HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B69/2023
File Title:	Dayney v. The King
Registry:	Brisbane
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	20 Feb 2024

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **MARK VINCENT DAYNEY**
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

[1] The respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: The issues the Respondent contends the appeal presents

[2] The appellant appealed his 2018 conviction, following trial by jury, for the murder of Mr Mark Spencer to the Queensland Court of Appeal in 2020.[1] The appellant advanced, at that time, two separate grounds in the Court of Appeal. He was successful on his first ground leading, as a consequence, to the Court ordering a re-trial; however, the Court was divided as to the second ground advanced by the appellant. It is the second ground which is the focus in this Court.

[3] The division in the Court of Appeal in ***R v Dayney (No 1)***[2] arose as a consequence of divergent interpretations as to the ambit of s. 272(2) of the *Criminal Code.* Sofronoff P reasoned to conclude that the provision created only two restrictions to the application of s. 272(1) of the *Code,* each of which were qualified by the concluding words of the provision (the *retreat condition*).

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1 *R v Dayney* [2020] QCA 264 ('*Dayney (No. 1)*'); CAB 7.

2 *Dayney (No. 1);* CAB 7.

[4] The majority (Fraser and McMurdo JJA) however reasoned to conclude that s. 272(2) of the *Code* created three separate, and independent, restrictions as to the availability of s. 272(1).[3] These were:

i. Where the accused person[4] began their assault with intent to kill or cause grievous bodily harm;

ii. Where the accused person developed an intent to kill or cause grievous bodily harm before the necessity for self-preservation arose; and

iii. Where the accused person did not, before the necessity to cause death or grievous bodily harm arose, decline further conflict, quitted it, or retreat from it as far as was practicable (the *retreat condition*).

[5] Each of the above were said to be informed by reference to the word 'case' as used in the provision. In an effort to give effect to the text of the provision the majority concluded, correctly it is submitted, that the *cases* to which the provision was directed was a 'case' in which death *or* a 'case' in which grievous bodily harm was caused. As a corollary therefore the conclusion of the majority was that in circumstances where an accused person does not use force which causes death or grievous bodily harm then s. 272(2) of the *Code* has no work to do.

[6] At the appellant's re-trial, Bowskill SJA (as her Honour then was) directed the jury in accordance with the majority's conclusion on the second ground advanced in ***Dayney (No 1)***. That is, the jury were instructed that the appellant could not rely on the 'complete defence' created by s. 272(1) of the *Code* unless he had "*before such necessity [to defend himself with lethal force which caused death] arose declined further conflict or quitted it or retreated from it as far as was practicable*" (the impugned direction).[5] The appellant was convicted, for a second time, of the murder of Mr Spencer.

[7] The appellant once again appealed his conviction to the Court of Appeal and advanced, relevantly, that the impugned direction was wrong. To support this ground the appellant sought to persuade the Court in ***R v Dayney (No 2)***[6] that the conclusion of the majority (and the reasoning underlying it) was *plainly wrong*.

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3 For ease the first two restrictions will be referred to collectively as the 'intent-based restrictions'.

4 For convenience, the person claiming the defence will be referred to in these submissions as the 'accused person'.

5 CAB 54 lines 30-35.

6 *R v Dayney* [2023] QCA 62 ('*Dayney (No. 2)*'); CAB 90.

[8] Dalton JA (with the concurrence of Mullins P and Boddice J) concluded, relevantly, that the *retreat condition* operated as *"an independent circumstance precluding the availability of a defence of self-defence [pursuant to s. 272(1)]"*.[7] That is, while the *retreat condition* may qualify the intent-based restrictions within s. 272(2), it also operates as a 'stand-alone' restriction.

[9] The appellant in this Court challenges the correctness of the impugned direction by advancing a preference for the interpretation of the provision given by Sofronoff P in ***Dayney (No 1)***. Such an interpretation is said to be correct because, the appellant contends, Dalton JA's pathway to the question of construction was wrong for a variety of reasons. However, such a proposition fails to properly recognise the actual task confronting the respective Courts in each case. Instead, the conclusion in ***Dayney (No 2)*** simply reflects that the conclusion in ***Dayney (No 1)*** was not *plainly wrong*. Consequently, the correctness, or otherwise, of Dalton JA's reasoning in ***Dayney (No 2)*** does not answer the question before this Court.

