5.40D-3 DESIGN DEFECT — LEGAL TESTS OF PRODUCT DEFECT (Approved 4/99)

NOTE TO JUDGE

Charge either (1) *Consumer Expectations* (in rare cases only), (2)(a) *Reasonable Safer Design* or (b) *Risk-Utility Product Defect Analysis*. If the Consumer Expectations charge is used, do not charge the jury on either *Reasonable Safer Design* or *Risk-Utility Product Defect Analysis*. Each theory is compatible with an inadequate warning theory, which may also be charged.

Since *Risk-Utility* includes the *Reasonable Safer Design* element, use the additional risk-utility factors only if the case is unusual in that it requires one or more of these additional elements.

1. Consumer Expectations Test

[Use this charge for obvious defect claims only.]

[Plaintiff] claims that the *[product]* was defectively designed because it failed to perform in accordance with the consumer's/user's reasonable expectations. To establish his/her claim of design defect, *[plaintiff]* must prove by the preponderance (greater weight) of the credible evidence that:

a. The product was designed in a defective manner.

A design defect is established by proof that the *[product]* did not safely perform the job or function for which it was made, contrary to the consumer's/user's

reasonable expectations. For example, a bicycle would be defective if it were designed so that its brakes did not hold in situations where a rider would reasonably expect the brakes to hold.[1]

In deciding this question, you should ask yourselves "what were the intended or foreseeable functions of the *[product]*? Has the plaintiff shown that the *[product]* did not safely fulfill its intended or anticipated functions?"

[Presumption of Knowledge]

In proving a defect in the design of a *[product]*, *[plaintiff]* need not prove that *[defendant manufacturer/seller]* knew that the accident in this case could happen as it did. Knowledge of the possibility of such an event is legally placed upon the manufacturer/seller. The question for you to decide is whether, assuming the defendant(s) knew the accident could happen as it did, it was (they were) nevertheless reasonably careful in the manner in which it (they) designed (marketed or sold) the *[product]*.[2]

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[1] *See also, Mettinger v. W.W. Lowensten*, 292 *N.J. Super.* 293 (App. Div. 1996), *modified o.b.*, 153 *N.J.* 371 (1998) (*Consumer Expectations Test* not met where food slicing machine was not equipped with a safety device to stop the blade from running when the blade guard was removed in order to wipe the blade clean).

[2] *See Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 452 (1984):

> "negligence and strict liability in warning cases may be deemed to be functional equivalents. . . . Constructive knowledge embraces knowledge that should have

But, if the danger of the design was not knowable at the time of manufacture or sale, or if there was no practical and technically feasible alternative design that would have prevented the harm, the defendant *[defendant's name]* cannot be found to be at fault. However, the burden of proof as to what was known and feasible falls on defendant. That is to say, if the defendant contends the danger was unknowable, it must prove that contention, as I will explain when I discuss the statutory defenses with you.

[Plaintiff] claims the *[product]* was designed in a defective manner because *[insert a short factual description of plaintiff's factual contentions]*. *[Defendant]* denies the product was designed in a defective manner because *[insert defendant's contentions]*.

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been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act. Put another way, would a person of reasonable intelligence or of the superior expertise of the defendant charged with such knowledge conclude that defendant should have alerted the consuming public?. . . **Further, a manufacturer is held to the standard of an expert in the field. . . .**[emphasis added]. A manufacturer should keep abreast of scientific advances."

See also Cepeda v. Cumberland Engineering, 76 *N.J.* 152, 163 (1978):

"knowledge of the dangerous potentiality of a machine design as reflected by the evidence at trial is imputable to the manufacturer, and that the remaining determinative question as to affirmative liability is whether a reasonably prudent manufacturer with such foreknowledge would have put such a product into the stream of commerce after considering the hazards as well as the utility of the machine..."

If the *[plaintiff]* has shown by a preponderance (greater weight) of the credible evidence that the *[product]* did not fulfill its intended or foreseeable functions safely, then the *[product]* was designed in a defective manner. But if the *[plaintiff]* fails to prove this, then the *[product]* was not designed in a defective manner.

NOTE TO JUDGE

The remaining elements of proof follow in subsection 4 of this charge. Statutory defenses and affirmative defenses can be found in Charge 5.40D-4.

