ARTICLE

THE DEFENCE OF MENTAL DISORDER: A DIVERGENCE IN THE APPLICATION OF *R V OOMMEN* AMONG CANADIAN COURTS AND THE NEED FOR REFORM

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ABSTRACT

The law recognizes through section 16 of the *Criminal Code* that, in exceptional circumstances, a person may be incapable of possessing the knowledge or intent of wrongdoing necessary to ground criminal liability by reason of mental disorder. For three decades, the Supreme Court of Canada's decision in *R v Oommen* has been the leading case on when the section 16 defence applies, such that an accused may be deemed not criminally responsible on account of mental disorder. This article examines a recently emerging divide in the application of section 16 and *Oommen* among Canadian courts that narrows the class of accuseds who may succeed in raising the defence. It will first summarize the elements of the defence and the principles enunciated by the Supreme Court of Canada in *Oommen*, and the historical foundations that informed the decision. This article will then analyze the shift towards a more narrow application of section 16 and *Oommen*, and explain the fault in this approach in light of the history and purpose of the defence. Finally, this article will propose a law reform that would protect the public, recognize the humanity of those living with mental illness, and resolve the current confusion as to what it means to possess knowledge of wrongdoing.

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INTRODUCTION

Canada's criminal justice system plays a critical role in prohibiting conduct that causes harm or threatens the safety of individuals or the public interest. Its ultimate objective is to maintain a just, peaceful, and safe society.[1] Therefore, criminal law identifies certain behaviours that our society considers to be wrong and deserving of punishment.[2] If found responsible for breaching criminal law, an individual is labelled a "criminal" and penalized by way of imprisonment, a monetary fine, or both.[3]

Proving that a person committed a wrongful act or omission is insufficient to ground criminal liability. Criminal responsibility also requires an "operating mind".[4] The Crown must prove, beyond a reasonable doubt, that at the time of the offence the accused had the intention or knowledge of wrongdoing. This is referred to as "*mens rea*".

The law recognizes that, in exceptional circumstances, a person may be incapable of possessing the necessary *mens rea* by reason of mental incapacity. Accordingly, the *Criminal Code* (the "*Code*") has always exempted such persons from criminal responsibility.[5] The current rendering of this principle is found in Section 16.[6] In essence, the provision permits a person to argue that they are not legally responsible for a crime because a mental illness prevented them from possessing the requisite "guilty mind".[7]

In the leading case of *R v Oommen,* the Supreme Court of Canada clarified that a person must possess both the general capacity to know right from wrong in the abstract sense, as well as the ability to apply that knowledge in a rational way during the alleged criminal act.[8] Otherwise, section 16 applies and the accused is deemed "not criminally responsible on account of mental disorder" ("NCRMD").[9] While initially applied quite liberally in the two decades following *Oommen*, it appears that a number of Canadian courts are now taking a stricter approach to the application of section 16, such that fewer accused succeed in raising a defence of NCRMD. Under this stricter approach, individuals who suffered from delusional symptoms at the time of committing an offence, but who remained aware that society would regard their actions as morally wrong, are exempt from the defence on the justification that they merely have a deviant moral code.

This interpretation of *Oommen* has raised significant concerns among some members of the psychiatric and legal communities. Establishing the requisite elements of the section 16 defence often involves an accused undergoing a comprehensive clinical assessment by a psychiatrist, who then testifies as

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1 *R v M(CA)*, 1996 CanLII 230 (SCC) [*M(CA)*].
2 *Cloutier v Langlois,* 1990 CanLII 122 (SCC) at para 54.
3 *M(CA)*, *supra* note 1 at para 36.
4 Government of Canada, *Response to the 14th Report of the Standing Committee on Justice and Human Rights, Government Responses and Standing Committee Reports*, (2002) [Response to the 14th Report].
5 Marilyn Pilon, *Mental Disorder and Canadian Criminal Law*, PRB 99-22E, revised ed (Ottawa: Library of Parliament, 2002).
6 *Criminal Code,* RSC 1985, c C-46, s 16.
7 Response to the 14th Report, *supra* note 4.
8 *R v Oommen*, 1994 CarswellAlta 121, *1994* CanLII 101 (SCC) [*Oommen*].
9 Response to the 14th Report, *supra* note 4.

to their findings.[10] Specifically, concerns arise both in the narrow context of the evidence required to raise the defence, and more broadly in its ramifications for society and those who are mentally ill.

This paper examines the emerging divide in the application of section 16 and *Oommen* among courts across Canada. I will first summarize the elements of the defence and the principles enunciated by the Supreme Court of Canada in *Oommen.* I will then look to its historical foundations, such as to understanding how the Court reached its decision in *Oommen,* and its intent in doing so. Next, I will analyze the shift away from this intended application and explain why all Canadian courts must return to a more liberal approach in light of the history and purpose of the defence. Finally, I will suggest a law reform that would reduce *Oommen's* confusion and that would protect the public while recognizing the humanity of those suffering from mental illness.

I. WHAT IS THE CANADIAN TEST FOR THE MENTAL DISORDER DEFENCE?

The *Code* provides for a defence of mental disorder by stipulating, in part, that:

> 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.[11]

Therefore, the party raising the issue must show on a balance of probabilities that:

1. The accused was suffering from a mental disorder at the time of the offence;
2. The mental disorder rendered the accused incapable of either a) appreciating the nature and quality of their act or omission, or b) knowing that it was wrong.

A. Suffering from a Mental Disorder

Section 2 of the *Code* defines "Mental disorder" as a "disease of the mind".[12] A person suffers from a disease of the mind if an illness, abnormal condition or disorder impaired their mind and its functioning when they committed the offence.[13] The Supreme Court of Canada defined disease of the mind in *R v Cooper:*

> 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.[14]

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10 Response to the 14th Report, *supra* note 4.
11 *Criminal Code*, *supra* note 6, s 16(1).
12 *Ibid*, s 2.
13 CED 4th, *Criminal Law—Defences,* "Exemption from Conviction" at §41 (March 2023).
14 *R v Cooper*, 1979 CanLII 63 (SCC) at 1159.

B. Knowing the Act was "Wrong"

Oommen is the Supreme Court of Canada's leading case on section 16's second requirement: that a mental disorder rendered the accused incapable of appreciating the nature of their offence or knowing it was wrong.

