CITATION: R. v. Minassian, 2021 ONSC 1258
COURT FILE NO.: CR-18-400000612-0000
DATE: 20210303

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	*J. Callaghan, J. Rinaldi, and C. Valarezo*,
– and –	)	for the Crown
	)	
ALEK MINASSIAN	)	
	)	*B. Bytensky and B. Smith,* for the Defendant
Defendant	)	
	)	
	)	
	)	**HEARD:** November 10, 12, 16, 17, 18, 19,
	)	20, 25, 26, 27, 30, December 1, 2, 3, 4, 7, 8,
	)	9, 10, 11, 14, 15, 16, 17, and 18, 2020.

MOLLOY J.:

REASONS FOR JUDGMENT

These reasons are organized under the following headings (references are to paragraph numbers):

A. INTRODUCTION

[1] This case has, in many ways, and on many days, been a struggle. One of the issues with which I have struggled is that this accused committed a horrific crime, one of the most devastating tragedies this city has ever endured, for the purpose of achieving fame. And he has achieved that purpose. He has told forensic psychiatrists who assessed him that the attention he has received and the information available when you Google his name, makes him "happy." One doctor asked him how he would feel if his name had never been reported by the media, and he said he would have been very disappointed.

[2] Throughout this trial, I have understood the need for these proceedings to be public and transparent. I have also recognized the crucial role of the media to keep the public informed, particularly during the pandemic when it was not easy for members of the public to attend the trial in person. That said, I am acutely aware that all of this attention and media coverage is exactly what this man sought from the start.

[3] In an earlier decision dealing with the sealing of exhibits in this trial, I commented, "I, for one, would welcome a consensus amongst responsible journalists to refuse to publish the names or images of individuals seeking fame by inflicting carnage upon innocent people."[1] I realize that journalists also have conflicting ethical principles to be weighed in the balance. I also know that in this case, long before I started this trial, the name of this accused was all over the media and the internet. His name is also published in several previous decisions I have written in this case. There is nothing I can do to rewind all of that. However, if any case like this should arise in the future, it is my fervent wish that, at the very outset, careful consideration be given to withholding publication of the name of the perpetrator. It would, in my view, be a rare situation in which the public's right to be informed would require revealing the actual name of the perpetrator, or where that limited right would outweigh giving the perpetrator the fame, or infamy, he or she seeks.

[4] In this case, and at this juncture, all I can do is to refuse to actually name the accused in my Reasons for Judgment. It is my hope that his name would no longer be published by anyone else either. That is not an order I will make, it is merely a wish, perhaps a naïve one. However, for purposes of this decision, I will refer to the accused as John Doe.

[5] Instead of naming the perpetrator of these crimes I will name the people he killed and injured. I would also like to acknowledge the true heroes of that day:

- Const. Ken Lam, who confronted the perpetrator alone immediately after the attack, did not lose his composure, holstered his weapon, and apprehended Mr. Doe without incident, even though Mr. Doe attempted to provoke him into shooting;

- Det. Rob Thomas, who interviewed Mr. Doe with a high degree of skill and professionalism, without ever being disrespectful;

- the numerous other police officers who ensured that Mr. Doe was treated in a proper manner, fully consistent with his constitutional rights;

- the first responders, who dealt with the aftermath of this attack;

- the numerous ordinary citizens who tended to the injured and comforted the dying at the scene; and,

- those individuals who chased after the van in an attempt to stop it, shouted out warnings to others who might otherwise have become victims, and particularly those who, without regard to their own safety, attempted to reach through the open window of the moving van and wrest control away from Mr. Doe.

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[1] 2020 ONSC 7167.

B. OVERVIEW

[6] Yonge Street is the primary north/south artery in the City of Toronto. Running from Lake Ontario at its south end to the very northern boundary of the city (and indeed beyond), it is a busy thoroughfare, lined with apartment buildings and businesses (big and small), and teeming with vehicular and pedestrian traffic, day and night, all seasons of the year. April 23, 2018 was a particularly beautiful day in Toronto. As often happens when winter finally transitions into spring, Toronto residents were out in abundance on Yonge Street, going about their business, running errands, wandering along the street, and enjoying this glorious day.

[7] Unfortunately, April 23, 2018 was also the date selected by John Doe, weeks in advance, as the day he would kill as many residents of Toronto as possible. At 12:40 p.m. that day, he picked up his pre-ordered rental van, and headed south down Yonge Street. Upon arriving at the intersection of Yonge Street and Finch Avenue, Mr. Doe left the street and steered the van south down the sidewalk on the west side of Yonge Street, mowing down pedestrians in his path. At times he veered back onto Yonge Street to avoid obstacles, returning to the sidewalk when he could, and directly aiming at pedestrians. He continued this rampage for 2.57 km down Yonge Street, in the course of which he drove on the sidewalk for 1.2 km, killing 10 people and injuring another 16. He ultimately turned off Yonge Street only because one of the pedestrians he struck was carrying a cup of coffee, which spilled across his windshield, obscuring his view.

[8] He paused for a moment at 1:27 p.m. to post to his Facebook page a message he had prepared in advance, stating:

> Private (Recruit) [Doe] Infantry 00010, wishing to speak to Sgt 4chan please. C23249161. The Incel Rebellion has already begun! We will overthrow all the Chads and Stacys! All hail the Supreme Gentleman Elliot Rodger![2]

[9] He then continued along side streets for a short distance and ultimately pulled over when a police car with flashing lights was on his tail. He emerged from the van, intent upon inducing the police to shoot him. He was unsuccessful. The lone officer first at the scene arrested Mr. Doe without incident. Mr. Doe was advised of his rights and taken to Toronto Police Service, 32 Division.

[10] John Doe now stands charged with the murder of 10 people:

- Ji Hun Kim (age 22)

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[2] The military references in this message relate to a short period of time when Mr. Doe was in the military, although he left before finishing basic training. “Incel” is short for “involuntary celibate,” a group of disaffected young men who hang out on fringe websites (such as 4chan) and feel aggrieved that women (Stacys) will not have sex with them because they prefer other obnoxious males (Chads). Elliot Rodger was an American mass murderer sometimes celebrated by those in the incel movement, and a subject of interest for John Doe.

- So He Chung (age 22)
- Geraldine Brady (age 83)
- Chul Min Kang (age 45)
- Mary Elizabeth Forsyth (age 94)
- Munir Abdo Habib Najjar (age 85)
- Anne Marie D'Amico (age 30)
- Beutis Renuka Amarasingha (age 45)
- Dorothy Sewell (age 80)
- Andrea Bradden (age 33)

[11] Mr. Doe further stands charged with the attempted murder of 16 people:

- Xiaolong An (age 21) – injuries to his arm, elbows, and left knee
- So Ra (age 23) – broken jaw, fractured ribs
- Hyeon Jeong Moon (age 25) – bleeding to the brain and broken pelvis
- Jun Seok Park (age 33) – bleeding to the brain and fractured lumbar
- Mavis Justino (age 42) – dislocated shoulder, fractured left ribs, 15 stitches to the back of her head, two stitches to her right arm
- Robert Anderson (age 59) – bleeding in his skull, broken left ribs, collapsed left lung, bleeding in his kidney
- Amir Kiumarsi (age 52) – skull and spine fracture, abdominal bleeding
- Aleksandra Kozhevinikova (age 90) – hip surgery
- Catherine Riddell (age 67) – brain trauma, broken ribs, broken scapula, broken pelvis
- Dina Risin (age 80) – head injury
- Yunsheng (Bob) Tian (age 28) – traumatic brain injury, surgical fracture to the lumbar spine, fractured right humerus, 24 broken vertebrae, facial fractures, laceration to his left leg

- Morgan Anthony McDougall (age 26) – knocked unconscious, cuts and scrapes to face, hands, forearms, and head, requiring multiple stitches and staples

- Samantha Peart (age 23) – fractured pelvis, clavicle, and tailbone

- Sammantha Samson (age 35) – injuries to knee, right elbow and right foot

- Beverly Smith (age 81) – numerous broken bones, both legs had to be amputated above the knee

- Amaresh Tesfamariam (age 62) – major injuries including a cervical fracture

[12] Following his arrest, Mr. Doe was interviewed by Det. Rob Thomas at 32 Division. Prior to that interview, Mr. Doe was fully advised of his rights and on two occasions he exercised his right to speak to a lawyer. Although there were some questions Mr. Doe declined to answer, he made extensive inculpatory statements including that he had set out to kill people that day and that he had rented the van almost three weeks in advance, deliberately choosing one that would be small enough to manoeuvre on the sidewalk but large enough to inflict maximum damage. He said he was motivated by the incel movement as he had been rejected by women and admitted that he frequented incel chatrooms on the internet. He paid tribute to mass murderers Elliot Rodger and Chris Harper-Mercer, with whom he claimed to have been in contact before they died. When asked if he had anything to say about the fact that he had killed and injured all those people, he stated, "I feel like I accomplished my mission."

[13] Given the charge of first-degree murder, this case was originally scheduled to be heard before a jury. Initially, defence counsel brought a motion to have the trial transferred to a jurisdiction outside Toronto where it was thought it would be easier to find an impartial jury. However, the horror of this incident generated such widespread media coverage that it became apparent it would be impossible to find jury members anywhere in Ontario who had not heard or read about the case. The defence withdrew its motion and sought to have the case tried by a judge sitting alone, without a jury, to which the Crown consented.

[14] It was apparent from the beginning that there would not be a significant dispute on the facts. There was extensive video of the van driving down the Yonge Street sidewalk. It was clear Mr. Doe killed and injured these people and that he intended to do that. The central issue was not the acts he had committed, but his state of mind at the time. To that end, there were many psychiatric and psychological assessments carried out, causing adjournments of the trial. By the time the trial was finally set to proceed in April 2020, the COVID-19 pandemic had hit Toronto, resulting in the physical closure of all courts, and further adjournment of the trial. New dates were scheduled for the fall but, as those dates approached, all counsel recognized that conducting the trial in the conventional way, in an actual courtroom with live witnesses and spectators, was not going to be possible. Ultimately, all parties involved consented to conducting the trial remotely, using a variety of virtual platforms to accommodate everyone with an interest in the case.

[15] At the beginning of the trial, Mr. Doe entered a plea of not guilty to all 26 counts on the indictment, but indicated that he was relying on s. 16 of the *Criminal Code* as a defence and that he was not criminally responsible for these offences within the meaning of that provision.

[16] All of the facts necessary to prove the charges of murder and attempted murder were conceded by the defence and were the subject of extensive Agreed Statements of Fact filed as exhibits at trial, some with accompanying photographs and video footage. Mr. Doe planned in advance to carry out an attack by driving a rented van down the sidewalk on Yonge Street, with the intention of killing as many people as possible. He then carried out that plan, killing 10 people and injuring another 16 people. There is no doubt that these actions were planned and deliberate. For the individual victims who died, all of the constituent elements for first-degree murder are established. For the individual victims who were injured but did not die, all of the constituent elements for attempted murder are established. Accordingly, the sole issue to be decided at trial was whether Mr. Doe had established, on a balance of probabilities, that because of a mental disorder he should not be held criminally responsible for his actions in causing these deaths and injuries.

[17] Prior to trial, Mr. Doe was assessed by three teams of experts: two retained by the defence, and one retained by the Crown. One or more experts from each of these teams testified at trial. Numerous expert reports were filed. I also heard evidence from Mr. Doe's father. John Doe was diagnosed as a young child with what was then called Pervasive Developmental Disorder. In more recent years, that name has changed to Autism Spectrum Disorder ("ASD"). Every expert who assessed Mr. Doe accepted that he is on the autism spectrum, as do I. I also agree with all of the experts that, although some people with ASD can have intellectual impairments, that is not the case for Mr. Doe. He does not have any impairment of his cognitive abilities, and is above average in intelligence.

[18] To meet the requirements for a defence under s. 16 of the *Criminal Code*, the accused must establish either: (a) that he has a mental disorder that renders him incapable of appreciating the nature and quality of his act; or (b) that he has a mental disorder that renders him incapable of knowing that it was wrong. This is commonly referred to as an NCR ("not criminally responsible") defence. All of the experts agreed that Mr. Doe was not psychotic at the time of this attack, nor was he suffering from any delusions. Rather, he was fully aware of what he was doing when driving the car down the sidewalk, and that this would result in the deaths of many people. He also understood that deliberately killing people in this manner would be murder and that this is a criminal offence. Thus, he appreciated the nature and quality of his actions and he knew they were legally wrong. Therefore, the only aspect of the s. 16 defence that might possibly fit Mr. Doe's circumstances is whether, because of his Autism Spectrum Disorder, he was incapable of knowing that his actions were morally wrong. On this issue, there was a division of opinion among the experts. And it is this issue that is the central point for me to decide in this case.

[19] Under s. 16, it is only an incapacity caused by a "mental disorder" that qualifies for the NCR defence. The first step, therefore, is to determine whether Autism Spectrum Disorder qualifies as a "mental disorder" within the meaning of s. 16 of the *Criminal Code.* In this context, "mental disorder" is a legal term with a specific legal meaning that may not be the same as what a layperson would consider to be a mental disorder in everyday language. Based on my review of

the legal principles, I am satisfied that Autism Spectrum Disorder meets the criteria to be considered a mental disorder for the purposes of this section. This merely opens the door. It means that people with ASD are eligible to be considered for a possible defence under this section, in the same manner as people with many other kinds of disabilities. It says nothing about whether the particular impact of that disability on that particular person in the particular circumstances of the crimes alleged constitutes a defence to the charges, nor does it say anything at all about any connection between ASD and criminality.

[20] Having concluded that ASD meets that preliminary threshold, the next question is whether the impact of ASD on Mr. Doe was such that he was incapable of knowing that his actions were morally wrong. The onus is on the defence to establish this on a balance of probabilities. It is clear that Mr. Doe knew his actions were legally wrong. To be criminally responsible, he must also be capable of knowing, at the time of the events, that his actions were morally wrong, in the sense that he knew the ordinary person in society would perceive them to be morally wrong. Further, an accused cannot be said to "know" something is morally wrong within the meaning of s. 16 if, because of a mental disorder, he lacks the capacity for rational perception and hence rational choice about the rightness or wrongness of the act. In other words, did he lack the capacity to rationally evaluate what he was doing?

[21] Based on the evidence at trial, including the testimony of the expert witnesses, it is clear to me that Mr. Doe knew that his actions would be seen by the vast majority of society as morally wrong. The more difficult issue is whether, in light of his social and reasoning deficits, Mr. Doe was incapable of bringing a rational mind to bear on the issue and to make a rational choice as to whether to proceed with these killings. I find that the defence has failed to meet its onus on this point. Mr. Doe thought about committing these crimes over a considerable period of time and made a considered decision to proceed. His attack on these 26 victims that day was an act of a reasoning mind, notwithstanding its horrific nature, and notwithstanding that he has no remorse for it and no empathy for his victims.

[22] The s. 16 defence has not been established. I find John Doe guilty on all counts on the indictment. My detailed reasons for these conclusions follow.

C. SECTION 16 of the CRIMINAL CODE: LEGAL PRINCIPLES

Background

[23] Section 16(1) of the *Criminal Code* states:

> 16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

[24] Our law presumes that every person is sane and responsible for their own actions, unless the contrary is proven. An accused who claims to be exempt from criminal responsibility by virtue of s. 16 bears the burden of establishing that fact on a balance of probabilities.[3]

[25] The "insanity defence" (as it used to be called) was part of our criminal law long before it was specifically included in the *Criminal Code*. It rests on the principle that a person should not be held criminally responsible for something they did when their mind was so deranged that they did not know what they were doing or were incapable of knowing the difference between right and wrong. This could be because: (a) they did not know the nature and/or quality of their act (*e.g.* they believed, because of a delusional disorder, that they were killing Satan, when in fact they were killing their mother); or (b) because they lacked the capacity to know that what they were doing was wrong (*e.g.* they believed they had been ordered by God to carry out the act in order to save mankind).[4] However, the defence is founded on the principle that criminal responsibility can only result from the commission of a voluntary act and that, to be voluntary, an act must be the exercise of free will. As stated by the Supreme Court of Canada in *R. v. Bouchard-Lebrun*:[5]

> The moral dimension of the voluntary act, which this Court recognized in *Perka*, thus reflects the idea that the criminal law views individuals as autonomous and rational beings. Indeed, this idea can be seen as the cornerstone of the principles governing the attribution of criminal responsibility (L. Alexander and K. K. Ferzan with contributions by S. J. Morse, *Crime and Culpability: A Theory of Criminal Law* (2009), at p. 155). When considered from this perspective, human behaviour will trigger criminal responsibility only if it results from a "true choice" or from the person's "free will". This principle signals the importance of autonomy and reason in the system of criminal responsibility. As the Court noted in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687:
>
> > The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to ground a conviction… . Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society… . Criminal liability also depends on the capacity to choose – the ability to reason right from wrong. [Emphasis added; citation omitted; para. 45.]

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[3] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 16(2) & (3).

[4] See the Rule in *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 8 E.R. 718, as discussed in *Schwartz v. R.*, [1977] 1 S.C.R. 673, 67 D.L.R. (3d) 716.

[5] *R. v. Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 S.C.R. 575, at para. 48.

[26] The modern "not criminally responsible" ("NCR") defence, as codified in the *Criminal Code* and developed in the case law, still consists of two alternative branches: one relating to the "nature and quality" of the act and the other to knowing the act is "wrong." Both branches are predicated on the accused having a "mental disorder" that caused the incapacity. The first branch reference to the "nature and quality" of the act means the physical nature, character, and consequences of the act.[6] Typically, the first branch of the defence arises in cases where a delusion or hallucination experienced while the accused is in a psychotic state causes the accused to do an act that is completely different in its nature and quality from what the accused believed to be the case. Indeed, this is the most common situation in which the NCR defence arises. That branch of the defence does not arise here. Mr. Doe was fully aware of the nature and quality of his actions: this was the opinion of all the experts, and conceded by the defence.

[27] I will therefore not be reviewing case authorities dealing with the first branch, except in one respect. Parliament used a different verb for each branch of the defence. To meet the first branch of the test, the question is whether the accused was capable of "appreciating" the nature and quality of the act; whereas, the test for the second branch is whether the accused was incapable of "knowing" the act was wrong. The difference between "appreciate" and "know" is relevant here and some of the case law on the first branch assists in that analysis.

[28] The focus in this case is on the second branch of the NCR defence, specifically, whether Mr. Doe was suffering from a "mental disorder" that rendered him incapable of "knowing" that his acts were "wrong." Issues arise as to the interpretation of three terms: mental disorder; knowing; and wrong.

Meaning of "Mental Disorder"

[29] The first requirement for the NCR defence to apply is that the accused was "suffering from a mental disorder." The *Criminal Code* provides no tangible assistance on what conditions qualify as a mental disorder. The definition section of the *Code* merely states that "mental disorder" means "disease of the mind," which obviously does not advance the analysis. As far as I am aware and counsel have been able to determine, no Canadian court has determined whether Autism Spectrum Disorder is a "mental disorder" within the meaning of s. 16 of the *Criminal Code.* It is therefore necessary to approach this question by reference to first principles.

[30] Before turning to that analysis, I wish to first address the terminology. The language used in the *Criminal Code* referring to "mental disorder" and "disease of the mind" and to people "suffering" from such a disability is rooted in case law going back decades or more. I will use that language, not because it is consistent with modern perceptions of disability, but because these are legal terms that have particular meaning in this context, as developed over many years of jurisprudence.

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[6] *R. v. Palma*, [2001] O.J. No. 3283 (S.C.), at para. 62.

[31] My next point flows from the previous one. The meaning of the term "mental disorder" (or "disease of the mind") in this context is a question of law. It is a determination that draws on medical information, but it remains a legal issue, not a medical one.[7] Further, it may change over time as the science evolves, or as societal and policy considerations evolve. The fact that a condition is regarded to be a mental disorder by psychiatrists may be persuasive, but it is not determinative.

