Section 272 – Self-defence against provoked assault, including when death or grievous bodily harm occurs

Legislation

272 Self-defence against provoked assault

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Further commentary on section 272

Section 272 provides for more restrictive rights of self-defence for a defendant who started a fight with the deceased/complainant or provoked the deceased/complainant to assault him/her.

This section applies where the defendant was the first to assault or has behaved in such a way as to lead to a response from the deceased/complainant in the form of an assault with the degree of violence referred to in section 272 (that is, such violence as to cause reasonable apprehension of death or grievous bodily harm).

Unlike section 271 – section 272 speaks of *an assault* and not *the assault*: see *R v Dayney* [2020] QCA 264.

The section places restrictions on the extent to which the defendant may resort to retaliatory force and reflects a policy which requires persons who initiate conflict to make some sacrifices to stop it.

A person who is subject to section 272(1) cannot lawfully use any defensive force unless the assault they have provoked is so serious as to (a) raise a reasonable apprehension of death or grievous bodily harm and (b) induce a reasonable belief that a defendant has no other way of avoiding death or grievous bodily harm than their own resort to the lethal or near lethal force in fact used by them.

If a provoked assault is not that serious – then the person who provoked it must tolerate it.

The section is concerned with two states of mind of the defendant, namely –

- their apprehension ((a) above); and
- their belief that force is necessary ((b) above).

Those states of mind are to be subjectively determined – but they must be objectively reasonable.

If (a) and (b) cannot be excluded beyond reasonable doubt by the Crown, then, subject to the proviso in section 272(2), a defendant is not criminally responsible for the force reasonably necessary for his or her preservation – including force which may cause death or grievous bodily harm.

The proviso in section 272(2) is problematic. The cases propose different constructions of it. The phrase commencing "nor, in either case …" either -

- provides a third qualification to the operation of section 272(1)

  (treating the "either case" as the use of force which causes death and the use of force which causes grievous bodily harm)

or

- it modifies the effect of the first two exceptions set out in section 272(2)

  (treating the "either case" as the first two cases contained in section 272(2)).

If it provides a third qualification to the operation of section 272(1), then, if self-defence is not excluded by either of the first two exceptions contained in section 272(2), it may be excluded by proof that, as far as was practicable, the accused person did not decline further conflict, and quit it or retreat from it, before it became necessary to preserve himself or herself.

If it does not provide a third exception to section 272(1), and instead modifies the effect of the first two exceptions in section 272(2), then in a case where an accused began an assault with an intention to kill or do grievous bodily harm, or in a case in which an accused endeavoured to kill or do grievous bodily harm before the necessity to preserve themselves arose, self-defence would still be available unless the prosecution proved that the accused did not decline further conflict and quit it or retreat from it before it was necessary to defend themselves.

In *Dayney* [2020] QCA 264, the Court of Appeal reached different conclusions as to the application of section 272(2). On this point, the majority view (Fraser and McMurdo JJA) was that section 272(2) provides three qualifications to the operation of section 272(1). Sofronoff P reached the alternative conclusion.

Fraser and McMurdo JJA said:

> [112] " …It is logically consistent with the distinction between cases within s 271 and those within s 272, that this final clause of s 272(2) should qualify the protection afforded by s 272 in every case. In cases of both unprovoked and provoked assaults, it may be relevant to consider whether the accused person sought to withdraw from the conflict, because that may be relevant to a consideration of whether he or she reasonably believed that it was necessary to use force in self-defence. But the absence of a withdrawal, when that would have been practicable, has a particular relevance where the accused person was the instigator of the conflict.
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> [113] That particular relevance is recognised under the common law. For example, in *Viro v The Queen*, Gibbs J said:
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> > "In my opinion, in Australia the fact that the person raising self-defence was the aggressor is an important consideration of fact, but not a legal barrier to the success of the plea. The matter may be regarded in a similar light to a failure to retreat. It is obvious enough that a person cannot rely upon the plea of self-defence unless the violence against which he sought to defend himself was unlawful. If, therefore, one man makes a violent attack upon another with intent to rob him, and the man attacked defends himself, using o more force than is reasonably necessary, the original assailant cannot be said to be acting in self-defence in trying to overcome the other's resistance, since that resistance was lawful. However, if the original assailant has desisted from his attack, and his intended victim no longer needs to defend himself, and can not reasonable believe that he is still in danger, but nevertheless takes the offensive and out of anger or revenge himself becomes the attacker, the original assailant is not obliged to let himself be killed or injured without any attempt at resistance. *Nevertheless, in such a case it is difficult to see how, as a matter of fact, the conduct of the aggressor, which commences as a criminal assault with an intent to commit a serious crime, can become transmuted in split seconds into lawful self-defence, unless the aggressor has clearly broken off his attack. In such circumstances the fact that he did not retreat when he had an opportunity to do so assumes a special significance.*"