Oommen concerned the death of Gina Lynn Beaton. Mathew Oommen shot Ms. Beaton between 9 and 13 times while she slept.[15] Mr. Oommen admitted to the killing, but argued he was exempt from criminal responsibility by reason of the mental disorder provision. Mr. Oommen suffered from a mental disorder described to be a "psychosis of a paranoid delusional type".[16] When he committed the offence, his paranoia was fixated on a belief that the members of a local union were conspiring to "destroy him".[17] The night of Ms. Beaton's killing, Mr. Oommen became convinced that such individuals had surrounded his apartment with the intent of killing him. Unfortunately, he came to fear that Ms. Beaton, who requested to spend the night at his home, was also a conspirator commissioned to kill him. When someone rang the buzzers to all the apartments in his building, Mr. Oommen believed it was a signal to Ms. Beaton to kill him.[18]

After killing Ms. Beaton, Mr. Oommen called a taxi dispatcher several times to request the police to his apartment.[19] When police arrived, Mr. Oommen explained that he shot Ms. Beaton because she came at him with a knife, and he had no other choice. He repeated a similar story to his lawyer and other officers.[20] Investigators reported that Mr. Oommen thought the cops were, or ought to be, investigating why Ms. Beaton was trying to kill him.

At trial, psychiatrists testified that Mr. Oommen possessed the general capacity to distinguish right from wrong, and that he knew it was wrong to kill Ms. Beaton.[21] However, his delusion deprived him of that capacity, leading him to believe the murder was necessary and justified. Either he shoot Ms. Beaton, or she would kill him. The Court said that there was little doubt Mr. Oommen's delusions provoked the killing. The availability of the section 16 defence rather turned on the interpretation of the phrase "knowing [the act] was wrong".[22] Specifically, the question was whether, to be found NCRMD, an accused must have the general capacity to know right from wrong, or rather an ability to know that the particular act was wrong in the circumstances.

The trial judge convicted Mr. Oommen of second-degree murder. Although Mr. Oommen subjectively believed his actions were right, the judge held that he was not entitled to the defence of mental disorder because he demonstrated capacity to know society would not hold

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15 *Supra* note 8 at para 1.
16 *Ibid* at para 3.
17 *Ibid* at para 4.
18 *Ibid* at para 7.
19 *Ibid.*
20 *Ibid* at para 8.
21 *Ibid* at para 11.
22 *Ibid* at para 20.

the same belief.[23] The Alberta Court of Appeal set aside the conviction on the ground that the judge erred in his interpretation of section 16(1), and ordered a new trial.[24]

In a decision penned by Justice McLachlin, the Supreme Court of Canada dismissed the Crown's appeal, stating that the evidence could support a conclusion that Mr. Oommen was deprived of the capacity to know his act was wrong by the standards of an ordinary person.[25] The Court stipulated that the section 16 inquiry "embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand".[26]

Justice McLachlin was quick to clarify that no authority requires an accused to establish that their delusion permits them to raise a specific defence, such as self-defence.[27] She explained that:

> …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.

She also distinguished situations where an accused failed to exercise their will, noting that the defence is unavailable to an accused claiming that a mental disorder rendered them incapable of controlling their volition.[28] Further, at paragraph 32, Justice McLachlin wrote that section 16 does not target persons who follow a personal and deviant code of right and wrong. Such persons choose to commit offences despite knowing society would find it wrong.

As such, to be held criminally responsible, an accused must possess both the general capacity to know right from wrong in the abstract sense, as well as the ability to apply that knowledge in a rational way during the alleged criminal act. In applying these principles, the court summarized that:

> ...while the accused was generally capable of knowing that the act of killing was wrong, he could not apply that capacity for distinguishing right from wrong at the time of the killing because of his mental disorder… because of that disorder, Mr. Oommen was deluded into believing that he had no choice but to kill. These findings are consistent with the conclusion that Mr. Oommen's mental disorder deprived him of the capacity to know his act was wrong by the standards of the ordinary person.[29]

In the past 29 years, Canadian courts have cited *Oommen* over 200 times. The Supreme Court of Canada itself has yet to subsequently apply its analysis or provide further comment.

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23 *Ibid* at paras 1, 16.
24 *R v Oommen*, 1993 ABCA 131 at para 30.
25 *Oommen*, *supra* note 8 at para 34.
26 *Ibid* at para 35.
27 *Ibid* at para 30.
28 *Ibid* at para 31.
29 *Ibid* at para 35.

II. WHAT IS THE HISTORY OF THE MENTAL DISORDER DEFENCE AND WHAT PRINCIPLES UNDERLIE *R V OOMMEN?*

To interpret the phrase "knowing [the act] was wrong" in *Oommen*, the Supreme Court of Canada canvassed the history of the current section 16 defence and its roots in the common law.[30] The provision originates from the English "insanity defence", which negated criminal responsibility where an accused was deemed "insane".[31] Prior to 1750, the defence was not carefully considered, mostly due to the view that insanity was some form of demonic possession.[32] As society and science's understanding of mental disorders evolved, so did the case law, culminating in the 1843 British House of Lords decision in *M'Naghten*.[33]

A. The M'Naghten Rules

In *M'Naghten,* the accused was charged with murdering civil servant Edward Drummond.[34] Mr. M'Naghten suffered from paranoid delusions at the time of the assassination, and his trial focused on what constituted a legal defence of insanity.[35] The jury ultimately returned a verdict of not guilty on the ground of insanity, causing significant public outcry.[36] The press described Mr. M'Naghten as a "dangerous lunatic at large" and asserted that such lenience in the justice system would cause chaos.[37] In response to the public's concern, the House of Lords addressed a series of hypothetical questions to the High Court Justices, to which they answered, in part:

> ... the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or it he did know it, that he did not know he was doing what was wrong.[38]

The answer comprised multiple rules, but one often hears reference to the singular M'Naghten "Rule". Dr. Thomas Dalby, explains in his article that this is a contraction of the responses to two of the questions and "relates to the cognitive test of knowledge of right and wrong with persons having a mental disease".[39] Subsequently, the insanity defence became known as the "M'Naghten Rule".

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30 *Ibid* at para 23.

31 The term "insanity" can trivialize, stigmatize, and harm those living with mental illness. I use this term only in reference to the historical name of the mental disorder defence.

32 Anthony M Platt, "The Origins and Development of the "Wild Beast" Concept of Mental Illness and its Relation to Theories of Criminal Responsibility" (1965) 1:1 J Hist Behav Sci 1 355 at 355.

33 *M'Naghten's Case* (1843), 8 ER 718 (UK) [*M'Naghten*].

34 *Ibid* at para 6.

35 *Ibid* at para 9.

36 *Ibid* at para 10.

37 Thomas Dalby, "The Case of Daniel McNaughton: Let's Get the Story Straight" (2006) 27:4 Am J Forensic Psychol 17 at 28.

38 *Ibid.*

39 *Ibid* at para 29.