[32] There is some assistance in the case law as to the meaning of "mental disorder" or "disease of the mind," but no solid definition emerges. In *Cooper v. R.*, the Supreme Court of Canada acknowledged that the term "disease of the mind" has "eluded satisfactory definition by both medical and legal disciplines."[8] The court held, however, that the term should be given a "broad and liberal construction,"[9] noting that the reason for requiring a disease of the mind was to exclude drunkenness, conditions of intense passion, and other transitory states. The court held:

> In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.[10]

[33] In *R. v. Bouchard-Lebrun*, the Supreme Court of Canada considered whether toxic psychosis flowing from a voluntary ingestion of drugs fell within the rubric of "mental disorder" for the purposes of s. 16. The court noted that medical science continues to evolve and that "it will undoubtedly never be possible to define and draw up an exhaustive list of the mental conditions that constitute 'disease[s] of the mind' within the meaning of" the *Criminal Code*.[11]

[34] The difficulties that have arisen in defining this term have related to conditions like automatism, or sleepwalking, or self-induced states from consumption of drugs or alcohol. Those difficult issues of interpretation do not arise here. Fundamentally, however, conditions that have an organic or internal cause are more likely to be seen as qualifying for the defence. A qualifying mental disorder may be: permanent or temporary; curable or incurable; or, recurring or non-recurring. However, conditions that are permanent, non-curable, and recurring are more likely to qualify.[12]

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[7] *R. v. Rabey* (1977), 17 O.R. (2d) 1, 79 D.L.R. (3d) 414 (C.A.), at pp. 12-13; *Bouchard-Lebrun*, at para 61.
[8] *Cooper v. R.*, [1980] 1 S.C.R. 1149, [1979] S.C.J. No. 139, at p. 1153.
[9] *Ibid.*, at p. 1156.
[10] *Ibid.*, at p. 1159.
[11] *Bouchard-Lebrun*, at para. 60.
[12] *Rabey*, at pp. 14-17; *Rabey v. The Queen*, [1980] 2 S.C.R. 513, [1980] S.C.J. No. 88; *Cooper*, at p. 1159; *R. v. Parks*, [1992] 2 S.C.R. 871, [1992] S.C.J. No. 71; *R. v.* Stone, [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27.

[35] Autism Spectrum Disorder is a neurodevelopmental disorder that presents in early childhood and continues for life. The manner in which ASD presents may change over time, and some deficits may attenuate with treatment. An individual with ASD may learn through treatment or life experience to manage or compensate for some of the deficits caused by the disorder. However, there is no "cure," *per se*, and the condition is permanent. Some individuals with ASD may also have varying degrees of an intellectual disability. However, sometimes there is no impact at all on intellectual function.

[36] Psychiatrists, and other medical professionals, recognize ASD as a mental disorder. The condition was identified decades ago, but has become more widely understood over the past 20 years. The disorder used to be referred to as "Pervasive Developmental Disorder-Not Otherwise Specified," which is the diagnosis John Doe was given when he was five years old. Subsequently, different variations of the condition were given different names, with Autism used for individuals who also had intellectual impairments and Asperger's Syndrome used for those with average and above intellectual functioning. However, in more recent years, both of those terms have been merged into one disorder classification known as Autism Spectrum Disorder. As the name suggests, there is a spectrum across which there is a vast difference in the severity of the disorder and its impact on the individual. The current *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5") stipulates the criteria for diagnosis of ASD under two categories: (a) persistent deficits in social communication and social interaction; and (b) restrictive, repetitive patterns of behaviour or interests. The social deficits category can include things such as: reduced ability to share emotions; deficits in understanding nonverbal communication; difficulties maintaining and understanding relationships; inability to adjust behaviour to suit various social contexts; and inability to empathize with others. Typical behaviours in the second category include: repetitive motor movements like flapping of hands; echolalia; insistence on sameness and rigid adherence to routines or ritualized actions; and highly restricted, fixated interests that are abnormal in intensity or focus.[13]

[37] All of the experts who testified particularly noted the theory of mind deficits experienced to some degree by all persons with ASD. They struggle to understand the emotions or perspective of somebody other than themselves, or to put themselves in somebody else's shoes. As a result, they frequently lack empathy for the suffering of others. Dr. Bradford pointed out that, unlike psychopathy, the empathy deficits experienced by people with ASD are actually caused by the disorder: they lack the capacity to have empathy. Psychopaths have the capacity to understand the emotions of others, but typically either ignore those emotions, or manipulate them for their own advantage.[14]

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[13] Evidence and Report of Dr. Westphal (Exhibit 14).
[14] Evidence of Dr. Bradford and Exhibit 12.

[38] The DSM-5 recognizes three levels of severity for ASD. At the most severe level ("requiring very substantial support"), the social communication deficits and restricted, repetitive behaviours are described as:

> Severe deficits in verbal and nonverbal social communication skills cause severe impairments in functioning, very limited initiation of social interactions, and minimal response to overtures from others. For example, a person with few words of intelligible speech who rarely initiates interaction and when he or she does, makes unusual approaches to meet needs only and responds to only very direct social approaches.
>
> Inflexibility of behavior, extreme difficulty coping with change, or other restricted/repetitive behaviors markedly interfere with functioning in all spheres. Great distress/difficulty changing focus or action.[15]

[39] The functional abilities of persons with ASD can range from very high (*e.g.* having jobs, marrying, having families, participating in social activities) to virtually non-existent, particularly when there is a comorbidity with other disorders such as an intellectual disorder.

[40] As I mentioned, there is no Canadian case dealing directly with whether ASD is a "mental disorder" under s. 16 of the *Criminal Code.* Dr. John Bradford, one of the defence experts, can fairly be described as the preeminent expert in forensic psychiatry in Ontario, and perhaps in all of Canada. He has 40 years of experience in dealing with the intersection of psychiatry and criminal behaviour. Dr. Bradford was aware of only one Canadian case dealing with ASD and s. 16 of the *Criminal Code*. He testified that this case involved a young offender ("J.F.") and that he believed the NCR finding was made on consent. Counsel were able to track this case down. Dr. Bradford was right about the determination at the trial level. J.F. had been charged with arson and other charges in Youth Court. Defence counsel sought a mental health assessment, which was shared with the Crown. It was the Crown who sought to have J.F. declared not criminally responsible. Defence counsel did not oppose the determination and the NCR finding was made. The young offender appealed. One of the grounds of appeal raised was that the psychiatric report was based on "Asperger's Disorder, which is not a reasonable basis for an NCR finding." However, the Court of Appeal decided the case based on another ground of appeal, essentially that the young offender did not have effective representation by counsel, who acted more as a social worker believing a mental health outcome was best for J.F., without proper instructions and even though there was an available defence to the charges. It was on this basis that the Court of Appeal set aside the NCR finding, with Lauwers J.A. stating for the court, "I need not determine whether the NCR verdict was based on a flawed psychiatric report and is unreasonable, in light of the disposition."[16]

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[15] Exhibit 8: *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Washington: American Psychiatric Association, 2013), at p. 52.
[16] *R. v. J.F.*, 2019 ONCA 432, 146 O.R. (3d) 734, at paras. 7 & 35.

[41] In the absence of Canadian precedent, it is useful to consider how the issue has been dealt with in other jurisdictions. There are two American decisions that have some relevance. In *United States v. Cottrell*, the accused was charged with conspiracy to commit arson and aiding and abetting arson. With respect to the aiding and abetting counts, the United States Court of Appeals, Ninth Circuit, held that the trial judge erred in excluding expert evidence about Cottrell's Asperger's Syndrome. The court stated, "To the extent that the Asperger's evidence was aimed at defeating an inference of Cottrell's intent from the circumstances, it was relevant and could have assisted the jury's determination of whether Cottrell had the specific intent required for aiding and abetting."[17] Likewise, in *People v. Larsen*,[18] a California Court of Appeal also concluded that the trial judge had erred in limiting the application of a psychiatric opinion on the impact of the accused's Autism Spectrum Disorder on his ability to form the intent on charges of conspiracy to commit murder and solicitation to commit murder. The court held that the expert's opinion was relevant and probative of the issue of whether the accused had a mental disorder that affected his ability to form the requisite intent, and it would have then been for the jury to determine whether he did, in fact, have that intent. In the result, however, the Court of Appeal found there was no prejudice to the accused as the expert evidence was still before them on a related issue, and would not have affected the ultimate verdict.

[42] In New Zealand, the equivalent of our s. 16 defence, requires the existence of either "natural imbecility" or a "disease of the mind" that renders the person incapable of understanding the nature and quality of the act or of knowing that the act is wrong. In *R. v. Tu*,[19] Whata J. of the New Zealand High Court considered whether ASD qualified under either category to raise the insanity defence to a charge of murder. The trial judge had held that ASD, because of its broad spectrum that could include people with no intellectual impairment at all, could not fall within "natural imbecility." In the result, Whata J. accepted that Mr. Tu had a "disease of the mind" comprising a "combination of autism (high functioning with 'theory of mind' problems and some cognitive impairment) and schizo-affective disorder."[20] However, the trial judge left open the possibility that even without a comorbidity such as a psychosis or intellectual disability, "acute forms of autism" might qualify as a "disease of the mind." Justice Whata wrote:

> Given the foregoing, I consider that "autism" is not a disease of the mind in the ordinary sense used by psychiatrists or psychologists and is not generically a disease of the mind. It is a developmental disorder that does not cause psychosis, delusions or incapacitate cognitive function except, perhaps, in severe cases. But in theory, at least, a low functioning person affected by severe autism or a high functioning person with severe "theory of mind" problems may be incapable of understanding what he or she is doing or to rationally form moral judgments. In

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[17] *United States v. Cottrell*, 333 F. App'x 213 (9th Cir. 2009).
[18] *People v. Larsen*, 140 Cal. Rptr. 3d 762, 205 Cal. App. 4th 810 (Ct. App. 2012).
[19] *R. v. Tu*, [2016] NZHC 1334.
[20] *Ibid.*, at para. 96(c).

> this much more limited sense, some forms of autism might qualify as a "disease of the mind."[21]

[43] What I take from the jurisprudence that does exist is that the question of ASD supporting a defence to criminal responsibility is a novel one in other jurisdictions, not just our own. Having considered the experience elsewhere, as well as case law in Canada dealing with the issue in a more general sense, I find that ASD qualifies as a mental disorder within the meaning of s. 16 of the *Criminal Code*. It has an internal cause, rooted in the brain, and often has a genetic link. It is a permanent condition that is always with the individual, as opposed to being transitory. There are treatments that can provide a person with alternative mechanisms to deal with ASD deficits, with varying degrees of success. However, it is clear that with or without treatment, ASD has an impact on brain functioning and thought processes. In its severe manifestations, and particularly where there are comorbidities, ASD might cause a person to lack the capacity to appreciate the nature of an action or to know that it is wrong. It is not possible to rule out ASD at this threshold stage by holding that it cannot ever qualify as a mental disorder under s. 16.

[44] Obviously, that is by no means the end of the analysis, but only the beginning. The existence of a mental disorder is merely a first step. There must also be a causative connection between the disorder and the incapacity referred to in one of the two s. 16 branches (*i.e.* incapable of appreciating the nature and quality of the act or incapable of knowing it is wrong). The particular manifestation of the condition on the individual, as well as all of the surrounding circumstances of the offence, will determine whether it applies in any given case. Not every person diagnosed with ASD will be eligible to assert the defence, just as is the case with any other disability routinely accepted as the kind of mental disorder that qualifies (*e.g*. schizophrenia). Everything depends on the particular circumstances of the individual and how they are affected by their disability.

Meaning of "Knowing"

[45] The first branch of the s. 16 test involves a lack of capacity to "appreciate" the nature and quality of the act, whereas the second branch refers to a lack of capacity to "know" that it is wrong. In drafting the legislation, Parliament used two different verbs ("appreciate" and "know") rather than the same verb in relation to both branches. As a basic principle of statutory construction, it is presumed that Parliament uses language carefully and consistently within a statute. There is a "presumption of consistent expression" which requires giving the same words the same interpretation throughout a statute. Conversely, if different words are used, particularly in close proximity to each other, they are presumed to have different meanings.[22] The case law has confirmed this to be true.

[46] As noted by the Supreme Court of Canada in *Cooper:*

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[21] *Ibid.*, at para. 86.

[22] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014), at paras. §8.32-§8.37 and §8.43.

> In contrast to the position in England under the M'Naghten rules, where the words used are "knows the nature and quality of his act", s. 16 of the *Code* uses the phrase "appreciating the nature and quality of an act or omission". The two are not synonymous. The draftsman of the *Code*, as originally enacted, made a deliberate change in language from the common law rule in order to broaden the legal and medical considerations bearing upon the mental state of the accused and to make it clear that cognition was not to be the sole criterion. Emotional, as well as intellectual, awareness of the significance of the conduct, is in issue.[23]

[47] Further, the court held:

> To "know" the nature and quality of an act may mean merely to be aware of the physical act, while to "appreciate" may involve estimation and understanding of the consequences of that act. In the case of the appellant, as an example, in using his hands to choke the deceased, he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking, he was able to appreciate its nature and quality in the sense of being aware that it could lead to or result in her death. In the opinion of the medical expert who testified at the trial, the appellant could have been capable of intending bodily harm and of choking the girl, but not of having intended her death.[24]
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> [Emphasis added]

[48] Similarly, in *R. v. Barnier*, the Supreme Court of Canada held that the trial judge erred in instructing the jury that "know" and "appreciate" were synonymous. The court held that "to appreciate embraces the act of knowing but the converse is not necessarily true."[25] After reviewing various dictionary definitions of the two words, Estey J. held:

> The verb "know" has a positive connotation requiring a bare awareness, the act of receiving information without more. The act of appreciating, on the other hand, is a second stage in a mental process requiring the analysis of knowledge or experience in one manner or another. It is therefore clear on the plain meaning of the section that Parliament intended that for a person to be insane within the statutory definition, he must be incapable firstly of appreciating in the analytical sense the nature and quality of the act or of knowing in the positive sense that his act was wrong.[26]

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[23] *Cooper*, at p. 1160.
[24] *Ibid.*
[25] *R. v. Barnier*, [1980] 1 S.C.R. 1124, [1980] S.C.J. No. 33, at p. 1137.
[26] *Ibid.*

[49] In *Kjeldsen v. R,*[27] the offender was a psychopath. In 1972, on charges of rape and attempted murder, he was found not guilty by reason of insanity (the former version of s. 16) and committed to a mental hospital in Alberta. In 1977, he was given a day pass. He took a plane to Calgary and from there hired a female taxi driver ostensibly to drive him to Banff. Before reaching that destination, he diverted the trip to a side road, forced the driver from the car, raped her, and bashed her in the head with a rock until she died. It was accepted at trial, and on appeal, that Kjeldsen had a "disease of the mind," given that he was a psychopath with sexually deviant tendencies. The question was whether he "appreciated" the nature and quality of his act. The Supreme Court of Canada held that "appreciate" did not have the same meaning as "know," but rather went beyond mere knowledge. To "appreciate" the nature of the act, the accused person must have the capacity to "know what he is doing" (bashing a woman's head in with a rock), but also to have the capacity to "estimate and to understand the physical consequences which would flow from his act, in this case that he was causing physical injury which could result in death."[28] In the result, however, the court drew a distinction between understanding the nature, character and consequences of the act, but lacking appropriate feelings for the victim or feelings of remorse. The accused fully understood it was a rock and that his victim was a person and that, as a result of smashing the rock into her head, she would die. Therefore, s. 16 did not apply, even though he had no empathy for his victim or remorse for his act.

[50] Thus, it is clear from the case law that "appreciate" in the first branch of the test is a broader concept than "know" in the second branch. It should be noted, however, that when these distinctions were being drawn in *Cooper*, *Barnier*, and *Kjeldsen*, the accepted interpretation of "wrong" in the second branch was restricted to legally wrong. As I will develop in the next section, the law on that point has changed quite significantly since that time.

Meaning of "Wrong"

[51] Prior to 1977, there were conflicting decisions in Canada as to the meaning of the word "wrong" in the second branch of the s. 16 defence. The Supreme Court of Canada addressed the issue in *Schwartz v. R.*, and ruled (in a five-to-four split decision) that the trial judge was correct in instructing the jury that "wrong" meant "forbidden by law" and did not encompass the concept of moral wrongfulness. There was a vigorous dissent authored by Dickson J. (with Laskin C.J., Spence and Beetz JJ. concurring), in which the minority opined that "wrong" as used in s. 16 included the "capacity to reason and to reach rational decisions as to whether the act is morally wrong."[29]

[52] The issue again came before the Supreme Court of Canada in 1990 in *R. v. Chaulk.*[30] Two teenage boys had been convicted of murder. There was expert evidence at trial that the boys suffered from a paranoid psychosis, believing that they ruled the world and that although they

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[27] *Kjeldsen v. R.*, [1981] 2 S.C.R. 617, [1981] S.C.J. No. 107.
[28] *Ibid*., at p. 623.
[29] *Schwartz*, at p. 689.
[30] *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1.

knew the laws of Canada existed, believed they were above that law. The trial judge instructed the jury, in accordance with *Schwartz*, that "wrong" meant contrary to the laws of Canada. By the time the case reached the Supreme Court of Canada, there had been an almost complete turnover on that bench, with Dickson C.J. the only member remaining of the court who had also sat on *Schwartz*. This time, in *Chaulk*, the majority of the court (Dickson C.J., Lamer C.J., Wilson, LaForest, Gonthier and Cory JJ.) specifically overruled *Schwartz*, agreed with its dissenting judgment, and held that "wrong" meant morally wrong in the circumstances according to moral standards in society, and that the question to be determined was whether an accused was incapable of knowing that the act committed "was one that he ought not have done."[31] Lamer C.J. (writing for the majority) held:

> Viewed from this perspective, it is plain to me that the term "wrong" as used in s. 16(2) must mean more than simply "legally wrong". In considering the capacity of a person to know whether an act is one that he ought or ought not to do, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law. A person may well be aware that an act is contrary to law but, by reason of "natural imbecility" or disease of the mind, is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society. This would be the case, for example, if the person suffered from a disease of the mind to such a degree as to know that it is legally wrong to kill but, as described by Dickson J. in *Schwartz*, kills "in the belief that it is in response to a divine order and therefore not morally wrong"[32]
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> An interpretation of s. 16(2) that makes the defence available to an accused who knew that he or she was committing a crime but was unable to comprehend that the act was a moral wrong will not open the floodgates to amoral offenders or to offenders who relieve themselves of all moral considerations. First, the incapacity to make moral judgments must be causally linked to a disease of the mind; if the presence of a serious mental disorder is not established, criminal responsibility cannot be avoided. Secondly, as was pointed out by Dickson J. in *Schwartz, supra*, ""[m]oral wrong" is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong" (p. 678). The accused will not benefit from substituting his own moral code for that of society. Instead, he will be protected by s. 16(2) if he is incapable of understanding that the act is wrong according to the ordinary moral standards of reasonable members of society.[33]
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> [Emphasis added]

[53] It is interesting to note that, in *Chaulk*, the dissenting judges on this issue (McLachlin, L'Heureux-Dube, and Sopinka JJ.) disagreed with the majority only as to the formulation of the

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[31] *Ibid.*, at p. 1354.
[32] *Ibid.*, at pp. 1354-1355.
[33] *Ibid.*, at p. 1357.

test for what constitutes "wrong" under s. 16, preferring not to import uncertainty as to what constitutes "moral wrongness" and endorsing a simpler approach of capacity to know that one "ought not to do" the act in question, regardless of the reason.[34] Thus, the full court agreed that "wrong" meant more than "legally wrong."

[54] A further refinement was added by the Supreme Court of Canada in its unanimous 1994 decision in *R. v. Oommen.*[35] The accused in that case was convicted of second-degree murder after he shot a guest in his apartment as she lay sleeping. He was suffering at the time from a psychosis with paranoid delusions, believing that a local union was out to get him and that the victim had been commissioned by the union to kill him. At the time, the accused had the intellectual capacity to understand right from wrong and would know that killing a person was wrong. However, his delusional state led him to the conclusion that the killing was justified under the circumstances he believed to be real. Justice McLachlin stated the question before the court as follows:

> This appeal poses the following legal issue. What is meant by the phrase "knowing that [the act] was wrong" in s. 16(1)? Does it refer only to abstract knowledge that the act of killing would be viewed as wrong by society? Or does it extend to the inability to rationally apply knowledge of right and wrong and hence to conclude that the act in question is one which one ought not to do?[36]

[55] The court further framed the question as follows:

> The issue is whether the accused possessed the capacity present in the ordinary person to know that the act in question was wrong having regard to the everyday standards of the ordinary person. It is not necessary additionally to show that the defence of self-defence would also apply. … Thus the question is not whether, assuming the delusions to be true, a reasonable person would have seen a threat to life and a need for death-threatening force. Rather, the real question is whether the accused should be exempted from criminal responsibility because a mental disorder at the time of the act deprived him of the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.[37]

[56] Ultimately, the court decided that the capacity to apply the knowledge of wrongfulness in a rational way was part of the test, stating:

> The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not. The inability to make a rational choice may result from a variety of mental disfunctions; as the following passages indicate these include at

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[34] *Ibid*., at p. 1354.
[35] *R. v. Oommen*, [1994] 2 S.C.R. 507, 30 C.R. (4th) 195.
[36] *Ibid*., at p. 516.
[37] *Ibid.*, at p. 520.