[10] Instead, the respondent submits that focus must be directed at the ultimate conclusion of both Courts of Appeal, informed by their individual reasoning framed by the task confronting each. In doing so primary regard must be had to the majority conclusion in ***Dayney (No 1)*** where the task of construction was properly undertaken.

[11] Understood in this way it is submitted that the impugned direction was appropriate as the interpretation of the *retreat condition* by Fraser and McMurdo JJA in ***Dayney (No 1)*** was correct. This is so because a proper reading of s. 272(2) paying regard to the text, context and purpose of the provision supports the majority conclusion in ***Dayney (No 1)***. The reasoning in ***Dayney (No 2)*** did not undermine this conclusion.

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

[12] The respondent does not consider any notice pursuant to s78B of the *Judiciary Act* 1903 (Cth) is necessary.

Part IV: Narrative statement of the relevant facts

[13] The Crown alleged that the appellant and his then partner, Peta Lorang-Goubran, went to the home of Mr Spencer, who suffered from mobility issues, in the early hours of the morning of 01 October 2014 with a plan to steal from him drugs and/or money. Ms Lorang-Goubran was known to Mr Spencer, which the appellant was aware of.

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7 *Dayney (No. 2)* at [54], [57]; CAB 109-110.

[14] Ms Lorang-Goubran was a sex worker and advertised her services on multiple on-line platforms under a pseudonym. On the night of 30 September 2014, after a failed booking, she and the appellant returned to their Gold Coast home with a plan to get a loan against some jewelry the next day in order to obtain the money to purchase drugs. The appellant woke her sometime later before confronting her angrily about a message she had received from Mr Spencer.

[15] Ms Lorang-Goubran attempted to go back to sleep, only to be woken again a short time later by the appellant insisting she drive him to the deceased's home. Ms Lorang-Goubran had previously told the appellant that Mr Spencer was known to have drugs and cash at his premises, and that he also kept firearms there.

[16] The pair made their way to Mr Spencer's home. The appellant was *dressed in black like a burglar should be dressed.*[8] It was intended that on arrival Ms Lorang-Goubran would distract Mr Spencer while the appellant entered the house and stole any drugs or money he could locate. Ms Lorang-Goubran's evidence was that it was the appellant's plan, and it was never intended she get out of the car.

[17] Immediately the plan went awry when the pair arrived at the house as Mr Spencer unexpectedly came out of the house when the car pulled up. Ms Lorang-Goubran got out of the car, on her evidence at the appellant's direction, greeted Mr Spencer and went inside the house with him. They sat on a couch in the living room and briefly embraced. Ms Lorang-Goubran's evidence was at that point Mr Spencer held a pipe and lighter in his hand and nothing else.

[18] Ms Lorang-Goubran looked to light a cigarette when she felt Mr Spencer bump into her quite forcefully. She looked up and the appellant was standing in the room. Mr Spencer stood, apparently in response to being struck by the appellant, whereupon he and the appellant became involved in a physical altercation.

[19] Ms Lorang-Goubran fled the house and remained outside for some time until the appellant called her back in. The appellant gave her a black bag and she retreated to her vehicle where she was joined sometime later by the appellant who placed a long metal object in the back seat before getting in and the pair drove away.

[20] The deceased's housemate, Daniel McNally, was woken by Mr Spencer calling out or trying to call out his name outside his bedroom. He got up and looked out of his bedroom door where he saw the appellant striking towards the ground with a long object which the Crown said was likely the tennis racquet in side profile. The

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8 *Dayney (No. 1)* at [4]; CAB 9.

evidence revealed that Mr Spencer was prone on the ground in the vicinity of where Mr McNally saw the blows being delivered.

[21] Mr McNally went out onto the patio and armed himself with a long metal crowbar he located on the patio as he went outside. He threw the crowbar (which was later recovered having been discarded by the appellant from the car) in the direction of the appellant who was standing over the deceased who then turned to run away. Mr McNally believed that the crowbar struck the appellant in the back of the leg as he fled. Mr McNally approached Mr Spencer on the patio, before going back out to the front of the house where saw the appellant to get into Ms Lorang-Goubran's car, after placing something in the back seat.

[22] A broken piece of a baseball owned by Ms Lorang-Goubran was found on the patio, as was a broken tennis racquet. Forensic evidence indicated both had been used to strike Mr Spencer. The appellant gave evidence that he had assaulted Mr Spencer with both objects, causing them both to break. He also gave evidence Ms Lorang-Goubran had struck Mr Spencer with the baseball bat once initially to the head.