B. The Canadian Criminal Code

While *M'Naghten* was heavily criticized, several countries continue to apply some basic variation of the Rule as a test for the defence of mental disorder.[40] In Canada, the M'Naghten Rule was incorporated into the *Code* at its inception in 1892. In its first writing, the defence was found under section 11, as an exact adoption of the English Commissioners' provision on the insanity defence and a direct replication of the M'Naghten Rule.[41]

This iteration continued until the 1953-54 amendments to the *Code,* when section 11 was re-enacted as section 16. The most notable change altered the wording in the provision from "*and* knowing that such act or omission is wrong" to "*or* knowing that such act or omission is wrong", therefore broadening the application of the defence.[42] The section read as follows:

> 16.(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
>
> (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
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> (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.[43]

Canada again amended the law in the 1992 *Code.* The word "insanity" was replaced by the words "mental disorder", and a person was no longer referred to as "not guilty by reason of insanity" but rather "not criminally responsible due to mental disorder". Additionally, subsection (3) was repealed on the basis that it was redundant to the main Rule.[44]

The jurisdictions that adopted some variation of the M'Naghten Rule recognized early on that the interpretation of the phrase "knowing that the act was wrong" was a significant issue in its application. In *R v Windle*, England's Court of Appeal held in 1952 that "wrong" did not mean morally wrong, but rather contrary to the law.[45] Other jurisdictions adopted a less stringent interpretation, stipulating that the defence was available when an accused knew his act was contrary to the law, but believed a reasonable person would find his actions morally right.[46]

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40 Gerry Ferguson, "Insanity" in WC Chan, Barry Wright & Stanley Yeo, *Codification, Macaulay and the Indian Penal Code* (London: Ashgate, 2011).

41 Gerry Ferguson, "The Mental Disorder Defence: Canadian Law and Practice" in Ronnie Mackay & Warren Brookbanks, *The Insanity Defence: International and Comparative Perspectives* (Oxford University Press, 2022) [Ferguson, "The Mental Disorder Defence"].

42 *Criminal Code,* SC 1953-54, c 51, s 16.

43 *Ibid.*

44 Ferguson, "The Mental Disorder Defence", *supra* note 41.

45 *R v Windle*, [1952] 2 QB 826 [*Windle*].

46 See *Stapleton v The Queen* (1952), 86 CLR 358 (HC Austl).

The Supreme Court of Canada was historically indecisive in which of these interpretations it adopted. In 1976, in *R v Schwartz,* the Supreme Court followed *Windle.*[47] In 1990, the majority in *R v Chaulk* reversed *Schwartz* stating that the focus of the wrong must be on whether the accused was capable of understanding "that the act [was] wrong according to the ordinary moral standards of reasonable members of society".[48] Chief Justice Lamer wrote:

> The principal issue in this regard is the *capacity* of the accused person to know that a particular act or omission is wrong. As such, to ask simply what is the meaning of the word "wrong" for the purposes of s. 16(2) is to frame the question too narrowly. To paraphrase the words of the House of Lords in M'Naghten's Case, the courts must determine in any particular case whether an accused was rendered incapable, b*y the fact of his mental disorder, of knowing that the act committed was one that he ought not have done*. [Emphasis in original.][49]

Four years later, in *Oommen,* Justice McLachlin summarized that "[a] review of the history of our insanity provision and the cases indicates that the inquiry focuses not on general capacity to know right from wrong, but rather on the ability to know that a particular act was wrong in the circumstances".[50]

III. HOW HAVE CANADIAN COURTS APPLIED THE TEST FOR THE MENTAL DISORDER DEFENCE?

As explained in *Oommen, "*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".[51] As explained below, for the first two decades following the decision, the principles enunciated in *Oommen* were liberally applied; however, in recent years some courts have narrowed the approach.

Regarding *Oommen's* statements that section 16 does not permit an accused to merely substitute their own moral code for that of society, many were under the impression that this principle was not intended to apply to those acting under delusional symptoms.[52] However, it appears that a line of cases has moved towards an interpretation of *Oommen* in which it does. Subsequent decisions have criticized this approach, commenting on what they view to be a misinterpretation of *Oommen.*

The consequence seems to manifest as a divergence of two camps. The first suggests that an individual is NCRMD if they were delusional and believed themselves to be justified in their actions. The second suggests that the same person is only NCRMD if they believe that others would also view their actions as justifiable. Both lines of cases are examined below.

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47 *R v Schwartz*, [1977] 1 SCR 673, 1976 CarswellBC 53.

48 *R v Chaulk*, 1990 CarswellMan 385 at para 104, [1990] 3 SCR 1303 [*Chaulk*].

49 *Ibid* at para 106.

50 *Oommen, supra* note 8 at para 21.

51 *Ibid* at para 26.

52 *Ibid* at para 32.

A. The Initial Liberal Application

In the decade or so following *Oommen,* judicial application of the section 16 test was quite broad. In numerous cases, discussed below, the court permitted the defence in situations where the accused, in his delusional state, believed his acts were "right", despite acknowledging that society would find them morally reprehensible. A key component of the inquiry centred on whether the accused could rationally choose between what was right or wrong.

i. *R v Szostak*

Mr. Szostak was found guilty of criminal harassment and threatening death against his former common law wife, Ms. Młodzianowska.[53] He testified that he was spying on her apartment when his son began calling out for help. Ms. Młodzianowska testified that their son never called for help. Police found the accused banging on the door. In the following days, Mr. Szostak called Ms. Młodzianowska repeatedly to utter threats and derogatory messages. The court ordered an assessment to determine if he was exempt from criminal responsibility under section 16.[54] The psychiatrist found that Mr. Szostak suffered from alcohol-related dementia, which caused delusions.

The trial judge was satisfied that Mr. Szostak believed his actions to be justified "because, in his own mind, given his delusional misperception of a danger to his son, he thought he was entitled to engage in that conduct in order to protect the child".[55] It was of no matter, in the trial judge's reading of *Oommen,* that Mr. Szostak had a general understanding of right versus wrong. His delusion led him to believe that in the circumstances, society would view his actions as "right". In reaching this conclusion, the judge reproduced the following expert testimony:

> ... in my view, he simply wasn't able to accurately gauge the level of risk posed to his son, and in my view, that's why I don't think he knew what he was doing was morally wrong. He felt completely justified in his actions during that time period, both in the telephone calls that he made, as well as appearing at his former spouse's residence.[56]

The trial judge noted the psychiatrist's elaboration that "the accused, confronted with what he perceived to be a danger to his son, was evidently unable to contemplate any rational alternatives to the course of conduct he adopted, which involved intervening immediately by attending at the apartment purportedly to save his son and thereafter by making the threatening phone calls".[57] Therefore, the accused believed his conduct to be entirely justified.

