# Court of Queen's Bench of Alberta

**Citation: R v Starrett, 2022 ABQB 442**

**Date:** 20220629
**Docket:** 191479732Q1
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

Crown

- and -

**Damien Christopher Starrett**

Accused

## Restriction on Publication

**Identification Ban** – See the *Criminal Code*, section 486.5.

By Court Order dated March 21, 2022: (1) Information that could identify the five-year old daughter of the Accused shall not be published, broadcast, or transmitted in any way. Identifying information includes any specific personal, demographical, or geographical information. (2) No person shall publish, broadcast, or transmit in any way the contents of the publication ban application or the evidence, information, or submissions at the hearing of the application.

This Court Order does not apply to the publication of identifying information that relates to the Accused or the deceased child victim.

**NOTE:** Identifying information has been removed from this judgment to comply with the ban so that it may be published.

**Reasons for Decision**
**of the**
**Honourable Mr. Justice John T. Henderson**

## I. Overview

[1] Damien Christopher Starrett is charged with second-degree murder in relation to the death of his one-year old son, Ares Starrett (Ares).

[2] Mr. Starrett is also charged with an assault on his five-year old daughter, whose name is protected by a publication ban. In these reasons, I will refer to Mr. Starrett's daughter simply as "Mr. Starrett's daughter" or "the young girl." I will refer to the mother of the children as Mr. Starrett's "then common-law spouse."

[3] On November 23, 2019, at approximately 6:30 PM in Fort Saskatchewan Alberta, Ares was the victim of a vicious act of extreme violence. The perpetrator punched, kicked, and stomped this very vulnerable child in the head and facial areas multiple times. The attack resulted in right and left-sided skull fractures, fractures at the base of the skull, and extensive bruising to the face and scalp. One portion of the skull became displaced and was forced across and beneath the skull on the right side of the head. The displaced skull bone sheared off a portion of the right side of the brain. Within a few minutes, Ares died due to blunt cranial trauma.

[4] Mr. Starrett's daughter was also assaulted by the perpetrator, who struck her in the side of the head with a closed fist on at least two occasions. This resulted in bruising and bleeding to the side of the head and facial areas.

[5] The Crown argues that Mr. Starrett was the perpetrator of the violence. Given the evidence tendered at trial, the Crown concedes that it cannot meet its burden in relation to the *mens rea* for second-degree murder. As a result, the Crown seeks a conviction for manslaughter in relation to Ares' death. The Crown also seeks a conviction for common assault in relation to the attack on the young girl.

[6] Mr. Starrett argues that he was not criminally responsible for the attacks on his children. He submits that the attacks occurred either while he was in a state of automatism that made his actions involuntary, or that a conflation of physical and mental disorders caused Mr. Starrett to suffer from a disease of the mind, making him incapable of appreciating the nature and consequences of his actions. In either case, Mr. Starrett argues that he is precluded from criminal liability and seeks a special verdict of not criminally responsible due to mental disorder pursuant to s 16 of the *Criminal Code of Canada*, RSC 1985, c C-46 (*Criminal Code*).

## II. Mr. Starrett's Background and Circumstances

[7] Mr. Starrett was born in Edmonton on February 10, 1989 and was 30 years old at the time of the incident. Mr. Starrett's mother struggled with drug and alcohol abuse and his father was never part of his life. Fortunately, at one year of age, Mr. Starrett was placed in the care of his

non-biological grandparents who provided him with a “good upbringing” and a “fairly normal life” in Fort Saskatchewan.

[8] Mr. Starrett struggled in school, particularly in math. After Mr. Starrett failed Grade 1, he took one year of school at the Glenrose Hospital in Edmonton, where his learning difficulties were assessed. Records from the Glenrose Hospital reveal concerns with Attention Deficit Hyperactivity Disorder (ADHD) and Fetal Alcohol Spectrum Disorder (FASD).

[9] Mr. Starrett did not graduate from high school, having fallen a few credits short. He entered the workforce in his teens and became a general labourer. In his early 20s he transitioned into work as a carpenter and a framer.

[10] As a result of several work-related incidents and sports injuries, Mr. Starrett developed severe back pain. Medical records show that Mr. Starrett’s back pain became more pronounced in about 2016, and plagued Mr. Starrett until at least November 2019.

[11] Mr. Starrett testified that he has a history of insomnia. His medical records reveal that as an adult he began seeking help for insomnia in early 2015. Mr. Starrett’s insomnia issues were addressed by several physicians between 2015 and November 2019. Numerous medications were prescribed, although these medications had limited success in treating the problem.

[12] Mr. Starrett has had a longstanding history of illicit drug use and addictions. He first began using marijuana at age 15 and continued its use until the time of the incident 15 years later. Mr. Starrett also had a serious alcohol problem that began with “binge drinking” at age 17. Fortunately, Mr. Starrett was able to overcome his addition to alcohol. By November 2019, he consumed alcohol only occasionally.

[13] Mr. Starrett also developed a serious addiction to cocaine. He first began using cocaine at age 20 and it quickly turned into an addiction. In an effort to address the addiction, Mr. Starrett attended Poundmaker Lodge, a residential treatment centre, for a 90-day program. Unfortunately, he was not successful, and discharged himself after only 30 days. Mr. Starrett testified that his cocaine addition continued until the birth of his first child in 2014, after which Mr. Starrett stopped using cocaine completely. This seems to be corroborated by medical records from South Pointe Medical Clinic dated October 28, 2014 (Ex 17, p 17). Mr. Starrett saw Dr. Kumleben on that date and reported that he had stopped using cocaine five months prior to the appointment.

[14] It is noteworthy that Mr. Starrett’s medical records begin to identify concerns with insomnia at or shortly after Mr. Starrett stopped using cocaine. It is also noteworthy that Mr. Starrett reported the connection between the insomnia and the use of cocaine when he met with a psychiatrist, Dr. Osiogo on October 16, 2019, approximately one month prior to the incident. The chart note from that appointment records the following:

> He said he used to be a cocaine addict for six and a half years and it was really bad. He thinks that was probably when his sleep difficulties started. He feels that since he stopped using cocaine that his brain continues to act like it was still stimulated by cocaine (Ex 18, p 19).

[15] Mr. Starrett also had a significant addition to opioids. He started using Tylenol 3 medication stolen from his grandmother in attempt to relieve his back pain and overcome insomnia. He transitioned to purchasing non-prescribed Percocet from a drug dealer, Danielle Brown. By 2019, Mr. Starrett was purchasing substantial quantities of Percocet, partially for his own use and partially for the purpose of resale. By mid-2019, he was purchasing 100 Percocet

tablets per week. He was reselling approximately 30 per week, leaving 70 per week for his own use.

[16] Mr. Starrett testified that he stopped using Percocet when he and his family spent some time in Newfoundland in the summer of 2019. Mr. Starrett testified that while he was not sure, he thought that their time in Newfoundland was in June and the beginning of July 2019. I am satisfied that Mr. Starrett was simply wrong on these dates. Based on Mr. Starrett's medical records and other evidence, I conclude that Mr. Starrett's trip to Newfoundland was more likely in August 2019. Mr. Starrett's medical records reveal that he attended a series of medical appointments in Alberta through the whole of June 2019 and until July 24, 2019. There are no medical record entries between July 24, 2019 and September 4, 2019 (Ex 17, pp 12 – 14). Additionally, Mr. Starrett testified that he attended Regatta Days while he was in Newfoundland, which is a Newfoundland civic holiday that falls in early August each year.

[17] Based on Mr. Starrett's medical records and other evidence, I conclude that Mr. Starrett was a very heavy user of Percocet for a one-year period, which ended, at least temporarily in late July or early August 2019.

[18] Much to his credit, Mr. Starrett sought medical assistance for his addiction issues almost immediately upon his return from Newfoundland. On September 4, 2019, Mr. Starrett saw Dr. Bani at the South Pointe Medical Clinic. During that appointment, Mr. Starrett disclosed an "opioid addiction (mainly Percocet and oxycodone)" (Ex 17, p 12). The plan was for a referral to an addiction clinic, however there is no evidence that Mr. Starrett ever attended at such a clinic.

[19] In late September 2019 Mr. Starrett began using heroin. This consumption began when his Percocet supplier accidentally dropped a baggy of heroin in Mr. Starrett's car. Mr. Starrett consumed that baggy of heroin by snorting it. When it was gone, he sought out other suppliers and continued to use the heroin until early November 2019, approximately two weeks prior to Ares' death.

[20] In the days leading up to Ares' death, Mr. Starrett had stopped using heroin and was not taking any other prescription or non-prescription drugs, apart from marijuana. Mr. Starrett was, however, experiencing significant symptoms of back pain and insomnia. In addition, he felt sick, nauseous, and hot, which was similar to "an extreme flu." Mr. Starrett described feeling "like a train wreck" and "like he had been hit by a car." The day before Ares died, Mr. Starrett purchased 12 Percocet tablets from Danielle Brown. In an attempt to "take the edge off," he consumed 6 of those tablets on November 22, 2019. The remaining 6 tablets were consumed on November 23, 2019 during the nine hours before Ares died.

[21] In addition to the issues with back pain, insomnia, drug use, and withdrawal, Mr. Starrett was also facing other stressors in the weeks leading to the incident. He and his family were experiencing serious financial pressures, in part because Mr. Starrett had not been working regularly. Mr. Starrett was also facing pressure to quit smoking, a habit that he had previously been unsuccessful in breaking. On the morning of November 23, 2019, Mr. Starrett had run out of cigarettes and had no money with which to purchase a further supply. His only avenue to obtain the cigarettes was by gaining access to the debit card of his then common-law spouse. This led to an intense argument during which he threw a plate at his then common-law spouse. Fortunately, the plate did not strike her, but did strike the wall immediately behind her and broke. Mr. Starrett's then common-law spouse relented and gave Mr. Starrett the debit card so that he could purchase the cigarettes.

[22] The evidence makes it clear, and I find, that in the hours leading up to Ares' death, Mr. Starrett was experiencing substantial physical symptoms and was facing numerous stressors.

## III. Mr. Starrett's Physical Actions Caused the Death and the Injuries

[23] The Defence does not challenge the Crown's assertion that Mr. Starrett applied force to both of his children and that this force resulted in Ares' death and injuries to his daughter. However, no formal admissions were made in this regard. Furthermore, when he testified, Mr. Starrett did not admit to the application of force. Instead, he asserted that he had no memory of applying force to his children and could therefore not speak to this issue. In the absence of formal admissions, the Crown is not relieved of its burden of proof in relation to the *actus reus* of the offences.

[24] As part of the *actus reus* of the offence of manslaughter, the Crown must prove beyond a reasonable doubt that Mr. Starrett's actions unlawfully caused Ares' death. As part of the *actus reus* of the offence of assault, the Crown must prove beyond a reasonable doubt that Mr. Starrett applied force to his daughter.

[25] November 23, 2019 was a Saturday. Mr. Starrett, his then common-law spouse, and the two children were at home that morning. Mr. Starrett's then common-law spouse was employed at a restaurant and was working a split shift. Late in the morning she left the home to work the lunch shift and returned at approximately 2:00 PM. While she was at home, she fed the two children lunch and then went back to work at approximately 3:30 PM. While she was at work, the two children were left in Mr. Starrett's care. When she left the home at approximately 3:30 PM, both children were in good health. Other than Mr. Starrett and the two children, no one else was in the home at that time.

[26] Sometime between 4:00 PM and 4:30 PM, a neighbour saw Mr. Starrett outside his townhouse smoking a cigarette while Mr. Starrett's daughter was playing in the yard. During that that time, Ares was upstairs in his crib having a nap.

[27] After Mr. Starrett finished his cigarette, he returned to the living room of the home and laid down on a couch. Using his phone, he began to send messages via Facebook to attempt to organize a vigil for a young neighbour who had recently and suddenly died after having been struck by a motor vehicle.

[28] While Mr. Starrett was sending these messages, Ares was playing on the floor near Mr. Starrett, and Mr. Starrett's daughter was playing in the living room. There is no evidence as to how Ares got to the living room, but I infer that after Ares awoke, Mr. Starrett went upstairs, lifted Ares from his crib, and carried him downstairs to the living room.