[23] The autopsy identified multiple injuries to Mr Spencer which contributed to his death including several to his head and face. The fatal injury was opined to be a facial fracture that led to an obstruction of his airways.

[24] Consistent with Ms Lorang-Goubran and Mr McNally, forensic and blood pattern evidence revealed that the assault commenced on the couch in the living room before Mr Spencer moved through the house and away from the living room as he bled. The evidence suggested that Mr Spencer touched or leant on objects as he made his way to the patio, and away from the ongoing attack, where he ultimately died.

[25] The Crown case was advanced on the alternate basis of an intentional killing or a felony murder (an intention to at least steal).

[26] The appellant gave evidence that the plan was that of Ms Lorang-Goubran's and that when he entered the house, he came upon she and Mr Spencer unexpectedly in the living room. His evidence was that Mr Spencer produced a silver pistol from between his legs. In response the appellant contended that he believed he was fighting for his life and thereupon punched Mr Spencer causing him to drop the gun. At that point Ms Lorang-Goubran hit Mr Spencer with the baseball bat before the appellant armed himself with the tennis racquet he found and struck Mr Spencer a number of times to the head with it. The appellant contended that the assaults to Mr Spencer to that point had little apparent impact so he, the appellant, took the bat from Ms Lorang-Goubran and struck the deceased with it causing it to break.

[27] The assault the appellant contended moved out onto the patio where the appellant continued to strike Mr Spencer with the broken bat. It was then Mr McNally appeared on the balcony and threw the crowbar, missing the appellant and instead hitting Mr Spencer in the face, rendering him unconscious.

[28] The appellant's evidence was that he pursued McNally into the garage, but he ran off down the driveway. After some time, he and Ms Lorang-Goubran took items from the house, including the gun, and ultimately disposed of them.

[29] There were two lynchpins to the defence case. Firstly that the appellant did not cause the death of Mr Spencer, but rather that the fatal blow was struck by McNally with the crowbar. Secondly that the conduct of the appellant was all in self-defence after Mr Spencer produced a silver pistol when he saw the appellant in the living room of the house.

[30] Both lynchpins required an acceptance of the appellant's evidence. There was otherwise no evidence that the crowbar thrown by McNally struck Spencer or that Spencer produced a pistol (or any type of gun).

[31] To convict the appellant of murder, the jury must have rejected the evidence of the appellant as to causation and, ipso facto, must have accepted the evidence of Mr McNally on that topic at least, beyond a reasonable doubt. The verdict though said nothing of the second limb of the defence case.

Part V: The Response

[32] The task of statutory construction was recently considered in ***Minister for Immigration v Thornton***. There, Gordon and Edelman JJ said: [9]

> *"The task of construction must start with the text of each provision, having regard to its context and purpose. Further, the context is to be considered "at the first stage of the process of construction", where context is to be understood in its widest sense as including "surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole"."* (Internal citations omitted)

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[9] *Minister for Immigration v Thornton* [2023] HCA 17; 97 ALJR 48; 409 ALR 234 at [54]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

[33] While the task of construction of codes must adhere to the above well settled principles, it must be recognised that codes are a *special type of legislation.*[10] The approach to be undertaken as a consequence demands loyalty to the language of the code itself, and does not proceed on any preconceived notions as to the language employed.[11] Importantly, a code must be read as a whole, and the ordinary and plain meaning should be preferred where practicable. It is only where an ambiguity arises that recourse might be had to broader historical and contextual considerations,[12] including the common law.[13]

[34] The question before this Court then turns, at first instance, on the precise language of s. 272 read as a whole. Thus, the provision itself provides a qualified 'complete defence' in the following terms:

> **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*

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10 *Charlie v The Queen* (1999) 199 CLR 387; *Bounds v The Queen* (2006) ALJR 1380; (2006) 228 ALR 190; [2006] HCA 39 at [50]; *Stevens v The Queen* (2005) 227 CLR 319 at [64]; *Murray v The Queen* (2002) 211 CLR 193 at [78].

11 *Brennan v The King* (1936) 55 CLR 253; *Hayman v Cartwright* (2018) 273 A Crim R 439; *Boughey v The Queen* (1986) 161 CLR 10 per Brennan J; *R v Barlow* (1997) 188 CLR 1 at [50]-[51], [95]; *R v Johnson* [1964] Qd R 1 per Stanley J; *Stuart v The Queen* (1974) 134 CLR 426, 437.

