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IN THE SUPREME COURT OF NEW ZEALAND

SC 80/2014
[2015] NZSC 198

BETWEEN	THE QUEEN Appellant
AND	TAWERA WESLEY WICHMAN Respondent

Hearing:	12 February 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	A Markham and P D Marshall for Appellant P V C Paino and S M M Bolland for Respondent
Judgment:	18 December 2015

JUDGMENT OF THE COURT

The appeal is allowed and the evidence in question is ruled to be admissible.

REASONS

WILLIAM YOUNG, ARNOLD AND O'REGAN JJ
(Given by William Young J)

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Introduction

[1] Strongly suspecting that the respondent had killed his infant daughter, T, but of the view that there was insufficient evidence to justify prosecution, the police

targeted him with an elaborate undercover operation aimed at obtaining a confession. In the course of this operation, the respondent was recruited as an associate of what he understood to be a criminal organisation but in fact consisted of undercover police officers. He was told that the organisation operated on the basis of loyalty, trust and honesty and also that it had the capacity (through an association with a corrupt police officer) to sort out problems with the police. During the final phase of the operation, the respondent was questioned by the ostensible head of the organisation, a man he knew as "Scott", as to his background. In the course of this discussion, the respondent admitted that he had twice assaulted T. Shortly afterwards he was arrested and charged with manslaughter and causing T grievous bodily harm with reckless disregard for her safety.

[2] The respondent challenged the admissibility of the admissions which he made to Scott. He was unsuccessful before Collins J in the High Court.[1] On appeal, however, the Court of Appeal held that the evidence had been obtained improperly and should be excluded under s 30 of the Evidence Act 2006.[2]

[3] The Crown now appeals with the leave of this Court.[3]

T's death

[4] On the Crown case:

(a) The respondent, then 17, assaulted T, then five months,[4] on 4 March 2009 and on at least one earlier occasion.

(b) In the aftermath of the 4 March 2009 assault, T was admitted to hospital suffering from subdural bleeding, severe and permanent brain injuries, retinal haemorrhaging and fractured ribs and femora.

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1 *R v Wichman* [2013] NZHC 3260 [*Wichman* (HC)].

2 *Wichman v R* [2014] NZCA 339, [2015] 2 NZLR 137 (Randerson, White and Miller JJ) [*Wichman* (CA)].

3 *R v Wichman* [2014] NZSC 142.

4 T and her twin brother were born prematurely and spent four months in hospital after their birth. As at 4 March 2009, they had been in their parents' care for about six weeks.

(c) Some of these injuries were inflicted on 4 March and others on the earlier occasion (or occasions) on which the respondent assaulted T.

(d) T died on 8 September 2009 as a result of these injuries.

[5] The police interviewed the respondent on three occasions, on 6 March (at the hospital), 11 March and 5 November 2009. On the latter two occasions he was legally represented. At all interviews he acknowledged having care of T immediately prior to her hospitalisation on 4 March 2009. He said that she had a choking fit, lost consciousness and stopped breathing. At the first two interviews he acknowledged that he had shaken T but said that he only did so in an attempt to resuscitate her. At the final interview he declined to repeat what he had previously said as to what he did (that is shaking T) when he realised that she was not breathing, though he did not resile from what he had earlier said. Rather, he said that he was unwilling to "go through it again, repeating the exact same stuff".

[6] When interviewed by the police, the respondent denied that there had been any particular problem with T crying. This was in contradistinction to the account of events given by T's mother in which she said that T cried for lengthy periods of time and was very hard to settle. As well, she indicated that T's crying had become more pronounced in the period before 4 March 2009; a likely consequence of the injuries which she had suffered prior to 4 March.

[7] The medical evidence, although not unequivocal in excluding attempted resuscitation as the cause of the 4 March injuries, points strongly to the child having been severely assaulted on that day and on at least one earlier occasion. She was in the care of the respondent immediately prior to her hospitalisation on 4 March 2009. His narrative of events in relation to what preceded her admission is not particularly plausible; this for a number of reasons which include, but are not confined to, the medical evidence. But, although there were undoubtedly strong grounds for suspicion, the police concluded in April 2012 that there was then insufficient evidence to warrant prosecution. This conclusion was supported by an opinion obtained by the police at the time from the Crown Solicitor's Office.

[8] The undercover operation against the respondent began in December 2012. The respondent by then was 21. He and T's mother were living with his father who, on the basis of what the respondent told the undercover police officers, operates two small businesses. The respondent was working for his father.

[9] The operation involved a total of 21 interactions (referred to as "scenarios") between the respondent and undercover police officers. They started with the respondent filling out a survey and being induced to believe that, as a result of his participation in the survey, he had won a four wheel drive adventure. When taking up this prize he met "Ben" who recruited him to carry out some work for his boss, who was later identified as Scott. The initial tasks involved the repossession of motor vehicles. Ben told him that Scott ran an organisation which engaged in criminal activities but which was based on professionalism, respect, trust, loyalty and honesty. As the operation developed, the respondent became involved in what he assumed were criminal activities, including the obtaining of a false passport, a burglary (in which firearms were stolen), transporting cannabis (which was real), the sale of the "stolen" guns (which were also real) and the cannabis, and the arranging of a false alibi. The respondent also had dealings with "CJ", whom he thought to be a corrupt police officer, which involved Scott sorting out charges of sexual offending against "Craig", also a member of the supposed group. There was also an incident in which the respondent saw another member of the group being dismissed from the group because he had a bad attitude and asked "too many questions". Over the course of the operation the respondent was paid a total of $2,600 for the work he carried out. During the last month of the operation, the respondent's telephone discussions with his father and T's mother were intercepted by the police.

[10] The operation concluded with Scott interviewing the respondent on 2 May 2013. Shortly before this, a police officer told the respondent's mother that there would be an inquest into T's death.[5] The purpose was to ensure that T's death was in the forefront of the respondent's mind when he was speaking with Scott. This

[5] The respondent's position is that what the police officer said was untrue in that, at the time, no inquest was planned and there was an application to this Court to admit evidence on this point. We saw such evidence as unnecessary. There would obviously not be an inquest where there was a likelihood of an arrest. So plainly, at the very least, a misleading impression was conveyed by the police officer in the course of this discussion. On the other hand, if the police had decided that there was to be no prosecution, there would undoubtedly have been an inquest.

purpose was achieved to the point that the intercepted discussions between the respondent and T's mother suggest that he thought it likely that he would be prosecuted.

[11] In the course of this discussion Scott reinforced the need for honesty and trust and assured the respondent that he need not stay or say anything. Scott also explained that:

(a) he knew of the respondent's problem with the police, could fix that problem and did not care what the respondent had done;

(b) organisational security required that the problem be fixed before the respondent could join the group; and

(c) anything the respondent said would remain confidential.

When asked about T's death by Scott, the respondent initially denied culpability. But after Scott took him to a medical report which he had supposedly obtained from CJ, the respondent admitted shaking the baby on an occasion sometime prior to 4 March 2009 and again on that night. He said he did so because she was crying and he could not comfort her. He also confirmed that what he had earlier told the police was untrue. At this point the respondent appeared to become tearful to the point that Scott offered him a tissue. He apologised to Scott for lying to him and expressed relief for having had the opportunity to confide in Scott, though he later maintained in cross-examination that this had been "a complete act".

[12] It is clear that the respondent was under some pressure to confess. Full membership of the organisation was attractive to him in terms of lifestyle and economic benefit. He could not, however, attain full membership unless he "passed" the interview. This required him to satisfy Scott that he was being honest with him. Scott made it clear that he was of the view that the respondent had assaulted T. The respondent may well have thought that unless he confessed to assaulting T, he would not be admitted as a full member. As well, the respondent saw prosecution in respect of T's death as likely and was led to believe that a confession to Scott would assist in

avoiding prosecution. It is also possible that he was affected by more subtle pressures resulting from a wish to fit into the ethos of the new organisation and a desire to maintain his association with its members. He was led to believe that a confession would be cost-free.

[13] On the other hand, the police were careful to avoid any conduct which could be regarded as threatening. None of the scenarios had involved violent crime. Indeed Scott told the respondent that the organisation eschewed violence. The respondent was told that he did not have to discuss T's death if he did not wish to do so and he could leave the organisation at any time and with no ill will. The respondent had discussed his role in the organisation in intercepted communications with his father and T's mother in terms which give no indication that he felt intimidated.

A Canadian model

[14] The undercover operation in this case was based on a model developed in the 1990s in Canada by the Royal Canadian Mounted Police (RCMP)[6] and later adopted by police forces in Australia and New Zealand. This model is referred to in various ways, for instance by the RCMP as the "Major Crime Technique" and by the New Zealand Police as the "Crime Scenario Undercover Technique" but commonly and popularly as the "Mr Big technique". We propose to use the popular terminology because (a) it accurately captures the essence of what is involved in such an operation and (b) avoids confusion with other undercover operations in which particular scenarios are played out by undercover officers.

[15] Interestingly the present appeal is one of three we have heard this year involving such scenarios. In *R v Kumar*[7] the defendant, on his arrest on a charge of murder, was placed in a cell with undercover officers. They posed as criminals who had also just been arrested and used this as a pretext for what in substance was an interrogation of the defendant as to his involvement in the murder. In *Wilson v R*,[8]

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6 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [56]. A version of the technique appears to have been used by Canadian police as far back as 1901: see *The King v Todd* (1901) 4 CCC 514 (Man KB).

7 *R v Kumar* [2015] NZSC 124.

8 *Wilson v R* [2015] NZSC 189.

an undercover officer who had infiltrated a gang involved in drug dealing and other offending was suspected by some gang members of being a police officer. To alleviate this suspicion, the police put in place scenarios involving: (a) the apparent commission of criminal offences by the undercover officer; (b) a search, pursuant to a dummy (in reality forged) search warrant of storage facilities he had rented; and (c) a staged prosecution of the undercover officer in the District Court (which involved the laying of charges, the undercover officer retaining a lawyer often used by gang members, appearances in the District Court and the issue of a warrant of arrest for non-appearance). As will be apparent, these operations share some, but not all, of the features of the Mr Big operation which was deployed against the respondent.

[16] At the heart of a complete Mr Big operation are the following features: a supposed criminal organisation based on the principle that its members are completely honest and open amongst themselves; the suspect being recruited as an associate of the organisation and becoming involved in what appear to be criminal activities; the organisation's apparent ability to resolve problems associated with possible prosecution; and, at the end of the operation, an interview between Mr Big and the suspect.[9] From the point of view of the suspect, the interview is the final step before full membership of the organisation and the suspect is expected to be entirely frank about any prior offending. All of these features were present in this case.

[17] The technique has been used in Canada at least 350 times. In 75 per cent of these operations, the person of interest has either been cleared or charged. Of the cases prosecuted, in excess of 95 per cent have resulted in convictions.[10] Mr Big operations have resulted in many major unsolved crimes (including cold-case homicides) being resolved,[11] sometimes with previously undiscovered remains of murder victims being located.[12] Canadian Mr Big operations have taken up to three years. In one operation more than 40 undercover officers, civilian employees of the

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9 See *R v Hart*, above n 6, at [58]–[60]; Kouri T Keenan and Joan Brockman *Mr. Big: Exposing Undercover Investigations in Canada* (Fernwood, Halifax (Nova Scotia), 2010) at 19–21.

10 "Undercover Operations: Questions and Answers" Royal Canadian Mounted Police <www.rcmp-grc.gc.ca>.

11 See *R v Hart*, above n 6, at [61].

12 See for instance *R v Copeland* 1999 BCCA 744, (1999) 131 BCAC 264; *R v Bridges* 2005 MBQB 142, (2005) 200 Man R (2d) 313.

RCMP and consultants to the RCMP were involved.[13] In another, 63 "scenarios" were played out.[14] Several operations in Canada are reported to have cost in excess of CAD $1 million[15] and one is reported to have cost CAD $4 million.[16] Some Mr Big operations have encompassed extremely florid scenarios in which the suspects observed or became peripherally involved in what appeared to be violent crimes, including murder and kidnapping.[17] As well, on some occasions, the final interview of the suspect by Mr Big has been conducted in a very intense and threatening way.[18]

[18] The Mr Big technique has been used in Australia in a number of investigations and we will refer later to the approaches which Australian courts have taken to the admissibility of evidence so obtained.[19]

[19] For the purposes of the appeal to this Court, the Crown produced an affidavit from Detective Senior Sergeant John Mackie as to the protocols relating to the use in New Zealand of what he, consistently with New Zealand police usage, called the "Crime Scenario Undercover Technique" and an account of the seven occasions (including the operation in issue in this appeal) on which it has been deployed.[20] One of these was not an orthodox Mr Big operation and we therefore put it to one side. All of the six remaining Mr Big operations involved suspected homicide. In one instance the Mr Big interview produced no admissions although the suspect was, sometime later, prosecuted for, and eventually found guilty of, murder on the basis of admissions made to a third party. The other five operations (including the one against the respondent) resulted in admissions. Two of these operations have

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13 See *Dix v Canada (Attorney-General)* 2002 ABQB 580, [2003] 1 WWR 436, discussed in Keenan and Brockman, above n 9, at 23.