Similarly, in *Zecevic v Director of Public Prosecutions,* Wilson Dawson and Toohey JJ said:

> "There is, however, one situation which requires particular mention. It should, we think, be regarded as raising only evidentiary matters to be considered in arriving at an answer to the ultimate question, although in code States it is treated as raising matters of law [e.g. s 272 of the Qld Code] … Where an accused person raising a plea of self-defence was the original

aggressor and induced or provoked the assault against which he claims the right to defend himself, it will be for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, based on reasonable grounds, that his actions were necessary in self-defence. For this purpose, it will be relevant to consider the extent to which the accused declined further conflict and quit the use of force or retreated from it, these being matters which may bear upon the nature of the occasion and the use to which the accused made of it."

[114] It is less likely that the intended operation of this third clause [in s 272(2)] should apply only to cases within the first and second clauses, and not to other cases (where death or grievous bodily harm was caused) when the accused person was the instigator of the conflict.

…

[117] …[I]t is an unremarkable consequence of the provision that a person who has caused death or grievous bodily harm, having begin the assault on the victim with that intent or having endeavoured to do so before it was necessary to preserve himself or herself, should not have the protection of self-defence,

Sofronoff P broke down the defence as follows (from [41] onwards):

[41] The accused *assaulted the deceased using n on-lethal force or has provoked the deceased to assault the accused*. It is assumed that neither of these two possible acts of the accused could justify the deceased's use of lethal force in response. That is why the provision uses the indefinite article with respect to the deceased's assault in response. The accused's responsibility for *an* assault is assumed; there is not the same responsibility for *the* actual lethal assault that followed.

[42] By way of response to the accused's assault or provocation, the deceased *assaulted the accused with such violence as to cause reasonable apprehension of death or grievous bodily harm*. This requires an objective test.

[43] The deceased's assault was *such as to induce the accused to believe on reasonable grounds that, to preserve himself or herself from death or grievous bodily harm, it was necessary to use force in self-defence.* This ingredient concerns the accused's state of mind about what is required to meet his or her own response to the lethal assault. The accused must actually hold the belief and the belief must be reasonable. This requires consideration of the facts upon which the belief was based.

[44] *The force actually used in retaliation was reasonably necessary for preservation from death or grievous bodily harm*. This last ingredient must be contrasted with the apparently similar, but fundamentally different, provision in s 271. In the case of an accused who did not initiate deadly combat, s 271 render lawful the use of "any such force

to the assailant as is necessary for defence". Thus, the force that it is lawful to use under s 271 is not limited only to the degree of force that could actually have effectuated a preservation. As Hart J observed in *R v Muratovic*, if that were so, a defence under s 271 would seldom be successful because in many cases, perhaps even in most cases, a lesser degree of force might, in hindsight, have been adequate, such as rendering the deceased unconscious instead of killing.

[45] That is not so under s 272(1) which limits the force that can lawfully be used in self defence to "such force as is *reasonably* necessary for such preservation".

[46] Subsection 272(2) is different. It is concerned to constrain the operation of the defence offered by subsection 272(1) if the accused's initiating assault, with which the first sub-section deals, was a lethal assault from the inception; or if that initiating assault, non-lethal at first, became a lethal assault before the victim had used any lethal force in self-defence. [Footnote 13: "before the necessity of so preserving himself or herself arose"; this slight but crucial difference explains the syntax by which the latter expression is unnecessary to quality "begun the assault with intent".] The provision posits these as two "cases":

(a) "a case in which" the accused began an assault against the deceased with the intention to kill or to do grievous bodily harm; and

(b) "a case in which" the accused assaulted the deceased in the first place and then endeavoured to kill or to do grievous bodily harm. [Footnote 14: The provision speaks of the accused having that intent with respect to, or endeavouring to kill or do grievous bodily harm to, "some person". This will usually be the victim of the assault but it need not be. This discussion will assume the existence of only two relevant persons, the accused and the deceased victim of the lethal assault.]

[47] Subsection (2) provides that "[t]his protection", namely the protection offered by subsection (1), does not apply in the first case or in the second case. That must be so for these two cases are ones in which it is the accused who first brought the risk of lethality into play so that it is the *deceased* who, being the victim of a lethal assault, is alone justified under s 271(2) to use lethal force in self-defence.