Mr. Szostak appealed the NCRMD finding. In dismissing the appeal, Justice Rosenberg stated the following on behalf of the court:

> 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

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53 *R v Szostak (No. 2),* 2007 ONCJ 393 [*Szostak*].
54 *Ibid* at para 1.
55 *Ibid* at para 16.
56 *Ibid* at para 10.
57 *Ibid.*

> 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.[58]

The accused's knowledge that the act was illegal and that generally, he should not do it, was irrelevant. Justice Rosenberg concluded, "[i]t is possible that a person may be aware that it is ordinarily wrong to commit a crime but, by reason of a disease of the mind, believes that it would be 'right' according to the ordinary morals of society to commit the crime in a particular context".[59]

ii. *R v W (JM)*

Two youths hijacked a school bus and its occupants as part of a plan to coerce the government into allocating them land, where they could accumulate nuclear weapons and "threaten the rest of the world into changing the existing social order".[60] Both were later diagnosed with schizophrenia.

At trial, the medical evidence showed that the youths knew what they were doing was legally wrong, and that society would regard it as morally wrong.[61] A psychiatrist also found that while carrying out the offence, the youth perceived under their delusions that they were acting for the greater good. The judge questioned the reliability of the evidence, but noted that even if given full weight, the defendants failed to meet their section 16 onus because they knew it was morally wrong in the eyes of an ordinary person. The youths appealed. On appeal, the British Columbia Court of Appeal defined the law in the following manner:

> ... the important question is not just whether the accused understood the difference between right and wrong, or their awareness of society's views on those questions in particular circumstances, but whether, notwithstanding those understandings, they were able to make a rational choice between what they knew was legally and morally wrong and what their delusions told them was nevertheless justifiable - or at least desirable in their view of the world.[62]

However, the Court cautioned that *Oommen* did not go so far as to exempt those who understand society's views of morality but do not care, or c*hose* to act contrary to those views from criminal responsibility, as was the case here.[63] The Court upheld the trial judge's decision finding that the youths did not adduce satisfactory evidence demonstrating that they were so driven by their delusions that they could not rationally choose which course to follow.[64]

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58 *R v Szostak*, 2012 ONCA 503 at para 57.
59 *Ibid* at para 59.
60 *R v W (JM), 1*998 CanLII 5612 (BCCA) at paras 1–5 [W *(JM)].*
61 *Ibid* at para 9.
62 *Ibid* at para 28.
63 *Ibid* at paras 30–31.
64 *Ibid* at para 12.

Further, the youth's ability to alter their plan during the offence to better achieve its goals indicated that they were capable of logical choice.[65]

While the section 16 defence did not apply, the decision clarified that an accused is not barred from its application because he knew an ordinary person would find it wrong, but rather because he retained capacity to make decisions despite his delusions.[66]

B. Divergence from the Liberal Application

The novel and narrower interpretation of *Oommen* began to surface in the 2010s. A selection of the most controversial of those decisions are discussed below.[67]

i. *R v Campione*

Ms. Campione had a history of mental illness and delusional conduct, and became convinced that her husband and his family were part of a conspiracy to "eliminate and replace her".[68] Ms. Campione expressed concern that her mental illness was being used in a custody battle over her two daughters, and once stated, "[i]f I can't have the kids, no one else can".[69] She later drowned both girls in the bathtub and attempted suicide. Afterwards, in a video recording, Ms. Campione spoke of how she wanted to "take [her] babies to the safe haven" and how only God could protect her and them from her violent husband.[70] She was unsuccessful in raising an NCRMD defence.

On appeal, Ms. Campione submitted that the trial judge erred in "providing confusing and unnecessary directions to the jury on the meaning of "moral wrongfulness" by incorporating a passage from the decision in *R v Ross…*"[71] The impugned passage in the charge stated:

> 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.[72]

The defence argued that this over-emphasized the measure of the accused's acts against societal standards, which may cause jurors to misunderstand the application of *Oommen.* The defence argued that "an accused who honestly believes his or her actions are morally justifiable in line with normal societal standards, still qualifies for an NCRMD defence no matter how unreasonable that belief may be".[73] The Court disagreed, describing its interpretation of the "wrongfulness" inquiry at paragraphs 39-41:

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65 *Ibid* at para 33.
66 *Ibid* at para 36.
67 Other cases, while not summarized in this paper, have been noted as part of this divergence: See eg, *R v McBride,* 2018 ONCA 323; *R v Baker,* 2010 SCC 9.
68 *R v Campione,* 2015 ONCA 67 at para 11 [*Campione*].
69 *Ibid* at para 11.
70 *Ibid* at para 18.
71 *Ibid* at para 26.
72 *Ibid* at para 32.
73 *Ibid* at para 36.

> The ultimate issue for the jurors to determine was whether - in spite of her delusions and any honest belief in the justifiability of her actions - the appellant had the capacity to know that those actions were contrary to society's moral standards. The centrepiece of the inquiry is her capacity to know and to make that choice; it is not the level of honesty or unreasonableness with which she may have held her beliefs. Concentrating on the latter unduly complicates the inquiry for the very reason the appellant raises in support of her argument; it leads to the application of reasonableness considerations to the appellant's delusions and subjective belief.
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> …
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> 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 NCRMD 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.[74]

In finding the passage was a correct presentation of the defence, the appeal was dismissed.

ii. *R v Dobson*

Perhaps the clearest divergence was in *R v Dobson*.[75] Mark Dobson was charged with two counts of first-degree murder after killing two friends and attempting to kill himself. The trio previously agreed to die by suicide together "so that their souls would travel to a different, divine world".[76] Mr. Dobson claimed that satanic beings guided him in the murder-suicide. He advanced the section 16 defence, arguing that he suffered from a significant mental disorder that rendered him incapable of knowing his actions were wrong in the circumstances.

The facts were undisputed, including that Mr. Dobson suffered from a severe mental disorder that was causally related to the murders. The trial judge heard evidence from four psychiatric experts. While all agreed that Mr. Dobson knew it was legally wrong to kill at the time of the murder, they disagreed as to whether he knew such actions were "morally" wrong.[77] The judge convicted Mr. Dobson on the basis that the "wrongness" inquiry must ask whether the accused "had capacity to understand that his actions, in the specific circumstances, would be regarded as wrong according to the moral standards of reasonable members of society".[78] In regard to Mr. Dobson, the judge answered in the affirmative.

The court of appeal reproduced the following passage summarizing the trial judge's understanding of "knowing that it was wrong":

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74 *Ibid* at paras 39–41.
75 *R v Dobson,* 2018 ONCA 589 [*Dobson*].
76 *Ibid* at para 3.
77 *Ibid* at para 6.
78 *Ibid* at para 8.

