Self-Defence: Overview and s 271(1)

General Commentary on Self-Defence

In *Palmer v The Queen* [1971] AC 814, the Privy Council stated:[1]

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances."

The Criminal Code allows for some use of force in self-defence, in defence of other persons and in defence of real and moveable property.

Speaking generally, the self-defence (or similar) provisions of the Code (sections 271, 272 and sections 270, 273, 273, 274, 275, 276, 277 and 278) each contain, as a key element, a requirement of reasonable necessity, with additional elements limiting the use of permissible force in various circumstances. [See also sections 266 and section 31(1)(c).]

There has been criticism of the defensive force provisions of the Code for their complexity and obscurity – see for example *R v Gray* (1998) 98 A Crim R 589 and *R v Messent* [2011] QCA 125.

Insofar as the defence of self-defence to assaults are concerned, the Code distinguishes between self-defence to provoked and unprovoked assaults.

The Code also distinguishes between self-defence to assaults which cause a reasonable apprehension of death or grievous bodily harm and those which do not cause such a reasonable apprehension.

It may be noted that section 271 incorporates the phrase "it is lawful for", yet section 272 uses the phrase "a person is not criminally responsible for". It has been suggested that the phrase "it is lawful" reflects the idea of a "strong" defence, in which the use of force is justified, but the use of the phrase "is not criminally responsible for" reflects the "weaker" idea that the conduct is excused: see *R v Prow* (1989) 42 A Crim R 343. A defendant who initially provokes an assault may be regarded as partially responsible for any retaliation to it, and of deserving no more than an "excuse" for their use of defensive force.

In relation to the defence of self-defence to an *unprovoked* assault, section 271(1) states:

> [I]t is lawful for [the defendant] to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

The test as to whether the force used was reasonably necessary or not is objective.

Force which may cause death or grievous bodily harm (sometimes called "lethal force") may be lawfully used in self-defence where the assault upon the defendant is of such a nature as to cause a reasonable apprehension of death or grievous bodily harm: see section 271(2).

Thus, if an assault upon a defendant is *unprovoked*, a defendant may use such force as is reasonably necessary to make an effectual defence against the assault – which can include

[1] [1971] AC 814 at 831.

lethal force *if* the assault is such as to cause reasonable apprehension of death or grievous bodily harm.

If the defendant was the original aggressor or the person who provoked the assault upon themselves, the defendant can lawfully use such force as is reasonably necessary to preserve himself or herself from death or grievous bodily harm only *if* the assault upon them caused a reasonable apprehension of death or grievous bodily harm *and* the defendant *believed on reasonable grounds* that it was necessary to so act.

However, this is not the case where the defendant began the assault on the other person with an intention to kill or do grievous bodily harm or where the defendant endeavoured to kill or do grievous bodily harm to the other person before the necessity for self-defence arose: see section 272.

The two limbs of s 271 are more commonly raised than any other section.

Preliminary question - which limb or limbs of the defences **in sections 271 or 272** should be considered by the jury?

In *R v Bojovic* [2000] 2 Qd R 183, it was said:

> Sometimes both limbs of s. 271 will be appropriately left to the jury. But more often than not the consequence of summing-up on both limbs may be confusion which detracts from proper consideration of the true defence. Speaking very generally, in homicide cases the first limb of s. 271 seems best suited for cases where the deceased's initial violence was not life-threatening and where the reaction of the [defendant] has not been particularly gross, but has resulted in a death that was not intended or likely; in other words cases where it can be argued that the unlikely happened when death resulted. The second limb seems best suited for those cases where serious bodily harm or life-threatening violence has been faced by the [defendant], in which case the level of his or her response is not subject to the same strictures as are necessary under the first limb. The necessity for directions under both limbs may arise in cases where the circumstances are arguably but not clearly such as to cause a reasonable apprehension of grievous bodily harm on the part of the [defendant]. In cases where the [deceased's] initial violence is very serious, most counsel will prefer to rely upon s. 271(2) alone… It is only cases in the grey area where it is arguable but not sufficiently clear that the requisite level of violence was used by the deceased person that directions under both subsections will be desirable.
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> The above general statements are not intended to paraphrase the meaning of the subsections. They are given with a view to identifying the broad streams of cases under which one or other or both of these defences may be appropriate.[2]

Thus, the evidence in a particular case, for example in a one punch case, may require directions in relation to both s 271(1) and s 271(2).[3]

The following observations were made by McPherson JA in *R v Young* (2004) 142 A Crim R 571, [2004] QCA 84 about section 271:

> [6] Both subsections of s 271 are predicated upon the happening of an unlawful assault, and both make it "lawful" (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorised under s 271(1) differs from that permitted under s 271(2). In the case of the former,

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2 *R v Bojovic* [2000] 2 Qd R 183, 186.

