this is a bailment for the mutual benefit of the bailor and bailee since it serves the purposes of both. If, however, a neighbor borrows a lawnmower, the neighbor is a bailee for his own benefit of using the lawnmower on his lawn and the owner of the lawnmower receives no benefit from that bailment. If a person is asked to keep his neighbor's canary for a few days while his neighbor is on vacation, the person who receives the canary is a bailee without any benefit to himself but solely for the benefit of the bailor).

A. WHERE BAILMENT IS NOT DISPUTED

In this case the parties agree that plaintiff delivered possession of (specify the article of property) to defendant for (specify the purpose) and defendant agreed to return the property (specify time or conditions). Therefore, in this case there is no dispute as to the existence of the bailment contract. The dispute concerns plaintiff's contention that the defendant, as bailee, did not exercise that degree of care for the safety of the property as was required by law and that as a proximate result of defendant's conduct the property was (damaged, destroyed or lost).

B. WHERE BAILMENT IS DISPUTED

In this case the plaintiff contends that he was a bailor of property and that defendant was the bailee of his property. (Specify plaintiff's factual contentions). Plaintiff contends that defendant, as bailee, failed to exercise that degree of care required by law for the safety of the property. Defendant, however, denies that a bailment contract or relationship ever existed. (Specify defendant's factual contentions).

It is for you as jurors to determine from the evidence in this case whether a contract of bailment, as I have previously defined that term, arose out of the transaction in question. If you find from the circumstances and conduct of the parties that the property came into the possession and control of defendant with his knowledge, in accordance with an understanding whereby the defendant is to be considered a bailee and the plaintiff a bailor, in accordance with the definition of bailment previously given, then you must conclude that a bailment relationship or contract did arise in the transaction between the parties. If, however, an element necessary to create a bailment contract or relationship, as previously defined, has not been established in this case by the preponderance of the evidence, you must conclude that a bailment contract or relationship did not exist. (If you conclude that a bailment contract or relationship did not exist, then you must bring in a verdict for defendant of no cause for action and you

need not consider the question of defendant's negligence or the question of damages).

Cases:

For a definition of bailment, see *State v. Carr*, 118 N.J.L. 233 (E. & A. 1937); *McFarland v. C.A.R. Corp.*, 58 N.J. Super. 449, 452 (App. Div. 1959) (possession and control of the property by the bailee required); *Moore's Trucking Co. v. Gulf Tire and Supply Co.*, 18 N.J. Super. 467 (App. Div. 1952) (a bailment existed where a trailer without the truck was left in a warehouse. The trailer would have been as difficult to move as a car without a key and the intentions of the parties were that the trailer should not be removed from the warehouse until it was unloaded); *Cerreta v. Kinney Corp.*, 50 N.J. Super. 514 (App. Div. 1958) (where the bailee does not know that the property had been delivered to him, there cannot be a bailment of such property); *Marsh v. American Locker Co.*, 7 N.J. Super. 81 (App. Div. 1950) (package stored in locker with key at Penn Station, Newark, where defendant exercised no control over the goods and the court held that by keeping the key plaintiff retained primary control over the package); *J. L. Querner, etc. v. Safeway Truck Lines, Inc.*, 65 N.J. Super. 554 (App. Div. 1961), aff'd. 35 N.J. 564 (1961) (physical control of the property and also intent to exercise control are essential elements); *Carter v. Allenhurst*, 100 N.J.L. 138 (E. & A. 1924) (jewelry checked with a swimming pool attendant); *Kittay v. Cordasco*, 103 N.J.L. 156 (E. & A. 1926) (diamonds delivered to a retail jeweler "on memorandum," for sale); *McBride v. DeCozen Motor Co.*, 5 N.J. Misc. 552 (Sup. Ct. 1927) (automobile placed in shop to be washed); *Hopper's Inc. v. Red Bank Airport, Inc.*, 15 N.J. Super. 349 (App. Div. 1951) (airplane stored in a hangar).

No bailment was found in the following cases because of lack of exclusive control: *Gilson v. Penn R.R. Co.*, 86 N.J.L. 446 (Sup. Ct. 1914), aff'd. 87 N.J.L. 690 (E. & A. 1915) (coat of restaurant customer hanging near lunch counter); *Zucker v. Kenworthy Brothers*, 130 N.J.L. 385 (Sup. Ct. 1943) (automobile stored in garage with the owner retaining key and right to come and go as he pleased). See also parking lot cases where the result depends upon control: *Moore's Trucking Co.* case, *supra*, 18 N.J. Super. at 470; 131 A.L.R. 1170 (1941).

II. DUTY OF CARE OWED BY BAILEE

A. MUTUAL BAILMENT

A "mutual bailment" is a bailment which is beneficial to both the bailor (the person who surrenders the property) and the bailee (the person who receives the property). Where there is a bailment for mutual benefit, a bailee will be liable for damage to the property or loss of the property if that damage or loss results from the bailee's negligence. Thus a bailee is liable to the bailor for loss or damage to the property if the bailee has failed to exercise reasonable care for the safety of the property which came into the bailee's possession. Reasonable care means such care for the safety of the property as a person of ordinary prudence would exercise in the same or similar circumstances.

Cases and Comments:

Rogers v. Reid Oldsmobile, Inc., 58 N.J. Super. 375 (App. Div. 1959); *Parnell v. Rohrer Chevrolet Co.*, 95 N.J. Super. 471 (App. Div. 1967) (automobile stripped while kept by bailee in a large cyclone fence enclosure); *Franklin v. Airport Grills, Inc.*, 21 N.J. Super. 409 (App. Div. 1952) (mere fact of fire in a restaurant is not sufficient to establish negligence).

Warehousemen under mutual bailments:

The duty of care of a warehouseman (*N.J.S.A.* 12A:7-102(1)(h)) is defined by *N.J.S.A.* 12A:7-204(1). The duty of care of a carrier is defined by *N.J.S.A.* 12A:7-309(1). Both sections also regulate limitation of damages.

N.J.S.A. 12A:7-204(1) is as follows: A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

N.J.S.A. 12A:7-309(1) is as follows: A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

A warehouse receipt may be issued by one who has undertaken to store the goods at no profit or one who is unlawfully engaged in storing goods. New Jersey Study Comment, paragraph 1 under *N.J.S.A.* 12A:7-201. Actual possession need not be established if the warehouseman acknowledges possession. Uniform Commercial Code Comment 1, *N.J.S.A.* 12A:7-102; paragraph 1 under *N.J.S.A.* 12A:7-203.

B. BAILMENT FOR THE SOLE BENEFIT OF BAILOR

Where the bailment is for the sole benefit of the bailor, as where property is accepted by the bailee as a favor to the bailor without compensation or other benefit to the bailee, the bailment is known as a gratuitous bailment. Where such a bailment exists, the bailee is not responsible for loss or damage to the property unless such loss or damage is caused by the gross negligence of the bailee.

Gross negligence is defined as the failure to exercise a slight amount of care or diligence for the safety of the property. It may also be described as a great degree of negligence. For bailor to recover it is not necessary for him to show that the bailee wilfully or intentionally caused the injury or loss of the property, but it is necessary for you to find that the bailee did not exercise even a slight degree of care for the safety of the property.

Cases:

Weinstein v. Scheer, 98 N.J.L. 511 (E. & A. 1922) (liability for gross neglect or bad faith); *Field v. Serpico*, 24 N.J. Misc. 289, 49 A.2d 21 (2

Jud. Dist. Ct. 1946); *Dudley v. Camden and Philadelphia Ferry Co.*, 42 N.J.L. 25 (Sup. Ct. 1880); *In Re National Molding Co.*, 230 F.2d 69, 72 (3 Cir. 1956).

C. BAILMENT FOR SOLE BENEFIT OF BAILEE

Where the bailment is for the sole benefit of the bailee, that is, where the bailment is solely for the benefit of the person who receives the property, that person must exercise that degree of care and vigilence for the safety of the property which persons of extraordinary care, prudence and foresight would exercise in the same or similar circumstances. Thus, if property is received by a bailee for his own benefit without benefit or advantage to the bailor, then the bailee is liable for loss of or damage to the property if the bailee has failed to exercise that degree of care for the safety of the property which an extraordinarily prudent and careful person would exercise in the same or similar circumstances.

Note:

We can find no New Jersey cases expressing the standard of care in the case of bailment for the benefit of the bailee only. Some cases in other states have used the term "slight negligence" as the test, which in turn requires definition. See *Prosser, Torts,* (4 ed.) §34, p. 183, (1971). See also 8 *Am. Jur.* 2d 1091, Bailments, §205 (1963) where it is stated that a bailee must exercise the "greatest care and attention" or "extraordinary" care or "more than ordinary care and diligence." Slight negligence is there defined as the "want of great diligence" which in turn is defined as that care which the very prudent take of their own concerns or affairs of great importance. See also *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P.2d 633 (Sup. Ct. 1944).

III. BURDEN OF PROOF

Where it is shown that property has been damaged (lost or destroyed) while in the hands of a bailee, the law requires the bailee to present evidence explaining the circumstances of the occurrence so that you may determine whether the damage (or loss or destruction) was caused by the bailee's failure to exercise that degree of care imposed upon him by virtue of the bailment or whether the damage (or loss or destruction) was the result of some cause other than the bailee's lack of due care.

If after hearing all the evidence you conclude that the preponderance of evidence shows that the bailee failed to exercise the required degree of care and that such failure proximately caused the damage (or loss or destruction) of the bailed property, then the bailor is entitled to recover damages against the bailee. If there is evidence which tends to prove the bailee's lack of due care as well as evidence tending to prove the exercise of care by the bailee then you must determine what the preponderance of the evidence shows. If the lack of due care has been established by the preponderance of the evidence, the bailor is entitled to

recover. However, if the preponderance of evidence fails to show the lack of due care on the part of the bailee, or if the preponderance of evidence shows that the bailee did exercise the degree of care required of him in the circumstances of this case, then the bailor cannot recover, and you will return a verdict of no cause for action.

Cases:

Bachman Choc. Mfg. Co. v. Lehigh Warehouse, 1 N.J. 239, 242 (1949); *Rodgers v. Reid Oldsmobile Inc., supra; Parnell v. Rohrer Chevrolet Co., supra; Kushner v. President of Atlantic City, Inc.,* 105 N.J. Super. 203 (Law Div. 1969); *Moore's Trucking Co. v. Gulf Tire and Supply Company, supra.*

See also *NOPCO Chemical Div. v. Blaw-Knox Co.,* 59 N.J. 274, 283 (1971) (where goods were damaged while handled successively by transportation-bailees, burden is shifted to each defendant to come forward with proof of its particular part in the transaction. If any defendant fails to offer proofs, it risks a finding of liability on the evidence).

IV. DEFENSES IN GENERAL

Contributory negligence as a defense, see: *Kandret v. Mason,* 26 N.J. Super. 264 (App. Div. 1953); *Parnell v. Rohrer Chevrolet Co.,* 95 N.J. Super. 471, 478 (App. Div. 1967). See also 8 *Am. Jur.* 2d, Bailment, §177 (1963); 8 *C.J.S.,* Bailment, §46 *et seq.* See also *Motorlease Corp. v. Mulroony,* 9 N.J. 82 (1952) as to the effect of the negligence of an employee of a bailee in possession of the bailed article (auto, for example). See *N.J.S.A.* 2A:53A-6.

5.10 NEGLIGENCE AND ORDINARY CARE—GENERAL

DEFINITION

1. Negligence may be defined as a failure to exercise, in the given circumstances, that degree of care for the safety of others which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.

WHERE A MORE DETAILED DEFINITION IS DESIRED, THE FOLLOWING MAY BE USED:

2. Negligence is the failure to use that degree of care, precaution and vigilance which a reasonably prudent person would use under the same or similar circumstances. It includes both affirmative acts which a reasonably prudent person would not have done and the omission of acts or precautions which a reasonably prudent person would have done or taken in the circumstances.

By a reasonably prudent person is not meant the most cautious person nor one who is unusually bold but rather one of reasonable vigilance, caution and prudence.

In order to establish negligence, it is not necessary that it be shown that the defendant had an evil heart or an intent to do harm.

To summarize, every person is required to exercise the foresight, prudence and caution which a reasonably prudent person would exercise under the same or similar circumstances. Negligence then is a departure from that standard of care.

Cases:

Negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.

2 *Restatement, Torts,* Sec. 282; *Harpell v. Public Service Coord. Transport,* 20 N.J. 309, 316 (1956); *Prosser, Torts,* p. 119.

The defendant's conduct is compared with that which the hypothetical person of reasonable vigilance, caution and prudence would have exercised in the same or similar circumstances or conditions. *Overby v. Union Laundry Co.,* 28 N.J. Super. 100, 104 (App. Div. 1953), affirmed 14 N.J. 526 (1954); *McKinley v. Slenderella Systems of Camden, N.J., Inc.,* 63 N.J. Super. 571 (App. Div. 1960).

"The conduct of the reasonable man will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what the reasonable man would do 'under the same or similar circumstances.'" *Prosser,* p. 125.

The above may be modified to cover cases involving property damage.

5.11 FORESEEABILITY (as affecting negligence)

In determining whether reasonable care has been exercised, you will consider whether the defendant ought to have foreseen, under the attending circumstances, that the natural and probable consequence of his act or omission to act would have been some injury. It is not necessary that the defendant have anticipated the very occurrence which resulted from his wrongdoing but it is sufficient that it was within the realm of foreseeability that some harm might occur thereby. The test is the probable and foreseeable consequences that may reasonably be anticipated from the performance, or the failure to perform, a particular act. If an ordinary person, under similar circumstances and by the use of ordinary care could have foreseen the result, [*i.e.*, that some injury or damage would probably result] and either would not have acted or, if he did act, would have taken precaution to avoid the result, then the performance of the act or the failure to take such precautions would constitute negligence.

Cases:

Lutz v. Westwood Transportation Co., 31 N.J. Super. 285 (App. Div. 1954), certification denied, 16 N.J. 205 (1954); *Glaser v. Hackensack Water Co.*, 49 N.J. Super. 591 (App. Div. 1958); *Martin v. Bengue, Inc.*, 25 N.J. 359 (1957); *Menth v. Breeze Corporation, Inc.*, 4 N.J. 428 (1950); *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356 (App. Div. 1959); *Avedisian v. Admiral Realty Corp.*, 63 N.J. Super. 129 (App. Div. 1960); 2 *Ohio Jury Instructions, Civil*, 7.13; see also instructions as to Proximate Cause. Cause.

5.12 UNDERTAKING VOLUNTARILY ASSUMED

(1) One who in the absence of a legal obligation to do so voluntarily undertakes to render a service for the protection of the safety of another may become liable to him for the failure to perform, or the failure to exercise reasonable care in the performance of that service. His responsibility, however, is only commensurate with the extent of his voluntary undertaking and his liability does not arise unless it appears from the evidence that his negligence had a proximate casual relationship to the occurrence of the mishap which brought about the injuries.

Cases:

Gudnestad v. Seaboard Coal Dock Co., 27 N.J. Super. 227 (App. Div. 1953); *Wolcott v. N.Y. and L.B. R.R. Co.*, 68 N.J.L. 421 (Sup. Ct. 1902).

THE FOLLOWING MAY BE ALTERNATIVELY CHARGED WHERE APPLICABLE:

(2) Where a defendant has gratuitously undertaken to do an act or to perform a service recognizably necessary to another's bodily safety and there is reasonable reliance thereon, the defendant will be liable for the harm sustained by the other party resulting from defendant's failure to exercise reasonable care to carry out the undertaking.

Cases:

Johnson v. Souza, 71 N.J. Super. 240 (App. Div. 1961); *Restatement, Torts*, Sec. 325, p. 881 (1934); *Miller v. Muscarelle*, 67 N.J. Super. 305 (App. Div. 1961).

5.13 RES IPSA LOQUITUR

The rule of *Res Ipsa Loquitur* takes its name from a Latin phrase which, freely translated, means the thing speaks for itself. It affords a permissible inference of negligence where certain factors are made to appear. Thus (a) if the occurrence itself ordinarily bespeaks negligence, that is, if the circumstances of the occurrence which caused the injury are such that, in the ordinary course of events, it would not have happened if

ordinary care had been used, and (b) where the instrumentality in question was within the defendant's exclusive control [or where the total circumstances show a probability that defendant's lack of due care while the instrumentality was in its possession and control was responsible for the occurrence and eliminate the probability of efficient participation by some other cause], and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect, then you may draw an inference that the occurrence was the product of the defendant's negligence, although you are not required to do so.

If you draw such an inference, it becomes a factor which remains in the case for your consideration together with all of the other facts in the case.

Such an inference is not conclusive of the defendant's negligence, however, and the defendant may come forward with explanatory proofs to negate the inference or to explain it on grounds other than its own negligence. Where there is an explanation given, it is for you to determine the facts and inference to be drawn from all of the circumstances.

The burden of proof still rests upon the plaintiff to convince you by the preponderance of the reasonable probabilities that the occurrence was the proximate result of the defendant's negligence and it is for you to determine whether in the final analysis the inference outweighs the defendant's explanation in probative force.

Cases:

Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958); *Kahalili v. Rosecliff Realty*, 26 N.J. 595, 605 (1958); *Leone v. Rutts Hut, Inc.*, 55 N.J. Super. 485, 491 (App. Div. 1959).

Note 1: Material in brackets may be utilized where the defendant has parted with exclusive control of the instrumentality prior to the injury as in *Bornstein v. Metropolitan Bottling Co., supra.*

5.14 ACT OF GOD

The defendant contends that the accident was caused by an Act of God without any negligence on his part and that he is thereby exonerated from responsibility for the plaintiff's injuries [or damage].

An Act of God is an unusual, extraordinary and unexpected manifestation of the forces of nature, or a misfortune or accident arising from inevitable necessity which cannot be prevented by reasonable human foresight and care. If plaintiff's injuries were caused by such an event without any negligence on the part of the defendant, the defendant is not liable therefor.

However, if the defendant has been guilty of negligence which was an efficient and cooperative cause of the mishap, so that the accident was caused by both the forces of nature and the defendant's negligence, the defendant is not excused from responsibility.

In other words, if the defendant was negligent and his negligence contributed as an efficient and cooperating cause to the happening of the mishap and the injuries which proximately resulted therefrom, it is immaterial that an Act of God was also a concurring cause.

Cases:

An "act of God" comprehends all misfortune and accidents arising from inevitable necessity which human prudence could not foresee or prevent. *Meyer Bros. Hay & Grain Co. v. National Malting Co.*, 124 N.J.L. 321 (Sup. Ct. 1940).

An "act of God" is an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature which cannot be prevented by human care, skill or foresight. 38 *Am. Jur., Negligence*, Sec. 7, 649; *Carlson v. A. & P. Corrugated Box Corp.*, 72 A.2d 290, 364 Penna. 216 (1950).

The significance of an "act of God" as a defense is that when it is the sole cause of damage, it exempts defendant from liability for negligence. *Meyer Bros. Hay & Grain Co. v. National Malting Co.*, 124 N.J.L. 321 (Sup. Ct. 1940).

It is the well established principle that where a defendant has been guilty of negligence which is an efficient and cooperating cause of the mishap, the defendant is not exonerated from liability by proof that an "act of God" was a concurring cause. *Cora v. Trowbridge Outdoor Adv. Corp.*, 18 N.J. Super. 1 (App. Div. 1952).

When there has been a finding of wrongdoing which is an efficient and cooperative cause of the mishap, the wrongdoer is not relieved from liability by proof that an "act of God" was a concurring cause. *Hopler v. Morris Hills Regional District*, 45 N.J. Super. 409 (App. Div. 1957). Reducing this principle to the terseness of a maxim, "he whose negligence joins with an 'act of God' in producing injury is liable therefor." 38 *Am. Jur., Negligence*, Sec. 65, 719; *Cora v. Trowbridge Outdoor Adv. Corp., supra*, p. 4.

5.15 SUDDEN EMERGENCY

(A.) EFFECT OF, ON QUESTION OF NEGLIGENCE

In connection with the question of (contributory) negligence, it has been asserted that the defendant (plaintiff) was confronted with a sudden emergency. Where a person, without any fault on his part, is confronted with a sudden emergency, that is, is placed in a sudden position of imminent peril not reasonably to be anticipated, the law will not charge him with negligence if he does not select the very wisest course in choosing between alternative courses of action. An honest mistake of judgment

in such a sudden emergency will not, of itself, constitute negligence, although another course might have been better and safer. All that is required of such a person is that he exercise the care of a reasonably prudent person under like circumstances.

It is for you the jury to determine from the evidence whether such an emergency existed, whether it arose without the fault of that person and whether that person acted with due care under the circumstances.

THE FOLLOWING TWO ADDITIONAL PARAGRAPHS MAY BE UTILIZED WHERE NECESSARY:

The law recognizes that one acting in a sudden emergency may have no time for thought and so cannot weigh alternative courses of action but must make a speedy decision which will be based on impulse or instinct. What is required of a person in such an emergency is that he act reasonably and with ordinary care under such circumstances.

However, if the emergency arose in whole or in part by reason of the fault, that is, a lack of due care, of that person in the events preceding the emergency, then this rule of sudden emergency does not apply to excuse him even though his conduct during the emergency does meet the standard of reasonable care referred to.

Cases:

Harpell v. Public Service, 20 N.J. 309 (1956); *Spalt v. Eaton*, 118 N.J.L. 327 (Sup. Ct. 1937); *Dobrow v. Hertz*, 125 N.J.L. 347 (E. & A. 1940); *Ferry v. Settle*, 6 N.J. Super. 107 (App. Div. 1950); *Massotto v. Public Service Coord. Transport*, 71 N.J. Super. 39 (App. Div. 1961); *Dickinson v. Erie Railroad*, 81 N.J.L. 464 (E. & A. 1911).

(B.) DEFENDANT'S LIABILITY FOR EFFECTS OF EMERGENCY

When one without negligence on his part is put by the negligence of another under a reasonable apprehension of emergent serious personal physical injury, and in a reasonable and bona fide and well meant effort to escape, the former sustains physical injury, a right of action arise against the person creating such emergency to recover for the damages proximately resulting therefrom.

Cases:

Buchanan v. West Jersey Railroad, 52 N.J.L. 265 (Sup. Ct. 1890); *Marshall v. Suburban Dairy*, 96 N.J.L. 81 (Sup. Ct. 1921); *Tuttle v. Atlantic City R.R. Co.*, 66 N.J.L. 327 (E. & A. 1901).

5.16 LIABILITY FOR DEFECTS IN PUBLIC STREETS AND SIDEWALKS

(A.) LIABILITY OF MUNICIPALITY

1. ACTIVE WRONGDOING, GENERALLY

Generally a municipality is accountable for its own positive misfeasance, usually termed active wrongdoing, but not for mere nonfeasance or inaction. For example, a municipality may not be held liable for an injury that results from the dangerous condition of a street or sidewalk caused by the elements or the wear and tear of traffic, and which is permitted to remain in such a condition by the municipality's non-action. A municipality may be held liable, however, where the condition causing the injury complained of is the product of its own active wrongdoing, that is, of the wrongful and injurious exercise of lawful authority or the doing of a lawful act in an unlawful manner. In other words, if the condition causing the injury arises out of a negligent act of commission on the part of the municipality as distinguished from its inaction, there is a showing of active wrongdoing. It makes no difference that the last event in the sequence of events culminating in the hazardous situation was the municipality's non-action in correcting a situation which it, in the first instance, affirmatively caused. It is enough if you find that the municipality, by its affirmative negligent conduct created the situation complained of and that such conduct on the part of the municipality proximately caused the plaintiff's injuries.

Cases:

Allas v. Rumson, 115 N.J.L. 593 (E. & A. 1935); *Newman v. Township of Ocean,* 127 N.J.L. 287 (E. & A. 1941); *Milstrey v. Hackensack,* 6 N.J. 400 (1951); *Hart v. Freeholders of Union Co.,* 57 N.J.L. 90 (Sup. Ct. 1894); *Doran v. Asbury Park,* 91 N.J.L. 651 (E. & A. 1917); *Fredericks v. Dover,* 125 N.J.L. 288 (E. & A. 1940).

2. DEFECTS DUE TO DEFECTIVE CONSTRUCTION OR REPAIR OF ROADS AND SIDEWALKS

A municipality cannot be held answerable for injuries caused by dangerous defects incident to the falling out of repair of a street or sidewalk. While it is a function of a municipality to repair streets and sidewalks when necessary, it cannot be held liable when it simply neglects or fails to take steps to correct or repair a dangerous condition not of its own creation.

The rule is otherwise where it is found that the municipality constructed (repaired) the street or sidewalk and that the dangerous condition is caused, not by normal wear and tear, or public use, but by structural faults which could have been avoided by the use of reasonable care

at the time the street or sidewalk was constructed [or at the time the alleged repairs were made]. If you find that plaintiff's injuries were proximately caused by such structural defects he is entitled to recover.

Note:

Portion in brackets to be used alternatively where defective repair rather than defective construction is established as the cause of the accident.

Cases:

1. *Milstrey v. Hackensack,* 6 N.J. 400, 409 (1951); *Farkas v. Middlesex Board of Freeholders,* 49 N.J. Super. 363, 371 (App. Div. 1958); *Longi v. Raymond-Commerce Corp.,* 34 N.J. Super. 593 (App. Div. 1955).

2. The defense of contributory negligence is available to the municipality notwithstanding the plaintiff has chosen to label his cause of action as arising from nuisance rather than negligence. *Hartman v. Brigantine,* 23 N.J. 530, 535 (1957).

3. *Manholes, manhole covers, catch basins. Taverna v. Hoboken,* 43 N.J. Super. 160 (App. Div. 1956), *certification denied,* 23 N.J. 474 (1957); *Schwartau v. Meismer,* 50 N.J. Super. 399 (App. Div. 1958); *certification denied,* 28 N.J. 34 (1959).

4. *Safety Islands. Cochran v. Public Service Electric Co.,* 97 N.J.L. 480 (E. & A. 1922); *Messier v. City of Clifton,* 24 N.J. Super. 133 (App. Div. 1952) (*certification granted,* 12 N.J. 247, but no opinion reported in Supreme Court).

5. *Defective Traffic Light.*

Vickers v. Camden, 122 N.J.L. 14 (E. & A. 1939) (no liability in absence of faulty installation).

6. *Shade Trees.*

If it was reasonably foreseeable at the time of the planting that the tree in the course of its natural growth, which includes the growth and spreading of its roots, would probably disrupt the sidewalk thereby causing the defect which proximately caused the plaintiff's injuries, a verdict for the plaintiff may be recovered.

Hayden v. Curley, 34 N.J. 420, 427 (1961); *Mount v. Recka,* 35 N.J. Super. 374, 383, 384 (App. Div. 1955).

7. *Immunity Statutes.*

N.J.S.A. 40:9-2

No *municipality or county* shall be liable for injury to the person from the use of any public grounds, buildings or structures, any law to the contrary notwithstanding.

N.J.S.A. 18:5-30

No *school district* shall be liable for injury to the person from the use of any public grounds, buildings or structures, any law to the contrary notwithstanding.

8. *Employment of independent contractor to make repairs.*

" * * * a municipality, if it permits the public to use a street wherein it is causing improvements to be made, cannot avoid liability for excavations or other defects resulting from the work, merely because the improvements are being done by an independent contractor. The municipality remains answerable for his active wrongdoing; it cannot escape liability where the independent contractor has acted in a negligent manner or created a nuisance." *Bechefsky v. Newark,* 59 N.J. Super. 437, 493 (App. Div. 1970).

(B.) LIABILITY OF ABUTTING OWNER OR OCCUPANT

1. IN GENERAL

(a) *As to construction or other activity.*

The owner [occupant] of premises abutting a public sidewalk is not responsible for defects therein caused by the action of the elements or by the wear and tear incident to public use. If, however, you find that the defective condition of the sidewalk was the result of the negligent construction thereof by the owner [occupant] or that it resulted from an activity, commercial or otherwise, which was carried on by him, the plaintiff may recover for the injuries proximately resulting from such defective condition.

Cases:

Hayden v. Curley, 34 N.J. 420 (1961); *Moskowitz v. Herman,* 16 N.J. 223, 225 (1954); *Krug v. Wanner,* 28 N.J. 174 (1958); *Prange v. McLaughlin,* 115 N.J.L. 116 (E. & A. 1935); *Braelow v. Klein,* 100 N.J.L. 156 (E. & A. 1924); *Rupp v. Burgess,* 70 N.J.L. 7 (Sup. Ct. 1903); *Volke v. Otway,* 115 N.J.L. 553 (E. & A. 1935).

(b) *As to repairs.*

A property owner owes no duty to the public to repair a sidewalk which is in a state of disrepair by reason of normal wear and tear or by reason of the elements such as rain, snow, frost, and the like. Nor is mere failure fully to correct the old condition a sufficient basis for liability.

Where, however, the owner attempts to make repairs to correct some defect therein for which he is not responsible, he becomes responsible if he makes the repairs negligently and thereby causes the sidewalk, after the repairs, to be more dangerous than before or if he causes a new hazard, different from the old.

Cases:

Snidman v. Dorfman, 7 N.J. Super. 207 (App. Div. 1950); *Halloway v. Goldenberg,* 4 N.J. Super. 488 (App. Div. 1949); *Braelow v. Klein,* 100 N.J.L. 156 (E. & A. 1942); *Istvan v. Englehart,* 131 N.J.L. 9 (Sup. Ct. 1943).

But where the abutting owner, although not obligated to construct a sidewalk, does so in such style that it is hazardous to pedestrians, it is a public nuisance and the owner liable. *Braelow v. Klein,* 100 N.J.L. 156 (E. & A. 1942). And the owner, attempting to repair an existing sidewalk, or to correct some defect therein for which he is not responsible, may create a nuisance for which he is responsible. *Istvan v. Engelhardt,* 131 N.J.L. 9 (Sup. Ct. 1943). He is responsible if the facts are such that one may fairly say that the owner was the maker of the condition which was the proximate cause of the accident. But mere failure fully to correct the old condition is not a sufficient basis for liability. The sidewalk, after the attempt to repair, must be more dangerous than before, or the new hazard must be different from the old, else the defendant is not liable.

Snidman v. Dorfman, 7 N.J. Super. 207, 210 (App. Div. 1950).

2. SNOW AND ICE

The owner (occupant) of premises abutting a public sidewalk is not required to keep the sidewalk free from the natural accumulation of ice and snow. But he is liable if, in clearing the sidewalk of ice and snow, he, through his negligence adds a new element of danger or hazard, other than that caused by the natural elements, to the use of the sidewalk by a pedestrian. In other words, while an abutting owner (occupant) is under no duty to clear his sidewalk of ice and snow, he may become liable where he undertakes to clear the sidewalk and does so in a manner which creates a new element of danger of increases the natural hazard already there.

Therefore, should you find that the defendant, in undertaking to remove the ice and snow from his sidewalk, created a new hazard or increased the existing hazard and that this new or increased hazard proximately caused or concurred with the natural hazard to cause plaintiff's injuries, then you must find for the plaintiff.

Should you find, however, that the defendant did not increase the natural hazard or create a new element of danger which proximately caused or concurred in causing plaintiff's injuries, you must find for the defendant.

Cases:

Taggert v. Bouldin, 111 N.J.L. 464, 467 (E. & A. 1933); *Saco v. Hall,* 1 N.J. 377, 381 (1949); *MacGregor v. Tinker Realty Co.,* 37 N.J. Super. 112, 115 (App. Div. 1955); *Gentile v. National Newark and Essex Bkg. Co.,* 53 N.J. Super. 35, 38 (App. Div. 1958); *Seqall v. Fox,* 98 N.J.L. 819 (E. & A. 1923) (existence of a municipal ordinance obligating landowner to clear sidewalk of ice and snow does not create rights in favor of private individual on defendant's failure to comply with the ordinance; *cf. Gellenthin v. J & D. Inc.,* 35 N.J. 341 (1962).

3. NUISANCE, SIDEWALK

A street and every part of it is so far dedicated to the public that any act or obstruction which unnecessarily incommodes or impedes its lawful use is a nuisance.

One who constructs a drain, grating or a coal hole or similar structure in the sidewalk does it subject to the right of safe passage of the public over and along every part of the sidewalk. In making such use of the sidewalk, he is required to do so by a method of construction which does not create a nuisance and, having done so, is under a further duty of exercising reasonable care to keep the structure safe for the use of the public.

Cases:

Saco v. Hall, 1 N.J. 377 (1949); *Weller v. McCormack,* 52 N.J.L. 470 (Sup. Ct. 1890) (tree); *Rupp v. Burgess,* 70 N.J.L. 7 (Sup. Ct. 1903) (drain); *Kelly v. Brewing Co.,* 86 N.J.L. 471 (Sup. Ct. 1914) affirmed 87 N.J.L. 696 (E. & A. 1905) (cellar door); *Braelow v. Klein,* 100 N.J.L. 156 (E. & A. 1924) (difference in level).

4. ADOPTION OF NUISANCE BY SUBSEQUENT OWNER

Where, through the action of a prior owner of premises abutting a public sidewalk, a condition amounting to a nuisance has been created, one who takes title from the original creator of the condition and continues to maintain it may be held liable in damages to a user of the sidewalk who suffers injury by reason of such condition.

Cases:

Krug v. Wanner, 28 N.J. 174 (1958), *Savarese v. Fleckenstein,* 111 N.J.L. 574 (Sup. Ct. 1933), affirmed 114 N.J.L. 275 (E. & A. 1934); *Braelow v. Klein,* 100 N.J.L. 156 (E. & A. 1924).

5.17 STANDARDS OF CONSTRUCTION, CUSTOM AND USAGE IN INDUSTRY OR TRADE

(A). EFFECT OF PROOF OF INDUSTRY STANDARD.

Some evidence has been produced in this case as to the standard of construction in the industry. Such evidence may be considered by you in determining whether the defendant's negligence has been established. If you find that the defendant did not comply with that standard, you may find the defendant to have been negligent. However, the general custom of the industry, although evidential as to what is the reasonable standard in such industry, does not conclusively establish the care the defendant was required to exercise in the performance of its operations. Compliance with an industry standard is not necessarily conclusive as to the issue of

negligence, and does not, of itself, absolve the defendant from liability. The defendant must still exercise reasonable care under all the circumstances, and if you find that the prevailing practices in the industry do not comply with that standard, the defendant may be found negligent by you notwithstanding compliance with the custom or standard of the industry.

Cases:

Adams v. Atlantic City Electric Co., 120 N.J.L. 357, pp. 368-370 (E. & A. 1938); *Buccafusco v. Public Service Electric and Gas Co.*, 49 N.J. Super. 385 (App. Div. 1958), *certification denied* 27 N.J. 74 (1958); 2 *Harper and James, Law of Torts*, 17.3, pp. 978-979; *Prosser, Torts*, 32, p. 135 (2d ed. 1955); *Annotation*, 55 A.L.R. 2d 129 (1957).

5.18 NEGLIGENCE—AUTOMOBILES

(A). GENERAL DUTY OWING (N.B.) While judge may prefer to adopt his own version of this phase of the charge, the following has been found to be satisfactory by many judges.

The plaintiff asserts that the defendant in this case was guilty of negligence in the operation of his automobile. You can appreciate that when people drive their motor vehicles on our highways, they have certain rights and assume certain obligations and responsibilities. They have the right to enjoy the streets and highways but they must make proper and lawful use of this right. They must use it with reciprocal regard for the rights of others who may be driving upon the highway, they must use their rights so as not to negligently injure other persons lawfully upon the streets. This simply means that the driver of an automobile upon a public highway is under the duty of exercising for the safety of others that degree of care, precaution and vigilance in the operation of his car which a reasonably prudent person would exercise under similar circumstances. It has sometimes been defined as care commensurate with the risk of danger. Thus, the driver of an automobile is required to use reasonable care in the control, management and operation of his machine. He is required to make such observation for traffic and road conditions and to exercise such judgment to avoid collision or injury to others on the highway, as a reasonably prudent person would have done in the circumstances. This duty of reasonable care by users of the highways is mutual and ordinarily each may assume that the other will observe that standard of conduct in the use thereof. Negligence then is the failure to adhere to this standard of conduct.

Cases:

Felix v. Adelman, 113 N.J.L. 445, (E. & A. 1934); *Senofsky v. Frecker*, 10 Misc. 505 (Sup. Ct. 1932); *Day v. Beyer*, 5 Misc. 1069, (Sup. Ct. 1924);

Kidder v. Hoffman, 12 Misc. 186 (Sup. Ct. 1934); *Lipschitz v. N.Y. & N.J. Produce Co.,* 111 N.J.L. 393 (E. & A. 1933); *Anderson v. Cassidy,* 119 N.J.L. 331 (Sup. Ct. 1938).

(B.) U-TURN

1. The law imposes upon the driver of an automobile the duty to exercise the care that a reasonably prudent man would use under all the circumstances confronting him at the particular time in question. Failure to exercise such care constitutes negligence.

2. Obviously the risk or harm will vary with the circumstances. In some settings that risk is greater than in others, and, when this is so, a reasonably prudent man will exercise a greater amount of care in proportion to the increased risk.

3. With respect to a U-turn, involving as it does a movement across the path of other traffic, the risk of harm is ordinarily increased beyond that which exists when a car is proceeding along a direct course. Hence with respect to a U-turn, a reasonably prudent man would seek an opportune moment for the turn and would exercise an increased amount of care in proportion to the increased danger.

4. Accordingly the law provides that a person seeking to do so has the duty to seek an opportune moment and to exercise a degree of care in proportion to the increased danger involved in the turn. It is for you to determine, therefore, whether a reasonably prudent man, charged with that duty, would, under the circumstances of the case here presented, have made the turn when and in the manner in which the defendant [plaintiff], here, did.

Case:

Ambrose v. Cyphers, 29 N.J. 138, p. 149 (1959).

(C.) LEFT-HAND TURN

The above may be modified to cover situations covering left-hand turns across the face of oncoming traffic where the rule is similar.

(D.) VIOLATION OF TRAFFIC ACT

In this case, in support of the charge of negligence made, it is asserted that the defendant violated a provision of the Traffic Act. The provision referred to is known as R.S. ____ and reads as follows:

Now the statute in question has set up a standard of conduct for the users of our streets and highways. If you find that the defendant has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that term to you,

has been established. You may find that such violation constituted negligence on the part of the defendant, or you may find that it did not constitute such negligence. Your finding on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon that issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to defendant's negligence.

Cases:

Philips v. Scrimente, 66 N.J. Super. 157 (App. Div. 1961).

The above may be modified to cover violations of certain other statutes or ordinances which set up a standard of conduct to be observed in given circumstances for the benefit of the class to which plaintiff belongs.

Evers v. Davis, 86 N.J.L. 196 (E. & A. 1914); *Moore's Trucking Co. v. Gulf Tire & Supply Co.,* 18 N.J. Super. 467 (App. Div. 1952).

(D-1) VIOLATION OF TRAFFIC ACT: EVIDENCE OF NEGLIGENCE

In this case, in support of the charge of negligence made, it is asserted that the defendant violated a provision of the Traffic Act. The provision referred to is known as R.S. . . . and reads as follows:

Now the statute in question has set up a standard of conduct for the users of our streets and highways. If you find that the defendant has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that term to you, has been established. You may find that such violation constituted negligence on the part of the defendant, or you may find that it did not constitute such negligence. Your finding on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon that issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to defendant's negligence.

Cases:

Philips v. Scrimente, 66 N.J. Super. 157 (App. Div. 1961).

The above may be modified to cover violations of certain other statutes or ordinances which set up a standard of conduct to be observed in given circumstances for the benefit of the class to which plaintiff belongs.

Evers v. Davis, 86 N.J.L. 196 (E. & A. 1914); *Moore's Trucking Co. v. Gulf Tire & Supply Co.,* 18 N.J. Super. 467 (pp. Div. 1952).

See 5.18 (D-2) which follows pertaining to those cases in which the violation of a statute is negligence and not merely evidence of negligence.

(D-2) VIOLATION OF TRAFFIC ACT IS NEGLIGENCE

Note:

There are some cases where the violation of a section of the Motor Vehicle laws is negligence as a matter of law and not merely evidence of negligence. In *Dolson v. Anastasia*, 55 N.J. 2, 9-11 (1969) the court held that the failure to maintain a reasonably safe distance behind the car ahead "*is* negligence and a jury should be so instructed. * * * This does not mean however, that such conduct is only *evidence* of negligence because it violates a statute." In *Dolson*, defendant struck plaintiff's vehicle in the rear. The court noted that defendant did not contend that plaintiff came to a sudden stop nor that he thought plaintiff intended to proceed slowly through the intersection rather than stop or turn. In the absence of any reasonable justification or explanation for striking plaintiff in the rear, the court held the violation of the statute on following too closely is negligence. The court noted further that it did not consider a binding instruction as to a liability because no motion to that effect had been made at trial nor contended on appeal.

