
Automatism Confined

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This article begins by briefly tracing the development of automatism in Canadian criminal jurisprudence. Most recently, *R. v. Stone* is remarkable not only for the pronouncements of the majority, but also for the differences between them and the reasons of the minority. The majority restates the substantive law of automatism and some of its evidentiary aspects. According to the majority, evidence of involuntariness that apparently arises from some form of automatism raises a presumption of mental disorder against the accused. To displace that presumption and benefit from a defence of non-insane automatism, the accused must, first, satisfy an unusually weighty evidential burden before the trial judge and, second, meet a legal burden by persuading the jury on the balance of probabilities. Also unusually, the majority requires that the trial judge instruct the jury as to factors to consider in weighing the evidence. The initial presumption that automatism results from mental disorder is far removed from medical understanding of the subject. The majority states that a defence of non-insane automatism would be good only if the average person would have reacted to the external events in the same way. The chance of demonstrating this is, by definition, almost nil and so effectively eliminates the applicability of the defence. The reverse legal burden on the accused created in *Stone* violates the presumption of innocence as protected in the *Canadian Charter of Rights and Freedoms*. The majority then justifies its own *Charter* violation under section 1. This shows a bold understanding of the Court's role in addressing problems it perceives. The article suggests that it seems that Canadian law cannot afford the full presumption of innocence. The Supreme Court of Canada in *Stone* adjudicated a constitutional question without notice and submissions. In effect, the Court used the *Charter* to legislate ordinary law. This article urges greater restraint by the Court in use of the Constitution.

Cet article débute en esquissant le développement de l'automatisme dans la jurisprudence pénale canadienne. *R. c. Stone*, une décision récente de la Cour suprême du Canada, est remarquable non seulement pour les propos de la majorité, mais aussi pour les différences entre ceux-ci et l'opinion minoritaire. La majorité refait le droit substantif de la défense d'automatisme, ainsi que quelques éléments de sa preuve. Selon elle, une présomption de troubles mentaux face à l'accusé est soulevée dès qu'il y a preuve d'un acte involontaire lié à une certaine forme d'automatisme. Afin de renverser cette présomption et de bénéficier de la défense d'automatisme sans aliénation mentale, l'accusé doit d'abord satisfaire un fardeau de preuve particulièrement lourd pour démontrer au juge de première instance qu'il existe une preuve suffisante pour que la défense puisse être soumise au jury, pour ensuite persuader le jury selon la prépondérance des probabilités qu'il a agi involontairement. De plus, la majorité exige que le juge de première instance donne des instructions au jury quant aux éléments à prendre en compte lors de l'évaluation de la preuve. Cette présomption initiale selon laquelle l'automatisme résulte de troubles mentaux est incompatible avec l'opinion du monde médical et scientifique. La majorité soutient que la défense d'automatisme sans aliénation mentale n'est applicable que si une personne normale aurait réagi aux événements externes de la même façon. Les chances de démontrer cela étant, par définition, quasi nulles, la possibilité d'invoquer cette défense sera illusoire dans la majorité des cas. Le renversement du fardeau de la preuve dans la décision *Stone* porte atteinte au droit de l'accusé à la présomption d'innocence garanti par la *Charte canadienne des droits et libertés*. La majorité justifie sa propre enfreinte en vertu de l'article 1 de la *Charte*. Cette démarche dénote une conception large par la Cour de son rôle dans la résolution de problèmes dont elle prend conscience. Selon l'auteur, il semble que le droit canadien ne puisse plus fournir la pleine protection du droit d'être présumé innocent. La Cour suprême a tranché une question constitutionnelle sans préavis et sans qu'elle ait été soulevée par les parties intéressées et s'est servie de la *Charte* pour mettre en place une règle de droit ordinaire. L'auteur prône une plus grande retenue dans l'emploi de la Constitution par la Cour.

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Introduction

In *R. v. Rabey*,¹ Dickson J. (later C.J.C.) noted that automatism had recently made its way into criminal jurisprudence in Canada and elsewhere. The premise for its introduction was that the common law should recognize some forms of a dissociated mental state as distinct from insanity (later “mental disorder”) but sufficient for acquittal. Complex questions of medical science and legal policy went with this, of course, particularly with regard to “internal” and “external” causes of automatism. But the premise itself was settled law, soundly based on the principle that criminal responsibility requires proof of voluntary conduct.

Following the opinion of Martin J.A. in the Ontario Court of Appeal,² a majority all but excluded the possibility that automatism that has an internal cause could be classified as non-insane. They acknowledged that automatism with an external cause would probably be characterized in this way, but they did not exclude the possibility that such causes might induce insane automatism. In dissent, Dickson J. was of the opinion that the characterization of automatism should not be determined by an unquestioned distinction between internal and external causes, but rather by as precise an explanation of the cause of automatistic involuntariness as the evidence will allow. The distinction between internal and external causes might therefore be helpful if the evidence is otherwise uncertain, but the distinction itself should not preclude the possibility that non-insane automatism might arise from evidence of a mental disturbance that is not the result of mental disorder within the meaning of section 16 of the *Criminal Code*.³ That non-insane automatism could be caused by a mental condition that is not a disease of the mind was and is, to many, a proposition that should be hedged with suspicion.

With *R. v. Parks*,⁴ the significance of the distinction between internal and external causes was modified, at least for the purpose of making a distinction between special verdicts of mental disorder under section 16 of the Code and general verdicts based upon the common law of non-insane automatism. The decision in *Parks* did not resolve all the complexities, but a majority of the Court recognized that, with appropriate caution, the courts should be allowed to follow the evidence at trial to its natural conclusion. If the evidence supported a reasonable doubt that the accused acted involuntarily in a dissociated or automatistic state caused by a disturbance *other than mental disorder*, an acquittal should be returned. To do otherwise would serve no valid penal purpose.