14 *R v Hart*, above n 6, at [38].

15 Keenan and Brockman, above n 9, at 23–24.

16 Shannon Kari "Need to catch a bad guy? Just leave it to Mr. Big" *The Globe and Mail* (online ed, Toronto, 11 August 2006).

17 See for instance *R v Hart*, above n 6; *R v Steadman* 2007 BCSC 483, [2009] BCWLD 8379.

18 Andrew Rose, suspected of a having committed an unsolved murder in British Columbia, was subject to "relentless pressure, abusive language, threats, inducements, robust challenges and psychological manipulation" in the final interview of a Mr Big operation run by the Royal Canadian Mounted Police (RCMP), leading him to make confessions that were "unsafe to rely on" – and, it turned out, contradicted by DNA evidence, with the result that the trial was abandoned: Gisli H Gudjonsson *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, Chichester, 2003) at 573–582.

19 See below at [42]–[45].

20 With some qualifications, this affidavit was accepted in evidence at the hearing of the appeal.

resulted in convictions for murder. The other three cases (including the case against the respondent) are before the courts.

[20] Central to much of the criticism of the Mr Big technique is the possibility that it may produce false confessions. A review of the case law and literature suggests that there have been some occasions in Canada in which the risk of false confession has crystallised.[21] Commonsense suggests that the risk that a particular use of the Mr Big technique has produced a false confession is, at least in part, a function of the design of the operation in question.[22] It is for instance plausible to consider that the more violent the organisation appears to be and the more threatening and hectoring Mr Big is at the final interview, the greater the chance of inducing a false confession. It is also plausible to assume that encouraging a suspect to boast about prior offending as a means of demonstrating criminal prowess and inclination might also have a tendency to produce false confessions. And in considering whether a particular confession is false, the terms in which it was given and the circumstantial detail provided will be material. As to all of this, it is right to recognise that there have been a number of murder cases which have been successfully resolved using the Mr Big technique and, as noted above at [17], in some instances this technique has led to the resolution of what would otherwise have been unsolved cases by producing confessions corroborated by consequential discovery of victims' remains.

[21] There are other criticisms which are also advanced, namely that:

(a) Evidence of a Mr Big operation is unfairly prejudicial to the defendant because it will necessarily disclose a willingness on the part of the defendant to engage in criminal activity.

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[21] An example is the case of Kyle Unger, who was convicted of murder in 1992, based in part on a confession obtained by the RCMP in a Mr Big operation. A new trial was ordered because, inter alia, DNA testing ruled out physical evidence that had initially been relied upon to link Unger to the murder scene, suggesting that a miscarriage of justice had occurred. The trial was eventually abandoned when the Crown concluded that it would be unsafe to try Unger on the available evidence. See *R v Unger* (1993) 85 Man R (2d) 284 (MBCA); *R v Unger* 2005 MBQB 238, (2005) 196 Man R (2d) 280; and Bruce A MacFarlane "Wrongful Convictions: Determining Culpability When the Sand Keeps Shifting" (2014) 47 UBC L Rev 597 at 615–616. A false confession was also obtained through the Mr Big technique in *R v Bates* 2009 ABQB 379, (2009) 468 AR 158 where an accused, though properly convicted of manslaughter, overstated his involvement by falsely admitting to having shot a rival drug dealer. See also Keenan and Brockman, above n 9, at 31–49.

[22] *R v Hart*, above n 6, at [69].

(b) Mr Big operations involve police officers interrogating a suspect unconstrained by the usual safeguards which apply when police officers, acting as such, interview suspects.

(c) It is improper for the police to engage in the deceits which are a necessary part of a Mr Big operation and in apparent (and perhaps sometimes real) criminal activity into which the suspect is recruited as an apparent participant.

[22] We will refer to the four concerns just discussed as involving unreliability, unfair prejudice to the defendant, breach or avoidance of constraints on police interrogation, and general impropriety.

The rules as to the police interrogation of suspects

[23] In New Zealand the interrogation of suspects by the police is controlled primarily[23] in three ways: under (a) the New Zealand Bill of Rights Act 1990; (b) the Evidence Act; and (c) the Chief Justice's Practice Note on Police Questioning. Because the relevant New Zealand Bill of Rights Act provisions apply only to those in custody, they are not material for present purposes.

[24] Section 29 of the Evidence Act, which addresses oppression, has not been invoked in the present proceedings. It is, however, of considerable contextual significance. Under this section, once the issue whether a defendant's statement was influenced by oppression is properly raised,[24] the statement can only be adduced in evidence if the judge is satisfied beyond reasonable doubt that the statement was not so influenced.[25] For the purpose of this inquiry, the truth of the statement is irrelevant.[26] Section 29(5) defines "oppression" as meaning:

(a) oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or

(b) a threat of conduct or treatment of that kind.

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23 Conceivably in some circumstances, abuse of process principles might be applicable as well: see *Wilson v R*, above n 8, at [39]–[80].

24 Either by the defendant on the basis of an evidential foundation or by the judge (see s 29(1)).

25 Section 29(2).

26 Section 29(3).

It thus includes actual or threatened violence. In assessing whether a statement was influenced by oppression, the judge must take into account factors such as the mental and psychological condition of the defendant when the statement was made, the defendant's characteristics and the manner and circumstances of any questions put to the defendant.[27] On this basis, a confession made at the end of a Mr Big interview which was influenced by express or implied threats of violence would be excluded as influenced by oppression.

[25] Section 29 identifies and enforces fundamental values about the treatment of suspects and, as part and parcel of this function, it disciplines the police (and others, as it is not confined to police oppression) by excluding admissions influenced by oppression, even if demonstrably true. As noted, however, this section was not relied on in this case.

[26] This means that the provisions which are potentially applicable are ss 8, 28 and 30:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.
>
> …
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> **28 Exclusion of unreliable statements**
>
> (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer a statement of a defendant if—
>
> (a) the defendant … against whom the statement is offered raises, on the basis of an evidential foundation, the issue of the reliability of the statement and informs the Judge and the prosecution of the grounds for raising the issue; or

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[27] Section 29(4).

(b) the Judge raises the issue of the reliability of the statement and informs the prosecution of the grounds for raising the issue.

(2) The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

…

(4) Without limiting the matters that a Judge may take into account for the purpose of applying subsection (2), the Judge must, in each case, take into account any of the following matters that are relevant to the case:

(a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):

(b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):

(c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:

(d) the nature of any threat, promise, or representation made to the defendant or any other person.

…

30 Improperly obtained evidence

(1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—

(a) the defendant … against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or

(b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) The Judge must—

(a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the

impropriety but also takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is improperly obtained if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

(b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[27] The Practice Note issued by the Chief Justice on 16 July 2007 relevantly provides:[28]

> 1. A member of the police investigating an offence may ask questions of any person from whom it is thought that useful information may be obtained, whether or not that person is a suspect, but must not suggest that it is compulsory for the person questioned to answer.
>
> 2. Whenever a member of the police has sufficient evidence to charge a person with an offence or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:
>
> (a) that the person has the right to refrain from making any statement and to remain silent
>
> (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme.
>
> (c) that anything said by the person will be recorded and may be given in evidence.
>
> …
>
> 4. Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.
>
> 5. Any statement made by a person … in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

[28] We will explain in a little more detail later the provenance of this Practice Note. For present purposes it is sufficient to note that prior to 2006, New Zealand judges applied the 1912 Judges' Rules promulgated in England and Wales relating to

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[28] *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

the questioning of suspects, although the Rules never had force of law[29] and the judicial concern was as to compliance with their "spirit".[30] The 1964 Judges' Rules as adopted in England and Wales were never applied in New Zealand.[31] The Practice Note thus replaced the 1912 Judges' Rules.[32]

[29] The respondent was not in custody and the police view that, prior to the Mr Big interview, there was insufficient evidence to charge him (supported as it was by an opinion from the Crown Solicitor) has not been challenged. At least on the assumption that the police view was correct, cls 2 and 5 were not engaged until, at the earliest, towards the end of the Mr Big interview. Clause 4 was arguably engaged when Scott referred to material from the police file, in particular the medical report but it was not suggested that the way the medical report was put by Scott to the respondent breached cl 4.

[30] The Canadian and Australian cases have addressed the common law rules (sometimes with statutory supplementation) as to the admissibility of confessions and, in particular, the rule that admissions obtained by reason of threats or promises made by persons in authority are involuntary. As will be seen, all the cases have adopted the view that, for the purposes of this rule, the undercover police officers in a Mr Big operation are not persons in authority; this because they are not acting in the role of police officers.

[31] The regime introduced by the Evidence Act differs significantly from the former law which comprised common law principles of admissibility as supplemented by the Evidence Act 1908. Some care is required in terms of applying the cases from overseas jurisdictions where the admissibility rules correspond broadly to those supplanted by the Evidence Act. That said, such cases are of considerable interest.

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29 So much was made clear by a statement made by the Chief Justices of the Commonwealth, the Australian States and New Zealand in 1965, where it was said that "Neither the old nor the new English Judges' Rules have the force of law in Australia or in New Zealand": See DL Mathieson *Cross on Evidence* (4th New Zealand edition, Butterworths, Wellington, 1989) at 563 and at n 7.

30 See Mathieson, above n 29, at [18.52].

31 At [18.51].

32 For further discussion see John Rowan "Criminal Practice" [2007] NZLJ 303 at 304.

The authorities

Canada

[32] Up until last year, the leading Canadian case was *R v Grandinetti*.[33] There, undercover officers engaged the respondent in simulated crimes over a five-month period. He was pressed as to involvement in the suspected crime but initially refused to speak about it. However, he eventually confessed when the undercover officers told him that they knew police officers who might influence his police investigation, and that unless he came clean he might be a liability to their organisation. It was clear that he had been offered inducements to confess and the primary issue in relation to the confession on the appeal was whether the undercover officers were persons in authority. If they were, the inculpatory statements made to them would have been inadmissible. The Supreme Court held that the undercover officers were not relevantly persons in authority because they were not purporting to be acting on behalf of the state.[34] The Court plainly did not see the evidence as being inadmissible by reason of unreliability, unfair prejudice to the defendant, the breach or avoidance of constraints on police interrogation, or police impropriety.

[33] The Supreme Court revisited the *Grandinetti* approach in two cases which were decided last year: *R v Hart*[35] and *R v Mack*.[36]

[34] In *R v Hart*, the unemployed and socially isolated suspect was thought by the police to have drowned his twin daughters. He was befriended by undercover police officers posing as criminals. Over four months, they involved him in 63 scenarios and he was paid more than CAD $15,000 for his services. On one occasion, they showed him CAD $175,000 cash. The undercover officers spoke to him about using violence both in relation to people outside the organisation and those who were within it but did not act with honesty and loyalty. The suspect allegedly made one unprompted bald admission to one of the undercover police officers to the effect that he had murdered his daughters, though this was not recorded and the suspect denied ever making it. He later confessed during his Mr Big interview and two days later

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33 *R v Grandinetti* 2005 SCC 5, [2005] 1 SCR 27.
34 At [42]–[44].
35 *R v Hart*, above n 6.
36 *R v Mack* 2014 SCC 58, [2014] 3 SCR 3.

went to the scene of the supposed murders and explained to an undercover officer how he had drowned his daughters.

[35] Without diverging from the earlier jurisprudence as to the voluntariness and right to silence issues, the majority of the Supreme Court took the view that the existing law provided insufficient protection[37] for those targeted by Mr Big operations and that, in order to address concerns as to reliability (given the incentive to confess), prejudice (in terms of the suspect's willingness to engage in criminal activities) and police misconduct (around the apparent offending),[38] it was necessary first to adopt a rule under which Mr Big evidence is prima facie inadmissible unless the Crown can establish on the balance of probabilities that the probative value of the confession outweighs its prejudicial effect and, secondly, to adopt a "more robust" conception of the doctrine of abuse of process.[39]

[36] Probative value was seen as turning on the Court's assessment of the reliability of the confession. This involves assessment of both the circumstances in which the statement is made (having regard to the nature and operation of the scenario technique and the personality of the suspect) and assessing the confession for markers of actual reliability (in particular, whether there is confirmatory evidence).[40] Prejudicial effect arises from the jury learning of the suspect's participation in the simulated criminal organisation.[41]

[37] The approach to the doctrine of abuse of process was explained as follows:

> [115] It is of course impossible to set out a precise formula for determining when a Mr. Big operation will become abusive. These operations are too varied for a bright-line rule to apply. But there is one guideline that can be suggested. Mr. Big operations are designed to induce confessions. The mere presence of inducements is not problematic … . But police conduct, including inducements and threats, becomes problematic in this context when it approximates coercion. In conducting these operations,

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37 See *R v Hart*, above n 6, at [67] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ.