> Under the second branch of section 16(1), the term "wrong" refers to morally wrong, that is to say, contrary to the ordinary moral standards of reasonable men and women. What is "morally wrong" is not to be judged by the personal standards of the person charged, but rather, by his or her awareness that society regards the conduct as wrong. In other words, the exemption extends only to those accused of crime who, because of a mental disorder, are incapable of knowing that society generally considers their conduct to be immoral.[79]

A primary issue on appeal was whether the trial judge erred in that interpretation. While both sides agreed *Oommen* was the leading authority on the meaning of "wrong" in section 16(1), they had substantially different takes as to what it said.

The defence submitted that an accused only knows an act is wrong if they are capable of making a rational choice. Because Mr. Dobson was in a delusional state, he was incapable of making a rational choice and therefore was incapable of knowing his act was "wrong". Counsel cited the following excerpts of *Oommen* in support:

> 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.
>
> …
>
> 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.[80]

The Crown disagreed, submitting that *Oommen* states an accused can only be NCRMD if he lacked the capacity to know society would regard his act as morally wrong.[81] A court may not assess capacity with sole reference to an accused's delusional perceptions. It is insufficient that an accused believed his acts were right according to his own moral code, by reason of his delusional state. Interestingly, the Crown cited different passages of *Oommen* than those of the defence:

> …[t]he 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…
>
> …

79 *Ibid* at para 7.

80 *Ibid* at para 18, citing *Oommen* at paras 26, 30.

81 *Ibid* at para 19, citing *Oommen* at paras 30, 32.

> 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 were wrong in the eyes of society, and despite such knowledge, chooses to commit them.[82]

The Ontario Court of Appeal's decision suggested that various extracts of the Supreme Court's decision in *Oommen* may attract different interpretations. However, the court ultimately sided with the Crown's interpretation, which it found consistent with an "unbroken line of authority in this court".[83]

Justice Doherty's approach presupposes that a subjective, but honest belief that an act is justified is insufficient to find a person NCRMD. It is not enough that the accused could personally justify their actions. Regardless of any delusions or honest belief, their mental disorder must also render them incapable of knowing their actions were contrary to society's moral standards. The inquiry should not focus on whether the accused's subjective beliefs and delusions were reasonable. Justice Doherty summarized this position as follows:

> … 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 know right from wrong. As a result, he is not NCRMD, even if he believed that he had no choice but to act, or that his acts were justified. However, an accused who, through the distorted lens of his mental illness, sees his conduct as justified, not only according to his own view, but also according to the norms of society, lacks the capacity to know that his act is wrong. That accused has an NCRMD defence. Similarly, an accused who, on account of mental disorder, lacks the capacity to assess the wrongness of his conduct against societal norms lacks the capacity to know his act is wrong and is entitled to an NCRMD defence.[84]

Mr. Dobson's evidence failed to convince the judge that "he did not have the capacity to know that his actions would be viewed as morally wrong in the eyes of reasonable members of the community".[85] As such, the Court of Appeal concluded that the judge did not err in interpreting the meaning of "wrong" in the manner reflected in the higher court's

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82 *Ibid.*

83 *Ibid* at para 22 (referring to *Campione, R v Ross*, 2009 ONCA 149 [*Ross*], *R v Woodward*, 2009 ONCA 911 [*Woodward*], *R v Guidolin*, 2011 ONCA 264 [*Guidolin*] and *Szostak*. Justice Doherty does not explain how each case support the Crown's contention, and respectfully, in my view they do not, as the cited paragraphs simply comprise general restatements of the legal principles in *Oommen* with minimal guidance on their application. Neither do they purport to deviate from *Oommen*. As such, I do not find such cases to warrant discussion here).

84 *Ibid* at para 24.

85 *Ibid* at para 30.

jurisprudence post-*Oommen*.[86] The Crown filed to appeal to the Supreme Court of Canada, but the appeal was never heard. *Dobson* was subsequently followed by other courts, most notably in *R v Mann.*[87]

iii. *R v Mann*

Balwinderpal Mann was charged with threatening to kill his father and nephew. Upon arrest, he told police that he knew what he was saying and that it was wrong. A psychiatric report noted Mr. Mann suffered from schizophrenia that rendered him unable to appreciate the nature or wrongfulness of his acts.[88]

The trial judge found Mr. Mann NCRMD based on his incapacity to make rational choices, relying on the passage in *Oommen* which states that the accused "must possess the intellectual ability to know right from wrong in an abstract sense but must also possess the ability to apply that knowledge in a rational way to the alleged criminal act".[89] He concluded that:

> …While it may be that the accused was aware that he was threatening both his father and nephew at a basic level, I find however I am satisfied that it is also at least more likely than not that at the time he did so he was not criminally responsible because due to his disease he had an impaired ability to exercise rational choice that reflected the reality of the situation around him. That lack of capacity grew out of his mental disorder and as a result he could not truly access the fact that his conduct was morally wrong in the circumstances.[90]

On appeal, a primary issue was whether the trial judge applied the wrong test for a finding under section 16.[91] In overturning the decision, Justice Durno noted that the trial judge did not have the benefit of the newly decided *Dobson* and applied a misinterpretation of *Oommen*. He stated:

> Whether regarded as a restatement of the morally wrong criteria (a view I share with the appellant) or as new law, *Dodson* [sic] is clear that the "narrow" test adopted by the *Dodson* [sic] trial judge is a correct statement of the test, a test that does not include the capacity to make rational choices.[92]

Justice Durno concluded that by relying on the fact that Mr. Mann's schizophrenia robbed him of the capacity to make a rational choice; the trial judge applied the wrong test.[93]

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86 *Ibid.*
87 *R v Mann,* 2019 ONSC 1949 [*Mann*].
88 *Ibid* at para 12.
89 *Ibid* at para 30.
90 *Ibid* at para 37.
91 *Ibid* at para 16.
92 *Ibid* at para 78.
93 *Ibid* at para 79.

iv. Other Notable Applications of *Dobson*

This paper does not purport to discuss each case in detail, but it is significant that a number of other Ontario courts have cited and followed Justice Doherty's interpretation of *Oommen* in analyzing the applicability of section 16 to an accused.[94]

While Ontario provides the earliest and most notable divergence in the interpretation of *Oommen,* this narrower application appears to be making its way to other provincial courts as well. For example, Justice Doherty's pronouncement in *Dobson* that an accused "is criminally responsible if he has the capacity to know that society regards his actions as morally wrong and proceeds to commit those acts, even if he believed that he had no choice but to commit those acts or considered them justified" was recently cited in Saskatchewan in *R v CL*, 2022 SKQB 10 at para 62.[95]

C. Judicial Response to the Narrower Application

Subsequent Ontario cases have commented on this divergence as being a misinterpretation of *Oommen.* Lower courts in that province have considered whether they are bound by the higher provincial judgments at the Ontario Court of Appeal, or *Oommen* at the Supreme Court of Canada level. Most notably, in *R v Minassian,* the Ontario Supreme Court heavily criticized *Dobson* for what it viewed to be a misinterpretation of *Oommen.*[96]

i. *R v Minassian*

On April 23, 2018, the accused, Mr. Doe, drove a van into pedestrians on a sidewalk on Yonge Street in Toronto killing and injuring numerous people.[97] Mr. Doe raised the defence of not criminally responsible within the meaning of section 16.

