

The Law, Women and Self-Defence

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ABSTRACT

Self-defence has become a media story in the late 1980s. For its part, the women's movement has moved from the fields of Woodstock to the boardrooms and the courtrooms, thus changing the profile of women's concerns. This power and influence that women have acquired must be protected. Position in decision-making is only one aspect of that power and influence; control over one's body, confidence, security and integrity is the other. Women have had to learn to repel attacks against themselves. Bearing in mind that self-defence is not a new phenomena to our society, this paper provides background information on the laws and their application over the past 20 years, in an attempt to answer the question, "Are there any limits or guidelines on the use of self-defence by a woman against a male attacker?"

RÉSUMÉ

Depuis la fin des années 1980, la question de la légitime défense attire l'attention des médias. Le mouvement féministe, quant à lui, a quitté les champs de Woodstock pour se trouver au sein des conseils d'administration et dans les tribunaux, ce qui a rendu les préoccupations des femmes plus en vue. Le pouvoir et l'influence que les femmes ont acquis doivent être protégés. Cependant, la place des femmes dans les organes de décision est seulement un aspect de leur pouvoir et de leur influence; la maîtrise de leur corps, la confiance, la sécurité et l'intégrité constituent l'autre aspect. Les femmes ont dû apprendre à repousser des agressions commises contre elles-mêmes. Il ne faut pas oublier que la légitime défense n'est pas un nouveau phénomène dans notre société, et c'est dans cette perspective que, dans cet article, on fait un historique des lois et de leur application au cours des vingt dernières années pour essayer de répondre à la question suivante: Existe-il des limites ou des lignes directrices concernant le recours à la légitime défense par une femme qui se protège contre un agresseur mâle?

CHAPTER ONE — INTRODUCTION

The purpose of this paper is to explore the law regarding self-defence in Canada and the limits which are placed on women in their efforts to defend themselves. While the integrity of the person is a recognized right, we do not have an unfettered right to hurt or kill an attacker in pursuit of it. While advocating self-defence training for women, this paper will emphasize the importance of the law in limiting the right to use that training and a woman's need to know what that law is.

Legislative responsibility in Canada is divided between the provincial and federal governments.¹ Criminal law is within the scope of the federal government by virtue of the *British North America Act*,² Canada's original constitutional document. The *Criminal Code*³ was enacted by Parliament to embody Canada's criminal law. The *Code* is a lengthy and sometimes ambiguous document which must be read in the context of pre-existing criminal law to determine the guilt of an accused person, the applicability of legal defences and the appropriate sentence to be applied. In addition, this statute seeks to make clear the tangle of criminal procedure.

The tenets of our justice system require that the prosecution prove beyond a reasonable doubt that the accused is actually guilty as charged. Theoretically, the accused need not say or do anything in her/his defence. However, practically, it is often necessary for the accused to provide evidence that s/he is not in fact guilty. This is particularly imperative when the accused agrees with the allegations of fact but wishes to argue against her/his culpability at law.

There are a number of possible ways in which an accused in a criminal matter may be acquitted. They fall roughly into three categories. First, a charge will be dismissed if the Crown fails to satisfy the Court of the accused's guilt beyond a reasonable doubt. Such things as mistaken identity or alibi come to mind in this category. Strictly speaking, these cases do not involve a "defence" but are based instead on insufficient evidence of guilt. Second, the accused may take advantage of certain procedural defences to exclude evidence or gain an acquittal. This occurs when there has been an unreasonable delay in the case, where the police or the Crown have violated the rights of the accused under the *Canadian Charter of Rights and Freedoms*⁴ or where the Court finds an abuse of the Crown's prosecutorial power.

It is the third category that is of interest in the context of this paper. A charge against an accused may be dismissed in situations where the commission of the *act* in question is admitted but the accused raises one of the "defences" which excuse or justify that act. Self-defence is one such defence, along with duress, defence of property and, to a lesser extent, provocation, which ordinarily is relevant only to the question of sentence. Self-defence is defined in the *Criminal Code* as follows:

"34.(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and

(b) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

This section, along with sections 35 - 42 of the *Code*⁵ and the pre-existing common law, set, albeit somewhat ambiguously, the parameters of the defence of self-defence.

This paper will explore and discuss self-defence in general but, more importantly, the particular difficulties that current definitions of self-defence pose for women in Canada. Until recently, the whole area of the use by women of physical force against another person in self-defence had received scarce mention in either legal or popular journalism. However, the reality of the feminist movement which encourages women to get involved in any and all areas of life brought the concerns of sexual assault, assault and wife-battering to the forefront. One of the realities today is for women to overcome increased exposure to personal danger resulting from greater mobility and visibility in the workforce, on the street and in the home. Despite the guarantees of security of the person in the Universal Declaration of Human Rights and the *Charter of Rights and Freedoms*, women must assume much of the responsibility for their own safety and security. Therefore many women enroll in martial arts or self-defence courses.

Knowing how to defend oneself physically, however, is not enough. As stated previously, the right to hurt or even kill someone, even in self-defence, is limited by law. This law is open to interpretation, leaving it to the police and prosecutors to decide whether or not a charge should

TABLE A
Possible Penalties Upon Conviction for Some Criminal Code Offences

Offence	Punishment	Criminal Code
murder	mandatory life imprisonment	section 218
manslaughter	maximum life imprisonment	section 219
causing bodily harm with intent	maximum 14 years imprisonment	section 228
aggravated assault	maximum 14 years imprisonment	section 245.2
assault with a weapon or causing bodily harm	maximum ten years imprisonment	section 245.1
unlawfully causing bodily harm	maximum ten years imprisonment	section 245.3
assault	indictable offence—max. 5 years summary conviction*	section 245
assaulting a peace officer	indictable offence—max. 5 years summary conviction	section 246
attempt**	murder—maximum life imprisonment other offences — indictable offences—where the sentence on the charge is death or life imprisonment—max. 14 years imprisonment;—in other cases a max. of 1/2 the sentence prescribed on the charge. summary conviction*	section 222 } section 421
possessing a weapon	maximum 10 years	section 85
carrying concealed weapon	indictable offence—max. 5 years summary conviction*	section 87
possessing a prohibited weapon	indictable offence—max. 5 years summary conviction*	section 88
possessing a restricted weapon	indictable offence—max. 5 years summary conviction*	section 89

*Unless otherwise provided, the punishment is a maximum fine of \$500 or six months imprisonment or both: section 722.

**There are a few other sections which create special attempt offences but none would be an appropriate charge in a self-defence case.

proceed, and to the courts to determine whether or not the law has indeed been broken. There are a number of *Criminal Code* charges to which the defence of self-defence might be applied, namely: murder,⁶ manslaughter,⁷ causing bodily harm with intent,⁸ aggravated assault,⁹ assault with a weapon,¹⁰ unlawfully causing bodily harm,¹¹

assault,¹² assaulting a police officer,¹³ and a variety of weapons charges.¹⁴ These charges are listed roughly in their order of seriousness, based on minimum and maximum penalties possible upon conviction.¹⁵

For a person to succeed on a plea of self-defence, the following factors must be present to establish the defence:

- (1) where the attacker's death or injury was not an intended result, that the amount of force used was necessary to prevent threatened injury or death;¹⁶ or
- (2) where the attacker's death or injury was intended, that there was a reasonable apprehension of being killed or suffering grievous bodily harm and that there was no other way to avoid the same.¹⁷

One cannot use physical force where moveable property—generally anything except one's land and home— is being protected except to repel force and, again, use only that amount of force as is necessary.¹⁸ Often threats to property involve a threat to the accused and/or her/his family, bringing it within the general self-defence rules.

Judicial decisions in cases in which self-defence has been raised by the accused provide legal guidelines for police officers, prosecutors and defence counsel in the interpretation of the *Criminal Code* provisions. In order to prepare oneself fully for any eventuality, it is useful to recognize the limitations within which the defence operates. Unfortunately, each case turning as it does on its own facts, there are few, if any, easy to understand sources which clearly explain the parameters. Legal "precedent,"¹⁹ the backbone of our legal system, is helpful only in a very limited sense, in such cases where decisions are based to a large extent on the facts presented to the court. No set of "rules" emerge which will provide sufficient certainty to permit an accurate assessment of the likelihood of charges being laid or of the success of the defence in court.