[48] Is there any case in which an accused who has in this way initiated the use of lethal force might still justify the use of lethal force for self-preservation? As its final limb s 272(2) provides:

> " … nor, in either case, unless, before *such necessity* arose, the *person using such force* declined further conflict, and quitted it or retreated from it as far as was practicable." (emphasis added)

[49] The expression "the person using such force" in the final limb refers to the "person" referred to twice in subsection (2) as "the person using

force which causes death or grievous bodily harm in relation to each case. The expression "such necessity" is a reference to the necessity to use lethal force in self-defence which is the basal hypothesis in both subsection (1) and subsection (2).

[50] The final part of s 272(2) thus directs attention to the moment "before such necessity arose", namely the moment in time before the victim began to use lethal force in response to the accused's attack.

[51] The effect of s 272(2) is to deny an accused, whose case fits into the two kinds of cases referred to in the subsection, a legal excuse for killing unless the accused first removes the necessity (which the accused created) for the deceased to use lethal force. Once the deceased has employed lethal force in response to the accused's lethal force, the time for avoidance of legal consequences is over. However, if, having been the first to use lethal force, the accused has declined further conflict or has "quitted it or retreated from it as far as was practicable" before the deceased had to employ lethal force, there can no longer be any reason for the deceased thereafter to resort to a lethal degree of violence. Mortal combat is over before it has gone too far. If, then, despite the accused's voluntary elimination of any need for the deceased to use lethal force before the deceased used it, the deceased still attempts to kill the accused, then the accused is in the same position as if he or she had never used such force in the first place. The accused can rely upon subsection (1).

As to whether retreat, as a condition of justified self defence, applied to the whole of s 272 or not, Sofronoff P considered the competing interpretations and concluded that it did not: "There is no reason consistent with the principles of self-defence enunciated in the *Code* why an accused who has assaulted a victim by the use of force which threatens neither death nor serious injury should have to retreat before trying to save his or her life in the face of a disproportionate lethal response".

In *R v Wilmot* [2006] QCA 91, Jerrard JA took the same approach (as Sofronoff P). His Honour said:

[47] On the facts described herein, it would have been open to the jury to consider that s 272 applied, in that Mr Wilmot [the defendant] did provoke an assault upon him by Mr Norman [the deceased], who assaulted Mr Wilmot with sufficient violence or threats of violence as to cause a reasonable apprehension of at least grievous bodily harm. I consider Mr Norman's assault with the metal bar constituted by Mr Norman's producing it and threatening to use it on the aggressive and alcohol fuelled Mr Wilmot was an assault which a jury would properly consider lawful. That was why s 272 applied, if self-defence was available, when Mr Wilmot later brutally bludgeoned Mr Norman to death with the bar. Whether s 271(2) was available, or only s 272(1), it is significant in rebuttal of either defence that Mr Wilmot's subsequent explanation for what happened, given to the police, only attempted to justify one blow and not the six that were delivered, and that he attempted to prepare a false account of events and did dispose

of the clothing which he was wearing. That conduct was inconsistent with a belief on reasonable grounds that the force he had used was necessary for his own self-defence.

[48] The remaining questions for the jury on a s 272(1) defence were whether Mr Norman's behaviour had caused Mr Wilmot to believe on reasonable grounds that it was necessary for him to use force in self-defence to preserve himself from death and grievous bodily harm, and whether the force Mr Wilmot actually used was reasonably necessary for his self-preservation. The learned judge actually put those very propositions to the jury, in the passages conceded to be misdirections for a defence relying on s 271(2), self-defence against unprovoked assault. The learned judge did not direct the jury on any of the requirements [of] s 272(2) which limit the availability of the plea of self-defence to a provoked assault.

[49] I consider the third obligation specified in s 272(2), namely that before the necessity for using potentially lethal force in self-defence [arose] the person using such force declined the conflict and quitted it or retreated from it as far as was practicable, applies only to the circumstances described in the two preceding clauses in that paragraph. That is, I agree with the view suggested by Hart J in *Muratovic* [at 28] that those two earlier clauses, respectively describing a person who used murderous violence in the first place or else before it was necessary, and who is thereby disqualified from the protection given by s 272(1), can re-qualify for that protection if that person has retreated before using lethal force. I therefore disagree with the suggestion by Stanley J in *Reg v Johnson* [1964] Qd R 1 at 14 that s 272(1) applies only if the defendant has declined further combat or retreated. Whichever view is correct, a view of the facts was open to the jury which would have entitled Mr Wilmot to plead s 272(1), namely that he had declined further conflict with Mr Norman and attempted to retreat from Mr Norman's assault before ultimately using lethal force …

Hart J's approach – which allows a defendant to "re-qualify" – was adopted by the Western Australian Court of Criminal Appeal in *Randle v The Queen* (1995) 15 WAR 26, in which Malcolm CJ said:

> … despite the fact that the first two clauses of the second paragraph of s 249 state cases where the protection would not be available in any event, the effect of the final clause is to qualify that absence of protection by stating particular circumstances under which the defence will nonetheless be available in either of those two cases.