> a minimum the states to which the psychiatrists testified in this case -- delusions which make the accused perceive an act which is wrong as right or justifiable, and a disordered condition of the mind which deprives the accused of the ability to rationally evaluate what he is doing.[38]

[57] And further:

> Finally, it should be noted that we are not here concerned with the psychopath or the person who follows a personal and deviant code of right and wrong. The accused in the case at bar accepted society's views on right and wrong. The suggestion is that, accepting those views, he was unable because of his delusion to perceive that his act of killing was wrong in the particular circumstances of the case. On the contrary, as the psychiatrists testified, he viewed it as right. This is different from the psychopath or person following a deviant moral code. Such a person is capable of knowing that his or her acts are wrong in the eyes of society, and despite such knowledge, chooses to commit them. To quote Herbert Fingarette, *The Meaning of Criminal Insanity* (1972), at pp. 200-201:
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> > It should be evident that we are not here reverting to the thesis that "knew it was wrong" means "judged it wrong in the light of his own conscience." ... [S]uch a definition could never be acceptable in a viable criminal law. As the courts have rightly insisted, it is a public standard of wrong that must be used, whether public law or community morality.
> >
> > What we are saying here is that "knowing the nature and quality of the act or that it is wrong" in the context of insanity (and thus, rationality) means "having the capacity to rationally assess -- define and evaluate -- his own particular act in the light of the relevant public standards of wrong"....
> >
> > The preceding comments should not be taken to mean that a person is not responsible if he holds irrational beliefs, for that is not the case.... The point is that if the person has a mental makeup which is such that he lacks even the capacity for rationality, then responsibility is vitiated. If he has the capacity but simply fails to use it, responsibility is not precluded.[39]

[58] In my view, the following four principles emerge from *Oommen*:

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[38] *Ibid.*, at p. 518.
[39] *Ibid.*, at pp. 521-522.

(1) Under a s. 16 analysis, the focus is not on the accused's intellectual capacity to know right from wrong in the abstract sense, but rather on the capacity to know that a particular act was wrong in the particular circumstances of the case.[40]

(2) The issue is whether the accused possessed the capacity to know that the act in question was morally wrong having regard to the everyday standards of the ordinary person.[41]

(3) An accused cannot be said to "know" something is "wrong" within the meaning of s. 16 if, because of a mental disorder, he lacks the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.[42]

(4) This does not excuse psychopaths or any other persons following their own deviant code of behaviour because they choose to do so, rather than because they are incapable of knowing that their acts are wrong in the eyes of society.[43]

[59] Since its decision in *Oommen*, the Supreme Court of Canada has not changed its position on any of these issues. Those principles have been noted and applied in numerous cases since 1994. In its 2011 decision in *R. v. Bouchard-Lebrun*, the Supreme Court of Canada, although not specifically citing *Oommen*, reiterated the principle that imposing criminal responsibility for an act is based on the presumption that an individual can distinguish right from wrong, is rational, exercising free will, and capable of making choices between right and wrong.[44]

[60] However, in a recent Ontario Court of Appeal case, *R. v. Dobson*,[45] an issue arose as to whether *Oommen* has been misinterpreted with respect to the issue of the capacity for rational choice being part of the meaning of "wrong" in the second branch of the s. 16 case. The Court of Appeal rejected the appellant/accused's submission that *Oommen* "stands for the proposition that the capacity to know one's act is wrong requires the capacity to make a rational choice about committing the act" and that if "a delusional state precludes the making of a rational choice … *Oommen* holds that the accused does not have the capacity to know his act is 'wrong'."[46] Justice Doherty (writing the unanimous decision of the court) held*:*

> In my view, *Oommen*, as interpreted in the judgments of this court, holds that an accused who has the capacity to know that society regards his actions as morally wrong and proceeds to commit those acts cannot be said to lack the capacity to

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[40] *Ibid.*, at p. 516.
[41] *Ibid.*, at p. 520.
[42] *Ibid.*, at pp. 519-520.
[43] *Ibid.*, at pp. 521-522.
[44] *Bouchard-Lebrun*, at paras. 45-49.
[45] *R. v. Dobson*, 2018 ONCA 589, 48 C.R. (7th) 410 (leave to appeal denied by S.C.C. June 27, 2019).
[46] *Ibid.*, at para. 17.

> know right from wrong. As a result, he is not NCR, even if he believed that he had no choice but to act, or that his acts were justified.[47]

[61] Mr. Bytensky, on behalf of the defence, argued before me that the Court of Appeal decision in *Dobson* is incorrect in law, inconsistent with the binding decision of the Supreme Court of Canada in *Oommen*, and inconsistent with other decisions of the Court of Appeal. He submitted that I should therefore not follow it. Mr. Callaghan, for the Crown, agreed with that position. As a general proposition, where there are conflicting decisions in the Court of Appeal, I clearly must choose between them. Further, if one line of decisions is consistent with the Supreme Court of Canada's jurisprudence, and one is not, I must follow the decision of the Supreme Court of Canada and the appellate decisions that follow it. I am persuaded by counsel that *Dobson* is not correct in its interpretation of *Oommen* and, further, that other decisions of the Ontario Court of Appeal are inconsistent with the position taken in *Dobson.* Accordingly, with the greatest of respect for the court in *Dobson*, I have decided that I will not apply their reasoning in this case, to the extent they depart from *Oommen.* In light of the implications of such a decision, it is incumbent upon me to set out my own reasoning in some detail.

[62] In *Dobson*, the accused was part of a murder-suicide pact with two women he had met on a website called the Joy of Satan. When they devised the pact, all of them believed that they could cause their souls to leave their bodies and be transported to a divine planet. The plan was for the two women to overdose on drugs and the accused would choke them to death, after which he would kill himself with a knife. The accused killed the two women as planned, but his own suicide attempt failed. He was charged with murdering the two women and raised a s. 16 defence. The accused was 22 years old and had a long history of mental illness. The experts agreed that the accused appreciated the nature and quality of his act in killing the two women and that he knew his actions were legally wrong. The issue was whether he had the capacity to know his actions were morally wrong. The trial judge convicted him of first-degree murder, which was upheld by the Ontario Court of Appeal.

[63] The Crown in *Dobson* argued that if it is the accused's own delusions that cause him to believe his actions are "justified," and he otherwise knows that his actions would be considered wrong by societal standards, the NCR defence is unavailable because the test for incapacity to know the act is wrong would not be met. As noted by the court in *Dobson*, the Crown relied on two passages in *Oommen* for this proposition:

> The issue is whether the accused possessed the capacity present in the ordinary person to know that the act in question was wrong having regard to the everyday standards of the ordinary person …
>
> Finally, it should be noted that we are not here concerned with the psychopath or the person who follows a personal and deviant code of right and wrong. The

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[47] *Ibid.*, at para. 24.

> accused in the case at bar accepted society's views on right and wrong. The suggestion is that, accepting those views, he was unable because of his delusion to perceive that his act of killing was wrong in the particular circumstances of the case. On the contrary, as the psychiatrists testified, he viewed it as right. This is different from the psychopath or person following a deviant moral code. Such a person is capable of knowing that his or her acts are wrong in the eyes of society, and despite such knowledge, chooses to commit them.[48]

[64] In addition to these excerpts from *Oommen*, the Crown relied on other decisions of the Supreme Court of Canada, but as these preceded *Oommen*, they do not advance the interpretation of *Oommen.*

[65] The Court of Appeal in *Dobson* also cited the sections from *Oommen* relied upon by appellant/accused:

> The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not.
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> …
>
> Thus the question is not whether, assuming the delusions to be true, a reasonable person would have seen a threat to life and a need for death-threatening force. Rather, the real question is whether the accused should be exempted from criminal responsibility because a mental disorder at the time of the act deprived him of the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.[49]

[66] In dealing with this issue, Doherty J.A. held:

> It may be that different extracts from *Oommen* are open to different interpretations, however, the Crown's interpretation of *Oommen* is consistent with the interpretation adopted in an unbroken line of authority in this court: *e.g*. see *R. v. Ross*, 2009 ONCA 149, at paras. 24-27*; R. v. Woodward*, 2009 ONCA 911, at para. 5; *R. v. Guidolin*, 2011 ONCA 264, at paras. 17-18; *R. v. Szostak*, 2012 ONCA 503, 111 O.R. (3d) 247, at paras. 56-58; *R. v. Campione*, 2015 ONCA 67, 321 C.C.C. (3d) 63, at para. 30.[50]

[67] I will review each of these five cited Court of Appeal decisions.

[68] *R. v. Ross* is a decision authored by MacPherson J.A., with Doherty and Lang JJ.A. concurring. The accused was obsessed with a woman who was not interested in him and

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[48] *Ibid*., at para. 19, quoting *Oommen*, at pp. 520 & 521.
[49] *Ibid*., at para. 18, quoting *Oommen*, at p. 518 & 520.
[50] *Ibid*., at para. 22.

persistently harassed and threatened her. He knew what he was doing was legally wrong. The Court of Appeal cited the test for "morally wrong" from *Chaulk* and the ruling in *Oommen* that the accused must possess the intellectual ability to know right from wrong in the abstract sense, as well as the ability to apply that knowledge in a rational way to the criminal act at issue. The court held that the accused was fully aware that his acts were morally wrong, and yet proceeded to engage in that behaviour. The issue of incapacity to make a rational choice was not raised. I do not see the decision in *Ross* as deviating from the decision in *Oommen*, nor does it purport to do so.

[69] *R. v. Woodward* is a brief endorsement by the Court of Appeal (Doherty, Rouleau, and Watt JJ.A.). Citing *Oommen*, the court held that the test for capacity to know the act is wrong was "whether the appellant was *incapable* of understanding that his acts were wrong according to the ordinary standards of reasonable members of the community" [emphasis in original].[51] There is no analysis beyond that as the capacity to make a rational choice issue does not appear to have arisen on the facts (although given the brief reasons, it is difficult to assess). Ultimately, however, the decision turned on the fact that the expert evidence failed to address whether the accused had the capacity to understand his acts were morally wrong and, in particular, that the accused had never maintained that he was justified in his actions. Again, there is nothing in *Woodward* that departs from any of the *dicta* in *Oommen.*

[70] *R. v. Guidolin* is a decision authored by Doherty J.A., with LaForme and Epstein JJ.A. concurring. The accused confronted two women as they were walking away from a bank machine and, after struggling with one of them, robbed her of $240. He had an extensive criminal record going back decades, as well as a history of mental illness. He was initially found unfit to stand trial, a treatment order was made, and he subsequently was declared fit and proceeded to trial. He raised a defence under s. 16. The Crown did not oppose the plea and, on consent, the report of a psychiatrist was filed. The doctor did not testify. The trial judge found the accused to be NCR. Three years later, the accused decided to appeal the NCR finding. The appeal was heard four years after the trial. The Court of Appeal held that the psychiatric report did not reasonably support the finding made by the trial judge. The psychiatrist himself stated he was "lukewarmly persuaded" that the accused "qualifies, at least marginally, for a non-criminal responsibility finding." He stated that, "This is not because he has no capacity to recognize the wrongfulness of his actions or specifically the most recent act of robbery, indeed he can, but he is substantially morally indifferent."[52] The psychiatrist further offered the view that the only possible way of seeing this man's actions as falling within the NCR rubric was that he was "unable to exercise the judgment of a normal person (Oommen)."[53] Doherty J.A. held that the expert appeared to find that the accused recognized the wrongfulness of his acts but just didn't care. He further stated:

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[51] *R. v. Woodward*, 2009 ONCA 911, [2009] O.J. No. 5484, at para. 5.
[52] *R. v. Guidolin*, 2011 ONCA 264, [2011] O.J. No. 1649, at para. 20.
[53] *Ibid.*

> In the first passage quoted above, Dr. McDonald also opines that the appellant is "unable to exercise the judgment of a normal person (*Oommen*)". If this is intended as a description of the meaning of the word "wrong" from *Oommen*, the doctor has misunderstood that case. The inability to exercise the judgment "of a normal person" is a long way removed from the incapacity to know that one's actions are wrong according to the normal standards applicable in the community.[54]

[71] Finally, Doherty J.A. noted that although there were some references in the material to the accused having hallucinations, which can sometimes support a s. 16 defence, there was no indication that the accused was influenced by hallucinations in respect of the act in question. Accordingly, the appeal was allowed on the grounds that the evidence before the trial judge could not reasonably support a verdict under s. 16 of the *Criminal Code.* Again, I see nothing in this decision to contradict anything in the *Oommen* decision, nor does it support the conclusion reached in *Dobson.*

[72] *R. v. Szostak* is a decision by Rosenberg J.A. (with Cronk and LaForme JJ.A. concurring). It is fully consistent with *Oommen* but, in my opinion, is not consistent with *Dobson.* In *Szostak*, the accused was charged with threatening and harassing his former common law wife. At trial, he testified that he could hear his son calling out to him for help and a man's voice telling the child to shut up. He said this was the reason he was pounding on his ex-wife's door and had threatened her. He was found guilty of both criminal harassment and threatening. The trial judge then ordered a psychiatric assessment. The defence objected to the NCR defence being raised, but the trial judge persisted, and the Crown led the evidence. The psychiatrist testified that the accused was suffering from alcohol-related dementia and that, as a result of the dementia, he was under the delusion that his son was in danger from his former-wife's boyfriend. The trial judge found that the requirements of s. 16 had been met because the accused believed he was entitled to engage in the threatening and harassing conduct in order to protect his son. He held that the accused was "deprived of the ability to rationally evaluate his conduct and to know that his death threats and criminal harassment of the complainant were morally wrong."[55] On appeal, the Ontario Court of Appeal, relying on *Oommen*, held that the trial judge's finding was a reasonable one. Rosenberg J.A. pointed out that the accused's delusional belief prevented him from being able to know right from wrong in the particular circumstances before him. He held:

> In this case, the appellant did have a general understanding of the difference between right and wrong and even appreciated that his actions were illegal. However, he also felt compelled to threaten and harass the complainant to protect his son and believed he was justified in taking this course of action. In the words of McLachlin J. in *Oommen*, he was deprived of the capacity for rational perception and hence rational choice about the rightness or wrongness of his acts.[56]

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[54] *Ibid.*, at para. 22.
[55] *R. v. Szostak*, 2012 ONCA 503, 111 O.R. (3d) 241, at para. 32.
[56] *Ibid.*, at para. 57.

[Emphasis added]

[73] *R. v. Campione* is a decision of Blair J.A. (with Pepall and Lauwers JJ.A. concurring). The accused was charged with murdering her two daughters, aged nineteen months and three years. She had a history of mental illness and, at the time of the offence, was embroiled in a custody battle with the father of her children. There was no question that she killed the girls: she filmed them before drowning them in the bathtub, and again after removing them from the tub and arranging them in bed with stuffed animals and dolls around them. She then tried to kill herself, unsuccessfully. At trial, the defence argued that she was not criminally responsible for her actions because she was suffering from a psychotic disorder that rendered her incapable of making rational choices. She had paranoid delusions that the only way she could save her children from harm at the hands of their father and his family was to send them to heaven where they would be in God's hands. The Crown's position was that these were acts of vengeance by the accused to keep the children away from her estranged husband, on the theory that if she could not have them, nobody would. Both the Crown and defence called expert evidence. Both experts agreed that the accused was capable of appreciating the nature and quality of her acts and that she knew they were legally wrong. The defence expert further opined that the accused knew the difference between right and wrong in the general sense, but did not have the capacity to apply that information to her own situation. The Crown's expert testified that the accused had the capacity to understand the moral wrongfulness of her acts, but was driven to kill her daughters by anger and revenge directed towards her husband and his family.[57] The jury convicted the accused of murder, the only inference being that the jury believed she had the capacity to know that her acts were morally wrong. The issue on appeal was whether the trial judge had accurately instructed the jury on the law with respect to this issue.

[74] The trial judge had instructed the jury using the tests for "morally wrong" from *Oommen* and *Chaulk.* However, the trial judge also included the following excerpt from the Court of Appeal decision in *Ross*:

> Our Court of Appeal has put it more succinctly saying that a subjective belief by the accused that his conduct was justifiable will not spare him from criminal responsibility even if his personal views or beliefs were driven by mental disorder, as long as he retained the capacity to know that it was regarded as wrong on a societal standard.[58]

[75] The appellant/accused in *Campione* argued that this passage, although correct in law, would have been confusing to the jury as it seemed to introduce an objective element into the test. The Court of Appeal disagreed, holding:

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[57] *R. v. Campione*, 2015 ONCA 67, 321 C.C.C. (3d) 63, at paras. 1-25.
[58] *Ibid.*, at para. 32.

> In my opinion, the *Ross* passage drew the jurors' attention to the issue of capacity in a clear and succinct fashion. Indeed, it very closely parallels the statement made by Lamer C.J.C., in *Ratti*, cited earlier in these reasons:
>
> > It is not sufficient to decide that the appellant's act was a result of his delusion. Even if the act was motivated by the delusion, the appellant will be convicted if he was capable of knowing, in spite of such delusion, that the act in the particular circumstances would have been morally condemned by reasonable members of society.
>
> In short, a subjective, but honest belief in the *justifiability* of the acts – however unreasonable that belief may be – is not sufficient, alone, to ground an NCR defence, because an individual accused's personal sense of justifiability is not sufficient. The inquiry goes further. The accused person's mental disorder must also render him or her *incapable* of knowing that the acts in question are morally wrong as measured against societal standards, and therefore incapable of making the choice necessary to act in accordance with those standards. [emphasis in original][59]

[76] Having noted this, however, the Court of Appeal in *Campione* went on to say that the trial judge had correctly instructed the jury that if they accepted the evidence of the defence expert, NCR was a proper verdict. Blair J.A. held:

> Dr. McMaster's view was that the appellant honestly believed that killing her children was the right thing to do because the only way she could keep them safe from her estranged husband and his family was to send them to heaven where she would be with them and they would be protected by God. If the jurors accepted this version of the facts, they could conclude that the appellant did not have the capacity to know that her acts were wrong in light of society's moral standards. If they reached that conclusion, they would find the appellant NCR.[60]

[77] The Supreme Court of Canada recognized in *Oommen* that a delusional belief, in and of itself, could not support an NCR defence. However, in *Oommen*, the accused's delusional belief was that his house guest had been sent by his enemies to kill him and to save himself he had to kill her first, which he did while she lay sleeping. The Supreme Court described the situation as follows:

> Dr. Trichard testified that a person suffering from this mental disorder would not lose the intellectual capacity to understand right from wrong and would know that to kill a person is wrong. However, the person's delusions would affect the person's interpretation of events so that the individual would honestly believe killing to be

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[59] *Ibid.*, at paras. 40-41.
[60] *Ibid.*, at para. 44.

> justified under the circumstances. In the abstract, the person would know killing was wrong. But his delusion would cause him to believe that killing was justified under the circumstances as he perceived them.[61]

This was the evidence that the Supreme Court of Canada held, in *Oommen*, supported an NCR finding. Importantly, the Supreme Court of Canada rooted this finding in the rationale underlying the whole purpose of the "insanity" defence.

[78] The evidence of Dr. McMaster in *Campione* is very similar to the evidence of Dr. Trichard in *Oommen.* Like the Supreme Court of Canada, the Court of Appeal in *Campione* held that such evidence could support an NCR verdict. Further, the jury charge did contain the language from *Oommen* about the capacity to "rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not." Accordingly, the Court of Appeal's finding that there was no error in the jury charge is fully consistent with *Oommen.*

[79] The decision of the trial judge (Watt J., as he then was) in *Dobson*,[62] refers to aspects of *Oommen*, but focuses on the language of knowing something would be seen by the community as morally wrong, with little attention to the capacity for rational choice. However, in my view, the decision does not turn on that issue, but rather on the trial judge's findings of fact. Justice Watt noted that the opinions of both Dr. Rootenberg and Dr. Chaimowitz (the defence experts) were dependent on their conclusions that Dobson was in the throes of a psychotic state at the time he killed the two victims, and stated that "therein lies the problem." The defence experts based their opinions on what Dobson told them, whereas Watt J. did not accept Dobson's word for any of that, holding him to have exaggerated and malingered as to his symptoms.[63] The trial judge also took issue with other aspects of the defence experts' reports, and ultimately declined to accept their conclusions, which of course was open to him on the evidence. Thus, although Watt J. did not examine the "capacity to rationally decide" issue arising in *Oommen*, neither did he reject it, as he had no need to do so given his finding that he was not satisfied Dobson was in a psychotic state at the time of the killings.

[80] I recognize that, having concluded that Dobson was not in a psychotic state when he killed the two victims, Watt J. went on to hold that what Dobson thought about the moral rightness or wrongness of his conduct was beside the point. He observed that it was "difficult to see how an individual like Mr. Dobson, who appreciated the nature and quality of his conduct, and knew that his conduct was legally wrong, would be incapable of knowing that these same horrific acts would be morally wrong in the eyes of members of the community."[64] With respect, those observations might be seen to run afoul of the decision in *Oommen*. However, they were superfluous to the decision itself.

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[61] *Oommen*, at p. 512.
[62] *R. v. Dobson*, [2015] O.J. No. 4427.
[63] *Ibid.*, at paras. 164-165.
[64] *Ibid.*, at para. 170.