Mr. Doe was assessed by a number of experts. Each agreed that he was on the autism spectrum, and that some people with Autism Spectrum Disorder ("ASD") have intellectual impairments. However, the judge found that Mr. Doe did not have any cognitive impairments and was rather above average in intelligence. The experts agreed he was not psychotic, nor was he suffering from delusions during the attack. He fully appreciated his actions were legally wrong.

Justice Molley thoroughly reviewed the underlying principles of section 16(1). While ultimately finding the defence was unavailable to Mr. Doe, a number of points regarding the interpretation of *Oommen* and criticisms of the Ontario Court of Appeal's approach are worth noting. Justice Molley stated her opinion that four key principles emerge from *Oommen:*

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;

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94 See *R v Pereira,* 2019 ONSC 4321 at para 106–107. See also *R v Gancthev,* 2021 ONSC 545 at para 111.

95 See *R v Lamontagne,* 2021 NSSC 44 at para 36. See also *R v Mann,* 2018 BCSC 2412 at paras 151–152.

96 *R v Minassian,* 2021 ONSC 1258 [*Minassian*].

97 At paragraph 4 of her decision, Justice Molley of the Ontario Supreme Court placed great emphasis on the fact that the accused committed this horrific crime for the purpose of achieving fame, and therefore refused to use his name in her Reasons for Judgment. As such, I refer to the accused in the same manner that she did, as John Doe.

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;

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; and

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.[98]

She then acknowledged that in *Dobson* the Ontario Court of Appeal suggested *Oommen* was previously misinterpreted in requiring that the meaning of "wrong" in section 16(1) include, as a component, the capacity for rational choice.[99] Both counsel in *Minassian* expressed a view that the decision in *Dobson* was incorrect in law, and inconsistent with both the binding Supreme Court of Canada decision in *Oommen,* as well as other decisions of the Ontario Court of Appeal. Justice Molley agreed, explaining that each case cited in *Dobson* in support of its particular interpretation of *Oommen* actually supports the contrary view, that section 16 is available to an accused who is delusional and believed himself to be justified in his actions, regardless of what he thought society would think.[100]

Recognizing that despite not examining the "capacity to rationally decide" issue that arose in *Oommen,* the trial judge in *Dobson* never rejected it; instead his decision turned on his findings of fact.[101] The trial judge was not satisfied that Mr. Dobson was in a psychotic state during the killings. As such, whether Mr. Dobson thought his own conduct to be morally right was irrelevant.[102] Justice Molley stated that the trial judge's observations concerning the veracity of Mr. Dobson's evidence on his knowledge of wrongdoing were rather immaterial to his ultimate decision. Despite this, the Court of Appeal focused on this very issue, explicitly affirming its acceptance of the Crown's interpretation of *Oommen* reproduced above.[103]

Justice Molley disagreed. She stated that a delusion depriving an accused of the ability to make a "rational" choice about his actions is not the same as acting on one's "own moral code" and explained:

> … [I]f 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,

98 *Ibid* at para 58.
99 *Ibid* at para 60.
100 *Ibid* at paras 67–78 (regarding the decisions in *Ross, Woodward, Guidolin, Szostak* and *Campione*).
101 *Ibid* at para 79.
102 *Ibid* at para 80.
103 *Ibid* at para 82.

> it is hard to imagine a scenario in which he would 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*… *Oommen* requires more than the intellectual knowledge that reasonable members of society would consider killing someone to be morally wrong.[104]

Ultimately, Justice Molley held that Mr. Doe's ASD did not deprive him of the capacity to rationally evaluate his actions, but rather he willingly chose not to comply with societal and legal norms.[105]

ii. Other Notable Criticism

Recent decisions of the Ontario Court of Justice have also denounced the expression of the law in *Dobson.* For example, in *R v Cheng*, 2021 ONCJ 248, the court endorsed Molley J.'s statement that the decision was incorrect at law and inconsistent with the Supreme Court of Canada's binding decision in *Oommen.*

IV. ANALYSIS OF THE DIVERGENCE

From canvassing the above case law, particularly that of Ontario in the past decade, some courts appear to be shifting towards a stricter application of the section 16 inquiry stipulated in *Oommen.* Specifically, a line of cases now interprets *Oommen* as precluding an accused from being found NCRMD where they have substituted their own moral code for that of society, even where that substitution was caused by delusions occasioned by a mental disorder.

This issue raises two important questions. First, whether this narrower application of *Oommen* is merely a function of the evidence presented in each case or a function of the courts interpreting and applying the law differently. Should it be the latter, the next question is which approach is correct, if either.

A. A Function of Evidence or Law?

In *Minassian,* Justice Molley suggested that what some perceive to be a discrepancy in the application of *Oommen* is simply a function of the specific evidence presented in each case. For example, in her opinion, no statement in *Campione* was inconsistent with the law as presented in *Oommen.* She further noted that the charge to the jury, which stated 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…", was caveated by including 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".[106] While the Court of Appeal in *Campione* acknowledged that the psychiatric evidence presented by the defence's expert could have supported an NCRMD verdict, it remained open to the jury to decide whether it accepted his evidence. Therefore, the statement of the law in *Campione* was in itself consistent with that in *Oommen.* However, based on the evidence,

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104 *Ibid* at para 84.

105 *Ibid* at para 205.

106 *Minassian, supra* note 94 at para 78.

the jury did not accept that Ms. Campione honestly believed that killing her children was the only way to keep them safe. The jury rather concluded that she knew killing her children was wrong in the circumstances.