¹ [1980] 2 S.C.R. 513, 15 C.R. (3d) 225 [hereinafter *Rabey*].

² *R. v. Rabey* (1977), 17 O.R. (2d) 1, 37 C.C.C. (2d) 461 (C.A.) [hereinafter *Rabey* (C.A.) cited to O.R.].

³ R.S.C. 1985, c. C-46, s. 16 [hereinafter the Code].

⁴ [1992] 2 S.C.R. 871, 15 C.R. (4th) 289 [hereinafter *Parks*].

The result in *Parks* recognized non-insane automatism caused by a *mental disturbance* that does not amount to mental disorder within the meaning of section 16 of the Code. Everything would turn on the evidence, notably expert psychiatric evidence, and its import for legal purposes. This conclusion was qualified on grounds of legal policy by the proposition that non-insane automatism should be excluded from consideration where protection of the public militates against it. In *Parks*, then, the Court ruled, first, that the classification of automatism as insane or non-insane should be governed by the evidence and, second, that the classification of non-insane automatism should be constrained by justifiable limitations based upon prudence. Accordingly, even a case of non-insane automatism should not lead to acquittal if the underlying cause of the automatistic episode persists or if such an episode is otherwise likely to recur.

The scope of the decision in *Parks* has been viewed in two ways, one narrower than the other. One approach is that the position of the majority in *Rabey* remains, subject to an exception for cases of somnambulism in which the evidence excludes mental disorder.⁵ On this view the distinction between internal and external causes retains its vigour, with the result that an internal cause that is not somnambulism in this sense is presumptively considered mental disorder. The other view is that the dissent of Dickson J. in *Rabey* was endorsed by a majority of the Court in *Parks*. On this view the distinction between internal and external causes is not determinative and, in principle, there might be a range of internal causes for automatistic involuntariness that could not properly be classified as mental disorder. Thus the form of somnambulism considered in *Parks* should be considered as but one example of a form of mental disturbance in that range of possible internal causes.

Since *Rabey*, much controversy has surrounded the question whether a severe psychological blow could also be a cause of non-insane automatism. According to the view expressed by Dickson J., the answer to this difficult question lies not in the distinction between internal and external causes, but in the nature and quality of the emotional shock and in the nature and quality of its effect upon the mind of the accused actor. The majorities in both *Rabey* and *Parks* were obviously apprehensive about this possibility, but Dickson J. had little fear that spurious or specious claims would get past the stout common sense of a Canadian jury.

And now *R. v. Stone*,⁶ which is remarkable not only for some of the pronouncements⁷ of the majority of five⁸ but also for the differences between them and the minority of four.⁹ For the dissenters, *Stone* was about the sufficiency of evidence ad-

⁵ This is the approach preferred by the Court of Appeal for British Columbia in *R. v. Stone* (1997), 6 C.R. (5th) 357, 113 C.C.C. (3d) 158 (B.C.C.A.).

⁶ [1999] 2 S.C.R. 290, 24 C.R. (5th) 1 [hereinafter *Stone* cited to S.C.R.].

⁷ Also considered in *Stone* were questions relating to disclosure and sentence. Neither of these points will be considered in this text.

⁸ The majority consisted of L'Heureux-Dubé, Gonthier, Cory, McLachlin, and Bastarache JJ.

⁹ The minority consisted of Lamer C.J.C. and Iacobucci, Major, and Binnie JJ.

duced at trial and, consequently, the adequacy of the trial judge's direction to the jury on issues of automatism. These four judges were of the opinion that non-insane automatism should not have been withdrawn by the trial judge because he had ruled that there was sufficient evidence to support an inference that the accused was "unconscious" throughout the stabbing. Moreover, psychiatrists called by the prosecution and the defence agreed that *in their medical judgment* the accused was not suffering, at the time of the act, from a disease of the mind. Thus, since there was some evidence of automatism, the minority was of opinion that the issue should have been resolved by the jury. They noted that it might have been, in the jury's view, a weak case for non-insane automatism, and hence a case in which this defence might easily be dismissed in the deliberations, but according to the authorities it was nonetheless a sufficient case for the jury's consideration.

Bastarache J., giving reasons for the majority, thought there was more to this case and undertook to restate the substantive law of automatism and some of its evidentiary aspects. Several features of these reasons are complex; others are striking. For convenience, the principal conclusions can be stated in the following propositions:

1. Where involuntariness is raised by the evidence, the judge must determine, as a first question of law, whether a jury could find on a balance of probabilities that such involuntariness was caused by automatism.¹⁰

2. If yes, the judge must then decide a second question of law, whether such probable automatism was caused by mental disorder. The trial judge should presume that the accused suffered from a disease of the mind and then decide whether the evidence distinguishes the instant case from mental disorder. For this purpose the judge should consider two points. "Under the [*first*], the internal cause theory, the trial judge must compare the accused's automatistic reaction to the way one would expect a normal person to react in order to determine whether the condition the accused claims to have suffered from is a disease of the mind."¹¹ Thus a claim of automatistic involuntariness must be considered a claim of mental disorder in every case *except* one in which evidence of an extremely shocking nature would establish that a normal person would have reacted to it by entering into an automatistic state. *Second*, any claim of

¹⁰ A note about terms is required. The majority said that "[i]nvoluntary action which does not stem from a disease of the mind gives rise to a claim of non-insane automatism. If successful, a claim of non-insane automatism entitles the accused to an acquittal" (*Stone, supra* note 6 at 368). This is too broad, because there can be involuntary action that has nothing to do with automatism in the sense that it does not occur in a "dissociated state" as that term is commonly used. The ultimate question is whether the conduct of the accused was voluntary. This question might be answered by determining whether his conduct was automatistic, that is, performed in a dissociative state. If there is sufficient evidence that it was, it must also be determined whether the dissociative state was caused by a disease of the mind or some other cause. Thus, involuntary conduct might include automatism, but some forms of involuntariness, such as reflexive action, are better not described as automatistic. In many such instances another label is more appropriate, such as accident.