[81] Nevertheless, when the case reached the Ontario Court of Appeal, the focus became this very issue. Obviously, the accused had no interest in asserting that this was a factual determination by the trial judge, after rejecting the factual foundation upon which the defence experts' reports relied. The defence argued on appeal that the trial judge erred in basing his decision on Dobson's cognitive awareness of how society would regard the morality of his actions, rather than a consideration of volitional incapacity to exercise rational judgment or choice. The Crown appears to have focused in response on selective portions of *Oommen*, rather than on those aspects dealing with the capacity to exercise judgment or make rational choices. In my view, and again with the greatest of respect, to the extent the Court of Appeal endorses that interpretation of *Oommen,* I feel obliged to not follow it. I hasten to add, however, that at no point in *Dobson* did the Court of Appeal specifically state that the *Oommen* statements about rational choice do not apply or that to apply that test would be to misinterpret *Oommen.* Further, the Court of Appeal upheld the trial judge's determination on the facts that the defence had failed to establish the accused was in a psychotic state at the time of the killings, so it might be said that the statements with respect to the interpretation of *Oommen* were *obiter*.

[82] However, the Court of Appeal specifically stated that it was accepting the Crown's interpretation of *Oommen*, which was summarized in the decision as follows:

> The Crown submits that *Oommen* does not suggest assessing the capacity of an accused to know that his actions were "wrong" exclusively by reference to his or her delusional perceptions. The Crown submits that it is not enough that the accused, in his delusional state, believed his acts were "right" according to his or her own moral code. On the Crown's approach, an accused can be found NCR only if that accused lacked the capacity to know that society would regard what he did, in the circumstances, as morally wrong.[65]

[83] Contrary to the Crown's submissions in *Dobson*, I believe *Oommen* does hold that the accused's delusions can be the basis for holding that he is NCR. The accused in *Oommen* was driven to kill his house guest while she was sleeping based entirely on his own delusional state, believing his actions were "right" because he incorrectly believed she was part of a plot to harm him. His delusion deprived him of the ability to make a "rational" choice about whether to save himself by killing his guest. That is not the same thing as acting on one's "own moral code," as a psychopath would do, as the Supreme Court in Canada in *Oommen* was careful to point out.

[84] Further, if the test under the second branch of s. 16 is restricted in the manner suggested in *Dobson*, I agree with the observation of the trial judge that it would have little meaning in a case involving a serious crime such as murder. The more serious the crime, the greater the overlap between knowing something is legally wrong and knowing that society would view it as morally wrong. If an accused had the capacity to appreciate the nature and quality of his act (killing someone) and knew that it was legally wrong, it is hard to imagine a scenario in which he would

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[65] *Dobson* (C.A.), at para. 19.

be incapable of knowing that society would regard it as morally wrong. In my view, this is not in keeping with the *ratio* of the decision in *Oommen*, nor with the reasoning of the Supreme Court in *Bouchard-Lebrun* (see paragraph 59 above). *Oommen* requires more than the intellectual knowledge that reasonable members of society would consider killing someone to be morally wrong.

[85] There is at least one significant case since the Court of Appeal decision in *Dobson* that has taken *Dobson* as authority for the proposition that the test in s. 16 for what constitutes the capacity to know the act is wrong "does not include the capacity to make rational choices."[66] That may, or may not, be a correct interpretation of *Dobson.* However, if it is what *Dobson* stands for, in my view that is not consistent with *Oommen*, nor is it consistent with the Court of Appeal's 2012 decision in *Szostak.*

[86] I consider that I am bound by the Supreme Court of Canada's decision in *Oommen*, and I will therefore apply the principles set out in that case, as I have summarized them in paragraph 58 above. I recognize that the defence sought leave to appeal to the Supreme Court of Canada from the Court of Appeal decision in *Dobson* and that leave was refused, without reasons. I do not take the Supreme Court of Canada as having thereby endorsed those aspects of the Court of Appeal decision which purport to remove the capacity to make rational decisions from the s. 16 test. If the Supreme Court of Canada had meant to overrule itself, or depart from its decision in *Oommen*, it would have done so more clearly. I note as well that this part of *Dobson* could be said to be *obiter* given the factual findings by the trial judge, upheld by the Court of Appeal, and leave to appeal could well have been refused on that basis.

D. THE DEFENDANT'S LIFE PRIOR TO APRIL 2018

Family

[87] John Doe was born on November 3, 1992. He has one sibling; a brother three years older than him. He grew up in a supportive family home in Richmond Hill, and was still living with both parents and his brother at the time of the attacks in 2018. Both parents are university graduates and engaged in meaningful employment for most of their lives. Both parents appear to have been highly attentive to his needs as a young child, through school, and into adulthood. He had a particularly close relationship with his older brother, and they would often socialize together, even as adults. Other than issues associated with his Autism Spectrum Disorder, his childhood appears to have been happy and uneventful.

Early Childhood

[88] Symptoms of ASD emerged at an early age. These included: difficulty interacting with other children; repetitive movements; head banging; delayed ability to speak; lack of emotion; and no eye contact. He had speech therapy, as a result of which he finally began to talk at about age

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[66] *R. v. Mann*, 2019 ONSC 1949, 155 W.C.B. (2d) 66.

three-and-a-half. As a small child he would have violent temper tantrums, but he grew out of those before starting school.

School Years

[89] Mr. Doe's parents sent him to an Armenian preschool, then a private Montessori school for junior kindergarten, and then a local public school for senior kindergarten. He had difficulty interacting with the other children at these schools, problems doing anything independently, and failed to meet the expectations for the class and social norms. Sometimes he would run out of the classroom and have to be brought back. As a result of concerns about his behaviour, he was referred to Markham Stouffville Hospital at the age of five, where he was diagnosed with Pervasive Developmental Disorder-Not Otherwise Specified (a term that has since been replaced by Autism Spectrum Disorder).

[90] When he was six and entering Grade One, Mr. Doe was admitted to Giant Steps, a specialized elementary program for children with ASD, with a goal to provide intense, almost one-on-one support and assistance leading to the child's eventual integration into the mainstream education system. He was gradually worked into a regular classroom, concurrently with the Giant Steps program, and by the end of elementary school was in the classroom fulltime, but with special education assistance. This continued through high school. Mr. Doe attended a mainstream public high school, but was in a Special Education class for part of the time and received support from special educators to complete class work.

[91] Throughout his school years, Mr. Doe continued to struggle with social interactions. He had above-average intelligence, was good at mathematics and science, and had an excellent memory. Even in kindergarten, he was able to add three-digit numbers in his head. However, subjects like English and history were more challenging, particularly where any kind of analysis was required. He would have difficulty summarizing the main point of an article or story, and would often go off on a tangent, or recite irrelevant segments.

[92] Socially, Mr. Doe improved somewhat as he went through school. He had one close friend in elementary school but lost touch when they went to different high schools. He also had a friend in high school, who was also in his Special Education class. He was the target of bullies in school. His response to bullying was to behave in a goofy way, such as using a high-pitched silly voice, and laugh along with the bullies. Sometimes he would act out in this way, simply to get attention. Throughout school he had difficulty in social relationships, never dated as a teenager, and had very few, if any, close friends.

[93] When in high school, Mr. Doe started to develop physical and verbal tics, and engaged in a number of repetitive rituals. He was diagnosed with Tourette's Syndrome and was on medication for a brief period. He disliked the side effects and went off the medication. Eventually, he outgrew this behaviour.

[94] As is often associated with ASD, Mr. Doe had some motor coordination issues. He was awkward in his movements, and not good at sports. He did not have good fine motor skills and

was accommodated in school by being permitted to type his exams because handwriting was difficult for him. He was also given a longer period of time to complete exams.

[95] Mr. Doe graduated from high school with a 70 percent average. He did not have to repeat any of the grades, although it took him five years to complete what would usually take four.

[96] Mr. Doe's father testified that John would sometimes develop fixations on things. He played video games incessantly. Sometimes he would memorize the whole text of a video and recite it. Although his family did not know it at the time, it was during high school that Mr. Doe developed an interest in school shootings and other mass murders and spent a lot of time on internet sites dealing with this issue.

[97] Throughout all of this time, there was never any hint of violent behaviour. He was described as gentle and shy, never aggressive.

University

[98] Mr. Doe went to Seneca College where he graduated with a degree in computer programming, a subject at which he had always excelled. His marks were better than in high school, Bs and As. He found that he fit in better socially with other students in his program, many of whom he also described as "nerds." However, he had no close relationships. A couple of attempts at trying to talk to a girl or ask her out failed from the start. He took an extra year to complete his degree, but that was partly due to a couple of failed exams and the fact that he switched majors partway through.

Employment

[99] Midway through university, and subsequent to having failed a few courses, Mr. Doe suddenly decided to join the military. His parents and brother knew nothing about these plans until he had already made the decision to enlist and were very surprised at the choice as it seemed out of character. A few weeks into basic training, Mr. Doe concluded that he was ill-suited to military life and negotiated an honourable discharge. He then returned to Seneca College and completed his degree.

[100] While in college, Mr. Doe had a part-time job that seemed to go well. He also did a co-op work term placement as part of his degree requirements, which he completed successfully. In 2016, however, he was fired from a job due to his work performance, specifically because he was playing video games while at work. Mr. Doe's explanation for this was that the work was easy, he completed his assignments quickly, and then started playing video games rather than asking for additional assignments.

[101] While in his final term of university, Mr. Doe undertook a job search and accepted an offer of permanent employment with a reputable company doing software development at an annual salary of $60,000. He was scheduled to start that job not long after the subject offences.

E. THE IMPACT OF AUTISM SPECTRUM DISORDER ON THE DEFENDANT'S LIFE

[102] As has been said over and over in this trial, there is no fixed profile as to how ASD will affect any particular individual. There are some common characteristics and traits associated with the disorder. However, not every individual will have all of these characteristics and the variances even within the same type of characteristic behaviour are infinite. Further, an individual will not have the same degree of impairment within all fields, such that a person may have marked limitations in one area, no impairment at all in another, and moderate impairments in others. No two people are the same. Therefore, determining how ASD affected Mr. Doe is a very individualized assessment.

[103] Mr. Doe is highly intelligent and functions well in terms of independent daily living. He required supportive therapy to overcome some of the repetitive and idiosyncratic behaviours often associated with ASD in early childhood. However, with those supports and with assistance through school, he was able to graduate from high school with good standing. With even less support, he was able to complete a university degree in computer programming. He was able to accomplish all of this because he is above average in almost all aspects of intelligence, with scores even higher in areas of mathematics and logic. However, he clearly has impairments in social functioning as a result of his ASD. The question is the extent to which he has been able to compensate for those deficits or learned to adapt to them in order to function in daily living.

[104] The fact that Mr. Doe has been successful in his academic endeavours does not mean that this has come easily to him. He did require substantial assistance. Also, he was always given extra time to complete things. He was accommodated in this regard by giving him extra time to write exams and allowing him to use a keyboard (to compensate for his difficulties in dexterity and fine motor skills). Also, he took an extra year to complete high school, not because he failed grades, but because he took a reduced course load. Likewise, in university he took a lighter course load and took a longer time than usual completing his degree.

[105] Some of the effects of Mr. Doe's ASD are readily apparent upon meeting or observing him. Although Mr. Doe occasionally uses inflection and gestures when speaking, for the most part he speaks in a monotone and with a stilted manner of speech. He struggles to maintain normal eye contact. Sometimes, his eye contact is overly intense. Often in describing something, he will focus on minutiae, while missing the bigger picture.

[106] In the course of the experts' assessments of Mr. Doe, many standardized tests were administered, some of them several times as each team of assessors gathered their own information. There were some differences in the results, but nothing of great significance. Common themes emerged.

[107] One common theme is that although Mr. Doe generally tested at average or above average in IQ, his scores on various components of the tests were not uniform. He scored quite high on verbal comprehension and mathematics, but quite low on processing speed, and was at or below average in perceptual reasoning. The processing speed issue is an interesting one, and provides confirmation of his experience in high school and college.

[108] The assessments show that Mr. Doe has significant deficits in his ability to engage in social interactions and reciprocal conversations. He is often unable to interpret the expressions on

people's faces or their tone of voice and has difficulty understanding other people's emotions. These difficulties in social settings have been a life-long problem for Mr. Doe, who had few friends, an extremely limited social life (other than with family members or playing video games), and no romantic involvements. Although all of the experts noted these deficits, they were not unanimous on the severity of these issues for Mr. Doe, nor did they agree on the extent of Mr. Doe's insight into his own deficits.

[109] Dr. Westphal testified that Mr. Doe was severely disabled in terms of his abilities to function socially. In his report, he stated that Mr. Doe's "communication in everyday settings is more like that of a child, and his skills in social relationships are even lower." Dr. Westphal was cross-examined extensively about this statement, but remained of the view that this accurately expresses Mr. Doe's substantial deficits in this area. He testified that this opinion is supported by Mr. Doe's scores on a test known as the Vineland-3, which measures adaptive behaviour – the things that people do to function in their everyday lives. According to those test results, Mr. Doe is in the bottom four percent of the population in terms of his overall adaptive behaviour, and much lower on some aspects. For example, his socialization skills were scored at below the first percentile of the population, and within that broader category, the interpersonal relationships subcategory and play and leisure subcategory placed him at the equivalent of a two-year-old and his ability to communicate in a social setting was put at the level of an eight-year-old. Dr. Westphal concluded from these scores that although Mr. Doe was able to communicate in written form at the level of an eighteen-year-old, this was because his intellectual capabilities permitted him to mask how profoundly affected he is by his ASD. He remained steadfast that Mr. Doe was "childlike" in his communication skills and in his ability to function at a social level.

[110] Nobody else administered the Vineland test. Dr. Wright, the psychologist who worked with Dr. Woodside, took exception to describing an adult person's level of functioning as equivalent to a child's age range. In fairness, Dr. Westphal himself acknowledged a degree of discomfort with this kind of analogy. However, Dr. Westphal persistently described Mr. Doe's interactions and communications as being like those of a child. Dr. Wright testified that these age descriptors are very misleading and do not accurately depict what Mr. Doe is actually able to do. Further, he disagreed strongly with Dr. Westphal's assessment that Mr. Doe communicated in a childlike manner.

[111] Dr. Wright was also quite critical of the usefulness of the Vineland test in this context. He explained that the test is completed entirely by family members, in this case Mr. Doe's parents. In addition, when it is done in an adversarial context it is clearly in the best interest of the scorer to portray their loved one as disabled. Typically, the test is used where the individual has intellectual disabilities and is designed to show what the person can and cannot do in daily living. It looks at what the child was able to do at points in his life and sets a score based on that, without regard to the fact that the child subsequently learned to adapt in other ways and achieve significant things (such as complete university). The test does not provide any credit for those achievements.

[112] Dr. Woodside also disagreed with Dr. Westphal's characterization of Mr. Doe's interpersonal skills as being like those of a child. Dr. Woodside agreed that Mr. Doe struggles in this area, and that it is difficult for him to read people. He uses his intellect to compensate for some of these deficits, but he is unable to completely overcome them. However, he found Mr.

Doe to be high-functioning and said that he had learned strategies to deal with his limitations to some degree.

[113] Dr. Westphal described Mr. Doe as often being "baffled" when asked a question and being completely unable to answer. Dr. Wright had no such problem and Dr. Woodside completely disagreed with Dr. Westphal as well. Dr. Westphal was unable to point to any of the videos of his interviews where Mr. Doe exhibited this supposed bafflement.

[114] I reject Dr. Westphal's evidence about Mr. Doe being baffled and unable to understand the questions he was asked. I have watched and read a number of excerpts from those interviews and it seems to me that Mr. Doe understood the questions and answered them in a meaningful and responsive manner. I accept the evidence of Dr. Wright and Dr. Westphal on this point. It may certainly be the case that Mr. Doe was confused about questions he was asked from time to time, but this would not have been the norm, and when he was uncertain, he asked for clarification.

[115] I also reject Dr. Westphal's evidence about Mr. Doe's communication skills being on the level of a small child. I prefer the evidence of Dr. Wright and Dr. Woodside on this point, and I find their opinions to be supported by the evidence. They described Mr. Doe as being socially awkward and stilted in his conversational style, which in my view is a more accurate description of Mr. Doe's interaction in the various videos I have seen. I also agree with Dr. Wright that the Vineland scores are not helpful to the questions I have to answer in this case. There were many times in Dr. Westphal's testimony when he appeared to be more of an advocate than an objective expert witness. This issue of "childlike" communications is one example. Dr. Westphal raised Mr. Doe's communications during his interview by Det. Thomas. Dr. Westphal noted that Mr. Doe behaved like a child by invoking his right to remain silent after getting legal advice, but after that continuing to answer questions. I completely disagree with that assessment. Much of what Mr. Doe told Det. Thomas was untrue. He told him those lies deliberately to buttress his overall plan to depict the killings as being connected to the incel movement and thereby get more media attention. He used things from the Elliot Rodger manifesto and passed them off as his own and lied about being in touch with Rodger and Harper-Mercer. He also provided some significant truthful information about how he planned the attack. However, he continued to refuse to answer some questions that could affect the privacy of others, such as his family members. Dr. Westphal stated that he thought Mr. Doe "got baffled" by the police officer continuing to ask questions. Again, in my view, that opinion is completely inconsistent with the tapes of the interview.

[116] Dr. Wright provided compelling testimony about Mr. Doe's ability to use his intelligence to solve abstract moral reasoning problems. One of the tests he administered to Mr. Doe was the Socio-Sexual Knowledge and Attitudes Tool-Revised, which is typically used to assess people with difficulties in social functioning. The subject is shown pictures and is required to make judgments about sexual mores and appropriate behaviour. Dr. Wright testified that Mr. Doe reasoned his way through this process, talking out loud as he was doing so (which he commented is not unusual for people with ASD). The fact that Mr. Doe verbalized his thinking process allowed Dr. Wright to see how his "theory of mind" was operating. He testified that even though Mr. Doe has no true dating experience, he was able to reason his way through every problem and answer each question correctly, although sometimes taking a long time to get there. Dr. Wright concluded

that Mr. Doe has "considerable theory of mind," noting that theory of mind is a question of degree, rather than you either have it or you do not.

[117] Dr. Wright made similar observations about Mr. Doe's performance on the Delis-Kaplan Executive Function System (D-KEFS). There are various subsets of this test and Dr. Wright administered four of them (Proverbs, 20 Questions, Sorting, and Colour Word). Dr. Loftin (the psychologist who worked with Dr. Westphal) also administered this test, but not the same subsets. In the Westphal report, the purpose of administering the D-KEFS is stated to be to "better understand how Mr. [Doe] processes information." The report notes that he scored in the average range or above, but demonstrated challenges with motor speed. Dr. Wright reported similar findings. It took Mr. Doe longer than usual to work his way through the problems. Again, however, Dr. Wright was assisted by listening to Mr. Doe talk his way through the problems, thus showing his actual reasoning process. Dr. Wright testified that the purpose of the subtests he administered was to get a sense of how literal the person's thinking is, whether they are able to understand underlying concepts not just the concrete words. On the Proverbs test, Mr. Doe was required to explain what a proverb meant and was scored for accuracy and for how abstract his understanding was. He scored in the average range, but was quite slow in coming to his answers. However, in the multiple-choice component of this same test, he answered quickly and perfectly. Dr. Wright explained that this is an important test for purposes of the issue before me because higher levels of moral reasoning require some understanding of non-concrete concepts. He testified that Mr. Doe was able to understand and explain the nonliteral, and did not really struggle on the test, other than taking a long time to reach the answer. Mr. Doe also scored well on the 20 Questions subtest, which tests the extent to which the person can plan ahead. Dr. Wright also scored Mr. Doe as well above the average range on the sorting subtest, which he said was a good measure for detecting cognitive rigidity and concrete thinking. He said that this demonstrated that Mr. Doe does not respond in a highly literal fashion and is not inflexible in his approach. Overall, Dr. Wright found that Mr. Doe has "a relative strength" in his understanding of nonliteral meaning, as compared to other people with ASD, and has strength in cognitive flexibility as compared to the average person. His weakness was that he had to talk his way through the test, and took longer to complete it. However, he did not score below average on any aspect of the test.

[118] Dr. Westphal did not agree that Mr. Doe was able to overcome any of his social deficits by the use of his superior intellect. In his opinion, Mr. Doe's cognitive ability merely masks how disabled he is in social communication, abstract thought, and theory of mind (or perspective taking).