This paper agrees with Justice Molley that in some cases, what others may view as a narrower application of the test resulting from a misstatement of the law in *Oommen* is simply a consequence of the evidence presented by the accused and that which was accepted by the trier of fact. However, other decisions, particularly that of *Dobson* and the line of cases following it, demonstrate a concerning stray from the principles stipulated in *Oommen.* Recall that in *Dobson,* the Ontario Court of Appeal accepted the Crown's submission that *Oommen* does not stand for the proposition that an accused, who in his delusional state believed his actions were "right", lacked the capacity to know right from wrong. This statement that *Oommen* does not allow an accused's delusions to be the basis for finding him NCRMD clearly differs from earlier decisions discussed above, which do appear to make such an interpretation.[107] Stated another way, the *Dobson* line of authority has deviated from requiring only that the accused was unable to rationally evaluate his actions. It necessitates a further expectation by the accused that a reasonable person in his position would have characterized his actions as justifiable.

B. Which Approach is Correct?

Having determined that the *Dobson* line of cases constitutes a different application of section 16 from those decisions penned in the two decades following *Oommen,* one must ask which interpretation is correct. That is, have earlier decisions misinterpreted the Supreme Court of Canada's statement of the test in *Oommen,* or did the court in *Dobson* unjustifiably digress from case law to write its own novel statement of the law? This paper holds that it is *Dobson* that has incorrectly interpreted *Oommen.*

i. The Purpose of the Mental Disorder Defence

Oommen must be interpreted in light of section 16's history and purpose. Before inflicting punishment for a crime or labelling an individual a criminal, Canadian criminal law requires proof that the accused, or a reasonable person in their position, had the intention or knowledge of wrongdoing.[108] Section 16 therefore shields individuals whose mental disorders prevent them from making rational choices from criminal responsibility.

There are many misconceptions as to what it means for an offender to be found not criminally responsible.[109] Some express concern that such persons "get away with" a crime or are afforded liberties that endanger the public.[110] However, an NCRMD verdict is

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107 See *W (JM)* (stating that *Oommen* permits an accused to be found NCRMD, despite being aware of societal views, if "their delusions told them it was nevertheless justifiable - or at least desirable in their view of the world").

108 Response to the 14th Report, *supra* note 4.

109 Community Legal Assistance Society, "Getting away with it": misconceptions about the mentally ill in the criminal law context" (25 September 2014), online: <https://clasbc.net/getting-away-with-it-misconceptions-about-the-mentally-ill-in-the-criminal-law-context/> [https://perma.cc/6CRU-WK24].

110 *Ibid.*

not an acquittal. Rather, it triggers an administrative process that gives effect to society's interest in protecting the public, while also ensuring that morally innocent offenders receive treatment rather than punishment.[111]

A provincial or territorial body, often known as a "review board", generally takes jurisdiction over the offender.[112] The options available to such boards range from ordering that the person remain in supervised community living, to ordering secure detention in a psychiatric facility. Such arrangements are in place until discharge requirements specified by the *Code* are met. Specifically, an absolute discharge is only permissible where the person no longer poses a significant threat to the safety of the public.[113] Further, research demonstrates that individuals found NCRMD experience greater restriction than those otherwise convicted, and are 3.8 times more likely to be detained than convicted offenders, and 4.8 times less likely to be released from detention.[114]

The purpose of this administrative process is to provide the offender appropriate care, while also controlling any potential threat to public safety. The majority of persons found NCRMD remain in the forensic psychiatric system indefinitely, under constant surveillance and treatment.[115] Trevor Aarbo was a senior director of patient care services at British Columbia's Forensic Psychiatric Hospital, where many individuals are admitted for treatment after an NCRMD verdict. He described the purpose as being to "treat people as patients, not criminals, so their symptoms can be managed… to provide treatment, and give them skills and rehabilitation so they can re-enter the community safely - while protecting the public".[116]

The Supreme Court of Canada has not specifically reconsidered its statements in *Oommen* regarding section 16. However, in the 2011 case of *R v Bouchard-Lebrun*, the Court re-emphasized the underlying principle that criminal responsibility must only be imposed where an individual can distinguish right from wrong, and rationally choose between the two under their own free will.[117] As such, one must proceed noting that the Supreme Court of Canada's position on exacting criminal responsibility remains unchanged.

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111 Government of Canada, "The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study" (last visited 1 January 2024) online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/p1.html> [https://perma.cc/77WU-RZWL].

112 *Ibid.*

113 *Criminal Code*, *supra* note 6, s 672.54.

114 Sandrine Martin et al, "Not a "Get Out of Jail Free Card": Comparing the Legal Supervision of Persons Found Not Criminally Responsible on Account of Mental Disorder and Convicted Offenders" (2022) 12:775480 Front Psychiatry 1.

115 Response to the 14th Report, *supra* note 4.

116 BC Mental Health & Substance Use Services, "What does it mean to be 'not criminally responsible' for a crime?" (24 July 2019), online: <http://www.bcmhsus.ca/about/news-stories/stories/what-does-it-mean-to-be-%E2%80%98not-criminally-responsible%E2%80%99-for-a-crime#:~:text=In%20B.C.%2C%20a%20court%20determination,the%20general%20public%20stay%20safe> [https://perma.cc/CR7T-G8S2].

117 *R v Bouchard-Lebrun*, 2011 SCC 58 at para 49.

ii. The Problems with *Dobson*

Dobson incorrectly interprets the law in *Oommen* and deviates from the purpose of the section 16 defence. The decision makes an arbitrary distinction among persons with mental illness and leaves an unduly narrow set of circumstances for an NCRMD verdict.

Dobson is most problematic in that it precludes an NCRMD verdict for an accused who believed he had no choice but to act, or that his acts were justified, but knew that society would regard the act itself as morally wrong. The court explicitly accepted the Crown's interpretation of *Oommen,* which was selective in omitting the passages of the decision that address the need to determine whether the accused, despite his mental disorder, retained capacity to exercise judgment or make rational choices. In doing so, *Dobson* places an unreasonable emphasis on an accused's conscious awareness of society's morality, when the question of whether he was able to willingly *exercise* that understanding is in fact at the crux of the inquiry. Such a distinction significantly narrows the circumstances under which the defence applies, especially for egregious crimes. Both courts in *Minassian* noted that this restriction renders the defence of little meaning in cases involving crimes like murder. In this regard, Justice Molley stated:

> 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 qualify of his act (killing someone) and knew that it was legally wrong, it is hard to imagine a scenario in which he would be incapable of knowing that society would regard it as morally wrong.[118]

Recall *Chaulk,* where the court agreed that "wrong" in the context of section 16 meant more than "legally wrong". This position was endorsed in *Oommen* and was part of the history that the Court relied on in formulating the section 16 test. Thus, it seems counterintuitive to interpret *Oommen* in a manner that renders the principle irrelevant. Such an interpretation also makes an arbitrary distinction amongst individuals with mental disorders. Regardless of whether an accused thought society would think it wrong, if they suffered from a delusion which led them to believe their actions were nevertheless justified, that accused still acted outside his own volition by reason of his mental illness. Presumably, but for the delusions caused by the illness, they would not have committed the act. Committing a crime by reason of a delusional state cannot be equated to a psychopath acting by their own deviant moral code, which is what *Dobson* purports to do.

