

DIVORCE--FROM BED AND BOARD--ISSUE OF CRUELTY.<sup>1</sup>

The (*state number*) issue reads:

"Did the defendant, without provocation, endanger the life of the plaintiff by cruelty or barbarous conduct?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:

First, that the defendant subjected the plaintiff to cruelty or barbarous conduct.<sup>2</sup> Whether particular acts constitute cruelty or barbarous conduct depend on the facts and circumstances of each case. Factors you may consider include, among other things, the status of the parties and their sensibilities, social position, refinement, intelligence, temperament, state of health, habits and feelings, as well as the character and nature of the acts or violence alleged.

Second, that the cruelty or barbarous conduct of the defendant actually endangered the life of the plaintiff. Acts of cruelty or barbarous treatment may be mental, physical or both.

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<sup>1</sup>N.C.G.S. §50-7(3).

<sup>2</sup>See *Bailey v. Bailey*, 243 N.C. 412, 90 S.E.2d 696 (1956); *Ollis v. Ollis*, 241 N.C. 701, 86 S.E.2d 420 (1955).

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Third, that the plaintiff did not engage in conduct which provoked the cruelty or barbarous conduct of the defendant.<sup>3</sup> What constitutes provocation depends on the facts and circumstances of each case. Ordinarily, provocation does not exist unless the conduct of the plaintiff has been such as would likely render it impossible for the defendant to continue the marital relationship with safety, health and self-respect.<sup>4</sup>

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant, without provocation, endangered the life of the plaintiff by cruelty or barbarous conduct, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, it would be your duty to answer this issue "No" in favor of the defendant.

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<sup>3</sup>The burden of proof is on the plaintiff to show that the defendant's conduct was not caused by the plaintiff's acts. *Perkins v. Perkins*, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987). What must be proven, however, is not the negation of every possible justification for the defendant's conduct. Instead, the plaintiff must prove only that he or she did not engage in conduct that provoked or justified the defendant's conduct. *Morris v. Morris*, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980).

<sup>4</sup>See *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953).