2. Reasonable Safer Design

NOTE TO JUDGE

The defendant manufacturer/seller, in response to the allegation that the product is unsafe because it did not contain a particular design feature proposed by plaintiff's expert, will usually argue that the proposed alternative was either not "practical" or "technically feasible" at the time of first distribution or sale.

In such a case the proper issue for the jury is whether the product should have been designed in the alternative manner proposed by the plaintiff. This focus requires the jury to balance the increased safety advantages against any disadvantages of altering the chosen design to conform to

the proposed design.[3] The question for the jury is whether the omission of the alternative design renders the product "not reasonably safe."[4]

N.J.S.A. 2A:58C-3a(1) establishes as an absolute defense that "(a)t the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product."

This defense, if proven, ends the case, but, even if the state of the art permitted the use of an alternative design, the issues still remain whether the alternative was reasonable under the circumstances of the case and whether its absence renders the product not reasonably safe.[5]

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[3] The *Reasonable Safer Design Test* is a limited '*risk utility*' balancing of costs and benefits. The seven factors devised by Dean John W. Wade in his article *On the Nature of Strict Liability for Products*, 44 *Miss. L.J.* 825 (1973), and relied upon by our Supreme Court, have been criticized in the *Third Restatement* for failing to precisely focus the jury on the product and the proposed alternative:

> In design defect litigation, that basic issue involves the following fundamental micro-balance question: whether the manufacturer's failure to adopt a particular design feature proposed by the plaintiff was, on balance, right or wrong. David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-balancing" Costs and Benefits*, 75 *Texas Law Review* 1661, 1687 (1997), quoted in *Restatement (3rd)*, Section 2, Comment f.

[4] Even if the proposed design is on balance better than the chosen design, the selected design is not *per se* defective because, as the *Restatement (Third)*, Section 2, *Categories of Product Defect*, Comment f. notes "...a number of variations in the design of a given product may meet the test in Subsection b." There can be multiple reasonably safe designs. *See* generally David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 *U. Ill. L. Rev.* 743, 770-72; William A. Dreier, *The Restatement (Third) of Torts: Products Liability and New Jersey Law—Not Quite Perfect Together*, 50 *Rutgers Law Review*, 2075-2076 (1998), quoting substantial portions of comment f.

[5] The *Reasonable Safer Design* charge, which takes its inspiration from the *Restatement (Third) of Torts: Products Liability*, has been encouraged by the Appellate Division. *See* for example, *Green v. General Motors*, 310 *N.J. Super.* 507, 517 (App. Div. 1998), *certif. denied*, 156 *N.J.* 381 (1998):

> Thus, in determining whether the (product) was defective, a jury must determine the risks and alternatives that should have been known to a reasonable manufacturer, and then assess whether the manufacturer discharged its duty to provide a "reasonably fit,

Plaintiff claims that the *[product]* was defectively designed because it did not employ a reasonable safer design. To establish his/her claim of design defect, *[plaintiff]* must prove by the greater weight of the credible evidence that:

a. The product was designed in a defective manner.

A design defect exists if the foreseeable risks of harm posed by the *[product]* could have been reduced or avoided by the adoption of a reasonable safer design and the omission of the alternative design renders the product not reasonably safe.

[Presumption of Knowledge]

In proving a defect in the design of a product, *[plaintiff]* need not prove that *[defendant manufacturer/seller]* knew that the accident in this case could happen as it did. Knowledge of the dangers of the product is legally placed upon the

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suitable and safe" vehicle (fn omitted). To do this, the jury employs a risk-utility analysis. *Jurado v. Western Gear Works, supra*, 131 *N.J.* at 385. Although there are seven listed factors in the classical statement of the risk-utility analysis, *see Cepeda v. Cumberland Eng'g Co., Inc.*, 76 *N.J.* 152, 174 (1978) and its progeny, the prevalent view is that, unless one or more of the other factors might be relevant in a particular case, the issue upon which most claims will turn is the proof by plaintiff of a "reasonable alternative design ... the omission ... [of which] renders the product not reasonably safe." *Restatement (Third) of Torts: Products Liability* § 2(b) (Proposed Final Draft, April 1, 1997). *See Lewis v. American Cyanamid*, 155 *N.J.* 189 (1998); *Congiusti v. Ingersoll-Rand Co., Inc.*, 306 *N.J. Super*. 126, 138-39 (App. Div. 1997); *Grzanka v. Pfeifer*, 301 *N.J. Super*. 563, 579 (App. Div.), *certif. denied*, 152 *N.J.* 189 (1997); *Smith v. Keller Ladder Co.*, 275 *N.J. Super*. 280, 283-84 (App. Div. 1994).