In addition, most reported cases are appeal decisions which very often proceed on very narrow legal issues²⁰ and do not address themselves to the factual matters. An appeal court does not always decide the case on its merits and judge issues of guilt or innocence; rather, the judges must often determine whether there has been an error of a more technical nature by the trial judge which is serious enough to have affected the outcome of the case. The result may, in those circumstances, be an order for a new trial to permit the error to be rectified. For example, a judge may have made an incorrect decision about the admissibility of evidence or may have incorrectly instructed a jury on the state of the existing law.

Finally, not all case reports are available in a publicly accessible medium. Because lawyers and judges need access to previous judgments, transcripts of the decisions are published in report series' available in a law library. However, the editors and publishers of the reports determine which cases will appear and which ones will not appear, based on subjective ideas of how the particular issue decided is relevant and important to the course of the law and the progress of the courts.²¹

It is possible, however, to draw some general conclusions about self-defence and, in so doing, to protect against at least the most extreme abuses of the law, thus assisting in the protection of women from successful prosecution.

CHAPTER TWO — DEFENCE OF PERSONS

This chapter is included to provide a framework for the discussion in Chapters Four to Seven of self-defence as a defence for women. In order to understand the operation of the defence, it is necessary to have a sense of how it has been interpreted to date. Reviewing existing case law²² in this area reveals a significant lack of attention to the difficulties faced particularly by women in seeking to defend themselves from threat or attack, as most decided cases involved male accused persons. However, at least at a general level, some conclusions may be drawn concerning the applicability of the defence in certain situations.

It is trite to say that as the immediacy and seriousness of the threat or attack increase, the greater will be the tolerance of the court toward an accused in the position of attempting to repel the attacker. However, it is a fine line that exists between acceptable (reasonable) and excessive force, one which the court must draw each time a case comes before it. This chapter will examine a number of circumstances in which self-defence has been raised to attempt to demonstrate judicial interpretations of the breadth of its applicability.

Murder and Manslaughter

Obviously, when an accused pleads self-defence in a case in which the result is the death of the alleged attacker(s), great care must be taken to ensure that the result was necessary in all the circumstances. Murder and manslaughter are two distinct offences but are related to one another in some ways. Manslaughter is an "included" offence of murder, meaning that where the evidence fails to establish the intent necessary for murder, it is possible to

convict the accused of manslaughter instead. A person convicted of murder serves a mandatory term of life in prison without eligibility for parole for 10 or 25 years; manslaughter provides a much greater range of possible penalties. The murder/manslaughter cases demonstrate one very important characteristic of this defence — it is an “all or nothing” possibility. If the defence succeeds, an acquittal is the only permissible result. This issue was thoroughly canvassed in a number of cases in which counsel attempted to argue “diminished self-defence” in situations where the accused could not meet the legal definition of “self-defence” because the facts revealed the use of excessive force, but where the court accepted that some form of self-defence was justifiable.

The Canadian cases involving a plea of “diminished self-defence” were reviewed in the 1982 Supreme Court of Canada decision in *R. v. Brisson*,²³ where Dickson, J.²⁴ (as he then was) concludes at pages 30-31:

On a reasonable statutory interpretation of section 34 it is apparent that a qualified defence of excessive force does not exist. To summarize, I would reject the notion that excessive force in self-defence, unless related to intent under section 212 of the Code or provocation, reduces what would otherwise be murder to manslaughter.

Rather than modifying self-defence as defined in the *Criminal Code*, Dickson, J. prefers to interpret the evidence as it relates to the requisite elements of the offence, specifically the required intent. One commentator, Brian E. McIntyre,²⁵ points out that since a majority of justices determined that there was no evidence at all to support the self-defence plea, Mr. Justice Dickson’s comments may not be binding. Also in 1982, the Supreme Court of Canada again considered this limited use of self-defence and reached a similar conclusion.²⁶ Although this decision is also not binding on the “diminished self-defence” issue, Mr. McIntyre concludes that no one should consider this defence viable in Canada any longer.

As it now stands, the self-defence pleas under section 34 contain restrictions as to the amount of force allowed even though death may result. Faced with an accused charged with murder, the judge or jury basically has three options — a finding of guilt on the murder charge where intent to kill has been established; an acquittal of the accused where self-defence has been made out (i.e., where there has been no use of excessive force); or a reduction of the charge to manslaughter where there was excessive use of force. In a practical sense, the accused is forced to call evidence to negate the Crown’s suggestion that there was excessive

force used if such a submission is made.²⁷ There are three issues to be considered:

- (a) From whose point of view must the trier of fact determine excessiveness?
- (b) Is the severity of the injuries suffered a factor in determining whether the force used was excessive? and
- (c) Does the use of a weapon to repel attack imply the use of excessive force?

Case judgments state that the determination of excessiveness must be made according to the accused’s state of mind²⁸ at the time, and subject to the “reasonableness” standard. Everyone who pleads self-defence testifies that s/he felt the need to react as s/he did. Unfortunately, the accused’s testimony is not the only relevant evidence on this point. All the circumstances must be weighed; a court may decide that the accused is lying²⁹ or overreacted³⁰ and refuse to accept that the force used was reasonable.

No one can be “expected to weigh to a nicety the exact measure of necessary defensive action.”³¹ Martin, J.A. continues by referring to a test which defines the parameters of acceptable force, at page 113:

[T]he harm sought to be prevented could not be prevented by less violent means and ... the injury or harm done by or might reasonably be anticipated from the force used is not disproportionate to the injury or harm it is intended to prevent.

An attempt to compare fact situations is crucial where the degree of injury caused must be weighted to the potential harm the accused could have suffered. In addition, the harmful nature of sexual assault, which is not always publicly viewed as an act of violence, must be presented in court.³²

Weapons in the context of the issue of excessive use of force are restricted to guns and knives in the case law available. It appears that the use of a gun in self-defence is rarely acceptable.³³ One might question the extent to which these results are based on the court’s assumption that the victim has the physical and emotional capability to defend her/himself without the assistance of a weapon.

The circumstances in which the use of a weapon is justifiable are precise: where the attacker has previously inflicted injury on the accused,³⁴ a factor which must clearly be established to provide sufficient excuse. Contradictory evidence leaves the decision as to whom to believe

as one of the duties of the trier of fact.³⁵ The following cases serve to illustrate the point.

In *R. v. Barilla*, supra, the Court of Appeal found that the use of a gun was excessive force. The accused was supporting a friend and, after firing a warning shot, he shot the deceased. After the now-deceased man returned to the apartment with two other men, the accused again fired his gun, killing the deceased.

Although verbally warning the deceased before firing, the accused in *R. v. Hay*, supra, was found to have used excessive force. He had shot at the deceased as the deceased advanced upon a third party with his arms over his head. The accused in *R. v. Trecroce*, supra, is a situation in which three shots were fired. The accused said the gun had discharged during a struggle.

Fatal stabbings are common in self-defence cases. The bar against the use of a knife is not as strict as it is against the use of a gun. A few cautious predictions can be made in light of the attitude of the courts to particular fact situation. There are a number of factors to be taken into account. First, where the accused is outnumbered, the defence has a good chance of succeeding (see *R. v. Stanley*,³⁶ where five drunken men forced their way into the home of the accused). Second, the accused must have wounded the attacker only to the extent necessary to subdue. In *R. v. Reilly*,³⁷ the accused, much larger than the drunken victim, stabbed the victim so hard that the knife blade broke. The defence of the accused did not succeed. Third, these rules apply to knives grabbed on impulse only. Knives being carried will be discussed later.