38 At [68]–[78] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. Cromwell J agreed with this approach: at [152].

39 At [84]–[86] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. Cromwell J agreed with this approach: at [152].

40 At [99]–[105] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. Cromwell J agreed with this approach: at [152].

41 At [106] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. Cromwell J agreed with this approach: at [152].

> the police cannot be permitted to overcome the will of the accused and coerce a confession. This would almost certainly amount to an abuse of process.
>
> [116] Physical violence or threats of violence provide examples of coercive police tactics. A confession derived from physical violence or threats of violence against an accused will not be admissible — no matter how reliable — because this, quite simply, is something the community will not tolerate … .
>
> [117] Violence and threats of violence are two forms of unacceptable coercion. But Mr. Big operations can become coercive in other ways as well. Operations that prey on an accused's vulnerabilities — like mental health problems, substance addictions, or youthfulness — are also highly problematic … . Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system. As this Court has said on many occasions, misconduct that offends the community's sense of fair play and decency will amount to an abuse of process and warrant the exclusion of the statement.

[38] The evidence in *Hart* was held to be inadmissible. On the particular facts of the case, the social isolation of the suspect and the transformation of his life as a result of the Mr Big operation meant the incentive to confess was very powerful. The suspect's confessions were somewhat inconsistent, and there was no confirmatory evidence as to reliability. Accordingly the prejudicial impact of the evidence outweighed its probative value.[42]

[39] In the other case, *R v Mack*[43] the same test produced a different outcome. In this case the police operation involved 30 scenarios with the suspect receiving approximately CAD $5,000 for his services. The confessional evidence was compelling, including, as it did, the location of the murder victim's previously undiscovered remains and general correlation with other evidence called by the Crown. As well, the inducements offered to the suspect in that case were more modest than those in *Hart* and the aura of violence was less significant.

[40] The effect of these decisions is that the Mr Big technique will remain in use in Canada but that there will, at least according to public statements issued by the RCMP, be refinements as to how it is implemented. The RCMP has indicated that the age, education level and economic condition of suspects will be considered before deciding whether to employ the technique; that investigators will strive to

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42 At [131]–[147] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ.

43 *R v Mack*, above n 36.

obtain confirmatory evidence; and that operations will be shortened and better recorded.[44]

[41] The approach adopted by the Canadian Supreme Court in these cases has had a mixed reception. Some commentators have praised the decisions for emphasising the importance of Mr Big evidence being reliable.[45] Others see the approach adopted by the Canadian Supreme Court as not going far enough to address either reliability or the other concerns mentioned above; namely fairness, prejudice to the accused and a general sense of state impropriety.[46] We consider these issues as they arise in the New Zealand context from [69] below.

Australia

[42] Four cases from Victoria in which Mr Big evidence resulted in convictions were reviewed by the High Court of Australia in *Tofilau v The Queen.*[47] That Court rejected arguments to the effect that the confessions obtained through Mr Big operations should be rejected as being either (a) induced by threats or promises made by a person in authority; (b) involuntary in a more general or "basal" sense; or (c) obtained unfairly. As to the first, the majority held that the rules as to statements induced by a threat or promise held out by a person in authority were not engaged by inducements or threats held out by an undercover officer.[48] As to the second, coercion[49] or the suspect's will being overborne[50] were considered essential to involuntariness; neither a desire to obtain an advantage such as acceptance into the criminal group nor the mere fact of trickery on the part of the police would suffice.[51]

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44 See Daniel LeBlanc "RCMP to keep 'Mr Big' sting tactic" *The Globe and Mail* (online ed, Toronto, 1 August 2014); Mike Cabana "RCMP Statement Following the Supreme Court of Canada Decision in the Nelson Hart Case" (31 July 2014) Royal Canadian Mounted Police <www.rcmp-grc.gc.ca>.

45 See for example David M Tanovich "*R v. Hart*: A Welcome New Emphasis on Reliability and Admissibility" (2014) 12 Cr Art 298.

46 See for example Adriana Poloz "Motive to Lie? A Critical Look at the 'Mr. Big' Investigative Technique" (2015) 19 Can Crim L Rev 231; H Archibald Kaiser "*Hart*: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014) 12 Cr Art 304; H Archibald Kaiser "*Mack*: Mr. Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak" (2014) 13 Cr Art 251.

47 *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396.

48 At [13] per Gleeson CJ, [29] per Gummow and Hayne JJ, and [323] per Callinan, Heydon and Crennan JJ.

49 At [81] and [108] per Gummow and Hayne JJ.

50 At [353] per Callinan, Heydon and Crennan JJ.

51 At [81] per Gummow and Hayne JJ and at [347] per Callinan, Heydon and Crennan JJ.

As to the third, a confession might be excluded in the exercise of discretion where its prejudicial impact exceeded its probative value, but the standard for exclusion was the fairness of using the confession at trial.[52]

[43] In *R v Cowan*,[53] the Queensland Court of Appeal recently dismissed an appeal against a murder conviction based substantially on a confession obtained in the course of a Mr Big operation. The case arose out of the abduction and murder of a 13 year old boy. Evidence available to the police suggested that in close proximity to the victim when he disappeared were two men who each had criminal records encompassing abduction of, and sexual offending against, boys. One of them was Mr Cowan. He and the other man were not acquainted. Both men reacted suspiciously when spoken to by the police. In the end, the police investigation focussed on Cowan. He was targeted by a Mr Big operation involving 25 scenarios and 36 undercover officers. The effectiveness of the operation was supplemented by some pressure put on Cowan in relation to the inquest into the victim's death. At the Mr Big interview, Cowan admitted abducting and murdering the victim and later identified the area where he had disposed of his body and clothes. Some of the victim's remains and his clothing were located as a result. At trial, Cowan's defence proceeded on the basis that the other suspect was the killer and that he, Cowan, may have been given the location details via a third person who was known to both him and the other suspect. He did not, however, give evidence in support of this hypothesis.

[44] On appeal, counsel for Cowan argued that by reason of a combination of the pressure placed upon him in respect of the inquest by persons in authority (which left him with the view that he would be prosecuted if he could not produce an alibi) and the inducement offered by Mr Big (which included the provision of a false alibi), his admissions were not voluntary. This argument was carefully tailored with a view to bringing into play the rules as to persons in authority which no longer apply in New Zealand and for this reason, the reasons why it was rejected are of no present materiality. More relevantly, however, it was also argued that the admissions were obtained unfairly. Cowan had earlier made it clear that he did not wish to speak to

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52 At [68] per Gummow and Hayne JJ and at [248] per Callinan, Heydon and Crennan JJ.

53 *R v Cowan* [2015] QCA 87.

the police and it was said that in that light the combination of the pressure and inducement just referred to were improper and unfair. Reliance was placed on *R v Swaffield*,[54] discussed in the reasons of Glazebrook J.[55] This argument was dismissed:

> [90] It can be accepted that the appellant would not have made the admissions had he known the true identity of the undercover police officers. But they were not exercising the coercive power of the state when he confessed. He believed he was amongst his criminal friends. They stressed the need for him to tell the truth so that they could help him. He was free to leave their company at any time. They were not threatening or violent and in truth had not committed offences with him. He chose to make detailed confessions to the offences involving [the victim] so as to obtain a watertight, false alibi; to use the alibi to exonerate himself at the inquest when recalled; this would enable him to remain in the criminal gang and to participate in the pending "big job" which would net him $100,000. There was no abuse of process in the undercover scenarios leading up to and including his confessions.

[45] In *Swaffield*, the suspect had been charged with crimes including arson but discharged at a committal hearing. He was subsequently spoken to by an undercover officer and made admissions on the basis of which he was prosecuted and convicted on the count of arson. His conviction appeal to the Queensland Court of Appeal was allowed on the basis that the admissions should have been excluded as resulting from questioning by the undercover officer which was in breach of the 1912 Judges' Rules as applied in Queensland.[56] A subsequent appeal by the Crown was dismissed. At least in result, *Swaffield* appears to be not easily reconcilable with *Tofilau* or *Cowan*. A factual distinction is that in *Swaffield* but not in the other cases, the suspect had previously been arrested (albeit later discharged), a matter which was the subject of comment in the reasons.[57] As well, the difference in outcomes may in part be a function of the approach taken in the Australian cases that admissibility turned on the exercise of discretion which is not easily amenable to appellate review.[58]

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54 *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159.
55 See below at [480]–[482].
56 *Swaffield v R* (1996) 88 A Crim R 98 (QCA).
57 See *R v Swaffield*, above n 54, at [94]
58 See *R v Swaffield*, above n 54, at [34] per Brennan CJ.

England and Wales

[46] On the basis of the English cases to which we are about to refer, admissions made at a Mr Big interview would probably be held to be inadmissible. Unsurprisingly therefore, the Mr Big technique is not deployed by the police forces of England and Wales, at least in relation to crimes committed within that jurisdiction. But other investigative methods which raise some of the issues we must deal with have been adopted with mixed success in the courts.

[47] The English cases were, with one exception, decided under, or by reference to, s 78(1) of the Police and Criminal Evidence Act 1984 and the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Section 78(1) is in these terms:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The Code is far more elaborate than the Chief Justice's Practice Note but is similar in that it contains requirements for interviewing police officers to caution suspects[59] and for police interviews to be recorded[60] which, at a broad level, correspond with those which appear in the Practice Note. The caution threshold, however, is lower as it applies to any "person whom there are grounds to suspect of an offence".[61]

[48] In *Regina v Christou* undercover police officers set up a shop ("Stardust Jewellers") and held themselves out as willing to buy stolen property.[62] Interactions between the police officers and the defendants involved what was ostensibly "friendly banter" (for instance as to the areas in London which should be avoided when it came to the resale of the stolen goods) but in fact was intended to, and did,

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59 See at [10] of the Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers: Police and Criminal Evidence Act 1984 (PACE) – Code C (May 2014).

60 See at [11].

61 See at [10.1].

62 *Regina v Christou* [1992] QB 979 (CA).

result in admissions of guilt. A challenge to the admissibility of the evidence of these admissions was rejected in these terms by the Court of Appeal:[63]

> In our view … [the Code] was intended to protect suspects who are vulnerable to abuse or pressure from police officers or who may believe themselves to be so. Frequently, the suspect will be in a detainee. But the Code will also apply where a suspect, not in detention, is being questioned about an offence by a police officer acting as a police officer for the purpose of obtaining evidence. In that situation, the officer and the suspect are not on equal terms. The officer is perceived to be in a position of authority; the suspect may be intimidated or undermined.
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> The situation at Stardust Jewellers was quite different. The appellants were not being questioned by police officers acting as such. Conversation was on equal terms. There could be no question of pressure or intimidation by [the undercover officers] as persons actually in authority or believed to be so. We agree with the Judge that the Code simply was not intended to apply in such a context.
>
> In reaching that conclusion we should ourselves administer a caution. It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it.

[49] The "caution" administered in *Christou* has been picked up in a number of subsequent cases in which courts have excluded evidence obtained (or claimed to have been obtained) as a result of questions addressed by undercover officers to suspects. The underlying thinking is captured by the following passage from the judgment in *R v Whiteley*:[64]

> It seems to this Court that there are two main situations where such evidence obtained by a police officer acting undercover should normally be excluded by a trial judge in the exercise of his discretion under section 78 of the Police and Criminal Evidence Act. The first is where the officer is in effect seeking to circumvent the requirements of the Code as to interviews. That was the situation in *Bryce* … . An undercover officer normally cannot seek to obtain evidence about a past offence which the other person is suspected of having been involved in, so that he should be interviewed under caution, with all the normal safeguards applicable.
>
> That, however, is not what happened here. The officer was not seeking to elicit admissions from the applicant about the conspiracy with which he was eventually charged; the officer was seeking to discover if the applicant could supply him with heroin (as the advice on appeal confirms) and with a view to looking in the future to obtain intelligence on drug smuggling.

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63 At 991.

64 *R v Whiteley* [2005] EWCA Crim 699 at [12]. The decision referred to in the passage quoted is *R v Bryce* (1992) 95 Cr App R 320 (CA).

The distinction drawn is between undercover operations targeting offending which is underway at the time and those which target past offending.

[50] In circumstances not controlled by the Act and the Code, a different approach has been taken, as illustrated by *R v Bow Street Magistrates' Court, ex parte Proulx*.[65] This case arose out of a reasonably typical[66] Mr Big operation carried out in England by the RCMP and two English police forces in connection with a suspected murder which had occurred in Canada. The operation was successful and the admissions that Proulx made were relied on when the Canadian Government successfully sought his extradition. His challenge to the order for his extradition was dismissed with the principal judgment being delivered by Mance LJ. He observed:[67]

> … I would, if the issue under s. 78 [of the Act] related to a killing in this country and fell to be decided in a purely domestic context, expect the [Crown] to face very considerable difficulty in seeking to uphold a first instance decision which had admitted the applicant's confessions. I say this despite the margin allowed to such a court in a domestic context under the *Wednesbury* approach to appellate review.

This observation was of no assistance to Proulx because, as is obvious, the issue before the Court did not arise in a "purely domestic context". Mance LJ defined the issue he had to determine in this way:[68]

> The issue is whether (once again bearing in mind the margin allowed to the magistrate under the *Wednesbury* approach) he ought to have excluded the evidence in the extradition context as 'outraging civilised values'.