manufacturer/seller.[6] The question for you to decide is whether, assuming the defendant(s) knew[7] the dangers of the product, it (they) were nevertheless reasonably careful in the manner in which it (they) designed (marketed or sold) the *[product]*.[8]

[Plaintiff] claims that the *[product]* should have contained the following: *[briefly describe reasonable safer design feature]*.

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[6] *Freund v. Cellofilm Properties, Inc*., 87 *N.J.* 229 (1981).

[7] It may be appropriate in failure to warn cases, where the defendant maintains that it could not have warned because it did not know of the danger, to advise the jury:

> But, if the danger of the design was not knowable at the time of manufacture or sale, the defendant cannot be found to be at fault. However, the burden of proof on this point falls on defendant. That is to say, if the defendant contends the danger was unknowable, it must prove that contention, as I will explain when I discuss the statutory defenses with you.

[8] *See Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 452 (1984):

> "negligence and strict liability in warning cases may be deemed to be functional equivalents. . . . Constructive knowledge embraces knowledge that should have been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act. Put another way, would a person of reasonable intelligence or of the superior expertise of the defendant charged with such knowledge conclude that defendant should have alerted the consuming public?. . . **Further, a manufacturer is held to the standard of an expert in the field. . . .** [Emphasis added.] A manufacturer should keep abreast of scientific advances."
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> *See also Cepeda v. Cumberland Engineering*, 76 *N.J.* 152, 163 (1978)
>
> "knowledge of the dangerous potentiality of a machine design as reflected by the evidence at trial is imputable to the manufacturer, and that the remaining determinative question as to affirmative liability is whether a reasonably prudent manufacturer with such foreknowledge would have put such a product into the stream of commerce after considering the hazards as well as the utility of the machine..."

[Defendant] on the other hand claims that the *[product]* should not have contained the reasonable safer design because [briefly describe the reasons for rejecting proposed reasonable safer design feature].

You are to decide whether the safety benefits from altering the design as proposed by *[plaintiff]* were greater than the resulting costs or disadvantages caused by the proposed design, including any diminished usefulness or diminished safety. If the failure to incorporate a practical and technically feasible safer alternative design made the *[product]* not reasonably safe, then the *[product]* was designed in a defective manner.[9]

If, on the other hand, *[plaintiff]* has not proven there existed a practical and technically feasible safer alternative, or if you find that the *[product]* as designed was reasonably safe, then the *[product]* was not designed in a defective manner.[10]

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[9] *See Restatement (Third),* § 2, Reporter's Note, comment f, *Design Defect*: Factors relevant in determining whether the omission of reasonable alternative design renders the product not reasonably safe.

> 2. The proposition that, in order to determine that a design is not reasonably safe, the alternative must contribute to greater overall safety needs no citation; it is axiomatic. If the alternative design proffered by the plaintiff does not make the product safer, let alone if it makes it more dangerous, such an alternative is not reasonable. In such a case, the fact that the alternative design would have avoided injury in a specific case is of no moment.

[10] This charge's reference to cost and benefits may be elaborated upon by the use of additional factors specific to the product such as productivity, aesthetics and other relevant considerations.

NOTE TO JUDGE

The remaining elements of proof, statutory defenses, and affirmative defenses follow. **Be sure to charge the other elements of a products liability claim under sections 4(a) to (d) below.**

3. Risk-Utility Analysis

NOTE TO JUDGE

This test of proving a design defect has been employed since before the passage of the *Product Liability Act, N.J.S.A.* 2A:58C- 1, *et seq.* In *Cepeda v. Cumberland Engineering Co.*, 76 *N.J.* 152 (1978), overruled in part by *Suter*, *supra*, 81 *N.J.* 150, the Court listed the risk-utility factors developed by Dean John W. Wade, in his article *On the Nature of Strict Tort Liability For Products*, 44 *Miss. L.J.* 825, 837-38 (1973). Those factors have been the core of the product defect instructions since then. USE ONLY THOSE FACTORS AS ARE CALLED FOR BY THE FACTS OF THE CASE BEFORE YOU.[11] *See*, for example, *Roberts v. Rich Foods*, 139 *N.J.* 365, 376-377 (1994).