[29] At approximately 5:50 PM, Mr. Starrett sent his then common-law spouse a text message with information regarding the death of their young neighbour. In the message, Mr. Starrett expressed concern for the grief that the deceased's father was experiencing.

[30] Mr. Starrett testified that he has no memory of what transpired after he began messaging on Facebook. He explained that he felt that he was "teleported" in some fashion and remembers having a dream in which he was being attacked by a "shadow creature" with no face, no eyes, and skin as black as a viper's skin. Mr. Starrett explained that in the dream the creature was continuously spinning, and he was thrown around the room. Mr. Starrett said that he tried to protect his children.

[31] Mr. Starrett testified that at some point he became aware that he was sitting on the couch. This was quite confusing to him since his last memory had been of laying down while using the phone for Facebook messages. Mr. Starrett testified that he saw that his daughter was to his right. She was curled up with her head ducked down into her arms and her knees drawn up. Mr. Starrett described her as looking scared. He then spun to his right and saw Ares on the floor bleeding and with very serious head injuries.

[32] Mr. Starrett testified that he initially thought that Ares may have been injured because of a fall. He then thought that his daughter may have caused the injuries to Ares. Mr. Starrett asked his daughter, "what the fuck happened?" Mr. Starrett's daughter responded by saying "Daddy, you hit him. You hit him daddy."

[33] Mr. Starrett made a series of telephone calls: first to Danielle Brown, then to his then common-law spouse, and finally to 911. Emergency medical assistance arrived promptly. Ares was taken to Fort Saskatchewan Hospital where he was pronounced dead.

[34] The only direct evidence regarding the actions that resulted in Ares' death was provided in a video recorded interview given by Mr. Starrett's daughter on the day following the incident. In a *voir dire,* I ruled that this interview was admissible pursuant to s 715.1 of the *Criminal Code*.

[35] The video recorded interview was conducted when the young girl was five years old. The interview was conducted by Cpl. Angela Heath, a 16-year member of the RCMP. The interview was undertaken in a sensitive and professional manner. Cpl. Heath permitted the young girl to explain what she saw and heard during the relevant times. With one notable exception, the questioning was not conducted in a way to suggest the answers to the questions posed.

[36] As might be expected with a five-year old child, there were many inconsistencies in the young girl's recitation of the events. However, when she described what happened to Ares, she was very clear and largely consistent. The young girl explained that her father was sleeping on the couch. She explained that Mr. Starrett began shaking and then began "fighting them." She said that her father punched her three times in the head with is knuckles, and also punched and kicked Ares multiple times when Ares was on the floor. Mr. Starrett then picked Ares up and threw him on the couch. The young girl explained that Ares was bleeding and that there was blood on the carpet, on a blanket, and on the wall.

[37] In ***R v W(R),*** [1992] 2 SCR 122, the Supreme Court emphasized that when assessing the credibility of a young child, it is necessary to undertake the assessment by reference to criteria appropriate to the child's mental development, understanding, and ability to communicate (p 134). In ***R v B(G),*** [1990] 2 SCR 30**,** at p 55 the Court explained:

> ... a flaw, such as a contradiction, in a child's testimony should not be given that same effect as a similar flaw in the testimony of an adult.... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.... The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[38] Given the age of the young girl and the numerous inconsistencies contained within her interview, I conclude that it is simply not possible to rely on some portions of her statement. I place no weight on her statement in several respects, including:

- whether she was on the same couch as Mr. Starrett or on another couch when the attack began,
- whether Mr. Starrett struck her before or after Ares was attacked;
- whether Mr. Starrett was awake at the time of the attacks;
- whether she tickled Mr. Starrett before the attacks began or whether the tickling occurred after the attacks were over (which was the subject of a very leading question);
- whether Mr. Starrett went back to sleep after the attack.

[39] Notwithstanding the concerns that I have with respect to some of the details of the young girl's statement, I am satisfied that the young girl's description of the attacks on her and Ares is reliable. The young girl's description is completely consistent with the injuries described by the medical examiner, Dr. Bannach. The young girl's description is also consistent with the evidence of blood spatter expert, Sgt. Dubyk. The young girl's description is also consistent with the finding that police made of Ares' blood on the leg of Mr. Starrett's pants.

[40] The young girl's evidence that identifies Mr. Starrett as the attacker is also supported by other circumstantial evidence. Other than Mr. Starrett and the two children, there is no evidence that any other persons were in the home at the time of the incident. The children were in good health when Mr. Starrett's then common-law spouse left for work at 3:30 PM. There is no alternate inference available to permit a conclusion that someone other than Mr. Starrett may have been the attacker.

[41] Mr. Starrett did not deny striking his son and daughter. Even if Mr. Starrett's evidence is completely accepted, it would not permit a conclusion that he was not the attacker. Furthermore, neither Mr. Starrett's evidence nor any other potentially exculpatory evidence would give rise to a reasonable doubt on this point.

[42] The totality of the direct and circumstantial evidence permits only one conclusion: that Mr. Starrett was the attacker. Therefore, I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Starrett was responsible for the physical attack on Ares which ultimately resulted in his death. I am also satisfied that the Crown has proven beyond a reasonable doubt that Mr. Starrett applied force to the young girl which resulted in injuries to her.

## IV. Automatism

### A. General Principles

[43] Mr. Starrett has raised the defence of automatism in relation to the allegations made against him in the Indictment.

[44] Automatism is not a substantive defence. Instead, it is a denial of the voluntariness component of the *actus reus*. Defence counsel argues that even though Mr. Starrett's actions caused Ares' death and injuries to the young girl, he is not criminally liable. Defence counsel

submits that Mr. Starrett was in a state of impaired consciousness at the time that he applied force to Ares and the young girl, and therefore his actions were not voluntary.

[45] The law in relation to automatism has evolved over that last 40 years. This evolution can be traced through a series of Supreme Court of Canada decisions: ***Rabey v The Queen***, [1980] 2 SCR 513 [***Rabey***], ***R v Parks***, [1992] 2 SCR 871 [***Parks***], ***R v Stone***, [1999] 2 SCR 290 [***Stone***] and ***R v Fontaine***, 2004 SCC 27 [***Fontaine***].

[46] Automatism is defined in ***Stone*** at para 156 as "a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action." This definition was recently affirmed by the Supreme Court in ***R v Brown***, 2022 SCC 18 at para 2.

[47] The law recognises two types of automatism: non-mental disorder automatism and mental disorder automatism. Defence counsel has not raised non-mental disorder automatism.

[48] Mental disorder automatism is subsumed within the provisions of s 16 of the *Criminal Code*. A finding of mental disorder automatism under s 16 of the *Criminal Code* will result in a verdict of not criminally responsible due to mental disorder pursuant to s 672.34 of the *Criminal Code*, after which a referral will generally be made to the Alberta Review Board for disposition under s 672.45(1.1) of the *Criminal Code*.[1]

[49] When an accused person raises automatism, the merits of the issue can only be assessed by the trier of fact if the accused first meets an evidentiary burden to demonstrate that automatism is "in play." The evidentiary burden to be met is based on the same principles as the air of reality test described in ***R v Cinous***, 2002 SCC 29. In relation to automatism, the evidentiary burden is described in ***Fontaine*** at para 92 as, "whether there was any evidence in the record upon which the jury, properly instructed and acting judicially, could reasonably conclude that the defence of automatism by reason of mental disorder had been made out." An assertion of involuntariness on the part of the accused, supported by the logically probative opinion of a qualified expert, will normally provide a sufficient evidentiary foundation for putting the issue of automatism to the trier of fact: ***Fontaine*** at para 89.

[50] If the evidentiary burden has been met by the accused, the trier of fact will be required to consider whether automatism has been proven to the requisite standard. This is a persuasive burden that is on the accused. To satisfy this burden, the accused must prove on a balance of probabilities that he or she was in a state of automatism at the time of the unlawful act. The rationale for the persuasive burden being placed on the accused was explained in ***Stone*** at para 180:

> The law presumes that people act voluntarily in order to avoid placing the onerous burden of proving voluntariness beyond a reasonable doubt on the Crown. Like extreme drunkenness akin to automatism, genuine cases of automatism will be extremely rare. However, because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness. In contrast, saddling the

[1] While s 672.45(1) of the *Criminal Code* permits a court to hold a disposition hearing, this is a practice that is rarely utilized and instead the disposition is almost always referred to the expertise of the Alberta Review Board.

> Crown with the legal burden of proving voluntariness beyond a reasonable doubt actually defeats the purpose of the presumption of voluntariness.

[51] Policy reasons also mandate that the burden be on the accused on a balance of probabilities: ***Stone*** at paras 175 – 179. At para 175 the Court stated:

> An appropriate legal burden applicable to all cases involving claims of automatism must reflect the policy concerns which surround claims of automatism. The words of Schroeder JA in ***R. v. Szymusiak***, [1972] 3 OR 602 (CA), at p 608, come to mind:
>
> > ... a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel.

[52] Therefore, to be successful, the accused must rebut the presumption of voluntariness by proof of automatism. These principles will guide the analysis of Mr. Starrett's assertion that he was in a state of automatism at the time that he attacked his two children.

### B. The Accused Has Met the Evidentiary Burden

[53] Mr. Starrett testified that he had for many years suffered from chronic back pain and insomnia. He explained that he was sleep deprived and that on the date of the incident was feeling very unwell. He lay on the couch to send some texts from his phone. He testified that he has no memory of the events that occurred thereafter and had no knowledge that he had assaulted his children until his young daughter told him what he had done. In the circumstances of this case, I am satisfied that this represents an assertion of involuntariness. When considering whether Mr. Starrett has met the evidentiary burden, I do not evaluate the quality, weight, or reliability of the evidence. Instead, I must only decide whether there is evidence on which a properly instructed jury could reasonably decide the issue: ***Fontaine*** at para 12.

[54] Dr. Colin Shapiro was qualified as an expert in psychiatry, neuropsychiatry with expertise in psychopharmacology, and sleep disorders including parasomnia and automatism. Dr. Shapiro was permitted to give opinion evidence in his areas of expertise. He provided detailed reports of his assessments of Mr. Starrett and testified about his conclusions regarding Mr. Starrett. Dr. Shapiro's opinion was that given the information available to him, parasomnia was the most likely explanation for Mr. Starrett's actions when he caused Ares' death.

[55] The Crown argues that the Dr. Shapiro's evidence should be given little weight. In asserting this position, the Crown invites me to weigh the evidence of Dr. Shapiro, noting that Dr. Shapiro conducted his assessment of Mr. Starrett two years after the incident, and relied on hearsay evidence and the accuracy of the information provided by Mr. Starrett.

[56] The Supreme Court in ***Fontaine*** was clear that this type of assessment at the evidentiary burden stage is prohibited. At the evidentiary burden stage, it is only necessary to consider whether the expert opinions are logically probative and support the assertion of automatism made by Mr. Starrett. I conclude that the evidence of Dr. Shapiro satisfies these requirements.

[57] Based on the evidence of Mr. Starrett and Dr. Shapiro, I conclude that the Accused has met the evidentiary burden, and therefore automatism is "in play." Given this conclusion, it is not necessary to address the evidence of Dr. Ennis at this stage.

### C. Mental Health Disorder or Non-Mental Health Disorder Automatism

[58] The next stage in assessing automatism is to determine which of the two branches of automatism should be left with the trier of fact: ***Stone*** at para 193. The analysis begins with a presumption that the automatism asserted is a "disease of the mind," thus giving rise to mental disorder automatism. Only if the evidence suggests that the automatism was not caused by a "disease of the mind" would non-mental disorder automatism be left with the trier of fact: ***Stone*** at para 199.

[59] In this case the Accused does not argue non-mental disorder automatism. Therefore, the presumption is applicable, the assessment of automatism will be based on mental disorder automatism, and s 16 of the *Criminal Code* will apply.

### D. The Persuasive Burden

[60] The burden is on Mr. Starrett to prove on a balance of probabilities that his actions were involuntary and arose while he was in a state of impaired consciousness. This will require a weighing of all the evidence, including the evidence of Mr. Starrett and the expert evidence of Dr. Shapiro and Dr. Ennis.

