

96. Self-defence against provoked assault, including when death or grievous bodily harm occurs

96.1 Legislation

[Last reviewed: December 2024]

Criminal Code

[Section 272](#) – Self-defence against provoked assault

96.2. Commentary

[Last reviewed: December 2024]

See generally the commentaries in **Chapter 94 – Self-Defence: Overview** and **Chapter 95 – Self Defence against Unprovoked Assault When There is Death or GBH: s 271(2)**.

Section 272 potentially applies where the defendant is assaulted by an alleged victim after starting the aggression by unlawfully assaulting or provoking an assault from that person. It is therefore more restrictive in its availability than s 271. Sub-section (1) places conditions on the circumstances in which an aggressor defendant may resort to defensive force and sub-section (2) imposes three specific exclusions on the reach of the defence.

Subject to the exclusions in s 272(2), s 272(1) excuses the defendant from criminal responsibility for use of force in self-defence, even if that force causes death or grievous bodily harm, where:

- 1) the defendant first assaulted or provoked an assault from the complainant/deceased; and
- 2) the deceased/complainant then assaulted the defendant; and
- 3) the assault on the defendant was committed with such violence as to cause reasonable apprehension of death or grievous bodily harm; and
- 4) the assault on the defendant induced the defendant to believe on reasonable grounds that it was necessary for the defendant's preservation from death or grievous bodily harm to use force in self-defence.

The existence of the above states of mind—‘reasonable apprehension’ and belief ‘on reasonable grounds’—are to be subjectively determined. However, the quality of the apprehension and the grounds for the belief must be objectively reasonable (see by parity of reasoning, in connection with s 271(2), *R v Wilmot* [\[2006\] QCA 91](#); [\(2006\) 165 A Crim R 14](#) and the cases discussed therein).

The nature of the three exclusions in s 272(2) was the subject of various cases, involving divergent judicial views. The divergence went to whether the third exclusion qualified the first two or stood alone as an independent exclusion. Those cases require no commentary analysis because the divergence was resolved in *Dayney v The King* [2024] HCA 22, in which the High Court affirmed the prevailing majority view of the Queensland Court of Appeal that the third exclusion operates as an independent exclusion, not merely a qualification of the first two.

The reasoning in *Dayney* interprets s 272(2) as only applying to a case where the defendant's use of force caused death or to a case where the defendant's use of force caused grievous bodily harm. The effect of *Dayney* is that in either such case, s 272(2) excludes the protection afforded by s 272(1), if:

- the assault by the defendant, initiating the responding assault by the deceased/complainant, was begun with intent to kill or do grievous bodily harm to some person; or
- the defendant endeavoured to kill or do grievous bodily harm before the need arose to preserve himself or herself by using force causing death or grievous bodily harm; or
- before the need arose for the defendant to preserve himself or herself, by using force causing death or grievous bodily harm, the defendant did not first decline further conflict, and quit it or retreat from it as far as was practicable.

Note the High Court considered the first exclusion applies as if the assault referred to is the defendant's 'initiating assault described in s 272(1)' (*Dayney v The King* [2024] HCA 22, [17]). On that reasoning the first exclusion does not apply if the initiating event was some provocation other than an assault.

The below suggested direction adopts some aspects of *Dayney*'s explanations of the exclusions.

While s 272 only applies where the defendant reasonably apprehends death or grievous bodily harm and potentially excuses force even if it causes death or grievous bodily harm, its application is not confined on its terms only to those cases where the defendant causes death or grievous bodily harm. However, they will be the most common cases in which the defence arises and accordingly the below suggested direction is crafted by reference to those cases.

96.3 Suggested direction:

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(Note that this suggested direction's references to s 272(2) need only be included to the extent any of the exclusions listed therein potentially apply).

The criminal law does not only punish; it protects as well. When a defendant's own violence or provocative behaviour has started an exchange of violence, there can be circumstances in which the violence escalates to the point where the defendant is in fear of death or grievous bodily harm. Where that occurs and the defendant uses force in defence, the law provides there are some circumstances in which the defendant will not be criminally responsible for using such force.

Those circumstances are set out in s 272 of our *Criminal Code*, 'Self-defence against provoked assault'. It reads (consider providing a copy of the section to the jury):

Sub-section (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.'

(If relevant, add this paragraph on subs (2)): **Subsection (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'.**

The law of self-defence against provoked assault is drawn in fairly general language 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 to the facts of each case.

I will break down the general language of the section into its main parts for you.