Assault/Causing Bodily Harm

Since the same *Criminal Code* provisions apply in situations of assault, the same concerns as discussed above are relevant when determining whether a woman would be convicted. An early Canadian case sets out a principle which still applies:

to enable the accused to validly avail himself thereof, it should have been shown that before he applied force to the person of his alleged victim he himself had at least been threatened by him with force and that in order to repel such threat he had necessarily injured him....³⁸

The key phrase is "to repel such threat." One is permitted to meet violence with violence only to the point of removing the possibility of harm to oneself or another. Subsequent cases illustrate that the courts accept this as the correct interpretation.

In *R. v. Matson*,³⁹ the accused, much smaller than the victim, struck the victim who fell and fractured his skull. In these circumstances, even though the injury was severe, the court acquitted the accused, consistent with the principle set out above.

Two cases, both more than 10 years old, involved accused women. In *R. v. Larlham*,⁴⁰ the court found that the accused was entirely justified in kicking an officer who was illegally searching her. However, an earlier decision convicted a woman of assault causing bodily harm when she stabbed a man who was trying to rape her.⁴¹ According to the court, the rape victim did not struggle sufficiently to permit finally resorting to a weapon. As well, "she could have threatened to use it before she did. She used it without warning."⁴² This judgment points once again to the elusive concept of "reasonableness," and to the special need to present evidence in court as to the reality of sexual assault as an act of violence.

There are three further principles recited by the court in a 1964 case which assist in determining the parameters of allowable force:

1. A person need not be reduced to a state of frenzied fear before the law permits resistance.
2. One is permitted to strike the first blow if there is a reasonable apprehension of immediate danger.
3. There is no requirement that a person reason or speculate as to whether a companion might assist him/her before defending his/her own bodily integrity.⁴³

Finally, avoidance may be an issue in determining the appropriateness of the force used in self-defence. If one could have easily avoided physical violence, the courts will not accept a plea of self-defence. In *R. v. Jacquot*,⁴⁴ the accused had started to leave the scene in a truck, but got out of the cab and confronted the men whom he knew were in pursuit on foot.

Weapons Offences

A brief discussion of the *Criminal Code* offences related to the possession of a weapon is included to illustrate judicial attitudes toward possession for the purposes of self-defence and the extent to which that is permissible.

Section 85 makes it unlawful to carry or have in one's possession a weapon (or imitation) for a purpose "dangerous to the public peace" or for the commission of an offence.

The Crown must establish that the article in question is a “weapon,” which under English law is defined as “any article made/adapted for use in causing injury and intended by the person using it for such use.”⁴⁵ In a recent amendment to our *Criminal Code*, Parliament adopted the English phraseology. The Crown must also establish that the accused is carrying the weapon for “a purpose dangerous to the public peace.” In the context of this paper, the important question is whether self-defence is viewed as such a purpose.

In one case,⁴⁶ the owner of a restaurant had on hand a bat for self-protection which he wielded against two unruly and violent customers. One may even confront the police with weaponry. Where the accused was unaware of the trespasser’s identity and sought to protect himself, he was found not guilty on the charges.⁴⁷ This purpose is deemed legitimate and not “dangerous to the public peace.” Courts in several provinces have reached similar conclusions.

Although even using a weapon to prevent a breach of the peace (a fight) has been approved,⁴⁸ the accused’s explanation is not the only relevant evidence. The trial judge in *R. v. Nelson*⁴⁹ held that the accused intended to use the knife for an illegal method of self-defence, which is a “purpose dangerous to the public peace” and Mr. Nelson was convicted under section 85.

Notwithstanding the rather vague language used as the general definition of a weapon, it should be noted that there are also specific weapons which have been declared under section 82(1)(e) of the *Code* to be “prohibited,” regardless of the purpose for which they are carried. An example is a “spiked wristband” as in *R. v. Murray*.⁵⁰ Self-defence does not arise as an issue in these cases because the mere possession of the weapon is sufficient for a conviction. Some weapons may only be carried if they have been registered with the proper authorities. Such weapons are governed by special rules applicable to them and anyone acquiring such a weapon should learn about its proper use.

CHAPTER THREE — DEFENCE OF PROPERTY

The *Criminal Code* provides a limited defence for persons protecting their home and property. However, there are very few cases in which a person defends property without also seeking to protect her/himself. This dual motivation is extremely important when determining whether the actions of an accused amounted to excessive

force, as it is clear (and reasonably so) that the accused is given far less leeway in the protection of property than in a case where bodily integrity is at issue. There is a crucial difference in the wording of the *Criminal Code* provisions which reflects this ordering of the priority of the interests involved. Even within the statutory treatment of property, differences also arise — with greater importance being afforded to home and land than to so-called “moveable” property.

Sections 40 and 41 of the *Criminal Code*⁵¹ allow a homeowner to use as much force as is necessary to prevent a forcible entry or to remove a trespasser, but section 38 does not permit the owner of moveable property to strike or cause bodily harm to a thief or trespasser. Under section 38(2) and 41(2), a trespasser who resists requests to leave is deemed to have committed an assault without justification or provocation. The legal argument then proceeds as follows: Do these sections mean that once there is resistance to the owner, the requirements under the personal self-defence sections become the operative factors in determining guilt or innocence?⁵² The courts have interpreted the parameters as follows:

(a) a mere trespasser cannot be fired upon or seriously injured with a knife;⁵³

(b) there must be both a request to leave and a reasonable opportunity afforded for compliance to a trespasser before s/he can be fired upon or seriously injured.⁵⁴

In *R. v. Crothers*, supra, the accused had invited the deceased and her husband to his home in order to share drugs. No drugs could be found so the visitors began to upset the furniture, threatening to destroy items. The accused brandished his rifle, ostensibly to frighten and persuade the couple to leave. When he confronted them, the woman stepped forward and he shot her. These actions were judged by the appeal court to constitute excessive force.

In other cases where shots were fired against trespassers, the trial judge did not find excessive force. One such situation involved a man who fired at police who were illegally searching his home.⁵⁵ Murder charges in another case were dismissed against a factory owner who had fired upon two persons who had forcibly entered his factory late at night.⁵⁶ In a third case, an apartment dweller had wielded a baseball bat against unlawful nocturnal intruders and was acquitted of possession of a weapon dangerous to the public peace.⁵⁷

With the information in the first three chapters providing the background, Chapter Four will attempt to grapple with the elusive concept of reasonableness.

CHAPTER FOUR — REASONABLENESS

As it has been noted, the term “reasonable” occurs again and again at law. Not only is it written into statutes but it is used as a comparative standard in judgments. No section in the *Criminal Code* defines “reasonable” or “reasonableness”; a dictionary definition only introduces other relative or interpretive descriptions: sensible, sane, not excessive, appropriate or suitable to the circumstances.⁵⁸ The dilemma of applying what is in effect a limiting factor remains fraught with difficulty.

One of the most common concerns at law regarding this standard is whether the trier of fact must act objectively or subjectively. Clearly, the use of the word “reasonable” and the requirements to be proven to establish self-defence of person or property restrict the degree of counter-violence that is permissible. These rules are not restricted to curbing weaponry or the type of blow struck. The perceptions under which the accused operates during an attack are also subject to external criteria.

According to section 34(1) of the *Code*, the accused must be judged to have acted under a reasonable apprehension of death or grievous bodily harm. Trespassers are permitted a reasonable opportunity to comply with requests to leave the premises.⁵⁹ A person need not wait to be struck before using violence if there is a reasonable apprehension of immediate danger.⁶⁰ The accused’s state of mind must be considered by the trier of fact,⁶¹ but it is not the only relevant evidence to be weighed in determining reasonableness.⁶²

Rape and sexual assault victims have stated that they were terrified during the period of the attack; many feared for their lives.⁶³ A judge or jury is entitled by the duty imposed upon them to disbelieve any witness. However, the reasonableness standard does not impinge upon a person’s honesty. The trier of fact could be of the opinion that an accused overreacted without feeling that the court was being deceived.

In *R. v. McQuarrie*, supra, a person fighting against three men struck a fourth, thinking he was one of the attackers. He was convicted of assault despite his express testimony as to his perception of the situation.