#### 1. Dr. Shapiro

[61] Dr. Shapiro undertook an assessment of Mr. Starrett in December 2021, more than two years after the incident. At the conclusion of the assessment Dr. Shapiro prepared a report dated January 31, 2022, that offered the following opinion (Ex 32, p 11):

> There is a plethora of information supporting the probability that this man, with very poor sleep for a variety of reasons, not all of his own making acted out in his sleep with dire consequences. To some extent the medical system has "let him down" for example he had not had a formal sleep assessment.

[62] When he testified at trial, Dr. Shapiro provided essentially the same opinion (Trial transcript April 1, 2022; p 79, ll 15 – 40):

> Q. All right. So let's just assume that the – that what Mr. Starrett told you and what Mr. Starrett told Dr. Ennis and what Mr. Starrett told the Court is all largely accurate. Okay? Are you able to, you know, looking at – at the entire picture and everything that you have before you in terms of information, are you able to formulate an opinion with respect to the likelihood that Mr. Starrett was suffering from parasomnia at the time he killed his son?
>
> A. I think that is the most likely explanation. And in the report that I wrote, the piece that starts on the 31st of January to 2022, and it's headed "Summary" ….
>
> Q. Okay. I'm not really interested in that case, though, Doctor. I just – what I'm interested in is, if I understand correctly, you're prepared to offer an opinion that Mr. Starrett was suffering from a parasomnia?
>
> A. Yes. I –
>
> Q. Okay.
>
> A. I am.

[63] Dr. Shapiro explained that parasomnia is a diagnosis in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-V). It refers to a behaviour pattern that occurs during sleep without the person being aware of it. The brain is partially awake and partially asleep. Dr. Shapiro explained that this behaviour could be mistaken for a person being awake when they are in fact asleep. Examples of parasomnia are talking while asleep, sleep walking, eating while asleep, riding a bicycle while asleep, or having sex while asleep.

[64] As part of his assessment, Dr. Shapiro arranged for Mr. Starrett to undergo sleep studies for two nights at the Jodha Tishon Inc. clinic in Toronto, followed by further testing to assess daytime "sleepiness" through a Multiple Sleep Latency Test (MSLT).

[65] The sleep study tests were undertaken on December 16 and 17, 2021. On the first night of the sleep study, Mr. Starrett went to sleep 2.9 minutes after the lights went out, which Dr. Shapiro described as "abrupt." Mr. Starrett slept for a total of 7.6 hours with a sleep efficiency of 88.7% which is "normal." Mr. Starrett did however show some signs of sleep apnea (Ex 33, p 3). On the second night of the sleep study, Mr. Starrett fell asleep 7.9 minutes after the lights went out which is "normal." Mr. Starrett slept for a total of 6.5 hours with a sleep efficiency of 91.2%, which is also "normal" (Ex 33, p 6).

[66] The MSLT test on the first day required that Mr. Starrett attempt to sleep on five occasions during the day spaced two hours apart. On each of the five occasions Mr. Starrett was able to fall asleep, on average within 6.4 minutes, which indicated that Mr. Starrett had moderate daytime sleepiness (Ex 33, p 4). The MSLT test on the second day required Mr. Starrett to attempt to sleep on four occasions during the day spaced two hours apart. Mr. Starrett was able to fall asleep during two of the four sessions on average within 11.09 minutes, which indicated that Mr. Starrett did not have any daytime sleepiness (Ex 33, pp 7 – 8).

[67] The results of the sleep tests do not match the description of severe insomnia that Mr. Starrett reported in the months prior to Ares' death. I conclude that there are several likely explanations for this inconsistency. First, the sleep tests were conducted more than two years after the incident. Second, Mr. Starrett was completely off all prescription medication and non-prescription drugs by the time of the sleep tests. Third, as Mr. Starrett reported to Dr. Shapiro on December 16, 2021, his sleep habits had changed fairly dramatically within the two years prior to the testing. Dr. Shapiro recorded the following in his interview notes: "Mr. Starrett reported that he "sleeps too much now" although he "could not sleep at all" previously" (Ex 33, p 9).

[68] On both the first and second night of sleep testing, Mr. Starrett was seen to be twitching his legs as he slept, as often as 20 times per hour, which Dr. Shapiro considered to be a borderline indicator of restless leg syndrome (Ex 33, pp 3 and 6). Dr. Shapiro testified that 10% of the general population and 40% of people who take anti-depressants have this condition. The twitching seen in the sleep study was much less severe than what Mr. Starrett testified to in relation to the restless leg syndrome and the "creepy crawly" sensation that he experienced in the months prior to Ares' death. This inconsistency may also be explained by the fact that Mr. Starrett was drug-free at the time of the testing, and because the testing took place two years after the incident.

[69] For these reasons, in most respects, the sleep study results give very little insight into the circumstances of Mr. Starrett's sleep patterns in November 2019.

[70] However, the sleep test results are important in one material way. On both nights of testing, Mr. Starrett was seen to be aroused from slow wave sleep (SWS), which Dr. Shapiro described as deep sleep. There were four such arousals on the first night of testing and five such arousals on the second night of testing (Ex 33, pp 3 and 6). These arousals from deep sleep are significant because, as Dr. Shapiro explained, the most common form of parasomnia is arousal from deep sleep. Dr. Shapiro described arousals from deep sleep as a "thumbprint for parasomnia." If a person is going to have a parasomnia event, it will most likely happen while in a state of deep sleep, which generally occurs shortly after the sleep starts.

[71] In Dr. Shapiro's opinion, parasomnia that occurs on arousal from deep sleep usually involves several factors, including disorientation on awakening, confusional behaviour, amnesia for the event, a triggering or precipitating factor, modulation or priming factors including the use of alcohol or drugs, sleep deprivation, disruption of circadian rhythm, or recent stressful events. In addition to these factors, concealment should not be present, and there should be an absence of any factors suggesting intent.

[72] Specifically with respect to Mr. Starrett, Dr. Shapiro considered that some of the following factors supported his opinion regarding parasomnia:

- Mr. Starrett experienced years of prolonged sleep deprivation, which can have the effect of catapulting a patient into deep sleep.
- Mr. Starrett had a history of restless leg syndrome that included experiencing "creepy crawly" sensations, which can disrupt sleep.
- Mr. Starrett has seen a therapist who told him that he had a post traumatic stress disorder, which may have played a role.
- Mr. Starrett had been diagnosed with FASD. People with such a diagnosis often have severe sleep and circadian abnormalities and reduced melatonin levels.
- Mr. Starrett was taking drugs that provided a modulating effect and were a factor. Dr. Shapiro relied on the following information from Mr. Starrett (although as I will explain later, much of this information is factually incorrect):
    - At the time of the incident Mr. Starrett reported that he was taking drugs, including Clonazepam, Quetiapine, Doxepin, Mirtazapine, and Percocet. Dr. Shapiro testified that several of these can disrupt sleep and lead to breaks in sleep and/or increased deep sleep.
    - Mr. Starrett reported that he felt that Doxepin may have been a factor.
    - Mr. Starrett had tried heroin a few times but not in any close proximity to this event.
    - Mr. Starrett was using Olanzapine, which may have been a factor. Mr. Starrett thought that his use of that drug may have resulted in sexual problems and led to gynecomastia (enlargement of breast tissue).
    - Withdrawal from drugs may have contributed to arousal.
- The absence of any indication that Mr. Starrett had previously applied physical force to his children.

- Pre-event history of acting out a dream by smoking a cigarette in bed.
- Pre-event stress including the pain he was experiencing, a sense of failure because he was on the edge of a break-up in his relationship, the stress of heroin withdrawal, the criticism he had taken from his partner, and the anxiety related to learning of the death of a young neighbour.
- Physical touch may have been a triggering factor. Dr. Shapiro relied on the fact that "apparently his daughter said that she touched his feet – Mr. Starrett says that she had apparently been tickling his feet."
- Mr. Starrett went back to sleep after assaulting his children.
- Amnesia regarding the event: Mr. Starrett asked his daughter "What the fuck happened?" when he saw Ares had been seriously injured.
- Disorientation on awakening: Mr. Starrett placed a series of phone calls, including a call to Danielle Brown. When Danielle Brown arrived to assist, Mr. Starrett asked her "What are you doing here?"
- Post-event history of assaulting his intimate partner while sleeping by punching and kicking her on multiple occasions.

[73] Weighing all the information available to him, Dr. Shapiro concluded that "the balance points fairly strongly to a parasomnia behaviour."

[74] Dr. Shapiro's opinion addresses the ultimate issue that the Court will be required to rule upon after taking into consideration the totality of the evidence. There is no longer a general rule of evidence that an expert's opinion may not reach the ultimate issue, although such opinions are to be treated with caution: see ***R v Mohan***, [1994] 2 SCR 9 at pp 24 – 25; ***R v Cortes Rivera***, 2020 ABCA 76 at para 35.

[75] I conclude that very little or no weight can be given to Dr. Shapiro's evidence on the ultimate issue. I come to this conclusion for several reasons.

### i. Dr. Shapiro's opinion relies on accuracy of information provided by Mr. Starrett

[76] Dr. Shapiro interviewed Mr. Starrett and obtained information from him regarding several critical issues. Dr. Shapiro relied on the accuracy of the information that Mr. Starrett provided.

[77] Whether Mr. Starrett has accurately reported his personal circumstances, his medical and drug history, and the circumstances leading to the assault of his children is critical. This must be subject to rigorous assessment when reaching a conclusion as to whether Mr. Starrett was an automaton when he assaulted his children.

[78] As I will describe later in these reasons, I have several concerns regarding the credibility and reliability of Mr. Starrett's evidence. Dr. Shapiro simply accepted the accuracy of the information provided to him by Mr. Starrett. This undermines the weight that can be given to Dr. Shapiro's opinion.

### ii. Dr. Shapiro's opinion relies on "patchy" medical records

[79] Dr. Shapiro was provided with some information to assist in his evaluation of Mr. Starrett. This information is described in an undated letter to counsel (Ex 33, pp 16 – 20). Dr. Shapiro reports that he received "a limited amount of documentation about this case," which included the report of Dr. Ennis along with 14 pages of "patchy" medication information regarding Mr. Starrett. Dr. Shapiro noted that Dr. Ennis had 19 documents available for review, most of which had not been available to him (Ex 33, p 19). There is no evidence that Dr. Shapiro received any records from the pharmacies that prescribed medication to Mr. Starrett in the years prior to November 2019.

[80] A much more comprehensive collection of medical and pharmaceutical records was entered into evidence at trial. Many of Mr. Starrett's physicians testified regarding the treatment that they provided to Mr. Starrett. Dr. Shapiro did not have the benefit of this important information in arriving at his opinion. As a result, his opinion on the ultimate issue is deserving of less weight.

### iii. Dr. Shapiro's opinion relies on a history of prescribed medication use that is not correct

[81] Dr. Shapiro considered Mr. Starrett's drug use at the time as a relevant factor in forming his opinion. Dr. Shapiro noted that "from what [he] can gather at the time of the event [Mr. Starrett] was taking Clonazepam, Quetiapine, Doxepin, Mirtazapine and Percocet" (Ex 32, p 6).

[82] This is not an accurate reflection of the medication that Mr. Starrett was taking at the time of the incident. As I will explain in greater detail later in these reasons, Mr. Starrett had not been prescribed any medication of any kind between July 2, 2019 and October 3, 2019. Between October 3, 2019 and October 18, 2019 he was prescribed trials of several medications, but by October 26, 2019, Mr. Starrett reported to Dr. Okolie that he was not taking any prescription medication (Ex 18, p 17). This was four weeks prior to the incident.

[83] Specifically with respect to the list of medications that Dr. Shapiro thought Mr. Starrett was taking "at the time of the event," the facts as disclosed in the medial and pharmaceutical records demonstrate that:

- Mr. Starrett was not prescribed Clonazepam at any time in 2019;
- Quetiapine was prescribed on October 5, 2019 but only a 15-day supply was provided (Ex 21, p 7). If taken as prescribed, the medication would not have been available after October 20, 2019, more than one month prior to Ares' death;
- Mr. Starrett was provided a 15-day refill of Doxepin on July 13, 2019, which is the last time Doxepin was prescribed and filled (Ex 21, p 7). If taken as prescribed, that medication would not have been available after the end of July 2019, which was more than four months prior to Ares' death;
- Mirtazapine was prescribed on October 16, 2019 and filled on October 18, 2019. A 30-day supply was provided (Ex 22, p 8). If taken as prescribed, the medication would not have been available after November 17, 2019, several days prior to Ares' death.
- On October 26, 2019, Mr. Starrett reported to Dr. Okolie that he was not taking any medication at that time (Ex 18, p 17).

