5.40I PROXIMATE CAUSE (Approved 2/89)

A. In General

The last requirement for holding a defendant liable is that the defect, whatever you find it to be, must have been a proximate cause of the accident. By proximate cause is meant that the defect in the product was a substantial factor which singly, or in combination with another cause, brought about the accident. Plaintiff need not prove that the very accident which occurred could have been anticipated so long as it was within the realm of foreseeability that some harm could result from the defect in question. If the product in question, however, does not add to the risk of the occurrence of the particular accident and hence was not a contributing factor in the happening of the accident [*or if there was an independent intervening cause of the accident*], then plaintiff has failed to establish that a particular product defect was a proximate cause of the accident.[1]

(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

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[1] *See Soler, supra*, and *Brown, supra*, where there is an issue of misuse/abnormal use or substantial alteration affecting proximate cause. Where there is misuse/abnormal use or substantial alteration after leaving the control of a defendant the critical question on the issue of proximate cause becomes whether the original defect in the product constitutes a proximate cause of the injury, despite a subsequent alteration or misuse/abnormal use. Misuse/abnormal use or substantial alteration will not relieve a defendant's(s') responsibility unless the proximate cause of the injury is the misuse/abnormal use or substantial alteration. *Soler,* 98 *N.J.* at 149.

accident, the independent act being the immediate and sole cause in which case the liability will not be established because the defect in the product is not the proximate cause of the injury. 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 and hence there is a substantial causal connection between the product defect and the accident.)[2]

B. Limiting Instruction Where Comparative Negligence is not Applicable — Plaintiff's Conduct May Only Be Considered on Issue of Proximate Cause[3] (Approved 4/95)

You have heard evidence about how the *(insert name of plaintiff)* was using the *(insert name of product)*. When you are deciding whether the *(product)* was defective, you are not permitted to consider the *(plaintiff's)* conduct.

If you find the *(product)* was defective, then you must decide whether the defect was a proximate cause of the accident. At this point, you may consider the *(plaintiff's)* conduct.

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[2] *Navarro v. George Koch & Sons, Inc*., 211 *N.J. Super*. 558, 573 (App. Div. 1986), and *Butler v. PPG Industries, Inc*., 201 *N.J. Super*. 558, 564 (App. Div. 1985), 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 (1984), and prior law.

[3] The conduct of the plaintiff may not be the only action which renders the product's defect an insignificant element in the happening of the accident. *See*, for example, the discussion of the "empty chair" defense in *Fabian v. Minster Machine Co.*, 258 *N.J. Super*. 276-277 (App. Div. 1992), where the court notes that the conduct of the employer, a co-employee or defendant who has

If you decide that the *(product)* defect was the *only* cause of the accident then you must find that that defect proximately caused the accident.

If you decide that the *(product)* defect was a partial or contributory cause, then you must also find that the *(product)* defect was a proximate cause of the accident, even if the *(plaintiff's)* conduct was also a partial or contributory cause.[4]

On the other hand, if you decide that the *(plaintiff's)* conduct was the only cause, then you must find that the *(product)* defect was not a proximate cause of the accident.

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already settled are factors which may be relied upon to show that the defect was not a proximate cause of the accident.

[4] *Tobia v. Cooper Medical Center*, 136 *N.J.* 335, 341-44 (1994); *Jurado v. Western Gear Works*, 131 *N.J.* 375, 388 (1993); *Johansen v. Makita USA, Inc.*, 128 *N.J.* 86, 102-03 (1992); *Brown v. United States Stove Co.*, 90 *N.J.* 155, 171 (1984).