As a witness at his trial, the accused in *R. v. Shannon*, supra, testified as follows: “I was totally — I was scared ... he was going to shoot me” (p. 232). His appeal against conviction on a murder charge was dismissed. Despite evidence of animosity between the deceased and the accused — including threats of retaliation against Shannon — and notwithstanding that he thought that a gun that he had seen in a doorway was meant for him, the jury had not accepted his actions as falling within self-defence guidelines.

What every individual perceives as reasonable differs. A jury member who has never been fearful of attack may overestimate the degree of calm which a person would maintain despite the threat. Thus it is difficult for any accused, male or female, to convince the trier of fact that s/he acted reasonably under the circumstances. Both Canadian and U.S. experience has shown that a woman accused must not only convince a judge or jury as to the actual frailties of human nature, but also overcome the myths associated with traditional female roles and involvement between the sexes.

R. v. Cochrane, supra, a 1969 decision, illustrates this point nicely. The accused, a woman, had entered a man’s cottage after accepting a ride. She had — with his permission — taken a nap on his bed while he prepared dinner. After she emerged from the bedroom and sat at the table, he began tugging at her clothing. His Honour Judge Leger, at the conclusion of her trial, stated at page 666 of the report of the case:

The accused in the permissive society in which we live today gave at least an implied invitation to Willie Donnel to invite her to have relations with him.

The judge had earlier set out the principles of self-defence to which the facts must be measured. He reiterated the tests previously discussed and stated:

The force used should be proportioned to and must not exceed what is necessary to defend or prevent the attack ... A woman under stress ... cannot be expected to measure with nicety and precision the force she applies.⁶⁴

He then imposed his interpretation of the exchange between the parties:

[S]he could have forced herself free without having recourse to the use of a weapon ... [S]he could have threatened to use it....

Unfortunately, the case report does not include two relevant elements: (1) the respective weights and heights of the parties, and (2) a record of her testimony as to the nature of his advances. Did she perceive his actions as pleading for affection, life threatening, arrogance or an intrusion upon privacy? 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 a court in advocating that physical differences are reasonable factors contributing to the woman's view of how forcefully she need defend herself against attack.⁶⁵ The other problems, myths as to female roles and relationships between the sexes, have only recently been recognized. In Canada, there have apparently been no cases in which evidence to counter these myths has been called. However, in the United States, advocacy for women who defend themselves in response to assaults is attracting much legal discussion.

Inez Garcia was acquitted on a retrial in 1977 on a charge of murdering an assailant who attempted to rape her.⁶⁶ A juror who served at the first trial stated during an interview following the case, "You can't kill someone for trying to give you a good time."⁶⁷ Obviously, the trier of fact needs to be educated as to the realities inherent in the female perception of rape.⁶⁸

The defence must address several other issues including: (1) female perceptions of danger; (2) a woman's need to use weapons; and (3) the acceptability of rage. This is not just the opinion of feminists who could be accused of their own biases and prejudices. In a decision reversing a conviction, the Supreme Court of Washington⁶⁹ acknowledged that a woman's mental state and experience are acceptable standards at law.⁷⁰

[This instruction] leaves the jury with the impression that the objective standard to be applied is that which is applicable to an altercation between two men. The impression created — that a 5'4" woman with a cast on her leg and using crutches must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing any weapons in her defence, unless the jury finds her determination of the degree of danger to be objectively reasonable — constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law. The respondent is entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's "long and

unfortunate history of sex discrimination" ... Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defence instructions afford women the right to have their conduct judged in the light of the individual handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

CHAPTER FIVE — WIVES WHO BATTER BACK⁷¹

The phenomenon of murdering of wife-battering husbands is not a new one, at least not in the United States, according to a *Newsweek* column entitled "Justice."⁷² What has changed is that instead of telling a tale of suffering, pleading guilty to a reduced criminal charge and serving time in prison, accused wives are fighting the charges in court on the basis of self-defence. Not only are they fighting, but many are winning acquittals on this basis. In the past few years this trend has spread to Canada.

Our research revealed five reported cases in Canada: one where a woman plead guilty to manslaughter and was given a suspended sentence,⁷³ two where the juries acquitted⁷⁴ and two where a Court of Appeal ordered a new trial based on an error by the trial judge.⁷⁵ The most recent case was heard in Nova Scotia. Mrs. Stafford shot and killed her common law husband after he passed out in their truck after a day of drinking and threatening neighbours and her teenage son. Mr. Stafford had a history of violence against family members, lawlessness and drunkenness. This was not the first time he had threatened others. At trial, the jury acquitted Mrs. Stafford but a Crown appeal succeeded on the basis that the judge had incorrectly charged the jury about section 37 of the *Criminal Code* (protection of another person under one's protection).

While Mrs. Stafford's situation was not pleasant and her fears were understandable, the decision does not create new law. As it is now worded, the *Code* does not consider the environment in which a person lives as a factor permitting resort to lethal self-defence. In other cases involving battered wives, the killings had all occurred at the time of a physical assault upon the accused. Hart, J.A. in *R. v. Stafford* noted that on the night in question, the victim's threats against her son had been quite general, no violence had actually been done and the deceased was unconscious from heavy drinking.

The judicial system has recognized the right of abused women to defend themselves, including cases where it

becomes necessary to kill. Yvonne McKay stabbed her common law husband immediately after being punched and smashed with a beer bottle. Catherine Wheelock had endured four days of rampages and beatings at her husband's hands at which point she hid a knife and later used it.

While these cases of wives retaliating for past violence by their husbands obviously evoke sympathy, the verdicts are not without precedent. Canadian cases of male relatives of an abusive man coming to trial on murder or manslaughter charges are not unusual. In two of these cases, the main issue was whether or not the accused had "reasonable and probable grounds" to believe that if he did not kill the deceased, the other people or he would have suffered at the hands of the deceased.⁷⁶ In a third case, the appeal decision turns on a narrow point of law.⁷⁷ The judge directed the jury as to the defence of provocation due to previous exhibitions of violence by the deceased, but not with regard to the plea of self-defence. The appeal court, in overruling this reasoning, implies that it is possible to rely on the defence of self-defence in such cases.

The case of *R. v. Lowther*, supra, involved the killing of one man by another, in which the accused relied on self-defence based on past acts of violence and threats by the deceased. Even though the men were not related, the Quebec Court of Appeal held that this circumstance did not alter the considerations to be left to the jury. If the accused had reason to be apprehensive, had taken all other reasonable preventative measures and had employed only that amount of force proportionate to the injury he intended to prevent, then there must be an acquittal.

Once again, these four cases point overwhelmingly to a need for emphasizing the female perspective in society. Although self-defence was not an issue in the *Thiessen*⁷⁸ case, Justice Mayer Lerner made one comment in particular which should be noted. He stated that "if conditions in the family had persisted, Mrs. Thiessen and some of the children might have been destroyed."⁷⁹ Therefore, this court seems to be suggesting that, in some cases, killing the abusive spouse may be the only reasonable, practical means of ending the abuse sustained by the accused, children or other family members.

There is another course of action which should be strongly recommended. Battered women and abused wives need to seek help and have their male partners seek help from organizations which exist to deal with these crisis situations. No woman should have to endure trauma and violence at the hands of a husband or loved one to the

point where murder becomes a viable resolution of the problem. Every man, woman and child has the right to be protected from mental and physical abuse and violence, and all constructive means should be employed at the first possible moment to ensure that this is so.

In the United States, a woman serving a 30 years to life sentence for hiring a man to kill her husband (successfully) lectures and writes about the need to leave an abusive partner.⁸⁰ Kathy Kaplan serves as an advisor to counsellors, social workers and crisis line volunteers and is not bitter about her incarceration. "I have more freedom here than I did in 10 years of marriage," she says. However, she does recommend ending the relationship as the better option.