[84] As of October 26, 2021, Mr. Starrett continued using heroin and marijuana. The heroin use stopped two weeks prior to the incident. The only drugs Mr. Starrett was using on the day the incident were marijuana and the non-prescribed Percocet that he had received from Danielle Brown the day before.

[85] To the extend that Dr. Shapiro's opinion on the ultimate issue involves reliance on Mr. Starrett's medication use, his opinion is deserving of less weight.

### iv. Dr. Shapiro's opinion is inconsistent with respect to restless leg syndrome

[86] Dr. Shapiro's opinion relies in part on Mr. Starrett's history of restless leg syndrome, which included a "creepy crawly" sensation that can disrupt sleep. Mr. Starrett described this sensation as being torturous. Despite this, Dr. Shapiro noted that "it is striking that [Mr. Starrett] describes stopping to have restless leg syndrome when he came off his medications and specifically [D]oxepin, which is likely to have triggered the periodic leg movements" (Ex 33, p 20).

[87] Notwithstanding what Mr. Starrett may have told Dr. Shapiro about the use of Doxepin, its relationship with restless leg syndrome, and its association with the "creepy crawly" sensation, the evidence is clear that Mr. Starrett had not been prescribed or had access to Doxepin since the end of July, 2019, approximately four months prior to Ares' death.

[88] In fairness to Dr. Shapiro, he was unaware that Doxepin prescriptions were discontinued in July 2019. However, to the extent that Dr. Shapiro ties the restless leg syndrome to the use of Doxepin, his opinion on the ultimate issue is deserving of less weight.

### v. Dr. Shapiro's opinion regarding melatonin is not consistent with the evidence

[89] Dr. Shapiro testified that melatonin is related to circadian rhythm in that it generally controls the body clock which can, in turn, affect sleep. Melatonin testing can provide information regarding melatonin secretion in the body. As part of Mr. Starrett's sleep study, Dr. Shapiro arranged for melatonin testing.

[90] Dr. Shapiro testified that Mr. Starrett's melatonin secretion was abnormal. This conclusion is not consistent with the results of Mr. Starrett's melatonin testing.

[91] Dr. Shapiro knew of the possibility that Mr. Starrett had been diagnosed with FASD. He also knew that persons with a diagnosis of FASD often have irregular melatonin levels. This was one of the reasons that Dr. Shapiro ordered melatonin testing. In Dr. Shapiro's report dated December 16, 2021, he described the testing that he was arranging for (Ex 33, p 15):

> We will also arrange the dim light melatonin onset test [DLMO] to measure the timing of [Mr. Starrett's] melatonin secretion and evaluate if there is circadian rhythm disorder.

[92] The DLMO test results do not support Dr. Shapiro's conclusion that Mr. Shapiro's melatonin secretion was abnormal. The DLMO report states (Ex 32, p 15):

> Based on the DLMO criteria above, it is not possible to discern this patient's DLMO.

[93] Mr. Starrett's melatonin secretion may or may not have been abnormal in November 2019 or at the time of testing in December 2021. The test in December 2021 was inconclusive, not abnormal. To the extent that Dr. Shapiro's opinion on the ultimate issue is influenced by Mr. Starrett's melatonin secretion and its relationship to circadian rhythm, it is deserving of reduced weight.

#### vi. Dr. Shapiro's opinion is based upon information much more limited than that available to Court

[94] Dr. Shapiro interviewed Mr. Starrett by telephone in advance of the assessment in December 2021 and in person both prior to and after the assessments. Those interviews were quite short, although possibly more than one-half hour each. At trial, Mr. Starrett's evidence was quite lengthy and spanned parts of three days.

[95] Dr. Shapiro did not observe any of Mr. Starrett's evidence, although he did receive a transcript of a portion of Mr. Starrett's examination-in-chief. It is unclear whether Dr. Shapiro had an opportunity to read that transcript. Dr. Shapiro neither observed nor read any part of Mr. Starrett's cross-examination. Dr. Shapiro did not observe any of the other evidence that was tendered at trial or any of the exhibits that provide extensive pharmaceutical information.

[96] Where an expert provides an opinion on the ultimate issue and where the expert has not had access to the totality of the evidence available to the Court and thus has not been able to use that evidence in the formulation of the opinion, the weight that can be given to the opinion on the ultimate issue is very limited.

#### Conclusion regarding Dr. Shapiro's opinion

[97] For all of these reasons, I conclude that Dr. Shapiro's opinion that Mr. Starrett was probably in a state of parasomnia and acting as an automaton at the time that he assaulted his children is deserving of very little or no weight.

[98] Nonetheless, Dr. Shapiro's evidence is helpful to the extent that he identified factors that should be considered in assessing the issue of automatism. Dr. Shapiro's evidence regarding Mr. Starrett's sleep testing is helpful because it showed that Mr. Starrett regularly arouses from deep sleep, which can be a "thumbprint for parasomnia." Dr. Shapiro's explanations surrounding Mr. Starrett's insomnia and prolonged sleep deprivation are also helpful to the assessment. This is because insomnia and sleep deprivation may have the effect of catapulting a patient into deep sleep.

[99] In addition, Dr. Shapiro' evidence regarding the mechanisms of parasomnia generally, and the specific indicators of parasomnia on arousal from deep sleep are helpful and must be considered. Dr. Shapiro described those indicators as including disorientation on awakening, confusional behaviour, amnesia for the event, a triggering or precipitating factor, modulation or priming factors including the use of alcohol or drugs, sleep deprivation, disruption of circadian rhythm, or recent stressful events.

### 2. Dr. Ennis

[100] Dr. Ennis was qualified as an expert and permitted to give opinion evidence in the areas of forensic psychology, assessment of mental health, diagnosis of mental disorders, familial violence, and assessment of future risk.

[101] Dr. Ennis concluded that the violence directed toward Mr. Starrett's children occurred while he was experiencing the effects of a parasomnia sleep disorder, specifically a condition described in the DSM-V as Rapid Eye Movement (REM) Sleep Behaviour Disorder.

[102] Dr. Ennis was qualified as an expert in forensic psychology and was entitled to provide an opinion in relation to that expertise and to use the DSM-V in arriving at his opinion. He was therefore technically qualified to provide the opinion of REM Sleep Behaviour Disorder in accordance with the criteria in the DSM-V. Despite this, I give no weight to the opinion of Dr. Ennis on the ultimate issue for the following reasons:

- Dr. Ennis acknowledged that he did not have expertise in sleep disorders and took this assignment conditional upon the Defence retaining a qualified sleep expert.
- Dr. Ennis has no experience diagnosing sleep disorders.
- Dr. Shapiro, who was an expert in sleep disorders, rejected Dr. Ennis' opinion because it is based on REM Sleep Behavior which is less likely to result in parasomnia than deep sleep arousal.

[103] Even if the opinion of Dr. Ennis on the ultimate issue was deserving of some weight, various factors would result in his opinion being given reduced weight. For example, the opinion of Dr. Ennis is dependent on the accuracy and reliability of Mr. Starrett's reports to him and others. As I will explain later in these reasons, I have some serious concerns regarding Mr. Starrett's credibility and reliability arising from his evidence at trial. Dr. Ennis did not have the benefit of listening to Mr. Starrett's evidence, although he did obtain and read the transcript of Mr. Starrett's examination-in-chief, but not the cross-examination. Reviewing only the examination-in-chief does not provide the best opportunity to assess credibility and reliability.

[104] Dr. Ennis did have the opportunity to watch Mr. Starrett's interviews with police. Dr. Ennis testified that Mr. Starrett was "quite convincing to [him]" during the police interviews. On that basis, Dr. Ennis concluded that he could rely on the information provided by Mr. Starrett. The videos of Mr. Starrett's police interviews are not in evidence. As such, it is not possible for me to evaluate Dr. Ennis' conclusions regarding Mr. Starrett's presentation during the police interviews. I can only assess Mr. Starrett's credibility and reliability based on Mr. Starrett's *viva voce* evidence at trial.

[105] While Dr. Ennis' opinion on the ultimate issue carries no weight, Dr. Ennis' evidence is helpful in understanding Mr. Starrett's psychological make-up and how that may form part of the matrix that at least partially explains the circumstances that resulted in Ares' death. Dr. Ennis conducted multiple psychological tests, including the Personality Assessment Inventory (PAI), the Stat-Trait Anger Expression Inventory, and the Trauma Symptom Inventory (although the Trauma Symptom Inventory produced results that were not valid for interpretation). Dr. Ennis cautioned that the psychological testing occurred more than one year after the incident. The testing addressed Mr. Starrett's mental status at the time of the testing and not necessarily at the time that he assaulted his children.

[106] The PAI testing indicates a broad range of clinical features and suggests the possibility of multiple diagnoses. The PAI testing revealed that Mr. Starrett has an unusual degree of concern about physical functioning and health matters. Mr. Starrett's responses suggested that he views others as unsympathetic to his physical concerns and that he would likely be resistant to psychological interventions aimed at addressing those physical complaints. Mr. Starrett also

demonstrates suspicion and hostility in relationships with others, is quick to believe that he has been treated unfairly and is prone to holding grudges even in relation to unintentional slights. Mr. Starrett also appears to have difficulties consistent with a significant depressive experience. His self-esteem is likely to be fragile and he may be self-critical and self-doubting. Mr. Starrett also experiences intense and recurrent suicidal ideation.

[107] The State-Trait Anger Expression Inventory involves several components. In relation to "Anger Expression," there are two components. The "Anger Expression – Out" component involves the expression of anger toward other persons or objects. The "Anger Expression – In" component involves anger directed inward by, for example, holding in or suppressing angry feelings. Mr. Starrett's score on the "Anger Expression – Out" scale was in the low range, which suggested that he may be under-reactive to others and may supress, repress, or deny feelings of anger because they are uncomfortable. Mr. Starrett's score on the "Anger Expression – In" scale fell within the high range, which suggests that he may supress his anger and may be significantly angrier, upset, and agitated than he is willing to admit. These responses suggest that Mr. Starrett may exhibit occasional outbursts of highly intense anger and increased risk of health problems.

[108] The State-Trait Anger Expression Inventory also includes the "Anger Control" scale, which also has two components. The "Anger Control – Out" measures the control of angry feelings by preventing the expression of anger towards other persons or objects. The "Anger Control – In" scale measures the control of suppressed angry feelings by calming down or cooling off when angered. Mr. Starrett's score on the "Anger Control – Out" scale was in the high range, suggesting that he devotes a lot of attention and energy to monitoring himself to prevent any explosive manifestations of anger. Mr. Starrett's score on the "Anger Control – In" scale fell within the moderate range, suggesting that he is likely to overcontrol his anger and may have difficulty expressing his angry feelings.

[109] While I give no weight to Dr. Ennis' opinion on the ultimate issue, the factors that he considered in arriving at his opinion are helpful, particularly as they relate to the psychological assessment. In that regard Dr. Ennis summarized those factors as follows (Ex 36, p 22):

> At baseline, Mr. Starrett is an individual who presents with a wide range of phycological vulnerabilities that make him prone to explosive, emotionally dysregulated behaviour. He has a history of developmental and neurodevelopmental trauma that has shaped the development of his personality and his social behaviour. Mr. Starrett is someone who is hypersensitive to rejection, prone to feeling put upon and unsupported, and who correspondingly experiences feelings of resentment and hostility toward others. Mr. Starrett is uncomfortable experiencing these angry feelings and highly invested in concealing them from others and from himself. This tendency to ignore and over control his anger at the expense of dealing with it in a more effective fashion makes him prone to substance abuse as an avoidant coping strategy, and to explosive outbursts which occur when his unaddressed anger overwhelms him. Mr. Starrett's FAS, and associated impulsivity further limit the extent to which he is able to successfully suppress his anger and other negative affect (emphasis added).