[119] Dr. Westphal testified that, because of his ASD, Mr. Doe is completely incapable of putting himself in the shoes of another person, seeing their perspective on something, and understanding how they might feel. That testimony is consistent with the conclusion portion of his report, in which Dr. Westphal wrote, "By virtue of the severity of his social-cognitive deficits, he was not constrained by any understanding of the impact that his actions would have on his victims, their

families, and his own family."[67] Similarly, he wrote, "Most importantly, Mr. [Doe's] actions reflect that he did not, and does not, have any understanding of the actual real-life impact of his actions on his victims, his victims' families and friends, and his own family, a direct consequence of ASD."[68]

[120] I will deal first with Mr. Doe's capacity to understand his parents' perspective. There is slightly more information about this in the earlier part of the report where Dr. Westphal states that Mr. Doe seemed surprised when asked about any impact his actions might have on his family, but then said that they would be affected emotionally 100 percent by what he had done and by the fact that he was no longer at home with them. However, he felt they could "move on," would not be affected financially, and would only be affected 5 percent in their daily lives.[69]

[121] Unfortunately, I find that the report does not disclose the full information Dr. Westphal had about Mr. Doe's understanding as to how his parents would feel. In cross-examination, Dr. Westphal acknowledged that what he recorded in his own notes was that Mr. Doe said that his parents would be affected emotionally 100 percent because "they know I have done this terrible thing." That does not appear in the report. Also, in cross-examination, Dr. Westphal was referred to two occasions during his interviews when Mr. Doe used the word "devastating" to describe the impact of his actions. There is video of one of those occasions. Dr. Westphal asked Mr. Doe if he felt bad about what he did. Mr. Doe replied, "I know that what I did was morally wrong and extremely devastating and irreversible."[70] When asked if he knew this at the time of the attack, he confirmed that he did. The other occasion on which Mr. Doe used the word "devastating" is confirmed in Dr. Westphal's notes in which he records Mr. Doe as saying that he hid what he was doing from his parents because, if they knew, it would be "devastating."

[122] Dr. Westphal explained why neither of these "devastating" references were in his report. He testified that he did not believe Mr. Doe understands the word "devastated" the way most people would and that the use of the word does not mean he has any insight into how his parents would feel. I reject this explanation. Mr. Doe has an excellent and sophisticated vocabulary. He does not have to have experienced emotional devastation himself to know the meaning of the word. Dr. Westphal further explained that his understanding about Mr. Doe's reference about his parents finding out was not that he thought his parents would be devastated, but rather that they would stop him from carrying out his plan, which would be devastating. It is difficult to assess this explanation as it comes only from Dr. Westphal's notes. His interpretation of his own notes is more likely to be correct than what would appear logically to be the case. However, I do note that – and I regret that I have to say this – Dr. Westphal was not always objective in his approach to the issues and tended to cite only those things that supported his theory, ignoring things that contradicted it. I will develop this point further, later in these reasons.

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[67] Westphal Report, p. 54
[68] *Ibid.*, p. 55
[69] *Ibid.*, p. 24
[70] Exhibit 24 at pp. 20-21 (Transcript).

[123] In addition, during cross-examination Dr. Westphal was taken to an excerpt from his December 12 interview with Mr. Doe, in which Mr. Doe shared further information about what he thought about the impact on his parents. The essence of this exchange was also omitted from the report. The interview went as follows:

> Q. Did you think about the impact it would have on the lives of people that you loved after?
>
> A. I knew they would be very upset and disappointed.
>
> Q. Disappointed in the same way that they would be disappointed if you didn't do well on geology or…?
>
> A. I think to a much higher degree.
>
> Q. And did you think about what they would carry for the rest of their lives?
>
> A. My parents might feel guilt. Where did I go wrong? Did I let him think this is OK? Why did he do this?
>
> Q. So knowing that, what do you think now of like the cost benefit analysis in retrospect?
>
> A. I think I was deliberately ignoring them, that I wanted to rationalize doing this. I just decided I would go ahead and do it anyways.[71]

[124] Notwithstanding what Mr. Doe actually said about what his parents must be going through, Dr. Westphal continued to maintain in his testimony that Mr. Doe did not actually understand at all how his parents would feel. I find that Dr. Westphal has overstated the extent to which Mr. Doe was unable to predict and understand how his actions would affect his parents. It is clear Mr. Doe has difficulty in the area of perspective taking and empathy. He does not have a full appreciation of the feelings of others. However, I do not accept Dr. Westphal's position that Mr. Doe was incapable of any understanding of the impact of his actions on others. Based on what Mr. Doe has said, it is clear that he has some understanding of the emotions of others, particularly when he has time to think about it and bring his intellect to bear. That does not mean that his understanding is innate, or that it is the same as a person without his impairments. However, I do not agree that it is completely missing. Dr. Woodside testified that Mr. Doe told him he believed his parents would be "shocked" by what he had done and that he felt guilty about his father being upset. Dr. Woodside accepted that as accurate, as do I.

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[71] December 12 interview, p. 94. This was read into the record, as opposed to filed, and is as close to verbatim as I can get it without an official transcript.

[125] There is less tangible evidence that Mr. Doe was able to take the perspective of the victims or their families. I suspect that this was considerably more difficult for him than putting himself in the shoes of his parents with whom he had a close and loving relationship. However, even with this considerably more abstract group of strangers, there are examples in the evidence of Mr. Doe showing some understanding of how they would feel. I have already referenced Mr. Doe's use of the words "devastating" and "irreversible" to refer to the harm to the victims. On another occasion, he referred to understanding how the child of a victim who was killed would feel, stating that it would be "obviously very upsetting." He then added, "If I was eight years old and my parents got hit by some random attacker I would be upset too." Dr. Westphal asked him to put himself into the position of a family member and think about how he would feel. Mr. Doe said, "I guess depending on their individual temperament I would either be extremely grief stricken or maybe even extremely angry but I mean I guess with my temperament I would probably be extremely grief stricken."

[126] An even more striking example of what I consider to be a considerable degree of insight can be seen in the interview on December 12. Dr. Westphal had asked Mr. Doe what he would say if he was given the opportunity to speak to the survivors of the attack. Mr. Doe answered, "I don't know what I would say. The appropriate thing might be to say – to apologize, but if I do that they might have a hostile reaction and say this is not sincere in what you're saying and it might sound disingenuous."[72] When again pressed by Dr. Westphal as to specifically what he would say, Mr. Doe responded that he would have to tell them the truth because "trying to say anything fancy or made up, it's going to be very offensive to them."[73] When again pressed about what the "truth" was that he would tell the victims, Mr. Doe said he would say he was isolated and bitter at society, that he felt left out and without friends since elementary school, and that he wanted to achieve some notoriety, that he was desperate for approval. He also acknowledged that what he did was stupid and did not make him powerful, but rather that he was weak compared to the victims and their families.

[127] This, in my view, is an example of Mr. Doe being able to use his intellect to process information that he might not fully appreciate on an emotional level. It strikes me as being insightful. Dr. Westphal, however, dismissed it as mere words that Mr. Doe used without truly understanding what it meant to be grief-stricken. He stood by the conclusion in his report that Mr. Doe did not have <u>any</u> understanding of the perspective of his victims. When cross-examined about his failure to include any of these statements made by Mr. Doe in his report, Dr. Westphal explained that his role is to provide opinion, not to record facts.

[128] Dr. Woodside recognized that Mr. Doe has an impaired ability to understand the perspective of someone else and that it is a difficult thing for him to do. However, in his view, this ability is not completely missing, it is just more superficial than it is in most people. He does not experience empathy or understanding of other people's emotions innately, but he can reason it

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[72] Exhibit 30B, at p. 87.
[73] *Ibid*.

out using his intellect if given time. Dr. Wright was of a similar opinion. In my view, this is a more balanced assessment of Mr. Doe's capacity to understand the perspective of others and I am persuaded by it.

[129] That said, I am mindful that every expert who assessed Mr. Doe was struck by his complete lack of emotion or remorse when discussing these horrific acts. I fully accept that Mr. Doe is remarkably lacking in empathy.

[130] The evidence is overwhelming that Mr. Doe was profoundly lonely. Both Dr. Woodside and Dr. Wright commented on the fact that Mr. Doe's intelligence permitted him to understand that he was different and what his social limitations were. He said he never expected to have a spouse or a family. This left him without any hope for his future. I agree that this message comes through clearly from what Mr. Doe told his assessors.

[131] I also note, as was commented on by many of the experts, that Mr. Doe was extremely hard on himself, a harsh self-critic. According to the experts, this is not all that common in people with ASD, who often tend to see others as responsible when things go wrong. Mr. Doe, however, was critical of himself for procrastination, failing courses, and generally being a failure in life.

[132] As is often the case with ASD, Mr. Doe had a number of areas of fixed interest or "hyper-focus" as a child. For example, he went through a period of time where he was fixated on Mr. Bean and memorized whole routines that he would perform. Most of these fixations waned as he got older, although he was still hyper-focused on video games. In high school, he developed an intense interest in mass murders. He regularly visited internet sites devoted to this interest and memorized statistics, as well as fantasizing about committing a mass murder at school. He reported that he did not visit these sites as much once he started university, but picked up his interest again in the months preceding his April 2018 attack. In addition to mass murders in general, he had a hyper-focus on Elliot Rodger and his manifesto. The experts were all agreed that this was an area of hyper-focus for Mr. Doe. Some went so far as to say it was obsessive. Mr. Doe kept his interest in mass murders, the incel movement, and Elliot Rodgers a complete secret from everyone in his life.

[133] Dr. Westphal stated in his report that Mr. Doe has a "rigid and concrete thinking style" and that "his thinking is intellectualized; out of touch with emotional experience." As was the case with other aspects of Dr. Westphal's report, there was no reference to statements made by Mr. Doe that appear to contradict the categorical opinions stated in the report. I will refer to two exchanges to illustrate this point – one concerning Mr. Doe's newfound interest in religion, the other relating to his understanding of the content on certain internet sites.

[134] At page 51 of his report, Dr. Westphal wrote:

> No doubt Mr. [Doe's] plan was conceived in the context of his saturation with provocative, hate-filled material on the internet. ASD made him less able to appreciate the theatrical, exaggerated nature and extremeness of the material, or the dark humor behind some of it. He took it very literally.

[135] It is difficult to reconcile this statement with what Mr. Doe actually told Dr. Westphal about these sites. In fact, Mr. Doe told Dr. Westphal that people on these websites were joking about what they said they were planning. In explaining one of the sites, Mr. Doe told Dr. Westphal that it was laid out like Wikipedia and warned him that some of the content was offensive. He told him that "a small part of it does joke about mass killers" and that "it is mostly satire." In a subsequent interview, Mr. Doe said, "I have enjoyed reading these stories … they did give me entertainment." When these excerpts were put to Dr. Westphal on cross-examination, he stated that what Mr. Doe told him was different from what he actually knew, and he stood by his report in which he said that Mr. Doe took everything literally. Needless to say, Dr. Westphal is entitled to his opinion on this, but I would have seen it as a more reasoned and objective opinion if he had at least revealed in his report that Mr. Doe had said the exact opposite to this position. I reject Dr. Westphal's opinion that Mr. Doe took everything on these websites literally. He very clearly knew that much of it was satirical, exaggerated, and dark humour.

[136] In their session on December 12, Dr. Westphal had a lengthy discussion with Mr. Doe about the fact that he had started reading the Bible since his arrest. Mr. Doe confirmed that he is atheist, but said that he took comfort from the habit of reading the Bible every day because of its underlying message of hope. He said he had also memorized some of the passages, which he found beautiful. Dr. Westphal asked him if he felt a connection to God and Mr. Doe replied, "I am able to imagine it. When I'm in the mood it's one of those things where you just sort of get yourself in the mood then you can kind of make yourself feel it's real, even if you know at the back of your mind it's not – it's not necessarily real, you can still feel it's real." Later in the discussion he explained that he read the Bible not for a religious purpose, but to give him a kind of hope in the situation he is in. They spoke a bit about the message of Jesus and Dr. Westphal asked him what was the point of Jesus dying. Mr. Doe inquired whether he meant from a biblical perspective or an historical perspective. In discussing the historical perspective, Mr. Doe likened the situation of Jesus to governments in Third World countries killing people for stirring up rebellion. He also noted that, from a biblical perspective, Jesus dying for our sins meant that there is always a chance for a person to redeem themselves after committing sin. Dr. Westphal asked Mr. Doe if he believed that for himself and Mr. Doe responded that this does not mean that there is "literally some spirit that automatically, magically forgives someone." He then went on to talk about the collegial nature of a church group and how they work together to change lifestyles, speaking to each other in a way that is "kind of like an implicit code." Dr. Westphal asked him for an example. Mr. Doe responded as follows:

> Well, for example, if a preacher let's say tells his nephew God is very disappointed about what you're doing, the nephew might realize really he's just saying we as your family are disappointed in you, please stop doing this. Something like that.

[137] Dr. Westphal then asked Mr. Doe if he thought there was a realistic possibility that he could get a kind of redemption for his sins, to which Mr. Doe said "No", noting that he was looking at 10 life sentences. Dr. Westphal persisted and asked him about spiritual redemption, to which Mr. Doe responded:

> I mean, to be honest, I know that what I did is worse than like some other more minor stuff. It is … realistically speaking, it would be considered extremely

> irredeemable, like 99% chance irredeemable, but nevertheless I'm still reading the Bible every day.

[138] Nothing about this exchange is mentioned in Dr. Westphal's report. When it was put to him in cross-examination, he denied that this showed abstract thought by Mr. Doe. Earlier in his testimony Dr. Westphal had said that Mr. Doe had become religious since his incarceration. On cross-examination, Crown counsel suggested to him that this was not the case and that Mr. Doe claimed in this discussion that he was not religious and did not believe in God. Dr. Westphal responded that this was not his perspective from listening to Mr. Doe. He disagreed that Mr. Doe showed any ability to engage in abstract thinking, stating that he had acquired some factual knowledge and what he said was scripted or based on what others, perhaps the prison chaplain, had told him. He denied that the example of the nephew showed Mr. Doe's ability to take the perspective of another, and pointed out that the nephew reference showed Mr. Doe's manner of concrete thinking. (It should be noted that Mr. Doe only gave that concrete example because Dr. Westphal asked for one.) When asked if this showed Mr. Doe being philosophical, Dr. Westphal stated that Mr. Doe was "thoughtful" but countered that "philosophy is about knowledge" and that being philosophical does not mean having empathy.

[139] I recognize that philosophy and empathy are not synonyms. However, in light of these discussions, I find it difficult to understand how Dr. Westphal can continue to maintain that Mr. Doe is a concrete, rigid, literal thinker, who is incapable of abstract thought or moral reasoning.

[140] To summarize, I find that Mr. Doe has significant deficits as a result of his ASD, particularly in the areas of social communication, the ability to understand the emotions and perspective of others, and the ability to feel empathy. Mr. Doe has no cognitive impairment, which is both a benefit and, in some ways, a disadvantage. He has been able to use his intellect to compensate for some of his impairments. He has learned methods of interacting. He is able to work out abstract concepts and analyze moral problems. However, these are not natural to him; he has to work at it. Questions that may be answered by the vast majority of people innately, or intuitively, may also be answered correctly by Mr. Doe, but only after the application of intellect and the process of logical reasoning. Although Mr. Doe clearly has impairments in these social constructs, he is not incapable of abstract thought and he does have some theory of mind. He tends to be a literal, concrete thinker, but he is also capable of abstract thought and introspection. It takes him much longer to work out these problems than would be the case for most people. Mr. Doe will experience the most severe impacts of his disorder in situations where he is required to respond immediately to a stimulus or make a snap judgment. Given time, he does much better. He has been able to navigate his way through high school, college, getting into and out of the military, and getting an excellent job in his chosen profession. He has friends, but not many. He perpetually feels like an outsider who does not fit in. The downside of his intellect is that he fully understands what he is missing and has lost hope that he will acquire the social life to which he aspires. He feels lonely, believes himself to be a failure in life, and feels hopeless to change it.

F. WHY DID HE DO IT?

[141] In order to determine whether the requirements of the s. 16 defence have been met, it is important to know why John Doe did what he did, what was in his mind before and during these

acts. Mr. Doe did not testify at trial. In order to determine his state of mind with respect to these killings, it is relevant to consider what he said to others, including in his original statement to the police that same night and in his many interviews with forensic assessors. I recognize that many of these sources will be hearsay statements, and that they have not been tested by cross-examination or otherwise. However, there is no better source of information about Mr. Doe's state of mind. Counsel have agreed that his statements to others are admissible, and the statements were made in circumstances where the person receiving them can be relied upon for an accurate account of what was said. That does not mean that I should take everything Mr. Doe said at face value. Everything he said cannot be true. Indeed, some of the things he said are completely contradictory and he has himself said that some of his statements were lies. This leaves me with the difficult question: was he telling the truth when he said he was not telling the truth?

Statements to the Police

[142] Mr. Doe made a fully voluntary statement to Det. Rob Thomas on the night of the attack, starting at 10:46 p.m. He talked to Det. Thomas about being a heterosexual male who would be interested in having sex with women, but that women were not interested in him. He said he was a "bit upset" that women would choose to date obnoxious males instead of a gentleman like himself. He described having discussions with like-minded males on internet sites such as 4chan and ForeverAlone and acknowledged embracing the incel – involuntary celibate – movement. He gave an example of an incident at a Halloween party in 2013 when he tried to initiate a discussion with girls, but they laughed at him and hung on to the arms of big guys. He described being "very angry" about this. He claimed that other guys on the internet expressed the same feelings, but they were "too cowardly" to act on their anger.

[143] He said he had become "radicalized" after Elliot Rodger committed an act of mass murder on May 23, 2014, significantly raising the movement's profile. He also admired another incel murderer, Chris Harper-Mercer and claimed to have had discussions with both of those killers prior to their deaths. Mr. Doe said what Rodger had done was to start a "beta uprising" against the "Chads and Stacys" (referring to obnoxious males and the women who choose to date them instead of gentlemen). He said that since June 2014 he had been thinking it was time he stood up to the Chads and Stacys by taking action rather than festering in his own sadness.

[144] According to Mr. Doe, his reason for enlisting in the infantry was so that he could learn how to use large guns, specifically assault rifles. However, he left the military before getting to that part of the training. Sometime before April 2018, he decided to use a vehicle for his attack. He said that about one month before the date of the attack, he reserved a large rental van for this purpose, pointing out twice that he chose a size that would be small enough to manoeuvre but large enough to "inflict severe damage."

[145] He told Det. Thomas that a day before his attack he posted an anonymous message on 4chan stating that the beta uprising was starting and encouraging others to follow suit. He said lots of posts were received encouraging this move. However, he said he did not otherwise tell anybody what he was planning to do. In the days leading up to the attack he described being preoccupied with thoughts about it, saying that he thought about it 80 percent of the time.

[146] Mr. Doe picked up the van at the appointed time on April 23, 2018, and made his way to Yonge Street. Upon reaching the intersection of Yonge and Finch, he saw that there were a lot of pedestrians in the area and decided it was time "to go for it." He said he floored the pedal, speeded the van towards the pedestrians and then "allow[ed] the van to collide with them." He said some people were knocked down and others rolled over the top of the van. He only stopped the attack when one of the pedestrians hit spilled a substance over his windshield and he could not see where he was going.

[147] When he heard police cars coming, he pulled over and got out of the van. He said he had "premeditated death by cop" and was expecting the officer to fatally shoot him when he repeatedly pointed a wallet at him, pretending it was a gun, and told the officer it was a gun. He also put his hand into his pocket and pulled it out quickly, making the shape of a gun with his hand. When it was apparent the officer was not going to kill him, Mr. Doe said he lay down on the sidewalk as ordered because if he was not going to be killed he would "rather not encounter a painful experience."

[148] At the end of the interview, when Det. Thomas asked Mr. Doe how he felt about the fact that 10 people had died and 15 people were seriously injured and Mr. Doe replied, in a matter-of-fact tone of voice, "I feel like I accomplished my mission."[74]

[149] The reason Mr. Doe gave to Det. Thomas for carrying out this attack is consistent with the message he posted on Facebook during the course of the incident:

> Private (Recruit) Doe Infantry 00010, wishing to speak to Sgt 4chan please. C23249161. The Incel Rebellion has already begun! We will overthrow all the Chads and Stacys! All hail the Supreme Gentleman Elliot Rodger!

[150] This was a highly-skilled interview. Det. Thomas ensured that Mr. Doe was comfortable and fully cognizant of his rights. He did not pressure Mr. Doe to answer, and did not show any signs of disapproval, except at the end of the interview on the issue of not telling the truth.

[151] Throughout the interview, Mr. Doe showed a flat affect and spoke almost in a monotone, showing no emotion. His demeanour did not seem to change, no matter what he was talking about.

[152] However, one aspect of what Mr. Doe told Det. Thomas was a definite lie. He gave a very detailed account about how he got from his home to the rental company to pick up the van, including specific buses, where he changed, how long it took and things of the like. He was quite convincing. At the end of the interview, when Det. Thomas challenged whether this was true, Mr. Doe said that it was. Det. Thomas then told him he knew it was not true because the police had already interviewed his father who told them that he had dropped his son off at the nearby Starbucks. At that point, Mr. Doe admitted he had lied, stating that he was concerned they would

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[74] The number of people injured was based on the information Det. Thomas had at the time. In fact, 16 people were injured.

think his father was an "accomplice." I can see no detectable difference between the way Mr. Doe gave the false account of his trip to the rental company and anything else he said.

