

# A LEGAL DEFENCE OF SELF-DEFENCE: FUTURE GUIDELINES TO FIGHTING BACK

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*Puisqu'un nombre grandissant de femmes s'entraînent à l'autodéfense, les auteures offrent des renseignements bien à propos, et nous avertissent des conséquences légales. En tant que victimes possibles d'attaques, nous devons savoir nous défendre – et connaître les limites légales imposées à la légitime défense. Des accusations peuvent être portées contre vous si vous choisissez de résister à une attaque.*

The theme of this paper is self-defence, its focus the legal perimeters which dictate the amount of force one should use when one's person or property is in jeopardy. As a potential victim of an assault you need to know how to defend yourself and what degree of force is permitted at law, because although you have been victimized, legal charges might be brought against you should you choose to fight back.

From the accused's perspective, the most serious charge which she could face after defending herself would be murder. Other charges include manslaughter, attempt (to commit an offence), causing bodily harm with intent, assault, and weapons offences. Some of the factors which affect a finding of guilt include such things as intent, perceptions of dangerousness, and reasonableness.

In the *Criminal Code*, the personal self-defence plea is divided into two parts. Under subsection 34(1), should the judge or jury determine that the accused did not intend to kill or maim, it must then be ascertained if she used only that amount of force as was necessary to prevent personal injury. The second section begins from the assumption that the resulting injury to the attacker was intended. Following this, it must then be determined whether the accused: (a) was under a reasonable apprehension of being killed or suffering grievous bodily harm;

and (b) believed that there was no other way than killing the attacker to avoid her own death or serious injury.

Case judgments state that the determination of excessiveness must be made according to the accused's state of mind at the time. Unfortunately, the accused's testimony is not the only relevant evidence to be considered. All the circumstances must be weighed and her actions subjected to the "reasonableness" standard. The reasonableness standard does not impinge upon a person's honesty. While a court may decide that the accused is lying, it may likewise determine that the woman overreacted, and refuse to accept that the amount of force used is justifiable. Should the judge (or jury) determine, upon deliberation, that excessive force was used, a conviction could be registered. Of course, the most effective method of ensuring an acquittal in these cases is to counter the assertion that excessive force was used.

It appears that the use of a gun during self-defence is only an acceptable course of conduct when the attacker has previously inflicted injury upon the accused and is using a gun. However, these factors must be clearly established. Contradictory evidence of this being the case leaves the decision as to whom to believe as one of the court's duties. Fatal stabbings are common factors in many cases where self-defence is pleaded. While the barr against the use of a knife is not as strict as it is against the use of a gun, the predictability of an acquittal is even less clear.

A few cautious predictions can be made. First, the use of a knife is acceptable against a multiplicity of factors, including being outnumbered. Secondly, the person defending herself should inflict wounds only until the attacker is subdued. Thirdly, these "rules" cover circumstances where the knife was grabbed on impulse. Furthermore, previous attacks by the deceased upon the accused

may justify the amount of force used.

The *Criminal Code* sections on self-defence are similar for cases of murder, manslaughter, and assault charges; one is permitted to meet violence with violence only to the point of removing the possibility of harm to one's person, or to another. However, what every individual perceives as reasonable differs. A jury member who has never been fearful of attack may over-estimate the degree of calm which a person would maintain, despite the threat. Both Canadian and American experience have shown that an accused woman must not only convince a judge or jury as to the actual frailties of human nature, but also must overcome the myths associated with traditional female roles and involvement between the sexes.

Rape and sexual assault victims have stated that they were terrified during the period of the attack; many feared for their very lives. Women should focus educational efforts on convincing the public that an attack by a man upon a woman is, and is perceived as, a dangerous situation.

Avoidance may be an issue in determining the appropriateness of the force used in self-defence. No one need relinquish her home to an adversary. However, if one could easily have avoided physical violence, the courts will not accept a self-defence plea.

Section 85 of the *Criminal Code* creates the offence of possessing a weapon or imitation of a weapon for a purpose which is dangerous to the public peace or for the purpose of committing an offence. Courts in several provinces have consistently found that self-defence is not a "purpose which is dangerous to the public peace." In fact, using a weapon to prevent a fight has been acceptable. However, as stated earlier, the accused's explanation is not the only relevant evidence in determining whether an offence has been committed.

