

805.64C DUTY OF OWNER TO TRESPASSER: POSITION OF PERIL.

*NOTE WELL: Use for claims arising on or after 1 October 2011.*

The (*state number*) issue reads:

“Was the plaintiff’s [injury] [death] caused by the defendant’s failure to exercise ordinary care not to injure the plaintiff when the plaintiff was in a position of [peril] [helplessness]?”

(You will answer this issue only if you have answered the (*state number*) issue “No” in favor of the defendant.<sup>1</sup> If you answered the (*state number*) issue “Yes” in favor of the plaintiff, you will answer the (*state number issue*) and not this one.<sup>2</sup>)

On this issue the burden of proof is on the plaintiff. That means that the plaintiff must prove, by the greater weight of the evidence, the following four things:<sup>3</sup>

First, that the plaintiff was in a position of [peril] [helplessness] on the property of the defendant.<sup>4</sup>

Second, that the defendant discovered the plaintiff’s [peril] [helplessness].<sup>5</sup>

Third, that the defendant failed to exercise ordinary care not to injure the plaintiff.<sup>6</sup> Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect *himself* and others from [injury] [death].

And Fourth, that such failure by the defendant proximately caused the plaintiff’s [injury] [death].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [death], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [death] or some similar injurious result.

There may be more than one proximate cause of [an injury] [death]. Therefore, the plaintiff need not prove that the defendant's conduct was the *sole* proximate cause of the [injury] [death]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's conduct was *a* proximate cause.

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 plaintiff was in a position of [peril] [helplessness] on the defendant's property; and that the defendant discovered the plaintiff's position of [peril] [helplessness]; and that the defendant failed to exercise reasonable care not to injure the plaintiff; and that such failure proximately caused the plaintiff's [injury] [death]; 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, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. Give only where there is a preliminary issue as to the legal status of the plaintiff, *i.e.*, lawful visitor or a trespasser, (see N.C.P.I.-Civil 805.50), and the jury has found that the plaintiff was a trespasser.

2. Give only where there is a preliminary issue as to whether the plaintiff was a lawful visitor or a trespasser. See N.C.P.I.-Civil 805.50. If the jury has found that the plaintiff was a lawful visitor, then the jury shall be instructed to answer the issue set forth in N.C.P.I.-Civil 805.55 instead of this instruction.

3. N.C. Gen. Stat. § 38B-3(3) (2011).

N.C.P.I.-Civil. 805.64C  
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4. *Id.*

5. N.C. Gen. Stat. § 38B-3(3).

6. *Id.*