



**Topic:** The Ground for Divorce – Alternative Proof  
**Opinion by:** Justice Doug Campbell  
**Date:** January 9, 2015

**See :** Fm. Law Practice Tips: Issue No.8: “...the Divorce in the Courtroom”  
: Fm. Law Practice Tips Issue No. 10: “Detailed Proof of the Marriage”

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*This memorandum was prepared by Justice Doug Campbell in reply to the request of ACJ O’Neil as outlined in his Notice to the Bar dated November 6, 2014. It represents Justice Campbell’s personal viewpoint and may or may not require some adjustment to conform to the preferences or practices of individual Judges. That will be left up to the Judge and the lawyer, if any, involved. Readers who make use of the within material do so therefore at their own discretion and subject to their own judgment.*

**Formulation:** 1) Breakdown of the Marriage is the **only** ground for divorce and it can be proved only in one of four ways;  
2) The practical meaning of “Intolerable” regarding continued cohabitation in the face of cruelty was substantially relaxed after the 1986 amendment to the Divorce Act.

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**Context:**

Family Law Practice Tips, Issue No. 8 envisages proof of the divorce ground by virtue of one year separation only. This Issue discusses the alternative ways to prove marriage breakdown in advance of one year of separation. They are adultery, mental cruelty and physical cruelty.

**Section 8 of the Divorce act states:**

*8. (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.*

*(2) Breakdown of a marriage is established only if*

*(a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding;*  
*or*

*(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,*

*(i) committed adultery, or*

*(ii) treated the other spouse with physical or mental cruelty of such a kind as **to render intolerable** the continued cohabitation of the spouses.*

**Comment:**

Prior to the 1986 change in the Divorce Act, there were numerous grounds for divorce. Separation grounds were based on separation for 3 or 5 years and **therefore** "Mental Cruelty", "Physical Cruelty", and "Adultery" were the more common grounds that were used to process a divorce.

With the change to one year of separation, a form of "no fault" divorce was invented in the sense that a period of separation for a single year was all that was needed and separation was then only one of four possible ways to prove the then only envisaged ground for divorce, which is marriage breakdown. The passage of one year almost always occurs before the parties are ready to finalize their divorce and it is therefore the most commonly used method of proving "marriage breakdown". The other 3 methods of proof are rarely used and so litigants do not often focus on how those alternative methods of proof are achieved.

A consequential change in attitude was that, if the marriage had suffered a breakdown (note the omission of the word "permanent" in describing that breakdown), the parties should be granted their divorce since continued cohabitation was then normally considered to be intolerable. That is to say, marriage breakdown is generally inconsistent with tolerable continued cohabitation. The need for extreme evidence of cruelty to show that cohabitation was "intolerable" had disappeared.

Previously, for example, proof of mental cruelty would often involve testimony from a professional such as a psychiatrist; but, after the Statute was amended, the test was very much less stringent. It was considered to be a very subjective test to determine that the Petitioner could not tolerate (or should I say "operate under") continued cohabitation in light of that breakdown.

Given that the divorce would be granted after 1 year regardless of "fault grounds", it became senseless to deny the divorce in the face of even minimal evidence of "breakdown", as shown by adultery or cruelty. For these reasons, the then Judges and now this author would require minimal evidence to prove "Mental Cruelty" in those rare cases when the separation for a period of a single year had not occurred.

The above comments apply equally to proof of physical cruelty or adultery.

**It should be kept in mind** that a parallel practice developed in that the Court insisted that 1-year separation evidence would always be relied on if it could be proved; ie that mental or physical cruelty or adultery would never be used (even if alleged) if one year separation was available.

***The following questions are intended to be samples only and must be tailored to meet the particular circumstances of the case. Because it is possible that these questions and answers may become contentious, leading the witness is not recommended.***

**Adultery:**

**1) Q: "In your Petition for Divorce, you allege that the marriage has broken down as evidenced by the fact that your spouse has committed adultery. What causes you to conclude that to be a fact?"**

**A:** "The Respondent admitted to me that she, during our marriage, had sexual intercourse with a person other than me".

**Note** that the reference to sexual intercourse solves the problem of a gap in the evidence arising from the question whether the witness properly understands the definition of "adultery". The reference to "during the marriage" further ties down the proof. If, despite good preparation, the witness falters with regard to these points, Counsel should ask follow-up questions to prove that the admission was with respect to actual "sexual intercourse" and that it occurred during the marriage.

**Eg. Q: 1A) "According to your understanding, when, in relation to the date of your marriage, did the admitted adultery occur?"**

**A:** "Her admission was that it occurred after the date of the marriage.

(Obviously, different evidence of adultery may be offered; the above is merely an example to illustrate minimum proof).

