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104.10 CONTRIBUTORY NEGLIGENCE ISSUE – BURDEN OF PROOF –  
DEFINITION.

This (*state number*) issue reads:

“Did the plaintiff, by *his* own negligence, contribute to *his* [injury] [damage]?”<sup>1</sup>

You will answer this issue only if you have answered the (*state number*) issue as to the defendant's negligence “Yes” in favor of the plaintiff.<sup>2</sup>

On this (*state number*) issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiff was negligent and that such negligence was a proximate cause of the plaintiff's own [injury] [damage].

The test of what is negligence, as I have already defined and explained it, is the same for the plaintiff as for the defendant. If the plaintiff's negligence joins with the negligence of the defendant in proximately causing the plaintiff's own [injury] [damage], it is called contributory negligence, and the plaintiff cannot recover.<sup>3</sup>

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1 If the contention of the defendant is that plaintiff's agent was negligent, the issue as stated above should be replaced by an issue as to the agent's negligence and a separate issue of agency submitted.

2 This sentence will be accurate only when there is a single defendant and there is no issue as to the negligence of an agent of the defendant. In more complex situations, the judge must instruct the jury precisely as to what answers to what prior issues will call for an answer to this issue.

3 Omit the phrase, “and the plaintiff cannot recover” if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to N.C.P.I.-MV 105.15. Note that “[O]ne who is so insane or devoid of intelligence as to be totally unable to apprehend danger and avoid exposure to it is not a responsible human agency and cannot be guilty of contributory negligence.” *Stacy v. Jedco Const., Inc.*, 119 N.C. App. 115, 120, 457 S.E.2d 875, 879 (1995) (citing 57A Am. Jur.2d *Negligence* § 954 (1989) (now 57B Am. Jur.2d *Negligence* § 863 (2018))).

However, a different rule applies where the person whose conduct is in question has diminished mental faculties not amounting to insanity or total incompetence. *Stacy*, 119 N.C. App. at 120, 457 S.E.2d at 879. Rather than being held to the objective reasonable

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person standard, such a person is “held only to the exercise of such care as ... a person of like mental capacity under similar circumstances.” *Id.* The burden is on the person claiming the lack of mental capacity to show that a “specific ‘diminished mental capacity’” rendered him unable to perceive and avoid a particular harm. *Proffitt v. Gosnell*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 809 S.E.2d 200, 208 (2017).