12 *Dayney (No. 2)* at [46] to [54] CAB 106-109; *R v Barlow* (1997) 188 CLR 1 at [50]-[51], [95].

13 *Mellifont v Attorney-General* (Qld) (1991) 173 CLR 289; *Stuart v The Queen* (1974) 134 CLR 426.

> *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.*

[35] As is evident the protection provided by s. 272(1) will lead to an accused person being excused (not criminally responsible) for the infliction of injury, including the causation of death or grievous bodily harm. The application of the protection is however contingent on s. 272(2).

The text

[36] The construction advanced in this Court by the appellant invites the opening words of the *retreat condition*, "*nor, in either case,*" to be ignored as unnecessary surplusage. Such an approach, as the appellant recognises in his criticism of the reasoning of Dalton JA, does not accord with the proper approach to the task to be undertaken. That is, effect must, where possible, be given to all words of the provision.

[37] It is this fixed focus on the operation of four words, in isolation, which lead to the appellant's submissions in this Court to invite the rhetorical question of what 'case' other than the intent-based restrictions could the *retreat condition* direct focus?

[38] By process of reasoning the fact that the Court in ***Dayney (No 2)*** did not give effect to these words is redolent, the appellant submits, of error in the conclusion. The vice in the appellant's argument however is the unduly narrow focus which is apt to obscure the proper approach to construction by reference to the broader text, context and purpose of the provision and its understanding within the *Code* itself.

[39] The respondent contends that the proper approach to be undertaken, as the majority in ***Dayney (No 1)*** did, is to review the provision, read as a whole, paying regard to the text and the context.

[40] Done in this way the true focus should not be limited, as advanced by the appellant, only on the language, "*nor, in either case, unless*", but also on the opening, and defining, salvo of s. 272(2), namely, "*This protection does not extend a case in which the person using force which causes death or grievous bodily harm*".

[41] When read as a whole it is clear and unambiguous that the '*case'* to which attention must be focused is not either of the two intent-based restrictions but instead a 'case' in which the force (element of conduct) which is to be excused is that which causes death or grievous bodily harm.

[42] Therefore, properly understood the language of the provision does not lend itself to the interpretation advanced by the appellant, namely that the *retreat condition* simply requalifies an offender for the excuse available in s. 272(1). If that were so there would be, as the majority observed, no need for the words "*nor in either case*" in the *retreat condition.*

[43] That the *retreat condition* operates independently of the intent-based restrictions is further supported by the text of the intent-based restrictions themselves. When read in their proper context each case is to be understood by the conjunction as between the force used and the state of mind which preceded it. The *retreat condition* however requires no such conjunction and operates untrammeled by reference to a state of mind, focusing exclusively on the use of force. It is for this reason that the *retreat condition* does not enlist the same opening words of the intent-based restrictions because by the point of its consideration the focus is more constrained and need not be further extrapolated.

[44] If the *retreat condition* were to be understood as annexing only to the intent-based restrictions in order to requalify an accused person for the protection of s. 272(1) then the language employed was unnecessary; that is, it was unnecessary to constrain its application by use of the word '*case*'. The words therefore must have a purpose beyond confining the *retreat condition* to the intent-based restrictions.

[45] As a result, the text of the provision confirms the conclusion of both the majority in ***Dayney (No 1)*** and the Court in ***Dayney (No 2),*** that the *retreat condition* is to be understood as having general, rather than selective, application to cases in which death or grievous bodily harm are caused.

The context

[46] All three restrictions within s. 272(2) operate by reference to particular consequences, albeit the first two import an additional consideration, namely the existence of a particular state of mind. That the qualifying provision of s. 272(2) would attach only to the infliction of certain consequences is understandable and not novel. To that end, to limit the restriction to cases in which death or grievous bodily harm is actually occasioned accords with the text of s. 272(1) itself.

[47] The protection afforded by s. 272(1) is framed by reference to the actual force inflicted, and the resultant consequence, in self-defence. This is so not only because of the ambit application of the provision but also by reference to the timing of the use of the force informed by the necessity of using same.

[48] That the protection centers on the force used, and its consequence, is highlighted by the use of the word '*force*' thrice in quick succession within the concluding words of s. 272(1).

[49] Understood in context the protection in s. 272(1) is designed to operate with, as a central focus, the force used. That it invites, also as a secondary consideration, the consequence, is clear by the final words of the provision which direct attention to the causation of death or grievous bodily harm.