In an appropriate case it would appear that no issue would be presented for the jury as to defendant's negligence, once proof of the violation of a particular Motor Vehicle Regulation has been established without evidence to explain such violation. In some cases, however, an issue may be presented for the jury as to whether a violation occurred or whether an adequate explanation is to be found in the evidence. In such a case where the particular statute violated requires a conclusion of negligence the jury should be instructed as follows:

In this case, plaintiff contends that defendant was negligent because defendant violated a provision of the Traffic Act. The provision referred to, *N.J.S.A.* 39:4-89, is as follows:

> The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of the preceding vehicle and the traffic upon, and condition of, the highway.

Defendant denies that he violated this section of the Traffic Act and makes the following contention concerning the operation of his motor vehicle:

The statute in question establishes a standard of conduct for motorists using our streets and highways. If you find that defendant has violated this statute by following another vehicle more closely than is reasonable and prudent, having due regard to the speed of the preceding vehicle and the traffic upon and condition of the highway, such conduct is negligence on defendant's part.

(E.) BLACK OUT, EFFECT OF

1. The fact that the automobile operated by defendant left the highway (or crossed the center line of a two way road, etc.) is evidence from which you may infer that the accident was brought about by the negligence of the defendant and calls upon him for an explanation of the reason for the unusual course of the vehicle.

Defendant's explanation is that immediately before the occurrence, he became unconscious (had a heart attack, etc.). He contends that he was not negligent because in his then condition he could not control the automobile and the period of unconsciousness came on suddenly without fault on his part.

2. It is not negligence to lose control of an automobile by reason of sudden unconsciousness (heart attack, etc.). A person who causes an accident by reason of such an attack is not held responsible for that which is not of his doing and is beyond his control.

3. However, where a person is suffering from a disease or condition which he knows, or which a reasonable person in his position should know, makes him subject to fainting or weak spells or seizures of a kind which may imperil his control of the vehicle, it may indicate lack of due care for such a person to drive on a public highway.

4. Evidence that defendant has previously suffered from a similar attack or attacks may be considered by you in determining whether defendant had such warning that an ordinarily prudent person in his position should have foreseen the danger and, in the exercise of reasonable care, should have refrained from operating an automobile or taken other precautions.

5. Taking into consideration all of the credible evidence with respect to the manner in which defendant operated his automobile, with respect to the defendant's alleged blackout [or other seizure] just before the accident, and with respect to defendant's prior knowledge of his own condition and his susceptibility to blackout, the plaintiff has the burden of establishing by the preponderance of the evidence that the defendant was negligent and that his negligence brought about the accident.

Cases:

Res Ipsa Loquitur: Bevilacqua v. Sutter, 26 N.J. Super. 394, (App. Div. 1953) (crossing highway and striking pole); *Spill v. Stoeckert*, 125 N.J.L. 382 (E. & A. 1940) (leaving pavement and overturning); *Smith v. Kirby*, 115 N.J.L. 225, (E. & A. 1935) (leaving highway and striking tree).

Burden of *explanation*, not exculpation, is on defendant: *Kahalili v. Rosecliff Realty, Inc.*, 26 N.J. 595, 66 A.L.R. 2d 680 (1958).

Sudden unconsciousness is not negligence: Prosser, Law of Torts, 2nd ed., (1955) p. 117 note 12; *State v. Shiren*, 15 N.J. Super. 440 (App. Div. 1951) (blackout caused by illness negatives criminal negligence) Annotation 28 *A.L.R.* 2d (1953) at p. 35, *et seq.*

Driving after warning of susceptibility to blackout may be negligence:

In re Lewis, 11 N.J. 217 (1953) (Criminal negligence); *Kreis v. Owens*, 38 N.J. Super. 148 (App. Div. 1955) (Civil negligence).

Burden of proof: "Unavoidable accident" is not an affirmative defense. It amounts to a denial of negligence. *Cohen v. Kaminetsky,* 36 N.J. 276 (1961).

Res Ipsa Loquitur does not shift burden of proof: 65 *C.J.S. "Negligence,"* Sec. 220(9)(b); *Bornstein v. Metropolitan Bottling Co.,* 26 N.J. 263 (1958); *Kahalili v. Rosecliff Realty, Inc.,* 26 N.J. 595, 66 A.L.R. 2d 680 (1958).

(F.) LIABILITY FOR INJURY DUE TO MECHANICAL DEFECT OR FAILURE

1. LIABILITY OF OWNER IN GENERAL

The law imposes upon the owner of a motor vehicle the duty of exercising reasonable care to have such vehicle in safe condition and properly equipped and maintained for use upon the highway. This duty includes the obligation of exercising reasonable care in the inspection of the vehicle for defects or other conditions which would render its use unsafe. An owner of a vehicle is chargeable with knowledge of such defects or conditions in the vehicle as a reasonable inspection would reveal. For failure to perform this duty a defendant is liable in money damages to one who suffers injury thereby.

In order for the defendant to be liable, it is necessary that you find that the defect or condition existed, that it was known to the defendant or could have been discovered by him in the exercise of reasonable care on his part, and that it was the [a] proximate cause of the plaintiff's injury.

Note:

The above or the alternate form hereunder would be applicable where the use of the vehicle is by the owner or his agent, or, with reference to the condition of the vehicle, where the owner entrusts it to another for operation upon the highway. It is not intended to cover defects which originate after the vehicle leaves the possession of the owner or his agent.

See separate charges as to liability for breach of warranty as in *Henningson v. Bloomfield Motors, et al.,* 33 N.J. 358 (1960).

ALTERNATE FORM

It is the duty of the owner of the motor vehicle to exercise reasonable care to see that it is in a reasonably safe condition for operation upon the highway, that it is so equipped and maintained as not to become a hazard to other users thereof. The failure on the part of the owner to exercise reasonable care as to the equipment, inspection or maintenance of the vehicle constitutes negligence and renders him liable for damage to the person or property of another who may be harmed as a proximate result thereof. If the defect or condition which brought about the plaintiff's injury could have been discovered by the defendant, in the exercise of

reasonable care on his part, it is no defense that he had no actual knowledge of the defect. However, if the defective condition in question was not known to the defendant and could not have been discovered by him in the exercise of ordinary care on his part, he was not negligent and hence would not be liable for the plaintiff's injury.

N.B. The circumstances of the individual cases will dictate which of the above alternative forms should be used. It should be kept in mind that the liability of the owner may extend to injuries sustained by the operator of the vehicle if he himself was in the exercise of reasonable care.

Either of the above versions may be modified to cover the obligation of one other than the owner. *Alpert v. Feldstein*, 21 N.J. Super. 50 (1952).

Notes:

See the American Law Institute's *Restatement of Torts*, 402A (1964 Revision).

As to obligation of one who operates a vehicle under a governmental franchise, see *Felbrant v. Able*, 80 N.J. Super. 587 (App. Div. 1964) *Honey v. Brown*, 22 N.J. 43 (1952).

As to liability of garage repairman, see *Zierer v. Daniels*, 40 N.J. Super. 130 (App. Div. 1956).

As to liability of owner of car when driven by repairman's employee, see *Ford v. Fox*, 8 N.J. Super. 80 (App. Div. 1950).

A manufacturer and a dealer are liable, regardless of privity, for injuries sustained by the wife of the buyer of a vehicle by reason of a defect therein. *Henningson v. Bloomfield Motors, et al.*, 33 N.J. 358 (1960), (breach of warranty case); see also, *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476 (App. Div. 1960).

RES IPSA LOQUITUR. Where through an instrumentality under the exclusive control of the defendant there is an occurrence which in the ordinary course of things would not take place if the person in control were exercising reasonable care, the occurrence thereof in the absence of explanation has been held to be *prima facie* evidence of negligence in certain cases. *Rapp v. Butler-Newark Bus Company*, 103 N.J.L. 512 (1927) (rear wheel of bus came off); *Gaglio v. Yellow Cab Co.*, 63 N.J. Super. 206 (1960) (front wheel locked). It is to be noted that the above cases involved passengers in common carrier vehicles. See, however, 24 A.L.R. 2d 161 (1952).

DEFECTIVE ACCELERATOR. Hennig v. Booth, 4 N.J. Misc. 150, 132 A. 294 (Sup. Ct. 1926).

DEFECTIVE STEERING MECHANISM. Brenson v. Scott 9 N.J. Misc. 1320, 157 A. 550 (Sup. Ct. 1931).

FAULTY BRAKES. Steigler v. Neuweiler, 91 N.J.L. 273 (E. & A. 1917); *Schriener v. Del. L. & W. R. R.*, 98 N.J.L. 899 (E. & A. 1923); *Feury v. Reid Ice Cream Co.*, 2 N.J. Misc. 1008, 126 A. 462 (Sup. Ct. 1924); *Hinsch v. Amirkanian*, 7 N.J. Misc. 274, 145 A. 232 (Sup. Ct 1929); *Wilkerson v Walsh*, 115 N.J.L. 243 (E. & A. 1935); *Alpert v. Feldstein*, 21 N.J. Super. 503 (1952).

DEFECTIVE ROAD LIGHTING EQUIPMENT. (See *N.J.S.A.* 39:3-58 *et seq.*); *Maini v. Hassler*, 38 N.J. Super. 81 (App. Div. 1955); *Zauber v. VanWagoner*, 12 N.J. Misc. 47, 172 A. 730 (Sup. Ct. 1934); *Hamilton v. Althouse*, 115 N.J.L. 248

(E. & A. 1935); *Gunnion v. Fern,* 6 N.J. Misc. 26, 139 A. 893 (Sup. Ct. 1928); *Halpin v. Tillon,* 2 N.J. Misc. 1100, 126 A. 665 (Sup. Ct. 1924); *Trefty v. Kirby,* 7 N.J. Misc. 555, 126 A. 665 (Sup. Ct. 1929); *Jacobus v. McEwan,* 2 N.J. Misc. 196 (Sup. Ct. 1924); *Julich v. T. A. Gilbespie Co.,* 7 N.J. Misc. 630, 146 A. 785 (Sup. Ct. 1929); *Osbun v. DeYoung,* 99 N.J.L. 284 (E. & A. 1923); *Steber v. Malanka,* 14 N.J. Misc. 141, 182 A. 890 (Sup. Ct. 1936); affirmed 117 N.J.L. 443 (E. & A. 1937); *Honey v. Brown,* 22 N.J. 443 (1956); *Mattero v. Silverman,* 79 N.J. Super. 449 (App. Div. 1963); *Nicolosi v. Knight,* 135 N.J.L. 515 (E. & A. 1947).

LIABILITY UNDER I. C. C. USAGE. Where independent contractor, who used truck of one having an interstate commerce license, was negligent in parking the truck on shoulder of highway without rear lights of truck being lighted and automobile ran into truck, the one who had the Interstate Commerce Commission license was liable for injuries sustained by the driver and occupants of automobile. *Honey v. Brown,* 22 N.J. 433 (1956).

ADDITIONAL NOTES AS TO DEFECTS IN GENERAL.

Lights, driving without, or with improper. 21 A.L.R. 2d 7 (1952); 21 A.L.R. 2d 209 (1952); 67 A.L.R. 2d 118 (1959).

Tires, blowout or other failure of. 24 A.L.R. 2d 16 (1952).

Wheel, detached, *res ipsa loquitur.* 46 A.L.R. 2d 110 (1956).

Steering mechanism, break of, or defect in. 23 A.L.R. 2d 539 (1952).

Rear view mirror lack or inadequacy of. 27 A.L.R. 2d 1040 (1953).

Inhalation of gases or fumes from motor vehicle exhaust, owner's or operator's liability for passenger's injury or death. 56 A.L.R. 2d 1099 (1957).

2. LIABILITY OF BAILOR FOR CONSIDERATION

The bailor of a motor vehicle for the mutual benefit of the parties is under a duty to use reasonable care and diligence to furnish a vehicle which is reasonably fit for the purpose for which it is to be used. This duty includes the obligation of making a reasonable inspection of the vehicle for defects or conditions liable to constitute a source of danger, and to correct such defect or give warning to the prospective user of such defects or conditions of which the bailor has knowledge.

Cases:

Restatement, Torts, § 392; *Nelson v. Frehauf Trailer Co.,* 20 N.J. Super. 198 (1952) *affirmed* 11 N.J. 413 (1953); *Mason v. Niewinski,* 66 N.J. Super. 358 (App. Div. 1961); *Union County U-Drive It v. Blomely,* 48 N.J. Super. 252 (App. Div. 1958); *M. Dietz & Sons, Inc. v. Miller,* 43 N.J. Super. 334 (App. Div. 1957); *Schimek v. Gibb Truck Rental Agency,* 69 N.J. Super. 590 (App. Div. 1961); *Bratka v. Castle's Ice Cream Co.,* 40 N.J. Super. 576 (App. Div. 1956); also, 46 A.L.R. 2d 404 (1956) 60 A.L.R. 2d 850 (1958).

3. MANUFACTURER'S LIABILITY

The manufacturer of an article, such as an automobile, which while not inherently dangerous, may become so when put to the use for which

it is intended, owes to the public the duty of employing reasonable care, skill and diligence in its manufacture, assembly and inspection, and of exercising reasonable diligence to see that it is reasonably fit for the purpose for which it is intended. This duty of reasonable care extends not only to the purchaser of the vehicle but to all persons who may reasonably be expected to use the vehicle or be in the vicinity of its use.

Cases:

Heckel v. Ford Motor Co., 101 N.J.L. 385, 387 (1925); *Henningson v. Bloomfield Motors, et al.*, 33 N.J. 358 (1960); *Fabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476 (App. Div. 1960). See also, *O'Donnell v. Asplundh Tree Expert Co.*, 13 N.J. 319 (1953); *Clark v. Standard*, 8 N.J. Misc. 284 (1930); *Sinatra v. National X-ray*, 26 N.J. 546 (1958).

The duty of inspection for the purpose of locating latent as well as patent defects which could be ascertained by the exercise of reasonable care on its part. *Sinatra v. National X-ray, supra.*

It is not enough that the defendant shows that it required reasonable tests of its equipment but it must appear that these tests were actually applied in a reasonably careful manner. *O'Donnell v. Asplundh Tree Expert Co., supra.*

See also Model Charge 5.27 below.

(G.) DUTY OF AUTOMOBILE DRIVER TO MAKE OBSERVATIONS

1. FOR TRAFFIC CONDITIONS

The law imposes upon the driver of an automobile the duty of exercising such care as is reasonable under all the circumstances confronting him at the particular time. This duty requires motorists to use our streets and highways with reciprocal regard for the rights of others who may also be using them. Thus a motorist is required to make such observations for traffic and vehicles which are or may come into his path of travel, as a reasonably prudent person would make.

Cases:

Ambrose v. Cyphers, 29 N.J. 138 (1959); *Bedford v. Hurff*, 9 Misc. 15 (Sup. Ct. 1930); *Poole v. Twentieth Century, etc.*, 121 N.J.L. 244 (E. & A. 1938); *Trout v. Bright*, 10 Misc. 914 (D.C. 1932); *Crisciotti v. Greatrex*, 9 N.J. Super. 26 (App. Div. 1950); *Hyman v. Bierman*, 130 N.J.L. 170 (E. & A. 1943); *Schaublin v. Leber*, 50 N.J. Super. 506 (App. Div. 1958).

Statutory duty to make observations: *N.J.S.A.* 39:4-58, driver to have clear view; *N.J.S.A.* 39:4-125, view on curve, grade, etc.; *N.J.S.A.* 39:3-74, windshied to permit clear view; *N.J.S.A.* 39:4-55, view on curve; *N.J.S.A.* 39:4-86, passing only where clearly visible. *N.J.S.A.* 39:4-37.1, blind persons.

The duty to exercise reasonable care between persons using a public highway is mutual. An approaching driver is justified in assuming, until he discovers that it is contrary to the fact, that all other users of the highway will exercise reasonable care in their use of the highway.

Tischler v. Steinholtz, 99 N.J.L. 150, 151 (E. & . 1923); *German v. Harris,* 106 N.J.L. 521, 523 (E. & A. 1930); *Nile v. Phillips Express Co.,* 118 N.J.L. 455, 460 (E. & A. 1937); *Poole v. Twentieth Century Operating Co.,* 121 N.J.L. 244, 248 (E. & A. 1938); *Van Rensselaer v. Viorst,* 136 N.J.L. 628, 631 (E. & A. 1947).

2. FOR PEDESTRIANS

Vehicular operators and pedestrians have a common right to the use of a public highway. Their rights and duties are mutual and relative and each is charged with a duty of reasonable care, commensurate with the risk of danger involved in the particular circumstances. Thus a motorist is required to make such observations for pedestrians who are, or may come into his path of travel, as a reasonably prudent person would make.

Cases:

Poole v. Twentieth Century Operating Co., 121 N.J.L. 244 (E. & A. 1938); *Van Rensselaer v. Viorst,* 136 N.J.L. 628 (E. & A. 1948); *LeBavin v. Suburban Gas Co.,* 134 N.J.L. 10 (E. & A. 1946).

The general rule is that the vigilance and care required of the operator of a motor vehicle may vary in respect to persons of different ages or physical conditions. He must increase his exertions in order to avoid danger to children whom he may see, or by the exercise of reasonable care should see, on or near the highway. Children are entitled to care proportionate to their inability to foresee and avoid danger.

Rosenberg v. Holt, 102 N.J.L. 159 (E. & A. 1925); *Eastmond v. Wachstein,* 4 Misc. 966 (Sup. Ct. 1926); *Ferris v. McArdle,* 92 N.J.L. 580 (E. & A. 1919); *Greco v. Schmidt,* 101 N.J.L. 554 (E. & A. 1925); *Sembler v. Scott,* 130 N.J.L. 184 (E. & A. 1943); *Balog v. Mitchell Co.,* 3 Misc. 1000 (Sup. Ct. 1925); *Silberstein v. Showell, Fryer & Co.,* 109 Atl. 701 (1920); *Mulhern v. Philadelphia Home-Made Bread Co.,* 101 Atl. 74; 5A *Am. Jur., Automobiles & Highway Traffic*—Secs. 439, 440, 444.

School Zones—*N.J.S.A.* 39:4-167; Playgrounds, *N.J.S.A.* 39:4-168; Caution Signs, *N.J.S.A.* 39:4-166.

3. WHERE VIEW OBSTRUCTED AT INTERSECTION

The fact that an operator of an automobile cannot see up an intersecting street until he is actually in it, does not obligate him to get out of the car and look up and down the street before proceeding over or into it. A person is not required to extend his vision beyond a point where vehicles

travelling at a lawful speed would threaten his safety. The duty imposed upon a motorist in such a situation is to approach the obscured intersection with reasonable care and caution, commensurate with the risk involved. This duty requires the motorist to have his vehicle under proper control, to operate it at an appropriate speed and to make such reasonable and effective observations as a reasonably prudent person would make, commensurate with the risk of danger involved.

Cases:

Moser v. Castles Ice Cream Co., 2 Misc. 1029 (Sup. Ct. 1924); *Wilson v. Kuhn*, 3 Misc. 1032 (Sup. Ct. 1925); *Abel v. Zeek Baking Co.*, 4 Misc. 213 (Sup. Ct. 1926); *Boyer v. Great At. &c.*, 99 N.J.L. 451 (E. & A. 1924); *Rich v. Eldredge*, 106 N.J.L. 181 (E. & A. 1929); *Rizio v. P.S.*, 128 N.J.L. 60 (E. & A. 1942); *LeBavin v. Suburban Gas*, 134 N.J.L. 10 (E. & A. 1946); *Neidig v. Fisher*, 123 N.J.L. 242 (E. & A. 1939); *Webber v. McCormick*, 63 N.J. Super. 409 (App. Div. 1960); *Schuttler v. Reinhardt*, 17 N.J. Super. 480 (App. Div. 1952).

4. WHERE VISION IMPAIRED

Where the view of the roadway ahead is impaired by obstructions to view caused by darkness, fog, rain on glass or other such obstruction, there is a duty to exercise care commensurate with the risk of the hazard presented. The operator of a motor vehicle in such a situation is required to exercise reasonable care, that is such care as the existing conditions require, to have his vehicle under such control as to be able to stop, if necessary, to avoid harm to others on the highway. In addition, while operating a vehicle in the night time, the operator is required to anticipate that other vehicles and persons may be on the highway and must use reasonable care to so adjust his lights that he can observe vehicles or pedestrians at a sufficient distance to avoid contact with them at the speed he is travelling.

Cases:

Ball v. Camden & Trenton Ry. Co., 76 N.J.L. 539 (E. & A. 1909); *Anderson v. Public Service Corporation*, 81 N.J.L. 700 (E. & A. 1911); *Crisciotti v. Greatrex*, 9 N.J. Super. 26 (App. Div. 1950); *Osbun v. DeYoung*, 99 N.J.L. 204 (E. & A. 1923); *Garvey v. Public Service &c., Transport*, 136 N.J.L. 533 (E. & A. 1948); *Madde v. Lindberg*, 12 N.J. Super. 248 (App. Div. 1951); *Hartpence v. Grouleff*, 15 N.J. 545 (1954); *Greenfield v. Dusseault*, 60 N.J. Super. 436 (App. Div. 1960); *Spear v. Hummer*, 11 Misc. 709 (Sup. Ct. 1933), 42 A.L.R. 2d 13 (1926).

5. TEMPORARY BLINDNESS OF DRIVER AS AFFECTING DUTY

No person is entitled to drive a car on a public street or highway blindfolded. Where street lights, headlights or other lights or reflections

of light have the effect of causing temporary blindness, it is his duty to stop his car and thereafter to proceed only when temporary blindness has passed.

Cases:

Osbun v. DeYoung, 99 N.J.L. 204, *affirmed,* see *Martin v. DeYoung,* 99 N.J.L. 284 (E. & A. 1923); *Robinson v. Mutnick,* 102 N.J.L. 22 (Sup. Ct. 1925); *Devine v. Chester,* 7 Misc. 131 (Sup. Ct. 1929); *Hammond v. Morrison,* 90 N.J.L. 15 (Sup. Ct. 1917); 22 A.L.R. 2d 292 (1923); *Windshields, N.J.S.A.* 39:4-126.

6. DUTY AS TO OBSTACLES AND DEFECTS IN STREETS

The law does not impose upon a motorist an absolute duty to observe and avoid obstacles and defects in a street or highway. The operator of a vehicle has the right to place reasonable reliance upon proper preservation of a street or highway in a reasonably safe condition. But where a defect or obstacle is obvious or clearly visible or where reasonable observation would disclose it in time to avoid or prepare for it, the operator of an automobile is liable for failure to exercise reasonable care to avoid it [or its effects].

Cases:

Geise v. Mercer Bottling Co., 87 N.J.L. 224 (1915); *Volinsky v. Public Service Coordinated Transport,* 5 N.J. Super. 320 (App. Div. 1949); *Messier v. City of Clifton,* 24 N.J. Super. 133 (App. Div. 1952); *Hallett v. Wm. Eisenberg & Sons, Inc.,* 116 N.J.L. (E. & A. 1935); *Rapp v. Public Service Coordinated Transport, etc.* (1952); *Robinson v. Mutnick,* 102 N.J.L. 22 (Sup. Ct. 1925); *Bowen v. Healy's Inc.,* 16 N.J. Misc. 113 (Sup. Ct. 1938); *Fisher v. Healy's Special Tours, Inc.,* 121 N.J.L. 198 (E. & A. 1938); *Yanas v. Hogan,* 133 N.J.L. 188 (Sup. Ct. 1945).

7. DUTY AS TO PERSONS UNDER DISABILITY

The operator of a car is bound to consider the lack of capacity of those in his way to care for their own safety, when such incapacity is known or should be known by him in the exercise of reasonable care. Where the driver of a vehicle actually observes that a person is under disability he is under a duty to exercise reasonable care to avoid injury to him, having this incapacity in mind. This rule applies to persons who are rendered helpless or whose capacity for self-protection is limited due to infancy, intoxication, illness or other causes. A driver under such circumstances is required to exercise a degree of care commensurate with risk of danger involved. [The mere fact that a pedestrian is intoxicated does not confer a right upon the driver to run him down].

Cases:

Eichinger v. Krause, 105 N.J.L. 402 (E. & A. 1929); blind persons, *N.J.S.A.* 39:4-37.1; *Confone v. Gnassi,* 5 Misc. 343 (Sup. Ct. 1927); *Bageard v. Consolidated Traction,* 64 N.J. 316 (E. & A. 1900); *Petrone v. Margolis,* 20 N.J. Super. 180 (App. Div. 1952); *Tabor v. O'Grady,* 61 N.J. Super. 446 (App. Div. 1960).

(H.) DUTY OF PEDESTRIANS TO MAKE OBSERVATIONS

Both motorists and pedestrians have mutual and reciprocal rights to the use of streets and highways and each have the right to expect that the others will exercise their rights with reasonable care and subject to the rights of others. Thus a pedestrian is under a duty to exercise for his own safety the care that a reasonably prudent person would exercise under all the circumstances confronting him. Although his observation need not extend beyond a distance within which vehicles moving at lawful speed will threaten him, a pedestrian is required to use such powers of observation, and to exercise such judgment as to how and when to cross a street or highway, as a reasonably prudent person would use in the particular circumstances.

Note:

The Motor Vehicle Act, *N.J.S.A.* 39:4-32 through 39:4-37.1 establishes statutory rights, duties and obligations of pedestrians and motorists and where applicable should be applied to the facts of a given situation.

Cases:

As to right of pedestrian to cross street at a point not a crosswalk, see *Fox v. Great Atlantic and Pacific Tea Co.,* 84 N.J.L. 726 (E. & A. 1913); *Gentile v. Public Service,* 12 N.J. Super. 45 (App. Div. 1941); *N.J.S.A.* 39:4-34; as to right of way at crosswalk, see *N.J.S.A.* 39:4-35 and *N.J.S.A.* 39:4-36.

(I) DUTY OF A PEDESTRIAN WHEN CROSSING AT A POINT OTHER THAN A CROSSWALK

A pedestrian crossing at a point other than a crosswalk is charged with the duty to exercise for his own safety reasonable care commensurate with the risk of such crossing.

In determining whether such care was used you should consider the location involved, the existing state of the traffic, the observations made by the pedestrian before and during the crossing, the presence of obstructions to view (such as buildings, passing or parked cars, rain, fog and darkness) and from these and all other facts and circumstances present, determine whether the pedestrian in this case exercised the care required.

In addition to considering the general duty I have just described, you are required to consider the following statutory provision which is part of our New Jersey Motor Vehicle Act and is entitled *N.J.S.A.* 39:4-34:

"Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk or, in the absence of a crosswalk, at right angles to the roadway, and when crossing at a point other than at a crosswalk shall yield the right of way to all vehicles on the roadway . . ."

Continue with Model Charge 5.18 (D) on violation of Motor Vehicle Act. Adapt to Contributory Negligence.

Cases:

Kopec v. Kakowski, 34 N.J. 243, 246 (1961);

"We cannot say as a matter of law that plaintiff was guilty of contributory negligence. In resolving the question of plaintiff's contributory negligence as a matter of law we must consider the factual setting as revealed by the testimony, including (1) his familiarity with the highway; (2) the observation made by him before venturing across the south bound lane and during his crossing thereof; (3) the distance, at the time of entrance upon the highway, between that point and defendant's car; (4) that fact that defendant was operating the rearmost of two cars traveling in tandem in the lane immediately adjacent to the medial strip; (5) the speed at which the cars were estimated to be traveling in a 45 mile per hour zone; (6) the distance of the highway traversed by plaintiff before the impact; (7) the sudden veering of defendant to the right across the second lane into the third lane, with the added acceleration of speed necessary to pass the lead car on the right. Fair-minded men of ordinary prudence might well differ under the proofs adduced as to whether plaintiff acted as an ordinarily prudent man would act. It follows that the issue of contributory negligence was not one of law for determination by the court but rather one of fact for determination by the jury."

Schaublin v. Leber, 50 N.J. Super. 506, 512 (pp. Div. 1958):

"Failure of a pedestrian to cross within a crosswalk is not conclusive evidence of contributory negligence even when struck by a moving vehicle. Whether the plaintiff here made reasonable observation, the lighting conditions, whether it was reasonable for her to pursue the path she did, whether her attention was upon her dog instead of upon her path, and all other matters which enter into the complex of contributory negligence, were matters for the jury to decide."

Van Rensselaer v. Viorst, 136 N.J.L. 628 (E. & A. 1948); *Fox v. Great Atlantic & Pacific Tea Co.,* 84 N.J.L. 726 (E. & A. 1913); *Vople v. Perruzzi,* 122 N.J.L. 57 (Sup. Ct. 1939); *Dugan v. Public Service Transportation Co.,* 5 N.J. Misc. 245 (Sup. Ct. 1927) (pedestrian justified in presuming that the driver, after having seen him, would so handle his car as to avoid running him down); *Schreiner v. Grinnell,* 89 N.J.L. 37 (Sup. Ct. 1916).

5.19 EFFECT OF INTOXICATION ON DUTY OWING

(A) AUTOMOBILE DRIVER

The driver of a vehicle is required to exercise the care which a reasonably prudent *and sober* man could exercise under the same or similar circumstances. The fact that a driver of a vehicle has been drinking and gives the appearance of being under the influence of alcohol does not in itself necessarily constitute negligence. However, it is proper evidence to be considered and weighed by you, along with all of the other evidence in the case, in determining whether negligence has been established.

If a person, although intoxicated, drives his vehicle in a proper manner and as a reasonably prudent and sober man would, he cannot be held liable for damage inflicted by his vehicle merely because he was intoxicated at the time. On the other hand, voluntary intoxication does not excuse his failure to exercise that degree of care, in the conduct and management of his vehicle, which would be exercised by a reasonably prudent and sober driver under the same or similar circumstances. If he does not exercise that degree of care, he is negligent, whether the failure to do so is caused by intoxication or not.

Cases:

Roether v. Pearson, 36 N.J. Super. 465 (App. Div. 1955); *Petrone v. Margolis*, 20 N.J. Super. 180 (App. Div. 1952); *Tabor v. O'Grady*, 61 N.J. Super. 446 (App. Div. 1960).

N.B.

Can be modified to apply to other situations where the sobricty of a party is in issue.

5.20 DUTY OF OWNER TO TENANT LEASING ENTIRE PREMISES, AND TO OTHERS ON PREMISES

(A) AS TO RESIDENTIAL PREMISES

When the landlord or lessor leases residential premises to a tenant and conceals or fails to disclose to his lessee or tenant any natural, artificial or latent (hidden) condition or defect involving an unreasonable risk of bodily harm to persons on the leased premises, he is subject to liability for the harm thereby caused to the lessee and to others upon the premises with the consent of the lessee after the lessee has taken possession, if (a) the lessee does not know of the condition or the risk involved therein, and (b) the lessor (landlord), knows or by reasonable inspection, should have known or has notice of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk.

Note:

The foregoing is a revision of the charge to give effect to *Marini v. Ireland,* 56 N.J. 130 (1970) to the extent of eliminating any reference to the landlord's or lessor's warranty that premises are fit and suitable for tenants proposed use. See all Judge Larner's decision in *Dwyer v. Skyline Apartments,* decided March 8, 1973.

(B) REPAIRS BY LANDLORD OF RESIDENTIAL PREMISES

The landlord also has the duty to repair damages to vital facilities caused by the ordinary wear and tear during the term of the lease or tenancy when he is given timely and adequate notice of defective conditions. However, where damage has been caused maliciously or by abnormal or unusual use, the tenant is conversely liable for repair.

In the event that repairs are made, either by contract or voluntarily on the part of the landlord, they must be carried out in a reasonably careful manner and the tenant and others lawfully upon the premises may rely upon the sufficiency of such repairs. Where a landlord negligently makes repairs so undertaken, whether gratuitously or not, he is liable in damages for such breach of duty to the tenant and to others upon the land with the consent of the tenant, if the resulting condition creates an unreasonable risk of harm to persons upon the land.

NOTE:

This proposed charge as 5.20 (a), applies only to residential premises leased or rented to a tenant for the latter's occupancy. *Marini v. Ireland,* 56 N.J. 130, 144. It does not apply to long-term leases of residential buildings for investment or other than residential purposes of the lessee.

(C) AS TO NON-RESIDENTIAL LAND AND BUILDINGS

Generally, on the renting or leasing of a building or lands, for other than residential purposes, in the absence of a contract to that effect, there is no implied warranty or condition that the premises are fit and suitable for the purpose specified or for the use to which the tenant or lessee proposes to devote them or for any purpose and in such case, the landlord is under no liability for injuries sustained by the tenant or his invitees or employees, by reason of the unsafe condition of the demised premises. Where, however, a lessor of land conceals or fails to disclose to his lessee any natural or artificial condition involving an unreasonable risk of bodily harm to persons upon the land, he is subject to liability for the harm thereby caused to the lessee, and to others upon the land with the consent of the lessee after the lessee has taken possession, if (a) the lessee does not know of the condition or the risk involved therein, and (b) the lessor, (the landlord), knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk.

D. Repairs by Landlord of Non-residential Land and Buildings

In the absence of a contractual obligation to repair premises leased for non-residential purposes, the landlord owes no duty to repair the leased premises. In the event that repairs are made, either by contract or voluntarily on the part of the landlord, they must be carried out in a reasonably careful manner and the tenant and others lawfully upon the premises may rely upon the sufficiency of such repairs. Where a landlord negligently makes repairs so undertaken, whether gratuitously or not, he is liable in damages for such breach of duty so arising, to the tenant and to others upon the land with the consent of the tenant, if the resulting condition creates an unreasonable risk of harm to persons upon the land.

5.21 DUTY OF MULTI-FAMILY HOUSE TO TENANTS AND OTHERS

(A.) PORTIONS OVER WHICH OWNER RETAINS CONTROL

In this case it is alleged that the plaintiff's injuries were sustained while on a portion of the premises used in common by the tenants and others lawfully thereon, over which the landlord retained control and supervision. Under these circumstances the landlord is under a duty to see that reasonable care is exercised to have the passageways, stairways and all portions of the premises used in common by tenants and others, over which he has retained control, reasonably fit for the use which he has invited others to make of them and reasonably safe for the use of tenants and those impliedly invited to come upon the premises.

THE FOLLOWING MAY BE ADDED WHERE APPROPRIATE:

1. DUTY NOT DELEGABLE

This duty of reasonable care owed by the landlord cannot be delegated or transferred and the landlord may not relieve himself of this duty by engaging an independent contractor to discharge it for him.

2. DUTY TO REPAIR AFTER NOTICE OF DEFECT

Where a landlord has had knowledge of defects brought to his attention or where he has promised to make repairs, he is required to act with reasonable care and diligence to correct such defects.

3. DUTY TO INSPECT

The duty of the landlord extends to the exercise of reasonable care in inspecting the portion of the premises intended for the common use of tenants and others over which he retains control in order to discover unsafe or dangerous conditions thereon. If a reasonably careful inspection by the landlord fails to disclose defects and the landlord has no actual knowledge of such defects, he cannot be held liable for failure to repair or correct

them. However, where a defect has existed for such a length of time that a reasonable inspection on the part of the landlord would have revealed it, the landlord is liable for injuries resulting from his failure to discover and correct the defect.

4. WHERE HAZARD IS CREATED BY LANDLORD

Where the defect which brought about the plaintiff's injury is a structural one or involves improper construction, it is not necessary for the plaintiff to adduce proof that the landlord had notice thereof or that the same had existed for such a length of time that reasonable inspection on the landlord's part would have revealed it.

Cases:

Michaels v. Brookchester, 26 N.J. 379 (1958); *Faber v. Creswick*, 31 N.J. 234 (1959); *Saracino v. Capital Properties Assn.*, 50 N.J. Super. 81 (App. Div. 1958).

Where the landlord retains portions of leased premises under his control and supervision he is, with respect to such portions, under responsibility of a general owner of realty who holds out an invitation to others to enter on and use his property, and is bound to see that reasonable care is exercised to have passageways and stairways reasonably fit for uses which he has invited others to make of them; and reasonably safe for the use of tenants and those who are impliedly invited to come upon premises; and such duty cannot be delegated or transferred.

Daniels v. Brunton, 7 N.J. 102 (1951); *Rizzi v. Ross*, 117 N.J.L. 362 (E. & A. 1937); *Hahner v. Bender*, 101 N.J.L. 102 (E. & A. 1925); *Scheirek v. Izsa*, 26 N.J. Super. 68 (App. Div. 1953).

A landlord must use reasonable care to keep in repair portions used in common by tenants and others, and to discover dangerous conditions.

Peterson v. Zaremba, 110 N.J.L. 529 (E. & A. 1933); *Bolitho v. Mintz*, 106 N.J.L. 449 (E. & A. 1930); *Corrao v. West Jersey Corp.*, 13 N.J. Super. 342 (App. Div. 1951); *Notkin v. Brookdale Gardens*, 28 N.J. Super. 9 (App. Div. 1953); *Snyder v. I. Jay Realty Co.*, 30 N.J. 303 (1959).

The landlord's duty as to general premises or portions thereof reserved to his care cannot be delegated or transferred.

Rizzi v. Ross, 117 N.J.L. 362 (E. & A. 1937); *Hussey v. Long Dock R. Co.*, 100 N.J.L. 380 (E. & A. 1924); *Levine v. Bochiaro*, 137 N.J.L. 215 (E. & A. 1948).

Where the landlord creates a dangerous condition as when the defect complained of is a structural one or involves improper construction, it is not necessary that plaintiff show notice to the landlord since he is chargeable with actual notice thereof.

Cf. *Martin v. Asbury Park*, 111 N.J.L. 364 (E. & A. 1933).

(B.) TENEMENT HOUSES

The premises here involved constitute a tenement house under the law of this State. *N.J.S.A.* 7-1 of the Tenement House Act, which applies here, provides in part as follows:

> "Every tenement house and all parts thereof shall be placed and maintained in good repair * * * "

An owner or proprietor of a tenement house is liable for a violation of this duty regardless of the part of the building in which the violation occurs. He must exercise reasonable care to maintain all parts of the tenement house in good repair, *i.e.*, reasonably suitable and safe for their intended use. In considering whether the landlord has failed to perform his duty in this respect, you will consider:

(a) Whether the alleged defect was called to the attention of the landlord, or he had knowledge of such defect, a sufficient length of time before the accident to permit him to correct the same; or

(b) Whether such defect existed for such period of time before the accident that in the exercise of reasonable care the landlord should have discovered the defect and corrected the same; or

(c) Whether the landlord created the dangerous condition, in which case it is immaterial how long the condition existed before the accident. (To be utilized where status of premises as a tenement house is not disputed or where court fixes status as a matter of law).

Cases:

> *N.J.S.A.* 55:7-1 of the Tenement House Act provides in part as follows: "Every Tenement House and all the parts thereof shall be placed and maintained in good repair * * *."
>
> Tenement House defined. *N.J.S.A.* 55:1-24.
>
> The landlord must exercise reasonable care to maintain all parts of the Tenement House in good repair, *i.e.*, reasonably suitable and safe for their intended use. A tenement house landlord must make such effort to keep building in repair as a reasonably prudent man would make in view of the provisions of the Tenement House Act.
>
> (WATER HEATER) *Daniels v. Brunton,* 9 N.J. Super. 294 (App. Div. 1950), affirmed 7 N.J. 102 (1951).
>
> (HALL LIGHTS) *McNamara v. Mechanics Trust Co.,* 106 N.J.L. 532 (E. & A. 1930).
>
> (KITCHEN CABINETS) *Michaels v. Brookchester,* 26 N.J. 379 (1958).
>
> (DEFECTIVE WINDOW) *Rivera v. Grill,* 65 N.J. Super. 253 (App. Div. 1961).

(CEILING) *Saracino v. Capital Properties, Inc.,* 50 N.J. Super. 81 (App. Div. 1958).

Where landlord retains portions of leased premises under his control and supervision he is, with respect to such portions, under responsibility of a general owner of realty who holds out an invitation to others to enter on and use his property, and is bound to see that reasonable care is exercised to have passageways and stairways reasonably fit for uses which he has invited others to make of them; and reasonably safe for the use of tenants and those who are impliedly invited to come upon premises; and such duty cannot be delegated or transferred.