3 *R v Beetham* [2014] QCA 131.

> it is limited to such force "as is reasonably necessary to make effectual defence against the assault", and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and it does not depend on the impression formed by the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the Code are doubtless available in appropriate circumstances.
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> [7] Section 271(2), on the other hand, is concerned with a different state of affairs. It authorises the use of more extreme force by way of defence extending even to the infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds; but, subject to that requirement, it is the defender's belief that is the definitive circumstance...

Where there is a conflict in the evidence about

- who was the aggressor – that is, who was responsible for the initial assault, or
- whether there was provocation by the defendant for the assault upon him/her,

it may be necessary to give the jury an alternative direction under section 272.

Generally speaking a defence under section 272 helps a defendant who has started a fight with another person, who then retaliates with such violence as to cause in the defendant a reasonable apprehension of death or grievous bodily harm.

In *R v Lacey; ex parte A-G* (Qld) (2009) 197 A Crim R 399, [2009] QCA 274 the Court of Appeal held that sections 271, 272 and 273 were intended to define comprehensively the circumstances in which the defence can operate. Where the specific provisions of the Code concerning self-defence arise for the jury's consideration, there is no scope, on the same facts, for the operation of s 25 (extraordinary emergency).

Discussion with counsel and common sense will often narrow the defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under sections 271(1), 271(2) and 272. But there will be rare cases where all three will be necessary.

Self-defence is recognised as a difficult area in which to direct a jury – which is sometimes further complicated by reliance upon mistake of fact (section 24).

A judge should endeavour to lay out a logical and coherent pathway for the jury e.g. by written aids, flow charts etc.[4]

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[4] *R v Messent* [2011] QCA 125.

Section 271(1) – Self-defence against unprovoked assault

Sample Directions

I must now give you instructions on the law about self-defence. The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive, especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.

You will appreciate from what I have said earlier about the prosecution bearing the onus of proof that the defendant does not have to satisfy you that this defence applies. The prosecution must exclude or negate it, beyond reasonable doubt, to satisfy you that the defendant acted unlawfully.

And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [e.g. the wounding or injury] occurred in self-defence, as the law defines it, then that is the end of the case. The defendant's use of force would be lawful and you must find him not guilty.[5]

You should appreciate that the law of self-defence is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the common sense and community perceptions that juries bring into court.

[Read the sub-section and consider providing a copy of it to the jury:

271(1): **When** a person has been **unlawfully assaulted**

and has **not provoked** the assault,

it is lawful for the person to use such force to the assailant as is **reasonably necessary** to make effectual defence against the assault,

if the force used is **not intended, and is not such as is likely**, to cause death or grievous bodily harm.].

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[5] The following cases may be of assistance: *R v Bojovic* [2000] 2 Qd R 183; *R v Gray* (1998) 98 A Crim R 589; *R v Prow* [1990] 1 Qd R 64; *R v Muratovic* [1967] Qd R 15; *Marwey v The Queen* (1977) 138 CLR 630; *Zecevic v DPP (Vic)* (1987) 162 CLR 645 (re requirements in a common law summing-up).

You will see from the section that there are four matters you must consider in respect of this defence.

They are –

1. **whether there has been an unlawful assault on the defendant;**
2. **whether the defendant has provoked that assault;**
3. **whether the force used by the defendant upon the complainant was reasonably necessary to make effectual defence against the assault; and**
4. **whether the force used was intended, or such as was likely, to cause death or grievous bodily harm.**

The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, that the defendant was acting unlawfully), and the prosecution must do so beyond reasonable doubt before you could find the defendant guilty.

Taking those matters one by one:

<u>An unlawful assault?</u>

The first matter is whether the defendant was unlawfully assaulted by [the complainant/deceased]. If you conclude that [the complainant/deceased] did not first unlawfully assault the defendant, this defence is not open.

[If necessary, define assault: see section 245. Note that the definition of assault includes a situation in which violence is *threatened* so long as the assailant has an actual or apparent present ability to implement the theat.]