¹¹ *Ibid.* at 390.

automatism must be considered mental disorder if the underlying condition presents a continuing danger.

3. All this having been done, the judge may leave sane or non-insane automatism with the jury, but not both, and in either case the judge must instruct the jury that a verdict of not guilty cannot be returned on the basis of automatism unless it is proved on a balance of probabilities.

Three points arise immediately and obviously from these propositions. First, it is highly improbable that Mr. Parks could have raised his defence if the trial judge had been obliged to apply the test described by the majority in *Stone*. Second, this test is more hostile to claims of non-insane automatism than was the position of the majority in *Rabey*. Third, it is not clear that the result in *Stone* itself would have been the same if the trial judge had followed the rules prescribed by the majority in the Supreme Court.

In other words, if the varnish is removed from all this, evidence of involuntariness that apparently arises from some form of automatism raises a presumption of mental disorder against the accused.¹² That presumption can be displaced if the accused can first persuade the judge, as a matter of law, that there was no disease of the mind—even though this decision makes the definition of disease of the mind more sweeping and less coherent—and then only if the jury can be persuaded to believe the contradicting evidence on a balance of probabilities. A claim of non-insane automatism will succeed only where the automatistic involuntariness of the accused in the act was the mental state that any normal person would experience, provided that there is no danger of recurrence.

In this new approach to a difficult question of law, the troublesome gap between concepts considered by both lawyers and doctors has now widened. A disease of the mind has seemingly become the legal explanation for involuntary behaviour that cannot be proved otherwise: "If he acted involuntarily, he must have been mentally disordered in law, unless it is proved in law *and* in fact that he was not mentally disordered." *Stone* widens the legal concept of mental disorder to vaporous indeterminacy, narrows sane automatism to picayune indeterminacy, and creates a "reasonable" violation of the presumption of innocence by imposing a legal burden on claims of sane automatism. The reasons of the majority are suffused with suspicion concerning claims of non-insane automatism. These developments merit comment.

I. Evidential Burden

Discharge of the evidential burden on any issue, by the prosecution or the defence, is a question of law that in common sense must be aligned with the standard of

¹² This point has been made and discussed in D.M. Paciocco, "Death by *Stone*-ing: The Demise of the Defence of Simple Automatism" (1999) 26 C.R. (5th) 273 at 278-79.

proof on the general issue.¹³ Thus the prosecution should fail on a motion for directed verdict if the judge determines that the trier of fact could not find an essential element of the prosecution case proved beyond reasonable doubt.¹⁴ Similarly, no matter of defence should go to the trier of fact unless the evidence for it is sufficient to support an inference of reasonable doubt.¹⁵ In the normal run of cases, however, appellate courts do not attempt to prescribe the evidentiary (as distinct from the substantive) ingredients for successful discharge of the burden.¹⁶ In the exceptional case where a legal burden is attached to a matter of defence, it follows that it should not be given to the jury unless it could be proved on a balance of probabilities by the evidence, but the sufficiency of such evidence has rarely been the subject of sustained judicial comment.

On this point the majority states its conclusions:

To sum up, in order to satisfy the evidentiary or proper foundation burden in cases involving claims of automatism, the defence must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion. However, it is an error of law to conclude that this defence burden has been satisfied simply because the defence has met these two requirements. The burden will only be met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In reaching this conclusion, the trial judge will first examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The trial judge will also examine all other available evidence, if any. Relevant factors are not a closed category and may, by way of example, include: the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatic violence. I point out that no single factor is meant to be determinative. Indeed, there may be cases in which the psychiatric or psychological evidence goes beyond simply corroborating the accused's version of events, for example, where it establishes a documented history of automatic-like dissociative states. Furthermore, the ever advancing state of medical knowledge may lead to a finding that other types of evidence are also indicative of involuntariness. I leave it to the discretion and experience of trial judges to weigh all of the evidence available on a case by case basis and to determine whether a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities.¹⁷

This invites further observations about the nature of an evidential burden. To begin, however, it will be noted that these comments go far beyond remarks commonly made

¹³ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 61-63.

¹⁴ *Ibid.*

¹⁵ *R. v. Osolin*, [1993] 4 S.C.R. 595, 26 C.R. (4th) 1 [hereinafter *Osolin*].

¹⁶ See, e.g., *R. v. Haslam* (1990), 78 C.R. (3rd) 23, 56 C.C.C. (3d.) 491 (B.C.C.A.).

¹⁷ *Stone*, *supra* note 6 at 384-85.

about the evidential burden in cases of non-insane automatism. Canadian courts now apply the wispy standard of the “air of reality”.¹⁸ Nobody can really say what this means, although the formal logic in this situation would seem to dictate that it is evidence in which a properly-instructed jury, acting judicially, could find a reasonable doubt. Trial judges will generally recognize an “air of reality” when their sense of prudence tells them that to do so would avoid needless excursions to the courts of appeal.

Lord Denning had said in *Bratty v. Northern Ireland (A.G.)*¹⁹ that a claim of non-insane automatism would require more support than a “facile mouthing” before it would be put to the jury. This is a vivid phrase but commonplace law. It means that assertions in law may be considered on the general verdict only if they are supported by relevant and sufficient evidence of facts. The majority in *Stone* expresses deep skepticism of non-insane automatism, and impliedly some skepticism of jurors, by reciting specific requirements concerning discharge of the evidential burden on non-insane automatism. Whatever else these rules demand, they set a standard for the discharge of an evidential burden that is not only complex, but manifestly more onerous than any statement of the evidential burden found elsewhere in Canadian law—even in the exceptional cases in which the accused bears a legal burden on a matter of defence. The standard set by the majority is one that depends upon a judicial determination of sufficient weight in the evidence and, moreover, an assessment of weight that must conform to prescribed guidelines.