E. & A. Daniels v. Brunton, 7 N.J. 102 (1951); *Rizzi v. Ross,* 117 N.J.L. 362 (1937); *Hahner v. Bender,* 101 N.J.L. 102 (E. & A. 1925); *Scheirek v. Izsa,* 26 N.J. Super. 68 (App. Div. 1953).

Landlord must use reasonable care to keep in repair portions used in common by tenants and others, and to discover dangerous conditions.

Peterson v. Zaremba, 110 N.J.L. 529 (E. & A. 1933); *Bolitho v. Mintz,* 106 N.J.L. 449 (E. & A. 1930); *Corrao v. West Jersey Corp.,* 13 N.J. Super. 342 (App. Div. 1951); *Notkin v. Brookdale Gardens,* 28 N.J. Super. 9 (App. Div. 1953); *Snyder v. I. Jay Realty Co.,* 30 N.J. 303 (1959).

Landlord's duty as to general premises or portions reserved cannot be delegated or transferred.

Rizzi v. Ross, 117 N.J.L. 362 (E. & A. 1937); *Hussey v. Long Dock R. Co.,* 100 N.J.L. 380 (E. & A. 1924); *Levine v. Bochiaro,* 137 N.J.L. 215 (E. & A. 1948).

N.J.S.A. 55:7-1 of the Tenement House Act provides in part as follows: "Every Tenement House and all the parts thereof shall be placed and maintained in good repair * * *."

Tenement House defined. *N.J.S.A.* 55:1-24.

The landlord must exercise reasonable care to maintain all parts of the Tenement House in good repair, *i.e.,* reasonably suitable and safe for their intended use. A tenement house landlord must make such effort to keep building in repair as a reasonably prudent man would make in view of the provisions of the Tenement House Act.

(WATER HEATER) *Daniels v. Brunton,* 9 N.J. Super. 294 (App. Div. 1950), affirmed 7 N.J. 102 (1951).

(HALL LIGHTS) *McNamara v. Mechanics Trust Co.,* 106 N.J.L. 532, (E. & A. 1930).

(KITCHEN CABINETS) *Michaels v. Brookchester,* 26 N.J. 379 (1958).

(DEFECTIVE WINDOW) *Rivera v. Grill,* 65 N.J. Super. 253 (App. Div. 1961).

(CEILING) *Saracino v. Capital Properties, Inc.,* 50 N.J. Super. 81 (App. Div. 1958).

5.22 DUTY OF OWNERS OR OCCUPIERS OF PREMISES OTHER THAN LANDLORDS

Note as to Independent Contractor Rule:

1. This charge does not deal with the negligence of an independent contractor as it may affect the duty owed by an owner or occupier of premises to third persons. The owner or occupier of premises can be held liable for injury to persons caused by conditions negligently created on the premises by an independent contractor, as well as for the owner's independent negligence. *Mayer v. Fairlawn Jewish Center,* 38 N.J. 549, 555 (1962). See also: *Majestic Realty Associates, Inc. v. Toti Contracting Co.,* 30 N.J. 425, 431 (1959), holding that demolition of a building adjacent to other buildings may be inherently dangerous activity for which a landowner is liable notwithstanding the demolition work was done by an independent contractor. See also: *Berquist v. Panterman,* 46 N.J. Super. 74 (App. Div. 1957), certif. denied, 25 N.J. 55 (1957), where conduct of a property owner combined with that of an independent contractor may constitute negligence. *Cf. Barnard v. Trenton-New Brunswick Theatres Co.,* 32 N.J. Super. 551 (App. Div. 1954), where a theatre owner was held not liable for injury caused by a ladder negligently placed on the premises by an independent contractor's employees; also *Tarranella v. Union Bldg. & Construction Co.,* 3 N.J. 443, 446-447 (1950).

2. A general contractor as the occupier in control of the premises under construction is burdened with a duty similar to that owed by the landowner to business invitees. *Schwartz v. Zulka,* 70 N.J. Super. 256 (App. Div. 1961), modified on other grounds, 38 N.J. 9 (1962); *Wolczak v. National Elec. Products Corps.,* 66 N.J. Super. 64 (App. Div. 1961).

I. ACTIVITY OF OWNER OR OCCUPIER AS DISTINGUISHED FROM CONDITION OF PREMISES, DUTY OWED

An owner (or occupier) who engages in an activity (or conducts active operations) upon his premises is liable to those on the premises for harm caused to them by the owner's (or occupier's) failure to exercise reasonable care in conducting such activities.

WHERE APPROPRIATE ADD:

The duty to exercise reasonable care in the conduct of activities on his premises is owed to invitees, licensees and social guests alike. Thus, the owner of premises must exercise reasonable care in conducting activities on his premises so as to avoid injury to persons who are invited or who are otherwise allowed or privileged to be on said premises.

Cases:

Cropanese v. Martinez, 35 N.J. Super. 118 (App. Div. 1955); *Barbarisi v. Caruso,* 47 N.J. Super. 125, 131 (App. Div. 1957); see also: *Berger v. Shapiro,* 30 N.J. 89, 97 (1959); *Prosser, Torts* (3rd ed. 1964), §60, p. 388; 2 *Harper & James, The Law of Torts,* §27.10, p. 1474 (1956).

II. DUTY OWED AS TO CONDITION OF PREMISES

NOTE: The duty owed by an occupier of land to a person coming thereon is determined according to the status of such person, *i.e.*, invitee, licensee or trespasser. *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 311, 314 (1959), holding that the guest of an employee of a factory tenant was a licensee as to the tenant but an invitee of the landlord in the use of a common passageway. See also: *Van Der Woude v. Gatty*, 107 N.J. Super. 164 (App. Div. 1969) and *Taneian v. Meghrigian*, 15 N.J. 267 (1954), for the rule that an owner of a two family or multi-family dwelling owes a social guest the same duty of care as is owed to an invitee with respect to common passageways.

A. *ADULT TRESPASSER–DEFINED AND GENERAL DUTY OWED*

A trespasser is one who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. He is one who is not invited, allowed or privileged to be on another's property. In general, the duty of an occupier of premises to a trespasser thereon is to refrain from acts wilfully injurious.

Cases:

Lordi v. Spiotta, 133 N.J.L. 581, 584 (Sup. Ct. 1946); *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 312 (1959). See: 2 *Harper & James, Law of Torts*, §27.3, pp. 1435, 1440 (1956), to the effect that a possessor of land may take some steps to repel a trespasser, but may not arrange his premises intentionally as to cause death or serious bodily harm to a trespasser. *Lordi v. Spiotta, supra*, speaks of abstaining from "willful or wanton injury." See also: *Imre v. Riegel Paper Corp.*, 24 N.J. 438, 446-449 (1957), dealing with repeated trespasses. The court said that there may be such acquiescence as to amount to a license and that some courts have held continued toleration of trespass amounts to permission to use the land and transforms a trespasser into a licensee, but the court seems to prefer the rule that a higher degree of care is owed to one whose repeated trespasses are known to the landowner where the reasonably foreseeable risk of death or severe injury outweighs the freedom of action that would otherwise govern the conduct of a landowner in regard to a trespasser. Sledding on Shoprite property by children held not sufficient to transform them from trespassers to licensees. *Ostroski v. Mount Prospect Shoprite, Inc.*, 94 N.J. Super. 374, 382 (App. Div. 1967).

B. *INFANT TRESPASSER, DEFINED AND GENERAL DUTY OWED*

Generally, in the law, a trespasser is one who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. He is one who is not invited, allowed or privileged to be on another's property. In general, the duty of an occupier of premises to a trespasser is to refrain from acts which willfully

injure the trespasser. What I have just charged you relates generally to adults. As to infants, the rule of law is modified as the following instructions to you will illustrate.

A landowner or occupier does not guarantee the safety or welfare of the infant trespasser. However, a possessor of property is subject to liability for physical harm to children trespassing on his property caused by an artificial condition upon the property if:

(a) the place where the condition exists is one which the possessor knows or has reason to know that children are likely to trespass, *and*

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, *and*

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the areas made dangerous by it, *and*

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, *and*

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

In order for plaintiff to sustain his cause of action he must establish each and every one of the five elements set out in the rule of law just given to you.

Cases:

Restatement of Torts 2d, §339, p. 197 (1965); *Ostroski v. Mount Prospect Shoprite, Inc.*, 94 N.J. Super. 374 (App. Div. 1967), certif. denied, 49 N.J. 369 (1967); *Scheffer v. Braverman*, 89 N.J. Super. 452 (App. Div. 1965); *Turpan v. Merriman*, 57 N.J. Super. 590 (App. Div. 1959), certif. denied, 31 N.J. 549 (1960); *Coughlin v. U.S. Tool Co., Inc.*, 52 N.J. Super. 341 (App. Div. 1958), certif. denied, 28 N.J. 527 (1959).

Notes:

For definitions of trespasser, invitee and licensee, see Model Charges 5.22—II A, C and E; *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 312 (1959). Prior use of area by children is not sufficient to warrant a finding of licensee. *Ostroski v. Mount Prospect Shoprite, Inc., supra*, 94 N.J. Super. at 382. However, continued toleration of trespass and acquiescence therein may amount to permission or implied leave and license. *Imre v. Riegel Paper Corp.*, 24 N.J. 438, 446 (1957).

As to infant trespassers on railroad property see *Egan v. Erie R. Co.*, 29 N.J. 243 (1959) and *N.J.S.A.* 48:12-152. This statute absolves a railroad

company from the duty to a trespasser, including an infant trespasser. Although in *Egan v. Erie R. Co., supra,* 29 N.J. at 254, the court held that the statute does not preclude recovery for injuries caused by a railroad's willful or wanton conduct, the failure to have watchmen present to protect infant trespassers is not wanton misconduct as a matter of law.

CARE TO AVOID INJURY, WHERE APPROPRIATE ADD:

The possessor of land is subject to liability to the trespassing child, if at all, only if he has failed to conform to the standard of care of a reasonable man in like circumstances. Even if he knows, or has reason to know, that children are likely to trespass and that the condition on the land involves an unreasonable risk of harm to them, and even if the children are likely not to discover or appreciate the risk, the possessor is liable only if he fails to take such steps as a reasonable man would take in the circumstances to make the condition safe, or otherwise to protect the children. If such reasonable care has been taken there is no liability even though injury has occurred.

Citation:

Restatement of Torts 2d, §339, Comment o, p. 206 (1965).

WARNING OF CONDITION, WHERE APPROPRIATE ADD:

In dealing with the obligation of the possessor to use reasonable care to eliminate the danger or otherwise protect an infant tresspasser, you may consider whether a warning would have been sufficient. In a particular situation a warning may be sufficient, and if you find that the possessor gave such a warning and it was disregarded, you may find for the defendant. In that connection, you must also determine whether the plaintiff was mature enough to understand the full nature and scope of the warning and danger involved. Only if you find that the plaintiff was capable of understanding the warning and danger involved may you find for the defendant in this regard. If, however, you find that the child was too young to understand or heed the warning or that the warning was not sufficient, a possessor may not relieve himself from liability simply by giving such warning.

Citation:

Restatement of Torts 2d, §339, Comment o, 206 (1965).

ARTIFICIAL CONDITION, WHERE APPROPRIATE ADD:

Basic to liability of a possessor of land is that an artificial condition upon the land caused the physical harm. You may not find for plaintiff if his injuries were the result of natural conditions maintained upon the land even though the accident would not have happened if the landowner had taken appropriate action to prevent the child from trespassing.

Case:

Ostroski v. Mount Prospect Shoprite, Inc., supra, 94 N.J. Super. at 380.

CREATION OF CONDITION, WHERE APPROPRIATE ADD:

In order for you to find the defendant liable it is not necessary that he be the person who created the condition which caused the plaintiff's injuries. You may find defendant liable even though the condition was created by some third person, provided you find that the defendant had actual knowledge of the condition and should have foreseen that such a condition would create an unreasonable risk of harm. However, the landowner has no obligation to make regular inspections upon his property in search of dangers created by others.

Cases:

Caliguire v. City of Union City, 104 N.J. Super. 210 (App. Div. 1967), aff'd, 53 N.J. 182 (1969); *Simmel v. N.J. Coop Co.,* 28 N.J. 1, 11 (1958); *Lorusso v. DeCarlo,* 48 N.J. Super. 112 (App. Div. 1957).

AWARENESS OF CHILDREN, WHERE APPROPRIATE ADD:

If a possessor of land has no reason to anticipate the presence of children at a place of danger on his land, he has no duty to look out for children and no liability for injuries sustained by children trespassing at such place of danger.

When we say that the plaintiff must prove that defendant "has reason to know" that children are likely to trespass at a place of danger on his land, we mean that the law charges defendant with information from which a person of reasonable intelligence would infer that children are likely to trespass in such places and would govern his conduct upon the assumption that they would.

Cases:

Long v. Sutherland-Backer Co., 48 N.J. 134 (1966), reversing 92 N.J. Super. 556 (App. Div. 1966); *Callahan v. Dearborn Developments, Inc.,* 57 N.J. Super. 437 (App. Div. 1959), aff'd, 32 N.J. 27 (1960); *Hoff v. Natural Refining Products Co.,* 38 N.J. Super. 222 (App. Div. 1955); *Restatement of Torts* 2d, §339, Comment g, p. 201 (1965).

Note:

In *Coughlin v. U.S. Tool Co., Inc., supra,* it was held that the possessor could not be charged with knowledge where prior trespasses were during the day and the accident occurred at night.

CHILD'S AWARENESS OF RISK, WHERE APPROPRIATE ADD:

If you find that the plaintiff, regardless of his age, did in fact realize the risk and appreciate the danger involved, and still proceeded despite the danger, he cannot recover for his injuries. The purpose of the duty placed upon the owner is to protect children from dangers which they do not appreciate and not to protect them against harm resulting from their own immature recklessness in the case of known and appreciated danger. Therefore, even though the condition is one which the possessor should realize to be such that young children are unlikely to realize the full extent of the danger of meddling with it or encountering it, the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but nonetheless chooses to encounter it out of recklessness or bravado.

Cases:

Ostroski v. Mount Prospect Shoprite, Inc., supra; Restatement of Torts 2d, §339, Comment m, p. 204 (1965).

Note:

A child's appreciation of the risk goes to the issue of defendant's liability to an infant trespasser under paragraph (c) of the rule, even though such awareness may also be an integral part of the defense of contributory negligence. *Hoff v. National Refining Products Co.*, 38 N.J. Super. 222, 236 (App. Div. 1955).

UNREASONABLY DANGEROUS CONDITION, WHERE APPROPRIATE ADD:

In determining whether a particular condition maintained by a possessor upon land which he knows to be subject to the trespasses of children involves an unreasonable risk to them, the comparison of the recognizable risk to the children, with the utility to the possessor of maintaining the condition, is important. The public interest in the possessor's free use of his land for his own purposes is significant. A particular condition is, therefore, regarded as not involving unreasonable risk to trespassing children unless it involves a substantial risk to them which could be obviated without any serious interference with the possessor's lawful use of his land.

Cases and Comment:

Restatement of Torts 2d, §339, Comment n, p. 205 (1965); *Coughlin v. U.S. Tool Co., Inc., supra.* "Foresight" is not synonymous with "omniscience;" hence, the possessor is not chargeable with knowledge of inherent danger in the storage of its cement mixer where boys pushed the mixer causing its wheels to move forward and the towing tongue to come down and crush the decedent. *Long v. Sutherland-Backer Co., supra,* 92

N.J. Super. at 559. In *Diglio v. Jersey Central Power & Light Co.*, 39 N.J. Super. 140 (App. Div. 1956), it was held that a fence was made unreasonably dangerous when sharp pointed wires projecting upward were added in the face of knowledge that children often played on the property, and of the propensity of children to climb fences, where the utility of the dangerous fence to defendant was slight in contrast to the foreseeable risk to the children.

C. *LICENSEE, DEFINED AND GENERAL DUTY OWED*

A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent. He is not invited but his presence is suffered. The duty of an occupier of premises to a licensee thereon is to abstain from acts willfully injurious, and if there is a known hazardous condition on the premises which the occupier could reasonably anticipate that the licensee would not observe and avoid, the occupier must either give warning of it or make the condition reasonably safe.

Note:

The duty of care owed a social guest is the same as is owed a licensee. *Berger v. Shapiro*, 30 N.J. 89, 96, 98 (1959); *Pearlstein v. Leeds*, 52 N.J. Super. 450, 457 (App. Div. 1958), certif. denied, 29 N.J. 354 (1959). For a more complex charge see Social Guest Defined and Duty Owed, below.

Cases:

Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959), holding that a friend of a manufacturer's employee who visits the manufacturer's rented factory premises at the invitation of the employee is a licensee of the manufacturer-tenant, but is an invitee as to the landlord's duty of care in common passageways.

One may enter the premises of another without invitation, express or implied, and be regarded as a licensee rather than a trespasser if his presence is either expressly or impliedly permitted by the possessor of the premises. Prevailing customs often determine whether a possessor of land is willing to have a third person come thereon. They may be such that it is entirely reasonable for one to assume that his presence will be tolerated unless he is told otherwise. *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 312 (1959).

Examples of licensees: Salesmen or solicitors canvassing at the door of private homes, tourists visiting a plant at their own request, people who enter a building to get out of the rain, parents in search of their children, someone who comes to borrow tools, etc. *Prosser, Torts* (3rd ed. 1964) §60, p. 386.

Note:

As to passengers in automobiles, the duty owed is the same, whether a licensee or an invitee. *Cohen v. Kaminetsky*, 36 N.J. 276 (1961).

D. *SOCIAL GUEST, GENERAL DUTY OWED*

Generally, although invited to his host's premises, a social guest must accept the premises of his host as he finds them. In other words, the host has no obligation to make improvements or alterations which would render his home safer for his guest than for himself. Nor is the host required to inspect his premises in search of defects which might cause injury to his guest.

If, however, the host knows or has reason to know of some artificial or natural condition on the premises and, in the exercise of reasonable foresight, should realize that it involves an unreasonable risk of harm to his guest and that his guest will not have reason to discover it and the risk involved, he is under the duty to exercise reasonable care to make the condition safe or to give warning to his guest of its presence and of the risk involved. In other words, while a social guest is required to accept the premises as the host maintains them, he is entitled, in the circumstances stated, to the host's knowledge of dangerous conditions on the premises. On the other hand, the host has no duty where the guest knows or has reason to know of the condition and the risk involved and nevertheless enters or remains on the premises.

(WHERE CALLED FOR, THE FOLLOWING MAY BE ADDED):

If you find that the host, the defendant, here, knew or had reason to know of the condition complained of, and realized or in the exercise of reasonable foresight should have realized that it involved an unreasonable risk of harm to the plaintiff, and that he had reason to believe that the plaintiff would not discover the condition and realize the risk, and that he nevertheless failed to take reasonable steps to protect the guest from the danger, that is to say, failed to exercise reasonable care to make the condition safe, or to warn the plaintiff of the condition and the risk involved, you may find the host negligent under the circumstances.

Cases:

Berger v. Shapiro, 30 N.J. 89 (1959); *Pearlstein v. Leeds*, 52 N.J. Super. 450 (App. Div. 1958), certif. den., 29 N.J. 354 (1959); *Mistretta v. Alessi*, 45 N.J. Super. 176 (App. Div. 1957); *Quinlan v. Quinlan*, 76 N.J. Super. 11 (App. Div. 1962), certif. den., 38 N.J. 313 (1962); *Giordano v. Mariano*, 112 N.J. Super. 311 (App. Div. 1970) (11½-year-old child injured after running into closed sliding glass door while attending birthday party.)

Notes:

(1) EXCEPTION AS TO VOLUNTARY UNDERTAKINGS

Where the host has gratuitously undertaken to do an act or perform a service recognizably necessary to his guest's bodily safety, and there is reasonable reliance thereon by the guest, the host is liable for harm sustained by the guest resulting from

his failure to exercise reasonable care to carry out the undertaking. *Johnson v. Souza*, 71 N.J. Super. 240 (App. Div. 1961) ,where host undertook to put salt on icy front steps after warning by guest.

(2) EXCEPTION AS TO HOST'S ACTIVITIES

In cases where the host is conducting some "activity" on the premises at the time of his guest's presence, he is under an obligation to exercise reasonable care for the protection of his guest. *Cropanese v. Martinez*, 35 N.J. Super. 118 (App. Div. 1955); *Barbarisi v. Caruso*, 47 N.J. Super. 125, 131 (App. Div. 1957); see also: *Berger v. Shapiro*, 30 N.J. 89, 97 (1959); *Prosser, Torts* (3rd ed. 1964), § 60, p. 388; 2 *Harper & James, The Law of Torts*, § 27.10, p. 1474 (1956). See Note 1 above.

(3) GUEST DEEMED INVITEE AS TO COMMON PASSAGEWAYS OF MULTIPLE DWELLING

See: *Van Der Woude v. Gatty*, 107 N.J. Super. 164 (App. Div. 1969), and *Taneian v. Meghrigian*, 15 N.J. 267 (1964), for the rule that an owner of a two-family or multi-family dwelling owes a social guest the same duty of care as is owed to an invitee with respect to common passageways.

(4) SOCIAL GUEST PERFORMING SERVICES FOR HOST

If the main purpose of the visit is social and the guest also performs services beneficial to the host, the social guest remains a social guest. *Pearlstein v. Leeds*, 52 N.J. Super. 450, 459 (App. Div. 1958). However, where the sister of a homeowner was asked to perform some chores for the homeowner and did not enter the home for a social gathering, the sister was deemed an invitee. *Benedict v. Podwats*, 109 N.J. Super. 402, 406 (App. Div. 1970), aff'd per curiam, 57 N.J. 219 (1970).

E. *INVITEE–DEFINED AND GENERAL DUTY OWED*

An invitee is one who is permitted to enter or remain on land (or premises) for a purpose of the owner (or occupier). He enters by invitation, express or implied. The owner (or occupier) of the land (or premises) who by invitation, express or implied, induced persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purpose embraced in the invitation. Thus, he must exercise reasonable care for the invitee's safety. He must take such steps as are reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to him (or his employees), and of hazardous conditions or defects which he (or his employees) by the exercise of reasonable care, could discover.

WHERE APPROPRIATE AS TO BUSINESS INVITEE ADD:

The basic duty of a proprietor of premises to which the public is invited for business purposes of the proprietor is to exercise reasonable care to see that one who enters his premises upon that invitation has a reasonably safe place to do that which is within the scope of the invitation.

Notes:

(1) *Business Invitee:* The duty owed to a "business invitee" is no different than the duty owed to other "invitees."

(2) *Construction Defects, Intrinsic and Foreign Substances:* The rules dealt within this section and subsequent sections apply mainly to those cases where injury is caused by transitory conditions, such as falls due to foreign substances or defects resulting from wear and tear or other deterioration of premises which were originally constructed properly.

Where a hazardous condition is due to defective construction or construction not in accord with applicable standards it is not necessary to prove that the owner or occupier had actual knowledge of the defect or would have become aware of the defect had he personally made an inspection. In such cases the owner is liable for failing to provide a safe place for the use of the invitee.

Thus, in *Brody v. Albert Lipson & Sons,* 17 N.J. 383 (1955), the court distinguished between a risk due to the intrinsic quality of the material used (calling it an "intrinsic substance" case) and a risk due to a foreign substance or extra-normal condition of the premises. There the case was submitted to the jury on the theory that the terrazzo floor was peculiarly liable to become slippery when wet by water and that defendant should have taken precautions against said risk. The court appears to reject defendant's contention that there be notice, direct or imputed by proof of adequate opportunity to discover the defective condition. 17 N.J. at 389.

It may be possible to reconcile this position with the requirement of consecutive notice of an unsafe condition by saying that an owner of premises is chargeable with knowledge of such hazards in construction as a reasonable inspection by an appropriate expert would reveal. See: *Restatement of Torts* 2d, § 343, Comment f, pp. 217-218 (1965), saying that a proprietor is required to have superior knowledge of the dangers incident to facilities furnished to invitees.

Alternatively, one can view these cases as within the category of defective or hazardous conditions created by defendant (see Charge I below) or by an independent contractor for which defendant would be liable (see introductory note above).

(3) *Landlord and Tenant Both May be Liable to Invitee: Krug v. Wanner,* 28 N.J. 174 (1958). The court there held that a tenant storekeeper and landlord owner were both liable to customer who tripped over protruding edge of cellar door in sidewalk. There the landlord installed and repaired the cellar door and tenant could have required the landlord to make repairs, or, in default thereof, make repairs himself, even if the lease called upon the landlord to make repairs. See authority cited in 28 N.J. at 183.

(4) *Negligent Activities or Operations:* As to injury to invitees caused by activities or operations negligently conducted on the premises, see Charge I below.

Cases:

Bozza v. Vornado, Inc., 42 N.J. 355, 359 (1954) (slip and fall on sticky, slimy substance in self-service cafeteria which inferably fell to the floor as an incident of defendant's mode of operation).

Buchner v. Erie Railroad Co., 17 N.J. 283, 285-286 (1955) (trip over curbstone improperly illuminated).

Brody v. Albert Lifson & Sons, 17 N.J. 383, 389 (1955) (slip and fall on wet composition floor in store).

Bohn v. Hudson & Manhattan R. Co., 16 N.J. 180, 185 (1954) (slip on smooth stairway in railroad station).

Gudnestad v. Seaboard Coal Dock Co., 15 N.J. 210, 219 (1954) (employee of contractor engaged in repair work on defendant railroad company's yard struck by railroad car).

Gallas v. Public Service Electric and Gas Co., 106 N.J. Super. 527 (App. Div. 1969) (employee of contractor killed while constructing a water tank when boom of crane made contact with power lines).

Williams v. Morristown Memorial Hospital, 59 N.J. Super. 384, 389 (App. Div. 1960) (fall over low wire fence separating grass plot from sidewalk).

Nary v. Dover Parking Authority, 58 N.J. Super. 222, 226-227 (App. Div. 1959) (fall over bumper block in parking lot).

Parmenter v. Jarvis Drug Store Inc., 48 N.J. Super. 507, 510 (App. Div. 1957) (slip and fall on wet linoleum near entrance of store on rainy day).

Nelson v. Great Atlantic & Pacific Tea Co., 48 N.J. Super. 300 (App. Div. 1958) (inadequate lighting of parking lot of supermarket, fall over unknown object).

Barnard v. Trenton-New Brunswick Theatre Co., 32 N.J. Super. 551, 557 (App. Div. 1954) (fall over ladder placed in theatre lobby by workmen of independent contractor).

Ratering v. Mele, 11 N.J. Super. 211, 213 (App. Div. 1951) (slip and fall on littered stairway at entrance to restaurant).

F. *IMPLIED INVITATION*

1. Defined

The test of an implied invitation is whether the entry of the plaintiff upon the premises was for a purpose directly or indirectly connected with the business carried on there by the owner (or occupier) or was of interest or advantage which was common or mutual to the owner (or occupier) and to the plaintiff.[1]

Another test of an implied invitation is whether the owner (or occupier) by his arrangement of the premises or other conduct led the plaintiff reasonably to believe that the premises were intended to be used in the manner in which plaintiff used them.[2]

Cases:

1. *Barnard v. Trenton-New Brunswick Theatres Co.*, 32 N.J. Super. 551 (App. Div. 1954). Also see: *Restatement of Torts* 2d, §332, p. 176 *et seq.* (1965); 2 *Harper & James, Torts*, §27.17, p. 1478 *et seq.* (1956).

2. *Handelman v. Cox*, 39 N.J. 95, 106 *et seq.* (1963) (jury could find that employer knew and acquiesced in visits by salesman to sell merchandise to employees and that salesman reasonably felt welcome to enter the premises); *Black v. Central Railroad Co.*, 85 N.J.L. 197, 201 (E. & A. 1913) (private way given all appearances of public street); *Phillips v. Library Co.*, 55 N.J.L. 307, 315 (E. & A. 1893).

Note:

The purpose of the entrant's ivsit need not involve some business benefit to the owner or occupier—the "economic benefit" test is not the exclusive one for determining whether an implied invitation exists. The "invitation test" which focuses upon the holding out of the premises by the owner or occupier for certain purposes also may be utilized. *Handelman v. Cox*, 39 N.J. at 106 *et seq.*

2. Scope of Invitation

The plaintiff is deemed to be an invitee only to the extent that he remains within the scope of his invitation. An invitation extends to all parts of the premises to which the invitee reasonably may be expected to go in view of the invitation given to him, and to those parts of the premises which the defendant by his conduct has led plaintiff reasonably to believe are open to him.

Cases:

Reiter v. Max Marx Color & Chemical Co., 82 N.J. Super. 334 (App. Div. 1964), affirmed, 42 N.J. 352, 353 (1964) (employee of plumbing company working on water tank fell while using defective ladder attached to inside of tank. The court held: "When an owner of premises engages a contractor to perform certain work or repairs thereon, under the law he impliedly invites the employees of the contractor to use such part of parts of the premises as are reasonably necessary for the doing of the work or the making of the repairs."); *Handelman v. Cox*, 39 N.J. 95, 110 (1963) (salesman showing merchandise to employees of defendant used rear entrance of defendant's diner); *Giangrosso v. Dean Floor Covering Co.*, 51 N.J. 80, 83 (1968) (open area in rear of store not intended for use by customers as pathway to store); *Williams v. Morristown Memorial Hospital*, 59 N.J. Super. 384, 389-390 (App. Div. 1960) (jury question as to invitation to cross grass area between parking space and cement walk).

G. *DUTY TO INSPECT OWED TO INVITEE*

The duty of an owner (or occupier) of land (or premises) to make the place reasonably safe for the proper use of an invitee requires the owner or occupier to make reasonable inspection of the land (or premises) to discover hazardous conditions.

Cases:

Zentz v. Toop, 92 N.J. Super. 105, 111 (App. Div. 1966), affirmed, 50 N.J. 250 (1967) (employee of roofing contractor tripped over guy wire on roof); *Handelman v. Cox*, 39 N.J. 95, 111 (1963) (salesman showing merchandise to employees of defendant fell down cellar stairway partially obscured by carton); *Schwartz v. Zulka*, 70 N.J. Super. 256 (App. Div. 1961), modified on other grounds, 38 N.J. 9 (1962) (employee of roofing subcontractor tripped over nail left by carpenter subcontractor, general contractor and carpenter subcontractor being sued).

H. *NOTICE OF PARTICULAR DANGER AS CONDITION OF LIABILITY*

If you find that the land (or premises) was not in a reasonably safe condition, then, in order to recover, plaintiff must show either that the owner (or occupier) knew of the unsafe condition for a period of time prior to plaintiff's injury sufficient to permit him in the exercise of reasonable care to have corrected it, or that the condition had existed for a sufficient length of time prior to plaintiff's injury that in the exercise of reasonable care the owner (or occupier) should have discovered its existence and corrected it.

Cases:

Tua v. Modern Homes, Inc., 64 N.J. Super. 211 (App. Div. 1960), affirmed, 33 N.J. 476 (1960) (slip and fall on small area of slippery waxlike substance in store); *Parmenter v. Jarvis Drug Store, Inc.*, 48 N.J. Super. 507, 510 (App. Div. 1957) (slip and fall on wet linoleum near entrance of store on rainy day); *Ratering v. Mele*, 11 N.J. Super. 211, 213 (App. Div. 1951) (slip and fall on littered stairway at entrance to restaurant).

Notes:

(1) The above charge is applicable to those cases where the defendant is not at fault for the creation of the hazard or where the hazard is not to be reasonably anticipated as an incident of defendant's mode of operation. See: *Maugeri v. Great Atlantic & Pacific Tea Company*, 357 F.2d 202 (3rd Cir. 1966) (dictum).

(2) An employee's knowledge of the danger is imputed to his employer, the owner of premises. *Handelman v. Cox*, 39 N.J. 95, 104 (1963).

(3) See Note 2 under Charge E above distinguishing between transitory defective conditions, such as foreign substance cases, where actual or constructive notice is required, and original defects in construction, sometimes referred to as "intrinsic substance" cases, where it is not necessary to prove that the owner had personal knowledge of the hazardous condition.

I. *NOTICE NOT REQUIRED WHEN CONDITION IS CAUSED BY DEFENDANT*

If you find that the land (or premises) was not in a reasonably safe condition and that the owner (or occupier) or his agent, servant or employee created that condition through his own act or omission, then, in order for plaintiff to recover, it is not necessary for you also to find that the owner (or occupier) had actual or constructive notice of the particular unsafe condition.

Cases:

Smith v. First National Stores, 94 N.J. Super. 462 (App. Div. 1967) (slip and fall on greasy stairway caused by sawdust tracked onto the steps by defendant's employees); *Plaga v. Foltis*, 88 N.J. Super. 209 (App. Div.

1965) (slip and fall on fat in restaurant area traversed by bus boy); *Torda v. Grand Union Co.*, 59 N.J. Super. 41 (App. Div. 1959) (slip and fall in self-service market on wet floor near vegetable bin). Also see: *Thompson v. Giant Tiger Corp.*, 118 N.J.L. 10 (E. & A. 1937); *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426 (1956); *Lewin v. Orbach's Inc.*, 14 N.J. Super. 193 (App. Div. 1951); *Maugeri v. Great Atlantic & Pacific Tea Company*, 357 F.2d 202 (3rd Cir. 1966).

J. *ACTUAL AND CONSTRUCTIVE NOTICE DEFINED*

When the term *Actual Notice* is used we mean that the person charged with a duty of care toward another (such as plaintiff) had actual knowledge of the particular condition involved.

When the term *Constructive Notice* is used we mean that the particular condition existed for such period of time that an owner (or occupier) of the premises in the exercise of reasonable care should have discovered its existence. That is to say, constructive notice means that the person having a duty of care to another is deemed to have notice of such unsafe conditions which exist for such period of time that a person of reasonable diligence would have discovered them.

Cases:

Parmenter v. Jarvis Drug Store, Inc., 48 N.J. Super. 507, 510 (App. Div. 1957).

See: *Restatement of Torts* 2d, §343, Comment f, pp. 217-218 (1965), to the effect that a proprietor is required to have superior knowledge of the dangers incident to facilities furnished to invitees; and see Note 2 under Charge E above to the effect that an owner may be chargeable with knowledge of hazards which reasonable inspection by an appropriate expert would reveal.

K. *NOTICE NOT REQUIRED WHEN MODE OF OPERATION CREATES DANGER*

A proprietor of business premises has the duty to provide a reasonably safe place for his customers. If you find that the premises were in a hazardous condition, whether caused by defendant's employees or by others, such as customers, and if you find that said hazardous condition was likely to result from the particular manner in which defendant's business was conducted, and if you find that defendant failed to take reasonable measures to prevent the hazardous condition from arising or failed to take reasonable measures to discover and correct such hazardous condition, then defendant is liable to plaintiff.

In these circumstances defendant would be liable even if defendant and his employees did not have actual or constructive knowledge of the particular unsafe condition which caused the accident and injury.

ALTERNATE CHARGE:

A proprietor of business premises has the duty to provide a reasonably safe place for his customers. If you find that a hazardous condition was likely to arise from the particular manner in which defendant's business was conducted and that defendant's employees probably were responsible either in creating such hazardous condition or permitting it to arise or to continue, defendant is liable to plaintiff if defendant failed to exercise reasonable care to prevent such hazardous condition from arising or failed to exercise reasonable care to discover and correct such hazardous condition.

In these circumstances defendant would be liable even if defendant and his employees did not have actual or constructive knowledge of the particular unsafe condition which caused the accident and injury.

WHERE APPROPRIATE ADD:

If you find that defendant did exercise reasonable care in the light of the risk of injury reasonably to be foreseen from the particular manner in which defendant conducted his business, then defendant would not be liable to plaintiff unless you find (a) that the hazardous condition was actually caused or created by defendant's employees or (b) that defendant had actual or constructive notice of the hazardous condition for sufficient time to have corrected it and failed to do so.

Cases:

Wollerman v. Grand Union Stores, Inc., 47 N.J. 426 (1966) (slip and fall on string bean in self-service supermarket);

Bozza v. Vornado, Inc., 42 N.J. 355 (1964) (slip and fall in self-service cafeteria);

Torda v. Grand Union Co., 59 N.J. Super. 41 (App. Div. 1959) (slip and fall on wet floor of self-service supermarket);

Panko v. Food Fair Stores, Inc., 403 F.2d 62 (3rd Cir. 1968) (slip and fall in self-service supermarket);

Maugeri v. Great Atlantic & Pacific Tea Company, 357 F.2d 202 (3rd Cir. 1966) (slip and fall in self-service supermarket);

Mahoney v. J. C. Penney Co., 71 N.M. 244, 317 P.2d 663 (Sup. Ct. 1963) (fall on stairway littered with sticky substance);

Francois v. American Stores Co., 46 N.J. Super. 394 (App. Div. 1957) (cans of soda in narrow quarters in front of cashier tumbled down from the top of packing cases).

Note:

BURDEN OF GOING FORWARD

In *Wollerman v. Grand Union Stores Inc.*, 47 N.J. 426, 429-430 (1966), the court held that where string beans are sold from bins on a self-service basis there is a

probability that some will fall or be dropped on the floor either by defendant's employees or by customers. Since plaintiff would not be in a position to prove whether a particular string bean was dropped by an employee or another customer (or how long it was on the floor) a showing of this type of operation is sufficient to put the burden on the defendant to come forward with proof that defendant did what was reasonably necessary (made periodic inspections and clean-up) in order to protect a customer against the risk of injury likely to be generated by defendant's mode of operation. Presumably, however, the burden of proof remains on plaintiff to prove lack of reasonable care on defendant's part. If defendant fails to produce evidence of reasonable care, the jury may infer that the fault was probably his. See also: *Bozza, supra*, 42 N.J. at 359.

L. *NOTICE TO INVITEE OR OBVIOUSNESS OF DEFECT*

1. AS AFFECTING NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE

Whether or not defendant has furnished an invitee with a reasonably safe place for his use may depend upon the obviousness of the condition claimed to be hazardous and the likelihood that the invitee would realize the hazard and protect himself against it. Even though an unsafe condition may be observable by an invitee you may find that an owner (or occupier) of premises is negligent, nevertheless, in maintaining said condition when the condition presents an unreasonable hazard to invitees in the circumstances of a particular case. If you find that defendant was negligent in maintaining an unsafe condition, even though the condition would be obvious to an invitee, the fact that the condition was obvious should be considered by you in determining whether the invitee was contributorily negligent (a) in proceeding in the face of a known hazard or (b) in the manner in which the invitee proceeded in the face of a known hazard.

Note:

See comprehensive note at the end of this section.

2. WARNING OF DANGER

The duty of an owner or occupier of premises is to provide a reasonably safe place for use by an invitee. Where the owner (or occupier) knows of an unsafe condition he may satisfy his duty by correcting the condition, or, in those circumstances where it is reasonable to do so, by giving warning to the invitee of the unsafe condition.

Where a warning has been given, it is for you as jurors to determine whether the warning given was adequate to meet the duty of care owed to the invitee. In this regard you should consider the nature of the defect or unsafe condition, the prevailing circumstances, and the likelihood that the warning given would be adequate to call attention to the invitee of the hazard and of the need to protect himself against said hazard.

Note:

See comprehensive note at the end of this section.

3. DISTRACTION OR FORGETFULNESS OF INVITEE

Even if you find that plaintiff knew of the existence of the unsafe or defective condition, or that the unsafe or defective condition was so obvious that defendant had a reasonable basis to expect that an invitee would realize its existence, plaintiff may still recover if the circumstances or conditions are such that plaintiff's attention would be distracted so that he would not realize or would forget the location or existence of the hazard or would fail to protect himself against it.

Thus, even where a hazardous condition is obvious you must first determine whether in the circumstances the defendant was negligent in permitting the condition to exist. Even if defendant was negligent, however, if plaintiff knew that a hazardous condition existed, plaintiff could not recover if he was contributorily negligent, that is to say, plaintiff could not recover if he did not act as a reasonably prudent person either by proceeding in the face of a known danger or by not using reasonable care in the manner in which he proceeded in the face of the danger. In considering whether plaintiff was contributorily negligent you may consider that even persons of reasonable prudence in certain circumstances may have their attention distracted so that they would not realize or remember the existence of a hazardous condition and would fail to protect themselves against it. Mere lapse of memory or inattention or mental abstraction at the critical moment is not an adequate excuse. One who is inattentive or forgetful of a known and obvious danger is contributorily negligent unless there is some condition or circumstance which would distract or divert the mind or attention of a reasonably prudent man.