(If using Appendix A, add the following paragraph): **Those parts are identified for your convenience in the elements table I have distributed. You may find it convenient to follow the table as I talk.**

Firstly, the words of s 272(1) specify four elements to the defence. Their combined effect is to excuse the defendant from criminal responsibility for use

of force in self-defence, even if that force causes death or grievous bodily harm, where:

- (1) the defendant first assaulted or provoked an assault from the [complainant/deceased]; and**
- (2) the [deceased/complainant] then assaulted the defendant; and**
- (3) the assault on the defendant was committed with such violence as to cause reasonable apprehension of death or grievous bodily harm; and**
- (4) the assault on the defendant induced the defendant to believe on reasonable grounds that it was necessary for the defendant's preservation from death or grievous bodily harm to use force in self-defence**

(If s 272(2) is relevant, add the following paragraph addressing the subsection):

Sub-section (2) of s 272 excludes the protection afforded by s 272(1), in those cases where death or grievous bodily harm is done to the [deceased/complainant] by the defendant and (here refer only to those of the following exclusory circumstances which are potentially relevant):

- (a) the assault by the defendant, initiating the responding assault by the [deceased/complainant], was begun with intent to kill or do grievous bodily harm to some person; or**
- (b) the defendant endeavoured to kill or do grievous bodily harm before the need arose to preserve [himself/herself] by using force causing death or grievous bodily harm; or**
- (c) before the need arose for the defendant to preserve [himself/herself], by using force causing death or grievous bodily harm, the defendant did not first decline further conflict, and quit it or retreat from it as far as was practicable.**

It is not for the defendant to satisfy you that this defence of self-defence against a provoked assault applies. Rather, because the prosecution has the onus of proving beyond reasonable doubt that the defendant acted unlawfully, the prosecution must exclude this defence beyond reasonable doubt.

If the prosecution cannot exclude, beyond reasonable doubt, the possibility that [the killing or the GBH] occurred in self-defence against a provoked assault, as the law defines it in s 272, 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. Conversely, the prosecution will have excluded the defence if it has excluded at least one of the elements of the defence beyond reasonable doubt [(If s 272(2) is relevant, add): or, alternatively, proved beyond reasonable doubt that the defendant caused death or

grievous bodily harm to the [deceased/complainant] and one of the exclusory circumstances in s 272(2) applies].

I now turn to each of the elements.

Element 1 is that the defendant first assaulted or provoked an assault from the [deceased/complainant].

An assault is any application of force or threatened application of force to the person of another without their consent (consider enlarging on this description per s 245 if necessary). An assault will have been provoked by the defendant in the event there has been some 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 induce the person to assault the defendant.

This defence only has potential application if the defendant's assault was preceded by an assault or other provocation by the [deceased/complainant]. If it was not, then this defence does not apply to excuse the defendant and the relevant self-defence provision to consider is the s 271 defence of self-defence against unprovoked assault.

(If there is no issue as to the presence of the requirement that the defendant first assaulted or provoked an assault from the complainant/deceased, then direct the jury accordingly. If there is, which is only likely to arise when uncertainty requires both s 271 and s 272 to be left as potential defences, then direct the jury as to the issues of fact it must determine in deciding this threshold issue).

Element 2 is that, after the defendant first assaulted or provoked an assault from the [deceased/complainant], the [deceased/complainant] then assaulted the defendant.

[If the occurrence of the assault by the deceased/complainant is in dispute, explain the issues of fact the jury must determine in deciding that dispute].

If the prosecution satisfies you beyond reasonable doubt that the [deceased/complainant] did not assault the defendant, then this element will have been excluded and the defence will not apply to excuse the defendant. If it does not so satisfy you then you would consider the remaining elements on the basis there was such an assault of the defendant by the [deceased/complainant].

Element 3 is that the assault on the defendant was committed with such violence as to cause reasonable apprehension of death or grievous bodily harm. The nature of that assault is said to have involved [here describe the assault and identify any factual issues the jury must resolve in determining its nature and extent]. You should consider whether that assault was committed with such violence that it caused apprehension by the defendant of death or grievous bodily harm, and that such apprehension was reasonable.

[Here describe any factual issues the jury must resolve in weighing whether the apprehension in fact existed and whether it was reasonable in the circumstances].

The prosecution will have excluded this element, and thus the defence, if it satisfies you beyond reasonable doubt either that the violence of the assault upon the defendant did not in fact cause the defendant to apprehend that death or grievous bodily harm may result to the defendant, or, if it did, that such apprehension was not reasonable in the circumstances.

Element 4 is that the assault on the defendant induced the defendant to believe on reasonable grounds that it was necessary for the defendant's preservation from death or grievous bodily harm to use force in self-defence. You should consider whether the assault induced the defendant to have such a belief, and, if it did, whether that belief was held on reasonable grounds.

[Here describe the alleged belief, including how it was allegedly induced, and the alleged grounds for holding it. Then identify any factual issues the jury must resolve in weighing whether the belief in fact existed and whether it was held on reasonable grounds].

The prosecution will have excluded this element if it satisfies you beyond reasonable doubt either that the assault on the defendant did not induce the defendant to believe it was necessary for the defendant's preservation from death or grievous bodily harm to use force in self-defence, or, if it did induce such a belief, that the belief was not held on reasonable grounds.

(If death or grievous bodily harm is done to the deceased/complainant and any of the exclusions in s 272(2) may potentially apply, continue to add the following. Otherwise, move to the last paragraph):

This is a case in which it is alleged that death or grievous bodily harm was done to the [deceased/complainant]. In such a case there are potentially circumstances listed in s 272(2) which exclude the protection of this defence. Those exclusory circumstances only have the potential to apply in cases where the defendant's use of force caused death or grievous bodily harm to the deceased/complainant.