It is not strictly necessary to insist upon an assertion of involuntariness by the defence, just as it is not necessary to insist upon an assertion of no *mens rea* or fault. In most cases, of course, affirmative defences will be mounted upon an assertion by the defence, but the law remains that the judge must direct the jury to consider any live issue raised upon sufficient evidence, whether it is raised by the prosecution or the defence. Complex scientific issues typically require expert evidence, but in *Stone* the majority insists that, as a rule of law, automatism cannot be entertained without it. And then more:

Although cases involving claims of automatism do not deal with complex chemical reactions or the like, they do require judges to assess confusing and often contradictory psychiatric evidence. In particular, when determining whether the evidentiary burden for automatism has been satisfied, trial judges must be careful to recognize that the weight to be given to expert evidence may vary from case to case. If the expert testimony establishes a documented history of automatistic-like dissociative states, it must be given more weight than if the expert is simply confirming that the claim of automatism is plausible. In the former case, the expert is actually providing a medical opinion about the accused. In the latter case, however, the expert is simply providing an opinion about the circumstances surrounding the allegation of automatism as they have been told to him or her by the accused. Trial judges must keep in mind that an

¹⁸ *Pappajohn v. R.*, [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481; *Osofin*, *supra* note 15; *R. v. Park*, [1995] 2 S.C.R. 836, 39 C.R. (4th) 287.

¹⁹ [1963] A.C. 386, [1961] 3 W.L.R. 965 (H.L.).

expert opinion of this latter type is entirely dependent on the accuracy and truthfulness of the account of events given to the expert by the accused. Indeed, in the present case, Dr. Janke, the defence psychiatrist, qualified his opinion by noting that it was based almost exclusively on the accuracy and truthfulness of the appellant's account of events ...²⁰

And then even more, as noted above, including what appears to be something in the nature of a requirement for corroboration and a catalogue of other considerations that share a running theme of suspicion that the majority candidly concedes.

All this amounts to a direction from the majority that trial judges should thoroughly *weigh* the evidence of automatism before even considering whether it provides a sufficient evidentiary foundation for further consideration. This stands in stark contrast to the traditional view that judges should not embark upon extensive weighing of the evidence when considering the evidential burden, for fear of trespassing upon the province of the jury or even usurping its authority. Indeed, it is a view of the evidential burden that stands in naked contradiction to the opinion expressed by Bastarache J. in *R. v. Charemski*.²¹ This is perplexing because in *Charemski* the issue concerned the evidential burden of the Crown; the argument against a weighing of the evidence when considering the evidential burden on a matter of defence is surely even more compelling.

In *Stone*, however, the majority enumerates multiple grounds upon which a trial judge will commit "an error of law" if automatism is put to the trier of fact on the mere basis that the evidence appears to support an inference of involuntariness due to sane or insane automatism. First among them would be the absence of strong expert evidence, followed by questions of corroboration and any number of other issues that have entirely to do with weight and the competence of the jury. It has always been common wisdom, especially among trial judges, not to insist too strenuously upon the sufficiency of evidence for discharge of an evidential burden—especially on matters of defence—and then to leave the matter, with suitable direction, to the trier of fact. The approach of the majority in *Stone* reverses this and warns trial judges that the risk of error in leaving non-insane automatism is great indeed.²²

According to the majority, the trial judge must decide whether the evidence that supports automatistic involuntariness is evidence of sane *or* insane automatism. It is not apparent why the judge must decide to classify it as one or the other but cannot instead leave both in an appropriate case. It is quite possible that sufficient evidence could be adduced on both and that both would merit consideration, even according to the stringent standard exacted by the majority. Forcing the trial judge to decide upon one or the other, or neither, only underscores the degree to which the majority's approach requires the judge to determine what has traditionally been reserved for the jury. The history of the common law in these matters demonstrates a progressive (in

²⁰ *Stone*, *supra* note 6 at 380-81.

²¹ [1998] 1 S.C.R. 679, 15 C.R. (5th) 1 [hereinafter *Charemski*].

²² It is ironic that the majority should insist on expert evidence, but then imply that even with it there will rarely be a good defence. Consider the situation in *Stone*.

both senses) trend away from special verdicts and directed findings by trial judges. The restrictive rigour of the approach declared in *Stone* is not radically different in effect from that older and discredited view of the judge's role. Moreover, as the discharge of an evidential burden is a preliminary question of law, it would seem excessive to demand that the trial judge decide whether the evidence proves on a balance of probabilities that non-insane automatism is the form of automatistic involuntariness before the court.

II. Mental Disorder?

A. Internal Cause

The crux of this approach is the double fiction that automatistic involuntariness is presumptively internal in its origin and that anything in the nature of an internal mental cause of automatism is presumptively mental disorder. This is an undifferentiated view of mental phenomena, one that is invoked, not justified, on the ground that it is necessary for prudent and protective reasons of policy. It requires the trial judge to determine the weight of the evidence and to do so in relation to a sweepingly wide definition of mental disorder that might well not conform to the expert evidence. It seems excessive that to erect an adequate screen against spurious claims of sane automatism it should be necessary to adopt the fiction that all mental disturbances are presumptively incidents of mental disorder.