He went on to say:

> [79] The general requirement of fairness in the admission of evidence in criminal proceedings may be expected to be reflected in any developed system of law. But it is a quite different matter to suppose that it will in its application involve throughout the civilised world the same results as would follow in England from decided authorities, whether under s 78 of PACE or under common law. Current English thinking and practice as to what is fair and appropriate cannot be transmuted axiomatically into the touchstone of the outer limits of civilised values.
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> …

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65 *R v Bow Street Magistrates' Court, ex parte Proulx* [2001] 1 All ER 57 (QB).

66 One uncommon feature was that the suspect was encouraged to develop romantic ambitions in relation to one of the supposed members of the gang who was an undercover police woman.

67 *R v Bow Street Magistrates' Court, ex parte Proulx*, above n 65, at [75].

68 At [78].

> [83] I for my part fully accept the privilege against self-incrimination as a principle that one looks to find generally recognised throughout the world. But that again is not the same as saying that there is no scope for argument about its application in particular circumstances. The general principle is by no means absolute in England … . English courts have been careful to emphasise the importance of balancing all relevant factors in all the circumstances of each case. I am unable to accept that the present circumstances fall within that exceptional class of case, where the magistrate was bound to conclude that a consensus of civilised opinion exists which would be outraged if the present confessions were to be admitted.

New Zealand

[51] As noted at [19], the orthodox Mr Big technique has been used by the New Zealand police on five other occasions. It has previously been considered twice by the Court of Appeal, albeit in respect of the same prosecution, *R v Cameron*.[69] In that case, the appellant was charged with the murder of a victim whose body was not discovered until approximately 12 years after he was killed. Upon being interviewed by the police, the appellant denied any involvement with his death. The Mr Big operation which followed was apparently unremarkable[70] and resulted in a confession.

[52] A pre-trial challenge to the admissibility of the evidence under s 28 (reliability) was dismissed in the High Court[71] and the conclusion of the Judge on this issue was upheld by the Court of Appeal.[72] The Court of Appeal also dismissed a s 30 challenge to the fairness of the evidence.[73] A post-conviction challenge to the evidence was later dismissed.[74]

The High Court hearing and judgment

[53] In the High Court the respondent gave evidence claiming that his confession was false; that he had been induced by money to get involved in the organisation; and then feared that it would not be easy to leave because he had seen too much. He

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69 *R v Cameron* [2007] NZCA 564 [*Cameron* (Pre-Trial)]; *R v Cameron* [2009] NZCA 87 [*Cameron* (Post-Trial)].

70 This comment is based on the evidence of Detective Senior Sergeant Mackie which was that there were 19 scenarios that took place on 14 separate days across a two-month period. We say "apparently" because of the qualifications as to the reception of the affidavit.

71 *R v Cameron* HC Gisborne CRI-2006-016-3325, 10 August 2007.

72 *Cameron* (Pre-Trial), above n 69.

73 At [46]–[55].

74 *Cameron* (Post-Trial), above n 69.

was afraid of Scott, who had "all the power" and "could fix problems", and he realised during the interview that Scott rejected his explanation:

> … when I told Scott what really happened … he seemed like he didn't believe me, you know, and he thought that I was lying and … that what CJ had told him was the truth and, you know, whatever I said I just felt like, yeah, he thought that I was lying and I got a bit scared that I didn't want the conversation to end with him thinking I'm lying 'cos pretty scary guy, yeah.

The Judge did not accept this evidence.

[54] The Judge accepted that the s 28(1) threshold was passed in relation to promises and misrepresentations made to the respondent but not in relation to manner in which questions were put to him during the Mr Big interview.[75] In relation to s 28(2) he concluded that the circumstances in which the admissions were made were not likely to have affected their reliability.[76] Although in a sense evaluative, this was nonetheless a conclusion reached after hearing oral evidence including that of the respondent. He commented that:[77]

> … the scenario during which [the respondent] made his admissions did not provide a context or incentive … to falsely admit the injuries he caused [T].

[55] The Judge also found that the s 30(1) threshold had been met in that the respondent had raised, on an evidential foundation, the issue whether the evidence was unfairly, and therefore improperly, obtained.[78] He concluded, however, that the evidence had not been unfairly obtained,[79] a conclusion which was heavily influenced by the judgments in *Cameron*.[80]

[56] The Judge was nonetheless left with misgivings, in particular about the approach taken in the second *Cameron* judgment, in which there was a heavy reliance on the Mr Big interview not having been conducted in an overbearing or intimidatory manner.[81] He considered that:[82]

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75 *Wichman* (HC), above n 1, at [69] and [73].
76 At [75]–[87].
77 At [34].
78 At [104].
79 At [123].
80 See the Judge's comments at [124].
81 At [120].
82 At [124].

> … an ordinary New Zealander properly informed of all relevant circumstances would not expect the police to engage in lies, deception and blatantly misleading conduct of the kind that occurred in this case.

[57] Collins J did not need to undertake the balancing exercise required under s 30(2), but he indicated that, given the seriousness of the charges, the quality of the evidence and the fact that all other investigative techniques had been exhausted, he would have admitted the confession.[83]

The Court of Appeal judgment

A general comment

[58] In concluding that the respondent's confession was unfairly, and hence improperly, obtained[84] and that the associated evidence should be excluded,[85] the Court of Appeal did not invoke either s 28 as to reliability or s 8 as to unfair prejudice. It likewise did not hold that there was any breach of the constraints which apply to police interrogations. Nonetheless, concerns as to reliability, unfair prejudice and what the Court saw as the "evasion" of the rules as to police interrogations were material to both its finding of impropriety and the conclusion that exclusion of the evidence was proportionate to the impropriety.[86]

Reliability

[59] The Court noted that there was no challenge to the finding by the Judge of reliability and admissibility under s 28. Understandably, therefore, it did not set-aside that finding and, in particular, it did not rely on s 28 as the basis upon which it excluded the evidence.[87] It was, however, still concerned as to reliability.

[60] It will be recalled that Collins J expressed the view that the police had not provided the respondent with "a context or incentive" to make a false confession.[88] The Court of Appeal disagreed with this comment. It was of the view that there were three incentives to lie: membership of a "family", material rewards, and relief from

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83 At [132].
84 *Wichman* (CA), above n 2, at [64].
85 At [83].
86 At [80].
87 At [35].
88 See [54] above.

the spectre of prosecution.[89] The Court also commented on the pressure which it considered had been placed on the respondent:[90]

> We consider that the scenarios used here were likely to place the appellant under substantial psychological pressure to confess. There were many of them, and they occurred very regularly over a substantial period. Police officers befriended him, they made 16 payments totalling $2,600 to him, and they repeatedly exposed him to an affluent lifestyle that would be his if admitted to membership. The phone call to the appellant's mother was apt to place him under pressure. There is no evidence that the appellant exhibits special characteristics, but we do know that he was young, with limited income (although he came from an affluent background) and little experience of life and no meaningful criminal history. The evidence indicates that he was vulnerable to the technique's appeal to familial loyalty; so effective was it that he told Scott "I feel like, as long as I follow all your instructions and all your rules that everything's going to be fine for me … it's a good feeling … I feel just very safe".

[61] As well, the Court was concerned by the cost-free nature of the confession, as the respondent would have seen it, noting that:[91]

> … confessions induced by the [Mr Big] technique are manifestly not statements knowingly made against interest. On the contrary, the suspect understands that confession is at once costless and beneficial.

[62] The Court was of the view that the accuracy or otherwise of the confession is irrelevant to the reliability inquiry, as it made clear in the following passage of its judgment:[92]

> [Sections 27–30] provide that the Crown may offer a defendant's out of court statements, subject to exclusion for unreliability, oppression or impropriety. When considering exclusion the court focuses not on whether a given statement is true but on whether "the circumstances in which it was obtained" are not "likely to have affected" its reliability, and whether it was "influenced by" oppression, and whether it was "improperly obtained". … [T]he court inquires whether the circumstances offer reasonable assurance of the statement's reliability, not whether the statement is in fact true; its truthfulness is a matter for the jury.

Unfair prejudice

[63] The Court was mindful of the risk of forensic prejudice to the respondent:[93]

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89 *Wichman* (CA), above n 2, at [66].
90 At [67] (citations omitted).
91 At [47].
92 At [46] (citations omitted).
93 At [72].

> We agree with [counsel for the appellant] that in order to persuade the jury that the confession may be unreliable he would have to explore the scenarios in detail, inevitably emphasising to the jury that the appellant had been willing to involve himself in serious criminal offending. If the confession was unfairly obtained he should not lightly be put in that position.

Breach or avoidance of constraints on police interrogation

[64] The Court accepted that there was no breach of the relevant rules which apply to police interrogation of suspects.[94] The basis for this acceptance is not spelt out in the Court's judgment. Presumably it was because it considered that the Practice Note had no application to undercover officers because its acceptance that the Practice Note was not breached appears to have encompassed the last part of the Mr Big interview, after the time when the respondent first began to make admissions to Scott.[95] The Court did, however, observe:[96]

> … the [Mr Big] technique is designed to place the boss in a position of authority and power vis-à-vis the suspect, and that does distinguish the technique in an important respect. Courts have reasoned that confessions made to undercover officers are voluntary partly because the officer is not in a position of authority vis-à-vis the suspect. That may be true in undercover operations in which a police officer infiltrates a gang, for example. The [Mr Big] technique is different. While it is true that so far as the suspect knows the boss has no power to detain and no intention of doing so, the boss may enjoy very real authority because of his status and apparent control over the suspect's future.

[65] The Court later went on to say:

> [68] [Counsel for the appellant] placed considerable emphasis on the police decision to use the technique after the appellant had invoked his right to counsel. We agree with Collins J that that consideration is not dispositive. A suspect may exercise the right to silence then speak voluntarily to someone who, for all he knows, may inform the police. Generally speaking, such confession is admissible because it owes nothing to the coercive power of the state. That is so even where the person who receives the admission is a covert state agent. Courts may think it necessary to intervene, however, where the police, knowing that the suspect has exercised his right to silence, use an undercover interview to interrogate or otherwise actively elicit information that would not normally have been disclosed in conversation. Intervention is justified on the policy ground that such behaviour may undermine suspects' rights.
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> …

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94 At [73].
95 See [40], [73] and n 8.
96 At [48] (citations omitted).

> [70] On the facts, the appellant had previously exercised his right to counsel. The police might have chosen to put the medical evidence to the appellant in another formal interview. The inference is irresistible that they chose the [Mr Big] technique so that they could interview him in very different circumstances. It is true that three years had passed since the last interview, but the point is not that it was improper for the police to question him without a lawyer in the circumstances such that the confession might be excluded for that reason alone; the point is that he had previously exercised his rights and the police must have appreciated that he would do so again, if interviewed formally.

General impropriety

[66] The Court had wider concerns as to the propriety of the actions of the police:[97]

> [74] [Counsel for the appellant] also emphasised the trickery and deceit practised in the [Mr Big] technique. We acknowledge that courts have sometimes distinguished deception from deceit, finding the former acceptable and the latter not. It may be a question of degree. Here the police unquestionably practised deceit on a very substantial scale. Deceit is the correct term if only because of the invitation to confess and associated assurance that confession would have no adverse consequences.
>
> [75] We accept that deceit is in some degree a property of all undercover operations, and we observe that no actual offence was committed during the investigation and the resulting charges concern events preceding it. That distinguishes the [Mr Big] technique from entrapment, which by definition happens when a police officer induces the suspect to commit a criminal offence with which he is then charged. Nonetheless, deceit is a material factor in this case. It was used to elicit a confession in circumstances amounting to an interrogation.

[67] Its conclusion was expressed in this way:

> [64] Our view is that the appellant's confession was unfairly, and hence improperly, obtained.
>
> [65] We do not conclude that evidence obtained using the [Mr Big] technique is always evidence unfairly obtained, although some of our reasons address risks inherent in it. Nor does our decision turn on any single feature of the undercover operation in this case. We conclude rather that … the nature and scale of the technique used in this case was unfair, having regard to the characteristics of the suspect.

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97 Citations omitted.

Was exclusion proportionate to the impropriety?

[68] The Court explained its conclusion that exclusion was proportionate to the impropriety as follows:

> [79] A number of the considerations listed in s 30(3) favour admission. Notably, no express right was breached, the police evidently believed they were entitled to behave in this way, and homicide is always very serious, mitigating circumstances notwithstanding. The [Mr Big] technique was evidently used as a last resort. The confession is also relevant and, if reliable, strongly probative of guilt. The Crown case is said to depend on it and although that is not self-evidently correct, we will assume for present purposes that it is so. There is no doubt that the recording is accurate.
>
> [80] Against that, other considerations favour exclusion. They are unfairness, reliability and evasion of rights. For the reasons given above … we consider that the technique was seriously unfair in the circumstances of this case. The combination of substantial inducements and interrogation also raises serious doubts about the confession's reliability. We acknowledge Collins J's finding that the statement was reliable, but we have disagreed with some of his reasons; notably, we consider that the technique was apt to induce a false confession in this case, having regard to its nature and scale and evident impact on the appellant. We accept that the account which the appellant gave Scott was plausible, but this is not a case in which the Court can take comfort from independent evidence which confirms the likely truthfulness of the confession.
>
> [81] It is of course true that the jury could be asked to assess the confession's reliability and the trial Judge would give a reliability warning under s 122 of the Evidence Act. But the Court may exclude a confession nonetheless, for policy reasons and because of the risk of unreliability. …
>
> …
>
> [83] Balancing is an exercise in judgement. In our opinion the scales point to exclusion. Substantial though they are, the considerations favouring the confession's admission are outweighed, in the particular circumstances of this case, by the degree of unfairness, the risk of unreliability, and the element of undermining rights.