C. Proposed Reform to Judicial Application of the Law

i. The Root of the Problem

While this paper argues that *Dobson* is an incorrect statement of the law set out in *Oommen,* it also recognizes the difficulties inherent in the language of our leading case that occasioned such a divergence. It is clear from the above discussion that both courts and lawyers face difficulty in applying *Oommen.*

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118 *Minassian*, *supra* note 97 at para 84.

First, counsel often direct the court to different passages of *Oommen* in support of opposing positions. The Crown tends to emphasize those paragraphs that note section 16 does not apply to an accused with a deviant moral code. Contrarily, defence counsel seem to focus more on those paragraphs explaining that even if an accused was generally capable of knowing his actions were wrong, he may be NCRMD because his mental disorder deluded him into thinking he was justified in not applying that knowledge. Further, lengthy discussions of *Oommen* in many of the subsequent decisions evidence a grappling by judges to reconcile conflicting statements.

What is needed is a restatement of the law concerning the application of section 16 that denounces *Dobson* and prevents any future interpretation of *Oommen* as observed in that line of authority. The new approach must reflect a return to the first principles. It must effectively balance the rights of persons living with mental illness and the need to protect society, while supporting victims, their families, and witnesses.

A more liberal approach is supported by the history and purpose of section 16, as well as research pertaining to NCRMD verdicts. Notably, violent crimes account for approximately 8% of all NCRMD cases.[119] The majority of that 8% had a diagnosis on the psychosis spectrum, and their victims were almost always family members. Studies also conclude that persons found NCRMD, who were subsequently discharged following successful treatment, have very low rates of recidivism, especially in the context of violent crimes when compared to long-term offenders released from federal custody.[120]

The Mental Health Commission of Canada alerts us to the stigma surrounding mental illness and the difficulties in encouraging those suffering to seek treatment.[121] When a person with mental illness commits a serious crime, the best indicator of their likelihood to reoffend is whether they received subsequent treatment. This suggests that the most effective method of preventing future offences, and keeping the public safe, is to capture a wider range of offenders with some form of mental illness under section 16, such that they might be rehabilitated. The alternative is spending a determinate time in the prison system, culminating in a return to society, untreated.

Finally, it is concerning that once found guilty of a serious offence, an offender is often subject to a mandatory minimum penalty.[122] If that person was mentally ill, but in a manner insufficient to satisfy section 16, no weight may be given in sentencing to any contributing role of mental illness where the offence carries a life sentence.

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119 Mental Health Commission of Canada, "Fact Sheet: About the Not Criminally Responsible Due to a Mental Disorder (NCRMD) Population in Canada" online (pdf): <https://www.mentalhealthcommission.ca/wp-content/uploads/drupal/MHLaw_NCRMD_Fact_Sheet_FINAL_ENG_0.pdf> [https://perma.cc/45PL-3DEH].

120 *Ibid.*

121 *Ibid.*

122 Government of Canada, "Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models" (last visited 1 January 2024) online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html> [https://perma.cc/HD2L-MASW].

ii. The Proposed Solution

Upon finding that an accused has a mental disorder, the court must ask whether he was capable of "knowing [the act] was wrong". In *Oommen,* the court suggested this was a two-part inquiry. First, the court must ask whether the accused possessed the cognitive ability to know right from wrong. Then, it must ask whether, despite his mental disorder, the accused retained a capacity to apply that knowledge to the particular circumstances of the offence.

In considering the former, I propose that the court ask whether the accused was generally aware that the act they committed was legally wrong. The latter focuses on the accused's ability to make a rational *choice* between right and wrong. If an accused's delusions led them to believe he was right to commit the act in the circumstances they perceived, then this requirement is not satisfied. Merely demonstrating that the accused had a general understanding of right and wrong, and that they knew their actions were illegal, will not suffice in establishing criminal responsibility. However, the defence will not be available should both questions be answered in the affirmative.

A point of contention has been applying the principle that section 16 does not apply to an individual acting under their own deviant moral code. In this regard, an accused acting under delusional symptoms is not substituting their own moral code for that of society. If a delusion rendered an accused unable to conceive of any rational alternative to the course of action they chose, they could not choose between right and wrong. Seeing no other option, such an accused believed themselves to be justified in their conduct.

I would go further in arguing that the defence should apply where an accused believed their acts were right according to their own "moral code" because of their delusional state. In my view, this situation differs from, and should not fall within, the exemption for psychopaths with a deviant moral code. Such individuals follow a deviant code by choice, not because delusions prevent them from knowing society would view their acts as wrong. Therefore, under this formulation of the test, an accused's delusions can be the basis for the NCRMD verdict if they affected his perception of reality such that he believed his actions were right in the circumstances.

CONCLUSION

It is a fundamental principle of Canadian law that criminal responsibility requires intention or knowledge of wrongdoing, and that those incapable of making a rational choice because of mental disorder are exempt under section 16 of the *Code.* While once applied liberally, recent case law demonstrates an exceedingly restrictive approach to the governing principles in *Oommen.* This approach, stemming from the decision in *Dobson,* fails to properly consider a mentally ill accused's capacity to exercise judgment and make rational choices and, as such, fails to reflect the history and purpose of the defence. Further, it constrains the application of modern psychiatric knowledge.

To resolve such discrepancies, I argue that one must look to first principles, which support a liberal application of the test. I propose that a court first ask whether the accused was cognitively capable of understanding the difference between right and wrong, then determine whether the accused was capable of applying that knowledge in the circumstances of the

offence. The latter is the heart of the inquiry and a question of whether the accused could rationally choose between right and wrong. The court should ask if the accused suffered from delusions as a result of his mental disorder. If so, the next question should be whether those delusions rendered him incapable of making a rational choice. Should the accused have believed, as a result of his delusions, that there was no other option in the circumstances than to commit the offence, then he was incapable of doing so and the defence should apply.

Perhaps nothing I propose is novel, but rather precisely outlines the range of circumstances Justice McLachlin intended the defence to apply to when she penned *Oommen*. However, to dispel the confusion and unreasonably narrow application of the test that exists, there must be a more clear and concise statement of the law. Particularly, one which clearly provides that delusions *can* be the basis for an NCRMD verdict. Such an application of section 16 is consistent with its history and purpose, as well as modern research pertaining to the presentation and treatment of mental illness.