[If appropriate, direct the jury**]: It is common ground [**or the evidence suggests**] that the [complainant/deceased] unlawfully assaulted the defendant, and that on that basis the first part of the section is satisfied in the defendant's favour.**

<u>A provoked assault?</u>

The second matter that arises is, if there was such an assault, whether the defendant provoked it.

"Provocation" means any wrongful act or insult, of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.[6]

[It has been suggested[7] that a jury should treat an assault as *unprovoked* unless they decide beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

If you conclude that the defendant provoked the assault, then this particular defence is not open to him/her. On this basis the prosecution has properly excluded the defence and you need not consider it further.[8]

If you do not conclude that the defendant provoked the assault – that is, you are satisfied that the assault upon the defendant was unprovoked, then you will go on to consider these further matters.

Reasonably necessary force?

The third matter is whether the force used by the defendant was reasonably necessary to make effectual defence against that assault.

Whether the degree of force used was reasonably necessary to make effectual defence against an assault is a matter for your objective consideration and does not depend on the defendant's state of mind about what he/she thought was reasonably necessary.

In considering whether the force used by the defendant was reasonably necessary to make effectual defence, bear in mind that a person defending himself/herself cannot be expected to weigh precisely the exact amount of defensive action that may be necessary. Instinctive reactions and quick judgments may be essential. You should not judge the actions of the defendant as if he/she had the benefit of safety and leisurely consideration.

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6 In *R v Dean* [2009] QCA 309 the Court of Appeal held that a trial judge should have directed the jury as to the meaning of provoked as outlined in *R v Prow* [1990] 1 Qd R 64.

7 *R v Kerr* [1976] 1 NZLR 335 at 342 citing the unreported case of *R v Sampson* (Wellington, 25 July 1972, 61/72).

8 On this basis, then s 271(2) is not open either. But it might be necessary in an appropriate case to give directions under s 272.

[Here an example might help e.g. if the assault is a push or a punch, a person may not be justified in shooting the other person who pushed or punched him**.]**

Whether the force used was intended to, or was such as was likely to, caused death or grievous bodily harm?

The fourth matter to consider is whether the force the defendant used was not intended and was not such as was likely to cause death or grievous bodily harm.

"Grievous bodily harm" means any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.[9]

The fact that the force used did cause death or grievous bodily harm is not the point. The question is whether it was likely to happen in all the circumstances.[10]

[In appropriate cases**]: And there remains the question whether the prosecution has satisfied you that the defendant intended to kill the complainant or to do him grievous bodily harm?[11]**

To re-state all of that briefly, you will appreciate that, to prove the [first] element of the offence charged – that the defendant acted unlawfully – the prosecution must negate or overcome this defence, beyond a reasonable doubt,.

The prosecution will negate this defence (or satisfy you that it does not apply) if it is able to satisfy you, beyond reasonable doubt, of any one of the following:

1. **That the defendant was <u>not</u> unlawfully assaulted by the [complainant/deceased]; or**

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9 Note that the expanded definition of grievous bodily harm under the Code means that the defendant may be disqualified from the protection of s 271(1) because he or she intended to cause 'the loss of a distinct part or an organ of the body; or serious disfigurement': s 1. Whether disfigurement is serious is a matter for the jury: *R v Collins* [2001] QCA 547.

10 "Likely" is a word in common use, and it should not ordinarily be necessary to elaborate on its meaning. If any explanation is needed, it is sufficient to say that what is required is a 'real or substantial' likelihood, without adding glosses such as 'more likely than not', 'more than a 50% chance' or 'odds on chance': *Boughey v The Queen* (1986) 161 CLR 10. The standard is a higher one than that for the 'possible consequence' relevant to accident: *R v Hung* [2013] 2 Qd R 64.

11 *R v Gray* (1998) 98 A Crim R 589; *R v Greenwood* [2002] QCA 360 at [20]. This does not often arise as a separate issue under s 271(1), because in cases where this is likely counsel usually opt for a direction under s 271(2).

2. **That the defendant gave <u>provocation</u> to the [complainant/deceased] for the assault; or**

3. **That the force used was <u>more than was reasonably necessary</u> to make effectual defence; or**

4. **That the force used was either <u>intended or was likely to cause death or grievous bodily harm</u>.**

It is critical that you appreciate that there is no burden on the defendant to satisfy you that he/she was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he/she was not.