According to section 87 of the *Criminal Code*, it is also an offence to carry a con-



Credit: The Police Gazette

cealed weapon, unless it is one for which the person has a permit. The courts have not seen fit to provide the right to carry a concealed weapon for self-defence.

There are different ways to interpret a situation with regards to what is considered reasonable force. In a Canadian case, *R. v. Cochrane*, in 1969, the perspective of the woman involved was not discussed. She was convicted of assault causing bodily harm when she stabbed a man who was attempting to rape her. According to the court, the rape victim did not struggle sufficiently to permit resorting to a weapon. As well, "she could have threatened to use it on him before she actually did." If Ms. Cochrane did not feel that her own life or bodily integrity were at stake, then, according to law, she overreacted. If she perceived danger involved in the situation, the judge's analysis should have been more detailed.

There are legal precedents to present to court in advocating that physical differences are reasonable factors contributing to a woman's view of how forcefully she need defend herself against attack. The other problem, myths as to female roles and relationships between the sexes, has only recently been recognized. In Canada, there have apparently been no cases requiring evidence to counter these myths. However, in the United States, advocacy for women who defend themselves in response to assaults is attracting

much legal discussion. In a decision reversing conviction, the Supreme Court of Washington in 1977 acknowledged that a woman's mental state and experience are acceptable standards at law.

There are a few Canadian incidents of wives retaliating for past violence by their husbands, as well as a number of precedents where male relatives of an abusive man have come to trial on murder or manslaughter charges. Although self-defence was not an issue in the recent *Thiessen* case (1980), Mr. Justice Mayer Lerner commented that "if conditions in the family had persisted, Mrs. Thiessen and some of the children might have been destroyed." Due to the extreme nature of the abuse, the court held that killing the abusive spouse was a justifiable means of ending the injuries sustained by the accused and by the children.

Neither patrols nor escorts nor even public awareness can ensure that women are protected from and against attack. Studies and statistics confirm that most attacks against women come from friends, lovers, husbands and neighbours. Most of the rapes in Calgary during the spring of 1982 occurred after the rapist broke into the victim's home. No one else may be present at the time, or willing to help. The only one unfailingly available to prevent assault is the victim herself.

Self-defence training offers a defensive, rather than an offensive, method of self-defence for women concerned about their personal safety and security. However, there is an ongoing debate over the usefulness and effectiveness of a woman physically resisting attack. Fighting back by breaking out of a hold, punching or kicking may not be the best defence in all situations, but its effectiveness has been proven. For all the gruesome media stories concerning battered or murdered rape victims, there are positive stories about women who have successfully repelled attack.

As related previously, the law does recognize that one may hurt or even kill another in self-defence. However, those advocating fighting to repel attack usually neglect to inform women as to the legal framework within which they are permitted to act. In order for a woman to be able to determine whether she should use physical means of self-defence, she must know how to apply force and understand

the possible legal consequences. Stories about women being charged and convicted of assault or murder as a result of defending themselves only serve to lessen the impact of those trying to overcome female inhibitions about self-defence training and the use of physical force.

A newspaper article which discusses the "doMain" course states that central to this system is the SAFE formula developed by the Los Angeles Police. Letters A and E recommend actions which limit violence through avoidance and escape. Concomitantly, the law also advocates these techniques. Letter F makes a very realistic statement, "Fight at all costs," but this does not necessarily follow the legal guidelines. A dangerous situation may be deemed to require force, but not as much force as the accused woman used. The judge's and jury's attitudes can be challenged but this adds an extra dimension to the courtroom battle.

Wen-Do is a system of self-defence developed in Toronto in the early 1970s by the Paige Family specifically to teach women techniques of self-defence. It can only be learned in the classroom under qualified instructors. The manual used by instructors includes a section entitled "Women and Law." The concept of "reasonable force" and the issue of weaponry are both addressed. Unfortunately, it cites a legal classification, "dangerous weapon," which does not exist. The authors are probably referring to section 85 in which the word "dangerous" appears. However, the adjective is used to modify the word "purpose," not "weapon."