[153] Subsequently, Mr. Doe told many of the assessors that much of what he told the police was a lie. For example, the incident Mr. Doe described at the Halloween party in 2013 is almost certainly untrue. His father stated that his son never attended such a party in 2013, or ever. It appears that this detail was lifted directly out of Elliot Rodger's manifesto.

[154] It is also highly unlikely that Mr. Doe was ever in direct contact with either Elliot Rodger or Chris Harper-Mercer.

[155] Again, there is no discernible difference in tone and affect between when Mr. Doe was telling the truth about matters that have been verified (*e.g.* when and how he reserved the rental van) and when he was telling a lie. This makes it difficult to determine what was actually going on in his head at any given time.

Statements to Dr. Bradford

[156] The first group of experts to assess Mr. Doe were: Dr. John Bradford (forensic psychiatrist); Dr. Rebecca Chauhan (psychiatrist with expertise in autism); and Dr. Mini Mamak (forensic psychologist who administered tests). Dr. Bradford interviewed Mr. Doe in August 2018.

[157] Mr. Doe told Dr. Bradford that he had become interested in mass murders and school shootings in about 2008 – 2009, when he was in high school. He said this interest increased around 2016. He acknowledged being involved on 4chan and other sites dealing with these issues and being particularly interested in Elliot Rodger. However, he told Dr. Bradford that he had lied to the police about having had contact with either Elliot Rodger or Chris Harper-Mercer. Further, Mr. Doe said he lied to the police about the Halloween party in 2013. He said he linked his actions to the incel movement in order to increase the notoriety of the attack. However, he continued to say that he was influenced by Elliot Rodger's manifesto and by the incel movement. He also was motivated by the desire to attain fame and his fear that he would fail in the job he was about to start.

[158] Dr. Bradford opined that Mr. Doe had become "hyper-focused" on Elliot Rodger and on mass murders. However, he was completely lacking any empathy for the victims who were murdered in the name of the incel movement, or for any of the people he himself killed or injured. Dr. Bradford described Mr. Doe as speaking without any emotion regardless of the topic he was discussing.

[159] Dr. Bradford testified that he believed Mr. Doe's plan to die in the course of the attack by getting a police officer to shoot him was merely part of his overall plan. Separate from the attack, he did not have any suicidal thoughts.

Statements to Dr. Chauhan

[160] Dr. Chauhan interviewed Mr. Doe on several occasions in September 2018. Her interviews were more about the aspects of autism that affected Mr. Doe, but she did get some information from him about the attack itself and the events leading up to it.

[161] Dr. Chauhan's opinion is that Mr. Doe carried out these attacks for the public notoriety it would bring him. She noted that even in his school years, Mr. Doe preferred to receive negative attention rather than no attention at all (*e.g.* saying and doing goofy things to get people to laugh at him). He told her that he had an intense fear since middle school of being rejected by girls and believed they were laughing at him behind his back. He described on incident in college in which he approached a woman he did not know and attempted to engage her in conversation with a view to dating her. She politely declined and he felt rejected. He did not mention anything to her about the Halloween party in 2013.

[162] Mr. Doe told Dr. Chauhan that when he was in high school and feeling down about being bullied, he started to fantasize about school shootings and other mass murders. He searched internet sites for information about mass murder and came across Elliot Rodger and his manifesto. He identified closely to Elliot Rodger in a manner Dr. Chouhan thought was unusual in that he saw only the similarities between them and none of the differences. He told her that by December 2017 he was obsessed about Elliot Rodger and was reading and thinking about him daily. He described great feelings of loneliness in college as he watched other students interacting and felt socially isolated. He said he began to fantasize about shooting people as Elliot Rodger had done, for the shock value of people learning what he had done. However, having concluded it would be too difficult to get a gun, he decided to use a van instead. He talked about his brief time in the military, but did not say anything about having joined up to learn about weapons (contrary to what he said in his police interview). He said he had failed some courses at college and saw the military as an easy way to get a job. As for the timing of the attack, he told Dr. Chauhan he wanted to finish all the requirements for his degree first and that he expected to die as a result of the attack he was planning. Dr. Chauhan was of the view that Mr. Doe was not otherwise suicidal; he simply saw being killed by the police as part of his overall plan.

[163] Dr. Chauhan saw Mr. Doe's fixation on Elliot Rodger as being "odd." She said the manifesto oozes with anger, but she saw no anger emanating from Mr. Doe. He did not appear to blame others for his problems, but rather saw himself as being unable to accomplish things. He believed he would fail at his job, before he had even started the job.

[164] Dr. Chauhan testified that Mr. Doe showed no emotion when talking about the attack. He had no remorse. He told her he thought the attack was "worth it." He realized that he was simply hitting random people as he drove down the sidewalk and said he had been wishing for more female victims and had hoped that there would be more young, attractive females hit. When asked about how he feels about it now, he said he was "happy" because when people go on Google his name will come up and they will see what he did.

[165] Dr. Chauhan believed that in the period of time prior to the attack, Mr. Doe had become "hyper-fixated" on writings about mass killings and indoctrinated with the viewpoint of Elliot Rodger, without ever seeing information from other people who might have different views.

[166] Although Mr. Doe talked quite a bit about Elliot Rodger, Dr. Chauhan did not question him in any detail about the incel movement. Dr. Chauhan was not aware that, in August 2018, Mr. Doe had told her colleague, Dr. Bradford, that he "made up" his attraction to the incel movement and obsession with Elliot Rodger.

Statements to Dr. Woodside

[167] The second group of experts to assess Mr. Doe was the team led by Dr. Scott Woodside, who was retained by the Crown. Both Dr. Woodside (a forensic psychiatrist) and his colleague Dr. Percy Wright (a forensic psychologist) met with Mr. Doe several times in October and November 2019.

[168] Mr. Doe told Dr. Woodside that, in high school, he became interested in school shootings and would fantasize about shooting people at his school, although he took no steps to follow through. He was particularly interested in websites that rated killers by their body counts and gave higher grades for those who killed more people.

[169] Mr. Doe also told Dr. Woodside that, when he was in school, bullies would ask him to do silly things and he would comply, stating that "it was better to have negative attention than for people to ignore me." He acknowledged that this was similar to his actions in killing people in order to get attention for himself, even if negative.

[170] According to what Mr. Doe said to Dr. Woodside, he did not start going on sites like ForeverAlone and incel-related sites until he was in college. He reported that he enjoyed reading negative, hate-filled comments about women and felt relieved that there was an explanation for why women never seemed interested in him. However, he denied any strong feelings of anger or hatred towards women, saying he was just "annoyed" at them.

[171] In first describing why he committed these murders, Mr. Doe said that it was because he was nervous about starting his new job and "screwing it up." He said he was seeking notoriety and "upgraded" it by associating it with the incel movement. Dr. Woodside quoted him as saying, "If I went out and killed people without any reason, then I'm just an average mass killer but if I say something on a large social network platform, then I tie myself into some other big-time names … increase my fame and infamy regarding the killing." He said it would be better to die as a famed killer than to "rot in obscurity."

[172] Dr. Woodside asked Mr. Doe to attribute percentages to his motivations for the attack to which Mr. Doe responded as follows:

- 35% - anger at women
- 30% - concerns about screwing up socially or performance-wise at work
- 30% - not wanting to rot in obscurity
- 5% - just always wanting to do something like this

[173] When asked if loneliness was a factor, Mr. Doe agreed that it was and that he would rate that at 10 – 15 percent and the others should be scaled down proportionately. However, at a later interview date, Mr. Doe said the incel ideology was 50 percent of the motivation for the attack.

[174] Mr. Doe told Dr. Woodside that he had told the police some "outlandish stuff" that was not true, including: that he had communicated with Elliot Rodger and Chris Harper-Mercer; the incident at the 2013 Halloween party (which was something he had actually read about in Rodger's manifesto); and that he played violent video games to get out his violent urges. He said he joined the military just for the job, but with prodding, admitted that he had been thinking about "cool stuff" associated with the military such as learning about weapons. However, he denied that this was part of a larger scheme to train himself in preparation for a mass shooting.

[175] Mr. Doe reiterated his intention to die in the course of his mass killing. He saw this as a way of being "martyrized" and getting more attention. He searched the internet for ways he might accomplish this. He worried about having a toy gun or knife because he thought there might be a security check when he rented the truck. He did not want to simply charge at the police, because they might just beat him up. He saw a video on the internet of police officers shooting a man who was holding a wallet in his hand because the officers believed the man to be holding a gun. He decided to emulate that man's actions to induce the police to shoot him.

[176] Mr. Doe described driving down Yonge Street in the van and wondering if he would really be able to go through with his plan or whether he would chicken out. When he got to the intersection of Finch and Yonge Street, he saw a group of people and decided to start there. He said he had been hoping to kill 20 people. He described his route in considerable detail, including hitting multiple people. He panicked when some sort of liquid spilled across his windshield and he could not see where he was going. Worried that he would hit a pole, he stopped the van. He then remembered to send the message to Facebook that he had already loaded onto his phone. He said he had a "feeling of satisfaction" at having completed that task. He said he deliberately posted the message on Facebook so that it would bring attention to him directly and quickly, unlike other sites habituated by incel followers which did not use people's real names. He also had given thought to the content of the message, telling Dr. Woodside:

> Something simple that was easy to say, a catchphrase … bear in mind, I was expecting to die…and that the media would pick up on this … the most important words in that post were 4chan, incel, and Elliot Rodger … because 4chan gives you that identity, says that I am with them, incel because it indicates that you are complaining about virginity and Elliot Rodger … I am basically using his name to boost my name. It is kind of like working at a company and your boss is really famous, some people might brag about working for him … [to boost their fame].[75]

[75] Exhibit 50, Report of Dr. Woodside, at p. 18.

[177] Mr. Doe acknowledged that his victims were random. He said he would have preferred to hit more women.

Statements to Dr. Wright

[178] As a psychologist, Dr. Wright's main focus was on testing Mr. Doe in various ways to assess the impact of ASD on his functioning. However, there were also discussions about the attack itself and the events leading up to it. Mr. Doe talked about his interest in school shooters and his fascination with internet sites devoted to mass killers and their ratings for how many people they had killed. He said he fantasized in high school about going into school with a handgun and shooting people he did not like and random people, while attempting to avoid killing people that he liked.

[179] Mr. Doe told Dr. Wright that he was hoping to kill 100 people in the 2018 attack, as that would be a world record. He said his preference was to kill women, but the overarching goal was to kill as many people as possible. Dr. Wright testified that Mr. Doe reported this in a matter-of-fact manner, not joking in any way. When Dr. Wright asked him if he now thinks it was all worth it, Mr. Doe said that he was "happy and excited" that people were talking about him and was satisfied with a kill count of 10.

[180] Dr. Wright asked him how his thoughts had transitioned from killing peers he disliked to wanting to target women. Mr. Doe responded that in 2018 he had become more lonely and was convinced he would never have a relationship with a woman. He was also nervous that he would get fired from his job. He thought it would be better to die having accomplished this one significant thing and be remembered for it as an achievement for all eternity, as opposed to simply dying in obscurity as a failure.

[181] Mr. Doe described to Dr. Wright the actual process of the killings in the same manner as he did in the other interviews.

[182] Dr. Wright noted that Mr. Doe, unlike other mass killers, appeared to be lacking any type of anger or rage. He was not a narcissist, blaming others for his problems. Instead, he saw himself as having failed at many things because of his own shortcomings.

Statements to Dr. Westphal

[183] The third and final team of assessors included two psychiatrists and a psychologist, all based out of Yale University in Connecticut. The team lead is Dr. Alexander Westphal. All three doctors signed the final report, but only Dr. Westphal testified at the trial. This team was retained by the defence, and interviewed Mr. Doe in December 2019 and January 2020, with a follow-up teleconference in July 2020. In total, Dr. Westphal interviewed Mr. Doe for 15 hours, with Dr. Alvarez-Toro being present for 10 of those hours. Dr. Loftin (the psychologist) administered the psychological tests. The majority of Dr. Westphal's interviews were video- and audio-recorded.

[184] The account Mr. Doe gave to Dr. Westphal with respect to the process of the attack itself was very similar to what he told other assessors, and I will therefore not repeat it here. As with all the other assessors, Dr. Westphal was struck by the complete lack of emotion displayed by Mr.

Doe when describing these horrific actions. Dr. Westphal testified that Mr. Doe could have been describing a shopping list.

[185] Dr. Westphal also agreed with the other experts who concluded that the suicidal aspect of this attack was merely part of the overall mission. Apart from that, Mr. Doe had no wish to kill himself.

[186] Consistent with his story to the other assessors, Mr. Doe told Dr. Westphal that the reason he told the police and posted on Facebook that this was an incel rebellion attack was to generate more attention for himself. Dr. Westphal concluded that the incel motivation was just a "veneer" and not the real motivation behind the attack.

[187] Mr. Doe also told Dr. Westphal about his feelings of loneliness, and his anxiety about not succeeding at his new job. He also described his fascination with websites dedicated to mass murder and other hateful topics and talked about attaining a high kill count in order to get on the list of high "achievers" recognized by one of those websites.

[188] Dr. Westphal opined that Mr. Doe's professed identification with the incel motivation was not real. Mr. Doe told him that he used the Elliot Rodger information in his statement to the police to "spice up the narrative." Dr. Westphal did believe, however, that Mr. Doe was obsessed with Elliot Rodger and his manifesto.

[189] Dr. Westphal also accepted that other motivations described by Mr. Doe were real, *e.g.* loneliness and isolation; job anxiety; and the desire for notoriety. Dr. Westphal testified that at one point Mr. Doe attempted to put percentages on his motivations as follows:

- 40% - identification with Elliot Rodger and his feelings of loneliness
- 25% - the desire to carry out a mass killing
- 20% - notoriety and fame
- 15% - anxiety about his job

[190] Dr. Westphal recognized, however, that these specific numbers probably meant nothing, as Mr. Doe had ascribed different percentages at other times. He testified that he believes Mr. Doe himself is not really sure why he carried out this attack.

[191] Mr. Doe told Dr. Westphal that if he had the opportunity to do this all over again, he would be more specific in targeting women between the ages of 18 and 30. He said this would be more consistent with what he told the police and posted on Facebook, and the basis upon which he was trying to get notoriety. Asked if he would do it again if he got out of jail, he replied that he was not sure, but that it "would certainly pop into [his] head." He said if he did get the chance to do it again, the opportunity to improve his kill count score on the website he frequented would be a motivator.

Analysis

[192] It is almost impossible to tell when Mr. Doe is lying and when he is telling the truth. Working out his exact motivation for this attack is likewise close to impossible. However, there are some common threads from which it is at least possible to identify some of the factors and determine which are the most significant.

[193] I place considerable reliance on the expert psychiatrists and psychologists who interviewed Mr. Doe. Ultimately, it is my task to decide what the facts are, but I am greatly assisted in that task by the many doctors who spent many hours talking to Mr. Doe. They found him to be forthcoming and cooperative, and they thought he was being truthful with them. Some of the testing they did was designed to detect malingering, and they never detected any. Of course, that does not mean that everything Mr. Doe said was true, nor does it follow that because he said the same thing numerous times, it is more likely to be true. He has an excellent memory and above-average intelligence; he is capable of maintaining a convincing lie over time. Nevertheless, I am inclined to accept the assessment of all of the experts that Mr. Doe did lie to the police about much of the incel motivation he talked about and that the incel movement was not in fact a primary driving force behind the attack. I note as well that Mr. Doe's father commented that when his son was talking to Det. Thomas, he was using the tone of voice and demeanour that he would use when doing a presentation, as if he was acting a part.

[194] I am confident that Mr. Doe started fantasizing about school shootings and mass murders from the time he was in high school. He has a wealth of knowledge about those kinds of killings and the people who carry them out. From the details he knows, it is also clear that he has spent considerable time on chatrooms and other internet sites devoted to mass murders and incel followers. He is clearly fascinated by, and to a degree obsessed with, Elliot Rodger and his manifesto. However, Mr. Doe shows none of the venom typical of incel followers. Although frustrated and disappointed that women did not appear to be interested in him, he has never expressed hatred, or even anger, towards women, not even in his initial statement to the police. Likewise, he did not at the time, and has not since, shown any pleasure or sense of satisfaction to have killed or injured women, apart from the notoriety it has brought to him. Accordingly, I agree with the assessors that Mr. Doe's story to the police about the attack being an "incel rebellion" was a lie.

[195] I am also persuaded by the unanimous conclusion of the experts that Mr. Doe did not start out with a decision to commit suicide, and then select a way to do it in a spectacular or memorable fashion. Rather, he decided to do the mass killing, and dying in that process was merely part of the overall plan.

[196] What, then, was his motivation? I am drawn to the conclusion that there was no one clear motivator. Mr. Doe was profoundly lonely and felt hopeless. He saw nothing in his future but failure, both in social relationships and work. He wanted to be seen. He wanted to be known, and talked about. He saw no way to accomplish that except through a spectacular act of violence. He had been musing about mass murder for years, to varying degrees. Convinced that he was about to fail in his first real job and live a life of obscurity and dependence, he decided instead to achieve fame and notoriety even if it meant dying in the process. I am sure that resentment towards women

who were never interested him was a factor in this attack, but not the driving force. Instead, as he told every assessor, he piggybacked on the incel movement to ratchet up his own notoriety.

[197] Why did he do it? There is a long answer. There were multiple factors at play as I have described above, as well as the impact of his ASD, and possibly desensitization as a result of the depraved internet sites he frequented. But there is also a short answer, a bottom line: he did it to become famous.

G. DID HE KNOW IT WAS WRONG?

1. He appreciated the nature and quality of his act, knew it was murder, and knew it was legally wrong

[198] There is no question that Mr. Doe set out, in a planned and deliberate manner, to commit multiple murders. There is also no question that he fully appreciated the nature and quality of his act, and knew that it would be considered first-degree murder under Canadian law. The following is an excerpt from his statement to the police on the night of his arrest:

> Q. Do you know what first degree murder is?
>
> A. It's-ah-premeditated murder and completely intentional and considered to be in what's known as cold blood.
>
> Q. …Do you understand what premeditated means?
>
> A. Yes it means – it would mean that someone planned for that murder in advance.[76]

[199] Mr. Doe was fully aware that what he had done constituted first-degree murder and that he would be facing a sentence of imprisonment for life, a fate he planned to avoid by provoking the police into killing him.

2. He knew, at least intellectually, that it was morally wrong

[200] Moreover, Mr. Doe was able to articulate that his actions were morally wrong in that society would consider what he had done to be wrong. When interviewed by Dr. Woodside, he said that most people would consider a mass murderer to be "despicable." He said that there would be fringe groups on the internet where people would praise what he had done and might joke about it if they were "immature teenagers." However, he stated that he knew at the time that most people would view both mass shootings and his own acts as morally wrong and unjustifiable.

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[76] Exhibit 2B, at p. 23.

[201] Similarly, when interviewed by Drs. Westphal and Alvarez-Toro, Mr. Doe spoke clearly about his knowledge of the moral wrongfulness of murder. One particularly illuminating example of this is the following exchange (on day three of their interviews):

> Dr. Westphal: So, do you think it's fair to say that you understood what you did was wrong?
>
> Mr. Doe: Yes
>
> Dr. Alvarez-Toro: Wrong for society, wrong for you, both?
>
> Mr. Doe: It's well wrong in the sense that it is immoral.
>
> Dr. Alvarez-Toro: For – you think there are two perspectives? Like it was immoral like you knew society would judge you as that act being immoral or did you think you shouldn't do this because …
>
> Mr. Doe: Both. I knew myself it's wrong what I'm doing regardless of what other people are saying, I knew it was wrong to kill.
>
> Dr. Alvarez-Toro: Why is that?
>
> Mr. Doe: Well, because I've been told by everyone. By family – and school or wherever. It's just an ingrained pillar, the ingrained sole rule that killing is wrong.[77]

[202] Likewise, in a previous interview with Dr. Westphal, Mr. Doe stated, "I know what I did was morally wrong. And extremely devastating. And irreversible." When Dr. Westphal pressed him as to what he meant by "wrong" in terms of "according to what standards," Mr. Doe replied, "Societal role standards. One of the – the most important one being that it is extremely wrong to kill people."[78]

[203] Dr. Bradford obtained similar information from Mr. Doe. He told Dr. Bradford that "to kill is extremely immoral" and that his actions would "be seen as morally terrible by anybody in the community."

