

800.53 ASSAULT AND BATTERY - DEFENSE OF FAMILY MEMBER¹

The (*state number*) issue reads:

"Did the defendant [assault] [batter] the plaintiff in defense of a family member?"

You will answer this issue only if you have answered the issue as to whether the defendant [assaulted] [battered] the plaintiff "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant.² This means that the defendant must prove, by the greater weight of the evidence, three things:

First, that the defendant reasonably believed that it was necessary to use force to protect a member of *his* family from imminent bodily injury or death. A belief is reasonable when a person of ordinary prudence under the same or similar circumstances would believe that force is needed to protect a member of *his* family from imminent bodily injury or death.

Second, that the defendant used no more force against the plaintiff than was reasonably necessary under the circumstances to protect the family member from bodily injury or death.³

Third, that neither the defendant nor the family member was the aggressor. A person can defend a family member only if the family member has the right to defend *himself*. A person who voluntarily and without provocation enters into a fight does not have a right to claim self-defense (unless *he* first abandons the fight, withdraws from it and gives notice to *his* adversary that *he* has done so).

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant [assaulted] [battered] the plaintiff in defense of a family member, then it would be your duty to answer this issue "Yes" in favor of the defendant.

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

1. This instruction may also apply to assaults or batteries committed in defense of an employer or employee. *State v. Moses*, 17 N.C. App. 115, 116, 193 S.E.2d 288, 289 (1972).

2. In criminal cases, the burden of proof is on the State to prove the non-existence of facts tending to show self-defense. See N.C.P.I.-Crim. 206.30. Otherwise, criminal cases may be used to determine a self-defense justification in the civil action. *Young v. Warren*, 95 N.C. App. 585, 588, 383 S.E.2d 381, 383 (1989); *Harris v. Hodges*, 57 N.C. App. 360, 361, 291 S.E.2d 346, 347, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982).

3. Unless such force was used or threatened as would create a reasonable apprehension of death or great bodily harm, the defendant's use of deadly force would be excessive (*i.e.*, unreasonable) as a matter of law. *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979), *overruled on other grounds*, *State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982).