[50] The protection itself does not call for any assessment of an accused person's state of mind as to the infliction of harm, only that it was believed to be necessary. Where the protection does not require an assessment of an intention there is no scope for the qualification provision to invite, as an imperative, such an assessment. To do so would import into the qualification an aspect which does not arise in an assessment of the protection itself.

[51] Where the focus of the protection is to excuse the actual infliction of harm and the consequences of it, regardless of any underlying intention, then to limit the application of the protection only in cases in which a mental element plays a role, as the appellant here suggests, does not accord with the context of the provision itself.

[52] Properly understood therefore the protection is designed to excuse an accused person from the use of force and the resultant grave consequences, where the need to use such force is necessary, irrespective of their intent before the necessity arose. The focus of the protection is, at all times, on the time the force that was used by an accused person and not their state of mind.

[53] Thus, where the protection annexes to the consequences so too must s. 272(2). Such a proposition accords with the text of the *retreat condition* framed by reference to the phrase 'quitted *it* or retreated from *it*'. In context, *it* must thus be referable to the initial conduct which invited the response, rather than any state of mind which might exist. The qualifications to the protection in s. 272(1) conform to the concept of blame by reference to the consequences of their use of force.

[54] So understood, that the *retreat condition* has broad application as it focuses on blame and the removal of it before the need to engage in *mortal combat* arises. Thus, if blame has not been removed by the time it is necessary to preserve oneself then the conduct of an accused person which results in grave consequences cannot be excused as *mortal combat* was invited by them. So understood the *retreat condition* can be seen to attach to cases where the intent-based restrictions operate, but it is not limited to them. Instead, the qualifications to the protection in s. 272(1) conform to the concept of blame.

[55] Where grave consequences do not flow then the level of blameworthiness is decreased to the point that, as the majority in ***Dayney (No 1)*** concluded, there is no restriction on the response other than proportionality. This is so because any response to *mortal combat* which results in something short of death or grievous bodily harm, will inevitably be proportionate.

[56] The provision, read as a whole, clearly focuses upon the outcome rather than the purpose. As such, the '*case*' to which reference is made in the intent-based restrictions must be informed by the outcome of the force used for preservation, where it occasions death or grievous bodily harm, and coexists with a murderous intent. If this is so then, it is submitted, the '*case*' to which reference is made in the *retreat condition* must, for consistency, also be reference to the outcome rather than simply, as advanced by the appellant, directing attention back to the intent-based restrictions.

[57] Such an interpretation is wholly consistent with the broader context of the *Code* when regard is had to like provisions.[14] Such a review reveals that the *Code*, before a 'complete defence' is available, often insists on a consideration of the result of force used rather than the intent of the alleged offender. Thus, understood in the broader context framing the '*case*' to which focus is directed by reference to an outcome rather than simply qualifying the preceding restrictions is understandable.

[58] This is further supported by the provision's additional focus on the necessity of force actually employed. That is, the central and recurrent focus of s. 272 in full, is on the outcome rather than anything else.

[59] In accordance with the language of the provision itself, the context in which it is to be understood, both within the construct of s. 272 and within the *Code* as a whole, supports the respondent's construction.

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14 For example see 271(1), s23(1)(b), 31(1)(d), 273 – 279.

The purpose

[60] As has been recognised,[15] it is significant to note that s. 271 and s. 272 are successive. The purpose of s. 272, read as a whole, is designed to allow an accused person to defend themselves against an assault which they themselves provoked. However, the protection will only extend to cases in which the assault offered in response to their provocation is such as to give rise to a reasonable apprehension of very serious injury or death. In this way the provision is in stark contrast to s. 271 which operates to excuse an accused person's use of force in self defence providing only that their response is proportionate.

[61] The successive nature of the provisions invites attention, in the first instance, as to whether an accused person has contributed, in any way, to the assault to which they were responding. It is thus the nature of the assault which they were responding to that is the focus of the provision. The force used in self-defence is therefore constrained only by the concept of proportionality annexed to the making of an *effectual defence*.

[62] It is only when an accused person has invited *an* (rather than *the)* assault by their own conduct that their ability to respond to such an assault is constrained and limited to circumstances where very serious harm or death is contemplated.

[63] In this way the focus is on the degree of the force to which an accused person believes they are required to respond. Thus, short of a concern as to serious injury or death, an accused person cannot be excused for responding to an assault which they themselves invited.

