Editorial

The Importance of Air of Reality Tests

Students of criminal law are often confused when they are introduced to air of reality tests or evidential burdens after first having been exposed to the golden thread of the presumption of innocence in Canadian criminal law. Air of reality tests, however, cannot be ignored. For example, from R. v. Pappajohn (1980), 52 C.C.C. (2d) 481 forward, the exact contours of the mistaken belief in consent defence have depended not only on the substantive law, but on how the courts administered the air of reality test.

Air of reality tests are even more complicated when applied to defences that the accused must establish on a balance of probabilities. Air of reality decisions can compound or mitigate the primary decision to impose a reverse burden on the accused. In R. v. Stone (1999) 134 C.C.C. (3d) 353, the court concluded that the new persuasive burden on the accused to establish the automatism defence on a balance of probabilities also influenced the air of reality test. The trial judge was justified in not instructing the jury on the defence of non-mental disorder automatism because there was no "evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities" (at p. 426). The court not only imposed a novel persuasive burden on the accused to establish non-mental disorder automatism, but raised the evidential burden considerably.

In R. v. Fontaine (2004), 183 C.C.C. (3d) 1 at para. 63, the Supreme Court qualified Stone as it relates to the evidential air of reality burden but not the persuasive burden on the accused to establish automatism. Fish J. acknowledged for an unanimous court that "there is language in Stone that may be understood to invite an assessment by the trial judge as to the likely success of the defence. This in turn, may be seen to require the judge to weigh the evidence in order to determine whether it establishes, on a balance of probabilities, that the accused perpetrated the criminal act charged in a state of automatism." The court, however, held that a trial judge who followed such an approach erred and that the multiple factors set out in Stone were better used to guide
the trier of fact in deciding whether the automatism defence had been established on a balance of probabilities. A trial judge should not weigh evidence or judge its credibility in deciding whether there is an air of reality that justifies leaving the defence to the jury.

The idea of a general air of reality test that should be the same for all defences is supported by the majority’s decision in K. v. Cinous (2002), 162 C.C.C. (3d) 129. The Cinous test requires evidence on each necessary element of the defence. Moreover, the evidence must be such that a properly instructed jury acting reasonably could acquit. The Cinous test may constitute a higher threshold and an increased emphasis on the sufficiency of evidence and the range of reasonable inferences that the jury can draw than some previous formulations, which had suggested that defences should be put to the jury if there was some evidence. Three judges dissented in Cinous on the basis that it was the role of the jury to determine the sufficiency and reasonableness of the evidence relating to self-defence. Nevertheless, there was agreement that in administering the air of reality test, the judge should assume that evidence is true and leave the determination of its credibility to the jury.

Fontaine is a positive development to the extent that it indicates that the persuasive burden should not affect the air of reality test and that the judge should not weigh the evidence or determine its credibility. Fish J. stressed that the threshold air of reality test is not “intended to assess whether the defence is likely, unlikely, somewhat unlikely or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury and not how the jury should ultimately decide the issue. The ‘air of reality’ test... should not be used to... introduce a persuasive requirement.” (at paras. 68 and 70). Citing Justice Arbour’s dissent in Cinous, he also warned that “the cost of risking a wrongful conviction and possibly violating the accused’s constitutionally protected rights by inadvertently withdrawing a defence from the jury is a high one” (at para. 61).

But Fontaine may also spawn some questions of its own. The court may have slightly reformulated the Cinous test when it stated that “in determining whether the evidential burden has been discharged on any defence, trial judges, as a matter of judicial policy, should therefore always ask the very same question: Is there in the record any evidence upon which a reasonably trier of fact, properly instructed and acting judicially, could conclude that the defence succeeds?” (at para 57, emphasis added). This raises the perplexing question of whether a jury acting judicially may nevertheless reach a decision that does not seem reasonable to a judge. The slight change in wording from Cinous is also accompanied by a change in tone. In Fontaine, the court erred on the side of allowing the defence to go to the jury, something that did not happen in Cinous.

Another passage in Fontaine may unfortunately cause unnecessary confusion. Fish J. stated: “In the case of ‘reverse onus’ defences, such as mental disorder automatism, it is the accused who bears both the persuasive and the evidential burdens. Here the persuasive burden is discharged by evidence on the balance of probabilities, a lesser standard than proof beyond a reasonable doubt. Reverse onus defences will therefore go to the jury where there is any evidence upon which a properly instructed jury, acting judicially, could reasonably conclude that the defence has been established in accordance with this lesser standard.” (ibid., at para. 54, emphasis added). The last passage could suggest that the persuasive burden on the accused is still relevant to the air of reality decision even though the rest of the judgment stresses the need to apply a consistent air of reality test to all defences regardless of the persuasive burden.

Fontaine’s qualification of Stone is a positive development but one wonders whether matters could have been made even clearer by overruling the oft-criticized persuasive burden that Stone places on the accused. It remains to be seen whether Fontaine will subtly change the Cinous test. Trial judges may answer that question in different and unstated ways, but their answers will be important. Indeed, they will help determine the true meaning of the presumption of innocence, the real contours of defences and the role of the jury in criminal trials.

K.R.

Editor’s Note

In an obituary entitled “Alan Mewett 1930-2001” published at (2002), 45 C.L.Q. 1, I made some errors concerning the legal text Mewett and Manning on Criminal Law. Morris Manning, Q.C., was never a student or assistant of the late Professor Mewett. He was co-author of all three editions of this leading criminal law text, with substantial credits and credentials of his own. I regret the errors and any harm that may have been caused to Mr. Manning.