Our approach – an overview

[69] Sections 8, 28, 29 and 30 must be interpreted in a coherent way. Considering the application of ss 28, 29 and 30 to Mr Big operations, we see s 29 as addressing impropriety by undercover officers acting in role as criminals involving threats (actual or implicit) of violence to obtain confessions, s 28 as addressing the risk of unreliable confessions and s 30 as dealing with other matters (such as police impropriety, including possible non-adherence to, or circumvention of, the Practice

Note). Section 30 should not be treated as conferring a broad discretion to exclude defendants' statements for reasons addressed in ss 28 and 29. It follows that we consider the Court of Appeal ought to have addressed its concerns about the reliability of the respondent's statements under s 28 rather than s 30. We accept, of course, that concerns as to reliability, and thus the cogency or otherwise, of the evidence in question may be relevant to the application of s 30, and particularly s 30(4) and that aspects of the operation that are relevant to the reliability assessment may also be relevant to the fairness assessment. As to s 8, it states a fundamental, over-arching principle, but does not indicate the circumstances relevant to a court's consideration of whether probative value is outweighed by prejudicial effect, as ss 28, 29 and 30 do. This means that a s 8 evaluation of the evidence in issue in this case must be carried out in a way which is consistent with the operation of the later sections.

[70] As we have noted, it was not suggested that the conduct of the police involved oppression for the purposes of s 29. That section, however, would apply where the Mr Big interview (or anything which went before it) involved violence or actual or implicit threats of violence. We see the availability, but non-applicability, of s 29 as being of significant contextual importance. And there was no finding that exclusion of the admissions would be justified under either or both of ss 28 or 8. All of this means that the fairness analysis under s 30 will be in the limited compass of assessing police conduct short of oppression that has not led to exclusion of evidence under s 28(2). Sections 28 and 8, in the context of the Act as a whole, proceed on the basis that residual risks of unreliability (which do not warrant exclusion under s 28(2)) or of unfair prejudice (which do not warrant exclusion under s 8) should be addressed by the Judge in the course of the management of the trial, with warnings as to possible unreliability and directions as to illegitimate reasoning and the burden and standard of proof. In this context, it is difficult to see how such issues are material to the logically distinct question whether the police acted unfairly and thus improperly.

[71] If what happened in this case is measured against the standard of what has been found to be acceptable in other cases in Canada and Australia, there is no basis for criticism of the police. Indeed it is difficult to conceive of a Mr Big operation

that could both succeed and be less objectionable. This point warrants some explanation:

(a) A Mr Big operation is only likely to take place where other investigative methods including formal interviews have been tried. In many – and perhaps most – cases dealing with Mr Big confessions, the defendant will, in the course of such an interview, have been advised of his right of silence and to counsel and will have exercised those rights before the operation began.

(b) Scott's organisation had a criminal raison d'être and carried on criminal activities but, on the other hand, its tenets were honesty, loyalty and non-violence. There was no occasion for the respondent to fear violence and, on the basis of the Judge's finding he had no such fear. As well, there was no encouragement to boast about criminal exploits.

(c) The number of scenarios was not unusual for operations of this sort and none were florid in nature.

(d) The amount of money given to the respondent was limited.

(e) The final interview was relatively unintimidating by the standards exhibited in some of the Australian and Canadian cases.[98] It was made clear to the respondent that he could walk away at any time and that, if he did so, there would be no ill will.

(f) There is no point in putting a Mr Big operation in place unless the target is likely to fall for the trick. As it turns out, the respondent did so but there is no evidence of any particular characteristics he had which made him particularly vulnerable and indeed none which made it likely that he would make a false confession.

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[98] See above at [32]–[45].

[72] The Court had very little contextual material as to the way the technique has been deployed in New Zealand and there was no discussion in the judgment of the general utility of the Mr Big technique in terms of the often very serious crimes which it has solved and the occasions in which it has led to the location of the remains of those who have been murdered, something which is likely to be of considerable moment for the relatives and loved ones of a murder victim. The efficacy of a particular investigative technique and the associated benefits to the public which flow from its use are obviously not controlling as to its propriety. But even those who are most firmly of the view that the Mr Big technique is inherently unfair or improper would have to concede that this is something on which reasonable minds differ, a point recognised by Mance LJ in *Proulx*[99] and demonstrated in the present context by the jurisprudence from Canada and Australia. That being so, the efficacy and utility of the technique are material to the assessment which must be made.

[73] Against that background we will discuss the issues raised by the case under the headings which we have already identified: unreliability, unfair prejudice under s 8, breach or avoidance of constraints on police interrogation, and general impropriety.

Unreliability

A preliminary comment

[74] Inherent in a Mr Big operation is putting the suspect under pressure to confess in a context in which the suspect is led to believe that such a confession will bring about the benefits associated with membership of the organisation without resulting in adverse consequences. It is not inconceivable that an innocent target of a Mr Big operation might be induced to make a false confession. It is possible that, at least in some circumstances, the risk of a confession obtained from this sort of operation being false may be as great – if not greater – than the corresponding risk associated with a confession obtained during a custodial interrogation.[100] The fact that a suspect is not in custody and does not perceive the questioner as having the

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99 See above at [50].

100 Gudjonsson, above n 18, at 581–582.

coercive power of the state at their disposal is not a complete answer to concerns as to reliability. Nor does the fact that the technique relies on psychological rather than physical pressure mean that such pressure could not, in the right circumstances, be seen as coercive.[101] We are very aware of this risk. As we have pointed out, there are examples from Canada that suggest that it has crystallised on occasion.[102]

[75] Associated with this is another risk, that of misclassification, which arises when investigators erroneously decide that an innocent person is guilty.[103] In the *Cowan* case,[104] if the police had not been aware of Cowan's presence, the other man was an obvious investigative target. From the point of view of the police it may have seemed an implausible coincidence that there might have been in close proximity to the victim just before he disappeared two men (that is the other man and the murderer) with an interest in, and track history of, abducting and sexually assaulting boys.[105] If the police inquiry had not come to focus on Cowan, the other man may, conceivably, have been targeted by a Mr Big operation.

[76] Risks associated with the possibility that someone who is innocent may be convicted on evidence which turns out not to have been reliable are not confined to Mr Big confessions. Indeed they are inherent in the criminal trial process and cannot be completely avoided. They can, however, be mitigated in various ways; in particular by recognising the risk of unreliability; the provision of a reliability screening process to be carried out by the judge; judicial warnings; jury assessment and the rules as to the burden and standard of proof. In the case of a Mr Big confession, all of these safeguards apply. In particular, a judge will exclude a Mr Big confession if left with the conclusion that there is a real risk of unreliability.

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101 Richard A Leo and Steven A Drizin "The Three Errors: Pathways to False Confession and Wrongful Conviction" in G Daniel Lassiter and Christian A Meissner (eds) *Police Interrogations and False Confessions: Current Research, Practice and Policy Recommendations* (American Psychological Association, Washington DC, 2010) 9 at 17–18.

102 See the cases of Kyle Unger and Cody Bates, above n 21, as well as that of Andrew Rose, above n 18.

103 Leo and Drizin, above n 101, at 13.

104 *R v Cowan*, above n 53.

105 It was on the basis of the implausibility of a very similar coincidence that a conviction for murder was entered in *R v Straffen* [1952] 2 QB 911 (CA).

Section 28

[77] A defendant who has made a confession in a Mr Big interview will always be able to point to the inducing effect of the promises and, because such promises and representations are always conditional on the suspect "passing" the Mr Big interview, to implicit threats (for instance as to continued association with the organisation) which are the other side of the coin to such promises.

[78] Leaving aside cases in which it might be thought that no practical issue of reliability arises – for instance because, as in *Mack* and *Cowan*, the previously undiscovered remains of a murder victim have been located[106] – such a defendant will have no difficulty in invoking s 28. To do so the defendant need merely raise the reliability of the confession "on the basis of an evidential foundation". Where, as was the case here, the threshold is satisfied, s 28(2) provides:

> The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

[79] Glazebrook J has reviewed the twists and turns of s 28's legislative history.[107] We accept that the Law Commission did envisage that an unquestionably true confession[108] might be excluded under s 28. Although the opposite position was provided for in the Bill as introduced (under which a statement would be admissible if the judge was satisfied on the balance of probabilities that it was true), the amendments proposed by the Select Committee and carried through into the Act represented a rejection of the view that the truth of a confession would warrant admissibility under s 28 no matter what. On the other hand, the Committee does not appear to have considered explicitly whether the apparent truth of a confession might be material to whether the circumstances in which it was made were likely to have adversely affected its reliability and thus to the determination of its admissibility under s 28.

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106 *R v Mack*, above n 36; *R v Cowan*, above n 53. That the confessions resulted in victims' remains being recovered did not completely resolve questions as to reliability and accuracy. Each accused claimed that someone else had committed the murder in question and that they, the accused, had learned of the location of the body from this other killer (in the case of *Mack*) or through a third party (in the case of *Cowan*).

107 See below at [413]–[425]

108 For instance one which resulted in the location of the remains of a murder victim.

[80] Complicating the situation is that s 28 carries out work previously performed by not only the rules as to voluntariness of admissions resulting from threats and promises by persons in authority but also the discretion to exclude an admission which was unreliable for reasons "internal" to the person who made them (for instance consumption of alcohol or mental illness). An admission which was involuntary as resulting from threats or promises from a person in authority was not rendered admissible because it could be shown to be true (perhaps by reason of admissions made by the defendant when cross-examined at an admissibility hearing). This was established by the Privy Council decision in *Wong Kam-ming v R*.[109] We are not, aware, however, of any pre-Evidence Act cases which determine that the same approach is appropriate where the admissibility challenge was on the basis of unreliability for reasons that are internal to the suspect. The point was adverted to briefly in *R v Cooney*:[110]

> The ratio of the decision in *Wong Kam-ming* forbidding inquiry as to the truth of the confessions is that in ordinary cases where voluntariness or fairness is raised the truth of the confession is irrelevant. If it is sought, as it is in this case, to exclude the confessions because they may be delusional there is a substantial air of unreality in conducting an inquiry that does not ask whether in fact the confessions are true or delusional. Although the judgment of the Privy Council in *Wong Kam-ming* was in no way stated to be qualified, it may be that it is not of universal application and if the test of the admissibility of the statement is said to be its reliability, an inquiry as to the truth of the statement on a voir dire may ultimately be held to be appropriate. We express no view as to that.

[81] Let us assume that a person prone to delusions confessed to a murder and identified the location of the victim's remains which had previously been unknown. That person would be able to satisfy the rather low s 28(1) threshold. On a strict application of the approach apparently favoured by the Law Commission and the Court of Appeal, the finding the victim's remains would go only to the truth of the confession and would be irrelevant as to reliability. This is not an approach which we favour.

[82] Section 28(2) is not an entirely easy provision and its language gives rise to a range of possible interpretations. On one, only the tendency of the relevant circumstances is relevant; their likely or actual impact on the defendant is irrelevant.

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109 *Wong Kam-ming v R* [1980] AC 247 (PC).

110 *R v Cooney* [1994] 1 NZLR 38 (CA) at 44.

On another, slightly less strict interpretation, the likely effect of the circumstances on the defendant are material. Such interpretation is consistent with s 28(4)(a) and (b) which treat the condition and characteristics of the defendant as material. A third interpretation would allow for the actual impact of the circumstances on the defendant to be taken into account, which in effect was the approach taken in *R v Fatu*, which is discussed in the reasons of Glazebrook J.[111] A judge who was of the view that the circumstances relied on had not materially influenced the statement made by the defendant would presumably also conclude that those circumstances were "not likely to have adversely affected" the reliability of the statement. A fourth interpretation would permit the inquiry to extend to the reliability of the statement on the basis that a judge who is satisfied as to the reliability of the statement would also conclude that it was not likely that the circumstances relied on adversely affected its reliability.

[83] Given the legislative history, it would be wrong to construe s 28(2) as permitting admissibility to be determined on the basis of a trial before a judge as to the truthfulness of the confession. To this extent we agree with the Court of Appeal. We also accept that there is considerable force in the considerations referred to by the Chief Justice in support of an approach to s 28(2) which focuses primarily on the circumstances relied on, and their tendency (albeit allowing for the personal condition and characteristics of the defendant). Such approach, however, does not easily accommodate cases in which the circumstances relied on are internal to the defendant – in other words, of the kind involved in *Cooney* – and is thus not a great fit for all the work which s 28 is required to perform. As well, it does not sit entirely easily with the use of the word "reliability". It would be incongruous, to say the least, if an obviously true confession[112] were to be excluded on the basis of a theoretical likelihood that the circumstances in which it was made may have affected its reliability.