In Canadian law the affirmative defences of mental disturbance have been ostensibly twofold: mental disorder and non-insane automatism. Throughout its reasons in *Stone*, the majority repeats that it is imperative as a matter of policy to restrict the defence of non-insane automatism. The decision that all forms of mental disturbance invoked in relation to the voluntariness of the *actus reus* should be deemed mental disorder, unless proved otherwise, is only one element of this overarching rationale for the opinion. "Disease of the mind" is, of course, a legal term of art that has little meaning for doctors, but that can be adapted by lawyers to meet concerns that are considered important by them.²³ A presumption that involuntariness arises from mental disorder unless proved otherwise would seem to serve concerns of policy, but only by the creation of an amorphous *residuum* called "disease of the mind". This is certain to cause some further chaos in the examination and cross-examination of expert medical witnesses at trial.²⁴

²³ Martin J.A. wrote that disease of the mind, "although a legal concept, ... contains a substantial medical component as well as a legal or policy component" (*Rabey* (C.A.), *supra* note 2 at 12). The deemed mental disorder in *Stone* reduces substantially the connections between the legal term of art and medical science.

²⁴ Lawyer: Doctor, I must tell you that in law a dissociative state is deemed to proceed from a disease of the mind unless proved otherwise, which means that a dissociative state is deemed to be a form of mental disorder until some other explanation is established.

Doctor: Well, I must say, that is not how we would understand these matters. ...

The majority describes as the “objective component” in a legal test for automatism that aspect concerned with whether the *apparent* involuntariness in the conduct of the accused comports with “the reaction that a normal person would have in the circumstances.”²⁵ It is not immediately apparent what the significance of a positive or a negative answer should be, but in either case this criterion can scarcely be described as objective in any meaningful sense of the word, although it might be construed in some way as a standard of reasonableness. The question it appears to raise is whether it would be reasonable for a reasonable person to have an unreasonable reaction in the circumstances. At all events, it is clear that the viability of non-insane automatism will be nil unless the judge decides, as a matter of law, that the average sane person would react to the events in issue by a dissociation of mind and body as expressed in involuntary physical behaviour. The effect of this will be to eliminate the defence of non-insane automatism because it is a standard that cannot be met. Defences of mental disorder or automatism are, by definition, highly specific to the mental make-up of individual persons. To demand that the average sane person would react to the events in issue in a specified way is to preclude, by law, the possibility that this accused person actually *did* react to shocking events by a dissociation of mind and body, *even if* the average sane person might not have done so. Besides, a psychiatrist would have great difficulty in answering the question of whether the average person, placed in the same circumstances as the accused, would have had such a reaction.

The majority says that the law presumes the voluntariness of the *actus reus*.²⁶ This is not strictly accurate because what the law does is only to recognize common sense: the prosecution must always prove the voluntariness of the act, but in almost every case that proof is an easy inference from evidence of the alleged conduct. It is only when the evidence pointedly raises a question about voluntariness that the issue becomes more subtle. The position taken by the majority on this point is that evidence of involuntariness creates in law a presumption of mental disorder as its cause. Thus the accused who raises an issue of involuntariness also puts mental disorder in issue. Moreover, it is mental disorder that will be put to the jury unless the accused can prove that its cause was some form of mental disturbance that is not mental disorder. The chances that he can do this are negligible because the category of mental disorder now comprises any mental state that a normal person would not have. It seems entirely odd that the test for mental disorder should turn in such large measure upon the magnitude of the precipitating circumstances and the ordinariness or reasonableness of involuntariness as the reaction. One can only hope that this expression of the law in *Stone* will be reconsidered at the earliest possible date.

²⁵ *Stone*, *supra* note 6 at 392-93.

²⁶ *Ibid.* at 373. See the comment on this point by R.J. Delisle in “*Stone*: Judicial Activism Gone Awry to Presume Guilt” (1999) 24 C.R. (5th) 91 at 93.

B. Recurrence

The continuing-danger theory can be expressed in two complementary ways. One is that if the underlying cause of automatistic involuntariness or a dissociative state is likely to subsist, or to recur, it is more likely to have some form of mental disorder among its effects and thus, as an empirical proposition, should be legally classified as mental disorder within the meaning of section 16 of the Code. Another is that where there is a risk of recurrence, the precise cause is immaterial and reasons of prudence justify either a narrower definition of automatism or treating the danger of recurrence with the same protective measures as are applied in cases of mental disorder. In *Stone* the majority appears to accept both.

The most difficult aspect of the continuing-danger theory is the accuracy and reliability of prediction. It is perhaps for this reason that the majority in *Stone* adopts an approach to this issue that considerably broadens the range of cases in which non-insane automatism would be excluded by law from the jury's consideration. The continuing danger, says the majority, cannot lie solely in the risk that the accused would commit another act of similar violence in a dissociative state. Nor can it lie solely in the danger that the precipitating cause of the dissociative state would recur and thus probably precipitate another dissociative state. It must include more generally the cluster of attendant circumstances within which the dissociative state arose previously; and if those attendant circumstances, or similar conditions, were capable of recurring, non-insane automatism should be excluded for reasons of policy. On this ground, however, it must be allowed immediately that the exclusion of non-insane automatism is a decision that really has nothing to do with mental disorder. The wider approach adopted by the majority would exclude a defence of non-insane automatism if the cluster of personal and social circumstances of the accused are likely to recur, thus making the recurrence of dissociation somewhat more likely. At the very least, this approach begs for some form of empirical justification, but the opinion of the majority provides none.

III. Legal Burden⁷ and the Constitution

Viscount Sankey's speech in *Woolmington v. D.P.P.* included the following peroration, which seemed to make plain that at common law the accused could not be required to prove a sufficient condition of acquittal: "[W]hile the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."²⁷ *Woolmington* was accepted as the law in Canada, but it is no longer quite so. At common law, the Supreme Court of Canada decided in *R. v. Sault Ste. Marie*²⁸ to recognize a class of strict-liability offences in which the accused could avoid conviction upon proof of due diligence or reasonable mistake. This

²⁷ [1935] A.C. 462 at 481, [1935] All E.R. Rep. 1 (H.L.) [hereinafter *Woolmington* cited to A.C.].