CHAPTER SIX — SELF-DEFENCE

The headline in *MacLean's* read "Angels with Heavy Wings."⁸¹ Journalists Rona Maynard and Jackie Carlos related the diversity of opinion as to the need for patrols in Toronto by the Guardian Angels. This New York-based group recruits local volunteers and trains them for twelve weeks in martial arts. Although the most famous of the vigilance groups, the Angels are not the only crime-fighting organization in Canada. For example, Brian Marchand, a former military officer, formed the Urban Knights in Winnipeg.⁸²

While politicians and police do not want people actively organizing to pursue crime, there appears to be a desire by many for more community involvement in combating crime. The Guardian Angels' leaders, Curtis and Lisa Sliwa attracted crowds of admirers when they appeared in downtown Toronto⁸³ and programs now operate in Windsor and Montreal⁸⁴ as well. Others are mounting challenges against the administration and system of justice, demanding stiffer penalties and tougher sentencing.⁸⁵ Programs in both rural and urban areas which encourage citizens to become the eyes and ears of the law and report crimes are attracting eager participants.⁸⁶ However, public concern over the issue of crime in the community rises and falls in response to highly publicized events. Of the 150 people who began the Guardian Angel training course in September 1982, only 22 graduated in December.⁸⁷

Neither patrols nor escorts nor even public awareness can ensure that women are protected from friends, lovers, husbands, neighbours and strangers, all of whom have been known to attack women.⁸⁸ For that reason, many women are seeking to protect themselves through self-

defence training. Such training for women does not attract the same kind of objections as do the vigilance groups.

Every woman must make a decision for herself about whether or not to be trained in self-defence. Feminist publications urge women to lose their fear of violent contact and to fight back.⁸⁹ Prominent feminists promote the same message.⁹⁰ A song by Holly Near encourages women to resist admonitions that they should curtail their lives in a way few men ever have to. However, most police forces are leery of such statements.⁹¹ Until recently, pamphlets by urban police forces suggested that women circumscribe their daily activities rather than passing along knowledge as to physical means of resistance.⁹² In October 1983, the Metropolitan Toronto Police released a booklet entitled *Sexual Assault*.⁹³ Apart from the recommendation that women should jog in pairs, the force recognized a woman's right to participate fully in activities and, while not encouraging violence, recognized resistance as a viable alternative.⁹⁴

A summary of studies of rape victim responses has led us to categorize behaviour as falling under one of three types: (1) submission (succumbing without even screaming); (2) resistance (victim screams, struggles, threatens counterviolence or runs); and (3) fighting (aggressive behaviour including kicking, biting, or punching, often using martial arts).⁹⁵

The summary goes on to show that by being other than submissive, 79 percent of victims studied avoided rape (Denver Rape Prevention Research Project). The Denver Anti-Crime Council also found that one-third of victims successfully resisted by running, physically reacting or screaming. College women in dating situations escaped in 70 percent of cases by resisting or fighting. Sociologist Jennie McIntyre of the University of Maryland found that the women who had escaped attack from rapists did so by screaming, kicking or yammering.⁹⁶

A series of independent studies for the U.S. National Center for the Prevention and Control of Rape is more emphatic, claiming that active resistance (kicking, screaming, hitting, biting, fleeing) increased women's chances of escape — 68 percent who tried physical force avoided rape or serious injury. Passiveness, tears and talking were less effective.⁹⁷

Frederic Storoska, a sociologist, advocates resistance but not fighting. He advocates treating the rapist as a person with a problem, doing something vulgar or bizarre to reduce desirability and, if the aggression continues, employ-

ing such tactics as the "eye push" (caress the attacker's face, then push thumbs hard into his eyes) or the "testicle squeeze" (tenderly pet his testicles, then squeeze hard).⁹⁸

Fighting back by breaking out of a hold by punching or kicking may not be the best defence in all circumstances, but its effectiveness has been proven. For all the gruesome media stories of battered or murdered victims, there are positive stories of women who have successfully repelled attack. One of the statistical studies we located, though, points to the need for women who wish to resist attack to know how to fight, stating that resistance tactics led to greater violence than actual fighting.⁹⁹ In order for a woman to know whether she should use physical means of self-defence, she must know how to apply force and the possible legal consequences.

CHAPTER SEVEN — SELF-DEFENCE SYSTEMS AND THE LAW

As related in previous chapters, the law does recognize that one may hurt and even kill another in self-defence. However, restrictions abound as to how much force can be used and when weaponry is appropriate. Those advocating fighting to repel attack usually neglect to inform women as to the legal framework within which they are permitted to act. In part, this is due to the dearth of information available which explains the law or provides any guidelines which make sense.

One book not recommended for those who wish to learn self-defence techniques or legalities is ironically called *Fighting Back* by Janet Bode.¹⁰⁰ In the "Self-Defence" chapter, Ms. Bode encourages women to learn self-defence skills, especially methods of releasing holds. She includes a summary of cases, including the story of Inez Garcia referred to in Chapter Four, where women have been convicted of killing attackers. There is no information as to the number of victims who have successfully repelled assailants without causing serious injury or without suffering legal consequences. The reader is left with the foreboding that physical resistance is the best technique to escape being raped, but always results in courtroom drama.

Many of the media reports do not attempt to instruct, but merely inform readers about certain self-defence classes.¹⁰¹ In the zeal to show how important a skill self-defence is to women, statements are made which could be incorrectly interpreted. Paul Malagerio, of the self-defence system "Commonsense Self-Defence," was quoted in a

1981 article as saying: "There are no rules in defending yourself in the streets; use anything to your advantage."¹⁰² Overcoming women's lack of confidence in their physical abilities and distaste for hurting other people is the first and most difficult obstacle on the route to self awareness and self-defence.¹⁰³ Mr. Malagerio's remark was directed to the idea that all bodily areas, including sensitive parts such as the eyes, are possible targets. Unfortunately, there is no mention of legal restrictions on violence used to counter an attack. A reader may not realize that weaponry used against an unarmed assailant might still be ruled unreasonable.

The same article which discusses the method "Commonsense Self-Defence" also mentions the "doMain" course. Central to this system is the SAFE formula developed by the Los Angeles police.¹⁰⁴

- S. Be secure, lock your doors, hold your purse tightly under your arm.
- A. Avoid attack situations and if you feel threatened, don't laugh it off, just trust your instincts.
- F. If you cannot avoid a dangerous situation, fight at all costs.
- E. Escape as soon as possible.

Letters A and E recommend actions which limit violence through avoidance and escape. This advice is based on practicality in order to avoid and minimize injury. Concomitantly, the law also advocates these actions in certain circumstances. For example, a mere trespasser must first be requested to leave and allowed time to comply. The letter F makes a realistic statement, but not necessarily one which follows 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 (as discussed in Chapter Four) but this adds an extra dimension to the courtroom battle.

*Rape: The First Sourcebook for Women*¹⁰⁵ has a very positive chapter about self-defence which includes diagrams and detailed instructions on various techniques. Authors Noreen Connell and Cassandra Wilson do not ignore the legal framework of self-defence. In fact, they advocate that women support any woman being tried for defending herself by attending at the court. However, the scenario of the courtroom drama is acknowledged by phrasing that assumes the reader knows that self-defence is permitted by law, but implies that any infliction of harm upon the assailant is not allowed.

The publication also includes a section about weapons which categorizes legal and illegal items. Unfortunately, the laws are those of New York State and do not parallel Canadian legislation. Further, the authors advise to strike repeatedly, probably meaning only until the attacker is subdued (as Canadian precedent suggests), without stating such a restriction. A particular technique (the heel of the hand thrust up under the nose) could be fatal and in bold letters are written the words "USE ONLY TO SAVE LIFE." There is no explanation of why someone should be wary of extreme action.