[84] We see the s 28(2) inquiry as particular in character. It is addressed to the reliability of "the" statement in issue rather than "a" statement in the abstract. We consider that the "circumstances in which the statement was made" encompass the

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111 See below at [429] and n 468.

112 For instance, one which leads to the location of the remains of a murder victim.

nature and content of the statement[113] and the extent to which those circumstances affected the defendant. We are also of the view that congruence (or the reverse) between what is asserted in the statement and the objective facts[114] and the general plausibility (or otherwise) of the statement[115] are relevant to the s 28(2) decision. This is consistent with at least the drift of the judgment of the majority in *CT (SC 88/2013) v R*, which was concerned with unreliability for the purposes of s 122 but proceeded on the basis that the ability (or inability) to challenge the truthfulness of the evidence in question may be material to its reliability.[116] It is, as well, generally consistent with the approach proffered by Glazebrook J in her reasons.[117] We emphasise, however, that a reliability hearing is not a mini trial. A confession induced by threats or promises of a character likely to result in a false confession will usually be held to be inadmissible.

The reliability findings of Collins J and the Court of Appeal

[85] The s 28(2) exercise is factual. In the present case it was carried out by the Judge who found in favour of the prosecution. His conclusions were not explicitly challenged in the Court of Appeal but, as noted, the Court disagreed with Collins J as to whether the police had offered the respondent an incentive to lie and was concerned as to both the impact of the operation on the respondent and the cogency of the confession as it was not knowingly made against interest.[118]

An incentive to lie?

[86] The Court of Appeal disagreed with the observation by Collins J that the operation had offered the respondent "no incentive to lie". Obviously the respondent was under pressure to confess. The promises and representations made to him

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113 There is a similar but not identical reliability test in relation to hearsay evidence, see s 18(1)(a), "the circumstances relating to the statement provide reasonable assurance that the statement is reliable". For the purposes of this section, there is a definition of "circumstances" in s 16 which encompasses the nature and content of the statement.

114 Where, for example, the statement gives the previously unknown location of the victim's body or of the murder weapon.

115 Where, for example, the statement contains details of the offending that could be known only to the perpetrator.

116 *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [49] per Elias CJ, McGrath and William Young JJ.

117 See below at [426]–[439].

118 See [59]–[61] above.

provided a context in which it would have seemed to him that it was to his advantage to do so. He was led to believe that such a confession would have no adverse consequences. As we have accepted, in circumstances of this kind, it is not inconceivable that someone who is innocent might think it worthwhile confessing. For this reason the language used by the Judge is legitimately open to at least semantic criticism. We do not, however, see such criticism as being of much moment.

[87] By his conclusion that the s 28(1) threshold was satisfied, Collins J necessarily accepted that the circumstances may have adversely affected the reliability of the respondent's confession. Such effect could only relevantly be manifested in the form of a false confession. It is, in fact, inconceivable that the Judge did not recognise that incentives designed to evoke a true confession might also result in the making of a false confession. In light of this, his remarks as to context and incentive to lie must be referable to the overall design of the operation and in particular its calibration so as to maximise the likelihood that any confession obtained was true and minimise the likelihood of a false confession. Thus the pressure put on the respondent, while still cogent, did not extend to threats of violence. Idle boasting about prior criminal activity was not encouraged. And there was a heavy focus on the need for honesty.

The impact on the respondent of the operation

[88] Psychological research suggests that personal characteristics such as suggestibility and impaired self-control are linked to the risk of false confession.[119] But other than the self-evident fact that the respondent was youthful, being 21 when the operation concluded, there was, as the Court of Appeal acknowledged, "no evidence that the appellant exhibits special characteristics".[120] He was in a long-term settled relationship with T's mother and lived with, and worked in one of his father's businesses. There was nothing in the scale of the operation which was

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119 See the brief overview given in Elizabeth C Wiggins and Shannon R Wheatman "So What's a Concerned Psychologist to Do? Translating the Research on Interrogations, Confessions and Entrapment into Policy" in G Daniel Lassiter (ed) *Interrogations, Confessions and Entrapment* (Springer, New York, 2004) 265 at 268. For one way of measuring these traits, see Gudjonsson, above n 18, at 361–370.

120 *Wichman* (CA), above n 2, at [67].

out of the ordinary for a Mr Big operation. As well, in terms of its impact on the respondent, this was confined to him being taken in by the operation and very much wanting to become a full member of the organisation.

[89] There are aspects of the discussions of the facts in the reasons of the Chief Justice and Glazebrook J on which we should, at this point, make brief comment. The evidence of Detective Senior Sergeant Mackie was that New Zealand Mr Big operations are structured on the basis that "no violence or threats of violence are used". There is nothing in the evidence to suggest that this aspect of the design of the operation was tailored with the respondent's personal characteristics in mind.[121] Although it is plausible to assume that some assessment was made as to whether the respondent was likely to be taken in by the operation, there is likewise no evidence of a sophisticated profiling assessment.[122] The respondent was, as just noted, comparatively young and, as well, at the time of the Mr Big interview was in Dunedin, but that apart there is no evidence to suggest that he was "isolated or immature or otherwise vulnerable".[123] Nor does a review of the Canadian and Australian cases suggest that only those who are isolated, immature or otherwise vulnerable are taken in by such operations. Accordingly we do not agree that the respondent's "immaturity and youth" were exploited.[124] On a related point, the evidential basis for the view that the respondent had a "wish for excitement (but within safe boundaries)" which the police exploited[125] is not apparent to us. Scott's questioning of the respondent achieved the desired end but we have reservations whether it is correct to conclude that the respondent was "skilfully cross-examined under sustained pressure".[126] More generally and importantly, we do not accept that the respondent "had no option but to make the admissions"[127] or that he was left "with no choice but to confess, whether or not he was innocent".[128] In one of the six New Zealand cases referred to at [19] the suspect, although in fact guilty of murder as a jury later concluded, did not make any admissions. There are also a number of

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121 Compare Chief Justice at [295] and Glazebrook J at n 355 and n 620.
122 Compare Chief Justice at [295].
123 Compare Chief Justice at [157]. See also Glazebrook J at [444].
124 Chief Justice at [318].
125 Glazebrook J at [443].
126 Chief Justice at [303].
127 Chief Justice at [318].
128 Glazebrook J at [451]. See also [541].

cases from Canada in which no admission was made.[129] In the present case, the respondent did not initially make any admissions, despite the incentives to do so (full membership of the organisation etc) and the apparent absence of any adverse consequences. He could have explained to Scott that despite police suspicion, he had not killed T and at the same time sought Scott's assistance with the prosecution which he (the respondent) anticipated was imminent. His eventual decision to make admissions was not the result of any fundamental change in the dynamic of the conversation. Indeed, just before the respondent made admissions, it would not have occurred to Scott that it was inevitable that he would do so.

The cogency of an admission not knowingly made against interest

[90] It is commonplace that neither the admissibility nor the cogency of an admission is dependent upon the maker having recognised at the time it was made that it was against interest. This was explained very clearly by Gleeson CJ in *Tofilau*:[130]

> Sometimes, an admission may be made in the course of an assertion of innocence. It may be an admission of a fact which is not seriously in dispute, which of itself is not inconsistent with innocence, but which the prosecution could not otherwise prove. The admission may have been made to any manner of person, and in any kind of circumstance. It may have been made in response to a mistake, a misrepresentation (either deliberate or innocent), to the pressure of events or circumstances, or to mere inadvertence. It may have been made in circumstances where issues of legal rights or consequences, or considerations of choice either to speak or remain silent, never entered the mind of the maker. It would be clearly wrong to suggest that the only kinds of admission used in evidence at criminal trials are those made to police officers in a context of a conscious decision not to exercise a "right to silence". Admissions, which may turn out to be very damaging, are often made in circumstances where the maker of the admission is unconcerned with legalities, and may not even realise the significance that later will be attached to what is said.

[91] Gleeson CJ saw these general remarks as applicable in the context of a Mr Big operation:[131]

> The particular technique of deception adopted in the present cases seems to have been imported into Australia from Canada. Since these trials, it has

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129 See for instance *Dix v Canada (Attorney-General)*, above n 13; *R v Valliere* 2004 BCSC 1766, 64 WCB (2d) 171 and *R v Ciancio* 2006 BCSC 1673.

130 *Tofilau v The Queen*, above n 47, at [5].

131 At [5].

> been reported in the media. … It would, however, be erroneous to characterise these appeals as raising a completely novel problem demanding reconsideration of established legal principle. The use of undercover police operatives always involves deception. Such operatives are undercover precisely because they are trying to deceive somebody about something. … . All forms of covert surveillance, many of them authorised (subject to safeguards, such as a requirement for judicial approval) by statute, involve a kind of deception. Interception and recording of telephone conversations often produces evidence of admissions tendered at a criminal trial, as well as circumstantial or direct evidence of criminal activity. The parties to those conversations speak in the erroneous belief that they are not being overheard. They have no opportunity to consult a lawyer, or to take advice on what they should or should not say. They are not given any warning that what they say may be used against them. They do not waive any right to silence. Yet, if a suspect, in an intercepted and secretly recorded conversation, makes an admission, that admission is ordinarily and rightly regarded as voluntary. At least, it is not regarded as involuntary simply because the person making the admission is the victim of a form of deception.

A conclusion as to reliability

[92] We consider that the conclusion reached by the Judge as to admissibility under s 28 was one which was open to him, this given the nature of the final discussion between Scott and the respondent, including its tone; the broad correlation between the admissions made by the respondent and evidence surrounding the death of T as detailed by Glazebrook J at [453]–[454] of her judgment (and the corresponding lack of any extrinsic indication of unreliability); the respondent's behaviour and remarks after he had made the admissions; and the disconnect between his evidence as to how he viewed the organisation and what he was saying at the time in the intercepted communications, which indicated he was not intimidated. As to this, we think it significant that the respondent, in his evidence, pitched his case very much on the basis that he was scared of the people involved in the organisation and considered that he had seen too much to be allowed to just walk away and, accordingly, had been intimidated into making the confession which Scott was seeking from him. The Judge's rejection of this explanation – and thus the contention of the respondent as to actual effect on him of the circumstances relied on – was material to his conclusion as to the application of s 28(2).

[93] As we have said, the Court of Appeal was not invited to, and did not, set-aside the Judge's conclusion as to the application of s 28 and such comments as that Court made as to reliability do not warrant us doing so. Accordingly we propose

to approach the case on the basis found by the Judge, namely that the reliability inquiry under s 28(2) has been resolved in favour of admissibility.

Unfair prejudice under s 8

[94] In order to give a context to the making of the confession obtained in a Mr Big operation, the Crown will have to lead some evidence as to the background and thus as to the defendant's involvement in criminal activity. Although in theory at least it may be possible to limit the extent to which that evidence addresses the defendant's conduct, it will be difficult for a defendant to challenge the reliability of the confession without going into all the detail. The result is that the jury will almost inevitably know to a lesser, but more commonly a greater, extent of the defendant's willingness to engage in criminal activity. So Mr Big evidence does carry some risk of forensic prejudice.

[95] This may be significant. If the value of the Mr Big admissions is distinctly limited (perhaps because they are incomplete or equivocal) the prejudicial effect of burdening the defendant with the detail of what happened may outweigh the probative value of the evidence.

[96] More usually, however, the confession is of obvious probative value and often is fundamental to the Crown case; perhaps to the point that without it, there is no case. It is far from common – indeed it is not easy to find examples where it has happened – for the courts to exclude under s 8 (or equivalent rules) evidence of that character. In the present case, the scenarios in which the respondent participated had no apparent relevance to the crime of which he was suspected. A general criminal propensity (in the sense of a willingness to engage in diverse forms of criminal activity) of the kind displayed by the respondent has little or no obvious relevance to whether he or not he assaulted his child. So in this case there is no logical basis for the jury to regard his willingness to engage in criminal activity as having any significant bearing on guilt.

[97] In these circumstances, there is no reason to think that the jury would not adhere to the illegitimate reasoning directions which the trial judge would be

required to give. In this context, we see do not see the risk of unfair prejudice as justifying exclusion of the evidence.

Breach or avoidance of constraints on police interrogation

A preliminary comment

[98] We address this aspect of the case in terms of two overlapping issues which come down to whether a Mr Big operation and particularly the Mr Big interview (a) breaches constraints on police interrogation; and, if not (b) avoids such constraints in a way which is improper. This is not quite the way the English cases to which we have referred[132] proceed; which seems to be on the basis that there is a single fundamental question – as to fairness – which must be addressed. It does, however, facilitate discussion if what we see as different issues are disaggregated.

Did the Mr Big interview breach constraints on police interrogations?

[99] As we have said, when the police instigated the Mr Big procedure, they did not consider that they had sufficient evidence to charge the respondent, a view which was not challenged. Nor was the respondent in custody. Accordingly, rr 2 and 5 did not apply. At some point in the interview, however, Scott would have had sufficient evidence to charge, so that a r 2 caution would arguably have been required. In issue therefore is whether the Practice Note applies to undercover police officers.