Note:

In *McGrath v. American Cyanamid Co.*, 41 N.J. 272 (1963), the employee of a subcontractor was killed when a plank comprising a catwalk over a deep trench upended causing him to fall. The court held that even if the decedent had appreciated the danger that fact by itself would not have barred recovery. The court said if the danger was one which due care would not have avoided, due care might, nevertheless, require notice or warning unless the danger was known or obvious. If the danger was created by a breach of defendant's duty of care, that negligence would not be dissipated merely because the decedent knew of the danger. Negligence would remain, but decedent's knowledge would affect the issue of contributory negligence. The issue would remain whether decedent acted as a reasonably prudent person in view of the known risk, either by incurring the known risk (by staying on the job), or by the manner in which he proceeded in the face of that risk.

In *Zentz v. Toop*, 92 N.J. Super. 105, 114-115 (App. Div. 1966), affirmed o.b., 50 N.J. 250 (1967), the employee of a roofing contractor, while carrying hot tar, tripped over a guy wire supporting an air conditioning tower on a roof. The court

held that even if plaintiff had observed the wires or if they were so obvious that he should have observed them, the question remained whether, considering the hazard and the work of the employee, he was entitled to more than mere knowledge of the existence of the wires or whether he was entitled to a warning by having the wires flagged or painted in a contrasting color. This was a fact for the jury to determine. The jury must also determine whether defendant had reason to expect that the employee's attention would have been distracted as he worked so that he would forget the location of a known hazard or fail to protect himself against it. The court also held the plaintiff's knowledge of the danger would not alone bar his recovery, but this knowledge goes to the issue of contributory negligence.

In *Ferrie v. D'Arc,* 31 N.J. 92, 95 (1959), the court held that there was no reasonable excuse for plaintiff's forgetfulness or inattention to the fact that a railing was temporarily absent from her porch, as she undertook to throw bones to her dog, and fell to the ground because of the absence of a railing she customarily leaned upon. The court held:

> "When an injury results from forgetfulness or inattention to a known danger, the obvious contributory negligence is not excusable in the absence of some condition or circumstance which would divert the mind or attention of an ordinarily prudent man. Mere lapse of memory, or inattention or mental abstraction at the critical moment cannot be considered an adequate diversion. One who is inattentive to or forgetful of a known and obvious condition which contains a risk of injury is guilty of contributory negligence as a matter of law, unless some diversion of the type referred to above is shown to have existed at the time."

But see: *Wolczak v. National Electric Products Corp.,* 66 N.J. Super. 64 75 (App. Div. 1961), saying that the duty to provide a safe place for employees of an independent contractor does not relate to "known hazards which are part of or incidental to the very work the contractor was hired to perform."

The following discussion in 2 *Harper & James, Torts,* §27.13, pp. 1489 *et seq.* (1956), cited with approval in *Zentz v. Toop, supra,* 92 N.J. Super. at 112, may be helpful in understanding the principles involved in the above charges:

> Once an occupier has learned of dangerous conditions on his premises, a serious question arises as to whether he may—as a matter of law under all circumstances—discharge all further duty to his invitees by simply giving them "a warning adequate to enable them to avoid the harm." A good many authorities, including the *Restatement,* take the position that he may. But this proposition is a highly doubtful one both on principle and authority. The alternative would be a requirement of due care to make the conditions reasonably safe—a requirement which might well be satisfied by warning or obviousness in any given case, but which would not be so satisfied invariably. * * *
>
> 1. Defendant's duty. People can hurt themselves on almost any condition of the premises. That is certainly true of an ordinary flight of stairs. But it takes more than this to make a condition unreasonably dangerous. If people who are likely to encounter a condition may be expected to take perfectly good care themselves without further precautions, then the condition is not unreasonably dangerous because of the likelihood of harm is slight. This is true of the flight of ordinary stairs in a usual place in the daylight. It is also true of ordinary curbing along a sidewalk, doors or windows in a house, counters in a store, stones and slopes in a New England field, and countless other things which are common in our everyday experience. It may also be true of less common and obvious conditions which lurk in a place where visitors would expect to find such dangers.

The ordinary person can use or encounter all of these things safely if he is fully aware of their presence at the time. And if they have no unusual features and are in a place where he would naturally look for them, he may be expected to take care of himself if they are plainly visible. In such cases it is enough if the condition is obvious, or is made obvious (*e.g.*, by illumination).* * *

On the other hand, the fact that a condition is obvious—*i.e.*, it would be clearly visible to one whose attention was directed to it—does not always remove all unreasonable danger. It may fail to do so in two lines of cases. In one line of cases, people would not in fact expect to find the condition where it is, or they are likely to have their attention distracted as they approach it, or, for some other reason, they are in fact not likely to see it, though it could be readily and safely avoided if they did. There may be negligence in creating or maintaining such a condition even though it is physically obvious; slight obstructions to travel on a sidewalk, an unexpected step in a store aisle or between a passenger elevator and the landing furnish examples. Under the circumstances of any particular case, an additional warning may, as a matter of fact, suffice to remove the danger, as where a customer, not hurried by crowds or some emergency, and in possession of his faculties, it told to "watch his step" or "step up" at the appropriate time. When this is the case, the warning satisfies the requirement of due care and is incompatible with defendant's negligence. Here again, plaintiff's recovery would be prevented by that fact no matter how careful he was. But under ordinary negligence principles the question is properly one of fact for the jury except in the clearest situations.

In the second line of cases the condition of danger is such that it cannot be encountered with reasonable safety even if the danger is known and appreciated. An icy flight of stairs or sidewalk, a slippery floor, a defective crosswalk, or a walkway near an exposed high tension wire may furnish examples. So may the less dangerous kind of condition if surrounding circumstances are likely to force plaintiff upon it, or if, for any other reason, his knowledge is not likely to be a protection against danger. It is in these situations that the bite of the *Restatement's* "adequate warning" rule is felt. Here, if people are in fact likely to encounter the danger, the duty of reasonable care to make conditions reasonably safe is not satisfied by a simple warning; the probability of harm in spite of such precaution is still unreasonably great. And the books are full of cases in which defendants, owing such a duty, are held liable for creating or maintaining a perfectly obvious danger of which plaintiffs are fully aware. The *Restatement*, however, would deny liability here because the occupier need not invite visitors, and if he does, he may condition the invitation on any terms he chooses, so long as there is full disclosure of them. If the invitee wishes to come on those terms, he assumes the risk.

The *Restatement* view is wrong in policy. The law has never freed landownership or possession from all restrictions or obligations imposed in the social interest. The possessor's duty to use care towards those outside the land is of long standing. And many obligations are imposed for the benefit of people who voluntarily come upon the land. For the invitee, the occupier must make reasonable inspection and give warning of hidden perils. * * * But this should not be conclusive. Reasonable expectations may raise duties, but they should not always limit them. The gist of the matter is unreasonable probability of harm in fact. And when that is great enough in spite of full disclosure, it is carrying the quasi-sovereignty of the landowner pretty far to let him ignore it to the risk of life and limb.

So far as authority goes, the orthodox theory is getting to be a pretty feeble reed for defendants to lean on. It is still frequently stated, though often by way of dictum. On the other hand, some cases have simply—though unostentatiously—broken with tradition and held defendant liable to an invitee in spite of his knowledge of the danger, when the danger was great enough and could have been feasibly remedied. Other cases stress either the reasonable assumption of safety which the invitee may make or the likelihood that his attention will be distracted, in order to cut down the notion of what is obvious or the adequacy of warning. And the latter is often a jury question even under the *Restatement* rule. It is not surprising, then, that relatively few decisions have depended on the *Restatement* rule alone for denying liability.

2. Contributory Negligence. * * * But there are several situations in which a plaintiff will not be barred by contributory negligence although he encountered a known danger. * * * For another it is not necessarily negligent for a plaintiff knowingly and deliberately to encounter a danger which it is negligent for defendant to maintain. Thus a traveler may knowingly use a defective sidewalk, or a tenant a defective common stairway, without being negligent if the use was reasonable under all the circumstances. * * *

These situations show that the invitee will not always be barred by his self-exposure to known dangers on the premises.

5.23 DANGEROUS INSTRUMENTALITIES OR CONDITIONS

(A) IN GENERAL

1. The law imposes upon a defendant the duty to exercise the care that a reasonably prudent man would exercise under all the circumstances confronting him at a particular time. Failure to exercise such care constitutes negligence.

2. Obviously the risk of harm will vary with the circumstances. In some settings that risk is greater than in others, and, when this is so, a reasonably prudent man will exercise a greater amount of care, that is, care in proportion to the increased risk.

3. Whoever uses a highly destructive agency is held to a correspondingly high degree of care toward all persons who in the exercise of their lawful right may come in contact with it.

4. The responsibility imposed in the use of reasonable care consistent with the dangerous instrumentality employed and a proper anticipation of the results which could be reasonably foreseen.

WHERE APPLICABLE THE FOLLOWING MAY BE ADDED:

(See *Beck v. Monmouth Lumber Co.*, 137 N.J.L. 268, 273 (E. & A. 1947) and other cases cited below.)

5. Ordinarily, the adoption and operation of a method which accords with that in general use by well regulated companies satisfies the duty of due care owed. But the care which must be exercised over the construc-

tion and maintenance of a highly destructive agency requires more than the use of mere mechanical skill and approved mechanical appliances. It also includes circumspection and foresight with regard to reasonably probable contingencies.

6. It is for you to determine from the evidence whether the defendant used reasonable care under the circumstances, considering the dangerous instrumentality employed and a proper anticipation of the results which could reasonably have been foreseen.

Cases:

ELECTRICITY

Beck v. Monmouth Lumber Co., 137 N.J.L. 268, 273 (1947); *Adams v. Atlantic City Electric Co.*, 120 N.J.L. 357 (E. & A. 1938); *Heyer v. Jersey Central Power & Light Co.*, 106 N.J.L. 211 (E. & A. 1929); *Manning v. Public Service Elec. & Gas Co.*, 58 N.J. Super. 386, 395 (App. Div. 1959); *Robbins v. Thies*, 117 N.J.L. 389, 393 (E. & A. 1936); *cf. Berg v. Reaction Motors Div.*, 37 N.J. 396 (1962).

A number of the above cases set forth a more minute specification of the duty owing.

GAS

Seward v. Natural Gas Co., 11 N.J. Super. 144 (App. Div. 1950) reversed in 8 N.J. 45 (1952); *Guzzi v. Jersey Central Power & Light Co.*, 12 N.J. 251, 257 (1953); *Harty v. Elizabethtown Consolidated Gas Co.*, 11 N.J. Misc. 382 (C.P. 1933); *Farrell v. N.J. Power & Light Co.*, 111 N.J.L. 526 (E. & A. 1933); *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356 (App. Div. 1959), but see *Araujo v. N.J. Natural Gas Co.*, 62 N.J. Super. 88 (App. Div. 1960).

EXPLOSIVES

McAndrew v. Collerd, 42 N.J.L. 189 (E. & A. 1880). Absolute liability imposed for damage due to storage of explosives within city limits. Referred to in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425, at p. 434 (1959).

But in Black Tom Explosion case, *N.J. Fidelity Ins. Co. v. Lehigh Valley R.R.*, 92 N.J.L. 467 (E. & A. 1918) the court said at p. 470 that a high degree of care is required, which means a "degree of care commensurate with the risk of danger." See also *Berg v. Reaction Motors Div., supra.*

DEMOLITION OF BUILDING

Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. 425, pp. 434-438 (1959).

FIREARMS

Davis v. Hellwig, 21 N.J. 412 (1956) p. 415 "Courts have universally regarded loaded firearms as dangerous instruments and have ascribed an elevated degree of reasonable care to be exercised in their use." *Peer v. Newark*, 71 N.J. Super. 12 (App. Div. 1961); certification denied, 36 N.J. 300; *Wimberly v. Paterson*, 75 N.J. Super. 584, 596 (App. Div. 1962).

X-RAY MACHINES

Kress v. Newark, 9 N.J. Super. 70 (App. Div. 1950), reversed 8 N.J. 562; *Rakowski v. Raybestos-Manhattan, Inc.,* 5 N.J. Super. 203, 207 (App. Div. 1949), certification denied, 3 N.J. 502 (1949).

ROLLER COASTER and Similar Devices

Kahalili v. Rosecliff Realty Inc., 26 N.J. 395 (1958) at p. 603 "Care commensurate with the reasonably foreseeable risk of harm, such as would be reasonable in the light of the apparent risk." *Garafola v. Rosecliff Realty Co.,* 24 N.J. Super. 28 (App. Div. 1952).

FIREWORKS

Spenzierato v. Our Lady of Mt. Virgin, 112 N.J.L. 93 (1933).

5.24 DUTY OF RAILROAD AT PUBLIC HIGHWAY GRADE CROSSING

(A) IN GENERAL

1. Every railroad company is required to maintain at each highway crossing at grade a conspicuous sign with such inscription and of such standard and design as shall be approved by the Board of Public Utility Commissioners, so as to be easily seen by highway travellers.

Source:

N.J.S.A. 48:12-58.

Note:

This is usually a cross-buck X sign reading "Railroad Crossing."

Such sign need not be maintained in any municipality unless required by its governing body, or by the board.

2. The statutory duty which a railroad company owes to a highway traveller at a grade crossing is created by *N.J.S.A.* 48:12-57. That statute provides that each engine shall have a bell, weighing not less than 30 pounds, which shall be rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least 300 yards from the crossing and continuing until the engine has crossed such highway or a whistle or horn operated by steam, air or electricity which shall be sounded except in cities, at least 300 yards from the crossing and continuing until the engine has crossed such highway or a whistle or horn operated by steam, air or electricity which shall be sounded except in cities, at least 300 yards from the crossing and at intervals until the engine has crossed the highway.

Cases:

Sotak v. Pennsylvania Railroad Co., Jelinek v. Sotak, et al, 13 N.J. Super. 130 (App. Div. 1951), reversed 9 N.J. 19 (1954); *N.J.S.A.* 48:12-57.

Where there are no crossing bells, flasher, wig-wag signals, gates or crossing watchman, unless it is an extra-hazardous crossing, this is ordinarily the only duty owing.

See, however, *Rafferty Adm'r v. Erie R.R. Co.*, 66 N.J.L. 444 (Sup. Ct. 1901) and *Taylor v. Lehigh Valley R.R. Co.*, 87 N.J.L. 673 (E. & A. 1915) as to duty when engineer detects position of plaintiff in time to avoid collision.

(B) AT PROTECTED CROSSINGS

1. Where a railroad company has installed any automatic device designed to protect the travelling public at any crossing, the railroad company is under a duty to exercise reasonable care to keep and maintain the said automatic device in operating condition.

2. Where a railroad company has placed a watchman or flagman on the crossing to warn the public highway traveller of the approach of its trains, it is liable for his negligence acts in the performance of his duties.

Cases:

Passarello v. W. J. & S. R. Co., 98 N.J.L. 790 (E. & A. 1923); *Snuffin v. McAdoo*, 93 N.J.L. 231 (E. & A. 1919); *Piper v. Erie R. Co.*, 9 N.J. Misc. 40 (Sup. Ct. 1930).

These duties apply whether the added protection at the crossing was voluntarily provided or ordered by the Public Utility Commission. See also instruction 5.12 and cases cited thereunder.

(C) AT EXTRA-HAZARDOUS CROSSINGS

1. Where a railroad crossing is so peculiarly dangerous that a reasonably prudent person could not use the highway in safety, even though the statutory signals by the engine bell or whistle are given, the railroad has the duty to employ extra means to signal the approach of its trains, beyond those required by statute. It is for you to determine here whether the railroad's warning system, taken as a whole, gave sufficient notice of danger. In passing on the sufficiency of the warning system maintained at the railroad crossing, the test which you will apply is whether the system adequately alerts reasonably prudent travelers to the hazards of crossing. The railroad is entitled to rely on the fact that the highway traveller will be attentive to the warning system maintained at the crossing, and if you find that the safety measures in effect are sufficient to warn a reasonably prudent person, the railroad has fulfilled its duty, while if you find otherwise, it has not done so.

WHERE APPROPRIATE, THE FOLLOWING MAY BE ADDED BY WAY OF EXPLANATION.

Automatic warning devices at grade crossings, unlike the standard crossbuck sign, are designed to alert the traveller to stop in a place of safety even though he does not or cannot see an approaching train. In effect,

such devices are a substitute for an unobstructed view of the train as it nears the crossing. While the standard cross-buck sign is designed merely to inform a traveler that he is nearing a railroad crossing, automatic devices do much more; they warn that a train is actually approaching.

Cases:

Duffy v. Bill, 32 N.J. 278 (1960); *DiDomenico v. Pennsylvania-Reading Seashore Lines,* 36 N.J. 455 (1962); *Shutka v. P.R.R. Co.,* 74 N.J. Super. 381 (App. Div. 1962).

ADDITIONAL NOTES ON EXTRA-HAZARDOUS CROSSING

The question of whether a crossing is extra-hazardous is initially one of law for the court. If there is sufficient evidence, the issue should be submitted to the jury.

Duffy v. Bill, 32 N.J. 278, 293 (1960).

In an action for personal injuries and property damage arising out of a railroad grade crossing collision between the plaintiff's automobile and the defendant's freight train, the Supreme Court held that where a railroad had fully complied with the statutory requirements relative to warning systems at crossings and where, although the area around the crossing had changed since the warning system was installed, such changes did not reduce the effectiveness of the system, the railroad's failure to provide extra precautions was not negligence, and was not liable for motorist's injuries. There the railroad was single tracked and the crossing was marked by two warning sign posts with cross-buck signs inscribed with reflector letters, flashing red lights and bells, which devices operated automatically upon the approach of a train.

DiDomenico v. Pennsylvania-Reading Seashore Lines, 36 N.J. 455 (1962).

Railroad accident cases are considered in the light of general tort law and the railroad in the absence of contributory negligence is liable to an injured person if it has not taken safety measures commensurate with the dangers involved. If the crossing is peculiarly dangerous that reasonably prudent persons could not use it in safety, then the railroad has the duty to employ extra means to signal the approach of its trains.

DiDomenico v. Pennsylvania-Reading Seashore Lines, 36 N.J. 455 at p. 467 (1962).

The railroad is under a duty to appraise changing conditions and alter its warning system if necessary to safeguard reasonably prudent motorists even if the Public Utility Commission has not ordered such change.

DiDomenico v. Pennsylvania-Reading Seashore Line, 36 N.J. 455 at p. 471 (1962).

5.25 CARRIERS FOR HIRE

(A) *GENERAL DUTY OF COMMON CARRIERS TO PASSENGER FOR HIRE DURING CARRIAGE*

In this case (you may find from the evidence that) the defendant is what is known in the law as a common carrier. A common carrier because of the nature of its undertaking and that responsibility inherent therein owes to its passengers a duty to exercise a high degree of care to protect

them from dangers that are known to it or which through the exercise of reasonable foresight it could anticipate. The law requires that carriers, such as defendant, who accept passengers entrusted to their care must use great caution to protect them. This is defined as the utmost caution characteristic of a very careful prudent man, or, in other words, the highest possible care consistent with the nature of the undertaking in which it is involved.

If you find that defendant in this case failed to exercise such a high degree of care and that plaintiff's injuries were proximately brought about by such failure, you should find for the plaintiff.

Cases:

(1) *Jackson v. D. L. & W. R. R. Co.*, 111 N.J.L. 487 (E. & A. 1933); *Schreiber v. P.S.C.T.*, 112 N.J.L. 199 (E. & A. 1933); *Sibley v. City Service Transit Co.*, 2 N.J. 458 (1949); *Barrie v. Central R.R. Co. of N.J.*, 71 N.J. Super. 587 (App. Div. 1962); *Rourke v. Hershock*, 3 N.J. 422 (1950); *Davis v. Public Service Coordinated Transport*, 113 N.J.L. 427 (E. & A. 1934); *Harpell v. Public Service Coordinated Transport*, 20 N.J. 309 (1956), where it was held:

> "Carriers who accept passengers entrusted to their care must use great caution to protect them, which has been described as 'the utmost caution characteristic of very careful prudent men' or 'the highest possible care consistent with the nature of the undertaking.'"

(2) A common carrier of passengers is one who undertakes for hire to carry all persons who apply for passage, so long as there is room and there is no legal excuse for refusing. This includes railroads, street car companies, subways, elevated railroads, bus companies, steamship companies, airlines, taxicab companies and others engaging in public transportation under this definition. *Schott v. Weiss*, 92 N.J.L. 494 (E. & A. 1918); *Sibley v. City Service Transit Co.*, 2 N.J. 458 (1949); *Davis v. Public Service Co-ordinated Transport*, 113 N.J.L. 427 (E. & A. 1934).

(3) As to liability of the driver of a common carrier vehicle for the safety of passengers, as distinguished from that of his employer, see: *Goekel v. Erie Railroad Co.*, 100 N.J.L. 279 (E. & A. 1924) (locomotive's engineer); *Maldonato v. Ironbound Transportation Co.*, 9 N.J. Misc. 985 (Sup. Ct. 1931) (bus operator), which appear to call for ordinary care only, as contrasted with *Wall v. G. R. Wood, Inc.*, 119 N.J.L. 442 (E. & A. 1938); *Whalen v. Consolidated Traction Co.*, 61 N.J.L. 606 (E. & A. 1898) and *Brice v. Austin*, 31 N.J. Super. 10 (App. Div. 1954) which do not distinguish between degrees of care.

(4) A common carrier owes its passenger a "high degree of care, not only in the operation of the vehicle but also in inspecting and maintaining it. *Gaglio v. Yellow Cab Co.*, 63 N.J. Super. 206, 211 (App. Div. 1960); *King v. Steglitz*, 111 N.J.L. 11 (E. & A. 1933); *Harpell v. Public Service Co-ordinated Transport*, 35 N.J. Super. 354 (App. Div. 1955), affirmed 20 N.J. 309 (1956).

(5) A common carrier is not an insurer of the safety of its passengers. It is not liable for mechanical defects of which it had no prior knowledge, or which could not be discovered despite a high degree of care in inspection and maintenance. As to certain defects *res ipsa loquitur* applies (ex. wheel coming off); *Gaglio v. Yellow Cab,* 63 N.J. Super. 206, 212 (App. Div. 1960); *Rapp v. Butler-Newark Bus Line,* 103 N.J.L. 512 (Sup. Ct. 1927).

(6) A common carrier must exercise the highest degree of care to protect its passengers from dangers that foresight can anticipate. Foresight means not absolute foreknowledge but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur and that due care would prevent. *Davis v. Public Service Co-ordinated Transport,* 113 N.J.L. 427 (E. & A. 1934); *Rivers v. Penna. R.R. Co.,* 83 N.J.L. 513 (E. & A. 1912); *McBride v. Penna. R.R. Co.,* 99 N.J.L. 464 (E. & A. 1924).

(7) As to the duty applicable to passengers "not for hire"—*Sheridan v N.J. & N.Y. R.R. Co.,* 104 N.J.L. 622 (E. & A. 1928); *Kinney et al. v. Central Railroad Co.,* 32 N.J.L. 407 (Sup. Ct. 1868) (Railroad pass.); *Morris v. West Jersey & S. R.R. Co.,* 87 N.J.L. 579 (E. & A. 1915) (Free pass issued to wife of employee of associate company.), *BUT SEE Sassaman v. Penn. R.R. Co.,* 144 Fed. 2d 950 (3rd Cir. 1944), *holding carrier liable* to employee who was injured while using "pass" going to and from work. The same case holds that such liability would *not* extend to members of the employee's family or to the employee himself while travelling for his own pleasure. See also annotations 147 A.L.R. 778 (1943) and 55 A.L.R. 2d 766 (1928). As to the liability of a carrier to pass holder for *gross negligence* or *wilfull and wanton injury,* see *New York Central Railroad Co. v. Mohney,* 252 U.S. 152, 9 A.L.R. 496 (1920) and annotations in 9 A.L.R. 501 (1920).

(B) DUTY AS TO STATIONS AND TERMINALS

1. IN GENERAL

A common carrier is under a duty to exercise reasonable care in the construction and maintenance of station buildings, platforms and approaches, so that they are reasonably safe for the use of passengers. The failure of a carrier to perform this duty will render it liable to those who enter the premises in response to the implied invitation of the carrier and suffer injuries proximately caused by such neglect.

THE FOLLOWING MAY BE ADDED WHERE APPLICABLE:

2. PREMISES USED BUT NOT OWNED OR CONTROLLED

In the event that injuries are caused by defects in premises which are not owned or controlled by the carrier, the general principle is that a carrier which, although not strictly in control of a defective agency or dangerous place, uses it for its own benefit or for its own purposes and invites passengers to make use of the same, may be held liable for injuries caused by the defect or danger. In other words, the carrier owes a duty to exercise reasonable care for the safety of its passengers, regardless of

whether the facilities offered are owned and controlled by the carrier or are used by it under contract or in cooperation with another, and such duty is not affected by any agreement between the carrier and terminal company.

Cases:

Exton v. Central R. Co. of N.J., 62 N.J.L. 7 (Sup. Ct. 1898), affirmed *per curiam* 63 N.J.L. 356 (E. & A. 1899); *Holtzman v. Hudson and Manhattan R.R. Co.*, 101 N.J.L. 255 (Sup. Ct. 1925); *Seckler v. Pennsylvania R.R. Co.*, 113 N.J.L. 299 (E. & A. 1934); *Horelick v. Penna. R. Co.*, 24 N.J. Super. 413 (App. Div. 1953); *Bohn v. Hudson & Manhattan R. Co.*, 16 N.J. 180 (1954).

Duty may extend beyond premises owned or controlled by carrier. *Buchner v. Erie R. Co.*, 17 N.J. 283 (1955).

(C) WHEN RELATION COMMENCES

1. AT STATION

A person becomes a passenger when he enters upon the station grounds of the carrier, through the approaches furnished by it, with the intention of becoming a passenger. If you find that the plaintiff entered the station premises through the usual channels provided, with the intention of becoming a passenger by either paying his fare before or after entering the train, the plaintiff had become a passenger and was entitled to the care owing by a carrier to one in that relation.

2. BOARDING VEHICLE

The relation of carrier and passenger commences when a person with a bona fide intention to take passage, with the consent of the carrier, express or implied, assumes a situation to avail himself of the facilities of transportation which the carrier offers. The essentials of the relation are that the person intending to become a passenger must present himself at a proper time, and in a proper manner, and at some place under the control of the carrier so that the carrier may have the opportunity to exercise the degree of care which the law exacts from it in the passenger's behalf. To this end it is essential that the carrier have knowledge of the fact that the person intends to board the vehicle. Knowledge in this case may be either actual or such as is charged to it by reason of the acts and conduct of the person and by such facts and circumstances as would reasonably inform and notify the carrier of the person's intent to board the train.

Cases:

Bernardine v. Erie R. R. Co., 110 N.J.L. 338 (E. & A. 1933); *Rothstein v. N. Y. & Long Branch R. R. Co.*, 121 N.J.L. 570 (E. & A. 1939); *Kovacs v. Penn. R. R. Co.*, 76 N.J. Super. 451 (App. Div 1962)

Changing Vehicles. Where a carrier assumes to direct the movements of a passenger while transferring from one carrier to another on the highway, the jury may find that the passenger was in the care of the carrier and that the relationship of passenger and carrier continued. *Rourke v. Hershook,* 3 N.J. 422 (1950). See also, *Walger v. Jersey City, Hoboken and Paterson Railway Co.,* 71 N.J.L. 356 (Sup. Ct. 1904) as to transferring passenger.

(D) CARE OWING TO PASSENGERS DURING CARRIAGE AS TO ACTS OF OTHERS.

1. FELLOW PASSENGERS

A common carrier owes a passenger the duty of exercising a high degree of care to protect him from injury caused or inflicted by other passengers on its vehicles if the danger of such injury is known or in the exercise of reasonable foresight could have been anticipated and is preventable by the exercise of that degree of care. If it failed to exercise this high degree of care and such failure was the proximate cause of plaintiff's injuries, then you should find for plaintiff.

Cases:

Skillen v. West Jersey & Seashore R. R. Co., 96 N.J.L. 492 (E. & A. 1921); *Spalt v. Eaton,* 118 N.J.L. 327 (Sup. Ct. 1937), affirmed 119 N.J.L. 343 (E. & A. 1928); *Frazier v. Public Service Ry. Co.,* 97 N.J.L. 37 (Sup. Ct. 1921); *Hoff v. Public Service,* 91 N.J.L. 641 (E. & A. 1918).

2. THIRD PERSONS

A common carrier owes to its passengers a duty to exercise a high degree of care to protect them from dangers of which it has knowledge or which through the exercise of reasonable foresight it could have anticipated and which in the exercise of the degree of care owing, it could have guarded against. The duty of the carrier is not always limited to situations in which it has control over the person whose act, intentional or otherwise, caused the injury.

If you find that the accident (occurrence) resulted from the wrongful act of a third person of which the carrier had knowledge or which, in the exercise of the high degree of care owing, it should have known of or anticipated, and that the plaintiff's injuries proximately resulted from the failure of the carrier to reasonably anticipate and protect against the dangers incident to such wrongful act, you should find for plaintiff. (Or, if you find that the carrier had knowledge of the danger against which it could have taken precautions, and that it failed to exercise a high degree of care to protect its passengers therefrom, and that such failure proximately brought about the plaintiff's injuries, you should find for plaintiff).

Note:

Generally, proof of contributory negligence will be absent in cases where these instructions will apply. However, where there is proof of contributory negligence, the above should be modified accordingly.

Cases:

Harpell v. Public Service Coordinated Transport, 20 N.J. 309 (1956); *Melicharek v. Hill Bus Co.,* 37 N.J. 549 (1962).

A common carrier must also exercise reasonable care to protect passengers in its stations from dangers which are either known or in the exercise of reasonable foresight should be known to it and this duty includes protection from the acts of third persons. *Exton v. Central R. R. Co.,* 62 N.J.L. 7 (Sup. Ct. 1898).

As to duty of carrier to protect passenger from ill treatment by those employed by it, see *Haver v. C. R. R. Co.,* 62 N.J.L. 282 (E. & A. 1898), and *Elliott v. Phila. and Camden Ferry Co.,* 83 N.J.L. 625 (E. & A. 1912).

(E) CARE OWING ON DISCHARGE OF PASSENGER

1. PLACE OF STOPPING VEHICLE

A common carrier is under a duty to exercise a degree of care for the safety of its passengers, and included therein is the duty to select a reasonably safe place for the passenger to alight. If you find that the defendant carrier, in the selection of a place to discharge plaintiff, failed to exercise such a high degree of care and that such failure proximately brought about the injuries sustained, you should find for the plaintiff. (Unless the defense of contributory negligence has been made out under the rules as I have given them to you).

THE FOLLOWING MAY BE ADDED WHERE APPLICABLE:

There is no duty resting upon a common carrier to anticipate every uneven surface or defect in the highway or along its side, and stop its vehicle so as to avoid the remote possibility of a passenger stepping on some uneven surface or in a depression which, notwithstanding the exercise of reasonable watchfulness, did not appear to be and was not a place having the manifest characteristics of potential harm.

Cases:

Snell v. Coast Cities Coaches, 15 N.J. Super. 595, 599 (App. Div. 1951); *Malzer v. Koll Trans. Co.,* 108 N.J.L. 296 (E. & A. 1931); *Greco v. Public Service Interstate, &c., Co.,* 135 N.J.L. 280, (E. & A. 1946); *Meelhein v. Public Service Coordinated Transport,* 121 N.J.L. 163 (E. & A. 1938).

2. LEAVING STATION OR TERMINAL

The duty of a common carrier of passengers does not end when the passenger is safely carried to the place of his destination. The carrier must exercise reasonable care to provide a safe means of egress from (access to and from) the station for the use of passengers. Passengers have a right to assume that the means provided are reasonably safe. If you find that the carrier failed to exercise such care and that the plaintiff's injuries were the proximate result thereof, you should find for the plaintiff. (Unless the defense of contributory negligence has been made out under the rules as I have given them to you).

Cases:

Buchner v. Erie Railroad Co., 17 N.J. 283 (1955); *Del., L. & W. R. R. Co. v. Trautwein*, 52 N.J. 169 (E. & A. 1889). In the former case, it was held that that duty of care could extend beyond the premises owned or controlled by the carrier.

(F) SUDDEN STOPS OR JERKS

A common carrier must exercise a high degree of care in starting, stopping or decreasing the speed of a vehicle so as not to imperil the safety of passengers.

A violent stop, jerk or lurch which would have been unlikely to occur if proper care has been exercised justifies the inference of negligence in the operation or maintenance of the vehicle or its brakes.

Note:

Mere failure to hold on while moving to or from door is not per se contributory negligence. Contributory negligence should not be charged unless there is evidence thereof.

Cases:

Scott v. Bergen County Traction Co., 63 N.J.L. 407 (Sup. Ct. 1899) (Plaintiff passenger upon defendant's street car was thrown from car platform while preparing to alight, when car lurched forward. Court applied doctrine of *res ipsa loquitor*); *Ivins v. Public Service Interstate Transp. Co.*, 8 N.J. Super. 94 (App. Div. 1950); *Massotto v. Public Service Coord. Transport*, 58 N.J. Super. 436 (App. Div. 1959), certification denied 31 N.J. 550 (1960), 71 N.J. Super. 39, (App. Div. 1961); *Consolidated Traction Co. v. Thalheimer*, 59 N.J.L. 474 (E. & A. 1896); *Gaglio v. Yellow Cab Co.*, 63 N.J. Super. 206 (App. Div. 1960); 3 *Michie, Carriers* Sec. 2538.

Vespe v. DiMarco, 43 N.J. 430 (1964) held that a charge stating that negligence is never presumed and that a collision is not itself evidence of negligence is reversible error in *res ipsa loquitor* cases.

(G) OVERCROWDING

The overcrowding of a passenger vehicle without more does not in and of itself constitute negligence. However, it is well recognized that overcrowding creates dangers. A common carrier must exercise a high degree of care to protect its passengers from dangers arising from overcrowding which reasonable foresight should anticipate.

Cases:

Miller v. Public Service Coordinated Transport, 7 N.J. 185 (1951); *Egner v. Hudson & Manhattan R. R. Co.,* 109 N.J.L. 367 (E. & A. 1932); *Barney v. Hudson & Manhattan R. R. Co.,* 105 N.J.L. 274 (Sup. Ct. 1929), affirmed 106 N.J.L. 230 (E. & A. 1930); *Hansen v. North Jersey Street Ry. Co.,* 64 N.J.L. 686 (E. & A. 1900). See 13 C.J.S. *"Carriers,"* Secs. 695 and 720.

(H) PERSONS UNLAWFULLY ON RAILROAD TRACKS OR CARS

N.J.S.A. 48:12-152 provides:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway.
>
> Any person injured by an engine or car while walking, standing or playing on a railroad or by jumping on or off a car while in motion shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating the railroad. This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing."

Under the provisions of this statute plaintiff is b arred from any recovery if he was engaged in any of the acts mentioned therein, unless the defendant railroad by its employees wilfully or wantonly injured him.

The defendant railroad owed plaintiff no duty of care for his safety beyond avoiding wilful or wanton injury.

To establish wilful or wanton injury plaintiff must show that the defendant railroad, its employee or other agent, with knowledge of existing conditions and conscious from such knowledge that injury to the plaintiff will likely or probably result from a given act or failure to act, with reckless indifference to the consequences, consciously and intentionally did such harmful act or omitted to do that which would have prevented the harm. Thus, if the engineer saw the plaintiff in a position of inescapable danger at a time when he could have stopped the train and made no attempt to stop but ran plaintiff down, the defendant would be liable for the injuries inflicted. But if the engineer gave a warning signal and had reason to expect the plaintiff to respond and leave the tracks in time to escape injury, he was not required to stop the train.

This statute applies to all persons regardless of age or physical or mental condition.

Note:

The statute does not apply if the plaintiff was crossing the tracks at a lawful public or private crossing and in that event, the railroad owed him the duty of reasonable care for his safety.

Cases:

Mack v. Lehigh Valley Railroad Company, 283 F. 2d 405 (3d Cir. 1960) (Wilful or wanton injury not within purview of statute).

Kowaleski v. Pennsylvania R. Co., 103 F. 2d 827 (3d Cir. 1939) (Failure to slow down locomotive after observing 12 year old trespasser on tracks is not in and of itself wilful or wanton injury.)

Egan v. Erie R. Co., 29 N.J. 243 (1959) (Children Trespassers included within purview of statute. Failure to reduce speed of train in area where it was known that children were customarily playing did not constitute wilful or wanton injury).

Green v. Reading Co., 183 F. 2d 716 (3d Cir. 1950) (One who was attacked and thrown on railroad tracks stood in no better position than a trespasser).

C.J.S., *Railroads,* Sec. 906, p. 290; 44 *Am. Jur., Railroads,* Sec. 430, p. 650; *King v. Patrylow,* 15 N.J. Super. 429 (App. Div. 1951) further defining wilful or wanton injury.

(I) COMMON CARRIER'S LIABILITY FOR LOSS OR DAMAGE TO GOODS SHIPPED

A common carrier is absolutely liable for the loss of or damage to property entrusted to it, subject only to some exceptions which I shall mention later. The shipper need only prove delivery of the property to the carrier in good condition and either failure to return the same or return in damaged condition. If these are proved and there is no other proof, the plaintiff is entitled to a verdict. Due care or lack of negligence of the carrier is not a defense.

The exceptions to this rule are:

1. That the loss or damage was caused by an act of God. This means an occurrence in nature such as lightning, violent winds or seas or other accident of nature without any intervention by man. If the loss or damage is caused by human conduct concurring with an act of God, the carrier is liable. It is excused only if the act of God is the only proximate cause of the loss or damage.

2. A second exception is that the loss or damage was caused solely by public enemies, that is, an act of war. In that event the carrier is not liable.

3. A third exception is that the loss or damage was caused solely by the inherent nature of the property. That means that the goods were of such a nature as to spoil or deteriorate by the mere passage of time when carried in a manner suitable for the carriage of such goods. In that event the carrier is not liable. But if you find that the carrier's negligence, that is, delay in transit, contributed to the deterioration or spoiling of the goods, the carrier is liable. The duty of the carrier is to carry a shipment safely with due regard to its perishable nature.

4. The fourth exception is that the loss or damage was caused by default of the shipper. If the shipper packs the goods improperly and such defect is not apparent to the carrier on ordinary observation and loss or damage results therefrom, the carrier is exonerated. But if the imroper packing is apparent and the carrier accepts the goods without a special agreement limiting its liability, it is nevertheless liable.

The burden of proving that the loss or damage was caused solely by one of the four exceptions above mentioned is upon the carrier. The burden of proving an agreement limiting liability is also upon the carrier and it must be strictly construed against the carrier.

Cases:

Missouri P. R. Co. v. Elmore & Stahl, 377 U.S. 134, 12 L. Ed. 2d 194, 84 Sup. Ct. 1142 (1964);

> ". . . [L]iability of a carrier for damage to an interstate shipment is a matter of federal law controlled by federal statutes and decisions."
>
> A carrier, although not an absolute insurer, is liable for damages to goods transported by it, unless it can show that the damage was caused by an act of God, the public enemy, the act of the shipper himself, public authority, or inherent vice or the nature of the goods. *Interstate Commerce Act,* Sec. 20 (11), 49 U.S.C.A., Sec. 20 (11).
>
> A shipper establishes a prima facie case when he shows delivery in good condition, arrival in damaged condition, and amount of damages, and thereupon, the burden of proof is upon the carrier to show both its freedom from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *Interstate Commerce Act,* Sec 20 (11), 49 U.S.C.A., Sec. 20 (11).

Jos. Toker Co. Inc. v. Lehigh Valley R.R. Co., 12 N.J. 608 (1953); *Reich v. McGill,* 119 N.J.L. 358 (E. & A. 1938); *Heidritter, & c., Co. v. Central Railroad Co.,* 100 N.J.L. 402 (E. & A. 1924); *Bobbink v. Erie Railroad Co.,* 82 N.J.L. 547 (E. & A. 1912); *New Brunswick Steamboat Company v. Tiers et al.,* 24 N.J.L. 697 (E. & A. 1853); *Morris & Essex Railroad Co. v. Ayres,* 29 N.J.L. 393 (Sup. Ct. 1862); *Modern Tool Corp. v. Ayres,* 29 N.J.L. 393 (Sup. Ct. 1862); *Modern Tool Corp. v. Pennsylvania R. Co.,* 100 F. Supp. 595 (D.N.J. 1951); 13 C.J.S. "Carriers," Secs. 79, 223, 264.