Another sensible, positive book which includes a chapter on self-defence is *Against Rape*.¹⁰⁶ The authors discuss not only physical techniques but sociological and psychological aspects of women fighting assailants. A section on weapons acknowledges that certain items, such as the chemical Mace, are illegal, but does not relate how this affects one's right to defend person and property. Once again, this book was written from the American perspective. This is particularly evident in the paragraph about handguns. While the authors advocate tighter gun control, their remarks are inappropriate for Canada as our firearm possession laws are already stricter than most states of the United States.¹⁰⁷

Another book, *Total Self Protection*,¹⁰⁸ outlines self-protection for both men and women without referring to legalities. However, the advice given follows one of the guidelines apparent upon analysis of past Canadian cases. The authors instruct the potential victim to counterattack only to the point of causing sufficient pain or disability to the attacker to permit escape.

Several other books¹⁰⁹ and the Toronto Rape Crisis Centre pamphlet¹¹⁰ are similarly designed. There are detailed explanations of self-defence techniques with the admonition that one stop striking when the attacker has been subdued to the point where there is enough time to run. These publications leave the clear impression that violence should only be used within limits.

*Lady Beware*¹¹¹ also emphasizes that "your objective is escape." The author, Peter Arnold, uses legal wording without mentioning the source: "use the minimum of force necessary." He continues, "If you are fighting for your life, fight dirty." This phrase probably relates to the difference between sparring with a partner in sport fighting and exchanging blows to win a street fight. In the

latter confrontation martial arts technique is not observed. Gouging eyes and ripping flesh are advisable and possibly necessary moves.

Frederic Storoska¹¹² approaches self-defence not as a physical act but as any verbal response or playacting which stops an attacker. Most of his book discusses why methods other than those he recommends are often ineffective. His advice is based on the concept that, if one treats the attacker as a person and not as an animal, he will react in kind. However, he admits that sometimes nothing short of counterviolence will be effective. Before instructing readers on forceful techniques, (including the "eye push" and the "testicle squeeze"), he warns that these are to be used only when "all else has failed and only if you must act in immediate defence of your life or against severe bodily harm."

In continuing his advice and comments, Storoska links this warning to the legal framework. Unfortunately, the entire chapter suffers from the same disjunction as does the law. He contends that a knife at the throat does not require immediate life-saving action, nor does the situation where the assailant "socks you and growls something about killing you." Yet, a few pages later, he praises a woman who felt compelled to bite the lip of her attacker, sending him into shock, after he threw her against a wall because *she perceived* an immediate threat to her life. At the end of the chapter, he states: "Anything you do in defence of your life or to prevent severe bodily harm is fair and even legal...." Theoretically, he is correct, but just as he assumes that certain circumstances can still be handled without resorting to violence, the law imposes a restriction of reasonableness. The professor concludes that, "What you are willing to do depends upon your frame of reference, your upbringing, your values, your view of yourself and the world." Unfortunately, these may not coincide with the frames of reference, values and views held by the courts of law unless evidence of the female perspective is presented.

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.¹¹³ There is no text from which one can learn; classes have been offered and are now available across Canada. Periodically, newspaper and magazine articles appear, detailing a few of the strategic moves. Most of them do say that some Wen-do techniques are lethal and one would not use these methods on someone who was merely being a nuisance at a party. One of the articles¹¹⁴ reveals that the third class of a five-session course included a talk on the responsibilities of defence.

The Wen-do organization provides a manual to all its instructors which includes a discussion entitled "Women and the Law."¹¹⁵ All students enrolled in the Basic Course hear this talk. It begins by introducing the concept of "reasonable force" and gives an example to illustrate the standard. Furthermore, the question of weaponry is addressed. Unfortunately, the talk 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 "purpose," not "weapon." As we have discussed, simple possession of an object as a means of self-defence is not, in itself, unlawful. Only when the possessor intends to use it for a purpose which is illegal or endangers the public peace has the offence been committed.¹¹⁶

*Fight Back!*¹¹⁷ is a large soft cover book from the United States which deals in depth with the entire issue of violence against women including child abuse. Among its many chapters there is an interview with an attorney, Barbara Hart, whose specialty is advocacy for women who kill their attackers. In this piece and another about cases where women have been charged after killing their attacker, both positive and negative factors are discussed. For example, the cases include those where the woman was convicted and others that ended in acquittal. The two chapters which instruct on self-defence, and several of the stories, include extensive information about avoidance, verbal self-defence and preparation.

A small pamphlet entitled *Surviving Sexual Assault*¹¹⁸ warns against possession of weaponry since an item can be wrenched away, unavailable at the appropriate moment, malfunction or be found by children who then injure themselves. No mention is made of the illegality of possession (this is a U. S. publication) nor of the limitations on the use of weaponry at law. The text asserts that a positive alternative is to enroll in a self-defence program. Again, the "key words in self-protection are awareness of surroundings and assertiveness for yourself."¹¹⁹

Recently, self-defence concerns have been aimed specifically at the senior population in North America. One book, *Rape and the Older Woman*,¹²⁰ discusses the most difficult problem in this area, which is to convince older women that they are potential targets. It advises avoidance followed by creating a loud noise, kicking, scratching and anti-social behaviours (such as defecating) to repel attack. However, the authors continue (at p. 62) by asserting that "only a woman in good physical condition should even attempt an aggressive defence." This statement is not accepted among all self-defence professionals and further

does not explain the term "good physical condition." Does this mean healthy and active for the age group? a retired athlete? a person who exercises regularly? No details of the legalities are even mentioned.

A second publication in this field advises against the possession of weapons, even those purchased legally, due to the inherent physical and legal risks.¹²¹ The authors differentiate between protecting property and protecting oneself. Upon being confronted by an armed thief, surrender your belongings; if attacked, scream, bite, scratch, kick, and "do whatever else you can to protect yourself" (p. 33). This approach is blurred somewhat in a chapter dealing with rape. As is the norm, avoidance and escape techniques are dealt with first, followed by an admonition that aggressive resistance is not recommended for older women. Yet, their advice is to poke a nail or another sharp object into the attackers genitals or eyes, again to bite, kick, and scratch or drive one's heel into his foot. Further, the statement is then made that it is a difficult choice that the attacked woman must make. No information on legal matters is provided.

Only one book we located, *Breaking the Hold*¹²², and the Metropolitan Toronto Police pamphlet, *Sexual Assault*,¹²³ actually quoted the law verbatim. The former is a Canadian publication which reprints the *Criminal Code* section 34 but without any analysis or caselaw. The latter does not include any discussion either, but does emphasize the escape aspect.

We contacted three self-defence instructors for their views on the law. The founder of the "Defendo" method spoke to us at length over the phone in August 1986. While there was no response to several attempts to call at "McK's Self-Defence" (416-924-5165), a recent news article included comments by one of the instructors, Mike Longo.¹²⁴ There was an instructor available in 1983 at "T & H Fitness and Self-Defence" (416-461-7362) who proved to be both helpful and informative, speaking at length about the school's teaching methods.

Mr. Van Bommel includes a talk about the law in his one-day course of instruction in "Defendo." The information was gleaned from a personal trip to the local law library and from discussions with lawyer friends. His terminology is "equal and opposite force"; the instruction suggests that, upon taking a weapon away from an attacker, it should be discarded. Further, one is not permitted to injure a person bothering you at a party. He stressed that he does not teach any death blows, or pokes to the eyes

and throat; instead, the emphasis is on points where a hit can cause piercing pain and allow escape.

"McK's" teaches basic streetfighting techniques although holds are favoured over punches. This attitude is a direct response to the possibility that a judge will hold that too much force was used when a punch causes a great deal of damage to the assailant. Longo also advises the use of an avenue of escape rather than fighting, especially after taking the training.

The black belt instructor from "T & H" stressed that the students are warned not to provoke a fight and even walk away from a confrontation. They are constantly reminded that the techniques they learn help improve the body's flexibility and fitness, and incidentally provide them with the capacity to defend themselves if such action should become necessary. The instruction does not include any information about the legal framework around self-defence. This particular man said that all he knew about the law in this area was that a black belt expert must warn anyone trying to provoke a fight that s/he has special training and credentials in martial arts.