[110] Dr. Ennis also notes that prior to the incident, the emotional outbursts that Mr. Starrett described had never manifested into any physically abusive or threating action directed toward

Mr. Starrett's children. Dr. Ennis' conclusion is consistent with the evidence in that there is no evidence of Mr. Starrett inflicting violence on or toward his children prior to the incident.

### 3. Is Mr. Starrett a Credible and Reliable Witness?

[111] Mr. Starrett's credibility and reliability are central to a successful automatism defence. Mr. Starrett is the only person who truly knows whether he was conscious and acting in a voluntary manner at the time of the incident. For this reason, Mr. Starrett's credibility and reliability are important factors in assessing whether he has met his burden of proving that he was not acting in a voluntary manner at the time of the assault upon his children.

[112] Much of Mr. Starrett's evidence was credible and reliable. He made many admissions against his own interest, or admissions which painted himself in poor light. For example, he freely admitted to many addiction issues, including an addiction to cocaine that ended approximately five years prior to the date of the incident. He acknowledged the heavy use of unprescribed Percocet in 2019 and the use of marijuana and heroin in the fall of 2019. He also admitted the use of Percocet within hours of Ares' death. He admitted that he was not a "perfect patient" and acknowledged other flaws. These types of admissions are indicators that suggest credibility.

[113] However, other parts of Mr. Starrett's evidence may call into question Mr. Starrett's credibility. Some examples are borne out by comparing Mr. Starrett's evidence with the pre-incident medical records and other reliable evidence.

#### i. July 4, 2019 "Suicide Attempt"

[114] Mr. Starrett testified that on July 4, 2019, approximately five months prior to Ares' death, he had been drinking alcohol with his then common-law spouse and neighbours. When Mr. Starrett arrived home later, he took Doxepin, the anti-anxiety medication that had been prescribed by Dr. Eyo.

[115] Mr. Starrett testified that shortly after taking the Doxepin, he began to experience a "creepy crawly" sensation in his skin, which was a sensation that he said he experienced every night for a long time. Mr. Starrett described the "creepy crawly" sensation as "extreme torture." Mr. Starrett felt that killing himself was "the only way out because no doctor could help [him]." Mr. Starrett testified that he took a "whole bottle of Doxepin" with an intention to commit suicide. Mr. Starrett went into medical distress and was taken by ambulance from his home in Fort Saskatchewan to the Royal Alexandra Hospital in Edmonton.

[116] Mr. Starrett's *viva voce* evidence of a suicide attempt on July 4, 2019, if it is to be believed, is very significant. According to Mr. Starrett's *viva voce* evidence, the suicide attempt was attributable to a "creepy crawly" sensation in his skin and legs. Dr. Shapiro and Dr. Ennis explained that this symptom is consistent with a diagnosis of restless leg syndrome, which is classified in the DSM-V as a type of parasomnia. However, Mr. Starrett's *viva voce* evidence on this point is simply not consistent with the weight of the evidence.

[117] When Mr. Starrett was treated at the hospital in Edmonton, he was specifically asked about suicide. The discharge summary records that Mr. Starrett "denied any homicidal or suicidal ideation," and denied any anxiety or psychotic symptoms (Ex 17, p 5). There was no reference to a complaint from Mr. Starrett of any "creepy crawly" sensations.

[118] After Mr. Starrett was discharged from hospital on July 5, 2019, he was advised to follow up with his family physician. Mr. Starrett followed up with Dr. Eyo on July 24, 2019. In Dr. Eyo's notes from that visit (Ex 17, p 12), there is no reference to Mr. Starrett complaining of any "creepy crawly" sensations, nor is there any reference to the Doxepin overdose being attributable to an attempt at suicide.

[119] On October 16, 2019, Mr. Starrett saw a psychiatrist, Dr. Osiogo. The medical chart notes from that visit indicate a discussion with Mr. Starrett regarding suicide attempts. Mr. Starrett disclosed to Dr. Osiogo several attempts at suicide, but all of those were situations in which Mr. Starrett cut his arm. None were related to overdoses of prescription medication, and none had occurred in "a long time" (Ex 18, pp 18 – 19). Mr. Starrett did not disclose a suicide attempt by Doxepin overdose in July 2019.

[120] There is no reference in any of Mr. Starrett's medical records that the overdose of Doxepin on July 4, 2019 was an attempt to commit suicide due to the "creepy crawly" sensation that he was experiencing during that period of time, or for any other reason. Additionally, there is no reference in any of Mr. Starrett's medical records to any "creepy crawly" sensation following the use of Doxepin. More specifically:

- Dr. Eyo's notes from June 3, 2019: Mr. Starrett saw Dr. Eyo three days after starting Doxepin. Dr. Eyo had prescribed Selenor, which is a brand name for a low dosage Doxepin. Mr. Starrett reported that he "has noticed some improvement in sleep." There is no reference to a "creepy crawly" sensation (Ex 17, p 14).
- Dr. Eyo's notes from June 12, 2019: Mr. Starrett saw Dr. Eyo for a follow-up. Mr. Starrett reported that the "Selenor helped a bit." There is no reference in the notes to a "creepy crawly" sensation (Ex 17, p 13).
- Dr. Eyo's notes from July 2, 2019: Mr. Starrett saw Dr. Eyo two days prior to the overdose. Mr. Starrett did not report any "creepy crawly" sensation, nor did he report any other side effects from the Doxepin. On the contrary, Mr. Starrett reported that the Doxepin had "helped considerably" and he asked about a possible increase to the dosage. The notes also report "neg side effects." Dr. Eyo agreed to double the dosage from one 10 mg capsule at bedtime to two 10 mg capsules at bedtime (Ex 17, p 13).

[121] Dr. Ennis recognized the contradiction between the medical records and Mr. Starrett's *viva voce* evidence but considered it irrelevant because Mr. Starrett was either attempting suicide or alternatively trying to fall asleep, both of which are signs of clinical distress. I disagree. There is a significant difference between a suicide attempt and an overdose on prescription medication after spending the afternoon consuming alcohol.

[122] I conclude that Mr. Starrett's evidence regarding a suicide attempt on July 4, 2019 is not credible. I find that Mr. Starrett's assertion that he attempted suicide as a last resort to end the "creepy crawly" sensation was simply an effort to create a narrative consistent with parasomnia that was related to the use of Doxepin. This is a narrative that was presented to Dr. Shapiro and Dr. Ennis. Dr. Shapiro described that Mr. Starrett had been taking Doxepin at the time of the assaults on his children and that Mr. Starrett "feels that Doxepin may have been a factor" (Ex 32, p 7). Dr. Ennis also explained that Mr. Starrett had discontinued Doxepin two days prior to Ares' death. The information regarding the use of Doxepin could only have come from Mr. Starrett. But it was false information. The Doxepin was last prescribed more than four months earlier.

[123] Mr. Starrett's evidence regarding a suicide attempt by Doxepin lacks credibility.

### ii. Prescription for Doxepin After Overdose

[124] Mr. Starrett was discharged from hospital on July 5, 2019 after the Doxepin overdose. The discharge summary indicates that Mr. Starrett was advised to follow up with his family physician, Dr Francis Eyo, within 48 to 72 hours (Ex 17, p 5). During cross-examination, Mr. Starrett explained that within a "a couple of days after [he] got out of the intensive care unit" he saw Dr. Eyo. Much more significantly, Mr. Starrett testified that Dr. Eyo "put [him] back on Doxepin," the very drug that was the cause of the overdose.

[125] Dr. Eyo was called as a witness by the Defence, but testified before Mr. Starrett did. As a result, Dr. Eyo was not able to respond to these very serious assertions. Therefore, the only evidence available to evaluate Mr. Starrett's *viva voce* evidence on this point is in Dr. Eyo's medical records. There is no notation in Dr. Eyo's medical records to suggest that he saw Mr. Starrett at any time between July 2, 2019 and July 24, 2019. Dr. Eyo testified, and the medical records confirm, that no medication of any kind was prescribed to Mr. Starrett when Dr. Eyo saw him on July 24, 2019 (Ex 17, p 12).

[126] Mr. Starrett's *viva voce* evidence on this point is not supported by the totality of the evidence. I conclude that Mr. Starrett did not see Dr. Eyo within "a couple of days" after Mr. Starrett's release from hospital. More significantly, I conclude that Dr. Eyo did not at any time prescribe Doxepin for Mr. Starrett after Mr. Starrett had overdosed on that medication.

[127] The pharmacy records show that that Mr. Starrett did fill prescriptions for Doxepin on two occasions within eight days following release from hospital (Ex 21, p 7). However, after examining the pharmacy records, the prescription numbers, and the dosages associated with those prescriptions, I conclude that the Doxepin that Mr. Starrett obtained after the overdose was not prescribed by Dr. Eyo after Mr. Starrett was release from hospital. Rather, the prescription for Doxepin (along with one refill) was prescribed by Dr. Eyo for Mr. Starrett on July 2, 2019, two days before Mr. Starrett was hospitalized. It was this prescription that was filled by Mr. Starrett after he was released from hospital. Since this is an important point, I will provide the details.

[128] Dr. Eyo prescribed Doxepin to Mr. Starrett on June 12, 2019 (Ex 17, p 13). This prescription was filled at the pharmacy on June 19, 2019, as prescription #1...593 (Ex 21, p 6). A total of 15 tablets of Doxepin at 10 mg each was dispensed, with instructions to take one 10 mg tablet daily. The pharmacy records also show that Dr. Eyo authorized one refill of 15 tablets.

[129] On July 2, 2019, Mr. Starrett saw Dr. Eyo and reported that the "Doxepin has helped considerably" and that Mr. Starrett was inquiring about an increased dosage. Dr. Eyo increased the dosage and provided a new prescription (Ex 17, p 13).

[130] Mr. Starrett filled a prescription for Doxepin on July 2, 2019. Importantly, the pharmacy records show that the prescription that was filled on July 2, 2019 was not the prescription that had been given by Dr. Eyo on July 2, 2019. Instead, it was the refill of prescription #1...593 that Dr. Eyo had given on June 12, 2019 (Ex 21, p 7). The pharmacy dispensed 15 tablets of Doxepin at 10 mg each, with instructions to take one 10 mg tablet daily. This was not the increased dosage that had been prescribed by Dr. Eyo on July 2, 2019.

[131] On July 5, 2019, the very day that Mr. Starrett was released from hospital, the pharmacy filled another prescription of Doxepin. The pharmacy records show that on that date, 15 tablets

of Doxepin at 10 mg were dispensed, with instructions to take **two** tablets daily (Ex 21, p 7). This was in accordance with the prescription that had been given by Dr. Eyo to Mr. Starrett on July 2, 2019 and reflected the increased dosage that Dr. Eyo authorized on that date. Dr. Eyo's prescription included one refill, which was filled on July 13, 2019 (Ex 21, p 7), and, if taken as prescribed, would have lasted for 15 days to approximately July 27, 2019.

[132] Mr. Starrett saw Dr. Eyo on July 24, 2019 (Ex 17, p 12). Dr. Eyo's notes reflect a discussion related to the overdose of Doxepin and the resulting hospitalization, and Mr. Starrett's use of medication beyond what was prescribed. Dr. Eyo testified that he did not prescribe further medication on July 24, 2019 because he was concerned about the overdose and proceeded with caution. Instead of prescribing medication, Dr. Eyo counselled Mr. Starrett on sleep hygiene and suggested a sleep clinic to address the concerns relating to insomnia.

[133] I conclude that Mr. Starrett's *viva voce* evidence regarding Dr. Eyo prescribing more Doxepin after the overdose is not credible. I find that Mr. Starrett alone made the decision to continue to use Doxepin immediately after his release from hospital. I conclude that Mr. Starrett was attempting to shift responsibility for this decision to Dr. Eyo by suggesting that this continued use of Doxepin was with Dr. Eyo's approval. It was not.