5.26 NUISANCE

(A) IN GENERAL

The plaintiff charges that the defendant created (and maintained) a nuisance resulting in damage to the plaintiff (plaintiff's property). It is for you to determine whether the condition created (or maintained) by the defendant constituted a nuisance.

The word "nuisance," as used here, means a wrong which arises from an unreasonable interference with the use and enjoyment of land, resulting in a material annoyance, inconvenience, discomfort, or harm to the property or person of another. An owner of property has the right to the reasonable use of his land. In determinig what is reasonable, the utility of the defendant's conduct must be weighed against the extent of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business.

BY WAY OF FURTHER EXPLANATION, THE FOLLOWING MAY BE ADDED:

The creation of trifling annoyances or inconvenience does not constitute actionable nuisance. The test is whether the defendant's activities complained of, materially and unreasonably interfere with plaintiff's use of his property, (his comforts or existence) according to the simple tastes and unaffected notions generally prevailing among plain people.
Note: The above may generally be used in most cases involving private nuisances.

Cases:

Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 449 (1959); see also *Berg v. Reaction Motors Div.*, 37 N.J. 396 (1962), as to strict liability for nuisance in creating air vibrations resulting in damage to plaintiff's property (punitive damages denied); 4 *Restatement, Torts,* Chapter 40 (Private Nuisance); *Prosser, Torts* 389 *et seq.* (2d Ed. 1955); 1 *Harper and James, the Law of Torts,* 64 *et seq.* (1956).

As between an "absolute nuisance" and "a nuisance growing out of negligence, in the latter situation the issue of contributory negligence may be asserted as a defense. "The operative facts rather than the label should control and the result should justly be the same although the plaintiff affixes a nuisance label to the defendant's negligent conduct." *Hartman v. Brigantine,* 23 N.J. 530 (1957). Otherwise, assumption of risk has been said to be the proper defense in a case involving a nuisance. *Thompson v. Petrozzello,* 5 N.J. Misc. 645 (Sup. Ct. 1927).

Any private erection obstructing a public street is *prima facie* a nuisance but one may stand teams and vehicles in front of his property for a reasonable time, he may obstruct the side-walk temporarily to receive and deliver goods, he may pile building materials in front of a building

during erection, and keep them there for a reasonable time, he may maintain scaffolds, etc., needed in the erection of outside walls; all of such uses are generally considered lawful unless reasonable. *Mann v. Max,* 93 N.J.L. 191 (E. & A. 1919).

Nuisance (Blasting)

A person or corporation engaged in blasting operations becomes liable for damages to neighboring properties where such damage is proximately caused by such blasting operations.

The defendant is liable for damages thus caused by its blasting operations even though it took reasonable precautions to prevent damage to the neighboring properties.

Before you can find a verdict in favor of the plaintiff, ..., and against the defendant, ..., on the plaintiff's claim, you must find from the evidence:

1. That the plaintiff was the owner of the property (describe property);

2. That the defendant actually engaged in blasting operations, causing explosives to be discharged (at the time and place alleged);

3. That the plaintiff's building (or other property) was damaged;

4. That such damage was proximately caused by the defendant's blasting.

Case:

Berg v. Reaction Motors Div., 37 N.J. 396 (1962).

5.27 PRODUCTS LIABILITY*

(A) GENERAL LIABILITY OF MANUFACTURER FOR NEGLIGENCE

The manufacturer of a product is under a duty of exercising reasonable care in the design and manufacture of the product to protect those who may be reasonably expected to be in the area of the use of the product, from unreasonable risk of harm while it is being used for the purpose for which it was intended. The same duty applies where the use made of the product is one that the manufacturer should reasonably have foreseen. To put it another way, the manufacturer is under a duty to exercise reasonable care in the production of his product to avoid unreasonable risk of harm from the use thereof by those likely to be exposed to such risk. Thus the maker

* Because of changes brought about by the Uniform Commercial Code, *N.J.S.* 12A:1-101 *et seq.*, its provisions should be checked before charging.

N.B.

See also Liability for Breach of Warranty.

of an article which is intended for sale or use by others, is required to use reasonable care and skill in designing and producing it so that it is reasonably safe for the purpose for which it is intended, as well as for other uses that are reasonably foreseeable. This duty includes the obligation of exercising reasonable care in the inspection of the product for the purpose of locating latent or patent defects therein. This duty to exercise reasonable care extends to anyone who may reasonably be expected to be in the vicinity of the chattel's probable use and to be endangered in the event it is defective.

In order for the manufacturer to be liable under the foregoing rule, the defect which is asserted to have been the [a] proximate cause of the failure or condition which brought about the plaintiff's injury, must be shown to have been one which existed at the time the article left the control of the manufacturer.

Authorities and Cases:

2 *Harper & James, Torts,* 1534 (1956); *Prosser on Torts* (2d ed 1955), pp. 497 *et seq.; Restatement of Torts,* sec. 395. See also sec. 402A as to liability of seller and Annotation Liability of seller of article not inherently dangerous for personal injuries due to the defective or dangerous condition of the article. 168 A.L.R. 1054 (1947).

O'Donnell v. Asplundh Tree Expert Co., 13 N.J. 319, (1953), (iron casting).

Martin v. Bengue, 25 N.J. 359, (1957), (ointment).

Nathan v. Electriglas, 37 N.J. Super. 494, (1955), (elec. fixture).

Sinatra v. National X-Ray Products, 26 N.J. 546, (1958), (x-ray cable).

Tomlinson v. Amour & Co., 74 N.J.L. 274, (Sup. Ct. 1907), reversed 75 N.J.L. 748, (E. & A. 1908), 19 L.R.A.N.S., 923 (1909) overruled in Henningsen (*infra*), (canned ham).

Cassini v. Curtis Candy Co., 113 N.J.L. 91, (Sup. Ct. 1934), (candy).

Ehmann v. Manhattan Rubber Mfg. Co., 5 N.J. Misc. 190, 136 A 178 (Sup. Ct. 1927), (no recovery), (emery wheel).

Martin v. Studebaker Corp., 102 N.J.L. 612, (E. & A. 1926), (no recovery), (auto wheel).

Heckel v. Ford Motor Co., 101 N.J.L. 385, (E. & A. 1925), 39 A.L.R. 989 (1925), (auto pulley).

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, (1960), (auto steering mechanism).

Pabon v. Hackensack, 63 N.J. Super. 476, 492 (App. Div. 1960), (no recovery), (auto steering wheel).

Okker v. Chrome Furniture Corp., 26 N.J. Super. 295 (App. Div. 1953), (bar stool).

Clark v. Standard Sanitary Mfg. Co., 8 N.J. Misc. 284, 149 A 828 (Sup. C. 1930), (bathroom faucet).

Levis v. Zapolitz, 72 N.J. Super. 168 (App. Div. 1962), certification denied 37 N.J. 226 (1962) (plastic slingshot).

As to contributory negligence, see *Shaw v. Calgon, Inc.*, 35 N.J. Super. 319, 114 A.2d 278 (App. Div. 1955).

As to duty of supplier: *Restatement, Torts, Sec.* 388, *O Donnell v. Asplundh*, 13 N.J. 319, 99 A.2d 577 (1953); *Nelson v. Fruehauf Trailer*, 11 N.J. 413, 94 A.2d (1953); *Roberts v. Brewster, Inc.*, 13 N.J. Super. 462, 80 A.2d 638 (1951).

As to obligation of exclusive distributor who assembles, installs and services product, to inspect, see *Sinatra v. National X-ray Products*. 26 N.J. 546, 553 (1958).

As to obligation of wholesaler and retailer to inspect, see *Levis v. Zapolitz*, 72 N.J. Super. 168 (App. Div. 1962).

As to application of *Res Ipsa Loquitur*, see *Bornstein v. Metropolitan Bottling Co.*, 45 N.J. Super. 365, 369, *et seq.* (App. Div. 1957); *Kramer v. R. M. Hollingshead Corp.*, 6 N.J. Super. 255 (App. Div. 1950).

Effect of fact that product is manufactured by one other than producer or distributor. *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421 (Sup. Ct. 1935), affirmed 117 N.J.L. 101 (E. & A. 1936).

(A-1) MANUFACTURER'S STRICT LIABILITY IN TORT

The manufacturer of a product is liable if the product was defective, that is, not reasonably fit for the ordinary purpose for which such products are sold and used, and the defect arose out of its design or manufacture or while the product was in the control of the manufacturer, and it proximately caused injury or damage to the ultimate purchaser or reasonably foreseeable consumer or user. Proof of the manufacturer's negligence in the making or handling of the article is not required.

In order to hold the defendant liable in this case you must determine that: (1) the product manufactured by the defendant was not reasonably fit for the ordinary use for which it was intended; (2) the defect arose of its design or manufacture or while the product was in the control of the manufacturer; (3 the defect proximately caused injury or damage to the plaintiff; and (4) the plaintiff was the ultimate purchaser or a reasonably foreseeable consumer or user.

Cases:

Santor v. A & M Karagheusian, Inc., 44 N.J. 52 (1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. (1960).

The manufacturer in under no duty to furnish a product which will not wear out. *Courtois v. General Motors Corp.*, 37 N.J. 525, 543 (1962).

Whether liability extends to a bystander, not the ultimate purchaser or a reasonably foreseeable consumer or user was mooted but not decided in *Courtois v. General Motors Corp.*, 37 N.J. 525, 547 (1962) (Plaintiff

was driver of a truck which was struck by a wheel which dropped off a truck manufactured by defendant.)

(B) DUTY OF MANUFACTURER TO INSPECT

A manufacturer or processor of material sold in a glass jar or container is under a duty to make a reasonable inspection and test of such product to discover or disclose discoverable defects. Ths duty calls for and requires the exercise of reasonable care in applying reasonable tests to detect discoverable defects and deficiencies in the article or product. For a guidepost as to what is a reasonable inspection, you must weigh the difficulties of effective discovery of the defect in question against the dangers inherent in the articles produced or processed. The greater the danger which inheres in the article produced or processed, the more precise the the inspection must be in order to be reasonable.

Cases:

Levis v. Zapolitz, 72 N.J. Super. 168 (App. Div. 1962), (As to general duty to inspect.)

(C) DUTY TO WARN

A manufacturer or processor not only owes a duty to exercise reasonable care in the manufacture and inspection of his products but likewise owes a companion duty to warn buyers and users of latent limitations of even a perfectly made article, the use of which is dangerous if the user is ignorant of those limitations, and the manufacturer has no reason to believe that the user will recognize the danger.

Cases:

Martin v. Bengue, Inc., 25 N.J. 359 (1957); *Restatement, Torts,* sec. 388 (1934).

5.28 MEDICAL MALPRACTICE

(A) GENERAL DUTY OWING

An action brought against a doctor alleging negligence in the practice of medicine is referred to as a malpractice action. In this action plaintiff contends that defendant did not comply with the standard of case which the law imposes upon him while attending to the medical needs of his patient, the plaintiff. Plaintiff contends that as a result of defendant's malpractice plaintiff suffered injury for which damages are sought.

To decide this case properly you must know the standard of care imposed by law by which defendant's conduct as a physician should be measured.

Medicine is generally defined as the science or art dealing with the diagnosis, prevention, cure and alleviation of disease, illness and injuries affecting human beings. A person who is engaged in the general practice

of medicine (or, who is engaged as a specialist in a given area of medicine) represents that he possesses that degree of knowledge, skill and care which is possessed and used by the average physician practicing his profession as a general practitioner (or as a specialist, as the case may be). The required knowledge, skill and care must be judged by the standard medical practice at the time the doctor attended to planitiff's medical needs. A physician who undertakes to attend to the medical needs of a patient represents also that he will use such knowledge, skill and care in the diagnosis and treatment of the patient. The law, therefore, imposes upon a physician the duty or obligation to have and to use that degree of knowledge, skill and care ordinarily possessed and exercised by the average member of his profession in his field in the diagnosis and treatment of a patient, such as the plaintiff in this case. This is the standard by which to judge the defendant (a general practitioner or a specialist) in his diagnosis and treatment of plaintiff in this case.

(In the case of a specialist Model Charge 5.28(B) dealing with the duty of a specialist may be inserted here).

The law does not require that a physician guarantee a favorable result nor that he guarantee to cure his patient. The law recognizes that in the practice of medicine treatment according to standard medical practice will not necessarily prevent a poor result. If the physician has brought and applied the required knowledge, skill and care to his patient he is not liable simply because a cure has not been achieved or simply because bad results have occurred.

Where, according to standard medical practice, the diagnosis and course of treatment involved are matters to be subjected to the judgment of the physician, a physician must be allowed the exercise of that judgment and he cannot be held liable if in the exercise of that judgment he has, nevertheless, made a mistake in his diagnosis or in his decision as to the course of treatment to be taken. Where judgment must be exercised the law does not require of the doctor infallible judgment. A physician cannot be held liable for malpractice so long as he employs such judgment as is allowed by the standards of accepted medical practice. If, in fact, in the exercise of his judgment a doctor selects one of two or more courses of action, each of which in the circumstances has substantial support as proper practice by the medical profession, he cannot be found guilty of malpractice if the course chosen produces a poor result.

But a doctor who departs from standard medical practice cannot excuse himself from the consequences by saying it was an exercise of his judgment. If the exercise of a doctor's judgment causes him to do that which standard medical practice forbids, the doctor would be guilty of malpractice. Similarly, a doctor whose judgment causes him to omit doing something which in the circumstances is required by standard medical practice is also guilty of malpractice.

Thus, the obligation or duty of care which the law imposes upon defendant is to bring to his patient that knowledge, skill and care which are ordinarily possessed and exercised in similar situations by the average member of the profession practicing in his field. The physician is obliged to use his knowledge, skill and judgment in ān effort to cure or care for his patient according to standard medical practice. If you find that the defendant has complied with this standard he is not liable to plaintiff, regardless of the result. On the other hand, if you find that defendant has departed from this standard of care, resulting in injury or damage, then you should find defendant liable for his malpractice.

Cases and Notes:

Schueler v. Strelinger, 43 N.J. 330, 344-346 (1964); *Carbone v. Warburton,* 22 N.J. Super. 5 (App. Div. 1952), affirmed 11 N.J. 418 (1953); *Young v. Crescente,* 132 N.J.L. 223 (E. & A. 1944); *Lewis v. Read,* 80 N.J. Super. 148 (App. Div. 1963), certification granted 41 N.J. 131 (1963); *Barbire v. Wry,* 75 N.J. Super. 327, 336 (App. Div. 1962).

(a) *Judgment of the physician*

Note that this charge does not use the expression, "A physician must be allowed a wide range in the reasonable exercise of judgment," which is contained in the opinion in *Schueler v. Strelinger,* 43 N.J. at p. 345, but the charge adapts that concept as modified by the sentence which follows it in the opinion. Obviously, in some cases there is no room for judgment, such as where a doctor removes a good finger on one hand when he was engaged to remove an infected finger on the other hand. See *Steinke v. Bell,* 32 N.J. Super. 67 (App. Div. 1954), dealing with the removal by a dentist of the wrong tooth, and holding that expert testimony is not needed to establish that this is malpractice.

See *Schueler v. Strelinger,* 43 N.J. at p. 346 as to a doctor's choice of two courses, each having substantial support as proper practice by the medical profession.

(b) *Locality, area and current state of medical science*

Smith v. Corrigan, 100 N.J.L. 267 (Sup. Ct. 1924) disapproves of a charge which judges the standard of care by the skill and knowledge of physicians "in this and similar localities," and disapproves of measuring the standard of care by the "practice established and in vogue among physicians and surgeons of this locality." Instead, the court expressed the rule as requiring the degree of knowledge and skill possessed and used ordinarily by other physicians in the same grade of the profession, *i.e.,* as a general practitioner or as a specialist. Recent cases cited above expressed the rule in similar language, without tying the standard to the doctor's locality. *Carbone v. Warburton,* 11 N.J. at p. 425, citing *Smith v. Corrigan.*

Moreover, there is implicit ratification of this principle in the holding that a non-resident *Warburton, supra,* allowing a New York doctor to

testify in a case involving a doctor practicing in Paterson, and allowing a medical expert to qualify by proof of knowledge of the standards pertaining to the situation under investigation where the knowledge is obtained either from "observations of the things done by fellow practitioners or of the witness's reading and study of treatises and medical journals." 11 N.J. at p. 425. This rule may reflect the view that New Jersey by location and modern communications, is close enough to the cross-currents of medical developments and standards of practice generally to require conformity to standards currently accepted in the profession generally, and in accordance with the state of medical science. ("Having regard to the present state of scientific knowledge," *Clark v. Wichman*, 72 N.J. Super. 486, 493 (App. Div. 1962); *Coleman v. Wilson*, 85 N.J.L. 203 (E. & A. 1913); *Carbone v. Warburton*, 11 N.J. at p. 426.) Different rules have been applied elsewhere giving weight to the size and character of the community in which the doctor practices. *Prosser on Torts*, 3d ed. (1964) sec. 32, p. 166. No reported New Jersey case has dealt with a country doctor who claims a limitation by reason of lesser equipment, facilities or knowledge than that available in urban areas of the state or adjoining states.

(c) *Contributory negligence*

This defense is treated in Model Charge 8.19.

(d) *Abandonment*

See *Clark v. Wichman*, 72 N.J. Super. 486, 491 (App. Div. 1962) and authorities cited therein for a discussion of the duty of a doctor not to abandon a patient, that is, not to discontinue the case for which he has assumed responsibility without being properly relieved, without notice, or without providing a competent substitute physician. See also *Parker v. Goldstein*, 78 N.J. Super. 472, 482 (App. Div. 1963), certification denied, 40 N.J. 225, (1963) for an example of a doctor's dilemma where a patient refused for a time to submit to a Caesarean section; and Annot., "Liability of physician who abandons case," 57 A.L.R. 2d 432 (1958).

(e) *Diligence and best skill*

The skill and diligence required is the usual degree of knowledge and skill possessed by other members of the profession and the use of due care to discover the malady and apply usual remedies. *Smith v. Corrigan*, 100 N.J.L. 267, 272 (Sup. Ct. 1924); *Young v. Stevens*, 132 N.J.L. 124, 129 (E. & A. 1944). A physician may expressly contract to produce a cure or a good result, but in the absence of express contract he does not guarantee that result. *Ibid; Prosser on Torts*, 3d ed., (1964) sec. 32 p. 165. Some jury charges talk in terms of the physician's duty to use his *best* skill and care; but the standard of care rule of New Jersey cases seems expressed only in terms of a duty to use the ordinary knowledge, skill and care used by others practicing in the same field, with appropriately higher skill required of a specialist than required of a general practitioner. See *Prosser on Torts*, 3d ed. (1964) sec. 32, p. 164, fn. 17, citing a case for the principle that the duty of care rule does not mean that a man must always be at his best, but that the care required is the ordinary care of a reasonable man who is possessed of special knowledge and experience.

(B) SPECIALIST DUTY OF

A specialist in a given area of medical science is one who devotes special study and attention to the understanding and treatment of medical conditions affecting certain parts of the body, certain diseases, illnesses or injuries. A physician who holds himself out as a specialist in a given area of medical science represents that, with regard to his specialty, he has and will employ not merely the knowledge and skill of a general practitioner but that he has and will employ that special degree of knowledge and skill normally possessed and used by the average specialist in his field. Accordingly, when a physician holds himself out as a specialist and undertakes as such to diagnose the care for the medical needs of a patient, the law imposes the duty upon that physician to have and to use that degree of knowledge and skill which is normally possessed and used by the average physician who devotes special study and attention to the particular organ or disease or injury involved, having regard to the state of scientific knowledge at the time he attended to plaintiff's medical needs.

Cases:

Carbone v. Warburton, 22 N.J. Super. 5, 9 (App. Div. 1952), affirmed, 11 N.J. 418, 426 (1953); *Coleman v. Wilson*, 85 N.J.L. 203 (E. & A. 1913); *Lewis v. Read*, 80 N.J. Super. 148 (App. Div. 1963), certification granted, 41 N.J. 121 (1963).

(C) EXPERT TESTIMONY TO PROVE STANDARD OF CARE

Negligence is conduct which falls below a standard of care required by law for the protection of persons or property from foreseeable risks of harm. In the usual negligence case it is not necessary for plaintiff to prove the standard of care by which defendant's conduct is to be measured. In the usual case, such as an automobile negligence action, it is sufficient for plaintiff to prove what the defendant did or failed to do, and what the circumstances were, and then it is for the jury to determine whether the defendant exercised such care as a reasonably prudent person would have exercised for the safety of others. The standard of care is reasonable prudence to avoid injury to another, and the jury, in effect, supplies that standard by deciding what a reasonably prudent person would have done in the circumstances.

In the usual medical malpractice case, however, jurors are not competent to supply the standard of care by which to measure the defendant's conduct. Based upon their common knowledge alone, without technical training, jurors normally cannot know what conduct constitutes standard medical practice. Therefore, ordinarily, when a physician is charged with negligence in the diagnosis or care of a patient, the standard of practice by which his conduct is to be judged must be furnished by expert testimony,

that is to say, by the testimony of persons who by knowledge, training or experience are deemed qualified to testify and to express their opinions on medical subjects.

Where the subject matter of the claim is such that jurors cannot determine the standard of conduct and any departure therefrom on the basis of their common knowledge as laymen, then as jurors they should not speculate or guess about the standards by which the average physician should conduct himself in the circumstances. In a case such as this you as jurors must determine what is standard medical practice from the testimony of the expert witnesses who have been heard in this case. After deciding what the standard of care is, what standard medical practice is in the circumstances of this case, you as jurors must then determine whether defendant has conformed with or whether defendant has departed from that standard of care.

Cases:

Sanzari v. Rosenfeld, 34 N.J. 128, 134-135, 142 (1961); *Schueler v. Strelinger,* 43 N.J. 330, 345 (1964); *Carbone v. Warburton,* 22 N.J. Super. 5, 10 (App. Div. 1952), affirmed 11 N.J. 418 (1953); *Toy v. Rickert,* 53 N.J. Super. 27 (App. Div. 1958); *Clark v. Wichman,* 72 N.J. Super. 486 (App. Div. 1962); Annot., "Necessity of expert evidence to support an action for malpractice against a physician or surgeon," 141 A.L.R. 5 (1942), supplemented in 81 A.L.R. 2d 597 (1967).

Notes:

The fact that a doctor is licensed in New York but is not licensed to practice medicine in New Jersey does not disqualify the doctor from testifying as a medical expert. *Carbone v. Warburton,* 11 N.J. 418, 424, 426 (1953); *Lewis v. Read,* 80 N.J. Super. 148, 168 (App. Div. 1963), certif. granted 41 N.J. 121 (1963). A general practitioner who is shown to be versed in a specialized subject from actual experience in his own practice or from observations of the practices of other physicians or from reading and study of treatises and medical journals may testify as a medical expert in a malpractice action involving a medical specialty, and the fact that he is not a specialist will not disqualify him but may be considered by the jury in determining the weight to be given to his opinion. *Carbone v. Warburton,* 11 N.J. 418, pp. 424-426; see also *Lewis v. Read, supra,* 80 N.J. Super. at p. 168. A physician who was a general practitioner but who also had specialized in dental anesthesiology is competent to testify in a dental malpractice case as to the standard of care to be used by dentists in administering anesthesia even though he is not a dentist. *Sanzari v. Rosenfeld,* 34 N.J. 128, 136 (1961). In areas where the dental and medical professions overlap a physician with knowledge or experience in such areas has been held competent to testify to the accepted standard of practice among dentists. *Ibid.*

Toy v. Rickert, 53 N.J. Super. 27 (App. Div. 1958) held that proof of an injection in buttock with consequent swelling, numbness and injury to sciatic nerve doesn't establish malpractice without expert medical testi-

mony of a departure from standard practice. *Clark v. Wichman,* 72 N.J. Super. 486 (App. Div. 1962) held that without expert medical testimony malpractice cannot be concluded from evidence that doctor advised weight bearing when patient's leg fracture was slow in healing. See also *Henrick v. Newark,* 74 N.J. Super. 200 (App. Div. 1962), certification denied 38 N.J. 309 (1962).

(D) COMMON KNOWLEDGE MAY FURNISH STANDARD OF CARE

Negligence is the failure to comply with the standard of care required by law to protect a person from foreseeable risks of harm. Negligence in a doctor's medical practice, which is called malpractice, is the doctor's failure to comply with the standard of care required by law in the care and treatment of his patient. Usually it is necessary to establish the standard of care by expert testimony, that is, by testimony of persons who are qualified by their training, study and experience to give their opinions on subjects not generally understood by persons, such as jurors, who lack such special training or experience. In the usual case standard medical practice by which to judge defendant's conduct cannot be determined by the jury without the assistance of expert medical testimony.

However, in some cases, such as the case at hand, the jury may determine from its common knowledge and experience the standard of care by which to judge defendant's conduct. In this case plaintiff contends that defendant violated the duty of care he owed to plaintiff by doing ..... or by failing to do the following ..... In this case, therefore, it is for you, as jurors, to determine, based upon common knowledge and experience, what skill and care the average physician practicing in defendant's field would have exercised in the same or similar circumstances. It is for you as jurors to say from your common knowledge and experience whether defendant did something which the average member of his profession would not have done or whether defendant failed to do something or failed to take some precaution which the average member of his profession would have done or taken in the circumstances of this case in the diagnosis or treatment of the plaintiff.

(Where there has been expert medical testimony as to the standard of care but the standard is one which can also be determined by the jury from its common knowledge and experience, the jury should determine the standard of care after considering all the evidence in the case, including the expert medical testimony, as well as its own common knowledge and experience).

After determining the standard of care required in the circumstances of this case you should then consider the evidence to determine whether defendant has complied with or departed from that standard of care. If you find that defendant has complied with that standard of care he is not

liable to plaintiff, regardless of the result. If you find that defendant has not complied with that standard of care, resulting in injury or damage to plaintiff, then you should find defendant guilty of malpractice and return a verdict for plaintiff.

Cases and Notes:

a) *In general*

Steinke v. Bell, 32 N.J. Super. 67, 70 (App. Div. 1954): "We think laymen, looking at this case in the light of their common knowledge and experience, can say that a dentist engaged to remove a lower left molar is not acting with the care and skill normal to the average member of the profession if, in so doing, he extracts or causes to come out an upper right lateral incisor." *Becker v. Eisenstodt*, 60 N.J. Super. 240 (App. Div. 1960), a plastic surgeon causing a burn on plaintiff's face by inadvertently applying a caustic chemical rather than a harmless chemical. (*Sanzari v. Rosenfeld*, 34 N.J. 128, 143 (1961), holding that laymen know that a reasonable man, including a dentist, who knows that a drug is potentially harmful to certain type of patient, should take adequate precaution before administering the drug or before deciding to administer it. The manufacturer's brochure warned that the drug had danger for certain patients, but the dentist made no inquiry to determine whether the patient's state of health precluded use of the drug. In *Lewis v. Read*, 80 N.J. Super. 148, pp. 170-173 (App. Div. 1963), certification granted 41 N.J. 121 (1963), the court speaks of "conduct so obviously wanting in reasonable skill and care" that it may be judged so by laymen, adding that some "basic facts" of childbirth procedure are within the common knowledge of laymen. The court suggests that laymen could determine that a doctor delivering a baby is careless in leaving the baby exposed in a cold room and in not taking adequate measures to recognize, diagnose and prescribe treatment for the baby's critical cyanotic condition which developed shortly after delivery. *Cf. Toy v. Rickert*, 53 N.J. Super. 27 (App. Div. 1958) holding that common knowledge without expert testimony does not permit the inference of malpractice from a showing that after the injection of penicillin in plaintiff's buttock immediate swelling, numbness and injury to the sciatic nerve resulted. See also *Clark v. Wichman*, 72 N.J. Super. 486 (App. Div. 1962) on the need for expert medical testimony.

b) *Res ipsa loquitur*

The doctrine may be applied in malpractice cases, but was found inapplicable in *Sanzari v. Rosenfeld*, 34 N.J. 128, pp. 140-141 (1961) and in *Toy v. Rickert*, 53 N.J. Super. 27, 34 (App. Div. 1958). In *Sanzari v. Rosenfeld, supra*, the court said: "Whether the *res ipsa* doctrine applies to a given case therefore depends upon the probabilities. Where, for example, a surgical sponge is left inside a patient after an operation, it is reasonable to say the probability is that someone has been negligent. * * * The plaintiff, therefore, is permitted to establish a *prima facie* case of negligence by proof of his injury and the surrounding circumstances; he does not have to prove a specific act or omission by the defendant or an applicable standard of care."

A distinction is made between *res ipsa* and the common knowledge doctrines in malpractice cases. In *res ipsa* cases, plaintiff need only prove his injury and the jury from its common knowledge or experience may infer that the harm would not have occurred but for defendant's negligence. However, where the injury alone does not bespeak negligence, nevertheless the jury may from its common knowledge determine the standard of care by which to judge defendant's alleged malpractice. See *Sanzari v. Rosenfeld, supra,* 34 N.J. at pp. 140-144; *Toy v. Rickert, supra,* 53 N.J. Super. at pp. 32-34.

c) Comomn knowledge can be employed in some cases although expert medical testimony is also offered as to the standard of care and defendant's alleged departure therefrom. See *Sanzari v. Rosenfeld, supra,* 34 N.J. at pp. 138 and 143; *Lewis v. Read, supra,* 80 N.J. Super. at p. 172.

(E) INFORMED CONSENT

NOTE:

Distinguish Between General Practitioner and Specialist

The standard of care as to the information being conveyed to a patient for his informed consent may vary depending upon the status of the doctor as a general practitioner or as a specialist such as a general surgeon. If this is the case, the following charge material should be modified accordingly (see Charge 5.28(B) SPECIALIST, DUTY OF, by way of reference.)

I charge you that, in the absence of an emergency, or of unforeseeable conditions arising during surgery, a physician or surgeon, before operating upon a patient, must obtain the consent of the patient (or if the patient is incompetent, the consent must be obtained from someone legally authorized to give it for him).

The consent of the patient, to be sufficient for the purpose of authorizing a particular surgical procedure, must be an informed consent. The patient must be given information regarding the nature of the medical problem, the results to be anticipated and the risks involved in the surgery.

You the jury must determine whether the defendant in this case has adequately informed the patient and the standard to be applied by you is whether or not the defendant disclosed to his patient what reasonable medical practitioners, in the same or similar circumstances, would have told their patients before undertaking the operation.

However, the law does not require a physician or surgeon in every case to disclose to a patient all the details of the operation, nor all the possible ill effects which could conceivably follow a proposed operation, no matter how remote. The standard remains the same; whether or not the defendant disclosed to his patient what reasonable medical practitioners, in the same or similar circumstances, would have told their patients before undertaking the operation.

WHERE APPROPRIATE, ADD:

If you find that the plaintiff obtained information concerning the medical problem or the risks involved in the surgery from a source (or sources) other than the defendant, this is a factor which you may consider in determining whether plaintiff's consent to the operation was an informed consent.

WHERE APPROPRIATE, ADD:

The nature and extent of the disclosure depends upon the medical problem as well as the patient. The apprehension and/or other mental or emotional state of the patient are factors that may be considered by the physician or surgeon in an appropriate case, in determining the extent and nature of the information to be disclosed for the patient's best interest. However, a physician or surgeon is liable for damages if he fails to give his patient such information as a reasonable medical practitioner would give in the same or similar circumstances.

Cases:

The only New Jersey case on the point is *Kaplan v. Haines,* 96 N.J. Super. 242 (App. Div. 1967), aff'd 51 N.J. 404 (1968). The majority of the States follow this rule: see *Aiken v. Clary,* 396 S.W. 2d 668 (Mo. Sup. Ct. 1965), alleged failure to advise of hazards involved in insulin shock treatment; *DiFilippo v. Preston,* 53 Del. 539, 173 A.2d 333 (Sup. Ct. 1961), failure to advise of possible injury to laryngeal nerves during thyroid operation; *Ditlow v. Kaplan,* 181 So. 2d 226 (Fla. Ap. 1965) perforation of esophagus during gastroscopic procedure; *Doerr v. Movius,* 463 P.2d 477 (Mont. Sup. Ct. 1970); *Govin v. Hunter,* 374 P. 2d 421 (Wyo. Sup. Ct. 1962), case taken from jury because no evidence presented by plaintiff as to medical standards; also see *Shetter v. Rochelle,* 2 Ariz. Rep. 358, 409 P. 2d 74; *Roberts v. Young,* 369 Mich. 133, 119 N.W.2d 627 (Sup. Ct. 1963); *Ross v. Hodges,* 234 So. 2d 905 (Miss. Sup Ct. 1970) *Paterson v. Lynch,* 299 N.Y.S. 2d 244 (Sup. Ct. 1969); *Negaard v. Estate of Feda,* 446 P. 2d 436 (Mont. Sup. Ct. 1968); *Anderson v. Hooker,* 420 S.W. 2d 235 (Tex. Ct. App. 1967).

1) *Expert Testimony May Not Be Needed:*

There are some instances where the hazard is so obvious that no expert testimony is necessary to prove that the failure to warn or disclose the hazards was negligence; *Mitchell v. Robinson,* 334 S.W. 2d 11 (Mo. Sup. Ct. 1960), fractures resulting from insulin shock treatments; also *Natanson v. Kline,* 186 Kan. 393, 350 P. 2d 1093 (Sup. Ct. 1960), reh. 354 P. 2d 670 (Sup. Ct. 1960), radioactive cobalt treatments; *Watkins v. Papala,* 2 Wash. App. 484; 469 P. 2d 974 (1970).

2) *Consent of Infant*

Cases recognize that consent of parent may not be necessary or required under circumstances where the child has knowingly consented. Sufficiency depends on the infant's ability to comprehend nature of physical procedure, risks involved, etc. *Young's v. St. Francis Hospital,* 205 Kan. 292, 469 P.2d 330 (Sup. Ct. 1970).

(F) PRE-EXISTING DISEASE OR CONDITION

If you find that the defendant's malpractice, as I have defined it, has aggravated a pre-existing disease or condition the plaintiff is not required to establish what expenses, pain, suffering, disability or impairment are attributable solely to the malpractice. The burden of proof is on the defendant who is responsible for all damages attributable to the disease or condition unless he can demonstrate by a preponderance of the evidence that the damages caused by the aggravation of the pre-existing disease or condition are capable of some reasonable apportionment in which event he is responsible only for damages caused by reason of the aggravation. The defendant has the burden of segregating recoverable damages from those solely incident to the pre-existing disease or condition.

Cases:

Fosgate v. Corona, 66 N.J. 268 (1974).

5.31 TAVERN KEEPERS SERVING MINORS AND INTOXICATED PATRONS

I. NEGLIGENCE OF TAVERN KEEPER

In this case the plaintiff seeks damages against the defendant tavern owner contending that the tavern owner (and his employee bartender) was (were) negligent by serving alcoholic beverages to ..... while he was intoxicated (or, was a minor) and that such negligence proximately caused (or, was a substantial factor in causing) an accident in which plaintiff was injured. Plaintiff contends that at the time the alcoholic beverage was served the tavern owner knew, or, under the circumstances, should have known that the patron was intoxicated (or, a minor). In this charge I will use the phrase "visibly intoxicated" (or, "an apparent minor") to mean a patron who the tavern owner knew or from the circumstances should have known was intoxicated (or, a minor).

Negligence is generally defined as the failure to exercise that degree of care for the safety of others which a reasonably prudent person would exercise in the same or similar circumstances. In determining whether such care has been exercised you should consider whether the defendant should have foreseen in the attending circumstances that the natural and proximate consequence of his conduct would have been some accident or injury. For a person to be negligent it is not necessary that he foresee the particular accident that occurred or the specific injuries which resulted from that accident. A person is negligent, however, if he does those acts which a reasonably prudent person would not have done, thereby creating or contributing to a risk of harm in circumstances where a reasonably prudent person would have foreseen that the probable consequence of his conduct would be some accident or injury.

Thus, negligence is the doing of an act which a reasonably prudent person would not have done in the same or similar circumstances because that act creates or contributes an unreasonable and foreseeable risk of harm to others. A person is also deemed negligent if he creates or contributes to an unreasonable risk of injury by his conduct when that conduct is combined with the conduct of others which a reasonably prudent person would foresee. In other words, a tavern owner is deemed negligent if he serves alcoholic beverages to a visibly intoxicated person (or, to an apparent minor) in circumstances where a reasonably prudent person would foresee that by serving alcoholic beverages to such a person he is causing or contributing to an unreasonable risk of harm to others that may result thereafter by the conduct of the intoxicated person (or, minor). (Add, if appropriate: In this connection you may consider that in current times travelling by car to and from a tavern is commonplace, and you may consider that the effects of intoxication of a driver may reasonably be foreseen).

The Division of Alcoholic Beverage Control, pursuant to authority granted by a statute enacted by our Legislature, has adopted Regulation 20, Rule 1, which provides in pertinent part as follows:

> No licensee shall sell, serve or deliver or allow, [or] permit *** the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the age of 18 years or to any person actually *** intoxicated, or allow, [or] permit *** consumption of any alcoholic beverage by any such person in or upon the licensed premises. [By specific statute, *N.J.S.A.* 33:1-77, the Legislature has declared it unlawful to sell any alcoholic beverage to a minor, but establishes conditions for exonerating a tavern owner].

Such a regulation (and statute) establishes a standard of conduct for tavern owners. The law is designed to protect not only patrons who are apparent minors or visibly intoxicated, but also to protect members of the public from foreseeable risk of injury. If you find that the defendant (through his bartender) has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that term to you, has been established. (*See:* Charge 5.18(D) for a charge dealing with the violation of a statutory regulation).

Thus, you may find the tavern owner negligent if you find that the tavern owner served, or permitted to be served, alcoholic beverages to a person who was intoxicated (or, a minor) and that the tavern owner knew or from the circumstances should have known that the person was intoxicated (or, a minor) at the time he was served.

Cases:

> *Rappaport v. Nichols,* 31 N.J. 188 (1959); *Soronen v. Olde Milford Inn,* 84 N.J. Super. 372 (App. Div. 1964); *Soronen v. Olde Milford Inn, Inc.* 46 N.J. 582 (1966); *Aliulis v. Tunnel Hill Corp.,* 114 N.J. Super. 205 (App. Div. 1971).

Notes:

In the case of a sale to an apparent minor, see *Rappaport v. Nichols, supra,* 31 N.J. at p. 201 for the concept of selling the first drink which does "its share of the work."

II. PROXIMATE CAUSE–INTERVENING CAUSE–SUBSTANTIAL FACTOR

A person who is negligent is liable for injuries which are proximately caused by his negligence. By proximate cause we mean a cause which naturally and probably led to the accident and resulting injuries. Where there are two or more causes of an accident, a person whose negligence is a substantial factor in contributing to a cause of the accident is held liable to a person injured in said accident. If a tavern owner negligently served alcoholic beverages to a patron who was visibly intoxicated (or, an apparent minor) and if such service of alcoholic beverage was a substantial factor in bringing about an accident, it would make no difference that other causes intervened and contributed to the accident so long as those other intervening causes were foreseeable or were natural and probable consequences of the risk of harm created by the sale of liquor to the visibly intoxicated person (or, apparent minor).

Thus, plaintiff is entitled to recover from the defendant if plaintiff proves by the preponderance of evidence the following elements:

1. That defendant was negligent in serving alcoholic beverages to ..... when he was intoxicated (or, a minor);

2. That at the time when the alcoholic beverage was served defendant knew or should have known from the circumstances that ..... was intoxicated (or, a minor); and

3. That such service of alcoholic beverages was a proximate cause or a substantial factor in causing the accident and injury complained of.

Notes:

As to the use of the "substantial factor" test, see *Rappaport v. Nichols, supra,* 31 N.J. at p. 203.

In *Dreuth, infra,* the court held that one sip of a drink by a patron who was previously intoxicated from drinking at home was insufficient evidence of proximate cause of an injury to plaintiff who was in a scuffle with the patron, when the jury found the patron acted in self-defense.

III. CONTRIBUTORY NEGLIGENCE OF PLAINTIFF PATRON

There is evidence in this case which might suggest that plaintiff himself was at fault by voluntarily getting drunk or by driving his car while drunk, or by other conduct which might suggest that he himself was negligent.

Some of you may have heard of the legal principle that the contributory negligence of a plaintiff is a defense to a claim for damages in a negligence case.

However, in a case such as this, contributory negligence is not a defense. Even if you conclude that plaintiff himself was negligent in a manner which contributed to the happening of the accident and the resulting injuries, plaintiff would still be able to recover from the tavern owner if you find said injuries were a proximate result of the defendant's negligence as previously defined (include substantial factor where appropriate).