Unfortunately, all the texts dealing with weapons and self-defence are written based on American law. Several texts warn against the use of knives, guns and even Mace, not only because these items are illegal in many states, but also because they can be taken away and used by the assailant. One book, *Speak Out on Rape*, warns that the difficulty of proving self-defence against an assault or murder charge increases when a weapon is used.¹²⁵

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 would obviously be intended solely for the purpose of injuring an attacker, for example: kitchen utensils, detergent, a squeeze lemon or a screwdriver.¹²⁶

Based on the cases discussed in Chapter Two, a woman may legitimately carry any item to be used solely for the purpose of self-defence. However, she must guard against three arguments which would nullify the applicability of a self-defence plea. First, recall the finding of guilt in the *Nelson* case where the court held that only legally acceptable forms of self-defence escape the rule against "purposes dangerous to the public peace" under section 85 of the *Code*. Conceivably, a court could rule that possession

of a weapon evidenced an intention to use excessive force in self-defence. Second, guns must be registered to be carried legally and some firearms are illegal per se. The same warning applies to switchblade knives and silencers. Third, while possession of a kitchen utensil for the purpose of self-defence, such as a corkscrew, may not be unlawful in itself, carrying it as a concealed weapon may be an offence.

When self-defence systems described in this chapter are measured against the legal principles put forth in Chapters Two, Three and Four, one realizes that women are usually misled and only partially educated about self-defence. While, as stated previously, no one can predict one hundred percent the outcome of any trial, there are certain guidelines which assist in making an educated guess as to the outcome of the judicial proceeding. 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 greatest advantage. Escaping from an attacker is important, but the victory will be hollow when the victim ends up in court charged with assault or murder or any of the other offences previously discussed. 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 a defensive action.

CHAPTER EIGHT — CONCLUDING REMARKS

Almost any discussion concerning violence against women will at least touch on, if not focus primarily on, rape. Women of all ages, shapes and sizes can be the victims of a rapist. No woman, merely by virtue of her age or measurements is immune from the onslaught of a rape or rape-murder. The facts and evidence are indisputable that rape is an act of violence and aggression. It does not result from a man's sexual desire or sexual needs.

The myths are coming into direct conflict with reality. Rape can happen to anyone. "It is just a function of being in the wrong place at the wrong time, and has nothing to do with the character or appearance of the victim."¹²⁷ Studies and statistics further reveal that only 25 percent of rapes are committed by strangers; most are committed by casual acquaintances, or friends, lovers and husbands. The effect of sexual assault is not only the physical injury but total humiliation from being abused, often accompanied by a loss of self-esteem.

Rape tends to be a highly under-reported crime. This assertion is confirmed by the large number of rape victims who contact rape crisis centres where they exist, but never report the crime to the police. This discrepancy is attributed to the dread of the courtroom ordeal and the low conviction rate for rape offenders: "As the law now stands, it is the woman and her character, not the rapist and his crime which are on trial."¹²⁸ It will be worth observing whether this will change as a result of the new sexual assault legislation.¹²⁹

The question remains as to what can be done to prevent rape, and all other aspects of violence and aggression against women. One conclusion reached was that an attitude change is needed. Women have to change their attitudes toward themselves and other women. We have discovered the strength we have when we are not afraid or demeaned. 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 within which they may act:

1. Strike back at an assailant only to the point where s/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 (punching, kicking, biting) would be insufficient, for example, where previous assaults have occurred, or where there is more than one attacker;
4. Whenever possible, threaten to use a weapon before inflicting injury;
5. To increase your confidence, resort to weapons which can be carried for purposes other than self-defence. Keys, knitting needles or a comb are common items to utilize;
6. At those times when you feel yourself to be the most vulnerable, carry the "weapon" in your hand. Thus you are not only removing the possibility of being charged with "carrying a concealed weapon," but prepared to repel an attack effectively and immediately;

7. Do not resort to violence in removing a trespasser until s/he has refused to comply with a verbal request to leave or until it becomes apparent that s/he is about to assault you or someone under your care;

8. Do not physically confront a thief who has taken your purse or parcel if s/he has not assaulted you in the process of snatching the article. One could try to effect a citizen's arrest but that, too, has restrictions;

9. Do not allow to pass without comment statements made by friends or politicians, or published in the media, which foster myths about rape, wife assault or incest;

10. Insist that all girls be exposed to and be involved in team and contact sports at school;

11. Lobby the board of education trustees to introduce a self-defence course for girls into the school's health education curriculum, or into any other appropriate course.

The cases which were discussed in this paper can be rationalized in a legal sense. This is useful in trying to judge what reactions would be appropriate in any potential attack situation. The summary given is one put forth by the Honourable Allan McEachern, Chief Justice of the Supreme Court of British Columbia, in an article he wrote entitled "On Self-defence."¹³⁰

All the self-defence sections *except* sections 34(2) and 35 require what His Lordship terms "proportionate force." In the words of the *Criminal Code*, the force must only be that which is "necessary" for the particular purpose. Sections 34(2) and 35 do not put express limits on the amount of force; rather, they require that the person defending herself/himself have reasonable and probable beliefs with regards to the attacker's intentions and likelihood of success. A jury must first decide what the accused's intentions (disregarding the actual result) were at the time s/he decided that the danger required extreme reaction. Then, accordingly, it must decide whether there was proportionate force or reasonable beliefs, depending on the section under which the first answer places the defence. Finally, even if the accused did not intend to kill the attacker and used more than proportionate force, her/his actions may still be justified under section 34(2).

We advocate, with caution, the use of force to counter force. In limited circumstances, counterforce 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 consi-

dered as a possible course of action. And when you do fight, be forewarned: the law is only on your side if you stay within its framework, and this framework is often loosely defined, ambiguous and/or contradictory.

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NOTES

1. As a colony, Canada was subject to British law until 1931 when the *Statute of Westminster* provided that Canadian laws were not subservient to those of England except the *British North America Act, 1867*, the document we commonly refer to as our Constitution, notwithstanding the fact that it is an enactment of the British Parliament. The B.N.A. Act provides for a division of legislative powers between the federal and provincial governments.
2. See footnote # 1.
3. R.S.C. 1970, c. C-34, as amended.
4. Schedule B, *Constitution Act, 1981*.
5. *supra*, footnote 3, sections 35-37. (See footnote 51 for other sections.)

"35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault upon himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose. 1953-54, c. 51, s. 35.

"36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures. 1953-54, c. 51, s. 36.

"37. (1) Every one is justified in using as much force to defend himself and anyone under his protection from assault if he uses no more force than is necessary to prevent the assault or a repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent."

6. *supra*, footnote 3, s. 212.
7. *ibid.*, s. 215.
8. *ibid.*, s. 228.
9. *ibid.*, s. 245.2.
10. *ibid.*, s. 245.1.
11. *ibid.*, s. 245.3.
12. *ibid.*, s. 244.
13. *ibid.*, s. 246.