[204] If the legal test for "morally wrong" at the second branch of the s. 16 analysis is mere intellectual knowledge that society would consider the act to be morally wrong, or that the act was something that the accused knew he ought not to do, then that would be the end of my inquiry. Mr. Doe's cognitive ability to know right from wrong was unimpaired by his disability. The fact that he had ASD did not mean he did not have the capacity to know that society would consider this to be immoral. On the contrary, he actually knew – at least intellectually – that by society's

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[77] Exhibit 35B, at pp. 92-93.
[78] Exhibit 24B, at pp. 20-21.

standards, his actions were morally wrong. Indeed, as I concluded above, his primary reason for carrying out the attack in the first place was to attract notoriety, an implicit recognition that people would be horrified by it. However, as I have indicated earlier in these reasons, in my view, the test as developed in *Oommen* requires more than the intellectual capacity to know what societal norms are, but also includes a capacity to rationally evaluate what he is doing and to make a rational choice to do it.

3. He had the capacity to rationally evaluate what he was doing and to rationally choose between what was right and what was wrong

[205] I turn then to what I consider to be the pivotal question in this case: did Mr. Doe, because of his ASD, lack the capacity to exercise a rational choice between carrying out these murders or complying with societal and legal norms that killing is wrong? In other words, was his decision to carry out these acts the result of a rational, reasoned decision, or did he lack the capacity to make such a reasoned decision because of his disability? On this issue, the experts disagree.

(a) Evidence of Dr. John Bradford (Retained by the Defence)

[206] Dr. Bradford testified that Mr. Doe does not have any kind of psychotic disorder. This is an opinion on which all of the experts are unanimous, and which I accept. Dr. Bradford found that Mr. Doe had no empathy for his victims, at the time or since, and has expressed no remorse for his actions. This is consistent with the findings of every expert who met with Mr. Doe and I accept it as a fact. Dr. Bradford was careful to distinguish between the lack of empathy seen in a psychopath and the situation of a person with ASD. A psychopath has the capacity to feel empathy and understanding, but simply does not care, preferring to satisfy his own desires without any regard for how his victim might feel. This is distinct from a person with ASD who is often unable, by virtue of that disability, to put himself in the shoes of another and truly understand how they would feel. Dr. Bradford was clear that Mr. Doe is not a psychopath. Again, every expert agrees on this point and I accept it as a fact.

[207] Dr. Bradford also distinguished the kind of fixed delusions held by a person who is psychotic, and an "overvalued idea" or hyperfocus on a particular idea or construct. He saw Mr. Doe as fitting into the latter group in terms of his fascination with Elliot Rodger and mass murders. However, in his opinion this was not of the kind of intensity required to ground a defence under s. 16 of the *Criminal Code*, because notwithstanding this fascination, Mr. Doe knew that murder was morally wrong. Based on Mr. Doe's answers to his questions about morality and how society would view his actions, it was Dr. Bradford's opinion that, notwithstanding his ASD, Mr. Doe had an understanding of moral reasoning and knew that what he had done would be seen as morally wrong.

[208] Having stated that opinion, and in an effort to be as objective as possible, Dr. Bradford went on to state an alternative theory that could result in a finding of NCR. On that theory, Mr. Doe's lack of empathy and deficits in the capacity for moral reasoning, when combined with his hyperfocus on internet sites featuring the incel ideology, Elliot Rodger, and other mass murderers, could be seen as rendering him incapable of the kind of moral reasoning required to be held criminally responsible. He opined that the "only basis for this finding would be if Mr. Doe was

found to be unable to appreciate the wrongfulness of his conduct."[79] Dr. Bradford believed that there was a "credible basis" for this to be considered, but in the final analysis, still remained of the view that Mr. Doe knew what he did was morally wrong and did not meet the requirements for a s. 16 defence.

(b) Evidence of Dr. Alexander Westphal (Retained by the Defence)

[209] Dr. Westphal noted that Mr. Doe would sometimes appear "baffled" and unable to provide answers to questions, and that many of his answers were "off the mark." He stated that although he was not psychotic, "his autistic way of thinking was severely distorted in a way similar to psychosis." Dr. Westphal was struck by the significant gap between Mr. Doe's high intellectual function and his poor functioning in everyday life, commenting that "his communication in everyday settings is more like that of a child, and his skills in social relationships are even lower." Significant to his ultimate opinion, Dr. Westphal found that Mr. Doe had a rigid, concrete way of thinking and a "theory of mind" deficit or "mindblindness" that interfered with his capacity to understand that others have internal states that differed from his own. He believed that, because of these deficits, Mr. Doe was less able to appreciate the theatrical and exaggerated nature of things he was fascinated with on the internet, and took everything literally.

[210] Dr. Westphal considered the reasons given by Mr. Doe for having committed these acts. He dismissed the idea that Mr. Doe was motivated by revenge to punish those who had bullied or rejected him in the past. He noted a complete absence of anger or hatred towards these people, and an absence of any history of ever feeling such hatred. The other reasons he considered were the desire for notoriety and anxiety about failing at a job he had not yet started. Dr. Westphal rejected these as being "insubstantial reasons" to inflict such an enormous amount of pain and to either die or be incarcerated for life as a result. He testified that, at times, Mr. Doe attempted to place percentages on his various stated reasons for carrying out the attack, but said that these numbers "mean nothing" and he did not think that Mr. Doe himself understands why he did this. Dr. Westphal testified that the only common element is that none of those reasons "provide a satisfactory account" for committing this attack. He said that, to him, this meant one thing, "which is that he didn't understand the horrific impact of what he was doing."

[211] One of the reasons Dr. Westphal rejected the idea that Mr. Doe was motivated by a desire for notoriety was because he saw in the prison records that Mr. Doe had twice turned down requests from journalists to interview him. Dr. Westphal said he found this to be inconsistent with Mr. Doe's stated desire for media attention. On cross-examination, Dr. Westphal acknowledged that he had never raised this point with Mr. Doe. On April 26, 2018, in response to the first of the media requests for an interview, Mr. Doe wrote on the request form, "At this time, I do not consent because I have not been tried yet." On the second request five days later, he simply wrote "No." During that same time frame, a note in his prison medical chart indicates that he refused to discuss

[79] Exhibit 46, Report of Dr. John Bradford, at p. 44.

the details of the material "as per his rights." Dr. Westphal agreed that these refusals may have been based on legal advice.

[212] In his report, Dr. Westphal concluded that Mr. Doe did not "understand" the impact and consequences of what he was doing, and although he intellectually knew it was wrong, he did not "appreciate" the moral wrongfulness of his actions. Dr. Westphal cited five reasons why he believed this to be the case:

(1) Mr. Doe demonstrated a "complete lack of insight" as to the impact of his actions on his victims, their families, or his own family.

(2) He described his actions as "converting life status to death status" which suggests a "complete emotional detachment" from his actions, as if it was a video game.

(3) He showed no emotion during the attack or during his police interview.

(4) While planning the attack, he simultaneously planned for the future in prosaic ways (filling out paperwork for his upcoming job, planning to go out with his brother to celebrate graduation, suggesting widening the driveway to accommodate the car he planned to buy).

(5) He told his family during a prison visit that he was optimistic about the prospect of going home and that he believed others would see he had done nothing wrong.[80]

[213] Dr. Westphal (and his colleagues) then concluded their report with the following opinions:

> "In summary, it is our opinion that without ASD [Mr. Doe] would not have perpetrated this offence. …
>
> We conclude that although [Mr. Doe] understood the wrongfulness of his actions from an *intellectual* standpoint, he did not understand the wrongness of his actions for a *moral* standpoint. …
>
> The act was also completely beyond his comprehension given his absence of understanding of emotional nuance, social exchange, and contextual accommodation. He had absolutely no insight into the terrible impact that the act would have on other beings, and did not think about the pain he was bound to cause, nor understand it, even slightly, now. …[81]

[214] Dr. Westphal placed significant reliance on Mr. Doe's complete lack of empathy for his victims. He described Mr. Doe's thought process as he was mowing down and killing people as

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[80] Exhibit 47, Report of Dr. Alexander Westphal, Dr. Viviana Alvarez-Toro, and Dr. Rachel Loftin, at p. 53.
[81] *Ibid*., at pp. 55-56.

being akin to playing a video game, concluding that Mr. Doe was unable to understand the actual impact of his actions on his victims, his victims' families, or even his own family. From this, Dr. Westphal drew the conclusion that Mr. Doe did not understand that his actions were morally wrong. He accepted that Mr. Doe knew this was a real-life situation as he was killing and injuring people, but said he was so detached from it emotionally that it was "almost a dissociative quality."

[215] Dr. Westphal testified that because of Mr. Doe's inability to truly understand the horrific consequences of his actions, he "was not capable of making a rational choice." He was adamant in his testimony that Mr. Doe had no understanding of the impact on his victims, their families, or his own family at the time of the attacks and still does not have any understanding. When cross-examined about the numerous statements Mr. Doe made about the impact on the victims and families, Dr. Westphal stated his belief that this was merely "lip service" and not true understanding, and that Mr. Doe likely picked up these ideas from other assessors who interviewed him or from other sources (such as pleadings in civil actions, discussions with his own lawyer, or discussions with the prison chaplain). He gave as an example the word "devastated" which had been used by Mr. Doe at one point to describe the impact on his own family and which he suggested was a word Mr. Doe had "picked up" from someone else. He acknowledged that he had no information upon which to base that assumption and that he was "theorizing" about it. He also acknowledged that he did not include in his report that Mr. Doe had said he thought his parents would be devastated by his actions, explaining that he had left it out because he believed Mr. Doe did not understand anything beyond the "most minimal insight."

[216] In his report, Dr. Westphal said that Mr. Doe "recognized feeling a 'sense of readiness and happiness' when he rented the van and a sense of 'nervousness' when he was driving," but that "he was not able to identify any particular feelings associated with the killing of his victims." On cross-examination he agreed that the nervousness Mr. Doe described was being afraid that he would not have the guts to go through with the attack. He also conceded that Mr. Doe told him that the nervousness went away as soon as he hit the first group of pedestrians at Yonge and Finch. Dr. Westphal explained that what he meant in his report about Mr. Doe not being able to identify any feelings associated to the killings was related to things like empathy for the victims.

[217] Although not referred to in his report, Dr. Westphal conceded in cross-examination that Mr. Doe "had an active decision-making process" before deciding to carry out the attack, and even after hitting the first group of pedestrians, made a further decision to keep going. Dr. Westphal agreed that prior to the attack Mr. Doe vacillated about whether he would go through with it. However, Dr. Westphal denied that this was connected in any way to moral reasoning, but rather stemmed solely from his concern that he might "chicken out." He also stated that he did not believe that there was ever a point where Mr. Doe was wrestling with his conscience in a moral sense. He said that Mr. Doe had "set himself a dare" and then experienced some ambivalence only about whether he "had the guts to go forward."

[218] Dr. Westphal was referred to one of his interviews in which Mr. Doe referred to the "ingrained pillar, the sole ingrained rule that killing is wrong." Dr. Alvarez-Toro then asked him how he was able to go ahead, thinking this was wrong and then commit these acts. Mr. Doe responded as follows:

> Mr. Doe: Just ignoring all the other thoughts and continuously think I really want to do this, I'm going to do this, I'm going to do this.
>
> Dr. Westphal: And wilfully ignoring those other thoughts or feeling compelled to do them regardless of those other thoughts.
>
> Mr. Doe: It was a combination. It was the fact that I wanted to do it but then it was wilfully ignoring it and amplifying feeling compelled to do it.

[219] On cross-examination, Dr. Westphal remained of the opinion that this did not constitute rational decision making or moral reasoning, but rather was only a concern that he would not have the courage to carry out the planned attack.

[220] In that same interview (on January 17, 2020), Mr. Doe told the doctors that he was hoping that everything would fall through, there would be no attack, and he would go on with his job and try that out. He said this would be the best-case scenario, that perhaps the van would just not be available, and he would not be able to proceed. Dr. Westphal again testified that this was not an example of moral reasoning, but rather an example of how Mr. Doe saw only two options: carry out the attack and either die in the process or be incarcerated for the rest of his life; or, not proceed with the attack and have to try the job and likely fail.

[221] Dr. Westphal conceded in cross-examination that the basis for his conclusion that Mr. Doe did not understand what he was doing was the fact that he did not provide anything that Dr. Westphal considered to be a "good reason" for doing it. He said that if Mr. Doe was able to comprehend the impact, he would not be able to describe it in the flat, unemotional way that he does.

(c) Evidence of Dr. Scott Woodside (Retained by the Crown)

[222] Dr. Woodside testified that he sees Mr. Doe as a mass murderer who happens to have ASD, rather than a person whose ASD caused him to commit this crime.

[223] Consistent with all of the experts, Dr. Woodside testified that Mr. Doe clearly appreciated the nature and quality of his actions. He was also of the opinion that Mr. Doe also knew that most people in the community would see his actions as despicable and morally wrong. Dr. Woodside saw this as a fundamental part of Mr. Doe's reason for committing the crimes. He was seeking notoriety, to be known for a "big thing," and committing a mass murder was a calculated move to do something that people believe is the worst thing you could do. He testified that Mr. Doe certainly knew right from wrong, and was a rational thinker. However, Dr. Woodside, like all of the assessors, found that Mr. Doe was lacking in empathy. Dr. Woodside therefore saw the central question raised as being whether Mr. Doe could rationally engage in moral reasoning without being capable of feeling empathy.

[224] Dr. Westphal accepted that there would be some degree of desensitization by virtue of Mr. Doe's many years of fascination with mass murder which has the effect of dehumanizing the victims. However, notwithstanding these fixed areas of interest, he was able to engage in other activities such as finishing college, engaging in a successful job search, and playing video games,

as well as some social interactions with his brother and friends. He did not believe Mr. Doe to be delusional, nor did he see any evidence that he was in a dissociative state.

[225] Dr. Westphal did not agree that Mr. Doe was incapable of moral reasoning. He recognized that Mr. Doe had deficits and that it was hard for him to empathize or to put himself in someone else's shoes. He opined that Mr. Doe is capable of reasoning through moral issues; it just takes him longer to do it. Although he may not innately understand the other person's perspective or feelings, he is able to use his intellect to reason it through, provided he has enough time to do so. Dr. Woodside saw Mr. Doe's moral reasoning deficits as having more of an impact in a situation where he might be called upon to make a sudden decision on the spur of the moment. However, he had been thinking about mass murder for years, and had been planning the specifics of this particular attack for nearly a month.

[226] He described Mr. Doe as engaging in an adaptive behaviour, whereby he put aside thinking about these acts being wrong and about the impact they would have because it was something he really wanted to do. Dr. Woodside noted that this is a common strategy that people use every day. When they want something badly and know there are bad aspects, they compartmentalize and push out the thoughts that constrain them or would prevent them from doing what they want. He also compared it to the kind of thinking engaged in by perpetrators of other crimes, *e.g.* pedophiles who know what they are doing is wrong and harmful, but yet continue to abuse children because it is something they strongly want to do. Dr. Woodside cited specific examples of Mr. Doe using this kind of reasoning. He said that Mr. Doe used the ideology of the incel movement to "rev" himself up into undertaking mass murder, even while recognizing that he was not himself a misogynist and that he did not have strong feelings of anger or rage towards women. He told Dr. Woodside that he saw the incel ideology as a way of "forcing [him]self into the mindset … so that [he] wouldn't chicken out." He said, "But I also wanted to do it … I was trying to push out all thoughts of trying to talk myself out of it." Mr. Doe also told Dr. Woodside that he knew his parents would be "shocked" when they found out what he had done, but that he "put those thoughts aside because I really wanted to go through with it."

[227] Dr. Woodside also rejected the notion that the highest order of moral reasoning is required, and suggested that very few people engage in that level of introspection in their everyday lives. He noted that Mr. Doe was willing to give up his own life, not just the lives of his victims, to achieve his objective of notoriety. He saw Mr. Doe as being without hope for his future. Mr. Doe had considerable insight into his social deficits and believed he would never marry or have a family and would never be successful in life. He was overwhelmed with feelings of loneliness and failure. He was anxious about what he saw to be his inevitable failure at the new job. He believed it would be better to leave his mark by becoming famous, even if for negative reasons, which he saw as being better than rotting in obscurity. Dr. Woodside testified that Mr. Doe might have had other reasons as well, but he saw no basis for discounting the reasons Mr. Doe did provide. Further, he disagreed with Dr. Westphal's view that these reasons should be rejected because they did not provide an adequate explanation for the crime. Dr. Woodside pointed out that there is no such things as a good reason to commit mass murder and that the reasons Mr. Doe provided are as easily understandable as other reasons Dr. Westphal would have accepted (*e.g.* the incel ideology; or feelings of rage or hatred).

(d) Analysis

[228] I come finally to the crux of this case: whether at the time Mr. Doe carried out this attack, he was, as a result of his ASD, incapable of knowing that what he was doing was morally wrong. This is a question of mixed fact and law and it is a question for me to answer. Given the subject matter it is of course relevant, indeed necessary, to take into account the expert evidence of the various psychiatrists and psychologists who have testified and/or provided written reports to the court. Their contribution has been extremely helpful. However, in the final analysis, it is for me to decide whether the defence has established Mr. Doe's incapacity on a balance of probabilities.

[229] As I have already stated above in the legal analysis portion of my reasons, I consider I am bound by the Supreme Court of Canada's decision in *Oommen* and that, therefore, my analysis on this question extends beyond whether Mr. Doe knew that by societal standards his actions were morally wrong. Before I can hold Mr. Doe criminally responsible for his acts, I must consider whether his disability deprived him of the capacity to make a rational evaluation of the situation and make a rational choice to carry out the attack.[82]

[230] If the sole question before me was whether Mr. Doe intellectually knew that his acts would be perceived in society as morally wrong, my answer would be clear-cut. Mr. Doe has repeatedly told everyone he spoke to that he knew his actions constituted first-degree murder and also that he knew what he had done would be condemned by everyone in society, with the possible exception of some fringe groups on the internet. He described the social norm that killing is wrong as an "ingrained" pillar that he had learned from his family and at school. He variously referred to his attack as "devastating," "despicable," "shocking," "morally terrible," "a horrible thing," and "irredeemable." He said that he knew these acts were morally wrong. I do not agree with the defence submission (or the opinion of Dr. Westphal) that these were concepts or expressions that Mr. Doe picked up from others since his incarceration. Mr. Doe himself explained that this was something that was taught to him by his parents and others and something he has always known to be an ingrained pillar of society. There is no question that on an intellectual level he knew that murder was morally wrong. If that is the extent of the test, then the defence clearly fails.

[231] However, as I have said, in my view the test as articulated in *Oommen* requires more than the intellectual capacity to recognize that society would see these acts as immoral. There must, in addition, be an exercise of a rational choice, recognizing the moral wrongfulness of the act and nevertheless freely choosing to proceed with it. I must therefore consider the impact of ASD on Mr. Doe and determine whether it rendered him incapable of rationally evaluating and rationally deciding on a course of action.

[232] It must be recognized as well that the court in *Oommen* did not depart from previous case law that has consistently recognized the difference Parliament intended by using the word "appreciating" in the first branch of the s. 16 test, and "knowing" in the second branch. The

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[82] *Oommen*, at p. 518.

addition of the requirement for rational decision-making does not import into the second branch the degree of insight and understanding that would be required to constitute "appreciating" moral wrongfulness. "Knowing" is a lower standard than "appreciating."

[233] There are two important points to bear in mind from the outset:

(i) This is not a "but for" test resolvable by merely showing that, but for his ASD, Mr. Doe would not have committed these acts.

(ii) "Rational" in this situation refers to the exercise of free will and decision-making, and not to the rationality (or rightness) of the conduct undertaken (in this case mass murder), it being recognized that killing 10 people and injuring 16 can never be said to be a "rational" decision in many senses of that word.

[234] The only expert witness supporting a s. 16 defence for Mr. Doe is Dr. Westphal, so I will deal with his evidence first. I did not find Dr. Westphal to be a reliable witness. He is American-trained and practices there. That does not disqualify him from testifying as an expert in a trial in Canada, but in this case he deliberately refrained from educating himself on the Canadian test for the NCR defence. He justified this by explaining that his job is to provide "psychiatric knowledge to legal aspects," not to opine on the legal consequences. I have no difficulty with the second part of that explanation: his opinion on the legal consequences is irrelevant. However, with respect to the first part of his explanation, it would certainly be more helpful if he directed his psychiatric knowledge to the legal aspects at issue, which would require at least some basic understanding of what those legal issues are. Having failed to inform himself on the Canadian test, he proceeded to direct his evidence throughout on whether Mr. Doe truly "understood" the moral wrongfulness of his actions, and whether he fully "appreciated" the consequences of those acts, which is not the Canadian test. That does not make his testimony irrelevant, but it does make his evidence more difficult to apply.