**2) Q: "What, if anything, did you do to approve of this behavior?"**

**A:** "Nothing".

**Note:** Some Judges might require more evidence such as the date and place of the adultery or more detail to show that the word "adultery" involves sexual intercourse. Some may also require that the respondent be required to testify to admit to the adultery under oath. Long gone are the days when the third party is needed to testify by way of an admission. Civil procedure rule 59.09 (8) specifies that an adultery allegation need not, in the petition, name the person involved. If it is not needed as an allegation, it follows that it is not needed as a matter of proof.

**Mental Cruelty:** *Note: The main elements of proof of mental cruelty are that the behavior is seen by the victim to be cruel in a mental sense and that it had a negative impact on him/her and that it rendered continued cohabitation intolerable. The threshold of proof of intolerability has since the Statutory change been very low for reasons given above.*

***The following questions are intended to be samples only and must be tailored to meet the particular circumstances of the case. Because it is possible that these questions and answers may become contentious, leading the witness is not recommended.***

**1) Q: "In your Petition for divorce, you allege that the marriage has broken down as evidenced by the fact that your spouse treated you with Mental Cruelty. Please give an example of the behavior to which that allegation refers".**

**A:** "On several occasions during the past few years of the marriage, including last month, the Respondent made negative remarks and gave disparaging descriptions of me to our friends and neighbors including negative references to my physical appearance, my weight, my housekeeping habits and many other things."

**2) Q: "Can you describe a more specific example of the behavior of the type that you have alleged to have occurred"?**

**A:** "I heard the Respondent speak to our neighbour, John Smith, where she referred to me by derogatory names such as 'jerk' and 'fat boy' and 'nowhere man'. She also spoke to me that way and in doing so, she would yell and speak in a way that I interpreted to be controlling ". *(Do not be surprised if, in real life, these descriptions are much more graphic).*

**3) Q: "When, in relation to the marriage date, did these things occur?"**

**A:** "They all occurred during the marriage and particularly in the last year of cohabitation which was mostly in 20XX"

**4) Q: "What, if any, impact did these behaviors have on you?"**

**A:** "They caused me to feel inferior and unworthy and to be depressed for days at a time."

**5) Q: "What, if any, impact did these above mentioned incidents have on your ability to continue to cohabit in a marital relationship with the Respondent?"**

**A:** "After so many years of this abuse by her, I can assure you that there is no possible way that I could live with the Respondent in any capacity, let alone in a marital relationship.

**Note:** *Some Judges might require more. It seems clear that it is no longer necessary to prove any form of mental health breakdown or hospitalization or even medical treatment or consultation. Obviously, proof of those facts would make the case stronger.*

**Physical Cruelty:** *Note: virtually any form of unwanted physical contact would constitute physical cruelty as long as there is evidence that it has had a negative impact on the victim and that, subjectively speaking, it has rendered continued cohabitation of the spouses intolerable. (Keep in mind the editorial comment above with regard to the meaning of the word "intolerable" in the post no fault divorce regime.)*

**1) Q:** "In your Petition for Divorce, you allege that the marriage has broken down as evidenced by the fact that your spouse has treated you with Physical Cruelty. Please give an example of the behavior to which that allegation refers".

**A:** "The Respondent punched me in the face and pulled my hair and threw me against the wall".

**2) Q:** "When did that occur?"

**A:** "14 months ago on the 4th of Month X of 20XX".

**3) Q:** "How can you recall the date?"

**A:** "I recall that it was on our anniversary".

**4) Q:** "Please describe another example of the behavior that you allege to have occurred?"

**A:** "I remember one occasion, about two days before we separated, when she put out her cigarette on my wrist".

**5) Q:** "What, if any, impact did these events have on you?"

**A:** "I was in physical pain for a number of hours on each occasion and it always caused me to be depressed for several days following each event".

**6) Q:** "What, if any, impact did these events have on your ability to continue to cohabit in a marital relationship with the respondent?"

**A:** The Cigarette burn was the last straw and I then made up my mind and still hold the view that I cannot possibly cohabit with this woman ever again."

**Note 1:** *Some Judges might require more. It would add to the strength of the case if the Petitioner could testify that he was seen by a medical professional, that there was treatment prescribed, that there were physical signs of the abuse and/or that it impaired his ability to go to work. In my view, none of these are necessary but would obviously assist with the task of proving that the marriage had broken down and that continued cohabitation was rendered intolerable.*

**Note 2:** *The use of the words "if any" in some of the above sample questions is designed to go some distance toward avoiding the allegation that the question is a leading question.*