In *Jurado v. Western Gear Works*, 131 *N.J.* 375, 385 (1993) the Court explained:

> The decision whether a product is defective because it is "not reasonably fit, suitable and safe" for its intended purposes reflects a policy judgment under a *Risk-Utility Analysis*. *O'Brien v. Muskin Corp.*, *supra*, 94 *N.J.* at 181.

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[11] The seventh risk-utility factor cited by our Supreme Court, taken from Wade (*see Cepeda* and *Roberts*, both *supra*), may be relevant to the court's duty analysis, but is not part of the charge given to the jury:

> [7] The feasibility on the part of the defendant(s) of spreading the loss by setting the price of the product or carrying liability insurance.
>
> *See Fiorino v. Sears Roebuck & Co.*, 309 *N.J. Super.* 556 (App. Div. 1998).

> That analysis seeks to determine whether a particular product creates a risk of harm that outweighs its usefulness... *Risk-Utility Analysis* is especially appropriate when a product may function satisfactorily under one set of circumstances and yet, because of a possible design defect, present an unreasonable risk of injury to the user in other situations.

> In the opinion of the drafters of this Model Civil Charge either the *Risk-Utility Analysis* charge or the *Reasonable Safer Design* charge may properly be employed in a design defect case. The *Reasonable Safer Design Test* has been approved in *Lewis v. American Cyanamid Co.*, 155 *N.J.* 544 (1998). However, the language of the *Reasonable Safer Design* charge has not been the subject of review by the Supreme Court of New Jersey. The two charges focus on the same principles.

Plaintiff claims that this *[product]* was designed in a defective manner. To establish this claim plaintiff must prove the following elements by the preponderance (greater weight) of the credible evidence that:

a. The product was designed in a defective manner.

A design defect is established by proof that the risks or dangers of this *[product]* as designed outweigh its usefulness and, therefore, that a reasonably careful manufacturer or supplier would not have sold the *[product]* at all in the form in which it was sold. A *[product]* may not be considered reasonably safe unless the risks have

been reduced to the greatest extent possible consistent with the *[product's]* continued utility.

In deciding whether the dangers of the *[product]* outweigh its usefulness and, therefore that a reasonably careful *[manufacturer, seller or distributor]* would not have *[manufactured, sold or distributed]* the *[product]* at all in the form in which it was *[manufactured, sold or distributed]*, you must determine whether the defendant, who is supposed to know the harms the product would cause, acted in a reasonably careful manner in manufacturing/selling the *[product]*. To reach this conclusion you must consider and weigh the following factors:[12] *[Only those risk-utility factors that are appropriate for the jury to consider in the particular case should be included in the charge*[13].]

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[12] *See O'Brien v. Muskin Corp., supra*, 94 *N.J.* at 182; *Suter, supra*, 81 *N.J.* at 172. Only those risk-utility factors that are appropriate for the jury to consider in the particular case should be included. Consideration should be given whether Factors No. 5 and 6 should be charged where comparative negligence is not a defense. There may also be some, such as Factor No. 7, that are more appropriate for the court to consider in its initial Risk-utility analysis. Note that the court should not resolve issues of fact in its initial analysis. *Brown, supra*, 98 *N.J.* at 170-171. Initially, the Risk-utility analysis is for the court, not the jury. It is the trial court which decides whether a product is so clearly more useful than dangerous that a decision in favor of the defendant is to be made as a matter of law.

[13] The seventh risk-utility factor cited by our Supreme Court, taken from Wade, (*see Cepeda* and *Roberts*, both *supra*) may be relevant to the court's duty analysis, but is not part of the charge given to the jury:

> [7] The feasibility on the part of the defendant(s) of spreading the loss by setting the price of the product or carrying liability insurance.

1) The usefulness and benefit of the *[product]*, as it was designed, to the user and the public as a whole. Was there a need that this product be designed in this specific way?[14]

2) The safety aspects of the *[product]*, that is, the likelihood or risk that the *[product]* as designed would cause injury and the probable seriousness of any injury which could have or should have been anticipated through the use of the *[product]*.