14. *ibid.*, ss. 16; 85-88.
15. See Table A.
16. *ibid.*, s. 34(1).
17. *ibid.*, s. 34(2).
18. *ibid.*, ss. 38 & 39.
19. Precedent: a case previously litigated involving similar facts and issues on which decisions in future matters before the court must be based. Not all prior cases are used as precedents; some are from very low court levels; some have been superceded by legislation.
20. See for example:
R. v. Faid (1981), 61 C.C.C.(2d) 28 (Alta. C.A.);
R. v. Fraser (1980), 55 C.C.C.(2d) 50.
21. In English Canada, each province has a report series. There is one for the Federal Court, one for the Supreme Court of Canada, two main criminal reports, *Canadian Criminal Cases* and *Criminal Reports* and the *National Reporter*. These reports are edited by 11 editors or editorial boards with a total of 69 members (36 men, 24 women and 9 whose genders are not identified).
22. Case law: legal rules and standards determined by the decisions of judges or juries in past court proceedings.
23. (1981), 44 N.R. 1 (S.C.C.).
24. When referring to the judge who heard the case, the surname is followed by initials which indicate the judge's position. J.A. — Justice of the Appeal Court; J. — Justice of a Supreme Court; Co. Ct. J. — Judge of the County Court.
25. "Excessive Self-Defence," *Current Criminal Law*, Toronto: Law Society of Upper Canada, 1982, final chapter.
26. R. v. Gee (1982), 68 C.C.C.(2d) 516 (S.C.C.)
27. Mewett, Alan W., "Murder and Intent: Self-defence and Provocation," (1985), 27 C.L.Q. 433.
28. See for example:
R. v. Cadwallader, [1966], 1 C.C.C. 380 (Sask. Q.B.);
R. v. Desveau (1986), 130 A.C. 1.
29. R. v. Basarabus and Spek (1981), 63 C.C.C.(2d) 13, reversed on appeal on other grounds, 31 C.R. 193; R. v. Trecroce (1980), 55 C.C.C.(2d) 202 (Ont. C.A.).
30. See for example:
R. v. Clark, [1983], 4 W.W.R. 313 (Alta. C.A.);
R. v. Whynot (1983), 9 C.C.C.(3d) 449 (N.S.S.C. — App. Div.);
R. v. Gaucher (1984), 2 O.A.C. 330 (C.A.).
31. R. v. Baxter (1975), 27 C.C.C.(2d) 96 (Ont. C.A.), p. 111.
32. See Chapter Four.
33. See for example:
R. v. Barilla (1944), 82 C.C.C. 228;
R. v. Hay (1973), 22 C.R.N.S. 191 (Ont. C.A.);
R. v. Crothers (1978), 43 C.C.C.(2d) 27 (Sask).
34. R. v. Cadwallader, *supra*; R. v. Lowther (1957), 26 C.R. 150 (Que. C.A.).
35. R. v. Baxter (1975), *supra*;
R. v. Shannon, (1981), 59 C.C.C.(2d) 229 (B.C.C.A.).
36. (1977), 36 C.C.C.(2d) 216 (B.C.C.A.).
37. (1982), 66 C.C.C.(2d) 146 (Ont. C.A.), upheld on appeal to the Supreme Court of Canada, 42 C.R.(3d) 154.
38. As reported by John Haslett Cuff in *The Globe & Mail* on March 31, 1984, in an article entitled "The best Defence is not always a good Offence," p. 11.
39. (1970), 1 C.C.C.(2d) 374(2:1) (B.C.C.A.).
40. [1971] 4 W.W.R. 304 (B.C.C.A.).
41. R. v. Cochrane (1969), 2 N.B.R.(2d) 665 (Co. Ct.).
42. *ibid.*, p. 667.
43. R. v. Antley, [1964] 2 C.C.C. 142, [1964] 1 O.R. 545.
44. (1960), 128 C.C.C. 282 (B.C.C.A.).
45. R. v. Laidley (1978), 39 C.C.C.(2d) 406.
46. R. v. Sotiriou (1979), 1 Man.R.(2d) 63 (Co. Ct.).
47. R. v. Stonechild (1981), 61 C.C.C.(2d) 251; R. v. Proverbs (1983), 9 C.C.C.(3d) 249 (Ont. C.A.).
48. See for example:
R. v. Sullard (1982), 41 B.L.R. 167 (C.A.);
R. v. Calder (1984), 51 A.R. 80 (Alta. Ct. of Appeal);
R. v. Ernst (1982), 1 C.C.C.(3d) 454 (B.C. Ct. of Appeal).
49. (1972), 8 C.C.C.(2d) 29.
50. (1980), 18 C.R.(3d) 171, 54 C.C.C.(2d) 412 (Ont. C.A.).
51. "38. (1) Every one who is in peaceable possession of moveable property and every one lawfully assisting him, is justified
(a) in preventing a trespasser from taking it, or
(b) in taking it from a trespasser who has taken it, if he does not strike or do bodily harm to the trespasser.
(2) Where a person who is in peaceable possession of moveable property lays hands upon it, a trespasser who persists in attempting to keep it or take it away from him or from any one lawfully assisting shall be deemed to commit an assault without justification or provocation."
- "40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority. 1953-54, c. 51, s. 40."
- "41. (1) Everyone who is in peaceable possession of a dwelling-house or real property and everyone lawfully assisting him or acting under his authority is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.
(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property or a person lawfully assisting him or acting under his authority to prevent his entry or remove him, shall be deemed to commit an assault without justification or provocation."
- "42. (1) Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or some person under whose authority he acts, is lawfully entitled to possession of it.
(2) Where a person
(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or
(b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,
assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.
(3) Where a person
(a) having peaceable possession of a dwelling-house or real property under a claim of right, or
(b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,
assaults any person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering. 1953-54, c. 51, s. 42.
52. See commentary by Allan D. Gold in (1982), 24 C.L.Q. 170.
53. See, for example, R. v. Scopelliti (1981), 63 C.C.C.(2d) 390.
54. R. v. Letourneau, [1971] R.L. 84 (Que. S.P.);
MacDonald v. Hess (1974), 46 D.L.R.(3d) 720 (N.S.S.C.);
R. v. Stonechild, *supra*.
55. Colet v. The Queen (1981), 57 C.C.C.(2d) 105 (S.C.C.).

56. R. v. Letourneau, *supra*.
57. R. v. Stonechild, *supra*.
58. Little, William, *The Oxford Universal Dictionary*, C.T. Onions (ed.), Oxford: Clarendon Press, 1955.
59. See footnote 54.
60. R. v. Antley, *supra*.
61. R. v. Baxter (1975); R. v. Cadwallader, *supra*.
62. See for example:
R. v. Cochrane, *supra*;
R. v. McQuarrie, [1944] 1 W.W.R. 33 (Sask. C.A.).
63. See, for example, Anne W. Burgess and Lydia L. Holmstrom, *Rape: Victims of Crisis*, Bowie: Robert J. Brady Company, 1974, pp. 3 and 5; "Sex assault victim said still terrified," *The Toronto Star*, 29 July 1986, p. H8.
64. R. v. Cochrane, *supra*, p. 667.
65. See for example:
MacDonald v. Hess, *supra*;
R. v. Murphy, *supra*;
R. v. Nelson, *supra*;
R. v. Reilly, *supra*.
66. People v. Garcia, C.R. No. 4259 (Superior Court, Monterey County, California).
67. A juror in Canada cannot be questioned at any time as to their secret deliberations.
68. Elizabeth M. Schneider and Susan B. Jordan, "Representation of Women Who Defend Themselves in Response to Physical or Sexual Assaults," 1 F.L.R. No. 2 (1978), footnote 48.
69. *ibid.*, footnote 59.
70. *ibid.*, p. 122.
71. "Wives Who Batter Back," *Newsweek*, 30 January 1971, p. 54.
72. *ibid.*
73. "Shot husband, abused wife gets suspended sentence," *The Toronto Star*, 30 October 1980.
74. "Woman found not guilty," *The Globe & Mail*, 3 March 1984, p. 4, (R. v. McKay); "When battered wives kill," *Chatelaine*, June 1984, p. 49, (R. v. Wheelock).
75. R. v. Ward, *supra*; R. v. Whynot (Stafford) (1983), 37 C.R.(3d) 198 and *The Globe & Mail*, 31 March 1984.
76. R. v. Cadwallader; R. v. Drouin, *supra*.
77. R. v. Robertson, 18 C.R. 7, [1954] O.W.N. 164, 107 C.C.C. 400 (C.A.).
78. See footnote 74.
79. *ibid.*
80. "'Get out before you kill' prisoner urges abused women," *The Toronto Star*, 1 September 1984.
81. "Angels With Heavy Wings," *Maclean's*, — 1983, p. T2.
82. "The citizens' call to arms," *Maclean's*, — 1982, p. 46.
83. *ibid.*
84. "Fighting for Victims of Crime," *Maclean's*, 5 September 1983, p. 44.
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94. *ibid.*, p. 10.
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98. See footnote 112.
99. "Resist or submit? New expert views," *Vogue*, March 1985, p. 497.
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