[64] The bounds of the protection, then invoked, does not extend as in s. 271 to the *effectual defence* of the accused person, but is limited to the force necessary to *preserve* themselves from death or grievous bodily harm. The sequential drafting of the provisions therefore reveals that the protection of s. 272(1) should be understood by reference to the outcome, that is, was it necessary to inflict death or grievous bodily harm to preserve oneself?

[65] Framed by this understanding the qualifications in s. 272(2) are to be understood. That is, the integral aspect of the protection, and qualifications, is the outcome. Thus the case to which reference is made is a case in which the outcome was death or a case in which grievous bodily harm, is caused.

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15 *R v Muratovic* [1967] Qd R 15 per Hart J; *Dayney (No. 2)* at [58]-[66]; CAB 110-112.

[66] Thus, as Dalton JA observed,[16] in circumstances where an accused person did not provoke *the* assault offered to which they are said to be defending themselves (i.e. they are blameless) then s. 271 will prevail and retreat is an unnecessary qualification. Where *the* assault has been invited then s. 272 will be applicable. It is in this circumstance which the factual scenario posited by Sofronoff P in ***Dayney (No 1)***,[17] would fall to be considered rather than by recourse to s. 272.

[67] As such the purpose of the provisions, read together, clearly represent that those who invite an assault will be limited in their ability to respond. To further restrict the availability of such a protection by s. 272(2) therefore accords with the purpose of the protective provisions.

[68] That an accused person who invited *mortal combat* must, in essence, undo the harm they had done by retreating, is sensible and appropriate. So much is not inconsistent with the concept of withdrawal as it attaches to criminal liability.[18]

[69] As the majority in ***Dayney (No 1)*** said *"The absence of withdrawal, when that would have been practicable, has a particular relevance where the accused was the instigator of the conflict"*.[19] This special relevance is well recognised,[20] and was entrenched in the common law until 1958.[21]

[70] It stands to reason that an accused person cannot commence an attack on another (by words or conduct) so as to purposefully (or otherwise) goad an assault in response merely to then excuse their continued attack with grave consequences. To allow this, without the requirement for retreat would be inconsistent with the purpose of the provision. Instead, to require an accused person to retreat before they use force which brings about serious consequences, is trite.

[71] That such a restriction applies accords with other similar provisions found within the *Code*. In this context a review of s. 31, which provides for materially similar considerations before protection is afforded, is apt to reveal the purpose of the provision here.

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16 *Dayney (No. 2)* at [63]; CAB 112.

17 *Dayney (No. 1)* at [53]; CAB 18.

18 *White v Ridley* (1978) 140 CLR 342; *R v Menniti* (1984) 13 A Crim R 417; *R v Sully* (2012) 217 A Crim R 446; *Miller v Miller* (2011) 242 CLR 446.

19 *Dayney (No. 1)* at [112]; CAB 30.

20 See *Viro v The Queen* (1978) 141 CLR 88 and *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645.

21 See *R v Howe* (1958) 100 CLR 448.

[72] When compared, both provisions provide limitations as to the availability of a 'complete defence' by reference to a particular outcome rather than a state of mind.[22]

[73] To limit an accused person's ability to be excused from very serious crimes, as distinct from others, makes sound policy sense. This is especially so where the accused person invited an assault and responded with lethal force. In those circumstances it is not unreasonable to expect the accused person to retreat before they cause death or serious harm.[23]

[74] There is no reason, it is submitted, to qualify the availability of protection which itself turns upon the outcome of the use of force, based purely on the notion of subjective intent. Instead, it is more likely that the intention of the provision when adopting the language, '*case*', throughout s. 272(2) was to direct attention to a case in which death or a case in which grievous bodily harm is caused. If neither is caused, then the subjective intention is irrelevant to the application of s. 272(1).

The authorities

[75] There is, with the exception of ***R v Randle***[24], an absence of decided authority on the question of interpretation in this case. While ***R v Randle*** was decided in a way which supports the appellant's contention, it is submitted that it does not decide the point here. To this point it is to be observed that the appellant does not frame his case in this Court to suggest that the Courts were wrong to not follow ***R v Randle***, instead it appears the appellant merely observes that ***R v Randle*** acts only in supports the interpretation he advances. As such, the following may be dealt with briefly.