[100] A little history is relevant at this point. Prior to the Evidence Act 2006, New Zealand judges applied the 1912 Judges' Rules as supplemented and clarified in 1918 and 1930.[133] Under these Rules a caution was required once the police officer had decided to charge the suspect or if the suspect was in custody.[134] This was extended to apply in circumstances where there was sufficient evidence to charge the suspect. New Zealand judges never applied the 1964 Judges' Rules which had the lower caution threshold of "evidence which would afford reasonable grounds for suspecting that a person has committed an offence".[135] Prior to the enactment of the

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132 See above at [46]–[50].

133 See FB Adams (ed) *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell, Wellington, 1971) at [3925].

134 See r 2 of the amended 1912 Rules as set out in Adams (ed), above n 133, at 1003.

135 See r 2 of the 1964 Judges' Rules as set out in Practice Note (Judges' Rules) [1964] 1 WLR 152.

New Zealand Bill of Rights Act 1990, police officers were not required to advise suspects, whether in detention or otherwise, of a right to legal advice or to facilitate the obtaining of such advice. The Practice Note of 2006 was substantially a recapitulation of the position applicable to police interrogations as it was in 2006, based on the 1912 Judges' Rules, the approach the New Zealand courts had taken to those rules, changes in technology (particularly as to electronic recording) and the impact of the New Zealand Bill of Rights Act.

[101] Under s 30(6), a Judge dealing with a contention of police impropriety in relation to police questioning "must take into account guidelines set out in practice notes on that subject issued by the Chief Justice". Conduct which breaches the Practice Note is thus not necessarily unfair.[136] Even when such conduct is unfair, and the evidence in question thus improperly obtained, it is still open to the Judge to refuse to exclude the evidence under the s 30(2)(b) balancing test.[137] That said, a conclusion that (a) the Practice Note applies to undercover police officers and (b) a Mr Big operation (and particularly the final interview) breaches the Practice Note would have the potential to affect materially the way that undercover police officers engage with suspects and, on our appreciation, would make it improbable that the police would launch further Mr Big operations.

[102] The primary risk addressed in the Judges' Rules that preceded the Practice Note was that suspects being interviewed by the police may see themselves as obliged to answer questions. This might have resulted from the suspect thinking that there was an obligation to answer questions asked by a police officer (as indeed there sometimes is).[138] It might also be associated with the actual or assumed ability of the police officer to make decisions which will affect the suspect in terms of arrest, prosecution and custodial arrangements. Such risks are associated with the official status and powers of police officers. They are accentuated for a suspect who is likely to be arrested and acute in the case of the suspect who is already in custody.

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136 See Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [EA30.10(1)(e)]: "Section 30(6) requires that the breach must be taken into account by the Judge, but a finding of unfairness is not mandatory".

137 At [EA30.10(1)(e)].

138 For instance a person's failure to provide their name and address to a constable who reasonably believes that the person has committed certain offences under the Summary Offences Act 1981 gives the constable the power to arrest the person without a warrant: see s 39(2).

Consistently with this, the courts have always held that the Judges' Rules had no applicability to questioners who, despite not being police officers, possessed legal or de facto authority in relation to the investigation of offending.[139] The scope of the Rules as applied was thus very closely tied to the rationale which in turn was seen as applying exclusively to the police questioning of suspects.

[103] We note in passing that a further risk addressed by both the Chief Justice's Practice Note and the English Code is that suspects who are interviewed by the police may be at a disadvantage if an the interview is not recorded electronically; for instance such suspects may be at risk of being "verballed". This has been quite a concern in some of the English cases dealing with unrecorded interactions between undercover officers and suspects.[140] But although the concern is important in terms of understanding why those cases were decided as they were, it is something of a distraction in the context of the Mr Big technique as the Mr Big interview is always recorded.

[104] As far as we are aware, the 1912 Judges' Rules were not seen as applying to undercover officers when acting in role. The only case[141] directly on point is *R v Meyers*[142] where the admissibility of remarks made by a suspect to an undercover police officer were challenged on the basis that there had been a breach of the Judges' Rules. The undercover officer in his assumed role had known the appellant and, in this role, approached him after his arrest on charges that appear to have been unrelated to his earlier interactions with the officer. The appellant was on bail at the time. On the findings of fact, it was the appellant who brought up the subject of his arrest and in the course of the discussion which followed (which included a question as to how it had happened), the appellant made some admissions. The challenge that there had been unfairness and a "circumvention of the Judges' Rules" was rejected by the Court of Appeal for reasons given by Cooke P:[143]

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139 See for instance *R v Lee* [1978] 1 NZLR 481 (SC) in relation to customs officers; *Ali v Labour Department* SC Auckland M1178/77, 18 October 1977 in relation to immigration officers; and *R v Handley* [1994] 2 NZLR 411 (CA) where the Court of Appeal affirmed that the Rules applied only to police officers.

140 See for instance *R v Bryce*, above n 64.

141 *R v Williams* (1990) 7 CRNZ 378 (CA), cited by Glazebrook J at [486], dealt with a situation where the police arranged for an accomplice of the suspect to speak to him.

142 *R v Meyers* (1985) 1 CRNZ 656 (CA).

143 At 657–658 (emphasis added).

> *The situation of arrest, release on bail and arranged interview with an undercover policemen is not directly within the contemplation of the Judges' Rules, but is to be considered in the light of the general requirements of fairness and with such help by analogy as the Rules afford. But they give little help. For, as the accused did not know that the questioner was a policeman, there was no element of inducement or overbearing by a person apparently in authority. The official position of the questioner played no part in the obtaining of the statements.*
>
> This case is not within the realm of incitement to commit offences. It is concerned only with admissions of past offending. On the Judge's findings there was no prior intent to extract admissions by trickery. Even if there had been, a question would have arisen as to whether under New Zealand law the case could validly be distinguished from the planted listener type of case … or the ordinary case of incriminating statements to undercover officers … . But we need not go into that question and express no opinion on it one way or the other. The Judge found that the undercover officer did not ask questions designed to elicit a confession. Such deception as there was arose from the very nature of the officer's role: he was masquerading. It has come to be accepted that this alone is not enough to vitiate evidence acquired by undercover activities. Accordingly the present applications must be dismissed.

The approach taken in *Meyers* as to the direct applicability (really non-applicability) of the Judges' Rules was practically the same as that taken in *Christou* as to the non-applicability of the English Code in relation to undercover officers.[144]

[105] As well, although this issue is not precisely the same as that decided in the Canadian and Australian cases where it was concluded that an undercover police officer is not a person in authority for the purpose of the common law voluntariness rules, the underlying reasoning is applicable by analogy; this because the policy underlying the person in authority rule is closely akin to that reflected by the Practice Note and the 1912 Judges' Rules.

[106] For these reasons, we see the Practice Note as intended to govern the conduct of police officers acting as such and thus with the ability to deploy the coercive power of the state. As to this, we think that if the Practice Note had been intended to address the conduct of undercover officers it would have addressed in some detail the circumstances in which a caution is required (perhaps when the interaction is in the nature of a discussion about past offending, as in *Meyers*) and those where it is not, for instance in an orthodox infiltration of a criminal organisation intended to

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144 *Regina v Christou*, above n 62.

ascertain information in relation to current offending. There would also have been a need to distinguish between the questions which an undercover officer can legitimately ask about past offending (perhaps along the lines of that seen as acceptable in *Christou*) and those which are unacceptable.

Was the Mr Big interview improper as avoiding constraints on police interrogation?

[107] Mr Big operations are deployed primarily to obtain evidence in relation to offending in the past as opposed to current offending. Their design enables undercover police officers to question suspects in ways which would not practicably be possible for police officers acting as such.

[108] There are a number of ways of looking at this. One view is that the use of the Mr Big technique is an improper avoidance of the rules which govern police interrogation and objectionable on that score. We will refer to this as the "strict avoidance" approach. The use by the Court of Appeal of the pejorative expression "evasion of rights" indicates that it very much proceeded on this basis.[145] Another view is that rules which govern the way police officers, acting as such, question suspects have no logical application, even indirect, to interactions between undercover police officers and suspects. We will describe this as "the irrelevance of the Practice Note" approach. There is also scope for views which lie somewhere in the middle.

[109] The approach taken by the Court of Appeal in the present case is broadly consistent with that adopted in the English cases to which we have referred at [46]-[50] which might be thought to have same effect as the strict avoidance approach which we have mentioned. Such approach would have the effect of:

(a) extending rules which apply to questioning by police officers acting as such to other circumstances – namely questioning by someone who is thought to be a criminal; and

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145 *Wichman* (CA), above n 2, at [80], as quoted above at [68].

(b) limiting police conduct in circumstances where the rationale for those rules (namely the coercive nature of police interviews and either the susceptibility of the suspect to arrest or the actual detention of the suspect) is not present.

The second of these points warrants some slight elaboration.

[110] It is true that in a sense Scott was in a position of authority vis-à-vis the respondent in that the respondent saw Scott as: (a) having the capacity to sort out his problem with the police over T's death; and (b) critical to whether he would attain full membership of the organisation. The "authority" which Scott ostensibly had was confined to the apparent ability to make good on his promises (as to prosecution and membership of the organisation) and thus in essence came down to the inducements which he could offer, something which is specifically addressed by s 28. Where, as found by the Judge in this case, such inducements did not adversely affect the reliability of the resulting admissions, identification of an over-arching impropriety becomes somewhat elusive.

[111] That a strict avoidance approach involves a leap was recognised by the English Court of Appeal in *R v Jelen*[146] in which an agent of the police had discussed the offending in issue with the suspect and recorded what was said. A challenge to the admissibility of the evidence was dismissed with Auld J explaining:[147]

> As to the suggestion that the police were using [the agent] in this way to avoid the requirements of the Code of Practice governing them if they had chosen to question Jelen at that stage, the Judge pertinently observed that Jelen had not been arrested. The provisions of the Code governing the detention, treatment and questioning of persons by police offers are for the protection of those who are vulnerable because they are in the custody of the police. They are not intended to confine the police investigation of crime to conduct which might be regarded as sporting to those under investigation.

[112] We are thus of the view that a strict avoidance approach is not appropriate. In other words, a Mr Big operation is not objectionable merely because it will, unless terminated early, culminate in a Mr Big interview which will involve interrogation

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146 *R v Jelen* (1990) 90 Cr App R 456 (CA).
147 At 464.

without a caution. On the other hand, we do not subscribe to what we have described as the irrelevance of the Practice Note approach.

[113] We can illustrate the point just made by reference to *Kumar*.[148] In that case, the suspect was in custody and the coercive powers of the state had thus already been deployed against him. As a result, he was within the scope of s 23(1)(b) of the New Zealand Bill of Rights Act. As well, he had no practical choice but to engage with the undercover officers who had been placed in his cell. Further, there had been interactions between his lawyer and the police as to the circumstances in which he would be asked further questions in which the police had not been candid. In those circumstances, this Court concluded that the conduct of the police was improper.

[114] We are inclined to think that the same result would have been arrived at if the police, instead of arresting Kumar, had released him on the basis that he was likely to be arrested the next day and, overnight, undercover police officers had in effect carried on the pre-release interrogation. There was already ample evidence to charge Kumar and he had, at interview, indicated a desire to say no more. In such circumstances, s 23 of the New Zealand Bill of Rights Act 1990 would not have been engaged and the Practice Note would not have been directly applicable. Nonetheless, the courts would very likely have concluded that the circumvention of their operation would have been unacceptable and thus unfair. As well, a finding of impropriety might follow if a detective, having concluded an investigation and having decided to charge the suspect, dispensed with the usual pre-arrest wrap-up interview of the suspect but rather deployed an undercover officer to carry out the functional equivalent of that interview.

[115] It is sufficient for the purposes of the present case to say that we do not see the Mr Big operation deployed in this case, including the final interview, as involving an improper circumvention of constraints on police interrogation of suspects:

(a) The view reached in April 2012 that there was insufficient evidence to warrant charging the respondent has not been challenged and, at worst

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148 *R v Kumar*, above n 7.

from the point of view of the police, the situation was reasonably evenly balanced. In other words it was not obvious that there was sufficient evidence to charge the respondent at that time.

(b) Once a Mr Big operation has been legitimately launched, it can be expected to take on a dynamic of its own. Given this, it is unrealistic to expect the police officer who assumes the role of Mr Big to caution the suspect at the moment admissions start to be made. And, assuming for the moment that the Mr Big interview in this case had been an orthodox police interrogation, we think it unlikely that a court would exclude all admissions made by the respondent after he first acknowledged assaulting T.

[116] The discovery of the remains of murder victims has been a striking feature of the use of the Mr Big technique. If the location of remains is the purpose of the deployment of a Mr Big operation – and of course this was not an issue in this case – that might be material to the court's assessment of the propriety of the operation. Arguably it might be seen as warranting the deployment of such an operation even though there is already sufficient evidence to warrant charging the suspect. It is not necessary for us to express a view on that.