### iii. Dr. Eyo Could No Longer Help

[134] Mr. Starrett was examined and treated by several medical practitioners in the months leading up to the incident. He saw Dr. Eyo at the South Pointe Medical Clinic on four occasions between May 30, 2019 and July 24, 2019. Mr. Starrett testified that (Trial transcript March 31, 2022; p 55 l 41 – p 56 l 1 and p 61 ll 20 – 21):

> I was looking for new doctors because Dr. Francis Eyo, quote, I say that I cannot help you because I've tried everything I can.
>
> .....
>
> Dr. Francis Eyo said that he had – couldn't do anything for me, so I was to find some new help ...

[135] Because the Defence called Dr. Eyo to testify before Mr. Starrett, Dr. Eyo was unable to respond to this assertion. Therefore, the only evidence available to evaluate Mr. Starrett's *viva voce* evidence on this point is in Dr. Eyo's medical records. There is no reference in Dr. Eyo's notes that would suggest that Dr. Eyo gave Mr. Starrett any such advice.

[136] Dr. Eyo last saw Mr. Starrett on July 24, 2019 (Ex 17, p 12). At that appointment, they discussed the overdose and subsequent hospitalization. Dr. Eyo gave Mr. Starrett sleep hygiene advice and they discussed a plan for a review at a sleep clinic. There is no indication that Dr. Eyo told Mr. Starrett that he could provide no additional assistance.

[137] Additionally, after July 24, 2019, Mr. Starrett continued to have contact with Dr. Eyo's clinic. In particular:

- On September 4, 2019, Mr. Starrett saw Dr. Bani at South Pointe Medical Clinic, which is the same clinic where Dr. Eyo practiced. At that appointment, Mr. Starrett reported his addiction to Percocet and oxycodone. Dr. Bani recommended a referral to an addiction clinic (Ex 17, p 12).

- An appointment was made for Mr. Starrett to see Dr. Eyo on October 15, 2019. Mr. Starrett was a "no show" at that appointment (Ex 17, p 12).

[138] When I examine all the evidence, I conclude that Mr. Starrett alone decided that he did not want to continue to see Dr. Eyo. The reason was not because Mr. Starrett was told that there was nothing further that Dr. Eyo could do to assist.

[139] Mr. Starrett saw Dr. Efunnuga for the first time on October 3, 2019. During that appointment, Mr. Starrett sought a referral to a psychiatrist to "help with the meds" (Ex 18, p 24). By that time, Mr. Starrett was no longer taking prescription medication of any kind. The last prescription written for Mr. Starrett was on July 2, 2019 when Dr. Eyo increased the dose of Doxepin. Dr. Eyo did not prescribe any medication on July 24, 2019, and no other physician at the South Pointe Medical Clinic prescribed any medication during Mr. Starrett's appointment on September 4, 2019. The decision to not prescribe medication seems reasonable in light of Mr. Starrett's overdose on July 4, 2019, and Mr. Starrett's disclosure on September 4, 2019 that he had been abusing other drugs.

[140] By October 3, 2019, it had been three months since Mr. Starrett had been prescribed any medication. When Mr. Starrett attended to see Dr. Efunnuga, there was no prescription medication to manage. It was more likely than not that Mr. Starrett was seeking prescription medication which he knew would not be forthcoming from Dr. Eyo or any other physician at the South Pointe Medical Clinic. The only way for Mr. Starrett to get further prescription medication was through a change of physicians.

[141] Based on an evaluation of all of the evidence, I conclude that Mr. Starrett's *viva voce* evidence claiming that Dr. Eyo told him that "I cannot help you because I've tried everything I can" is not credible. I find that Dr. Eyo gave Mr. Starrett no such advice. Mr. Starrett's evidence on this point was lacking in credibility.

### iv. "Hamster Wheel" of Medication

[142] Mr. Starrett testified that he was on a "hamster wheel" of medication and that he was taking the medication as prescribed by his doctors.

[143] The evidence discloses that Mr. Starrett had been on several medications over the years. However, he was certainly not on a "hamster wheel" of prescribed medication in the months leading up to the incident. As earlier noted, absolutely no medication was prescribed to Mr. Starrett during the three-month period between July 2, 2019 to October 3, 2019.

[144] On October 3 and 5, 2019, Dr. Efunnuga prescribed trials of three different medications, but none seemed to have the desired effect. All of the medication prescribed by Dr. Efunnuga was discontinued by October 16, 2019 (Ex 18, pp 23 – 24). This was confirmed by the medical notes of psychiatrist, Dr. Osiogo from that date (Ex 18, p 19).

[145] During Mr. Starrett's psychiatric consultation on October 16, 2019, Dr. Osiogo prescribed a "low dose of mirtazapine" (Ex 18, pp 20 – 21), which Dr. Osiogo described as a non-addictive sleep aid and anti-depressant. The prescription for mirtazapine was filled on October 18, 2019 (Ex 21, p 8). If taken as prescribed, that medication would have lasted until November 16, 2019. However, Mr. Starrett saw Dr. Okolie on October 26, 2019 (Ex 18, p 17). At that appointment, Mr. Starrett reported to Dr. Okolie that he was not taking any regular medication.

[146] While Mr. Starrett's description of being on a "hamster wheel" of medication may have been accurate at one point, that description was not accurate after July 2019. The last prescription to be filled prior to the incident was Dr. Osiogo's prescription for mirtazapine, which would have run out a week prior to the incident, or more likely was stopped by October 26, 2019.

[147] More importantly, the effects of whatever limited prescription medication Mr. Starrett was taking between September and November 2019, was completely overshadowed by Mr. Starrett's heroin use during those months.

### v. Very Open with Physicians Regarding Drug Use

[148] Mr. Starrett testified that he was very open with his physicians regarding his use of non-prescribed drugs. This is at least partially true. When he first saw Dr. Miller-Shewchuk on May 4, 2016, Mr. Starrett disclosed a family history of alcoholism and drug abuse and provided information regarding his own addiction issues. Dr. Miller-Shewchuk's notes indicate that Mr. Starrett disclosed that he had "former alcoholism, former drug user, former smoker" (Ex 16, p 17). Dr. Miller-Shewchuk testified that this was important information to her because:

> … I had mentioned to him that we're kind of limited with regard to options because a lot of other sleep mediations are even more addictive, and he was at a high risk for addiction.

[149] Similarly, when Mr. Starrett saw Dr. Bani on September 4, 2019, Mr. Starrett disclosed an "opioid addiction (mainly Percocet and oxycodone)" (Ex 17, p 12). Dr. Bani's notes from that appointment also suggest that Mr. Starrett was trying to resolve his addiction issues but that he was not able to do so on his own. For this reason, Mr. Starrett wanted a referral to an addiction clinic. Part of Dr. Bani's plan was to "refer to addiction clinic." Unfortunately, Mr. Starrett's heroin use began shortly after that appointment with Dr. Bani. Mr. Starrett did not return to the South Pointe medical clinic after that.

[150] Mr. Starrett also disclosed drug use at the time of his first visit with Dr. Efunnuga on October 3, 2019. Dr. Efunnuga's chart notes from that visit make the following reference: "Smokes ABT 20 CIGS/DAY, SMOKES WEEDS, opioids addiction" (Ex 18, p 24). While there is no evidence on this point, it seems likely that there may have been reference to heroin use in addition to the Percocet and oxycodone that had been disclosed to Dr. Bani one month earlier. This is because the heroin use began after the visit with Dr. Bani but before the first visit with Dr. Efunnuga.

[151] Although Mr. Starrett did seek help from some physicians regarding his addiction issues, Mr. Starrett did not disclose addiction issues or the use of unprescribed Percocet or heroin to all of his physicians. Mr. Starrett's failure to disclose his drug use is apparent in the following medical record entries:

- Mr. Starrett saw Dr. Eyo between May 30, 2019 and July 24, 2019 (Ex 18, pp 12 – 14). During that time, Mr. Starrett testified that he was consuming 70 Percocet tablets per week from the 100 per week that he purchased from Danielle Brown. Mr. Starrett never disclosed to Dr. Eyo that he was a very heavy user of non-prescribed Percocet.
- Mr. Starrett never disclosed his heroin use to psychiatrist, Dr. Osiogo. During the appointment on October 16, 2019, Mr. Starrett only disclosed a past problem with

cocaine, which he attributed to his ongoing sleep problems (Ex 18, pp 18 – 21). This is significant because Dr. Osiogo testified that if Mr. Starrett had disclosed the use of heroin use or other non-prescribed opioids, Dr. Osiogo would have had concerns. Dr. Osiogo only recorded the following in his chart notes regarding illegal drug use:

> He said he used to be a cocaine addict for six and a half years and it was really bad. He thinks that was probably when his sleep difficulty started. He feels that since he stopped using cocaine that his brain continues to act like it was still stimulated by cocaine (Ex 18, p 19).

[152] I do not accept that Mr. Starrett was open with all of his doctors regarding his drug use. I conclude that Mr. Starrett was only open with his doctors about his drug use when it suited his purposes.

### vi. Effects of Withdrawal from Heroin

[153] Mr. Starrett testified that he was a heroin user from late September 2019 until early November 2019. He testified that the heroin use began when his Percocet supplier left a bag of heroin in his car. Mr. Starrett used that heroin and then purchased additional quantities of heroin over the next several weeks from other drug dealers. Mr. Starrett ultimately decided that he would terminate the use of the heroin and did so approximately two weeks prior to the incident.

[154] During cross-examination, Mr. Starrett was asked about the symptoms he experienced when he stopped using heroin. He said (Trial transcript March 31, 2022; p 32, ll 28 – 33):

Q. After you stopped using heroin, you certainly felt symptoms from coming down off that didn't you?

A. I felt kind of nauseous, yes.

Q. Probably didn't feel like yourself?

A. Well, I felt sick. Nauseous.

[155] Later in cross-examination, Mr. Starrett explained that in the days leading up to the incident, he was experiencing some significant symptoms, which he attributed to going "cold turkey" from his medication, and not to heroin withdrawal. To "take the edge off" these symptoms he arranged to purchase 12 Percocet tablets from Danielle Brown. Mr. Starrett explained this in cross-examination (Trial transcript Marc 31, 2022; p 42 ll 20 – 29):

Q. You accessed them [Percocet] on the 22nd of November 2019 to help take the edge off. Is that right?

A. I was dealing with a lot of – a lot of symptoms.

Q. What symptoms?

A. Well, I <u>stopped taking my medication cold turkey</u>, and I experienced a lot of – I <u>though I was dying</u>. I just didn't want to tell [his then common-law spouse].

Q. You said you were experiencing a lot of symptoms though.

A. Yes.

(emphasis added)

[156] While Mr. Starrett acknowledged very significant symptoms in the days leading up to the incident, he only attributed nauseousness to the heroin withdrawal. Mr. Starrett attributed the remainder of his symptoms to the "cold turkey" discontinuation of his prescribed medication. As noted previously, Mr. Starrett had not been prescribed any medication of any kind between July 2, 2019 and October 3, 2019. While he was placed on a series of medications on a trial basis in early to mid October 2019, he stopped taking all prescription medications by October 26, 2019, which was one month prior to Ares' death. The only possible exception was the low dose non-addictive anti-depressant mirtazapine, which would have run out by November 16, 2019 if taken as prescribed. Since mirtazapine is non-addictive, there is no basis to permit me to infer that it would have caused withdrawal symptoms.

[157] I do not believe Mr. Starrett's assertion that the symptoms that he was experiencing in the days leading up to the incident were the result of going "cold turkey" from prescription medication. Rather, I find that by November 22, 2019, Mr. Starrett's symptoms were entirely attributable to heroin withdrawal.

[158] This conclusion is bolstered by Mr. Starrett's own words in his interview with Dr. Ennis (Ex 36, p 6):

> According to Mr. Starrett, he quit using heroin two weeks prior to the index offence. He approached his friend Danielle Brown and confided, "I tried heroin. I kind of liked it. I want to get off." On November 22, 2019, he procured 12 Percocet pills from Ms. Brown in an effort to alleviate the symptoms of heroin withdrawal.
>
> (emphasis added)

[159] Mr. Starrett was simply not credible when he attempted to attribute his symptoms to going "cold turkey" from prescription medication. I conclude that this was simply an attempt to shift responsibility for the symptoms to medical professionals who had prescribed the medication, rather than accepting responsibility for the symptoms which were attributable to heroin withdrawal.