Several texts warn against using knives, guns and even Mace, not only because these items are usually illegal but because they can be taken away and used by the assailant. As an alternative, several authors recommend that a woman carry a variety of common household tools. Some of the objects suggested, such as hat pins, keys, knitting needles, umbrellas, combs, pens, pencils and fingernail scissors may be carried initially for purposes other than self-defence. However, several of the objects, obviously intended solely for the purpose of injuring an attacker, could be classified as weapons under the *Criminal Code*. Other examples include kitchen utensils, detergent, a squeeze lemon, or a screwdriver.

A woman can legitimately carry any item to be used solely for the purpose of self-defence. However, the right is not unlimited; there are circumstances which must be avoided. Overarming has been interpreted by the courts as an offensive rather than a defensive action. Secondly, guns must be registered and certain types of firearms are always illegal. The same warning applies to switchblade knives and silencers. Thirdly, while possession of a kitchen utensil, such as a corkscrew, for the purpose of self-defence may not be unlawful, carrying this item as a concealed weapon may be an offence.

When the self-defence systems described are measured against the legal principles one realizes that women are only partly educated about self-defence. While no one can predict with one hundred percent accuracy the result of any trial, guidelines assist in making an educated guess as to the outcome of judicial proceedings. Unless women are aware of the restrictions imposed by law on the right of self-defence, they are unable to use the techniques learned to their best advantage. It remains the decision of the victim to choose whether or not to fight back. Part of that decision should be the likelihood of incurring a legal sanction as a result of defensive action.

The question remains as to what can be done to prevent rape and all other acts of violence and aggression against women. Women have to change their attitudes towards themselves and other women. Furthermore, action is required. Training in self-defence gives one the knowledge necessary to take a stand against an assailant. It may even work to prevent or reduce confrontations if men become aware that attacking a woman may prove a risk to themselves.

Based on the research done for this paper, we recommend that all self-defence classes, teaching both verbal and physical means of self-defence, make the following suggestions to their students regarding the legal framework in which they may act:

1. Strike back at an assailant only to the point where he is no longer a threat to your safety. This may mean either until you have a chance to escape or the assailant leaves the scene;

2. Use a gun only to repel an attacker with firearms;
3. Resort to the use of any weapon other than a gun only when the use of body weapons (meaning a punch or a kick or even biting) would be ineffective, for example, if the attacker is very much heavier and stronger than you, or when there are several attackers;
4. Whenever possible, threaten to use a weapon before inflicting injury;
5. If you do not feel confident that your physical strength and abilities alone would stop an attacker resort to weaponry items which can be carried for purposes other than self-defence. Keys, combs or knitting needles are common items to utilize;
6. At those times when you feel yourself to be most vulnerable, carry the "weapon" in your hand. Thus you are not removing the possibility of being charged with "carrying a concealed weapon," but are prepared to repel an attack effectively and immediately;
7. Do not allow statements made by friends or politicians or publicized in the media, which foster myths about rape, to pass without comment;
8. Insist that all girls be exposed to and be involved in team and contact sports at school;
9. Lobby the Board of Education trustees to introduce a self-defence course for girls into the school's health curriculum or into any other appropriate courses.

We advocate, with caution, the use of force to counter force. Given any number of factors, counter-force may cause an escalation of violence with an increase in injuries and even lead to death. Only the potential victim can assess the situation. However, one must know how to fight back (physically and psychologically) if force can even be considered a possible course of action. And when you do fight, be forewarned: the law is only on your side if you keep within its framework, and this framework is often loosely defined, ambiguous and contradictory.

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### THE COOKIE

While a lady in blue  
was in the process of preaching  
on the lack of meaning in life  
(as welcomed to an office party  
as burnt fortune cookies)  
a lady in red announced  
she would acquire her next  
promotion  
through feats of non-verbal  
intercourse.

*Mary Melfi*  
Montreal, Quebec

### THE BOTTOM LINE

Your smile, unlike the rim of our  
wine bottle,  
(round and non-judgemental)  
was horizontal, a straight line,  
definite about its intentions.

But if I hadn't taken your  
lines seriously  
(opting to believe your godly (?)  
penis  
was Bacchus' virile/vertical smile  
itself)

you would have probably frowned  
and I would have been anything  
but pleased  
with that slice of lemon in your (my)  
mouth.

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