7.31 COMPARATIVE NEGLIGENCE/FAULT: ULTIMATE OUTCOME (Approved 03/2000; Revised 09/2018)

If you find that the plaintiff and one or more individuals or entities were [*negligent/at fault*] and proximately caused the [*accident/injury*], then you must compare the [*negligent conduct/fault*] of those individuals or entities in terms of percentages. You will attribute to each of them that percentage that you find describes or measures his/her/its [*negligent contribution/fault*] in proximately causing the [*accident/injury*]. The percentages must add up to 100%. You should not allocate any percentage to any individual or entity who you have found was not both [*negligent/at fault*] and a proximate cause of the [*accident/injury*].

I will explain to you the effect of these percentages. In order for the plaintiff to recover against any defendant, plaintiff's percentage of fault must be 50% or less. If the plaintiff's percentage is more than 50%, he/she will not recover damages at all and your deliberations are concluded and you should not make any determination as to damages. A plaintiff whose percentage is 50% or less will recover from any defendant, whose fault you have found was a proximate cause of the [*accident/injury*].

NOTE TO JUDGE

The ultimate outcome charge is required where the jury apportions negligence (fault) between plaintiff and one or more tortfeasor. It is not to be used to tell a jury the effect of its apportioning negligence (fault) between or among joint tortfeasors when plaintiff is not negligent (at

fault). *Brodsky v. Grinnel1 Haulers*, Inc., 181 *N.J.* 102, 122 (2004) (holding reversible error as "irrelevant" to jury's function of apportioning fault percentages and "highly prejudicial" to tortfeasors). "New Jersey law favors the apportionment of fault among responsible parties." *Verni ex rel. Burstein v. Stevens*, 387 *N.J. Super.* 160, 206 (2006), *certif. denied*, 189 N.J. 429 (2007). "The guiding principle of our State's comparative fault system has been the distribution of loss "in proportion to the respective faults of the parties causing that loss." *Brodsky*, 181 *N.J.* at 114. Apportionment of fault is favored under New Jersey law and is mandated when liability is in dispute. *Boryszewski v. Burke*, 380 *N.J. Super.* 361, 374 (App. Div. 2005), *certif. denied*, 186 N.J. 242 (2006). The quantum of evidence required to qualify for an apportionment charge is low. *Id*. *See also R.* 4:5-1(b); *Holloway v. State*, 125 *N.J.* 386, 400-401 (1991) (The Joint Tortfeasors Contribution Law "was enacted to promote the fair sharing of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim.").

Fault should be used where the cause of action involves liability for non-negligent conduct. *See*, *e.g.*, fn. 9, *infra*. *See also* fn. 3, *infra*.

If one of the parties' liability is based on strict liability or statutory liability, such as for a dangerous condition of public property, *N.J.S.A*. 59:4-2, you should substitute a suitable phrase like "produced an unfit product" or "palpably unreasonable conduct" for negligent. Suitable change should be made elsewhere in the charge, where the word "negligent" or negligence" appears. *See Williams v. Phillipsburg*, 171 *N.J. Super*. 278 (App. Div. 1979). There also are instances in which the term "accident" is inappropriate. "Incident'' or "event" may be suitable substitutions. Where the plaintiff's negligence (fault) did not cause the accident (liability) but may have contributed to his/her injuries (damages), then his/her negligence (fault) is best discussed as one of the causes of his/her injuries (damages) rather than as a cause of the accident (liability).

The use of the phrase "individual or entity" is to bring this charge in line with the Supreme Court's decision in *Krzykalski v. Tindall*, 232 *N.J.* 525 (2018), holding that a jury properly apportioned fault between a named party defendant and a known but unidentified "John Doe" defendant. Notably, the Comparative Negligence Act, *N.J.S.A.* 2A:15-

5.1 to -5.8, requires "the 'jury to make a good-faith allocation of the percentages of negligence among joint tortfeasors based on the evidence -- not based on the collectability or non-collectability" of the tortfeasors' respective shares of the damages.'" *Id*. at 535.

As to the appropriateness of apportioning negligence (fault) among settling and non-settling defendants, *See Young v. Latta*, 123 *N.J.* 584 (1991).

As to the appropriateness of trier of fact allocating percentage of negligence (fault) to Defendant dismissed from medical malpractice case for failure to timely serve Affidavit of Merit, *See Burt v. W. Jersey Health Systems*, 339 *N.J. Super* 296 (App. Div. 2001).

As to the inappropriateness of trier of fact considering negligence (fault) of employer immune from suit because of Workers' Compensation Act, *See Ramos v. Browning Ferris Industries of Southern Jersey, Inc*., 103 *N.J.* 177 (1986).

As to the appropriateness of trier of fact to determine comparative negligence (fault) of party dismissed following discharge in bankruptcy. *See Brodsky,* 181 *N.J.* at 116.

For cases where comparative negligence and intentioned conduct are at issue and should be apportioned by a jury, *See Steele v. Kerrigan*, 148 *N.J.* 1 (1997); *See also Blazovic v. Aldrich*, 124 *N.J.* 90 (1991). A comparison between the plaintiff's conduct and defendant's conduct is appropriate even when the plaintiff has acted in a wanton, willful, or reckless manner. *See McCann v. Lester*, 239 N.J. Super. 601, 609-610 (App. Div. 1990).

For inappropriateness of comparative negligence in product liability context. *See Johansen v. Makita U.S.A., Inc*., 128 *N.J.* 86 (1992). *See also Cavanaugh v. Skil Corp*., 331 *N.J. Super* 134, 189 (App. Div. 1999), *aff'd*, 164 *N.J.* 1, 4 (2000) (*Suter* rule applies in all workplace contexts, including construction sites). As to applicability of *Suter* to negligence in a factory setting*, see Green v. Sterling Extender Corp*., 95 *N.J.* 263 (1984) and *Ramos v. Silent Hoist and Crane Co*., 256 *N.J. Super.* 467 (App. Div. 1992).

For appropriateness of comparative negligence (fault) in cases involving public entities, *See Frugis v. Bracigliano,* 177 *N.J.* 250 (2003) (Special charge for duty of school boards to ensure students safety from foreseeable harm of negligent and intentional conduct). *See also Jones v. Morey's Pier, Inc.*, 230 *N.J.* 142 (2017) (permitting the potential for apportionment of liability where public entity defendant was immune pursuant to the Tort Claims Act and where other defendants were permitted to establish that the public entity defendant was still at fault and was a proximate cause of plaintiff's injury).

As to the appropriateness of jury or judge to apportion negligence (fault) in an environmental action and the effect of apportionment, *See N.J.S.A*. 2A:15-5 d (1) (2) (3).

The ultimate outcome charge is not to be confused with whether contribution has been sought among joint tortfeasors. Each party alleged to be negligent (at fault) is entitled to know the extent of his/her/its/their own negligence (fault). *Bolz v. Bolz*, 400 *N.J. Super.* 154 (App. Div. 2008). *Cf. R.* 4:7-5(c) ("A non-settling defendant's failure to have asserted a cross-claim for contribution against a settling defendant, however, shall not preclude an allocation of a percentage of negligence by the finder of fact against the settling defendant or a credit in favor of the non-settling defendant consistent with that allocation, provided plaintiff was fairly apprised prior to trial that the liability or the settling defendant remained an issue and was accorded a fair opportunity to meet that issue at trial.").