²⁸ [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30 [hereinafter *Sault Ste. Marie*].

was before the *Canadian Charter of Rights and Freedoms*²⁹ came into force and, in any event, it gave the accused a benefit that did not previously exist. Perhaps the encumbrance of a legal burden at common law could be justified in those circumstances on those grounds.

Since the *Charter* has come into force, almost all violations of the presumption of innocence have been considered reasonable by the Supreme Court.³⁰ In *R. v. Daviault*,³¹ surprisingly, the Court even took the opportunity to encumber the new common law or constitutional defence of extreme intoxication with a legal burden. This was neither sought nor argued by any of the parties, and the attorneys general could present no submissions on the question because they were not notified that the Court was considering a point of constitutional law. The majority of the Court concluded that the burden thus imposed was a reasonable violation of the presumption of innocence, although no evidence was presented and no argument heard. This aspect of the decision attracted critical comment, in part because it took the case away from the parties and, second, because it was intrinsically ill-advised for the final court of appeal to make legislative decisions without advice. There was also something anomalous in the notion that the Supreme Court could correct a violation of the presumption of innocence by substituting for it another violation of the presumption of innocence.

The majority in *Stone* reverses the onus on the common law defence of non-insane automatism. This is surprising, for all of the reasons just given, but more arresting for the forceful manner in which it is done. The minority states flatly that there was nothing in the record that could open the issue of the burden of proof on non-insane automatism. In the courts below, there was not even a whisper on the issue, and that would seem to end the matter. The majority says that the respondent Crown invited the Court in its written submissions to consider the question, but at its highest, all this means is that a majority of the Court might have thought that this was an issue raised by the Crown's written submissions. It is surprising that the majority might have reached this conclusion because nowhere in those written submissions can one find a suggestion that the Court might consider the imposition of a legal burden on the issue of non-insane automatism. If the submissions of the respondent in this case were sufficient to raise an important constitutional question, there is no case in which the same assertion could not equally be made. This would make constitutional adjudica-

²⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³⁰ See e.g. *R. v. Potvin*, [1989] 1 S.C.R. 525, 21 Q.A.C. 258; *R. v. Downey*, [1992] 2 S.C.R. 10, 13 C.R. (4th) 129 [hereinafter *Downey* cited to S.C.R.]; *R. v. Whyte*, [1988] 2 S.C.R. 3, 64 C.R. (3d) 123; *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1; *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1 [hereinafter *Chaulk*]; *Osolin*, *supra* note 15. The exceptions to this pattern are *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, and *R. v. Laba*, [1994] 3 S.C.R. 965, 34 C.R. (4th) 360 (legal burden found unconstitutional and replaced by a read-in evidential burden).

³¹ [1994] 3 S.C.R. 63, 33 C.R. (4th) 165 [hereinafter *Daviault*].

tion unpredictable and it would eliminate the requirement of notice of a constitutional issue.

The import of the reverse burden on non-insane automatism is a matter of constitutional law. Frankly, in the administration of criminal justice it is unlikely to make any appreciable difference, but the same cannot be said about the constitutional significance of this aspect of *Stone*. The essential points are as follows.

Section 11(d) of the *Charter* proclaims the right to be presumed innocent and it is agreed that the imposition of a legal burden on a matter of defence is inconsistent with the presumption of innocence.³² It is also agreed that presumptions that relieve the prosecution of the burden to prove its case beyond reasonable doubt are inconsistent with the presumption of innocence. The rationale for these two agreed points is the same: reverse burdens and mandatory presumptions would both permit a finding of guilt in cases where there remains a possibility of reasonable doubt at the end of the case and on the whole of the evidence.³³ Nevertheless, section 1 of the *Charter* proclaims that the rights guaranteed by it are subject to such reasonable limitations as are demonstrably justified in a free and democratic society. As noted previously,³⁴ all but two challenges to *statutory* violations of the presumption of innocence have been rejected by the Supreme Court on the ground that they are reasonable limitations of the right. There was a startling novelty in *Daviault* when the Court itself created a legal burden on a matter of defence and, in the absence of evidence or argument, pronounced that this deliberate violation of the presumption of innocence was reasonable. A decision of this kind had only once been made previously at common law by the Supreme Court, and not without anxious compunction,³⁵ but to see it done under the cover of the Constitution was indeed striking. It signified many things in the fast evolution of Canadian constitutional adjudication, and among them was the evident ease with which the Supreme Court has assumed legislative authority. If anyone thought that the pronouncement in *Daviault* concerning the burden of proof was a momentary misjudgment of the Court's role, *Stone* goes so far as to suggest that it is the Court's duty to do nothing less than make such changes in the law.

It was once a common dictum in the Empire and later the Commonwealth that in deciding constitutional cases appellate courts should take care to say and to determine no more than is necessary for the disposition of the precise matters before them.³⁶ This prudential doctrine of restraint no longer constrains Canadian courts; it has been surpassed by more energetic approaches to doing the right thing, not infrequently involving recourse to the *Charter* as an engine of right. The Supreme Court has said

³² *Woolmington*, *supra* note 27 at 481; Sopinka, Lederman & Bryant, *supra* note 13 at 121-22.

³³ *Downey*, *supra* note 30 at 21.

³⁴ *Supra* note 30.

³⁵ *Sault Ste. Marie*, *supra* note 28.

³⁶ See e.g. *Citizens Insurance Company v. Parsons* (1881), 7 A.C. 96 at 109 (P.C.). See also B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3d ed. (Toronto: Butterworths, 1988) at 199-207.

many times that it must be guided in its interpretation of the *Charter* by the *Charter's* general objects and by the specific purposes sought by its various provisions.³⁷ It has also said that in reaching legislative decisions about the meaning of constitutional rights it must give due regard to the context in which the issue for decision arises.³⁸

The mandate for legislative reform derived from the Constitution is onerous and it is for this reason that restraint should be cautioned afresh. Perhaps the first article of restraint should be that the courts ought not to decide a constitutional question that they are not asked, and if they perceive a need to answer such an unasked question they should remit the matter for adequate preparation and submissions. A constitutional answer to an unasked question might be incomplete. It is more likely, however, that the net effect will be to trivialise the Constitution itself. Without doubt, the interpretation of the Constitution forces courts to make difficult decisions, but the decisions concerning the burden of proof in *Daviault* and *Stone* were unnecessary.