3) Was a substitute design for this *[product]* feasible and practical?

   Was there available a substitute *[product]* at the time of manufacture, sale or distribution which would meet the same needs or perform the same functions as this product without containing the alleged defect? In other words, the existence of a more safely designed *[product]* diminishes the justification for using a challenged design in either the manufacture, sale or distribution of a particular product.

4) The ability of the *[defendant(s)]* to eliminate the unsafe character of the *[product]* without impairing its usefulness or making it too expensive to maintain its utility.

5) The ability of foreseeable users to avoid danger by the exercise of care in the use of the *[product]*.[15]

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[14] *Mettinger v. W.W. Lowensten*, 292 *N.J. Super*. 293, 307 (App. Div. 1993), *modified o.b.*, 153 *N.J.* 371 (1998) ("Risk-utility analysis is appropriate when the product may function satisfactorily under one set of circumstances, yet because of its design present undue risk of injury to the user in another situation", citing *O'Brien v. Muskin Corp.*, 94 *N.J.* 169 (1983)).

[15] This is an objective test of foreseeability by the product designer *with respect to the class of users* — not a subjective test of what the particular plaintiff knew. *See Johansen v. Makita USA*, *supra*, 128 *N.J.* at 100-101:

> The *Risk-Utility Analysis* is an objective test that focuses on the product... Our endorsement of the risk-utility analysis in *Cepeda, supra,* 76 *N.J.* at 172-73, quotes with approval the objective product-oriented explanation of that test by Dean Wade:
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> > The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else. * * * Another way of saying this is to ask whether the magnitude of the risk created by the dangerous

6) The foreseeable user's awareness of the dangers inherent in the *[product]* and their avoidability, because of general public knowledge of the obvious condition of the *[product]*, or of the existence of suitable warnings or instructions.

In applying the risk-utility factors, remember that a product may not be considered reasonably safe unless the risks have been reduced to the greatest extent possible consistent with the *[product's]* continued utility, that is, without impairing its usefulness and without making it too expensive for it to be reasonably marketable.

> condition of the product was outweighed by the social utility attained by putting it out in this fashion." [*Id*. at 172 (*quoting* Wade, *supra*, 44 *Miss. L.J.* at 834-35).]

> The fifth factor of the *Risk-Utility Analysis* requires the jury to consider the extent to which the hypothetical "average user" of the product — not the plaintiff — could avoid injury through the use of due care. Because the *Risk-Utility Analysis* is based on the premise that a product is defective if it is dangerous when marketed, the post-marketing conduct of one plaintiff cannot inform that determination. Evidence of this plaintiff's use of care in the operation of the saw was irrelevant to the risk-utility analysis.

See also Jurado v. Western Gear Works, 131 *N.J.* 375, 386 (1993):

> [T]he plaintiff in a design-defect products-liability suit may succeed even if the product was misused, as long as the misuse or alteration was objectively foreseeable...The absence of misuse is part of the plaintiff's case. Misuse is not an affirmative defense...Thus, the plaintiff has the burden of showing that there was no misuse or that the misuse was objectively foreseeable.

See also Sharpe v. Bestop, Inc. and Sears Roebuck and Company, 314 *N.J. Super.* 54, 62-65 (App. Div. 1998), explaining the operation of this presumption and the methods by which a defendant may rebut this heeding presumption.

[Presumption of Knowledge]

In proving a defect in the design of a *[product]*, *[plaintiff]* need not prove that *[defendant manufacturer/seller]* knew that the accident in this case could happen as it did. Knowledge of the dangers of the products is legally placed upon the *[manufacturer/seller]*. The question for you to decide is whether, assuming the defendant(s) knew the dangers of the product,[16] it was (they were) nevertheless reasonably careful in the manner in which it (they) designed (marketed or sold) the *[product]*.[17]

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[16] It may be appropriate in failure to warn cases, where the defendant maintains that it could not have warned because it did not know of the danger to advise the jury:

> But, if the danger of the design was not knowable at the time of manufacture or sale, the defendant cannot be found to be at fault. However, the burden of proof on this point falls on defendant. That is to say, if the defendant contends the danger was unknowable, it must prove that contention, as I will explain when I discuss the statutory defenses with you.