### vii. Rage and Anger Issues

[160] Mr. Starrett denied that he had any rage issues or that he had ever self-identified as having rage issues. However, the medical records show that as early as March 12, 2016, Mr. Starrett self-reported to Dr. Carlson that he had concerns with rage and anxiety (Ex 16, p 19). Furthermore, Dr. Ennis described Mr. Starrett as presenting with a wide range of phycological vulnerabilities that make him prone to explosive, emotionally dysregulated behaviour and to "explosive outbursts which occur when his unaddressed anger overwhelms him" (Ex 36, p 22).

[161] Additionally, during Mr. Starrett's *viva voce* evidence, he testified that he was always "tired and cranky," and acknowledged regularly arguing, yelling, and having impulse control issues.

[162] On the morning of November 23, 2021, Mr. Starrett lost his temper when his then common-law spouse would not give him money to purchase cigarettes. As the argument escalated, Mr. Starrett threw a plate at his then common-law spouse.

[163] I conclude that Mr. Starrett is not credible when he suggests that he does not have rage issues.

### viii. Evolving Memory of Dream

[164] Mr. Starrett testified that when he woke up after the incident, he looked to his right and saw his daughter curled into a ball, and then saw Ares who was obviously in severe distress. He testified that he had no knowledge as to what had happened, and asked his daughter, who explained that he had caused Ares' injuries. When Mr. Starrett spoke on the phone with his then common-law spouse and 911, he had no explanation for what had happened. He said that he just woke up and Ares was dying.

[165] When Mr. Starrett spoke to witnesses immediately after the incident and when he first met with Dr. Ennis, he did not describe any dreams surrounding the incident. However, when he testified at trial, he provided an elaborate description of a dream he was experiencing at the time of the attack. This included being "teleported" in some fashion and being attacked by a "shadow creature" with no face, no eyes, and skin as black as a viper's skin that was continuously spinning. Mr. Starrett explained that in the dream he was thrown around the room by the creature, and in that process, he tried to protect his children

[166] Mr. Starrett's *viva voce* evidence at trial is significantly more elaborate than any description that Mr. Starrett provided at any time near the happening of the incident. Mr. Starrett's memory has clearly evolved over time.

[167] Dr. Ennis interviewed Mr. Starrett on four occasions over 12 months. When he testified, Dr. Ennis explained that Mr. Starrett's recall "evolved over time, has become more rich, relative to certainly his initial statements to police and even to me." (Trial transcript April 5, 2022; p 30, ll 34 – 36). While Dr. Ennis acknowledged the inconsistency in Mr. Starrett's reporting, he did not feel that it was an "important inconsistency" (Trial transcript April 5, 2022; p 31, l 40). Dr. Ennis explained that memory is malleable, and that nature abhors a vacuum. Dr. Ennis opined that Mr. Starrett was attempting to reconcile having caused the death of his child by developing the story of the dreams and plugging in details "<u>to craft a narrative for oneself or for others</u>" (emphasis added) (Trial transcript April 5, 2022; p 31, ll 13 – 14). Dr. Ennis described this as a relatively natural progression for people.

[168] While Dr. Ennis is a highly qualified and experienced psychologist, his evidence in this regard is not helpful in assessing Mr. Starrett's credibility.

[169] In almost all situations, where a witness's memory of the events has evolved or becomes more elaborate over time, credibility issues must be considered. Where a witness plugs in details "to craft a narrative for oneself or others," credibility becomes an even greater concern.

[170] I conclude that the evolving nature of the story of Mr. Starrett's dream is a demonstration of the lack of Mr. Starrett's credibility. This lack of credibility directly relates to the critical time during which the assault on his children took place.

### Conclusion regarding Mr. Starrett's credibility and reliability

[171] I conclude that I must be very cautious in relation to Mr. Starrett's *viva voce* evidence. Much of his evidence is accurate, reliable, supported by other evidence, and therefore is easily accepted. However, when Mr. Starrett testified regarding facts that touched upon, or were very closely related to the issue of automatism, there were many instances where his evidence gave rise to very serious credibility concerns.

[172] None of the individual concerns that I have expressed regarding Mr. Starrett's credibility would, on their own, cause me to disbelieve his evidence on critical issues. However, the combination of the concerns that I have expressed along with the totality of the evidence do cause me call into question Mr. Starrett's credibility on the critical issue of automatism.

### 4. Persuasive Burden - Conclusion

[173] The burden is on Mr. Starrett to prove on a balance of probabilities that he was in a state of automatism at the time of the unlawful act.

#### i. The *Stone* Factors

[174] In ***Stone***, at paras 188 to 191, the Supreme Court identified several factors to assist in the assessment of whether automatism has been made out. Those factors are not intended to be prerequisites to automatism, but rather a list of factors that may provide some assistance when undertaking the analysis. The ***Stone*** factors, which were confirmed in ***Fontaine*** at para 87 are the following:

1. What was the nature of the trigger?

[175] The nature of the trigger is most relevant in cases of "psychological blow" automatism, which is not asserted in this case. However, as ***Stone*** suggests, this is a factor that should be considered in all automatism cases.

[176] In this case, there is some evidence of a trigger consistent with automatism. Triggering events that may have precipitated the automatism could have been a touch from Mr. Starrett's daughter, restless leg syndrome, or withdrawal. Dr. Shapiro testified that all of these are potential triggering events, although the touch by Mr. Starrett's daughter is the most likely.

2. Is there a documented medical history of similar automatism?

[177] This factor involves a consideration of not only whether there has been any documented history of automatistic-like dissociative states, but also the similarity between any earlier recorded instances and the behaviour that is the subject of the index offence.

[178] In this case, there is some documented medical history from the Glenrose Hospital records that shows some evidence of sleepwalking and staring behaviour as a child. I conclude that this evidence adds little to the analysis for three reasons. First, the history is very old and records observations that were made 20 years prior to the incident. Second, as Dr. Shapiro notes, instances of parasomnia in children are much more common than in adults. Third, the sleepwalking and staring is markedly different than the violent outburst that resulted in Ares' death.

[179] There is no other documented medical history of any prior instances of automatism. There is some evidence of undocumented instances of automatism-like behaviour that must be considered. Mr. Starrett testified that approximately one week prior to the incident, he experienced an episode in which he dreamed he was walking and smoking a cigarette in a city that he did not know. Mr. Starrett said that he woke up in his bedroom with a lit cigarette in his hand. Mr. Starrett testified to two different versions of this incident. In one version, he awoke and was lying in bed with the cigarette. In the other, Mr. he awoke and was sitting in a in a chair with the cigarette. Neither of the versions are similar to the violence that was inflicted on his children on the date of the incident.

[180] Ms. Westcott provided much more reliable evidence of instances of Mr. Starrett's automatism-like behaviour. She lived and shared a bed with Mr. Starrett from approximately April 2020 until September 2020. This was many months after the incident and after Mr. Starrett had been released from the Edmonton Remand Centre. Ms. Westcott testified to witnessing multiple instances when Mr. Starrett would kick, punch, and elbow her while he was asleep. Ms. Westcott suffered from bruises as a result.

[181] Ms. Wescott also testified that Mr. Starrett's arms and legs would begin twitching while he was asleep. The twitching became progressively worse until Mr. Starrett would suddenly sit upright, get out of bed, and run out of the bedroom. When Ms. Westcott confronted Mr. Starrett, he did not appear to know what was going on. Ms. Westcott described one situation where Mr. Starrett got out of bed and bolted out of the bedroom. Ms. Westcott followed and confronted Mr. Starrett. Mr. Starrett said that he was chasing someone who had fired a shotgun, which of course was not the case.

[182] The instances of unusual dissociative behaviour took place during a time when Mr. Starrett's home was being subjected to numerous protests that were quite concerning, which is one potential explanation for some of Mr. Starrett's behaviours. Nevertheless, Ms. Westcott's evidence does suggest that for a period of time beginning about five months after the incident, Mr. Starrett experienced several episodes of automatism-like behaviour.

[183] These incidents do not fall clearly into the ***Stone*** parameters, because they are neither prior to the date of the incident and are not recorded in Mr. Starrett's medical history. Since the ***Stone*** factors are non-exhaustive and not prerequisites to a finding of automatism, I conclude that these incidents must be considered in assessing whether Mr. Starrett was in a state of automatism at the time of the incident.

3. Is there corroborative evidence from bystanders?

[184] The only bystander to these events was Mr. Starrett's five-year old daughter. As discussed earlier, I do accept the reliability of the young girl's evidence in terms of what Mr. Starrett did to her and Ares. However, I am not satisfied that her evidence is otherwise reliable. She was describing a very traumatic incident and was aware that her brother was dead. Her statement included many inconsistencies, which is to be expected from a five-year old child.

[185] Therefore, I conclude that there is no reliable corroborating evidence from bystanders. This neither supports nor contradicts Mr. Starrett's assertion of automatism.

4. Was there a motive?

[186] As is noted in ***Stone***, a motiveless attack will generally lend plausibility to a claim of automatism. In this case, there was no motive for Mr. Starrett to have attacked his children. There is no evidence of Mr. Starrett having been violent toward his children in the past.

[187] This factor supports the plausibility of a conclusion of automatism.

5. Was the trigger of the automatism-like state also the victim?

[188] ***Stone*** suggests that generally where the trigger is also the victim a claim of automatism should be considered suspect. In this case, if the trigger was the touching by Mr. Starrett's five-year old daughter, she was also one of the victims. This factor would weigh against the plausibility of automatism.

6. Was the offence explicable without reference to automatism?

[189] The Crown argues that Mr. Starrett's actions were the result of rage and not automatism. The Crown submits that the most plausible explanation for the events that resulted in Ares' death is that Mr. Starrett, while experiencing back pain, fatigue, and the side effects of heroin withdrawal, fell asleep and was suddenly awakened, perhaps because he had been touched by his daughter or for some other reason. Regardless of the reason for the sudden waking, the Crown alleges that Mr. Starrett lashed out in rage and responded disproportionately.

[190] This alternate theory was not put to Mr. Starrett in cross-examination and thus I do not have the benefit of his response to the Crown theory. However, the Crown theory was put to Dr. Ennis. In response Dr. Ennis agreed that the Crown theory was a plausible explanation for what had happened but that it was not the most plausible explanation.

[191] I will address the 6th ***Stone*** factor in more detail later in these reasons.

### ii. Mr. Starrett was Pre-Disposed to Parasomnia

[192] The evidence discloses that Mr. Starrett is a person who is more pre-disposed to parasomnia than other persons. This conclusion is most clearly illustrated by the evidence of Dr. Shapiro who described the results of the sleep study that was undertaken by the Jodha Tishon Inc Sleep Centre in Toronto. The test results demonstrated that Mr. Starrett was aroused from deep sleep frequently during both nights of testing. Dr. Shapiro described the nature of these arousals from deep sleep as a "thumbprint for parasomnia."

[193] Equally importantly, the evidence clearly establishes that Mr. Starrett had a long history of insomnia and chronic back pain which affected his sleep in the months and years leading to Ares' death. Dr. Shapiro testified that insomnia and sleep deprivation are factors that could catapult a patient into deep sleep. For this reason, I conclude that frequently when Mr. Starrett falls asleep, he quickly goes into a deep sleep from which there is the potential for arousal.

[194] I am mindful that the sleep study was conducted two years after Ares' death and that Mr. Starrett's sleep patterns had changed significantly in two years prior to the testing. I am also aware that the sleep patterns at the time of testing were inconsistent with the significant insomnia that Mr. Starrett reported in the months preceding the offences. Because of this, caution must be exercised when extrapolating the test results back to November 2019. However, there is no evidence that the arousals from deep sleep were any different in 2019 than they were in 2021 at the time of testing. Thus, I infer that Mr. Starrett experienced similar types of arousals in 2019 as were reported by the test results.

[195] The evidence also suggests that Mr. Starrett may have FASD, which can be disruptive to normal sleep cycles, and which can result in arousals that, in turn, can give rise to a parasomnia.

[196] Mr. Starrett experienced a dream approximately one week prior to the attack on his children. The dream involved Mr. Starrett walking in a strange city and smoking, only to wake up to find himself smoking. This may also indicate a pre-disposition to parasomnia, even though it did not result in any act of violence.