Before addressing these decisions in particular, it should be said that the scorecard on reasonable violations of the presumption of innocence in Canada is long enough to suggest that adherence to this principle might be a public value that Canadians cannot afford at full price. If almost all statutory violations of the presumption of innocence have been sustained as reasonable limitations, it would appear that the rigour of the right is too rich for the smooth running of Canadian law. Indeed, it is not inapt to paraphrase the general economy of the *Charter* by saying that it guarantees rights that the courts consider reasonable in a free and democratic society. That is exactly the conclusion that is intended by inclusion of a saving provision such as section 1, which legitimates the notion that guaranteed rights can be reasonably violated.

On this point there has been some intriguing word-play in the Supreme Court. It has been suggested that where the Court finds a reasonable limitation upon a constitutional right there is no violation of the Constitution.³⁹ In the result this might be accurate, because it recognizes that such limitations might be constitutionally lawful, but it collapses the chain of reasoning that leads to the result. That is, there is no need to consider whether a limitation is reasonable unless and until a violation of a constitutional right has been established. It may be entirely sound that the violation is a reasonable limitation, but that does not mean that the violation is retroactively made to disappear.

In *Daviault* and *Stone*, the Court decided to create a violation of the presumption of innocence and to assert its confidence in the reasonableness of the decisions. Taken together these decisions demonstrate, paradoxically, that the presumption of innocence under the *Charter* has less force than it had at common law and, further, that the

³⁷ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97; *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385.

³⁸ See e.g. *R. v. Mills*, [1999] S.C.J. No. 68 at para. 64, online: QL (SCJ).

³⁹ *R. v. Swain*, [1991] 1 S.C.R. 933 at 997, 63 C.C.C. (3d) 481, Lamer C.J.C. [hereinafter *Swain* cited to S.C.R.].

Constitution itself is the source of this erosion. The Court's decisions to reverse the burdens in *Daviault* and *Stone* show the Constitution being used for legislative purposes as if it were no different as a source of law than the common law. It is different, of course, because the Constitution is and should be comparatively inflexible. It provides "a rule for making rules" and should not be the instrument for quotidian concerns. That is, it should rarely be invoked by the courts *ex proprio motu* to amend what the legislator has done or to do what the legislator has chosen not to do. It should be invoked only where the ordinary law of the land fails to conform to the basic law. To use the *Charter* as an engine for making ordinary law is to exploit the Constitution and transfer ordinary law-making powers of the legislator away from their proper source.

What was done in *Daviault* and *Stone* raises a point of considerable interest. In both cases the Court knowingly and deliberately created a rule that is inconsistent with the presumption of innocence, and with the Court's interpretation of the presumption of innocence in section 11(d) of the *Charter*. The Court then pronounced that this violation of the presumption of innocence was a reasonable limitation under section 1. The point of interest is whether it is permissible for a court to create a reasonable limitation upon constitutional guarantees by first creating a rule that violates one of those guarantees.⁴⁰ One answer is that there is no objection to this because the *Charter* must be read as a whole, including, of course, section 1, and thus the courts have the authority under the Constitution to develop the law in a manner that is, *on the whole*, consistent with the *Charter*. This is problematic, however, because the orthodox approach to questions under section 1 of the *Charter* is that they do not arise unless and until it is determined that a rule of law (statutory or common law) breaches a right guaranteed by the Constitution. What was done in *Daviault* and *Stone* cannot be accommodated within this orthodox approach. Indeed, what was done there amounts to an assertion that the courts can and indeed must find a reasonable solution to a problem, such as extreme intoxication or automatism, even if it requires the creation of a rule that violates the *Charter*, as long as it does so in a reasonable manner.

⁴⁰ The Court in *Swain, ibid.*, chose not to discuss its ability to apply s. 1 to a new rule that it is creating that it already realizes breaches a *Charter* right from the outset. Lamer C.J.C., for the majority, contemplated the reformulation of the existing common law to conform with s. 7 of the *Charter*. Failing a reformulation that did not infringe a constitutionally protected right or freedom, he would turn to see if "the common law rule" (presumably the original rule, and not any reformulation) could be upheld under s. 1 (at 978-79). Later, Lamer C.J.C. said, "It is not enough to say that the newly formulated common law rule is less intrusive than the previous rule ... If this Court is to enunciate a new common law rule to take the place of the old rule, it is obliged to consider the status of that new rule in relation to all relevant aspects of the *Charter*. In my view, the only other provision of the *Charter* which is directly applicable to the new common law rule is s. 15" (at 989). He makes no reference to the possibility that a *Charter* infringement in the new rule could be upheld under s. 1, or that s. 1 was a relevant aspect of the *Charter*. In contrast, Wilson J. did subject the proposed new rule to s. 1 scrutiny, against which she argued it failed (at 1035).

The Supreme Court has made clear that it will reformulate the common law to make it consistent with the *Charter*, even where there is no government actor present in the sense of section 32 of the *Charter*.⁴¹ Where government is a party to the litigation and the *Charter* is thus generally applicable to the litigation in question, the *Charter* applies more strictly to any common law rules, in the same way it does to statutes and regulations.⁴² It is difficult indeed to understand where a court could derive the lawful authority to approve a reasonable violation of the *Charter* by first creating a rule that plainly breaches the *Charter*. If this is done by the Supreme Court of Canada, there is certainly no forum in which the lawfulness of this practice can be challenged, but nonetheless, it is submitted that the *Charter* affords the courts no basis upon which to create a rule of law that deliberately breaches the Constitution, even if it is justifiable as a reasonable limitation under section 1. In the absence of any other forum in which to test this submission, perhaps when the rules in *Daviault* and *Stone* next come before the Supreme Court it should be submitted to the Court that those rules were created *per incuriam* and are of no authority.