In other words, if a defendant tavern owner was negligent in serving alcoholic beverages to an intoxicated patron (or, a minor) when defendant knew or should have known that the patron was intoxicated (or, a minor) and if as a proximate result that patron is injured in an accident, the tavern owner would be liable for damages to that patron, even though you may feel the patron himself did not exercise reasonable care for his own safety.

If, however, you are not satisfied from the evidence that plaintiff was served while visibly intoxicated (or, while an apparent minor), or you are not satisfied from the evidence that the alleged negligent service of alcoholic beverage to plaintiff was a proximate cause or a substantial factor in causing the accident and claimed injuries, the plaintiff cannot recover. If this accident was caused solely by the conduct of the plaintiff himself (or, some third person) without any negligent conduct on the part of the defendant tavern owner contributing to the accident, then plaintiff cannot recover from the defendant tavern owner.

Cases:

Soronen v. Olde Milford Inn, Inc., supra; Aliulis v. Tunnel Hill Corp., supra; Dreuth v. Czarnecki, App. Div. Dkt. No. A-1683-69, May 4, 1971. In *Dreuth, supra,* a patron sued another patron, Miller, for assault and battery and a tavern owner for serving a drink to Miller while he was intoxicated. The court held that plaintiff's contributory negligence should have been submitted to the jury, since it is inapplicable as a defense only where plaintiff is the patron who claims injury to himself as a result of his being served those drinks while he was intoxicated or a minor.

5.32 DUTY OF A SUPERMARKET TO A BUSINESS INVITEE WALKING IN ONE OF THE AISLES

Plaintiff was a person to whom defendant owed the duty of exercising reasonable care to maintain the aisle in a reasonably safe condition for passage. Plaintiff had a right to assume that the floor of the defendant's store was free from obstruction as she (he) walked down the aisle. This right existed until she (he) was aware or should have been aware of the hazard which caused the accident. Plaintiff is not required to maintain a continuous surveillance of the floor, but if you find that immediately before

the accident she (he) was not exercising due care for her (his) own protection and that her (his) injury was the proximate result of this failure to exercise due care, her (his) claim is barred.

Note:

Although plaintiff is not required to exercise constant vigilance in order to discover hazards, she (he) is required to exercise due care for her (his) own safety, and if the hazard should have been discovered and because of such discovery the accident would have been averted, contributory negligence operates as a total defense. *Krackomberger v. Vornado, Inc.*, 119 N.J. Super. 380 (App. Div. 1973).

6.10 DAMAGES—PERSONAL INJURIES

(A) MEDICAL EXPENSES

A plaintiff who is awarded a verdict is entitled to damages for his expenses for medical services, hospital services, medicines and medical supplies which were reasonably required for the examination, treatment and care of injuries sustained by him as a proximate result of the defendant's negligence (or other wrongdoing). The measure of damages is the fair and reasonable value of such medical and hospital services, medicines and medical supplies. There is testimony before you as to [doctor's bills, hospitals bills, drug bills and bills for medical supplies], that these were fair and reasonable in amount and that the medical and hospital services, medicines and medical supplies were reasonably required for the examination, treatment and care of injuries sustained by the plaintiff in this accident. You need not award the full amount claimed if you find a verdict in favor of the plaintiff, if you determine that any of these bills were not fair and reasonable to any extent, or that any of these services were not reasonably necessary to any extent. The upper limit of the award which you make for medical and hospital expenses is $_____.

Cases:

Botta v. Brunner, 26 N.J. 82 (1958), *Peer v. Newark*, 71 N.J. Super. 12 (App. Div. 1961); *Mengle v. Shields*, 53 N.J. Super. 76 (App. Div. 1958).

Damages may be awarded for future medical and hospital expenses in accordance with the measure of damages stated above. The test is reasonable probability, according to *Coll v. Sherry*, 29 N.J. 166 (1959). "[S]uch reasonable outlay in the future as may be necessary to heal [plaintiff and his injuries]." *Work v. Philadelphia Supply Co.*, 95 N.J.L. 193, 196 (E. & A. 1920).

Total or partial compensation received by the plaintiff from a collateral source, wholly independent of the wrongdoer, is not applied to reduce the damages recoverable from the wrongdoer, even though the result may be that the plaintiff receives more than total compensation for his injuries. *Long v. Landy*, 35 N.J. 44, 55, 56 (1961) (medical and hospital expenses recoverable although paid by insurance on which defendant had paid

the premiums); *Cornish v. North Jersey St. Ry. Co.*, 73 N.J.L. 263 (Sup. Ct. 1906) (medical expenses recoverable although paid by insurance); *State v. Harrison*, 107 N.J.L. 211 (Sup. Ct. 1933) (hospital expenses recoverable although paid by relatives as a gift).

The fair and reasonable value of medical and hospital services which are donated to the plaintiff may be included in a verdict in favor of the plaintiff in accordance with the collateral source rule. *Harper & James*, Sec. 25.9.

(B) DUTY TO MITIGATE DAMAGES BY MEDICAL AND SURGICAL TREATMENT

It is a general rule that a plaintiff injured by another's negligence (or other wrongdoing) has a duty to exercise ordinary and reasonable care to seek and submit to medical and surgical treatment in order to effect a cure and minimize damages. Failure or refusal to do so bars recovery for consequences which could have been averted by the exercise of such care. In other words, damages that could have been prevented by the plaintiff's exercising reasonable care are not damages proximately caused by the defendant's negligence (or other wrongdoing). However, in this state the injured person is regarded as having the right to avoid, if he chooses, peril to life, however slight, and undue risks to health that go beyond the bounds of reason. A refusal to accept an operation may be unreasonable if the operation involves no danger to life and health and no extraordinary suffering, and, according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from the disability.

Cases:

Budden v. Goldstein, 43 N.J. Super. 340, 350 (App. Div. 1957).

The reasonableness of the refusal is one of fact. *Robinson v. Jackson*, 116 N.J.L. 476, 478 (E. & A. 1936).

(C) LOSS OF EARNINGS

A plaintiff who is awarded a verdict is entitled to damages for loss of earnings proximately caused by his injuries sustained as a consequence of the defendant's negligence (or other wrongdoing). In order to recover such damages, he must be found to have been disabled from working. In fixing the amount of damages for loss of earnings the jury should take into consideration the period of time during which the plaintiff was not employed, his average weekly wages before the accident, any diminution of his average weekly wage upon his return to gainful employment, his earning capacity before and after he sustained his injuries, his special skills, if any, and the availability of employment suitable for the plaintiff if he had not been injured, in its determination of the damages to be awarded for loss of earnings up until the present.

In fixing the amount of damages for loss of future earnings, if any, the jury should take the foregoing factors into consideration and, in addition, the plaintiff's work life expectancy prior to his injuries and the amount which he can earn in such available employment as he will be physically capable of undertaking.

Cases:

". . . [T]he plaintiff is entitled to . . . a fair recompense for the loss of what he would otherwise have earned in his trade or profession and has been deprived of the capacity of earning. . . ." *Smith v. Red Top Taxicab Corp.*, 111 N.J.L. 439, 443 (E. & A. 1933).

Moore v. Pub. Service Coordinated Transport, 15 N.J. Super. 499, 510 (App. Div. 1951) approved a jury charge that damages might be awarded" . . . for such wages as you find from the testimony and from your own experience she will probably lose in the future . . . less such earnings as you may find in a similar manner that she will probably have in her present and future condition. . . ."

A plaintiff has a duty to mitigate his damages by seeking and taking reasonably available employment of which he is capable. Loss of earnings which could have been mitigated are not the proximate result of the defendant's wrongdoing. *Restatement, Torts*, Sec. 924, p. 633. See *Associated Metals, etc., Corp. v. Dixon Chemical, etc.*, 82 N.J. 281, 307 (App. Div. 1964) as to the duty of reasonable care in mitigating damages.

The standard to be applied in fixing damages for loss of future earnings is reasonable probability that the plaintiff's injuries will impair his earning capacity. There must be sufficient evidence upon which the quantum of future loss can reasonably be determined. *Coll v. Sherry*, 29 N.J. 166, 176 (1959).

The collateral source rule (see cases under Model Charge 6.10 (A)) applies to loss of earnings as well as to medical and hospital expenses. The plaintiff may recover damages for loss of earnings although he has been paid his wages or their equivalent pursuant to sick leave or annual leave benefits by his employer or retired on half salary pursuant to a pension contract (*Rusk v. Jeffries*, 110 N.J.L. 307 (E. & A. 1933)).

(D) LOSS OF PROFITS

The measure of damages for loss of profits to a plaintiff who is an owner of a business is the value of the plaintiff's services in carrying on that business which were lost as a proximate result of his injuries. In determining the value of the plaintiff's services, the jury should take into consideration the nature of the business, the capital, assets and personnel employed, the average weekly (or monthly) profits earned before and after the accident and any expense to which the plaintiff was put to hire others to perform services which he had previously performed himself.

Cases:

Woschenko v. Schmidt & Sons, 2 N.J. 269, 278 (1949): "The value of his services is manifestly worth more than the mere cost of hiring another

temporarily to fill his place. The thorough knowledge of the business thus acquired together with personal acquaintance with the customers has a value in the commercial world readily recognized by any business man. The evidence must be such as to directly point up the value of the plaintiff's services in the operation of the business in which case it is not conjectural."

East Jersey Water Co. v. Bigelow, 60 N.J.L. 201 (E. & A. 1897).

Damages may be awarded for future loss of profits if capable of being estimated with a reasonable degree of certainty.

(E) DISABILITY AND IMPAIRMENT

A plaintiff who is awarded a verdict is entitled to fair and reasonable compensation for any permanent or temporary injury resulting in disability to or impairment of his faculties, his health or his ability to participate in activities, as a proximate result of the defendant's negligence (or other wrongdoing). Disability or impairment means worsening, weakening or loss of faculties, health or ability to participate in activities. The measure of damages is what a reasonable man or woman would consider to be adequate and just under all the circumstances of the case to compensate the plaintiff for his injury and his consequent disability and impairment, no more and no less.

Cases:

Simmel v. N.J. Coop Co., 28 N.J. 1 (1958). See also *Botta v. Brunner*, 26 N.J. 82 (1958); *Mengle v. Shields*, 53 N.J. Super. 76 (App. Div. 1958).

Damages may be awarded for future disability and impairment. *Coll v. Sherry*, 29 N.J. 166 (1959).

Damages may be awarded for mental or nervous impairment consequent upon a physical injury. *Greenberg v. Stanley*, 51 N.J. Super. 90 (App. Div. 1958).

(F) PAIN AND SUFFERING

A plaintiff who is awarded a verdict is entitled to fair and reasonable compensation for his pain and suffering, discomfort and distress as a result of injuries sustained through the defendant's negligence (or other wrongdoing). The measure of damages is what a reasonable man or woman would consider to be adequate and just under all the circumstances of the case to compensate the plaintiff for his pain, suffering, discomfort and distress, no more and no less.

ALTERNATE CHARGE

In addition to the claims of damage already mentioned, you may also take into consideration plaintiff's claimed pain and suffering in determining the total adverse consequence to the plaintiff proximately resulting from the defendant's negligence.

Unfortunately, we are unable to provide you with any formula by which the plaintiff's alleged pain and suffering may be measured in terms of money. However, you jurors know from your common experience the nature of pain, and you also know the nature and function of money. The problem of equating the two so as to arrive at a just and fair award of damages is one which requires a high order of human judgment. For this reason the law has provided no better a yardstick for your guidance than your own enlightened and impartial conscience. The problem, as I say, is not one of arithmetical computation, but one which involves the exercise of sound judgment as to what is fair and just and reasonable under all the circumstances. In this undertaking you should, of course, have regard to the testimony of the plaintiff himself bearing on the subject of his discomforts. You should measure that testimony against the background of your own common experience and in light of your own appreciation of the inherent probabilities and your own frank appraisal of the plaintiff's demeanor and general credibility as a witness. Similarly, you should scrutinize all the other evidence presented by both parties on this subject, including, of course, the testimony of the doctors who appeared. Then, having given weight and consideration to each of the factors presented to the extent that you feel such weight and consideration is merited, you will arrive at a judgment which fixes the amount of money plaintiff shall receive in compensation for his pain and suffering.

Cases:

Botta v. Brunner, 26 N.J. 82, 95 (1958); *Doud v. Housing Authority of Newark*, 75 N.J. Super. 340, 346 (App. Div. 1962).

Damages may be awarded for future pain and suffering. *Coll v. Sherry*, 29 N.J. 166 (1959).

(G) AGGRAVATION

If a plaintiff who is awarded a verdict had a pre-existing illness or injury, he is entitled to an award of damages only if the jury finds that his illness or injury was aggravated or made more severe as a result of this accident and only to the extent of such aggravation.

In fixing your award of damages for medical and hospital expenses, loss of earnings, pain, suffering, disability and impairment you may allow the plaintiff such damages as will fairly and reasonably compensate him for injuries sustained in this accident, including any additional medical and hospital expense and loss of earnings and any increased pain, suffering, disability and impairment because of aggravation of a pre-existing illness or injury. You may not award damages in this lawsuit for any medical and hospital expense, loss of earnings, pain, suffering, disability or impairment attributable solely to a pre-existing illness or injury.

If such pre-existing illness or injury did not itself involve pain, suffering, disability or impairment, but combined with the injuries sustained in this accident to produce pain, suffering, disability or impairment, you may award damages to the full extent of such pain, suffering, disability and impairment. If you find that the plaintiff's present condition results in part from a vulnerability or predisposition or a latent disease or weakness without symptoms, his damages would be based upon his present condition of pain, suffering, disability and impairment in full, even though you may speculate that an individual without such pre-disposition or latent condition would have experienced less pain, suffering, disability and impairment.

Cases:

Dalton v. Gesser, 72 N.J. Super. 100 (App. Div. 1962); *McCray v. Chrucky,* 66 N.J. Super. 124 (App. Div. 1961); *Spinning v. Hudson & Manhattan R. Co.,* 11 N.J. Super. 333 (App. Div. 1951); *Hahn v. D., L. & W. R.R. Co.,* 92 N.J.L. 277 (Sup. Ct. 1918), affirmed 93 N.J.L. 463 (E. & A. 1919); *Restatement, Torts,* Sec. 461.

(H) LIFE EXPECTANCY

Plaintiff introduced testimony that his life expectancy today (at the time of the accident) is .... years. That is an estimated figure on the probable length of life based upon statistical data. It is contained in an actuarial table attached to the Rules of this Court. Since it is a general rule you should use it with caution in an individual case. The plaintiff may live longer than the actuarial life expectancy table provides or he may die or be killed in a much shorter period of time. You should consider the life expectancy figure in your determination of damages, if any, to be awarded for future medical and hospital expenses, loss of future earnings, pain, suffering, disability and impairment in the future. You should exercise your sound judgment in applying the life expectancy figure without treating it as a necessary and fixed rule.

Cases:

Dalton v. Gesser, 72 N.J. Super. 100 (App. Div. 1962); *Housen v. Olesky,* 71 N.J. Super. 95 (App. Div. 1961); *Kappovich v. Le Winter,* 43 N.J. Super. 528 (App. Div. 1957); *Dickerson v. Mutual Grocery Co.,* 100 N.J.L. 118 (E. & A. 1924).

(I) CAPITALIZATION

The plaintiff introduced testimony that $ X is the amount which if invested today at 3-1/2% compound interest would produce $1.00 per year for the *y* years of his life expectancy [or work life expectancy]. You may apply this figure of $ X in your award of damages, if any, for future loss of earnings but you need not do so or you may make such adjustment in it as you determine to be fair and reasonable.

If you apply the figure of $ X, do so as follows: determine the amount of the plaintiff's loss of earnings proximately caused by this injury and disability starting today into the future. This may be an amount based upon the difference between what you find the plaintiff would have earned if it had not been for this injury and disability and what you find he will earn in such employment as he is physically capable of undertaking. Reach your calculation of the amount to be awarded for his future loss of earnings by multiplying $ X by what you have determined to be the plaintiff's average dollar loss of earnings per year from now into the future. That amount, or such other amount as you arrive at fairly and reasonably, should be included in your verdict to compensate the plaintiff for his future loss of earnings.

Note:

This model charge may be adapted to provide a formula for calculation of the pecuniary loss to the dependents or next of kin in wrongful death actions.

Further explanatory language to supplement this model charge: "The law says we must ascertain the present value of future losses. Our rules have provided a method which may be used in ascertaining the present value of future losses. There is a difference in the value of an amount of money given as a lump sum at the present time and the present value of the same amount given in periodic future payments, such as weekly (monthly) contributions over a period of years during the next of kin's anticipated life expectancy. A sum of money due at some future time is not worth that much today because if you were paid today you would have the money to invest and it would earn interest. You take the amount you wish to have in the future and discount it, that is, reduce it making allowance for the interest you would earn by getting the money earlier."

Cases:

Kappovich v. LeWinter, 43 N.J. Super. 528, 532 (App. Div. 1957), certification denied, 24 N.J. 112 (1957); *Dickerson v. Mutual Grocery Co.*, 100 N.J.L. 118, 120 (E. & A. 1924).

6.11 DAMAGES—PER QUOD

(A) MEDICAL EXPENSES

A husband (father) is legally responsible for his wife's (infant child's) medical and hospital expenses. In the event that you have determined that the plaintiff wife (infant child) is entitled to a verdict and that the plaintiff husband (father) was not contributorily negligent, you should include in your award of damages to the plaintiff husband (father) the fair and reasonable value of medical services, hospital services, medicines and medical supplies which were reasonably required for the examination, treatment and care of injuries sustained by his wife (infant child) as a proximate result of the defendant's negligence (or other wrongdoing). There is testimony before you as to [doctor's bills, hospital bills, drugs bills

and bills for medical supplies], that these were fair and reasonable in amount and that the medical and hospital services, medicines and medical supplies were reasonably required for the examination, treatment and care of the plaintiff wife's (infant child's) injuries sustained in this accident. You need not award the full amount claimed if you find a verdict in favor of the plaintiff husband (father), if you determine that any of these bills were not fair and reasonable to any extent, or that any of these services were not reasonably necessary to any extent. The upper limit of the award which you may make for the plaintiff husband's (father's) medical and hospital expenses is $_____.

Cases:

Simmel v. N.J. Coop Co., 28 N.J. 1 (1958); *Mathias v. Luke*, 37 N.J. Super. 241 (App. Div. 1955); *Schuttler v. Reinhardt*, 17 N.J. Super. 480 (App. Div. 1952).

See cases under Model Charge 6.10 (A).

A husband's (father's) contributory negligence bars any recovery by him for consequential damages, although his wife (infant child) is entitled to a verdict for her (his) personal injuries. *Pennsylvania R.R. Co. v. Goodenough*, 55 N.J.L. 577 (E. & A. 1893); *Peskowitz v. Lawrence F. Kramer, Inc.*, 105 N.J.L. 415 (E. & A. 1928).

(B) LOSS OF WIFE'S SERVICES, SOCIETY AND CONSORTIUM

A husband is entitled to the services of his wife in attending to her household duties, to her companionship and comfort and to her consortium, that is, marital relations with her. A plaintiff husband who is awarded a verdict is entitled to fair and reasonable compensation for any loss or impairment of his wife's services, society or consortium because of injuries sustained by her as a proximate result of the defendant's negligence (or other wrongdoing). Damages may be awarded not only for total loss of services but for a worsening of their quality. Damages may include but are not limited to out of pocket expenses incurred by the husband in engaging the services of others to perform household duties previously attended to by his wife.

Cases:

Schuttler v. Reinhardt, 17 N.J. Super. 480 (App. Div. 1952); *Rex v. Hutner*, 26 N.J. 489 (1958).

Contributory negligence by the husband bars any recovery of consequential damages for loss of his wife's services, society and consortium. See Cases under Model Charge 6.11 (A).

(C) LOSS OF CHILD'S SERVICES AND EARNINGS

A parent is entitled to the services of his infant child in the performance of household chores and to his earnings until he reaches age twenty one or is emancipated. A parent who is awarded a verdict is entitled to fair

and reasonable compensation for any loss or impairment of his infant child's services and for any loss or diminution of his earnings because of injuries sustained by him as a proximate result of the defendant's negligence (or other wrongdoing).

Adapt Model Charge 6.11(B) on damages for loss of wife's services and Model Charge 6.10(C) on damages for loss of earnings in personal injury actions.

Cases:

Simmel v. N.J. Coop Co., 28 N.J.L. 1 (1958); *Mathias v. Luke*, 37 N.J. Super. 241 (App. Div. 1955).

Contributory negligence by the parent bars any recovery of consequential damages for loss of his infant child's services and earnings. *Harper & James, Torts*, Sec. 23.3.

6.12 DAMAGES—TRESPASS TO REAL PROPERTY

(A) GENERAL

The measure of damages to be awarded to a plaintiff entitled to a verdict is the difference between the fair market value of his property before and after the trespass by the defendant.

If you find that the defendant was in wrongful possession of the property, the damages should include also the profits or earnings, that is, the monetary advantage or income, which derived from the occupation of land during such period of wrongful possession.

Cases:

Huber v. Serpico, 71 N.J. Super. 329 (App. Div. 1962); *Barberi v. Bochinsky*, 43 N.J. Super. 186 (App. Div. 1956); *Manda v. Orange*, 77 N.J.L. 285 (Sup. Ct. 1909). See also *Harper & James, Torts*, Secs. 1.8-1.10; *Dime Sav. Bank of Brooklyn v. Altman*, 275 N.Y. 62, 9 N.E.2d 778 (Ct. App. 1937).

The cost of repair is a proper element to consider in ascertaining the diminution in value resulting from a tortious injury to real property. *Rempfer v. Deerfield Packing Corp.*, 4 N.J. 135 (1950).

(B) SPECIAL VALUE

If the trespasser to land destroyed shade or ornamental trees or shrubbery having special value to the landowner the measure of damages is the fair and reasonable cost of restoring the land to a reasonable approximation of its former condition, without necessary limitation to the diminution in the market value of the land.

Cases:

Huber v. Serpico, 71 N.J. Super. 329 (App. Div. 1962); see also *Restatement, Torts,* 929, Comment (b).

(C) GROWING CROPS

If the trespasser has destroyed crops not yet severed from the land the measure of damages is the probable fair market value of the crops, if they had ripened and been brought to market, minus the reasonable cost of cultivation, harvesting and marketing.

Cases:

Deverman v. Stevens Builders, 31 N.J. Super. 347 (App. Div. 1954). See also *United States v. 576.734 Acres of Land, etc.,* 143 F.2d 408 (3rd Cir. 1944).

(D) TRESPASSING STRUCTURES (ENCROACHMENTS)

If a trespasser erects a structure (encroachment) which the landowner has a right to remove the landowner as plaintiff may recover the cost of removal of that structure (encroachment) but not in excess of the diminution in fair market value of the land resulting from the structure (encroachment).

Cases:

Rempfer v. Deerfield Packing Corp., 4 N.J. 135 (1950); *Barberi v. Bochinsky,* 43 N.J. Super. 186 (App. Div. 1956). See also *Restatement, Torts,* 929, Comment (d).

The general rule setting the diminution of value as the upper limit of recovery is in harmony with the earlier cases. See *Bates v. Warrick,* 77 N.J.L. 387 (Sup. Ct. 1909). The exception to this general rule is found in the "special value" rule. See *Huber v. Serpico,* 71 N.J. Super. 329 (App. Div. 1962).

(E) ACTION BY ONE WITH LESS THAN SOLE POSSESSORY INTEREST

Any person having a possessory interest in the land may recover against a trespasser the full measure of damages for the wrong, holding such fund as constructive trustee for others having a possessory interest.

Note:

Both mortgagor and mortgagee have a cause of action against a trespasser causing damage to the mortgaged premises; the mortgagor being entitled to recover the damage caused to the estate; the mortgagee for the diminution of the value of the security. Recovery by either mortgagor or mortgagee bars suit by the other against the trespasser. *Garrow v. Brooks,* 123 N.J. Eq. 138 (Ch. 1938), *Elwins v. Del. & Atl. Tel. Co.,* 63 N.J.L. 243 (E. & A. 1899), *Schalk v. Kingsley,* 42 N.J.L. 32 (Sup. Ct. 1880). As to Landlord-Tenant see *Todd v. Jackson,* 26 N.J.L. 525 (E. & A. 1857).

(F) PUNITIVE DAMAGES

If the trespass committed by the defendant was malicious or in wanton or reckless disregard of the property owner's rights, the plaintiff may recover, in addition to compensatory damages, punitive damages to punish the defendant for his evil intent or malice and to deter him from committing such unlawful acts in the future.

Cases:

LaBruno v. Lawrence, 64 N.J. Super. 570 (App. Div. 1960), *Trainer v. Wolff*, 58 N.J.L. 381 (E. & A. 1895); *Hollister v. Ruddy*, 66 N.J.L. 68 (Sup. Ct. 1901).

6.13 DAMAGES—CONVERSION

(A) GENERAL

The measure of damages to be awarded to a plaintiff entitled to a verdict is the fair market value of the converted chattel at the time of conversion by the defendant, with interest from the date of conversion. Fair market value is defined as the price which would be agreed upon in good faith negotiations between a willing seller without any compulsion to sell and a willing buyer without any compulsion to buy, under usual and ordinary circumstances.

Cases:

Arnold v. Hamilton, 132 N.J.L. 10 (Sup. Ct. 1944), affirmed *per curiam* 132 N.J.L. 419 (E. & A. 1944); *Ward v. Huff*, 94 N.J.L. 81 (Sup. Ct. 1920); Rule cited with approval in *Winkler v. Hartford Acc. and Ind. Co.*, 66 N.J. Super. 22 (App. Div. 1961), certification denied, 34 N.J. 581 (1961).

Punitive damages may be assessed. *Winkler v. Hartford Acc. and Ind. Co.*, 66 N.J. Super. 22, 29 (App. Div. 1961).

(B) UPON RETURN OF CONVERTED CHATTEL

If the plaintiff has accepted return of the converted chattel the measure of damages is the difference between the fair market value at the time of its conversion and the fair market value at the time of its return plus interest during such period, or in the alternative any damages flowing naturally and proximately from the wrong complained of, including the loss of use of the chattel.

Cases:

Taylor v. Brewer, 94 N.J.L. 392 (Sup. Ct. 1920).

Plaintiff is permitted to recover all damages flowing naturally and proximately from the wrong complained of, including the loss of the use of the chattel. See *Ward v. Huff*, 94 N.J.L. 81 (Sup. Ct. 1920), as modified

by *Winkler v. Hartford Acc. and Ind. Co.*, 66 N.J. Super. 22 (App. Div. 1961). This is the common law measure of damages in the action of trespass *de bonis asportatis.*

Loss of use has been defined as those damages occasioned to the plaintiff by reason of the detention, including personal loss, inconvenience and capital outlay. *Taylor v. Brewer*, 94 N.J.L. 392, 393 (Sup. Ct. 1920), as modified by *Winkler v. Hartford Acc. and Ind. Co.*, 66 N.J. Super. 22 (App. Div. 1961).

Punitive damages may be assessed. *Winkler v. Hartford Acc. and Ind. Co.*, 66 N.J. Super. 22, 29 (App. Div. 1961).

(C) CHOSE IN ACTION OTHER THAN MARKETED SECURITIES

When the action is for conversion of written evidence of a debt, the measure of damages is the value of the property converted, plus interest from the date of conversion. The face value of an instrument for payment of money is *prima facie* its actual value. The defendant is liable only for the actual value if, in fact, less than the face value.

Cases:

Arnold v. Hamilton Inv. Co., Inc., 132 N.J.L. 10 (Sup. Ct. 1944), affirmed *per curiam*, 132 N.J.L. 419 (E. & A. 1944).

(D) MARKETED SECURITIES

If the converted property is stocks or bonds, commercial securities or instruments of fluctuating value on the market, the measure of damages is the highest intermediate fair market value between the time of the conversion and a reasonable time after notice of the conversion within which to replace the securities, plus interest from the date of conversion.

Cases:

Dimock v. United States Nat. Bank, 55 N.J.L. 296 (E. & A. 1893), following the rule of *Galigher v. Jones*, 129 U.S. 193, 32 L. Ed. 658, 9 S. Ct. 335 (1889).

6.14 DAMAGES—SURVIVAL

In the survival action, the administrator as plaintiff is seeking damages for the decedent's hospital and medical expenses and loss of earnings and for any disability and impairment, pain and suffering which the decedent sustained during the final [hours, days, weeks] of his life between this accident and his death. Under the law he is entitled to recover such damages as the decedent would have been entitled to recover had he lived.

Adapt Model Charge 6.10 wherever applicable as to measure of damages.

Cases:

See *N.J.S.* 2A:15-3; *Soden v. Trenton, & c., Traction Corp.*, 101 N.J.L. 393 (E. & A. 1925), historical summary of common law rule, also damages recoverable; see also, *Kotkin v. Caprio*, 65 N.J. Super. 453, 458 (App. Div. 1961), certification denied 34 N.J. 470 (1961); *Ryan v. Public Service Ry. Co.*, 103 N.J.L. 145, 147 (E. & A. 1926); *Prudential Insurance Co. v. Laval*, 131 N.J. Eq. 23 (Ch. 1942).

6.15 DAMAGES—WRONGFUL DEATH ACTION

(A) *IN GENERAL—NO DISPUTE AS TO DEPENDENCY*

In this action, plaintiff ....., as the representative of surviving family members of the decedent ....., seeks to recover damages against defendant contending that defendant negligently (or wrongfully) caused the death of .....

(OPTIONAL: The Legislature has provided by statute, *N.J.S.A.* 2A:31-5, that in such an action where damages are to be awarded "the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death . . .")

Thus, this is a civil action in which plaintiff seeks compensation on behalf of certain survivors of the decedent for the pecuniary or financial loss which plaintiff contends has been and will be suffered because of the death of .....

The phrase "pecuniary or financial injuries" does not refer to any physical injuries sustained by the deceased. Under this action there can be no recovery for any physical or personal injuries sustained by the deceased. (If there is a survival action under *N.J.S.A.* 2A:15-3 *et seq.*, reference may be made to that cause of action for the damage claim due to personal injuries and pain and suffering during decedent's lifetime. See Model Charge 6.14. See also (e) below as to medical, hospital and funeral expenses).

If plaintiff is entitled to recover damages in this case you must limit your consideration to the financial loss suffered by the survivors, measured by what they would have received from the decedent according to reasonable probabilities if the decedent had continued to live. Pecuniary injuries or money losses do not include injuries to the survivors such as emotional distress, anguish, grief and sorrow, or the loss of the society and companionship of the decedent. Such feelings, though real and distressing, cannot be taken into consideration in determining the extent of the financial or pecuniary loss suffered by the survivors. However, financial loss does include not only actual monies which would have been contributed to or expended for the benefit of a survivor, but also includes the reasonable value of benefits which would have been received by a survivor

from the decedent in the nature of services and assistance (as well as training and guidance to a child) if decedent had continued to live.

In determining the amount of damages to be awarded, that is, in determining the extent of the financial loss caused by the premature death of the decedent, all of the circumstances and probabilities which bear upon such financial loss may be considered. Among the factors that you may weigh are the following:

(NOTE:

If decedent is a child see (D) below.)

(a) It is appropriate to consider the age and general state of health of the decedent as well as the survivors. (Comments on evidence may be appropriate).

(b) In this context evidence has been introduced relating to the life expectancies of the decedent and the survivors. (Reference should be made to Model Charge 6.10 (H) as to the life expectancy table.)

(c) You should consider the actual earnings of the decedent at the time of his death, and his potential future earnings during the balance of his life. (Where appropriate, the work life expectancy of the decedent may be considered.)

(d) You should consider the financial contributions (if any) made by the decedent prior to his death to his survivors and the probability of decedent continuing to make financial contributions had he lived.

(e) As noted above, consideration should also be given to the benefits bestowed by the decedent upon a survivor in the form of services or assistance rendered by the decedent and, in the case where the survivor is a child, you may consider the guidance and training afforded by the decedent to his child. It is for you as jurors to determine what reasonable value these services or benefits had and what is the reasonable value to be placed on the services or benefits that will be lost by reason of decedent's premature death.

(OPTIONAL: With respect to a child of the deceased you may consider that decedent had a legal obligation to support such child until the child reaches his majority or until the child is self-supporting, whichever first occurs. You may also consider whether it is probable, if indicated by the evidence, that decedent would have continued to make any contributions to the welfare of such child even after the child has reached his majority).

(f) You should also consider the decedent's own personal expenses. You should consider to what extent the earnings of the decedent (or his financial contributions for the household expenses) were required for his own use, maintenance and personal needs. Thus, in determining the pecuniary loss of the survivors there should be deducted from the earnings (and/or contributions) of the decedent such sums which fairly represent expenses for his own maintenance since such sums would not have been used for the benefit of the survivors.

(g) In evaluating the various factors and in ascertaining the probability of pecuniary loss of the survivors, you should consider the decedent's personality and character, his habits and customs, and the relationship which existed between the decedent and the survivors.

(h) Remarriage of widow or widower (if applicable).

You have been told at the outset that since the death of Mr. ....., his wife, ..., has remarried. Nevertheless, the fact that a widow has remarried and may obtain financial support from her new husband are not factors that you may consider in evaluating the damage claim in this case. More specifically, you cannot reduce the amount of damages by reason of the fact that ..... has remarried. Under our law, the right to damages in a wrongful death action comes into being as of the date of death, and is not defeated or diminished by remarriage of the surviving spouse. The measure of damages is the loss or deprivation of a reasonable expectation of financial advantage which would have resulted from the continued life of the decedent. You must evaluate that expectation of pecuniary advantage as of the date of death without regard to the fact that Mrs. ..... has thereafter remarried (nor can you consider her remarriage in evaluating the financial loss of decedent's surviving children).

1) *General*

N.J.S.A. 2A:31-1 *et seq.;*

H. Greenstone & M. Lane Jr., "Evaluating Death Claims" 89 N.J.L.J. 609 (1966); *Jurman v. Samuel Braen, Inc.*, 47 N.J. 586 (1966); *Gluckauf v. Pine Lake Beach Club, Inc.*, 78 N.J. Super. 8 (App. Div. 1963); *Carianni v. Schwenker*, 38 N.J. Super. 350 (App. Div. 1955); *Kern v. Kogan*, 93 N.J. Super. 459 (Law Div. 1967); *Meehan v. Central R.R. Co. of N.J.*, 181 F. Supp. 594 (S.D.N.Y. 1960); S. *Speiser, Recovery for Wrongful Death*, The Lawyers Co-operative Publishing Co., Rochester, N.Y. (1966, Supp. 1969).

2) *Pecuniary Injuries*

N.J.S.A. 2A:31-5;

Meehan v. Central R.R. Co. of N.J., 181 F. Supp. 594 (S.D.N.Y. 1960); *Dubil v. Labate*, 52 N.J. 255 (1968); *Graf v. Taggert*, 43 N.J. 303 (1964); *Capone v. Norton*, 8 N.J. 54 (1951), remanded, 21 N.J. Super. 6 (App. Div. 1952); *McStay v. Przychocki*, 7 N.J. 456 (1951); *Bohrman v. Pennsylvania R.R. Co.*, 23 N.J. Super. 399 (App. Div. 1952); *Kern v. Kogan*, 93 N.J. Super. 459 (Law Div. 1967).

3) *Factors in Determining Amount of Damages*

Frazier v. Public Service Interstate Transp. Co., 244 F.2d 688 (2d Cir. 1957); *Meehan v. Central R.R. Co. of N.J.*, 181 F. Supp. 594 (S.D.N.Y. 1960); *Carter v. West Jersey & Seashore R.R. Co.*, 76 N.J.L. 602 (E. & A. 1908); *Matthews v. Nelson*, 57 N.J. Super. 515 (App. Div. 1959); *Clark v. Prime*, 18 N.J. Misc. 226, 12 A.2d 635 (Bergen Cty. Ct. 1940).

4) *Remarriage of Widow or Child*

Dubil v. Labate, 52 N.J. 255, 261 (1968)

NOTE: In *Dubil* the court held that the remarriage or the possibility of remarriage of a widow cannot be considered by a jury in reducing the amount of damages. The court said at p. 262:

> "Thus, we believe that—while evidence of the details of a remarriage, such as the earnings of the new spouse or the birth of a child, is to be excluded—the mere fact of a plaintiff's remarriage should not be kept from the jury. The trial judge should instruct the jury, at the beginning of the case, that the plaintiff has remarried but that this fact is to play no role in their determination of the pecuniary advantage which would have resulted from a continuance of the life of the deceased."

Also, at p. 261, the court noted that this rule (excluding from consideration the remarriage of a spouse) would operate to prevent reduction of the damage claim of decedent's dependent children (presumably, in the case where the surviving parent has remarried).

5) *Punitive Damages*

In a wrongful death action punitive damages, based upon fraud, deceit and negligence of a doctor causing death, will not be allowed. *Kern v. Kogan,* 93 N.J. Super. 459 (Law Div. 1967).

(B) *LOSS TO DATE PLUS PRESENT VALUE OF FUTURE LOSS*

(NOTE: If dependency is disputed, charge (C) below at this point.)

If you find that the survivors suffered pecuniary injuries as a result of the death of the decedent, the actual sum recoverable as damages is the amount of such loss to date plus the present value of future financial injury or loss.

To fix the total sum that should be awarded, you should first determine the amount of the survivors' financial loss from the date of death to the present date. You must then determine the present value of the financial losses that may reasonably be anticipated from this time on into the future.

In arriving at such present value, it would be improper to take the amount of financial loss, such as a certain number of dollars per year, and simply multiply this dollar sum by the number of years which you find constitutes the period of time that the decedent would have made contributions to the survivors, because that sum of money would exceed the present value of the financial loss sustained by the survivors. This is so because if plaintiff prevails in this case the survivors would receive their award of damages now in one lump sum, whereas contributions from the decedent would have been spread over a period of time. A sum of money due at some future time is worth less today, because, if paid today in a lump sum rather than in installments, the lump sum received today can be invested or could earn interest in a savings account.

For these reasons, the proper method of determining the present value of future losses requires that the total amount of the future losses (which will result from the premature death of decedent) must be reduced by a certain amount. This is done by making allowance for the interest that this total sum of money would earn for such period of time. This allowance is calculated by discounting or reducing the total future financial losses during the period of expectancy by applying a fixed interest figure.

(OPTIONAL, depending on whether evidence is offered as to interest rates or the Table of Mortality in Appendix I under *R.* 1:13-5: You should determine the interest figure to be applied in making this calculation. It should be a reasonable estimate of the rate of return which, in your judgment, a sum of money invested at the present time is likely to earn over the period of expectancy).

The sum of money which you determine constitutes the present value of the future financial losses of the survivors should represent a fund which will be completely used up or exhausted at the end of the period of expectancy.

(An explanation of capitalization based on the present worth table may be given. See Model Charge 6.10 (I) on Capitalization. *R.* 1:13-5 provides: "The tables of morality and life expectancy printed as an Appendix to these rules shall be admissible in evidence as *prima facie* proof of the facts therein contained." Appendix I provides a table of mortality showing the present value of $1 per year given certain ages and life expectancies based on interest at 3½%. For example, the life expectancy table shows a male age 40 has a life expectancy of 31.4 years, but a present value of $1 per year of 19.5).

NOTE:

In *Housen v. Olesky,* 71 N.J. Super. 95, 98, 99 (App. Div. 1961) plaintiff's attorney requested a charge:

> "'* * * that the jury may consider the present value of one dollar per annum at 3 per cent interest of an annuity of one dollar during life, first payment to be made at the end of the year, in computing the loss suffered by Mrs. Housen, the plaintiff, from the death of her mother, and that if the values so given are of one dollar, they may compute on the basis of the contribution made by her mother to her maintenance and support.'"

The Appellate Court held that:

> "* * * had the jury been charged the request in proper fashion, it could not have intelligently applied it without being informed at the same time as to, and told to use, an appropriate figure representing present value of $1.00 per annum at an approved rate of interest during the life expectancy of the decedent. The figure of $5.8836 computed at 3% interest is set forth in the court-approved Table of Mortality (Appendix to Part IV of the Rules of Civil Practice)."

Note also that the same case held that reference should not be made to the Tables of Mortality and/or Life Expectancy unless they are formally introduced in evidence. 71 N.J. Super. at p. 100.