[235] The second difficulty with Dr. Westphal was his intractability. He did not appear to me to understand that his role as an expert witness was to be impartial and fair in his assessment of the evidence. He referred only to information that supported his conclusions, ignoring anything to the contrary. There were significant aspects of the information he gathered in the course of his assessment that never appeared in his report and were directly contradictory to the opinions expressed in the report. This could have had dangerous implications for the search for truth because in the first instance he also did not disclose his notes or the videotapes of his interviews, all of which were only obtained at the eleventh hour because I ordered them to be produced.[83] In the end, I am satisfied that the issues had a fair airing. However, it is troubling to me that this was necessary. There is no problem with an expert giving an opinion that is different from what an accused said to him, but in a fair report I would expect to see both sides of the evidence and then a reasoned opinion as to why the information offered by the accused was not accepted.

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[83] *R. v. Minassian*, 2020 ONSC 7130; *R. v. Minassian*, 2020 ONSC 7167.

Regrettably, that did not happen here. When confronted in cross-examination with information contradictory to his report, Dr. Westphal was adamant, perhaps even rigid, in defending the language used in his report. Further, his evidence was rambling and often not responsive to the questions asked, particularly in cross-examination.

[236] Frequently, Dr. Westphal spoke only in extremes, without nuance. For example, he testified that Mr. Doe did not have any ability to see things from his parents' perspective or to understand the impact of his actions on them, despite being taken pointedly to things Mr. Doe told him about how he thought his parents had been affected (*e.g.* that they would have been shocked, devastated, felt guilty, asked themselves what they had done wrong *etc*.).

[237] One of the five reasons advanced by Dr. Westphal for finding that Mr. Doe did not "appreciate" the moral wrongfulness of his actions was the fact that he had told his parents during a prison visit that he was optimistic about the prospect of going home and that he believed others would see he had done nothing wrong. This information was provided to Dr. Westphal's team by Mr. Doe's parents. Mr. Doe's father was called by the defence as a witness at trial. The Crown objected to the admissibility of this statement by Mr. Doe being adduced through his father, but I ruled the evidence could be adduced, subject to review at the end of the trial as to what inferences could be drawn from it.

[238] I accept the evidence of Mr. Doe's father that this is what his son said to him. I do not accept that Mr. Doe actually believed either part of this statement. He knew he would not be going home soon. He made a number of statements to his assessors, including to Dr. Westphal, about the fact that he believed he would be in prison for the rest of his life. He also made numerous statements about knowing that his actions would be seen by society as morally wrong. It is possible Mr. Doe was simply lying to his parents and hiding the truth from them, as he had done since his early teens (*e.g.* fantasizing about mass murders, his obsession with Elliot Roger, failing courses at college, his plans to join the military, and planning these attacks). Alternatively, he might have said these things in an attempt to allay their concerns for his welfare (thereby demonstrating some degree of empathy). However, regardless of the reason, I find that Mr. Doe was not being truthful in this statement. It is troubling that Dr. Westphal fastened on this one statement as a foundation for his opinion given that it is totally inconsistent with everything else Mr. Doe said to everybody. In the hours and hours of interviews with the assessors, Mr. Doe never once said that people would know he had done nothing wrong, or that he expected to be released from prison. Indeed, he told everybody else, including Dr. Westphal, the opposite. Not only did Dr. Westphal seize on this one example as evidence of Mr. Doe not understanding his actions were morally wrong, he neglected to ask Mr. Doe about it, and he left all of the other statements out of his report (apart from one passing reference at p. 26 of the report).

[239] Another difficulty with Dr. Westphal's evidence is that, for him, almost everything hinged on Mr. Doe's lack of empathy for his victims and their families. He examined all of the reasons Mr. Doe had advanced for wanting to commit these acts and rejected them all as not being sufficient justification to carry out an act so horrific. He coupled that with Mr. Doe's lack of remorse and concluded that the only explanation possible was that Mr. Doe simply did not get it, that he did not really "understand" the impact of his actions, even though he could articulate what those impacts were. I find this logic to be circular: none of the other reasons provided make sense,

therefore what he said about understanding moral wrongfulness must be rejected, on the theory that if he did truly understand, he could not have done it. I'm not sure what explanation would have sufficed for Dr. Westphal in the face of Mr. Doe's lack of empathy for his victims. Would it be an acceptable reason to carry out these acts if Mr. Doe expressed anger or hatred towards women? Is that a more "sensible" reason than wanting the notoriety and not caring if you die in the process?

[240] All of the experts who testified were clear that Mr. Doe is not a psychopath. He is lacking in empathy, but the clear consensus is that this is because of his ASD. In my view, this does not change the analysis with respect to s. 16 of the *Criminal Code.* Every one of us has, or lacks, empathy to various degrees. The same is true of people who commit crimes, whether it be fraudsters, drug dealers, rapists, child abusers, or murderers. Many of them may lack empathy altogether. However, that does not create a defence under s. 16 of the *Criminal Code.* The question is not whether they took into account the impact on their victim, but rather whether they knew what they were doing was wrong and proceeded to do it anyway. A lack of empathy does not render somebody incapable of knowing right from wrong or of making a reasoned, rational choice. Another difficulty with Dr. Westphal's evidence is that he fails to appreciate that a lack of empathy for victims is not sufficient to ground a s. 16 defence under Canadian law. If it were, not many criminals would ever be convicted of anything. As Dr. Wright noted in his testimony, empathy is not a component of an NCR assessment because it is a different thing entirely from knowing whether something is wrong. He testified that a person could have a lot of empathy for their victim and still have an NCR defence, and likewise, could have an NCR defence without any empathy whatsoever. They are simply different concepts.

[241] All of the experts, including Dr. Westphal, were also clear that Mr. Doe does not have a psychotic disorder of the type typically seen in NCR cases, nor did he suffer from delusions. Dr. Westphal at one point described Mr. Doe's degree of disability as being "almost like a psychosis" and at another point referred to his use of internet sites as being "almost a dissociative state." Without agreeing that Mr. Doe's disability ever did approach that level, suffice to say he was never in a psychotic or dissociative state. The only disorder that could possibly ground a defence under s. 16 would be his ASD. Dr. Westphal also pointed to Mr. Doe's reference to "converting life status to death status" and his lack of emotion during his attack, stating that it was as if he was playing a video game. However, there was no point in time where Mr. Doe experienced a break with reality, where he <u>actually</u> believed he was playing a video game. He always knew that these were real people and he was attempting to kill them. The fact that he did so without showing emotion may well be attributable to his ASD, but it does not mean he did so without a rational mind incapable of making choices.

[242] I turn then to the testimony of Dr. Bradford, who was also a witness for the defence. As I noted above, Dr. Bradford's opinion is that Mr. Doe had the capacity to know his acts were morally wrong, and he does not fit within the conventional parameters of the NCR defence. However, Dr. Bradford went on to state that there could be a "credible basis" for a defence based on Mr. Doe's deficits in cognitive empathy (the ability to perspective-take, or put himself into the shoes of another person) combined with his hyper-focus on internet sites dealing with mass murder and Elliot Rodger. I agree with Dr. Bradford that <u>if</u> there is a defence available, these would be the areas of focus. I also agree with Dr. Bradford, and indeed all of the experts, that Mr. Doe

demonstrates a marked lack of empathy in relation to the victims of his attack, both at the time of the attack and since. I also agree that empathy could be one of the ingredients in moral reasoning. The question is whether Mr. Doe's ASD impairments were sufficient to render him incapable of exercising a rational mind. In my view, notwithstanding his impairments, Mr. Doe was capable of rational thought, particularly given the length of time he spent planning this attack. I share Dr. Bradford's view that the NCR defence cannot be stretched to encompass Mr. Doe's situation.

[243] I do not see that Mr. Doe's fascination with mass murder sites on the internet, or with Elliot Rodger or his ilk, were sufficient to deprive him of an operating rational mind. It may have served to desensitize him to the horror of murder, and to believe there would be some people who would applaud such a crime, thus giving him some encouragement. However, he was nowhere close to delusional, nor was he in a dissociative state. His internet use alone was not sufficient to destroy his capacity for rational decision-making. The question then is whether, when combined with his ASD deficits, the threshold of rationality was crossed. I find that it was not.

[244] Mr. Doe's interest in mass murder was not a new thing. He had been visiting these sites on a regular basis since high school and fantasizing about doing a school shooting. Throughout all of that time, he did not act on his fantasies. Later, when Mr. Doe started following incel sites, and getting more interested in Elliot Rodger, as well as sites featuring mass murders, he was well aware that the material on these sites would be unacceptable to almost everybody. He hid from others what he was doing. He said that he could not tell anyone about this interest because they would not approve and would reject associating with him. Nobody knew: not his best friend, not his brother, not his parents, not even others on the sites, as he hid his true identity when on there. To me, this shows that he was aware of the moral wrongfulness of this material throughout this time.

[245] Mr. Doe was clearly aware that his parents would be disturbed to know what he was planning, which is why he hid this from them. I find Dr. Woodside's evidence on this point to be highly persuasive. Mr. Doe told him that he deliberately tried not to dwell on his parents' likely reaction, because he really wanted to do this act. He also said something similar to Dr. Westphal (although Dr. Westphal chose to ignore it and it does not appear in his report). As Dr. Woodside testified, this is a kind of thinking most of us have done, realizing that there is a bad side to something we really want to do, but deliberately not thinking about that because you really want the good side. He likened it to the behaviour of a pedophile who knows it is wrong to sexually assault a child, and knows that it will be harmful to the child, but puts those thoughts aside because he really wants to perform sexual acts with a child. Whether we approve of the thought process or not, or consider the outcome desired by the accused to be repugnant, the reasoning process is nevertheless the exercise of a free and conscious mind, even though driven by the desire for something repellant to most of us.

[246] Crucial to my conclusion that Mr. Doe was capable of moral reasoning in relation to this attack is the length of time he spent preparing for it. This was not an impulsive act, nor was it an immediate reaction to some triggering action by someone else. This act was carefully thought out and planned over time. The evidence shows that it is in situations where Mr. Doe has ample time to think things through that he is most able to engage in abstract thought and moral reasoning. I recognize that Mr. Doe is also less able to use his intellect to reason his way through moral

problems that are complex or novel. However, he has always been aware intellectually that murder is one of the most morally wrong things a person could ever do. Therefore, the concept of murder being morally wrong was not novel to him, nor was the idea of mass murder. He had been ruminating about mass murder since high school. The moral prohibition against killing people was neither novel nor complex.

[247] Defence counsel argued that Mr. Doe's attack was, in effect, a split-second decision. Mr. Doe was nervous picking up the van, unsure whether he would go through with his plan. He got to the intersection of Yonge and Finch, which was not where he had originally planned to carry out his attack. However, he saw some people at the intersection and suddenly decided to run over them, speeding up, changing lanes, driving up onto the sidewalk, and doing just that. He then continued on his rampage as described. I do not agree that the sudden change in plan to start killing people at this intersection, as opposed to some other location, changes the nature of the attack. There was nothing special about the location other than there would be a lot of people and enough room to drive up on the sidewalk where pedestrians would be. He continued the attack exactly as planned, using the van he had rented weeks before, using the technique he had contemplated, killing as many people as possible, sending the Facebook message linking the attack to the incel movement, and then attempting to induce a police officer to kill him. This was not an impulsive, split-second decision whereby he had no time to exercise rational thought or make a reasoned decision. His decision had been made already. He was now merely carrying it out.

[248] I tend to agree with Dr. Westphal's point that without ASD Mr. Doe would not have committed these offences. Mr. Doe's life would have been quite different if he did not have ASD, and those aspects of his life experience that led him to commit these offences are likely inextricably connected to that diagnosis. I emphasize, however, that establishing a s.16 NCR defence requires far more than this simplistic "but for" test.

[249] On the other hand, Dr. Wright advanced the interesting theory that Mr. Doe's actions might not be as connected to his ASD as everyone seems to accept. He noted quite a few similarities between Mr. Doe and the attributes associated with school shooters, as described in much of the scholarly literature in this area. Dr. Wright referred in particular to the classification system developed by Dr. J. Reid Meloy (and others) in an article written in 2001 and testified that Mr. Doe fit quite well within the category called "classroom avengers."[84] According to Dr. Wright, common characteristics of school shooters include: they are typically seen by their peers as loners; they have a history of being bullied at school; they engage in a lot of fantasy; they are preoccupied with weapons; and they often have served in the military. All of these apply to Mr. Doe, with the possible exception of being obsessed with weapons. The self-image of a school shooter often features self-reproach, another characteristic shared by Mr. Doe. Dr. Wright also testified that the extent to which Mr. Doe is "haunted" by his past failures is unusual for a person with ASD, but quite typical for a classroom avenger. Further, school shooters often fixate on another highly-

[84] Exhibit 40, J. Reid Meloy et. al., "Offender and Offense Characteristics of a Nonrandom Sample of Adolescent Mass Murderers" (2001) 40:6 J. American Academy Child & Adolescent Psychiatry 719 at 723.

publicized mass killing and seek to emulate the perpetrator, and typically described their offences afterwards in a detached and "chilling" manner. Again, these are both features that fit Mr. Doe. Dr. Wright's point is that there may be more than ASD at play here, and more than one explanation for the lack of empathy and emotional connection displayed by Mr. Doe. Either way, however, Dr. Wright did not see the lack of empathy as something that could ground a defence under s. 16 of the *Criminal Code*, and I agree with him in that regard.

[250] I accept that when most people weigh the pros and cons of doing something that could injure somebody else, their empathy for the potential victim would be a factor they would take into account. I therefore also accept that empathy for the victim is one of the factors usually weighed in the balance in moral reasoning. However, I do not accept the submission of defence counsel that this is an equivalent situation to informed consent, where the absence of one piece of information negates the consent. It is the process of reasoning that is at issue when considering a s. 16 defence, and whether the person has the capacity to do so. The weight the person gives to empathy in that reasoning process, including that no weight at all is given to it, will not be sufficient to find that person not criminally responsible under s. 16.

[251] Mr. Doe told Dr. Woodside that he used the incel material to "rev himself up." He really wanted to achieve notoriety and saw a mass murder as the way to achieve fame. He did this consciously and deliberately. As he laid his plans, deciding on a route, renting a van, working out the timing, he also kept everybody in the dark. He knew that if his parents found out they would be shocked and devastated, and would stop him from carrying out his plan. He therefore hid his plans, because he really wanted to go through with the attack. Again, this was a conscious act on his part.

[252] Mr. Doe also kept all his options open. He accepted a permanent job and, on the same day as the attack, filled out employee information forms for his employer. He completed writing the final paper due for his degree requirements, and submitted it the day before the attack. Indeed, he selected the date for the attack based on when he knew he would be finished all of his course requirements. He planned with his brother to go out to celebrate after he graduated. He told assessors he did this because he was worried that he would "chicken out" and not be able to proceed with the attack. Unlike some of the experts who found it strange that Mr. Doe would continue writing a paper after he had already rented the van to carry out this mass murder, I do not find this conduct to be surprising. Although Mr. Doe was doing planning and taking concrete steps towards the fulfillment of his long-standing goal to commit mass murder, he was still in active decision-making mode. If he did not go through with the killing, he needed to get on with his life, and he made plans accordingly. To me, this shows the functioning of a "rational" mind.

[253] Dr. Woodside was cross-examined vigorously as to his lack of experience treating or assessing individuals with ASD and his failure to add another person to the team who was an expert on ASD. This alleged failure does not cause me to disregard or give no weight to Dr. Woodside's opinion. He is a highly-skilled forensic psychologist, clearly qualified to provide an opinion on these issues. He was assisted in his assessment by Dr. Wright who, while not an expert in ASD *per se*, does have quite a bit of experience with persons with that disability, as well as expertise as a forensic psychologist. Further, there was no question about whether Mr. Doe was correctly diagnosed with ASD. The issue was his capacity to "know" his actions were morally

wrong and to make a rational choice. In my view, Dr. Woodside clearly had the expertise to offer such an opinion. On the whole I found his testimony to be fair, balanced, and supported by the evidence.

[254] Dr. Woodside was also cross-examined extensively about the "absence" of any notes of his interviews with Mr. Doe. I accept Dr. Woodside's evidence as to the manner in which he takes notes and writes his reports. It is an unusual method. While interviewing the person being assessed, Dr. Woodside takes notes on his laptop. Instead of separately writing his report, he incorporates his interview notes into the report, and then adds other things. Thus, there are no separate notes from the interviews themselves. Further, any revisions to delete things, amend them, or move them around, would not be apparent to opposing counsel. I fully understand Mr. Bytensky's frustration with being unable to cross-examine by showing inconsistencies between what Mr. Doe told Dr. Woodside and what actually appeared in the report (a technique employed by the Crown when cross-examining Dr. Westphal, with devastating results). I agree with the submission that it would have been preferable for Dr. Woodside to have kept a separate record of his interview notes. However, I reject the suggestion that he did this in order to protect himself from cross-examination. It is merely a habit that he finds convenient and has used for many years. Ultimately, what Mr. Doe told Dr. Woodside is consistent with what he told everyone else, including Dr. Westphal. I do not find this method of writing adopted by Dr. Woodside to undermine the reliability of the information he gathered, nor the reliability of his opinion.

Ultimately, I agree with Dr. Woodside's opinion that Mr. Doe made a "calculated decision" to carry out this attack. Dr. Woodside recognized that Mr. Doe's ASD "likely played a role" in his actions, but stated that the deficits in his moral reasoning did not prevent him from knowing, indeed understanding, how others would view his actions. As Dr. Woodside pointed out, Mr. Doe's stated motivation included a desire to "become infamous/notorious," which he said showed that "at some level, he 'appreciates' that his actions will be seen as 'despicable' by others."[85] I recognize that, in this portion of his report Dr. Woodside puts the test higher than it actually is, finding that Mr. Doe "understood" and "appreciated" the moral wrongfulness of his acts. However, even with that enhancement of the test in Mr. Doe's favour, Dr. Woodside was of the view that Mr. Doe did not meet the requirements of s. 16. I agree with the logic of Dr. Woodside's opinion. It is difficult to see how Mr. Doe can be said to be without insight as to how his actions were morally wrong when he deliberately relied on the horrified reaction of the public and the media to generate fame for himself.

H. CONCLUSION

[255] In this case, Mr. Doe knew it was legally wrong to kill people. He also knew that his plan to run down and kill people constituted first-degree murder and that, if arrested, he would go to jail for the rest of his life. That is why his plan was to "die by cop," death being preferable to jail. Mr. Doe knew that the vast majority of people in society would find an act of mass murder to be

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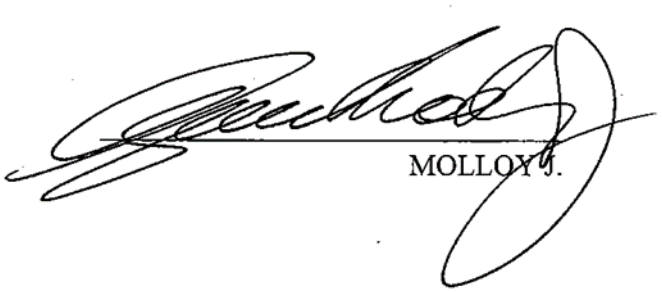
[85] Exhibit 50, Report of Dr. Woodside, at pp. 36-37.

morally wrong. However, he desperately wanted to achieve fame and notoriety, believing even negative attention for his actions would be better than to live in obscurity. He had been fantasizing about a crime such as this for over a decade. He had no direct wish to commit suicide, and would not have done so independent of these offences. However, he believed himself to be a failure, saw no hope for his life in the future, and did not care if he died, as long as he died while achieving fame. He considered the impact it would have on his family, and deliberately set those thoughts aside, ignoring them, because he did not want them to deter him from achieving this important goal. He was capable of understanding the impact it would have on his victims. He knew death would be irreversible. He knew their families would grieve. At various times during his assessments by various experts, he described his actions as being "devastating," "despicable," "shocking," "morally terrible," "a horrible thing," and "irredeemable." Even if he only worked this out intellectually, without truly being able to fully grasp it emotionally or to have empathy, that is sufficient. It still demonstrates that he had a functioning, rational brain, one that perceived the reality of what he was doing, and knew it was morally wrong by society's standards, and contrary to everything he had been taught about right and wrong. He then made a choice. He chose to commit the crimes anyway, because it was what he really wanted to do. This was the exercise of free will by a rational brain, capable of choosing between right and wrong. He freely chose the option that was morally wrong, knowing what the consequences would be for himself, and for everybody else. It does not matter that he does not have remorse, nor empathize with the victims. Lack of empathy for the suffering of victims, even an incapacity to empathize for whatever reason, does not constitute a defence under s. 16 of the *Criminal Code.*

[256] I therefore find that the defence has failed to establish on the balance of probabilities that Mr. Doe was incapable of knowing his actions were wrong within the meaning of s. 16 of the *Criminal Code.* Mr. Doe is criminally responsible for his actions.

[257] Accordingly, I find Mr. Doe guilty on all 26 counts on the indictment.



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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

ALEK MINASSIAN

Defendant

REASONS FOR JUDGMENT

MOLLOY J.

Released: March 3, 2021