5.32B DUTY OF A PEDESTRIAN WHEN CROSSING AT A POINT OTHER THAN A CROSSWALK

(Approved before 1983; Revised 4/02)

A pedestrian crossing at a point other than a crosswalk is charged with the duty to exercise for his/her 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 provisions that are part of our New Jersey Motor Vehicle Act. They are referred to in *N.J.S.A.* 39:4-34 and 39:4-36. *N.J.S.A.* 39:4-34 provides, in part, that:

> 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, and where not otherwise prohibited, at right angles to the roadway. It shall be unlawful for a pedestrian to cross any highway having roadways separated by a medial barrier, except where provision is made for pedestrian crossing.

In addition, *N.J.S.A.* 39:4-36 provides, in part, that:

> [e]very pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

[***Continue with Model Charge 5.30D on Violation of Traffic Act. Adapt to Comparative Negligence.***]

Cases:

These notes were part of the Model Civil Charges before the passage of the Comparative Negligence Act. *N.J.S.A.* 2A:15-5.1 *et seq.* Keep in mind that the phrase "contributory negligence" usually should be read "comparative negligence."

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 (App. 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); *Volpe 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).