OPTIONAL—DECREASING VALUE OF DOLLAR: You may also take into account the decrease in the purchasing power of the dollar that may occur, that is, the extent to which inflation will probably reduce the value of money. You may determine to what extent the purchasing power of the dollar will be reduced because of inflation and you should increase the total amount of your award for anticipated future financial losses in order to offset the extent by which inflation will reduce the value of the dollar in the future.

NOTE:

See *Nusser v. United Parcel Service of N.Y., Inc.*, 3 N.J. Super. 64, 69 (App. Div. 1949) where the court said: "Judicial notice (of the deflated value of the dollar) thereof may be properly taken and the jury, in the exercise of its judgment, could have properly considered it in assessing the damages * * *." Cited with approval in *Cabakov v. Thatcher*, 37 N.J. Super. 249, 258 (App. Div. 1955).

(Recapitulation:)

Thus, in determining the amount of damages to be awarded because of the premature death of the decedent, you must determine (1) the amount of financial loss from the date of death until today, and (2) you must add to that amount such sum which represents the present value of anticipated future losses to the survivors. Future losses are adjusted by (a) reducing the total anticipated future loss by an amount which will reflect the present value of those losses, and (b) thereafter, increasing such sum by an amount to reflect the rate of inflation that may be anticipated.

(If death occurred on or after 2/27/68, add an appropriate charge concerning hospital, medical and funeral bills. See (E) below).

Cases and references:

(1) *Damages to Date of Trial Plus Future Losses.*

Danskin, Adm'x. v. Penna. R.R. Co., 83 N.J.L. 522, 530 (E. & A. 1912); *Meehan v. Central R.R. Co. of N.J.*, 181 F. Supp. 594, 620 (S.D.N.Y. 1960); *Frasier v. Public Service Interstate Transp. Co.*, 254 F. 2d 132, 134-135 (2nd Cir. 1958). See *Matthews v. Nelson*, 57 N.J. Super. 515, 519-520 (App. Div. 1959) as to the method of determining present value, and counsel's explanation of actuarial tables and a self-depleting fund. See also Model Charge 6.10 (I).

(2) *Interest.*

The *Danskin* and *Frasier* cases, *supra*, note (1), hold that interest should be added to the loss from the date of death to the date of trial; *cf. R.* 4:42-11.

(C) *DEPENDENCY DISPUTED*

NOTE:

N.J.S.A. 2A:31-4 limits recovery to those persons "entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same." The statute goes on to provide that dependents of decedent take to the exclusion to those next of kin who are not dependent.

(1) *Persons entitled to recover*

If all the survivors were dependent upon the decedent at the time of his death, the damages awarded shall include the financial loss of all survivors (and all would be entitled to share in the damage award). If one of the survivors were dependent upon the decedent at the time of his death, but some or all of such survivors have suffered or will suffer financial loss by reason of that death, the damages to be awarded shall include the financial loss of each such survivor who has or will suffer financial loss by reason of that death.

If you find that some survivors were dependent upon decedent and some were not, the amount of damages to be awarded by reason of decedent's death is limited to the amount of pecuniary loss suffered by those survivors who were dependent upon the decedent at the time of his death, and in such case you must disregard the pecuniary loss, if any, suffered by those survivors who were not dependents, as that term will be defined for you.

NOTE:

The statute leaves some doubt as to the measure of damages in situations where some surviving next of kin were dependent on the decedent and some, who were not dependent upon decedent, nevertheless would suffer pecuniary loss by reason of decedent's death. The above charge follows what appears to be the interpretation in *Turon v. J. & L. Construction Co.*, 8 N.J. 543 (1952) and *Carianni v. Schwenker*, 38 N.J. Super. 350 (App. Div. 1955). Before 1960, *NJ.S.A.* 2A:31-4 provided in part:

> "If any of the persons so entitled were not dependent on the decedent at his death, the remainder of the persons so entitled shall take the same as though they were the sole persons so entitled. If all or none of the persons so entitled were then dependent on him, they shall all take as aforesaid."

In 1960 the statute was amended to read:

> "* * * If any of the persons so entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among them * * *."

The statute may be interpreted to mean that the measure of damages is the total pecuniary loss suffered by all survivors, whether dependent or not, with only those who were dependent entitled to share in the award. Before 1960 the statute expressly

provided that if none were dependent they would all share in the award. The model charge is based on an interpretation that if some were dependent and some were not, only the loss of dependents may be recovered, and the loss of those not dependent should be disregarded in assessing damages. This interpretation would seem to conform to the holding in *Carianni, supra,* expressed there (38 N.J. Super. at 364) as follows: "As the statute now stands the factual issues which devolve upon the jury in a death case include, in addition to those related to liability, (a) the dependence *vel non* of each eligible member of the statutory class; (b) the pecuniary injuries to those members of the class *only* who are found to have been dependent on the decedent where some but not all members of the class were so dependent, and (c) the pecuniary injuries of all members of the class where either all or none of them were so dependent." (Emphasis added).

(2) *Dependency Defined.*

Defendant contends that some, but not all, of the surviving family members were dependent upon the decedent. If some were dependent and others were not, only those survivors who were dependents of decedent are entitled to recover damages against the defendant. Therefore, it is necessary to determine which of the surviving family members were dependent upon the decedent at the time of his death.

A person may receive some benefits by way of financial contribution or services or assistance from the decedent without being a dependent of that decedent. Occasional gifts or contributions made by a person, for example, to a son or daughter who may be married and earning a good living, may not be sufficient to establish dependency. Dependency means that the contributions by way of financial aid, services, or other assistance had aided or would have aided in a substantial or significant way to the maintenance or support of the survivor. For a survivor to be dependent upon the decedent it is not necessary that the entire maintenance or support of the survivor come from the decedent. A survivor may be completely or partially dependent upon decedent for maintenance or support. Even if the decedent's contributions were only a part of the maintenance or support of the survivor, the survivor may be considered a dependent provided such contributions aided the survivor in a substantial or significant (material) way. Where there are contributions to the maintenance of the survivor, dependency may exist notwithstanding the survivor was able to subsist or earn a livelihood or possess the necessities of life without such contributions.

As indicated above, the contribution need not take any particular form. The contribution may be in the form of assistance, care, services or money. Moreover, a survivor may be dependent upon the decedent even though the decedent does not have a legal obligation under the law to support that survivor partially or entirely. In determining whether contributions aided or would aid substantially or significantly (materially), although partially, in the maintenance of a survivor, consideration should be given

to the survivor's position in life and to the survivor's standard of living and the time of decedent's death.

Cases:

Turon v. J. & L. Const. Co., 8 N.J. 543, 559 (1952); *Carianni v. Schwenker*, 38 N.J. Super. 350, 361-363 (App. Div. 1955); See also, *Bohrman v. Penna. R.R. Co.*, 23 N.J. Super. 399, 404-405 (App. Div. 1952). Referring to dependency of a parent upon a child, the court, in *Bohrman* asks whether decedent's child contributed in whole or in part to the maintenance of the claimant, regardless of any legal obligation to do so, but points out that the reasonable expectation of advantage that may be received in the future may be considered, whether in terms of financial assistance or services. Note, also, in *Bohrman* the suggestion that reliance by the survivor upon the contributions, care or services is a factor to be considered.

(3) *Verdict where all or no survivors were dependent.*

If you have determined that all or none of the survivors were dependent upon the decedent at the time of his death, your verdict in the wrongful death action should be expressed as a single lump sum in an amount sufficient in your judgment to compensate all of the survivors for the total or aggregate amount of their combined pecuniary losses. In expressing your verdict in favor of the plaintiff, you should not state a separate award for any individual survivor since the verdict is to be expressed in one single, total sum for all of the survivors.

NOTE:

This charge and the charge in (4) below are based on the interpretation of the statute discussed in the Note under (C)(1) above.

(4) *Verdict where some but not all survivors were dependent.*

If you have determined that some but not all of the survivors were dependent upon the decedent at the time of his death, your verdict in the wrongful death action should be expressed as a single lump sum in an amount sufficient in your judgment to compensate those survivors who were dependent upon the decedent for their pecuniary losses. In expressing your verdict in favor of the plaintiff you should not state a separate award for any individual survivor since the verdict is to be expressed as one single, total sum for all the losses that may be recovered. However, you should also state in your verdict which person or persons you found to have been dependent upon decedent at the time of his death (or who would be a dependent in the future).

NOTE:

(1) *Special Verdicts.*

See *Carianni, supra*, 38 N.J. Super. at 360, where the court suggested that to assure that the verdict accords with the statutory intent "special verdicts under appropriate

instructions from the court" may be the wisest procedure to follow in order to determine (a) whether all or none were dependent, (b) if some were dependent and others not, those of the statutory class who were dependent, and (c) the pecuniary injuries of those members of the class only who were found to have been dependent where some were not.

See also Note under (3) above.

(2) *Apportionment of damages.*

As to the equitable apportionment of damages among survivors, see *Jurman v. Samuel Braen, Inc.*, 47 N.J. 586, 601-602 (1966). There the court held that *N.J.S.A.* 2A: 31-4, as amended, requires the court to make distribution in varying amounts among all dependent beneficiaries, and, where appropriate, a guardian ad litem should be appointed to represent the interests of a dependent child.

(D) *DEATH OF CHILD—ADDITIONAL FACTORS*

(If the decedent is a child, a modified or supplemental charge may be appropriate.)

In determining the amount of damages to be awarded, you should determine the potential earnings the child might have had if his life continued and what, if any, monetary benefit his surviving family members (father and/or mother, etc.) would have been likely to receive during the remainder of his life.

(a) You may consider what services the child would have been likely to perform. (Comments on evidence, if appropriate; *i.e.*, care of the house, cooking, cleaning, washing, ironing, gardening, shoveling snow, assisting in a family business, etc.). In evaluating the claim for loss of services, you may consider the tasks or duties, if any, that the child regularly performed before his death and any additional chores he would be likely to undertake as he grew older.

(b) You may also consider any income the child would probably have earned until he reached his majority or until he left home and started caring for himself. (Comments on evidence, if appropriate, *i.e.*, part-time or summer jobs, etc.).

(c) You may consider also the probable future earnings of the child after he reached adulthood and what share of such income, if any, would he have been likely to contribute to his survivors (father, mother, etc.). In estimating the prospective earnings of the child, you should take into aceount such evidence as has been offered as to any special skills, talents, or propensities displayed by the child and also any education or training that the child would have been likely to receive, including college and graduate school, if such a course of study seems likely. In this context, you may also consider the probability of the child's marrying and rearing a family of his own.

(d) There should be taken into account an estimate of the expenses relating to the decedent. You should determine the amount the child's survivors (father, mother, etc.) would have been expected to expend in supporting, educating, and clothing the child until he became of age or left home and cared for himself, which amount should be deducted from your determination of the monetary loss suffered by his parents.

Cases on Death of Child.

See *Graf v. Taggert,* 43 N.J. 303 (1964); *McStay v. Przychocki,* 7 N.J. 456 (1951); *Gluckauf v. Pine Lake Beach Club, Inc.,* 78 N.J. Super. 8 (App. Div. 1963); *Bohrman v. Pennsylvania R.R. Co.,* 23 N.J. Super. 399 (App. Div. 1952).

(E) *MEDICAL, HOSPITAL AND FUNERAL EXPENSES*

NOTE:

N.J.S.A. 2A:31-5, applicable to accidents occurring on or after February 27, 1968 (*Schmoll v. Creecy,* 54 N.J. 194, 205 (1969)), provides that "hospital, medical and funeral expenses incurred for the deceased" may be recovered in a wrongful death action.

N.J.S.A. 2A:15-3, as amended, effective January 12, 1970, provides that "all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased" may be recovered in a survival action.

If there is both a survival and a wrongful death action, these claims should be allowed as part of the survival action only because they are claims of the estate. It would seem more appropriate for the Legislature to have provided for the recovery of these items only by the executor or administrator of the estate, rather than by an administrator ad prosequendum for the benefit of beneficiaries defined by the Wrongful Death Act. Perhaps it would be appropriate, even at time of trial, to amend the pleadings so that these claims for medical, hospital and funeral expenses can be made part of a survival action rather than as part of a wrongful death action, with the estate of the decedent as the party plaintiff.

(F) *SEPARATE VERDICTS FOR DEATH AND SURVIVAL ACTIONS*

If you award damages in the survival action as well as the death action, you should return a verdict in separate amounts for each action. You may state this verdict as ..... dollars for the survival action and ..... dollars for the dealth action.

6.16 DAMAGES—PERSONAL PROPERTY

(A) GENERAL

If you ultimately find the plaintiff's (personalty involved) was damaged as a result of the defendant's negligence, plaintiff would be entitled to your verdict. Plaintiff would be entitled to money damages from the defendant for the loss suffered.

The measure of damages for such loss is the difference between the market value of the (personalty involved) before and the market value after the damage occurred. If the (personalty involved) has no market value in its damaged condition, the measure of damages is the difference between the market value of the (personalty involved) before the damage occurred and its salvage value in its damaged condition. If the (personalty involved) is not substantially damaged and it can be repaired at a cost less than the difference between its market value before and its market value after the damage occurred the plaintiff's damages would be limited to the cost of the repairs.

Jones v. Lahn, 1 N.J. 358, 362 (1949); *Douches v. Royal*, 1 N.J. Super. 45, 47 (App. Div. 1948); *Associated Metals & Minerals Corp. v. Dixon Chemical & Research, Inc.*, 69 N.J. Super. 305, 314 (Ch. Div. 1961); *Hintz v. Roberts*, 98 N.J.L. 768, 770 (E. & A. 1923).

Limitation: (1) The cost of repairs is evidential on the issue of the difference in value of goods before and after injury, but the cost of such repairs must neither exceed the loss in market value due to the damage nor the automobile's market value immediately before the damage. *Jones v. Lahn*, 1 N.J. 358, 362 (1949)—(damage to tractor-trailer); *Bransley v. Goodman*, 40 N.J. Super. 472, 476 (App. Div. 1956)—(damage to furniture); *Nixon v. Lawhon*, 32 N.J. Super. 351, 354 (App. Div. 1954)—(damage to automobile—cost of car, furnishings and repairs are elements of value); *Douches v. Royal*, 1 N.J. Super. 45, 47 (App. Div. 1948)—(damage to automobile).

(2) Where the automobile was damaged and then sold by plaintiff without any repairs having been made thereon, the measure of damages is the difference between the value of the automobile before it was damaged and the price which was received for it from the purchase (assuming the sale price is not less than the automobile's worth or value in its damaged condition). *Van Sciver v. Public Service Railway Co.*, 96 N.J.L. 13 (Sup. Ct. 1921).

(B) EVIDENCE AS TO VALUE

In determining the amount of money, if any, to be awarded to plaintiff (owner) for the damage to his (personalty involved), you may consider, but are not bound by, the testimony of the plaintiff (owner) as to his opinion of the value of the property before and after it was damaged.

Rodgers v. Reid Oldsmobile, Inc., 58 N.J. Super. 375, 385 (App. Div. 1959); *Nixon v. Lawhon*, 32 N.J. Super. 351, 356 (App. Div. 1954).

Limitation: The owner of personal property may be permitted to testify as to its value before and after damage where such personal property is "of a common class or in general daily use," in the court's discretion, but not where the owner has not the slightest knowledge of such value. *Rodgers v. Reid Oldsmobile, Inc.*, and *Nixon v. Lawhon, supra.*

Notes: These rules for measuring damages are subordinate to the ultimate aim of making good the injury done or loss suffered. "The answer rests

in good-sense rather than in a mechanical application of a single formula." *N.J. Power and Light Co. v. Mabee,* 41 N.J. 439, 441 (1964).

See "Damages," *McCormick* (West Pub. Co. 1969) p. 470 *et seq.*, for full discussion of general subject of damages for personal property losses.

(C) INCIDENTAL DAMAGES AS A RESULT OF MOTOR VEHICLE DAMAGES

A plaintiff who is entitled to a verdict for property damage to a motor vehicle is also entitled to recover for necessary and reasonable out-of-pocket expenses for towing and storage of the vehicle and rental cost of a substitute vehicle whether the property damage to plaintiff's car is partial or total.

As to any of the out-of-pocket expenses, the determination as to necessity for same and the reasonableness of both the cost thereof and the period of time required is for you, the jury, to determine in the light of all the circumstances in which plaintiff found himself following the accident.

Hintz v. Roberts, 98 N.J.L. 768, 771 (E. & A. 1923); *Bartlett v. Garrett,* 130 N.J. Super. 193 (Co. Dist. Ct. 1974).

6.20 DAMAGES—BREACH OF CONTRACT

(A) GENERAL

A plaintiff who is awarded a verdict for breach of contract is entitled to compensatory damages for such losses as may fairly be considered as arising naturally, that is according to the usual course of events, from the defendant's breach of contract; or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of such contract. The test is what a reasonable man would foresee, being fully acquainted with all the facts known to the defendant at the time of the making of the contract.

Compensatory damages for breach of contract are designed under the law to place the injured party in as good a monetary position as he would have enjoyed if performance of the contract had been rendered as promised.

Cases:

525 Main Street Corp. v. Eagle Roofing Co., 34 N.J. 251 (1961); *Marcus & Co., Inc. v. K.L.G. Baking Co., Inc.,* 122 N.J.L. 202 (E. & A. 1939).

Notes:

There are specific subsidiary rules of damages formulated for various situations which are subordinate to the broad rule of damages expressed above. These subsidiary rules of damages as well as the broad rule are

guides requiring considered judicial discretion as to applicability in a particular situation. See *525 Main Street Corp. v. Eagle Roofing Co.*, 34 N.J. 251 (1961).

As to building contracts the disappointed owner may recover the costs of completing the promised performance or making necessary repairs, unless under the facts it is impossible to do so or the costs of completion or repairs would constitute unreasonable economic waste, in which event the measure of damages is the difference in value formula. *Restatement, Contracts,* Sec. 346 (1) (a). In the case of *Price v. B. Construction Co.*, 77 N.J. Super. 485 (App. Div. 1962) involving a clause in a contract warranting that the cellar in a new home being sold would be free from water for a period of one year from date of closing title, the court concluded that the parties bargained (1) not for a one-year result, but (2) for work of greater expectable life but supported by a guarantee for a portion of that period; and that the proper measure of damages was the "entirety of such sums of money as were required to be expended by [plaintiffs] in correcting the defect complained of."

(B) LOSS OF PROFITS

If you should determine that the plaintiff is entitled to a verdict, the law provides that the plaintiff is to be reasonably compensated for any damage sustained by him which was proximately caused by the defendant's conduct in breach of the contract. In arriving at the amount of the award, you should include all damages suffered by the plaintiff because of lost profits within the reasonable contemplation of the parties at the time of the making of the contract; that is to say, profits which the plaintiff would have made but for the breach of the contract by the defendant.

If you find that the plaintiff has in fact suffered loss of profits, proximately caused by the defendant's breach of contract, then the circumstance that the precise amount of plaintiff's damages may be difficult to ascertain should not affect the plaintiff's recovery. The plaintiff is not to be awarded damages for such loss of profits within the reasonable contemplation of the parties as is capable of determination with reasonable certainty.

In arriving at the amount of any loss of profits sustained by the plaintiff, you may consider any past earnings of the plaintiff in his business, as well as any other evidence bearing upon the issue.

Cases:

Van Dusen Aircraft Supplies, Inc. v. Terminal Const. Corp., 3 N.J. 321 (1949); *Feldman v. Jacob Brasfman & Son, Inc.*, 111 N.J.L. 37 (E. & A. 1933); *Interchemical Corp. v. Uncas Printing & Fin. Co. Co., Inc.*, 39 N.J. Super. 318, 329 (App. Div. 1956) (a defendant whose wrongful act creates the difficulty may not complain that the amount of damages cannot be accurately fixed); *Casler v. Weber*, 27 N.J. Super. 396 (App. Div. 1953); *De Ponte v. Mutual Contracting Co.*, 18 N.J. Super. 142, 147, 148 (App. Div.

1952); *Restatement, Contracts,* Sec. 331 ("Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property.")

6.30 DAMAGES—EFFECT OF INSTRUCTIONS

The fact that I have instructed you on the law as to the proper measure of damages should not be considered as intimating any view of the court as to which party is entitled to prevail in this case.

Instructions as to the measure of damages are given for your guidance in the event you find from the evidence in favor of (the plaintiff) (any particular party).

6.31 TAXABILITY OF DAMAGE AWARD IN PERSONAL INJURY CASES

NOTES AND COMMENTS:

Under Federal tax law gross income does not include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." 26 *U.S.C.A.* § 104(a)(2). Damages awarded "through prosecution of a legal suit or action based upon tort or tort type rights" are income tax exempt so far as the plaintiff or other beneficiary is concerned. *Treas. Reg.* § 1.104-1(c), *T.D.* 6169, filed 4-13-56; republished in *T.D.* 6500, filed 11-25-60; amended by *T.D.* 6722, filed 4-13-64.

1. REQUEST TO CHARGE. The majority rule is that the trial judge should not charge the jury on the taxability of a jury's award of damages for personal injuries even though counsel requests such a charge.

Refusal to charge requested instruction that damages awarded to a plaintiff are not subject to income tax has been held not to be reversible error in these cases: *Altemus v. Pennsylvania R. Co.,* 32 F.R.D. 7 (D. Del. 1963); *O'Donnell v. Great Northern R. Co.,* 109 F. Supp. 590 (N.D. Cal. 1951); *Payne v. Baltimore and Ohio Railroad Co.,* 309 F.2d 546 (6 Cir. 1962); *McWeeney v. New York, N.H. & H.R.R. Co.,* 282 F.2d 34 (2 Cir. 1960), *cert. denied* 364 U.S. 870 (1960); *New York Central R. Co. v. Delich,* 252 F.2d 522 (6 Cir. 1958); *Atherly v. MacDonald, etc., Inc.,* 142 Cal. App. 2d 575, 298 P.2d 700 (Dist. Ct. App. 1956); *St. Johns River Terminal Co. v. Vaden,* 190 So. 2d 40 (Fla. App. 1966); *Atlantic Coast Line R. Co. v. Braz,* 182 So. 2d 491 (Fla. App. 1966); *Highshew v. Kushto,* 235 Ind. 505, 134 N.E. 2d 555 (Sup. Ct. 1956); *Maus v. New York, Chicago & St. L. R. Co.,* 165 Ohio St. 281, 135 N.E. 2d 253 (Sup. Ct. 1956); *Bergfield v. New York, Chicago & St. L. R. Co.,* 103 Ohio App. 87, 144 N.E. 2d 483 (Ct. App 1956); *Chicago, Rock Island & P. R. Co. v. Kinsey,* 372 P.2d 863 (Okla. Sup. Ct. 1962); *Crum v. Ward,* 146 W. Va. 421, 122 S.E. 2d 18 (Sup. Ct. App. 1961); *Hardware Mutual Cas Co. v. Harry Crow & Sons, Inc.,* 6 Wis. 2d 396, 94 N.W. 2d 577 (Sup. Ct. 1959); *Behringer v. State Farm Mutual Auto Ins. Co.,* 6 Wis. 2d 595, 95 N.W. 2d 249 (Sup. Ct. 1959).

The following cases hold that the trial judge properly refused to charge the jury that a damage award was not subject to income tax: *Combs v. Chicago, St. P., M. & O. R. Co.,* 135 F. Supp. 750 (N.D. Iowa 1955); *Prudential Insurance Company of*

America v. Wilkerson, 327 F.2d 997 (5 Cir. 1964); *Mitchell v. Emblade,* 80 Ariz. 398, 298 P.2d 1034 (Sup. Ct. 1956); *Henninger v. Southern Pacific Co.,* 250 Cal. App. 2d 872, 59 Cal. Rptr. 76 (Ct. App. 1967); *Atlantic Coast Line R. Co. v. Brown,* 93 Ga. App. 805, 92 S.E. 2d 874 (Ct. App 1956); *Kamamoto v. Yosatuke,* 410 P. 2d 976 (Hawaii Sup. Ct. 1966); *Spencer v. Martin K. Eby Construction Co.,* 186 Kan. 345, 350 P. 2d 18 (Sup. Ct. 1960); *Bracey v. Great Northern Ry.,* 136 Mont. 65, 343 P.2d 848 (Sup. Ct. 1959), *cert. denied* 361 U.S. 949 (1960); *Dixie Feed & Seed Co. v. Byrd,* 52 Tenn. App. 619, 376 S.W. 2d 745 (Ct. App. 1962), *appeal dismissed,* 379 U.S. 15 (1964); *Missouri-Kansas-Texas R. Co. v. McFerrin,* 156 Tex. 69, 291 S.W. 2d 931 (Sup. Ct. 1956); *John F. Buckner & Sons v. Allen,* 289 S.W. 2d 387 (Tex. Ct. Civ. App. 1956).

It was indicated in *Atlantic Coast Line R. Co. v. Brown, supra,* that such instruction would have been improper. In *Briggs v. Chicago, Ct. W. R. Co.,* 248 Minn. 418, 80 N.W. 2d 625 (Sup. Ct. 1957), the court ruled it was improper to instruct the jury that a damage award is exempt from income taxation; and such instruction was declared to be reversible error in *Wagner v. Illinois Central R. Co.,* 7 Ill. App. 2d 445, 129 N.E. 2d 771 (App. Ct. 1955).

Counsel should not be permitted to argue to the jury that whatever amount a plaintiff may receive by way of verdict is not subject to income tax. *Hall v. Chicago & N.W.R. Co.,* 5 Ill. 2d 135, 125 N.E. 2d 77, 50 A.L.R. 2d 661 (Sup. Ct. 1955); *Pfister v. Cleveland,* 96 Ohio App. 185, 113 N.E. 2d 366 (Ct. App. 1953), *appeal dismissed,* 159 Ohio St. 580 112 N.E. 2d 657 (Sup. Ct. 1953) (but failure to object deemed waiver of error).

The rationale for refusing to instruct the jury on the question of income taxes appears in the frequently cited case of *Hall v. Chicago & N.W.R. Co., supra:*

(a) The jury is instructed on the proper measure of damages.

(b) The court cannot assume the jury will not follow those instructions.

(c) Since there is a possibility of harm, it is better to instruct the jury on the proper measure of damages and then rely on the assumption that the jury will follow those instructions.

(d) To include the tax aspect in the instructions would present an extraneous subject which would give rise to conjecture and speculation.

The only reported New Jersey case which deals with the income tax aspect of a damage award in a personal injury action is *Cross v. Robert E. Lamb, Inc.,* 60 N.J. Super. 53 (App. Div. 1960), *certif. denied* 32 N.J. 350 (1960), in which defendant raised for the first time on appeal the failure of the trial judge to charge the jury that the recovery would not be subject to income tax. The Appellate Division declined to treat the question, but noted that the subject is complex and controversial and said, in passing, that most of the cases hold there is no right to such an instruction in view of the uncertain and conjectural nature of the amount of future taxes on future earnings.

Contra: The minority rule is set forth in *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W. 2d 42 (Sup. Ct. 1952), in which the court held that the jury should have been instructed, as requested, that a personal damage award is not taxable under Federal or State law. The reasoning was:

(a) Most jurors are conscious of the impact of income taxes.

(b) Few persons know of the exemption respecting damage awards in tort cases.

(c) Since jurors might believe the award to be subject to income tax, it would be competent and desirable to instruct the jury that an award of damages for personal injuries is not subject to Federal (or State) income taxes.

(d) Such an instruction would for all purposes take the subject of income taxes out of the case.

The weakness of *Dempsey v. Thompson, supra,* is its assumption that jurors consider the matter of income taxes in awarding damages in tort cases and increase the award on that account. As the court said in *McWeeney v. New York, N.H. & H.R.R. Co., supra:*

> "* * * The requested instruction was that the jury should not add something to the recovery because of a factor for which the plaintiff had never suggested it should. Before an appellate court should hold that failure to give such a cautionary instruction was reversible error, there ought to be evidence that juries in general increase recoveries on this account or that the particular jury did so. The published material on the former point is too slender to support a judgment that juries do this generally, and there is nothing to suggest that this one did."

Charging the jury that a verdict would not be subject to Federal or State income taxes was held not to be error in *Poirier v. Shireman,* 129 So. 2d 439 (Fla. App. 1961); and *Stager v. Florida East Coast R. Co.,* 163 So. 2d 15 (Fla. App. 1964). In *Atlantic Coast Line R. Co. v. Braz, supra,* as well as in *Atherly v. Mac Donald, etc., Inc., supra,* there was a suggestion that such charge might be proper; and in *Anderson v. United Air Lines, Inc.,* 183 F. Supp. 97 (S.D. Cal. 1960), the court held that the charge was within the discretion of the trial judge. See also *McWeeney v. New York, N.H., & H.R.R. Co., supra.*

A recommendation that juries should be instructed that compensatory damages are not subject to income tax was made by the American Bar Association and appears in 55 *A.B.A. Journal* 972-973 (1969). See also Morris, 3 *Defense L.J.* 3 (1958). And see *Harper and James, The Law of Torts,* § 25.12, p. 1327 (1956).

For a thorough discussion of the subject, see Morris and Nordstrom, "Personal Injury Recoveries and the Federal Income Tax Law," 46 *A.B.A. Journal* 274 (1960); and Nordstrom, "Income Taxes and Personal Injury Awards," 19 *Ohio State Law Journal* 212, 231 (1958). See also Annotation, 63 A.L.R. 2d 1393 (1959).

2. INQUIRY BY JURY. If the jury, during its deliberations, should make specific inquiry with respect to the tax consequences of a damage award, it is probably within the court's discretion to respond with an additional instruction to the effect that any damages awarded to plaintiff would not be subject to income tax.

In *Spencer v. Martin K. Eby Construction Company, supra,* the court held that it was not reversible error to charge the jury, in response to its inquiry, that it was not to consider the question of whether plaintiff would be liable for income taxes upon any award of damages.

There is no New Jersey case on this point. Even though the majority rule is that the jury should not be instructed with respect to the incidence of income tax, the trial judge, when faced with a specific inquiry by the jury, may decide to answer the inquiry. In that event, the following instruction is offered as a guide:

You are to assume that any award made to plaintiff as damages in this case, if any award is made, is not subject to income tax or other tax. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions

already given by this court on measuring those damages and in no event should you either add to or subtract from that award by any speculation concerning taxes.

3. The question of whether the jury should be instructed by the trial judge as to the tax-free status of awards rendered in personal injury actions should be distinguished from the question of whether taxes on future earnings should be considered in measuring a wage loss or the pecuniary injury to a dependent in a wrongful death action. Some cases hold that taxes on the anticipated earnings of a decedent should be deducted in estimating the pecuniary loss of a decedent in a wrongful death action just as the living expenses of a decedent should be considered. *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 136 A.2d 918, 63 A.L.R. 2d 1378 (Sup. Ct. Err. 1957); *Moffa v. Perkins Trucking Co.*, 200 F. Supp. 183 (D.C. Del. 1963); *O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959). See also 2 *Harper & James, The Law of Torts*, § 25.12, p. 1326 (1956). Other cases hold that taxes on future earnings of decedent should not be taken into consideration even in wrongful death actions. See, for example, *New York Cent. R. Co. v. Delich, supra.* Some courts particularly Federal courts, have adopted a middle ground, namely, where the taxes are appreciable they should be considered, but where a wage earner is in a low bracket the problem of projecting the amount of his taxes does not warrant taking taxes into consideration. See *McWeeney v. New York, N.J. & H.R.R. Co., supra; Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2 Cir. 1966), *cert. denied*, 38 U.S. 1005 (1967). See *Stopford v. Boonton Molding Co., Inc.*, 169, 193 (1970); Annot. 63 A.L.R. 2d 1393 (1959).

NOTE ON RECENT THIRD CIRCUIT COURT DECISION

In *Domeracki v. Humble Oil & Refining Co.*, — F.2d — (3 Cir. 1971), 39 L.W. 2659 (5/25/71), the Third Circuit Court of Appeals held that, in the future, all trial courts in the Third Circuit, upon request of counsel, must instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes when fixing the amount of any award.

In that case plaintiff, a longshoreman, was injured while loading a ship in port, due to the vessel's unseaworthy condition, and the failure of its owner to provide a safe place to work. Defendant submitted a request to charge on the nontaxability of the jury award. The court did not reverse because the District Court refused to charge, but applied the new rule prospectively.

CONCLUSION

On the preceding page a proposed charge is offered for guidance with the comment that a trial judge may decide to use that charge if the jury raises the question. The opinion of the Third Circuit Court of Appeals may add persuasively to the view that such a charge should be given upon request of counsel, as well.

6.40 DAMAGES—PUNITIVE

In addition to the claims of damage already mentioned, you should consider whether plaintiff is entitled to punitive damages, which are awarded in exceptional cases as a punishment of the defendant and as a deterrent to others from following his example.

You may award such damages if you determine that the defendant's act(s) (omission[s]) was (were) actuated by: (1) actual malice, which

is nothing more or less than intentional wrongdoing—an evil-mnided act; *or* (2) an act accompanied by a wanton and willful disregard of the rights of another—in other words, a deliberate act (omission) with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of his act (omission).

Unfortunately, we are unable to provide you with a formula for the amount of punitive damages to be awarded should you find that the facts justify such an award. The law has provided no better yardstick for your guidance than your own enlightened and impartial conscience, and you should exercise your sound judgment as to what is a fair and just and reasonable amount under all the circumstances, remembering that punitive damages are not intended to compensate a plaintiff for injuries but rather are intended to punish the defendant and to deter such conduct in the future. Thus if you award such damages you should in making such an award consider the defendant's pecuniary ability to pay such damages.

Cases:

DiGiovanni v. Pessel, 55 N.J. 188, 190-191 (1970); *Berg v. Reaction Motors Div.,* 37 N.J. 396, 412-414 (1962); *LaBruno v. Lawrence,* 64 N.J. Super. 570, 574-575 (App. Div. 1960).

See Also:

Cabakov v. Thatcher, 37 N.J. Super. 249, 258 (App. Div. 1955); *Derowski v. Zaremba,* 100 N.J. Super. 284, 286 (App. Div. 1968); *Gierman v. Toman,* 77 N.J. Super. 18, 20 (Law Div. 1962).

7.10 PROXIMATE CAUSE—BURDEN OF PROOF

It is the duty of the plaintiff to establish, by the preponderance of the evidence, that the negligent conduct of the defendant was the proximate cause of the accident and of the injuries alleged to have resulted from it.

Cases:

The doctrine of the proximate cause is a limitation upon legal liability for the effects traceable to the defendant since a defendant may be held liable for his negligent conduct only if that conduct was the proximate cause or a proximate cause of the accident. *Barr v. Francks,* 70 N.J. Super. 565 (App. Div. 1961); *Kries v. Owens,* 38 N.J. Super. 148 (App. Div. 1955); *Pisano v. S. Klein,* 78 N.J. Super. 375, 391 (App. Div. 1963).

Wherever the complex of the evidence permits the jury to determine that there were one or more potential causes with which the party sought to be charged was not connected, it is imperative that proximate cause be charged. *Calpado v. Reamer,* 77 N.J. Super. 215 (App. Div. 1962).

It is not necessary that the tortfeasor anticipate the very occurrence which results so long as it can be said that the injury was the natural and probable consequence of the wrongful act and it was within the

realm of foreseeability that some harm might result to the plaintiff. *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356, 367 (App. Div. 1959); *Melone v. Jersey Central Power & Light Co.*, 30 N.J. Super. 95, 105 (App. Div. 1954), affirmed 18 N.J. 163 (1955); *Avedisian v. Admiral Realty Corp.*, 63 N.J. Super. 129 (App. Div. 1960).

7.11 PROXIMATE CAUSE—GENERAL DEFINITION

By proximate cause is meant that the negligence of the defendant was an efficient cause of the accident, that is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about. It is defined as a cause which naturally and probably led to and might have been expected to produce the accident complained of.

7.12 PROXIMATE CAUSE—CONCURRENT NEGLIGENCE OF NONPARTY

When the negligence of two or more persons combines to produce an injury and damages to the plaintiff, the parties concurring in such negligence and bringing about the result are jointly and severally liable for the injury and damages proximity caused thereby, regardless of the degree of their negligent participation.

If you find by the preponderance of the evidence that both the driver of the automobile in which the plaintiff was a passenger and the defendant driver were negligent, and the proximate cause of the plaintiff's injuries was the combined or concurring negligence of both drivers, then your verdict would be for the plaintiff; and this result would follow even though such negligence of the one driver was more or less than that of the other driver.

If you find that the defendant driver was not negligent, or that the sole proximate cause of the plaintiff's injury was the negligence of the driver of the car in which the plaintiff was a passenger, then your verdict would be for the defendant.

Cases:

Robbins v. Thies, 117 N.J.L. 389 (1937); *Daniel v. Gielty Trucking Co.*, 116 N.J.L. 172 (E. &. A. 1935); *Gereghty v. Wagner*, 117 N.J.L. 174 (E. & A. 1936).

Any number of causes and effects may intervene between the first wrongful cause and the final injurious occurrence and if they are such as might, with reasonable diligence, have been foreseen, the last result as well as the first, and every intermediate result, is to be considered as the proximate result of the first wrongful cause. A tortfeasor is not relieved from liability for his negligence by the intervention of acts of third persons, if those acts were reasonably foreseeable. *Menth v. Breeze Corporation, Inc.*, 4 N.J. 428 (1950); *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356, 367 (App. Div. 1959).

7.13 PROXIMATE CAUSE—LIABILITY OF JOINT TORTFEASORS TO PLAINTIFF

If you find that the concurring negligence of two or more of the defendants proximately brought about the plaintiff's injury, [or damage] each is liable to the plaintiff regardless of the relative degree in which each contributed to such injury [or damage].

Cases:

When each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tortfeasors are subject to a like liability. *Ristan v. Frantzen,* 14 N.J. 455, 460 (1954); *Melone v. Jersey Central Power & Light Co.,* 18 N.J. 163, 171 (1955). Our law attaches liability not only to the dominating cause but also to any cause which constitutes at any event a substantial factor in bringing about the injury. *Menth v. Breeze Corporation, Inc.,* 4 N.J. 428, 442 (1950); *Melone v. Jersey Central Power & Light Co.,* 30 N.J. Super. 95, 105; *Daniel v. Gielty Trucking Co.,* 116 N.J.L. 172 (E. & A. 1935); *Hartman v. Brigantine,* 42 N.J. Super. 247, 261 (App. Div. 1956).

7.14 PROXIMATE CAUSE—EFFECT OF INTERVENING CAUSE

The law provides that if a person is injured by the negligence of two (or more) persons acting independently but concurrently in causing the injury, each of the wrongdoers is liable to such injured person for the full amount of the damages. In order to hold a person liable for negligence, such negligence need not be the sole cause of the injury complained of. It is sufficient that the defendant's negligence, concurring with one or more efficient causes, other than the plaintiff's fault, is the proximate cause of the injury.

The term "proximate" means that there must be no other culpable and efficient agency intervening between the defendant's negligence, his dereliction, and the injury and damage.

An intervening cause is the act of an independent agency which destroys the causal connection between the negligent act of the defendant and the wrongful injury, the independent act being the immediate cause, in which case damages are not recoverable from that particular defendant because the original wrongful act is not the proximate cause of the injury.

However, the defendant is not relieved from liability for his negligence by the intervention of acts of third persons, if those acts were reasonably foreseeable. Neither is a defendant relieved from liability by the intervening acts of third persons where his own prior negligence was the efficient cause of the injury and damage.

Cases:

Menth v. Breeze Corporation, Inc., 4 N.J. 428, 441 (1950); *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356, 367 (App. Div. 1959); *Yanas v. Hogan*, 133 N.J.L. 188, 190 (Sup. Ct. 1941); *Davenport v. McClellan*, 88 N.J.L. 653 (E. & A. 1916).

NOTE:

Causes of action arising on and after August 22, 1973 are governed by the Comparative Negligence Statute, *N.J.S.A.* 2A:15-5.1 *et seq.* Model Charges on Contributory Negligence are retained for actions arising prior to that date. Model Charges and Interrogatories for Comparative Negligence are provided at Model Charge 8.30.

8.10 CONTRIBUTORY NEGLIGENCE—DEFINITION

Contributory negligence may be defined as the failure to exercise, in the given circumstances, that degree of care for one's own safety which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.

Cases:

Where there are no facts in evidence upon which plaintiff's contributory negligence could be based, it is error to charge contributory negligence. *Kaufman v. P. R. R. Co.*, 2 N.J. 318, 324 (1949); *King v. Jones*, 47 N.J. Super. 479, 283 (App. Div. 1957); *Orbanus v. Seder*, 48 N.J. Super. 512 (App. Div. 1957); *Gluckauf v. Pine Lake Beach Club, Inc.*, 78 N.J. Super. 8 (App. Div. 1963).