See also See *Kenny: Criminal Law in Queensland and Western Australia*, 9th Edition, J Devereux and M Blake, Sydney 2016.

For obvious reasons, the following sample direction adopts the view of the majority in *Dayney.*

Suggested direction:

> **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. It does not always follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.**
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> **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.**
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> **And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [**the killing or the GBH**] 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.**[1]
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> **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.**
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> **Speaking generally, you will not be surprised to know that if the violence of the attacker is such that the person defending himself/herself reasonably fears for his/her life or safety, then the justifiable (or lawful) level of violence which may be used by the person attacked in self-defence will be greater also.**

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[1] The following cases may be of assistance: *R v Bojovic* [2000] 2 Qd R 183; *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* (1987) 162 CLR 645 (re requirements in a common law summing-up).

The level of violence in self-defence that is lawful depends on the level of danger created by the attacker and the reasonableness of the defendant's reaction to it.

Section 272 of the Criminal Code excuses a person from using lethal or near lethal force in certain circumstances. By "lethal or near lethal" I mean force that kills or does grievous bodily harm.

This section may apply where the defendant had good reason to believe he/she was in serious danger of losing his/her own life, or suffering a very serious injury, even though he himself provoked the assault.

Section 272 of our *Criminal Code* reads [you may wish to provide a copy of the section to the jury**]:**

1. **"When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.**
2. **This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable."**

This section raises several matters for your consideration, namely:

1. **Whether the defendant unlawfully assaulted the deceased/complainant or provoked an assault from them?**

2. **Whether the response from the deceased/complainant was so violent as to cause reasonable apprehension of death or grievous bodily harm?**

3. **Whether the defendant <u>believed</u>, on <u>reasonable grounds</u>, that it was <u>necessary</u>, in order to preserve himself/herself from death or grievous bodily harm, to use force in self-defence?**

4. **Whether the force in fact used was such as was <u>reasonably necessary</u> for his/her preservation from death or grievous bodily harm?**

[If this is an issue, you may add**]**:

You will see the proviso in section 272(2).

The defence does not apply where:

- **The defendant first began the assault with intent to kill or to do grievous bodily harm to the [**deceased/complainant/some person**]; or**
- **The defendant endeavoured to kill or to do grievous bodily harm to the [**deceased/complainant**] before the necessity of so preserving himself arose;**
- **<u>Nor unless</u>, the defendant declined further conflict, and quitted it or retreated from it as far as was practicable, before the necessity to preserve himself/herself from death or grievous bodily harm arose,**

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

So, [assuming that it is not in issue that the defendant assaulted the deceased/complainant or provoked an assault from the deceased/complainant**]**

if the prosecution satisfies you beyond reasonable doubt of any one of the following, the defence has been excluded:

1. **The assault by the other person was <u>not</u> of such violence as to cause reasonable apprehension of death or grievous bodily harm; or**
2. **The assault did <u>not</u> induce the defendant to <u>believe, on reasonable grounds</u>, that it was necessary for his own preservation from death or grievous bodily harm to use the force used in self-defence; or**
3. **That the force used was <u>more</u> than was <u>reasonably necessary</u> to save the defendant from death or grievous bodily harm;**

   [if necessary,**]** or
4. **That the defendant first began the initial assault with intent to kill or to do grievous bodily harm to some person; or**
5. **The defendant endeavoured to kill or do grievous bodily harm to some person before the necessity of so preserving himself arose; or**
6. **The defendant did not decline further conflict, before the necessity of preserving himself or herself from death or grievous bodily harm arose, and did not quit or retreat from it as far as was practicable.**

Remember it is for the prosecution to satisfy you beyond reasonable doubt that self-defence does not apply. There is no burden on the defendant to satisfy you that he was acting in self-defence, or to establish any one of those things I have described to you. To negate the defence, the prosecution must prove, beyond reasonable doubt, any one of the six matters mentioned above.