[17] *See Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 452 (1984):

> "negligence and strict liability in warning cases may be deemed to be functional equivalents. . . Constructive knowledge embraces knowledge that should have been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act. Put another way, would a person of reasonable intelligence or of the superior expertise of the defendant charged with such knowledge conclude that defendant should have alerted the consuming public?. . . . **Further, a manufacturer is held to the standard of an expert in the field. . . .** [Emphasis added.] A manufacturer should keep abreast of scientific advances."
>
> *See also Cepeda v. Cumberland Engineering*, 76 *N.J.* 152, 163 (1978):
>
> "knowledge of the dangerous potentiality of a machine design as reflected by the evidence at trial is imputable to the manufacturer, and that the remaining determinative question as to affirmative liability is whether a reasonably prudent manufacturer with such foreknowledge would have put such a product into the

[This may give rise to a warning defect claim and require a charge on this point. See N.J.S.A. 2A:58c-4.]

If the risks or dangers of the *[product]* outweigh its usefulness and therefore a reasonably careful *[manufacturer/seller/supplier]* would not have sold the product at all in the form in which it was sold, then the *[product]* was designed in a defective manner. But, on the other hand, if the plaintiff fails to prove this, then the *[product]* was not designed in a defective manner.

4. To subsections 1, 2, or 3 above, add the following:

a. The defect existed before the product left the control of the defendant.[18]

[Use b. only when misuse or substantial alteration is an issue and use only applicable portion. Note that plaintiff has the burden of proving absence of misuse].

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stream of commerce after considering the hazards as well as the utility of the machine..."

[18] This may be a threshold question. Where the issue of whether the alleged defect existed at the time the product left the defendant's control is genuinely in issue, a separate jury interrogatory may be posed first, such as 'Did the condition which plaintiff alleges to have been defective exist at the time the product left defendant's control?' ___Yes ___No. If your answer is 'No', cease your deliberations and return your verdict.

b. When the accident happened the product was not being misused; or, that the *[product]* had not been substantially altered in a way that was not reasonably foreseeable.[19]

[Plaintiff] must prove that at the time of the accident the *[product]* was being used properly for its intended or reasonably foreseeable purposes and in an intended or reasonably foreseeable manner. To prove this, plaintiff must show that the *[product]* was not being misused in a way that was neither intended nor was reasonably foreseeable. In this case the *[defendant]* contends that at the time of the accident the *[product]* was being misused. *[Set forth a brief factual description of this dispute.]*

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[19] *Jurado v. Western Gear Works*, 131 *N.J.* 375, 385-387 (1992).

> Under a *Risk-Utility Analysis*, a defendant may still be liable when a plaintiff misused the product, if the misuse was objectively foreseeable...the absence of misuse is part of the plaintiff's case. Misuse is not an affirmative defense...plaintiff has the burden of showing that there was no misuse or that the misuse was objectively foreseeable.
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> The distinction between misuse as to purpose and misuse as to manner of use must be carefully explained to the jury:
>
> For a plaintiff to recover, the purpose for which the product is used at the time of the accident must be objectively foreseeable. When a plaintiff is injured while using the product for a purpose that is not objectively foreseeable, the injury does not establish that the product is defective.
>
> The other kind of misuse concerns the manner in which the plaintiff used the product. When, for example, the operator of a high-lift forklift is injured while using the forklift on steep, instead of level, terrain, the emphasis should be on the manner, not the purpose, of the misuse... As comment h of *Restatement (Second) of Torts* at

[Plaintiff] must also show that when he/she used the *[product]*, it had not been substantially altered since it left defendant's control. A substantial alteration is a change or modification made to the *[product]* after it was manufactured or sold which both alters the design or function of the product and has a significant or meaningful effect on the *[product's]* safety when used.[20]

In this case the defendant contends that the *[product)* was substantially altered. *[Set forth a brief factual description of this dispute.]*

In considering this issue, you must determine whether there has been a *[misuse/abnormal use in purpose or manner]* or a *[substantial alteration to the product]*. If you find such to exist, you must determine whether that *[misuse/abnormal use]* or *[substantial alteration]* was reasonably foreseeable at the time the *[product]* left the control of the *[defendant(s).]*

Reasonably foreseeable does not mean that the particular *[misuse/abnormal use or substantial alteration]* was actually foreseen or could have been actually

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402A states: "A product is not in a defective condition when it is safe for normal handling or consumption."