[76] As has been recognised there is great force in the concept of consistency in the interpretation of like statutes.[25] This however is not an inflexible rule and falls to be considered in a context where intermediate appellate Courts are not bound by decisions of an intermediate appellate Court of a different state.[26] Whether to depart from a decision of an intermediate appellate Court is a matter of practice for the Court to determine itself.[27]

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22 See *Pickering v The Queen* (2017) 260 CLR 151.

23 So much is consistent with the *Acts Interpretation Act 1954 (Qld)* s 14A.

24 *R v Randle* (1995) 15 WAR 26.

25 *Totaan v R* (2022) 108 NSWLR 17 per Bell CJ at [72]; *AC v The King* [2023] NSWCCA 133; *Lynch v Commissioner of Police* (2022) 11 Qd R 609.

26 *Nguyen v Nguyen* (1990) 169 CLR 245.

27 *Nguyen v Nguyen* (1990) 169 CLR 245, 268; *Lynch v Commissioner of Police* (2022) 11 Qd R 609 at [60]-[70]; [99].

[77] As ***R v Randle*** was a decision of an interstate intermediate appellate Court it was not binding on the Court in ***Dayney (No 1)*** nor ***Dayney (No 2)***. Instead, it operated to provide some assistance in the interpretation of a provision drawn in identical terms.[28] It was thus to be given great weight but was not determinative.

[78] As was identified by Sofronoff P in ***Dayney (No 1)*** the like provision under consideration in ***R v Randle*** was no longer in force in that jurisdiction. Therefore the interpretation of s. 272(2), consistent with ***R v Randle*** or otherwise, would not have any impact outside of Queensland, and importantly would not create any lingering tension. As such, and where s. 272(2) in its terms existed only in Queensland the decision in ***R v Randle*** did not have a restraining effect.

[79] Further, for the reasons expanded on by Dalton JA in ***Dayney (No 2)***[29] the interpretation of the analogue provision in Western Australia was informed by the state of the common law post 1958, where retreat was no longer a necessary imperative to the availability of the defence.[30] Where the common law post 1958 said nothing about the language of the *Code* in Queensland as inserted six decades prior, then there was a compelling reason not to follow ***R v Randle***.

The correctness of the majority in Dayney (No 1)

[80] Given the above, the conclusion arrived at in Dayney (No 1), namely that the retreat condition, is independent to, rather than only qualifies, the first two restrictions is correct. As observed by the majority in Dayney (No 1),[31] it would be a very rare situation, if the appellant's contention in this court is correct, that the retreat condition would ever arise for practical consideration. That is so because it is inherently unlikely that an accused person would invite an assault and at any time before the necessity for self defence arose had, but abandoned, a murderous intent. That this interpretation is consistent with Queensland authority (albeit in *obiter* remarks)[32] and also by legal writings[33] provides support for the interpretation of the majority in ***Dayney (No 1)***.

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28 *Lynch v Commissioner of Police* (2022) 11 Qd R 609 at [100]; M*arshall v Director-General, Department of Transport* (2001) CLR 603 per McHugh J at [632]-[633].

29 *Dayney (No. 2)* at [25]; CAB 101.

30 *R v Howe* (1958) 100 CLR 448.

31 *Dayney (No. 1)* at [118]; CAB 32.

32 *R v Johnson* [1964] Qd R 1 per Stanley J; *R v Keith* [1934] St R Qd 155. It is notable that both cases involved convictions for 'wilful murder' and thus did not invite attention to the general application of the provision beyond the cases of death or grievous bodily harm.

33 R S O'Regan in *Self-Defence in the Griffith Code* [1979]3 Crim LJ 336 at 347; *New Essays on the Australian Criminal Code – R S O'Regan*, Law Book Company, 1988, p.89.

[81] If the majority though was incorrect as the nature of the '*case*' to which the provision was focused that does not undermine the ultimate conclusion of the Court. This is so because the *retreat condition* may also be read as referring to a case in which an accused person either unlawfully assaults another *or* has provoked another.

[82] It is trite to observe that an accused person may provoke an assault from another without unlawfully assaulting them. As such the s. 272(1) contemplates the actions of an accused person as inviting a response through two separate mechanisms.

