



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Mar 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: B69/2023  
File Title: Dayney v. The King  
Registry: Brisbane  
Document filed: Form 27E - Reply  
Filing party: Appellant  
Date filed: 12 Mar 2024

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

NO. B29 of 2023

BETWEEN:

**MARK VINCENT DAYNEY**  
Appellant

and

**THE KING**  
Respondent

10

## APPELLANT'S REPLY

### Part I: Certification

---

1. This submission is in a form suitable for publication on the internet.

### Part II: Argument

---

2. On the one hand, the Respondent contends that the interpretation the Appellant submits ought to be given to the retreat condition invites the words “nor, in either case” to be ignored as unnecessary surplusage: RS[36], [42]. That is not so. The Appellant submits that a plain reading of the words “*nor, in either case, unless*” signifies that the protection in s 272(1) *does not apply in either of the preceding cases* (those cases being a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or do grievous bodily harm, and a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or do grievous bodily harm before the necessity of so preserving himself or herself arose) *unless* the retreat condition has been met (that is, unless, before the necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable). The words “nor, in either case” are far from unnecessary surplusage: they are key to the interpretation of the retreat condition.
3. On the other hand, the Respondent contends that the Appellant’s interpretation involves a fixed and narrow focus on the words “nor, in either case” which ignores the broader text, context and purpose of the provision: RS[37]-[40]. That is also not so. The interpretation the Appellant submits ought to be given to the retreat condition is

20

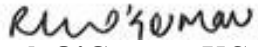
30

consistent, as it must be, with the text, context and purpose of the provision. The interpretation submitted for by the Appellant gives meaning to those words in a way which recognises, and is consistent with, the use of the word “case” to describe two scenarios in the preceding part of the paragraph. It is clear that the first “case” is “a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or do grievous bodily harm to some person” and that the second “case” is “a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or do grievous bodily harm to some person before the necessity of so preserving himself or herself arose”. It follows that the words “in either case” in the retreat condition must refer to those two cases. To interpret them as referring to either a “case” in which an accused “causes death” or “causes grievous bodily harm” renders s 272(2) difficult to apply and unfair in its operation.

4. Section 272(2) would be rendered difficult to apply and unfair in its operation because the person involved in a melee later answering a charge involving an allegation they caused death or grievous bodily harm to another in circumstances where s 272(1) might apply would, in the course of the melee, be required by s 272(2) to take an additional step (ie retreat) before acting in self-defence against a lethal attack only in circumstances where if, by chance, the force used by the accused person against the lethal attack caused death or grievous bodily, and not otherwise. The unfairness lies in the fact that, by the time the necessity for preservation from death or grievous bodily harm arises because of a lethal attack, the opportunity for retreat would have passed but a defence which causes death or grievous bodily might be necessary. By contrast, the interpretation submitted for by the Appellant, which would require retreat by the accused only in circumstances where the accused had been the first person to intend, or to attempt, to kill or do grievous bodily harm to the other, causes no difficulty in its application or unfairness in its operation.

5. Finally, the Respondent’s secondary submission that the phrase “in either case” refers “to a case in which an accused person either unlawfully assaults another *or* has provoked another” (RS[81]) should be rejected. The notion that the phrase “in either case” does not refer to the two “cases” immediately preceding it, but instead refers to the phrase “unlawfully assaulted another or has provoked an assault from another” appearing at the beginning of s 272(1) has no textual footing and is acontextual.

Dated: 12 March 2024



**Ruth O'Gorman KC**  
Higgins Chambers  
T: 07 3008 5598  
E: [rogorman@qldbar.asn.au](mailto:rogorman@qldbar.asn.au)



**Joshua Underwood**  
8PT Chambers  
T: 07 3511 7169  
E: [junderwood@8pt.com.au](mailto:junderwood@8pt.com.au)