The reasons given for the majority in *Stone* concerning the reverse burden on non-insane automatism lack persuasive force as justifications for violating the presumption of innocence, not least because there was no evidence before the Court to demonstrate a limitation of this right. The most curious of these reasons is the suggestion that there should be consistency in respect of the legal burden on claims of mental disorder (section 16 of the Code), extreme intoxication (*Daviault*) and non-insane automatism.⁴³ The rationale for this, apparently, is that all three are claims of involuntariness and, because such claims should be viewed with suspicion, they will be appropriately handicapped by a reverse burden. That is, the suspicion is strong enough to offset the presumption of innocence.

As already noted, this does not say much for the presumption of innocence, or perhaps it is more accurate to say that it says less and less for the presumption of innocence. What we have here is the extension of the reverse burden from insanity to extreme intoxication and now to non-insane automatism. The first of these claims has been recognized in Anglo-Canadian law for two hundred years, the second for five years in Canada alone, and the third for almost fifty years in Canada and elsewhere. It is appropriate to recall, however, that even in *Woolmington*, Viscount Sankey observed that the reverse burden on insanity at common law was an anomaly and, further, it was only because it had become so deeply entrenched in the common law of England that it would not be disturbed.⁴⁴ This anomaly was incorporated and preserved in the Code and a challenge to it was dismissed when the Supreme Court held in *Chaulk* that the reverse burden on insanity is a reasonable limitation of the presumption of innocence.

⁴¹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 34 C.R. (4th) 269; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 184 N.R. 1.

⁴² *Swain*, *supra* note 39 at 968.

⁴³ *Stone*, *supra* note 6 at 370-71.

⁴⁴ *Supra* note 27 at 475; *Delisle*, *supra* note 26 at 95 makes the same point.

By itself, of course, this is not a justification for the extension of a reverse burden to other forms of involuntariness, especially when those forms of involuntariness are not strictly comparable. The defence of extreme intoxication after *Daviault* allows a person to assert a constitutional right to acquittal for *self-induced* involuntariness and irresponsibility. There is an argument that there should be no such defence at common law, but there is no point to rehearsing this argument again because the law has been settled in favour of such a defence. It will suffice to note that the defence of extreme intoxication is categorically distinct from the other two forms of automatistic involuntariness in that the other two are concerned with involuntariness arising from causes beyond the control of the accused.

Automatism is thus concerned with a dissociation of the mind arising from a cause beyond the control of the accused. If it is caused by mental disorder within the meaning of section 16 of the Code, the special verdict and the consequences of psychiatric detention are self-evidently justified. If it is not, and the automatistic involuntariness of the accused's conduct is blameless, there is no legitimate purpose served by attributing criminal responsibility to such a person. The rules prescribed by the majority in *Stone* not only obfuscate these important principles, but also raise the strong possibility that the jury would be obliged to return a special verdict against a person whose automatistic involuntariness was not caused by mental disorder.

A final point on the reverse burden: When discussing the burdens that should attach to claims of automatism, the majority refers to a White Paper published but not tabled in Parliament by the Minister of Justice: "In her 1993 *Proposals to amend the Criminal Code (general principles)* the Minister of Justice recommended that the legal burden of proof in all cases be on the party that raises the issue on a balance of probabilities."⁴⁵ It is with this reference that the majority then proceeds through a discussion of the burdens on extreme intoxication and insane automatism, leading to the conclusion that there should indeed be a legal burden on non-insane automatism.

A word about this White Paper is in order.⁴⁶ No Minister of Justice has committed the Government of Canada to a policy that the accused should bear a legal burden on the issue of non-insane automatism. The White Paper went nowhere and it was followed by two subsequent initiatives concerning reform of the General Part of the criminal law. Neither of these led to legislation, but it is more important to note that in one of them there was no mention of a reverse burden on automatism⁴⁷ and in the other the option for a reverse burden was one option among several.⁴⁸

⁴⁵ *Stone*, *supra* note 6 at 375.

⁴⁶ Canada, Minister of Justice, *Proposals to Amend the Criminal Code (General Principles)* (28 June 1993). See the reference to this point by Delisle, *supra* note 26 at 93.

⁴⁷ Canada, Department of Justice, *Reforming the General Part of the Criminal Code* (1994) 15-16.

⁴⁸ Canada, Department of Justice, *Toward a New General Part of the Criminal Code of Canada* (1994) 34-37.

Conclusion

The *ratio decidendi* of *Stone* is that the trial judge was right to leave insane automatism with the jury and made no error in not leaving non-insane automatism. More specifically, no substantial wrong or miscarriage of justice occurred in the case. The majority dismissed the appeal, and thus the conviction for manslaughter stood. That conviction would appear to be based upon the jury's acceptance of a defence of provocation.

It is clear that the trial judge and the Court of Appeal did not observe the rules on automatism laid down by the majority in *Stone*, including the presumption of mental disorder now imposed when evidence of automatistic involuntariness is adduced. If those rules had been observed, it is far from clear that the result at trial or in the Court of Appeal would have been the same. It is entirely possible, perhaps even likely, that the jury would have returned a special verdict of acquittal by reason of mental disorder. Thus, if the majority's new rules on automatism need not have been applied to the case itself, and indeed they were not applied, this leaves a perplexing conclusion with respect to those rules. They are all *obiter dicta* and they have only prospective persuasive force. This means that they are not authoritative at the moment and can be re-argued before the Supreme Court at a future date.