Contributory negligence is not a defense when the alleged offense of defendant amounts to a *willful trespass* or *intentional wrong*. *N.J. Express Co. v. Nichols*, 33 N.J.L. 434 (E. & A. 1867); *Tabor v. O'Grady*, 61 N.J. Super. 446 (App. Div. 1960).

Contributory negligence may be asserted as a defense to a claim for injuries due to "nuisance growing out of negligence." *Hartman v. Brigantine*, 23 N.J. 530 (1957); *Milstrey v. Hackensack*, 6 N.J. 400 (1951); *but see, Hammond v. County of Monmouth*, 117 N.J.L. 11 (Sup. Ct. 1936), and *Hartman v. Brigantine, supra*, p. 534 as to "absolute nuisance."

One who is inattentive to or forgetful of a known and obvious danger which carries a risk of injury is guilty of contributory negligence as a matter of law *unless* some diversion is shown to exist at the time. *Ferrie v. D'Arc*, 31 N.J. 92 (1959).

8.11 CONTRIBUTORY NEGLIGENCE—EFFECT OF

If you find that the plaintiff was negligent and that such negligence was a substantial factor in bringing about the harm complained of, it makes no difference whether the defendant was more negligent than the plaintiff or vice versa. If both were negligent, though in unequal degrees, and

the concurrent negligence of both proximately contributed to a substantial degree to the happening of the event, the affirmative defense of contributory negligence has been established. If, on the other hand, you find that as a proximate result of defendant's negligence, the accident would have occurred regardless of any negligence on the part of the plaintiff, contributory negligence has not been established.

NOTE:

As was pointed out in *O'Brien v. Bethlehem Steel Corporation*, 59 N.J. 114 (1971), what is to be scrupulously avoided is the use of such terms as "in-any-degree" or "however slight" in describing the degree of negligence sufficient to bar plaintiff's recovery. For contributory negligence to lie, therefore, plaintiff's negligence must have been a substantial factor in causing the harm complained of. See Prosser, *Torts*, (3rd ed. 1964), Section 64, p. 431; Restatement, *Torts* 2d, Section 465.

8.12 CONTRIBUTORY NEGLIGENCE—BURDEN OF PROVING

The presence of contributory negligence is never presumed. Just as the plaintiff has the burden of establishing the defendant's negligence, so the defendant, who makes this charge of contributory negligence, must carry the same burden of proof with respect to that defense. This means that he must establish by a preponderance of the evidence, *i.e.*, by the greater weight of the credible evidence, that the plaintiff was guilty of negligence and that such negligence proximately contributed to the happening of the accident and the injuries which followed it.

Cases:

Byer v. H. R. Ritter Trucking Co., 131 N.J.L. 199 (E. & A. 1943).

8.13 CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF CHILDREN

(A.) IN GENERAL (7 YEARS AND OLDER)

The degree of care required of a child (old enough to be capable of negligence) is such as is usually exercised by persons of similar age, judgment and experience. In order to determine whether such a child has been guilty of contributory negligence, it is necessary to take into consideration the age of the child and its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation. Whether the child has been guilty of contributory negligence is a question of fact for you, the jury, to determine.

(B.) WHERE CHILD UNDER 7 YEARS

There is a presumption in the law that a child under the age of seven years is not guilty of contributory negligence. This presumption may be overcome by proof to the contrary. The burden of proof to show a child to be capable of contributory negligence when below the age of seven years is on the defendant.

Cases:

Bush v. N.J. & N.Y. Transit Co., Inc., 30 N.J. 345 (1959); *Dillard v. Fue*, 65 N.J. Super. 234 (App. Div. 1961).

Between the time in life when a person is incapable of exercising care and judgment necessary to avoid and avert danger, and the time when such person is in law an adult and responsibility depends on matters of fact and in this transition period such person may or may not be guilty of contributory negligence.

The degree of care required of a child old enough to be capable of negligence, is such as is usually exercised by persons of similar age, judgment and experience. In order to determine whether such a child has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation.

Nichols v. Grunstein, 105 N.J.L. 363 (E. & A. 1929); *Dillard v. Fue*, 65 N.J. Super. 234 (App. Div. 1961).

As to children under 7, New Jersey follows the *rebuttable presumption* rule. Thus in *Bush v. N.J. & N.Y. Transit Co.*, 30 N.J. 345 (1959), the Supreme Court held:

> "The question of capacity or incapacity is simply a factual inquiry, and is whether the particular child has the capacity to be contributorily negligent, i.e., act unreasonably under the circumstances, in light of the age, training, judgment and other relevant factors applying to the child, and the test to be applied is that applicable to any other question of fact."
>
> "* * *, a trial judge is first to view the matter and if he is of the opinion after a consideration of all relevant factors that the child did not have capacity to be contributorily negligent and that reasonable men could not disagree, he then decides the question of capacity as *a matter of law*, but if he feels that reasonable men can disagree even though he himself would decide for or against incapacity, he must allow the jury to decide the question of incapacity, and the jury, if he finds the particular child had capacity to be negligent, must then decide whether the particular child was negligent."
>
> "After a consideration of the authorities we adopt the view that a child of less than 7 years of age is *rebuttably presumed* to be incapable of negligence and hence the issue *may not* be submitted to the jury in the absence of evidence of training and experience from which the jury could infer that the child was capable of understanding and avoiding the danger of injury involved in the circumstances of the case."
>
> "If evidence of capacity is introduced, then the trial judge must determine if such evidence is sufficient so that reasonable men might disagree concerning the question of whether the child had the capacity to perceive the risk and avoid the danger to himself. If the answer is in the affirmative and if there is further evidence that

the child did not act in a manner which would be expected of a child of similar age, judgment and experience, then the question of contributory negligence must be submitted to the jury."

N.B.

The trial judge must instruct the jury that *there is a presumption of incapacity*, that it is first to determine whether there is such evidence sufficient to overcome the presumption of incapacity and to render the child capable of being contributorily negligent, and, then, if the jury finds that the child is capable, it must determine whether the child was contributorily negligent under the facts of the particular case.

Additional factors which might be introduced to show that a child was capable of negligence whereas the average child the same age would not be, are, for example, his attending school, his being taught traffic safety regulations, his experience in caring for himself in traffic, and any other evidence of the child's physical and mental capabilities.

8.14 CONTRIBUTORY NEGLIGENCE—DUTY OF PASSENGER IN AUTOMOBILE

A passenger in an automobile must exercise such reasonable care and caution for his own safety as an ordinary prudent person would exercise under like circumstances. He has the right to assume, however, that the driver will exercise proper care and caution, and until he knows, or in the exercise of reasonable care should know that the driver is incompetent to operate the vehicle or is operating it in a negligent manner, there is no duty on his part to supervise the driving, to keep a lookout for danger, or to warn of a danger as to which there is reason to believe the driver is aware.

THE FOLLOWING MAY BE ADDED WHERE APPROPRIATE:

However, while the passenger ordinarily has no duty to control or direct the driver, there is a point where passive reliance upon the driver ends and the duty to take affirmative action begins. Thus, when it should become apparent to a reasonably prudent person that the vehicle is being driven negligently, reasonable care requires that the passenger protest or remonstrate with the driver in an effort to persuade him to drive carefully and if such protests are disregarded, there is a duty to leave the car when a reasonable opportunity is afforded, if a reasonably prudent man would do so in like circumstances.

ALTERNATE:

While the negligence of the operator of an automobile is not chargeable to a passenger who has no control over the car, still the passenger is bound to exercise such care for his own safety as the circumstances of the case require.

A passenger in a car, in the absence of any facts or circumstances indicating the contrary, is not required to anticipate that the driver, who has exclusive control and management of the vehicle, will enter a sphere of danger, omit to exercise proper care, to observe the approach of other vehicles, or fail to keep the speed of the vehicle within proper limits, or otherwise improperly increase the risks common to travel.

Note:

The above applies where the relation of master and servant, principal and agent, or mutual responsibility in a common enterprise does not exist.

Cases:

A passenger is bound to exercise such care for his own safety as the exigencies of the situation require. *Melone v. J. C. P. & L. Co.*, 18 N.J. 163 (1955); *Ambrose v. Cyphers*, 29 N.J. 138, 150-151 (1959); *Falicki v. Camden Co. Bev. Co.*, 131 N.J.L. 590 (E. & A. 1944). An invitee is duty bound to warn a driver only of known and appreciated peril if a reasonably prudent person would have given such warning under the same or similar circumstances and the risk could thereby have been averted. *Kaufman v. P. R. R.*, 2 N.J. 318, 323 (1949); *Kaufman v. Huss*, 59 N.J. Super. 64 (App. Div. 1960).

A peril can be said to be known and appreciated when the passenger is (1) aware of the danger, and (2) circumstances indicate to the passenger that the driver is unaware of it.

Kaufman v. Huss, 59 N.J. Super. at p. 76.

It is a question for the jury whether a passenger, by his own overindulgence, contributed to his injury. *Petrone v. Margolis*, 20 N.J. Super. 180 (App. Div. 1952); *Bowman v. C. R. R. of N. J.*, 27 N.J. Super. 370 (App. Div. 1953).

8.15 CONTRIBUTORY NEGLIGENCE—INTOXICATION

(A.) IN GENERAL

The care required of a person who has become intoxicated voluntarily is the same as that required of one who is sober. So long as such a person exercises that degree of care for his own safety which an ordinary prudent and sober person would exercise under the same or similar circumstances, he is not contributorily negligent. But if you find that, by reason of his own voluntary overindulgence in intoxicating liquor, plaintiff exposed himself to manifest danger and sustained bodily injuries which he otherwise could, and which a sober person in the exercise of ordinary foresight and prudence would, have avoided, he would be guilty of contributory negligence and could not recover for such injuries.

Note:

It has been held that negligence is not necessarily to be inferred from proof of intoxication and that a drunken man may be careful.

Bageard v. Consolidated Traction Co., 64 N.J.L. 316 (E. & A. 1900).

Cases:

Petrone v. Margolis, 20 N.J. Super. 180, 188 (App. Div. 1952); *Bowman v. C.R.R. of N.J.*, 27 N.J Super. 370 (App. Div. 1953).

(B.) RIDING WITH INTOXICATED DRIVER

A passenger in an automobile is under the duty to exercise such a degree of care for his own safety as the exigencies of the situation reasonably require. The test to be applied in determining whether voluntarily riding in a motor vehicle operated by a person under the influence of intoxicating liquor constitutes negligence on the part of the plaintiff, is whether an ordinarily cautious and prudent person would under the same or similar circumstances, have incurred the risk of riding with the driver. If you find that the plaintiff voluntarily rode in an automobile operated by a person under the influence of, or affected by, intoxicating liquor after the plaintiff knew, or, in the exercise of reasonable care should have known of the driver's condition, and if you also find that an ordinarily cautious and prudent person would not have incurred the risk of riding with such a driver under the same or similar circumstances, you may find the plaintiff to have been guilty of contributory negligence, provided the intoxication of the driver was a proximate cause of the accident and the injuries resulting therefrom.

Cases:

Petrone v. Margolis, 20 N.J. Super. 180, 188 (App. Div. 1952); *Bowman v. C. R. R. of N. J.*, 27 N.J. Super. 370 (App. Div. 1953).

8.16 CONTRIBUTORY NEGLIGENCE—EFFECT OF PHYSICAL IMPAIRMENT

A person suffering with a physical impairment is bound to exercise that degree of care which an ordinary prudent person suffering from a similar impairment or disability would have exercised under the same or similar circumstances.

Cases:

Berger v. Shapiro, 30 N.J. 89, 102 (1959); *Butelli v. J. C. H. & R. El. Ry. Co.*, 59 N.J.L. 302, 306 (Sup. Ct. 1896); 2 *Harper & James "The Law of Torts"* Sec. 16.7.

8.17 CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF PEDESTRIAN ON SIDEWALK

(A.) IN GENERAL

A pedestrian using the sidewalk, as was the plaintiff here, is required to exercise such care for his own protection as a reasonably prudent person

would have exercised under like circumstances. Your inquiry, then, will be whether under the circumstances the plaintiff by the exercise of ordinary or reasonable care, would have discovered the danger and avoided it.

Cases:

The above rule applies when the defect is in the sidewalk itself. *Milstrey v. Hackensack,* 6 N.J. 400-414 (1951); *Saco v. Hall,* 1 N.J. 377 (1949); *Kelly v. Limbeck,* 86 N.J.L. 471 (Sup. Ct. 1914); *Citro v. Stevens Institute of Technology,* 55 N.J. Super. 295 (App. Div. 1959).

WHEN DEALING WITH STRUCTURES NOT NECESSARILY COMPONENTS OF SIDEWALKS, SUCH A DRAINS, GRATES AND CELLAR DOORS, THE FOLLOWING SECTION (B) MAY BE FOUND TO APPLY WHERE PLAINTIFF HAS NO PRIOR KNOWLEDGE THEREOF.

(B.) ARTIFICIALLY CREATED CONDITIONS FOR PRIVATE USE

While a pedestrian using the sidewalk is required to exercise reasonable care for his own safety, he is entitled to assume that there is no dangerous impediment or pitfall on any part of the sidewalk. He is not obliged to anticipate dangerous conditions and is not negligent merely because he does not look for them, but he must exercise reasonable care to avoid them if he sees or is aware of them.

SEE ALSO NOTE UNDER (A.) ABOVE.

Cases:

Saco v. Hall, 1 N.J. 377 (1949); *Krug v. Warner,* 28 N.J. 174, 183 (1958); *Taverna v. Hoboken,* 43 N.J. Super. 160, 164 (App. Div. 1956).

8.18 CONTRIBUTORY NEGLIGENCE—IMPUTABILITY

(A.) AS TO CHILD'S CLAIM

Where a parent is driving an automobile in which his [or her] child is a passenger, negligence on the part of the parent, if you find it has been established, cannot be imputed to the child merely because of the relationship of parent and child or that of driver and passenger, and thus would not bar a recovery by the child.

(B.) AS TO PARENT'S DERIVATIVE CLAIM

In the event, however, that you find that the contributory negligence of the parent has been established, under rules as I have given them to you, then the parent cannot recover on his derivative claim for loss of the services of the infant plaintiff or for medical or other expenses.

Note:

The above may be modified to cover other situations. (Husband and Wife, etc.). It applies in absence of master and servant, principal and agent, or joint enterprise relations. See note below as to suit under Death Act.

Cases:

In General: N.Y.L.E. & W.R.R. v. N.J. Elec Co., 60 N.J.L. 338 (Sup. Ct. 1897), (see, however, *N.J.S.* 2A:53A-6); *Newman v. Philipsburg Horse Car R.R. Co.,* 52 N.J.L. 446 (Sup. Ct. 1890).

Parent and Child: Hedges v. McManus, 10 N.J. Misc. 336, 342 (Sup. Ct. 1932); *Maccia v. Tynes,* 39 N.J. Super. 1 (App. Div. 1956).

Husband and Wife: Peskowitz v. Kramer, 105 N.J. 415 (E. & A. 1928); *Kimpel v. Moon,* 113 N.J.L. 220 (Sup. Ct. 1934).

Administrator Ad Pros. and Decedent: Bastedo v. Frailey, 109 N.J.L. 390 (E. & A. 1932) (sole next of kin may recover in spite of contributory negligence); Consol. *Trac. v. Hone,* 59 N.J.L. 275 (Sup. Ct. 1896).

8.19 CONTRIBUTORY NEGLIGENCE—MEDICAL MALPRACTICE CASE

Contributory negligence is negligence on the part of a person suffering injury or damage which proximately contributes to bring about the injury and damage complained of. In order to constitute a bar to plaintiff's claim, the fault asserted to constitute contributory negligence of the plaintiff (patient) must have been an active and efficient contributing cause of the injury; it must have been simultaneous and cooperating with the fault of the defendant; it must have entered into the creation of the cause of action, and have been an element which constituted it.

Note:

In using the above, define Proximate Contributing Cause.

Cases:

The general rules relating to contributory negligence must be sharpened considerably in Medical Malpractice Cases and care must be taken to tailor the charge to the facts. *Flynn v. Stearns,* 52 N.J. Super. 115 (App. Div. 1958).

Where the fault of the patient is subsequent to the fault of the physician, *it only affects the amount of the damages* recoverable by the patient and is not such contributory negligence as bars the action against the physician. *Flynn v. Stears, supra.*

In order for contributory negligence on the part of the plaintiff to bar a recovery by such plaintiff, the contributory negligence must a proximate cause of the injury. (define Proximate Cause) *Flynn v. Stearns, supra.*

8.20 CONTRIBUTORY NEGLIGENCE—WHERE DEFENDANT'S ACTION WILLFUL, WANTON OR MALICIOUS, OR IN RECKLESS DISREGARD OF PLAINTIFF'S SAFETY

In this case, the plaintiff [also] alleges that the acts of misconduct of the defendant were willful, wanton or malicious. If you find that the defendant was guilty of willful, wanton or malicious misconduct which proximately brought about plaintiff's injuries, it would make no difference whether or not the plaintiff was guilty of contributory negligence. In the event you so find, the contributory negligence of the plaintiff, even if you find it to be present here, would not bar a recovery by him [her].

THE FOLLOWING MAY BE ADDED WHERE APPROPRIATE:

However, if you find that the conduct of the plaintiff himself, just before and at the time of the occurrence in question was also willful, wanton or malicious, and if you also find that such conduct proximately contributed to bring about such occurrence, the plaintiff cannot recover from the defendant.

Note:

If the above is charged, jury should also be given definition of willful, wanton and malicious and of proximate cause.

Cases:

Tabor v. O'Grady, 61 N.J. Super. 446 (App. Div. 1960); 2 *Harper and James, Sec. 22.6; Iaconio v. D'Angelo,* 104 N.J.L. 506 (E. & A. 1928).

Plaintiff's contributory negligence, if any, will not bar a recovery by the plaintiff if the injuries were caused by the defendant's reckless disregard for such plaintiff's safety, but if plaintiff with knowledge of defendant's conduct and the danger it poses to him, recklessly exposes himself, he is barred from recovery.

Restatement, Torts, Sec. 482.

8.21 FEDERAL EMPLOYERS LIABILITY ACT—COMPARATIVE NEGLIGENCE

If, in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that the plaintiff was contributorily negligent, you will apply the following provision of the *Federal Employers Liability Act,* 45 U.S.C.A., Sec. 53:

"In all actions against any common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

This provision which deals with the effect of the employee's contributory negligence upon the amount of his recovery states two principles of law.

A. The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but

B. If the employee is guilty of contributory negligence the effect of such contributory negligence is that the damages the employee is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

These provisions of law are applicable to the facts in this case in the following manner:

First, ascertain the amount of damages that the plaintiff would be entitled to without reference to his contributory negligence.

Second, ascertain the proportion or percentage of such amount of damages which is attributable to plaintiff's contributory negligence.

The third step will be for you to diminish the amount first ascertained by you, by the proportion or percentage of contributory negligence ascertained in the second step.

The amount remaining is the amount the plaintiff is entitled to.

ALTERNATE CHARGE

If, in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that the plaintiff was contributorily negligent, you will apply the following provision of the *Federal Employers Liability Act*, 45 U.S.C.A., Sec. 53:

> 'In all actions against any common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

This provision which deals with the effect of the employee's contributory negligence upon the amount of his recovery, states two principles of law.

A. The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but

B. If the employee is guilty of contributory negligence the effect of such contributory negligence is that the damages the employee is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

To explain how to apply the doctrine of comparative negligence to the facts of this case I shall use an illustration.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 50%. You would compute what 50% of X dollars is, that is 50 cents times each of X dollars, and diminish the amount of X dollars by 50% or 50 cents out of each dollar, which would leave the amount of 50% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 10%. You would compute what 10% of X dollars is, that is 10 cents times each of X dollars, and diminish the amount of X dollars by 10% or 10 cents out of each dollar, which would leave the amount of 90% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 90%. You would compute what 90% of X dollars is, that is, 90 cents times each of X dollars, and diminish the amount of X dollars by 90% or 90 cents out of each dollar, which would leave the amount 10% of X dollars to which the plaintiff would be entitled in your verdict.

Notes:

State and Federal courts have concurrent jurisdiction in Federal Employers Liability Act cases. See 45 *U.S.C.A.*, Sec. 56.

45 *U.S.C.A.*, Sec. 51 provides generally that every common carrier by railroad, if negligent, shall be liable to its employees for damages arising out of injuries or death.

45 *U.S.C.A.*, Sec. 53 provides that "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, C. 140, Sec. 3, 35 Stat. 66."

The proviso in the foregoing refers to *Title* 45, Chapter 1, Sec. 1 *et seq.* (Safety Appliance Act) which required railroads to incorporate certain safety appliances and equipment on railroad engines and cars for the protection of employees and travelers.

Cases:

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L.Ed. 610, 63 S. Ct. 444 (1943); *Bascho v. Pennsylvania Railroad Co.*, 3 N.J. Super. 86, 90, 91 (App. Div. 1949); *Hardy v. D.L. & W.R.R. Co.*, 97 N.J.L. 358, 361 (Sup. Ct. 1922); *Koshorek v. Pennsylvania Railroad Co.*, 318 F.2d 364 (3d. Cir. 1963).

As to concurrent jurisdiction see *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, 62 S. Ct. 827 (1942). Forum non conveniens may be asserted by a State court in a F.E.L.A. case. *Vargas v. A.S. Bull Steamship Co.*, 44 N.J. Super. 536 (App. Div. 1957).

8.22 JONES ACT—COMPARATIVE NEGLIGENCE

If in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that the plaintiff was contributorily negligent, you will apply the following provision of 46 U.S.C.A., Sec. 688 commonly referred to as the Jones Act:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply, and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This statute extends to seamen the benefits of the Federal Employers Liability Act which as related to this case provides that the fact that the seaman may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such seaman.

This provision which deals with the effect of the employee's contributory negligence upon the amount of his recovery, states two principles of law.

A. The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but

B. If the employee is guilty of contributory negligence the effect of such contributory negligence is that the damages the employee is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

These provisions of law are applicable to the facts in this case in the following manner:

First, ascertain the amount of damages that the plaintiff would be entitled to without reference to his contributory negligence.

Second, ascertain the proportion or percentages of such amount of damages which is attributable to plaintiff's contributory negligence.

The third step will be for you to diminish the amount first ascertained by you, by the proportion or percentage of contributory negligence ascertained in the second step.

The amount remaining is the amount the plaintiff is entitled to.

ALTERNATE CHARGE

If in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that the plaintiff was contributorily negligent, you will apply the following provision of 46 U.S.C.A., Sec. 688 commonly referred to as the Jones Act:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the commonlaw right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.".

This statute extends to seamen the benefits of the Federal Employers Liability Act which as related to this case provides that the fact that the seaman may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such seaman.

This provision deals with the effect of the employees contributory negligence upon the amount of his recovery, states two principles of law:

A. The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but

B. If the employee is guilty of contributory negligence the effect of such contributory negligence is that the damages the employee is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

To explain how to apply the doctrine of comparative negligence to the facts of this case I shall use an illustration.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 50%. You would compute what 50% of X dollars is, that is, 50 cents times each of X dollars, and diminish the amount of X dollars by 50% or 50 cents out of each dollar, which would leave the amount 50% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 90%. You would compute what 90% of X dollars is, that is, 90 cents times each of X dollars, and diminish the amount of X dollars by 90% or 90 cents out of each dollar, which would leave the amount 10% of X dollars to which the plaintiff would be entitled in your verdict.

Notes:

Causes of action under the Jones Act may be tried in state courts. See Title 46, *U.S.C.A.* Sec. 688; *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 87 L.Ed. 596 (1943); *Romero v. International Term. Operat Co.*, 358 U.S. 354, 3 L.Ed. 2d 368, 79 S. Ct. 468 (1959).

Title 46, Chapt. 18, Sec. 682 *et seq.* of the *U.S. Code* (Merchant Seamen) commonly referred to as the Jones Act provides in Sec. 688 that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

This extends to seamen the benefits (including the comparative negligence doctrine) of the Federal Employers Liability Act.

Cases:

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 98 L. Ed. 143, 74 S. Ct. 202 (1953); *Nygren v. American Boat Cartage, Inc.*, 290 F. 2d 547 (2d Cir. 1961; *Duplanty v. Matson Navigation Company,* 53 Wash. 243, 333 P. 2d 1092 (Sup. Ct. 1959); *Allan v. Oceanside Lumber Company,* 214 Or. 27, 328 P. 2d 327 (Sup. Ct. 1958); *Wood Towing Corporation v. West,* 181 Va. 151, 23 S.E. 2d 789 (Ct. App. 1943); *Boles v. Munson S.S. Lines, Inc.*, 256 N.Y.S. 709, 235 App. Div. 175 (1932).

8.23 THIRD PARTY ACTION UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—COMPARATIVE NEGLIGENCE

If in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that plaintiff was contributorily negligent, you will apply the following principle of law commonly referred to as the law of comparative negligence.

In an action such as this, to recover damages for personal injuries, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

This provision which deals with the effect of the plaintiff's contributory negligence upon the amount of his recovery, states two principles of law.

A. The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery, but

B. If the plaintiff is guilty of contributory negligence the effect of such contributory negligence is that the damages the plaintiff is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

These provisions of law are applicable to the facts in this case in the following manner:

First, ascertain the amount of damages that the plaintiff would be entitled to without reference to his contributory negligence.

Second, ascertain the proportion or percentage of such amount of damages which is attributable to plaintiff's contributory negligence.

The third step will be for you to diminish the amount first ascertained by you, by the proportion or percentage of contributory negligence ascertained in the second step.

The amount remaining is the amount the plaintiff is entitled to.

ALTERNATE CHARGE

If in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that plaintiff was contributorily negligent, you will apply the following principle of law commonly referred to as the law of comparative negligence.

In an action such as this, to recover damages for personal injuries, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

This provision which deals with the effect of the plaintiff's contributory negligence upon the amount of his recovery, states two principles of law:

A. The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery, but

B. If the plaintiff is guilty of contributory negligence the effect of such contributory negligence is that the damages the plaintiff is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

To explain how to apply the doctrine of comparative negligence to the facts of this case I shall use an illustration.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 50%. You would compute what 50% of X dollars is, that is, 50 cents times each of X dollars, and diminish the amount of X dollars by 50% or 50 cents out of each dollar, which would leave the amount 50% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 10%. You would compute what 10% of X dollars is, that is, 10 cents times each of X dollars, and diminish the amount of X dollars by 10% or 10 cents out of each dollar, which would leave the amount of 90% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his contributory negligence is 90%. You would compute what 90% of X dollars is, that is, 90 cents times each of X dollars, and diminish the amount of X dollars by 90% or 90 cents out of each dollar, which would leave the amount 10% of X dollars to which the plaintiff would be entitled in your verdict.

Notes:

Third party actions under the Longshoremen's and Harbor Workers; Compensation Act may be tried in state courts. See *Title* 33 *U.S.C.A.*, Sec. 933; *Paxos v. Jarka Corp.*, 314 Pa. 148, 171 A. 468 (Sup. Ct. 1934); *Kermarec v. Compagnie Generale Transatlantique*, 348 U.S. 625, 3 L.Ed. 2d 550, 79 Sup. Ct. 406 (1949).

Title 33 (Navigation and Navigable Waters) Chapt. 10, Sec. 901 *et seq.* of the *U.S. Code*, is the Longshoremen's and Harbor Workers' Compensation Act.

Compensation is payable irrespective of fault in respect to disability or death of an employee if the disability or death results from an injury occuring upon the navigable waters of the United States (including any dry dock).

The remedy under this Workers' Compensation Act is exclusive and in place of all other liability of such employer to his employee or legal representative.

In addition to the foregoing remedy, longshoremen and harbor workers may also have a third party action against the vessel or its owner grounded on negligence or unseaworthiness or both. Such an action may and generally is brought in a Federal District Court.

However, the action under either theory may also be brought in a state court of the state in whose territorial waters the injury occurred or where jurisdiction over the parties may be obtained.

In such cases the Federal Maritime Law prevails with the comparative negligence rule applying.

Cases:

Reed v. S.S. Yaka, 373 U.S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349 (1963); *United N.Y. & N.J. Pilots Asso v. Halecki*, 358, U.S. 613, 3 L. Ed. 2d 541, S. Ct. 417 (1959); *Romero v. International Terminal Operat. Co.*, 358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959); *Kermarec v. Compagnie Generale Transatlantique*, 348 U.S. 625, 3 L. Ed. 2d 550, 79 S. Ct. 406 (1959); *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L. Ed. 143, S. Ct. 202 (1953); *Caldarola v. Eckert*, 332 U.S. 155, 91 L. Ed. 1968, 67 S. Ct. 1569 (1947).

8.30 COMPARATIVE NEGLIGENCE—INTERROGATORIES [FOR USE IN CAUSES OF ACTION ARISING ON AND AFTER AUGUST 22, 1974]

The interrogatories selected by the committee for submission to the jury on the issue of comparative negligence represent a compromise between the extremely general and the extremely specific type of interrogatory and have been included in the model charge because it was thought that they would have the widest possible application. Questions more general or more specific in nature could be and should be utilized in a particular case where either more specificity or less generality is required. Thus, in a case where proximate cause is not a seriously contested question, the Judge might properly choose to combine the questions of negligence and proximate cause into one question. The same would be true with respect to questions bearing on plaintiff's negligence and causal relationship to that question and the cause of the accident.

This charge deals only with the simplest of factual situations wherein one plaintiff is suing one defendant. Where a counterclaim is asserted, the same six questions should be submitted with an additional question being put to the jury in such a case requiring them to evaluate the defendant's damage claims. In cases dealing with multiple plaintiffs' injuries,

question 3, 4 and 6 would have to be submitted with respect to each additional plaintiff. For each additional defendant, sued as a joint-tort-feasor, interrogatory questions 1 and 2 would have to be submitted for each defendant so joined.

1. Follow usual form of charge with respect to the nature of the jury's function as distinguished from the court's obligation of the trial of the case, including charges concerning credibility, use of pretrial discovery devices, expert witnesses, and the like.

2. Follow with the normal charge concerning burdens of proof in the context of the elements of the plaintiff's case with respect to which he has the burden of proof.

3. Define the term "negligence" generally and as applied to this specific case, as you would in a normal charge involving concepts of negligence and proximate cause.

4. The committee recommends that the term "contributory negligence" be omitted and the term "plaintiff's negligence" used in its place. Define this term in the same manner in which contributory negligence has heretofore been defined, leaving out any portions of that model charge which suggest to the jury that degrees of negligence between a plaintiff and a defendant are irrelevant.

5. This portion of the charge should be followed by a more detailed description of the jury's function with respect to evaluating the quantum of negligence on the part of all parties, comparing their respective degrees of fault with respect to the accident, and computing or translating these degrees of fault into a percentage of the total amount of negligence causing the accident.

6. Read the specific interrogatories to the jury together with an explanation of each one. RIDER A.

7. Define for the jury the several measures of damages applicable to this specific case and follow with an explanation that the full amount of plaintiff's loss is to be calculated irrespective of fault, or degrees thereof, or irrespective of whose obligation the payment of damages is finally determined to be.

RIDER A

I have just described to you the various concepts with which you are going to have to deal in deciding the present case. To assist you in reaching a verdict you will have with you in the jury room a form consisting of questions calling for certain answers. Your duty will be discharged by answering such of these questions as under the evidence and the court's instructions it becomes necessary to answer in order to arrive at a complete verdict.

Question #1 deals with plaintiff's allegations as to defendant's negligence. In order to answer this question you are going to have to decide whether the plaintiff has sustained his burden of proof with respect to defendant's negligence. I am going to read to you question #1; it reads:

Was defendant, John Jones, negligent?

Yes .....
No .....

If you conclude that plaintiff has (have) failed to sustain the burden of proving defendant's negligence, the answer to question #1 would be "No;" you would check the appropriate answer and then you have need to answer no further questions but you would return your verdict at this point. If, however, on the other hand, you conclude that plaintiff has (have) proven defendant's negligence, you will answer question #1 "Yes" and proceed to answer question #2.

Question #2 deals with plaintiff's allegations that defendant's negligent conduct was a proximate cause of the accident (injuries) to plaintiff. Question #2 reads as follows:

Was the negligence of defendant, John Jones, a proximate cause of the accident?

Yes .....
No .....

If you find the plaintiff has failed to prove that the negligent conduct of the defendant was a proximate cause of the accident, then you will answer question #2 "No" and check the appropriate answer on the form. If that should be your answer to question #2, you would need to answer no further questions but would return your verdict at this point. However, if you conclude that the plaintiff has met the burden of proving that defendant's negligent conduct was a proximate cause of this accident, then you will answer question #2 "Yes," check the appropriate answer, and proceed to deal with question #3.

Question #3 deals with defendant's allegation that plaintiff was negligent. Question #3 reads as follows:

Was plaintiff negligent?

Yes .....
No .....

If you find the defendant (defendants) has (have) failed to meet its burden of proving plaintiff's negligence, you will answer question #3 "No," check the appropriate answer to question #3, and then pass directly on to the damage question, question #6, which is described on the form as a

"damage question." If, on the other hand, you find the defendant has proven the plaintiff was negligent, you will answer question #3 "Yes" and go on to deal with question #4.

Question #4 deals with defendant's allegations that plaintiff's negligence was a proximate cause of the accident. Question #4 reads as follows:

Was plaintiff's negligence a proximate cause of the accident?

Yes .....
No .....

If you find that the defendant has met its burden of proving that the plaintiff's negligence was a proximate cause of this accident, then you will answer question #4 "Yes," check the appropriate answer on the form and return your verdict at this point.* However, if you find on the other hand, that defendant has failed to prove plaintiff's negligent conduct was a proximate cause of the accident, then you will answer question #4 "No" and go on to answer question #6, which is the question requiring evaluation of damages.

After you have answered those questions these instructions have required you to answer, examine your answers. If you find that the answers to all four questions are "Yes," then you will have to answer question #5. In other words, if you find from your answers that you have concluded that both the defendant and the plaintiff were negligent and that their respective negligent conduct was a proximate cause of the accident, then you are going to have another task to perform and another question to answer—question #5. You are going to have to evaluate the conduct of both the plaintiff and the defendant with a view to determining the degree of fault with respect to this accident attributable to each, and express that degree of fault in terms of a percentage figure—taking the combined fault of all parties to this lawsuit as being 100%.

In other words, you shall assume that the negligence of all parties to this lawsuit is taken to be 100%; then determine what percentage of that total amount of negligence is to be attributable to defendant and what percentage of that total negligence is to be attributable to the plaintiff. Your answer will be expressed in percentage terms and the total of all percentages which you assign to each party must add up to 100%.

Thus, I will now read to you question #5. You will note that it recites the instructions that I have just given you in oral form. Question #5 reads as follows:

If you find that you have answered all the previous four questions "Yes," i.e., you have found that both the plaintiff and the defendant were

*In trials wherein both liability and damages are in issue, the Jury will then be instructed to proceed to consider the damage phase of the case.

negligent and that their respective negligent conduct proximately caused the accident, then you must answer this question—taking the combined negligence of all parties to this lawsuit which proximately contributed to the happening of this accident as being 100%—what percentage of such total negligence is attributable to:

a. Defendant ..... Answer— —%
b. Plaintiff ..... Answer— —%
TOTAL—100%

NOTE:

The question and the instructions will have to be modified to accommodate the number of claims, the number of plaintiffs, and the number of defendants.

If you have determined that the defendant was solely negligent or that both plaintiff and defendant were negligent, it then becomes your duty to determine the amount of money which would reasonably compensate plaintiff for the injuries proximately caused by the accident in question. For that reason I am going to give you instructions with respect to the measure of damages in a case as the present one, for your guidance, in the event you need to consider this question.

[PROCEED WITH YOUR CHARGE ON DAMAGES]

After having considered the evidence in this case bearing on plaintiff's injuries and their consequences, you will determine what amount of money would fairly and reasonably compensate plaintiff for his injuries and losses proximately resulting from the accident in accordance with the law as just given you and state the dollar amount of your conclusion in answer to question #6 which, you will note, requires a lump sum dollar amount. The evaluation of plaintiff's injuries and damages in money terms should be made irrespective of which party is at fault or to what degree, or who is to ultimately pay damages to be assessed. Here, you, members of the jury, are only concerned with evaluating plaintiff's injuries and damages without regard to whose fault proximately caused them. Question #6 reads as follows:

What amount of money would reasonably and fairly compensate the plaintiff for his injuries and losses?

$.....

AS TO LIABILITY

1. Was defendant, ..., negligent? Yes .... No ....

2. Was the negligence of defendant, ..., a proximate cause of the accident? Yes .... No ....

3. Was plaintiff negligent? Yes .... No ....

4. Was plaintiff's negligence a proximate cause of the accident? Yes .... No ....

5. If you find that you have answered all the previous questions Yes, i.e., you have found that both the plaintiff and the defendant were negligent and that their respective negligent conduct proximately caused the accident, then you must answer this question—taking the combined negligence of all parties to this law suit which proximately contributed to the happening of this accident as being 100%—what percentage of such total negligence is attributable to:

a. Defendant ..... Answer— —%
b. Plaintiff ..... Answer— —%
TOTAL—100%

AS TO DAMAGES

6. What amount of money would reasonably and fairly compensate the plaintiff for his injuries and losses? $.....

9.10 ASSUMPTION OF RISK (In the primary sense)

In defense of the plaintiff's action, defendant asserts that the plaintiff assumed the risk. This simply means that defendant denies that he was under a duty to act in any particular manner toward plaintiff (or, asserts that he fulfilled every duty charged upon him by the law with respect to his conduct toward plaintiff) and that any injury which plaintiff sustained arose out of risks or dangers which were inherent in the transaction in which plaintiff was engaged, and concerning which defendant owed him no duty. In short, by this defense, defendant claims that he has acted as a reasonably prudent man under the circumstances and that plaintiff has been injured through the operation of risks which arise out of the ordinary course of affairs, completely outside of any duty cast upon defendant by law.

If you find that plaintiff's injury resulted from dangers which were inherent in the transaction in which he was engaged and that defendant exercised the care of a reasonably prudent man in his conduct toward plaintiff with reference to such dangers, then defendant was free of negligence and plaintiff would be barred from recovery.

Cases:

Krauth v. Geller, 31 N.J. 270, 273-274 (1960); *Meistrich v. Casino Attractions, Inc.*, 31 N.J. 44 (1959).

The foregoing should *not* be charged where the defense is urged to defeat a recovery despite a demonstrated breach of defendant's duty. It is an attempt to establish in abstract terms the principles of assumption of risk in the primary sense as set forth in the opinion of Chief Justice Weintraub *in Meistrich v. Casino Attractions, Inc., supra,* pp. 47-56. The opinion clearly indicates that assumption of risk in the secondary sense may be equative with contributory negligence. Accordingly, whenever the issue goes to the conduct of plaintiff with respect to the prudent man's standard, the defense of contributory negligence should be apropos. Whenever, however, defendant asserts that plaintiff's injury arose out of circumstances over which he had no duty with respect to plaintiff, and it is not asserted by the defendant that despite his conduct plaintiff acted, knowing of a risk, the defense of assumption of risk in the primary sense should be considered to have been properly raised. It is indicated in *Meistrich* (31 N.J. at p. 55) that it will not matter whether a trial court makes or omits a reference to assumption of risk, provided that if the terminology is used the jury is plainly charged that it is merely another way of expressing the thought that a defendant is not liable in the absence of negligence; that a plaintiff does not assume a risk defendant negligently created; and that if defendant is found to have been negligent, plaintiff is barred only if defendant carries the burden of proving contributory negligence, i.e., plaintiff's failure to use the care of a reasonably prudent man under the circumstances either (1) in incurring the known risk, or (2) in the manner in which he proceeded in the face of that risk.

Assumption of risk has two meanings. In the primary sense, it is an alternative expression for the proposition that the defendant was not negligent (owed no duty or did not breach the duty owed). In its secondary sense it is an affirmative defense to an established breach of duty. *Meistrich, pp.* 48, 49.

In applying assumption of risk in its *secondary* sense, in areas other than that of master and servant, the ultimate question has been consistently recognized to be whether a reasonably prudent man would have moved in the face of a known risk, and the question has been handled in the same manner as contributory negligence. *Meistrich,* p. 53, and cases there cited.

The burden of proving negligence rests with the plaintiff, even though defendant asserts assumption of risk in the primary sense. *Meistrich,* p. 56.