8.11 DAMAGES CHARGES — GENERAL

F. AGGRAVATION OF THE PREEXISTING DISABILITY
(Approved 1/97)

In this case, evidence has been presented that *[plaintiff]* had an illness/injury(ies)/condition before the accident/incident — that is *[describe the alleged preexisting injury]*. I will refer to this condition as the preexisting injury.[1] There are different rules for awarding damages depending on whether the preexisting injury was or was not causing plaintiff any harm or symptoms at the time of this accident.

Obviously, the defendants in this case are not responsible for any preexisting injury of *[plaintiff]*. As a result, you may not award any money in this case for damages attributable solely to any preexisting illness/injury(ies)/condition.

I will now explain what happens if the *[plaintiff]* was experiencing symptoms of the preexisting condition at the time of the accident. If the injuries sustained in this

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[1] This rule does not apply to medical malpractice cases; there the defendant has the burden of segregating recoverable damages from those solely incident to preexisting disease. *Fosgate v. Corona,* 66 *N.J.* 268 (1974). *See also Scafidi v. Seiler,* 119 *N.J.* 93 (1990) and Model Civil Charge 5.50E. The burden of proving which of plaintiff's conditions were caused by preexisting events is shifted to the defendants whenever defendants have vastly greater access than plaintiff to crucial proofs. *Blanks v. Murphy,* 268 *N.J. Super.* 152 (App. Div. 1993) citing *Sholtis v. American Cyanamid Co.,* 238 *N.J. Super* 8 (App. Div. 1989) (applying the same principal in the area of asbestos exposure injuries). *See also Thornton v. General Motors Corp.,* 280 *N.J. Super* 295 (Law Div. 1994) applying the *Fosgate* and *Scafidi* principal of burden shifting to the defendant manufacturer in a crashworthy case.

accident aggravated or made *[plaintiff's]* preexisting injury more severe, then the *[plaintiff]* may recover for any damages sustained due to an aggravation or worsening of a preexisting illness/injury(ies)/condition but only to the extent of that aggravation. Plaintiff has the burden of proving what portion of his/her condition is due to his/her preexisting injury.[2] *[Plaintiff]* is entitled to damages only for that portion of his/her injuries attributable to the accident.

If you find that *[plaintiff's]* preexisting illness/injury(ies)/condition was not causing him/her any harm or symptoms at the time of the accident, but that the preexisting condition combined with injuries incurred in the accident to cause him/her damage, then *[plaintiff]* is entitled to recover for the full extent of the damages he/she sustained.

[Use the following where a preexisting latent condition is involved].

I will now explain what happens if *[plaintiff]* had a predisposition or weakness which was causing no symptoms or problems before the accident but made him/her more susceptible to the kind of medical problems he/she claims in this case. If the

[2] There may be cases where based on medical testimony or other evidence there is no dispute that the preexisting injury was quiescent in which case the second and third paragraphs of the charge might be omitted.

injuries sustained in this accident combined with that predisposition to create the plaintiff's medical condition, then plaintiff is entitled to recover for all of the damage sustained due to that condition. You must not speculate that an individual without such predisposition or latent condition would have experienced less pain, suffering, disability and impairment.[3]

[3] *Quagliato v. Bodner*, 115 *N.J. Super.* 133 (App. Div. 1971) contains detailed instructions for how to handle the unusual circumstance where two separate tortious events such as automobile accidents within a few months which cause overlapping or invisible injuries are properly consolidated for a damage-only trial after a finding of liability.