[83] Understood in this alternative way, s. 272(2) operates in the intent-based restrictions by reference to an unlawful assault.[34] That is, it is informed by the case in which an unlawful assault is commenced by an accused person with intent to kill or cause grievous bodily harm from the outset or at some time before the intent was unnecessary and not annexed to the need for self-preservation. However, the *retreat condition* does not operate in the same way. That is because there is no need for the qualification within the *retreat condition* to suggest its application extends only to cases in which an *unlawful* assault is undertaken by an accused person. Instead, the *retreat condition* expressly avoids the concept of assault. As such, an alternative construction as to the '*case*' to which s. 272(2) refers, still reveals that the *retreat condition* is a third independent restriction to the availability of the protection afforded by s. 272(1). Thus the majority conclusion was correct, regardless of the correctness or otherwise of their process of reasoning.

The reasoning in Dayney (No 2)

[84] A proper understanding of the text, context and purpose of the provision itself demonstrates with clarity, it is submitted, the correctness of the majority reasoning in ***Dayney (No 1)***, supported by the Court in ***Dayney (No 2)***, that the *retreat condition* is an independent restriction. However, if there is any ambiguity which arises, as Dalton JA concluded there was, then the interpretation advanced by the respondent is not otherwise undermined by a review of the legislative history of the provision, nor its association to the common law.

[85] Since its insertion into the *Code*, s 272 has not changed in any substantive way. At the time of its drafting Sir Samuel Griffith noted in the margin "*compare Bill of 1880, s.57*". While the marginal note does not decisively answer the question of interpretation, it nevertheless does not tell against the construction supported by five Judges across two Courts of Appeal that the *retreat condition* operates independently of the two other restrictions in s. 272(2).

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34 For if the assault were not *unlawful* then s. 272(1) would not be applicable.

[86] Thus, while the appellant in this Court challenges the correctness of Dalton JA's reasoning in ***Dayney (No 2)*** it is submitted the reasons must be understood in their proper context. The Court in ***Dayney (No 2)*** was invited to consider whether the conclusion of the majority in ***Dayney (No 1)***, that the *retreat condition* was an independent restriction, was *plainly wrong*. Understood in this way her Honour's analysis did not need to embark on the process of reasoning the majority in ***Dayney (No 1)*** did. Instead, her Honour's approach must be understood to proceed from the premise that the majority in ***Dayney (No 1)*** had given effect to the language of the provision. As such her Honour was not considering what '*case*' to which reference was being made, but instead whether the *retreat condition* was independent. As a consequence, the absence of any consideration of the phrase said to be central was unnecessary for the Court's purposes in ***Dayney (No 2)***.

[87] Given the above even if her Honour's approach to answering that question was flawed that does not undermine the conclusion of each Court on the ultimate issue.

[88] That is so because the issue to be resolved is not how her Honour arrived at the conclusion, but instead whether the conclusion that the *retreat condition* was independent of the first two restrictions was correct.

Conclusion

[89] If the construction of s. 272(2) is as the majority in ***Dayney (No 1)*** concluded,[35] then meaning is given to each word within the provision itself, informed by the broader purpose and context of the provision.[36] As such, the impugned direction was correct, and the appeal ought be dismissed.

[90] The respondent does not accede to the appellant's broad submission at [55] of his written submissions as to the availability of the *proviso* generally. However, if this Court concludes that the *retreat condition* merely annexes to the intent-based restrictions then the respondent does not invite this Court to consider the application of the *proviso* given the individual circumstances of this case.

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35 Supported by the Court in *Dayney (No 2)*.

36 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; *The Commonwealth v Baume* (1905) 2 CLR 405, 419; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethic Affairs* (1992) 176 CLR 1, 12-14.

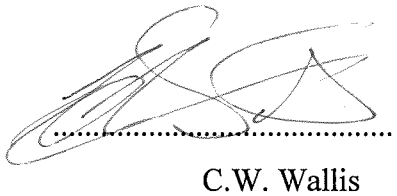
Part VI: Notice of contention

[91] There is no notice of contention filed by the respondent.

Part VII: Time required for oral argument

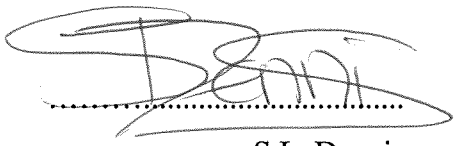
[92] The respondent estimates a total of 1 hour to present oral argument.

Dated 20 February, 2024



C.W. Wallis

Counsel for the Respondent



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ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Respondent sets out below a list of the statutes and provisions referred to in these submissions:

No.	Description	Version	Provision
1	Criminal Code (Qld)	Current (reprint effective date 5 September 2014)	ss 23(1)(b), 31, 271, 272, 273-279