

94A. Self-defence against unprovoked assault: 271(1)

94A.1 Legislation

[Last Reviewed: February 2025]

Criminal Code

[Section 245](#) – Definition of *assault*

[Section 271](#) – Self-defence against unprovoked assault

94A.2 Commentary

[Last Reviewed: February 2025]

In preparing a summing up on s 271(1), 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).

The suggested direction below divides the defence into four matters for the jury's consideration, namely:

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.

As to issue 2, the suggested direction is consistent with the statement of the Court of Appeal in *R v Dean* [\[2009\] QCA 309](#) that the trial judge should have directed the jury as to the meaning of provoked as outlined in *R v Prow* [\[1990\] 1 Qd R 64](#).

If a jury finds that the assault was provoked by the Defendant, then a defence under s 271(1) has been excluded. On this basis, s 271(2) is not available either. However, in an appropriate case, it might be necessary to direct under s 272 (Self-defence against a provoked assault).

As to issue 4, 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](#)).

As to whether the force was likely to cause death of grievous bodily harm: ‘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’ (*Bouhey 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](#)).

Further, the bare fact that grievous bodily harm was caused does not exclude a s 271(1) defence. The issue in this context is whether the force was likely to cause grievous bodily harm, not whether grievous bodily harm occurred (*R v Speakman* [\[2024\] QCA 164](#), [13]).

As to whether the Defendant intended to cause death or grievous bodily harm, see *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).

94A.3 Suggested Direction

[Last Reviewed: February 2025]

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/her] not guilty.

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.

[It may assist to provide the jury with a copy of s 271(1) or Appendix 1 below].

Our *Criminal Code* provides: 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.

That provision makes a use of force lawful in these circumstances:

- 1 The Defendant was unlawfully assaulted, and**
- 2 The Defendant did not provoke the assault, and**
- 3 The force used by the Defendant was reasonably necessary to make effectual defence against the assault, and**
- 4 That force was not intended, and was not such as was likely, to cause death or grievous bodily harm.**

It is not for the defence to prove the Defendant's alleged use of force did occur in those circumstances; it is for the prosecution to prove it did not. If you are left in a state of reasonable doubt whether it did occur in those circumstances, then the prosecution will not have met its burden of proving beyond reasonable doubt that the alleged use of force was unlawful. It follows the prosecution must exclude this defence beyond a reasonable doubt.

Taking the four circumstances I mentioned one by one:

An unlawful assault?

The first matter to consider 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, the defence will not apply.

[If necessary, define assault: see s 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 threat].

[Identify what, if any, factual issue(s) arise about this matter for the jury to resolve].

A provoked assault?

The second matter to consider is, whether the Defendant provoked the assault.

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

[Identify what, if any, factual issue(s) arise about this matter for the jury to resolve].

If you conclude that the Defendant provoked the assault, the defence will not apply.

Reasonably necessary force?

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

[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/her].

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 precisely weigh 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.

[Identify what, if any, factual issue(s) arise about this matter for the jury to resolve.]

Force intended or 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.

The fact that the force used did cause [death or grievous bodily harm] does not determine this matter. The question is whether [death or grievous bodily harm] was intended or was likely to happen in all the circumstances.

[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/her grievous bodily harm].

[Identify what, if any, factual issue(s) arise about this matter for the jury to resolve].

Recap

To recap, you will appreciate that, to prove 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 The Defendant was not unlawfully assaulted; or**
- 2 The Defendant provoked the assault; or**
- 3 The force used by the Defendant was more than reasonably necessary to make effectual defence against the assault; or**
- 4 The force used was either intended or was likely, to cause death or grievous bodily harm.**

It is critical that you appreciate 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.

94A.1 Appendix 1

[Last Reviewed: February 2025]

SELF-DEFENCE

The law of self-defence makes a use of force lawful in these circumstances:

- 1 The Defendant was unlawfully assaulted, and
- 2 The Defendant did not provoke the assault, and
- 3 The force used by the Defendant was reasonably necessary to make effectual defence against the assault, and
- 4 That force was not intended, and was not such as was likely, to cause death or grievous bodily harm.

It is not for the defence to prove this defence. It is for the prosecution to exclude it. To do that it must satisfy you beyond reasonable doubt of at least one of the following:

- 1 The Defendant was not unlawfully assaulted; or
- 2 The Defendant provoked the assault; or
- 3 The force used by the Defendant was more than reasonably necessary to make effectual defence against the assault; or
- 4 The force used was either intended or was likely, to cause death or grievous bodily harm.