[197] Similarly, the episodes of Mr. Starrett acting out in his sleep many months after the attack on his children, as described by Ms. Westcott may also be supportive of a conclusion that Mr. Starrett was pre-disposed to parasomnia, even though there may be equally reasonable alternate explanations for that behaviour.

[198] Sleepwalking and staring as a child, as reported by the Glenrose Hospital records, may also give some indication that Mr. Starrett was pre-disposed to parasomnia, but for the reasons given earlier, I attach no weight to these factors.

[199] When I consider the combination of these factors, I conclude that Mr. Starrett was pre-disposed to parasomnia and that this contributes to the plausibility of automatism at the time of the offences. However, simply because he was pre-disposed to parasomnia does not mean that Mr. Starrett experienced an episode of parasomnia when he attacked his children. That can only be determined by assessing the evidence with respect to what transpired that day.

### iii. Some Evidence Supports Automatism

[200] The evidence does disclose factors that could potentially lend some support a conclusion of parasomnia at the time of the attack on his children. Most importantly the evidence is clear, and I find, that in the months prior to the attack on his children, Mr. Starrett was experiencing insomnia and chronic back pain. He was not sleeping well and, as Dr. Shapiro testified, this makes it more likely that when he went to sleep at or around the time of the assaults, he fell into a deep sleep. This created the potential for parasomnia.

[201] In the days leading to the attack on his children, Mr. Starrett was experiencing several financial and relationship stresses. Even more importantly, he was experiencing significant symptoms of heroin withdrawal. These are factors that Dr. Shapiro described as potential modulating or priming factors that could have given rise to an arousal that in turn could result in parasomnia and thus automatism.

[202] There is some evidence that Mr. Starrett experienced disorientation and confusion after the incident, which are factors that Dr. Shapiro explained are consistent with parasomnia. Danielle Brown testified that after the children were injured, Mr. Starrett called her and asked her to come to the home to help. When Danielle Brown arrived, she thought that Mr. Starrett appeared confused and panicked. Mr. Starrett did not appear to know why Danielle Brown was there or how she knew that Ares had been injured. This is some evidence that parasomnia may have been present, although this is far from conclusive since Mr. Starrett's behaviour may also have been consistent with the state of panic arising from the realization of the extent of the injuries to Ares.

[203] Other evidence that suggests Mr. Starrett was acting in a state of automatism at the time that he attacked his children include that after the assaults, he asked his five-year old daughter "What the fuck happened?" In response, the young girl told Mr. Starrett that he had been responsible for the violence. Additionally, immediate after the attack, Mr. Starrett explained to his former common-law spouse and others that he did not know what had happened. He only said that Ares was dying.

[204] For these reasons, I conclude that there is some evidence that could potentially be consistent with a finding that Mr. Starrett was suffering from parasomnia and thus automatism at the time of the incident. However, this evidence cannot be looked at in isolation but must be considered in the context of all of the evidence.

### iv. Conclusion – Automatism Not Proven

[205] While I am satisfied that there is some evidence that could potentially support a conclusion of parasomnia and thus automatism, when I consider the totality of the evidence, I

find that it is not possible to conclude that Mr. Starrett was in a state of automatism at the time of the attack on his children. I come to this conclusion for several reasons.

[206] I do not accept Mr. Starrett's statement that he was unaware of what was happening at the time of the assaults and that he only became aware of what he had done after speaking with his daughter. A finding of automatism depends on the Court accepting Mr. Starrett's explanation for what transpired at the time of the assaults. For the reasons given earlier, I am not satisfied that Mr. Starrett is a credible witness and I do not accept the fundamental premise of his evidence.

[207] I conclude that Mr. Starrett is attempting to rationalize his behaviour. This rationalization is most evident in the evolving story of his dream of being "teleported" and attacked by a "shadow creature" during which he was attempting to protect his children. It is certainly possible, as Dr. Ennis explained, that this story evolved because Mr. Starrett plugged in details "to craft a narrative for [him]self or for others." It is even possible that Mr. Starrett actually believes this story. But the story did not exist for more than one year after Ares' death and it only began evolving thereafter. I conclude that Mr. Starrett crafted this narrative in an attempt to rationalize to himself and others his own behaviour at having committed such an extreme act of violence against his own child. Alternatively, the story was crafted to satisfy a narrative that would lead to a conclusion of automatism.

[208] Furthermore, in accordance with the 6th ***Stone*** factor, I need to consider whether the offence is explicable without reference to automatism. I conclude that a finding of automatism is not possible because it would require that I ignore the more likely explanation that the assaults arose from a fit of rage. The evidence is clear, and I conclude that Mr. Starrett had unresolved anger and rage issues and that existed at the time of the assaults. As Dr. Ennis explained, Mr. Starrett presented with a wide range of phycological vulnerabilities that make him prone to explosive, emotionally dysregulated behaviour and to "explosive outbursts which occur when his unaddressed anger overwhelms him" (Ex 36, p 22). I conclude that Dr. Ennis' opinion is well founded and is supported by Mr. Starrett's own behaviour the morning of the assaults when he threw a plate in anger at his former common law spouse during a dispute over money for cigarettes.

[209] I conclude that it is more likely than not that in the hours before the attack on his children, Mr. Starrett was experiencing very significant symptoms of heroin withdrawal. These symptoms made his whole body feel like a train wreck, and like he has been hit by a car. With the Percocet purchased from Danielle Brown the day before, Mr. Starrett had been able to take the edge off these symptoms, but by mid afternoon on the day of the assault, he had run out of Percocet. Even worse, given that he had no money to even purchase cigarettes earlier that morning, I find that Mr. Starrett had no money to purchase additional Percocet to attempt to control the symptoms. I conclude that Mr. Starrett was in a desperate situation at that time and that, as described by Dr. Ennis, he was prone to explosive outbursts when unaddressed anger overwhelmed him. I conclude that Mr. Starrett became overwhelmed by his situation and burst out in an aggressive and disproportionate manner by striking his children.

[210] I conclude that this explanation for the attack on his children is much more likely than a conclusion that Mr. Starrett was in a state of automatism.

[211] When I consider the totality of the evidence, I conclude that Mr. Starrett has not proven on a balance of probabilities that he was suffering from parasomnia at the time that he applied

force to his children. Therefore, I find that Mr. Starrett was not an automaton and that he acted voluntarily at the time that he applied force to his children.

[212] The *actus reus* of the offences of manslaughter and assault have therefore been proven beyond a reasonable doubt.

## V. Defence of Mental Disorder – s 16 of the *Criminal Code*

[213] Defence counsel submits that there is a distinction between mental disorder automatism, which I have just discussed, and the defence of mental disorder. These are distinct defences even though both are subsumed in s 16 of the *Criminal Code*. The distinction is referred to in ***Fontaine*** at para 18. The defence of mental disorder can be applicable even where an accused person acts in a voluntary manner, provided that it can be established that the person suffered from a disease of the mind that rendered him incapable of appreciating the nature and quality of the acts or of knowing that they were wrong.

[214] Defence counsel argues that the confluence of factors from which Mr. Starrett was suffering at the time of the incident could constitute a mental disorder that rendered him incapable of appreciating the nature and quality of his actions. Defence counsel submits that that even if I do not accept that Mr. Starrett was in a parasomnic state at the time that he applied force to his children, the evidence is sufficient to show that Mr. Starrett was suffering from a disease of the mind that rendered him incapable of appreciating the nature and quality of his actions, and therefore not criminally responsible.

[215] Like the defence of mental disorder automatism, the burden of proving the mental disorder on a balance of probabilities falls on Mr. Starrett as he is the party raising the issue: see s 16(2) and s 16(3) of the *Criminal Code*.

[216] Having concluded that Mr. Starrett has failed to prove that he was acting in an involuntary manner at the time of the assault on his children and given the totality of the circumstances of this case, I conclude that there is simply no rational basis that would give rise to a defence of mental disorder. The expert evidence does not suggest a diagnosis other than parasomnia, which I concluded was not proven on a balance of probabilities. There is no evidence to suggest that Mr. Starrett did not appreciate the nature and quality of his assaultive behaviour, that striking his children would cause serious injury to them, or that it was wrong to do so.

[217] Mr. Starrett has the onus to proof on a balance of probabilities and has failed to meet the onus on this issue. There is no evidence to support a defence of mental disorder.

## VI. *Mens Rea* for Manslaughter and for Assault

[218] The *mens rea* for unlawful act manslaughter has two requirements:

> (a) the *mens rea* required for the unlawful act and
>
> (b) it being objectively foreseeable that the unlawful act(s) create a risk of bodily harm that is neither trivial nor transitory.
>
> ***R. v Osman***, 2022 ABCA 77 at para 56; ***R v Javanmardi***, 2019 SCC 54 at para 31.

[219] The unlawful act in this case was the assault on Ares. The *mens rea* for the assault on both Ares and the young girl is the intentional application of force without consent. Given the ages of the children, consent is not a relevant factor.

[220] It is however necessary to consider the circumstances in which the force was applied. An application of force that is the result of carelessness, reflex action, accident, or honest mistake is not intentional. In those circumstances, the essential element of intent is lacking, and the accused must be acquitted: ***R v Starratt***, [1972] 1 OR 227 (Ont CA); ***R v Wolfe***, [1974] OJ No 868 (Ont CA); ***R v D(M)***, 2010 BCCA 182 (BC CA) at para 29.

[221] Since Mr. Starrett has testified, I need to assess the evidence as outlined by the Supreme Court in ***R v W(D)***, [1991] 1 SCR 742 as more fully explained in ***R v Ryon***, 2019 ABCA 36 at para 51 and ***R v Achuil***, 2019 ABCA 299 at para 18. I must consider whether I believe Mr. Starrett's evidence denying guilt or other exculpatory evidence to that effect. For the reasons that I have outlined above, I do not believe that portion of Mr. Starrett's evidence with respect to what happened at the time of the assault on his children. Thus, I do not accept his evidence with respect to whether he intended to strike his children. I would not acquit at the first stage of the ***W(D)*** analysis.

[222] I must also consider whether Mr. Starrett's evidence or other exculpatory evidence raises a reasonable doubt on the issue of *mens rea*. A portion of the evidence of the young girl might be interpreted to suggest that at lease one of the blows to Ares was accidental. However, for the reasons earlier given, I conclude that the young girl's evidence on this and many other issues is unreliable. I find no evidence that would give rise to reasonable doubt on the *mens rea* issue. Furthermore, none of Mr. Starrett's evidence or the other potentially exculpatory evidence would create a reasonable doubt regarding carelessness, a reflex action, accident, or honest mistake. Thus, I would not acquit at stage two of the ***W(D)*** analysis.

[223] Finally, I must determine whether the evidence as a whole proves the *mens rea* beyond a reasonable doubt. Dr. Bannach testified that Ares suffered from numerous blunt injuries to the head with bruising to the face and scalp, and right and left skull fractures. The extent of these injuries clearly demonstrates beyond a reasonable doubt that they could not have been caused by one careless strike, reflex action, accident, or honest mistake. Similarly, the young girl's evidence was that she was struck more than once by Mr. Starrett. The only reasonable inference that can be drawn from this evidence is that the application of force to both victims was intentional.

[224] When I consider all of the evidence, I conclude that the Crown has proven beyond a reasonable doubt that Mr. Starrett intentionally applied force to Ares that created a risk of bodily harm that was neither trivial nor transitory. I also conclude that Mr. Starrett intentionally applied force to the young girl that caused her injuries.

[225] In considering the evidence as a whole, I find that the Crown has proven the *mens rea* for both manslaughter and common assault beyond a reasonable doubt.

## VII. Conclusion

[226] For all of these reasons I conclude that the Crown has proven beyond a reasonable doubt that Mr. Starrett is guilty of the manslaughter in relation to the death of Ares and common assault on the young girl.

Heard from the 14th day of March, 2022 to the 6th day of April 2022,
Written submissions received on April 18, 2022, and April 21, 2022.
Oral submission heard on June 3, 2022.

**Dated** at the City of Edmonton, Alberta this 29th day of June, 2022.

**John T. Henderson**
**J.C.Q.B.A.**

**Appearances:**

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Sandra Christenson-Moore
for the Crown

Y. Rory Ziv
for the Accused