[20] *See Soler v. Castmaster, Div. of the H.P.M. Corp.*, 98 *N.J.* 137 (l984); *Brown v. United States Stove Co.*, 98 *N.J.* 155 (l984). Note that an issue of alteration arises only if the particular facts indicate a substantial change relating to the safety of the product. *Soler*, 98 *N.J.* at 148. Note further that the issue of misuse/abnormal use or substantial alteration, if present in a case, presents considerations bearing upon proximate cause. *Id.* at 149; *Brown*, *supra*, 98 *N.J.* at 171-174. *See also Fabian v. Minster Mach. Co., Inc.*, 258 *N.J. Super.* 261 (App. Div. 1992).

foreseen by *[defendant]* at the time the *[product]* left his/her control.

This is a test of objective foreseeability. You may consider the general experience within the industry as to what was known or could have been known with exercise of reasonable diligence when the *[product]* was *[manufactured, sold or distributed]*. Then decide whether a reasonably careful *[manufacturer, seller or distributor]* could have anticipated the *[misuse/abnormal use or substantial alteration]* of the *[product]*.

If the *[alteration or misuse]* reasonably could have been anticipated, and if the *[substantial alteration or misuse/abnormal use]* made the *[product]* not reasonably safe, the defendant may be responsible. *[Plaintiff]* has the burden to show that a typical *[manufacturer or seller]* of the *[product]* could foresee that the *[product]* would be altered or that despite the alteration the original defect was nonetheless a cause of the injury.[21]

[Plaintiff] has the burden to show that a typical *[manufacturer or seller]* could foresee that the *[product]* would be misused for an improper purpose or in an improper manner — and that a reasonably careful *[manufacturer or seller]* should have taken steps to prevent injury from such misuses of the product.

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[21] *Brown, supra,* 98 *N.J.* at 169.

c. *[Plaintiff]* was a direct or foreseeable user, or the kind of person who might reasonably be expected to come into contact with the *[product]*.[22]

d. The defect was a proximate cause of the *[accident/injury]*.

Proximate cause means that the design defect was a substantial factor which singly, or in combination with another cause or causes brought about the accident. *[Plaintiff]* need not prove that this same accident could have been anticipated so long as it was foreseeable that some significant harm could result from the design defect. If the defect does not add to the risk of the occurrence of this accident [or if there was an independent intervening cause of the accident] and therefore is not a contributing factor to the happening of the accident, then plaintiff has failed to establish that the design defect was a proximate cause of the accident.

An intervening cause is the act of an independent agency which destroys the causal connection between the effect of the defect in the *[product]* and the accident. To be an intervening cause the independent act must be the immediate and sole cause of the accident. In that event, liability will not be established because the defect is not a proximate cause of the injury.

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[22] This may be omitted if not in dispute.

However, the *[defendant]* would not be relieved from liability for its defective *[product]* by the intervention of acts of third persons, if those acts were reasonably foreseeable. Where the intervention of third parties is reasonably foreseeable, then there may still be a substantial causal connection between the *[product]* defect and the accident.[23]

You must determine whether the *[insert the alleged intervening cause here]* was an intervening cause that destroyed the substantial causal connection between the defective *[product]* and the accident. If it did, then the *[product]* defect was not a proximate cause of the injury.

If plaintiff has proven each element, then you must find for the plaintiff. If, on the other hand, plaintiff has failed to prove any of the elements, then you must find for the defendant.

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[23] *Navarro v. George Koch & Sons, Inc.*, 211 *N.J. Super.* 588, 573 (App. Div. l986), and *Butler v. PPG Industries, Inc.*, 201 *N.J. Super.* 558, 564 (App. Div. l985), may be understood as discussions of a burden of production rather than persuasion. So construed they clearly conform to *Brown v. U.S. Stove*, 98 *N.J.* 155 (l984), and prior law. *See Fabian v. Minster Mach. Co., Inc.*, 258 *N.J. Super.* 261 (at 277, footnote 5) and *Johansen v. Makita USA Inc.*, 128 *N.J.* 86 (1992).