[In the event that the defendant's alleged causing of death or grievous bodily harm is in dispute, identify the issues of fact to be resolved by the jury to determine that dispute].

If you are not satisfied beyond reasonable doubt that there was a use of force by the defendant which caused death or grievous bodily harm, then the exclusory circumstances have no potential application in this case.

The prosecution contends that the following exclusory circumstances apply (direct only on those which potentially apply):

(a) If the event which prompted the assault on the defendant by the [deceased/complainant] was an assault by the defendant, then the defence does not apply if that assault was first begun with intent to kill or do grievous bodily harm to someone. In other words, the defence does not protect a defendant who started the violence if he or she started it intending to kill or do grievous bodily harm.

[Here identify the factual issues the jury must resolve to determine whether the assault was begun with such an intent].

If the prosecution satisfies you beyond a reasonable doubt that the defendant's use of force caused death or grievous bodily harm to the [deceased/complainant] and the defendant's initiating assault was begun with intent to kill or do grievous bodily harm to someone, then the defence of self defence against provoked assault will have been excluded. If it does not so satisfy you then this exclusory circumstance does not apply.

(b) If the defendant endeavoured to kill or do grievous harm to some person before the necessity arose of preserving [himself/herself] by using force causing death or grievous bodily harm, then the defence does not apply.

[Here identify the factual issues the jury must resolve to determine whether the defendant tried to kill or do grievous bodily harm before the need to do so arose].

If the prosecution satisfies you beyond a reasonable doubt that the defendant's use of force caused death or grievous bodily harm to the [deceased/complainant] and the defendant endeavoured to kill or do grievous bodily harm before the need arose for the defendant's self-preservation by the use of such force, then the defence of self defence against provoked assault will have been excluded. If it does not so satisfy you then this exclusory circumstance does not apply.

(c) The protection of the defence does not extend to a case in which a defendant uses force which causes death or grievous bodily harm unless, before the need to preserve [himself/herself] from death or grievous bodily harm arose, the defendant declined further conflict and quitted it or retreated from it as far as was practicable. In other words, such a defendant cannot avail themselves of such a defence unless they first, as far as was practicable, sought to neutralise the threat they themselves created.

[Here identify the factual issues the jury must resolve to determine whether the defendant declined further force and quitted it or retreated from it as far as was practicable].

If the prosecution satisfies you beyond a reasonable doubt that the defendant's use of force caused death or grievous bodily harm to the [deceased/complainant] and the defendant, before the need to preserve [himself/herself] from death or grievous bodily harm arose, did not decline further conflict and quitted it or retreated from it as far as was practicable, then the defence of self defence against provoked assault will have been excluded. If it does not so satisfy you then this exclusory circumstance does not apply.

Finally, I remind you it is not for the defence to prove that the defence of self defence against provoked assault applies. It is for the prosecution to exclude the defence, if it can, by excluding beyond reasonable doubt at least one of the elements of the defence [(If s 272(2) is relevant, add): or by proving beyond reasonable doubt the presence of one of the exclusory circumstances I have explained to you]. If it has done so, then the defence does not apply to excuse the defendant from criminal responsibility. If it has not done so, then the defence applies to excuse the defendant from criminal responsibility and you must find [him/her] not guilty.

96.4 Appendix A

[Last reviewed: November 2024]

R v

Elements Table

Self-Defence Against Provoked Assault (s 272)

[Delete the irrelevant component in 'deceased/complainant' and 'himself/herself', and remove any irrelevant references to exclusory circumstances (a)-(c).]

The following elements constitute the defence known as self-defence against provoked assault:

Element 1: the defendant first assaulted or provoked an assault from the complainant/deceased; and

Element 2: the deceased/complainant then assaulted the defendant; and

Element 3: the assault on the defendant was committed with such violence as to cause reasonable apprehension of death or grievous bodily harm; and

Element 4: the assault on the defendant induced the defendant to believe on reasonable grounds that it was necessary for the defendant's preservation from death or grievous bodily harm to use force in self-defence.

The prosecution will have excluded this defence if it excludes at least one of the above elements beyond reasonable doubt OR if it proves beyond reasonable doubt that one of the following exclusory circumstances apply:

(a) the defendant's use of force caused death or grievous bodily harm to the deceased/complainant AND the initial assault by the defendant which preceded the responding assault by the deceased/complainant, was begun with intent to kill or do grievous bodily harm to some person; or

(b) the defendant's use of force caused death or grievous bodily harm to the deceased/complainant AND the defendant endeavoured to kill or do grievous bodily harm before the need arose to preserve himself/herself by using such force; or

(c) the defendant's use of force caused death or grievous bodily harm to the deceased/complainant AND before the need arose for the defendant to preserve himself/herself, by using such force, the defendant did not first decline further conflict, and quit it or retreat from it as far as was practicable.