General impropriety

[117] The remaining propriety concerns relate to (a) the lies which are a necessary part of a Mr Big operation, the commission of simulated and perhaps real crimes and the associated recruitment of the suspect into such activities; and (b) the pressure to confess to which the respondent was subjected.

[118] We accept that questions of degree may arise. The inclusion of violence in scenarios raises significant concerns with the more violent the scenarios, the greater the grounds for concern. Also of concern is the intrusiveness of the operation from the point of view of the suspect. On the other hand, the operation in the present case was vanilla in character; at least by comparison with Mr Big operations in other jurisdictions. If it is the case that the operation was improper because it involved the telling of lies and simulated or actual offending, then so too will be any Mr Big

operation and indeed any undercover operation. As the judgment of the Court of Appeal might be thought to illustrate, there is not much point (whether logical or etymological) in trying to distinguish between concepts of acceptable "deceit" and unacceptable "deception". And while there are no doubt differences between a Mr Big operation and other undercover activities, such differences are likely to prove to be an unstable foundation for determining whether particular police activities are proper or improper.

[119] It is not our intention to provide scope for police officers to put pressure on those they interview without sanction of inadmissibility if the s 28(2) assessment goes in favour of the Crown. Indeed, and save for the comment made at [69]–[70] above, we do not seek to place any constraint on the operation of the s 30 discretion, which is an aspect of the Evidence Act that has essentially been left in the hands of judges to allow for developments over time on a case by case basis to deal with situations not thought of when the Act was passed.

[120] Prior to 2006, it would have been possible for a judge to exclude on the ground of police impropriety the statement obtained by threats or inducements but not inadmissible by reason of s 20 of the Evidence Act 1908. Consistently with this, a statement which is admissible under s 28(2) might nonetheless be excluded under s 30 if the judge concludes that the interviewing police officer had acted improperly.

[121] Given the strictness of the voluntariness rules prior to 2006, there was not much occasion for the courts to engage with the propriety of the police encouraging confessions by use of threats or the making of inducements; this because such statements were usually held to be inadmissible as involuntary. We see no reason why, however, findings of impropriety should not be made in appropriate cases.

[122] The usual interview which follows the completion of an investigation and precedes arrest is an important part of the criminal justice process. It provides a suspect with an opportunity to confront the case which is to be advanced and to put on the record such denials and explanations that he or she chooses to make. The functionality of such an interview is enhanced if it is conducted calmly and in a measured way. Overbearing police conduct is thus to be discouraged. So too is the

badgering of suspects. The Practice Note addresses, although not exhaustively, considerations of this kind. Consistently with the Practice Note, it would be well open to the courts to conclude that the integrity of the interview process is improperly compromised where a suspect is put under pressure to confess by reason of threats or inducements.

[123] There is another possible route to a finding of impropriety. The threats or inducements which it is practicable for a police officer to make or hold out almost always involve the exercise or non-exercise of official powers; for instance as to (a) whether or not charges (and if so at what level) are to be laid against the suspect (or someone associated with the suspect); (b) bail; and (c) custodial arrangements. Such powers are to be exercised in accordance with their purposes and not as a means of putting pressure on suspects to confess. So if for instance a police officer told a suspect that his wife would be prosecuted unless he confessed, in which event she would not be prosecuted, it would not be very difficult to conclude that the conduct of the police officer was improper.

[124] It might be asked why the pressure put on the respondent to confess in the Mr Big interview was not improper when the application of pressure of similar intensity in a formal police interview would be improper. We see this question coming back to whether the constraints which limit the way in which police officers, acting as such, can interrogate suspects apply to undercover officers who are not purporting to exercise the coercive power of the state. For the reasons already given (which include the Canadian and Australian decisions as to the non-applicability of the person in authority approach to Mr Big interviews), we are of the view that those constraints do not directly apply to undercover officers and that, in the circumstances of this case, the Mr Big operation was not an improper circumvention of them.

[125] We should also briefly mention the second aspect of the *Hart* approach which focuses on abuse of process, which the Court saw as arising where the operation involved violence or threats of violence or exploited particular vulnerabilities of the suspect. As we have mentioned earlier, the operation in the present case did not have any of those characteristics.

[126] As will already be apparent, we have had to address three cases this year which have involved significant issues about other undercover operations. Experience has shown that there is potential for undercover operations to go awry, particularly where an undercover officer becomes part of the life of a suspect or the associate of a suspect in respects which are very intrusive. Such operations may have detrimental effects on the suspect. There has been much controversy as to this in the United Kingdom particularly where male undercover officers have formed long-term sexual relationships with female members of the group under investigation[149] which in some instances have resulted in children.[150] A similar situation (involving sexual relationships but not children) has arisen in New Zealand.[151] There are also the different issues which arose in *Wilson* as to the nature of the steps taken to avert suspicion of the undercover officers. Human nature being what it is, the police officers who design and run undercover operations are likely to be primarily focused on securing a successful outcome and there is an associated risk, which has sometimes crystallised, that other important and countervailing considerations are not sufficiently taken into account.

[127] The case by case approach which this Court must take in relation to the appropriateness of particular police practices is not well-suited to the establishment of general guidelines as to the circumstances in which a particular investigatory technique is deployed. It is of note that court sanction in the form of a warrant is required for police investigations which are far less intrusive than a Mr Big operation. Against that background there may be some sense in devising a system (perhaps involving the courts) under which criteria for the deployment of such techniques are developed and perhaps for some form of supervision (perhaps in the form of a warrant process) to ensure that such considerations are properly weighed, where a proposed operation will be intrusive and may have damaging effects as far as the suspect is concerned.

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149 See for instance the cases discussed in *AKJ v Commissioner of the Police of the Metropolis* [2013] EWCA Civ 1342, [2014] 1 WLR 285.

150 Including the well-publicised story of Bob Lambert: see Lauren Collins "The Spy Who Loved Me: An undercover surveillance operation that went too far" (25 August 2014) The New Yorker <www.newyorker.com>.

151 Such conduct was alleged in, for instance, *R v Slater* (1994) 12 CRNZ 198 (HC).

[128] Assuming there is no legislative change, where there is an admissibility challenge to evidence obtained in a Mr Big operation, police should provide to the Court details of why the decision to deploy a Mr Big operation was made and the material upon which such decision was made (including any advice received), so as to facilitate meaningful judicial supervision.

Pulling the threads together

[129] Under the Canadian approach adopted in *Hart*,[152] a Mr Big confession may be admitted only if the Crown can establish on the balance of probabilities that its probative value outweighs its prejudicial effect. Highly relevant to this issue is the reliability of the confession. It will be noted that this is not far removed from the position which obtains by reason of ss 28 and 8 of the Evidence Act. Save in cases in which no practical issue as to reliability arises,[153] a defendant challenging a Mr Big confession should be able to satisfy the s 28(1) threshold with the result that the confession will only be admitted if the judge is satisfied on the balance of probabilities that the circumstances in which the admission was made did not adversely affect its reliability. As well, although the burden of proof is the other way round, the test under s 8 of the Evidence Act is also very similar to that adopted in *Hart*. We note in passing that the incidence of the burden of proof is only of any logical moment if the considerations each way as to admissibility are in a state of exact equipoise. This is not a particularly common occurrence. As the Court in *Hart* saw probative value as encompassing reliability, the position adopted in that case is very similar to the approach we propose.

[130] Given that reliability and unfair prejudice are addressed – adequately to our way of thinking – by the statute, the only remaining issues of any moment relate to the circumvention of constraints on police interrogation and the telling of lies and participation in apparent criminal activity (and recruitment of the suspect) by the police. Recognising as we do that different views may be legitimately held as to these issues, we see no reason why we should differ from the approach taken previously in New Zealand and in other similar jurisdictions.

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152 *R v Hart*, above n 6.

153 For instance because the defendant took the police to the previously undiscovered remains of a murder victim.

Disposition

[131] The appeal is allowed and the evidence in question is ruled to be admissible.

ELIAS CJ

[132] The Crown appeals against a decision of the Court of Appeal ruling inculpatory statements made by the respondent to be inadmissible as evidence at his trial for manslaughter.[154] The statements were obtained on 2 May 2013 in an interview with an undercover police officer. The interview was the final stage of a five month police undercover operation designed to obtain admissions of culpability by the respondent for the death of his infant daughter three years before.

[133] The policing technique involved in the elaborate deception used in this case is relatively new to New Zealand. It is one in which a suspect is drawn into what is an apparently criminal organisation conducted by undercover police officers through "scenarios" enacted often over many months and often, as in the present case, designed with input from a clinical psychologist. The purpose of the operation is to obtain admissions in respect of the past offending which is the real subject of investigation. The culmination of the operation is an interview with the head of the organisation, "the boss" or "Mr Big". The interview will decide whether the person targeted is taken on as a full member of the organisation. He has been repeatedly told that his acceptance depends on the head of the organisation being convinced of his truthfulness and trustworthiness. That is the context in which the person targeted is interrogated by Mr Big in order to obtain the admissions which are the purpose of the operation.

[134] This is the first case to reach this Court dealing with admissibility of a confession arising out of such an operation. And it is only the second to be considered by the Court of Appeal. The previous case considered in the Court of Appeal, *R v Cameron*, produced conflicting decisions pre-trial and post-conviction from differently constituted panels of the Court on the approach properly to be taken to the admissibility of confessions made as a result of a scenario operation, although both panels concluded that the statements were admissible.[155]

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154 *Wichman v R* [2014] NZCA 339, [2015] 2 NZLR 137 (Randerson, White and Miller JJ).

155 *R v Cameron* [2007] NZCA 564 (Pre-Trial); and *R v Cameron* [2009] NZCA 87 (Post-Trial). The decisions to admit the evidence in *Cameron* were treated by the High Court Judge as binding on him, as further discussed below at [215].

[135] As always when addressing novel circumstances, it is necessary to take care to ensure that existing authorities are on point or supply useful analogies. While the courts have long taken the view that the deception inevitable in any undercover investigation is not improper or unfair in itself, the scale and degree of the operation in issue here and the fact that it was designed to obtain confessions of past offending by someone set up by the operation as a person with authority over the suspect puts it in a different class from policing methods considered in earlier cases. As Kirby J pointed out in a case in which the High Court of Australia considered a similar policing operation, "judicial reasoning addressed to different problems considered long ago, before 'scenario techniques' were dreamed of" may not meet the case.[156] Care is also necessary in considering authorities from other jurisdictions which have admitted "scenario" evidence, because of the different legal contexts in which such cases have been decided.

[136] The issues in the present case raised by the policing technique fall to be considered under rules of exclusion contained in the Evidence Act 2006. In particular, they raise the application of ss 28 and 30.

[137] The purposes of the Act are set out in s 6 and include the promotion of "fairness to parties and witnesses", recognition of the rights affirmed by the New Zealand Bill of Rights Act 1990, and "avoiding unjustifiable expense and delay". The general rule in s 7 is that all relevant evidence is admissible. It is subject to rules of exclusion contained in other provisions of the Act. They include the general rule of exclusion in s 8 that relevant evidence must be excluded by a judge "if its probative value is outweighed by the risk" that it will "have an unfairly prejudicial effect on the proceeding; or [will] needlessly prolong the proceeding".

[138] Section 30 is a provision of general application to all evidence offered by the prosecution at trial. By contrast, the admissibility of statements made by a defendant is the subject of specific exclusionary rules derived from common law antecedents and now contained in ss 28 and 29 of the Evidence Act. The separate treatment of statements by defendants follows the suspicion with which the common law traditionally treated confessions because of concern with reliability (the risks both

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156 *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [130].

that confessions might be falsely reported and in themselves untrue), the risk of abuse by law enforcement officers (especially by coercion or inducements), and unfairness to the accused in circumstances where self-conscripted evidence may undermine the privilege against self-incrimination and the presumption of innocence (the subject of legislative and common law protections).

[139] The former common law rule of exclusion applied both to statements obtained by coercion and to statements made by inducements (promises or threats). These two bases of exclusion of statements by an accused are now divided in the legislation. Section 29 excludes statements "influenced by oppression" (defined as "oppressive, violent, inhuman, or degrading conduct" towards the defendant or another person or "a threat of conduct or treatment of that kind"). Section 28 treats as presumptively inadmissible statements by a defendant where an issue of reliability about the statement is raised. Such a statement may nevertheless be admitted if the judge is satisfied under s 28(2) that "the circumstances in which the statement was made were not likely to have adversely affected its reliability".

[140] In addition to these mandatory requirements for exclusion of statements by a defendant, any evidence must be excluded under s 30 if "improperly obtained" if exclusion is "proportionate to the impropriety".[157] In this context, evidence "improperly obtained" includes evidence obtained in breach of "any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies", or "in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution", or "unfairly".[158] On the present appeal, it is the third of these bases of impropriety that is invoked.

[141] In considering whether a statement has been unfairly obtained by the police, the court must "take into account" under s 30(6) "guidelines set out in practice notes on that subject issued by the Chief Justice" (a provision which acknowledges the

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157 Evidence Act 2006, s 30(2)(b).
158 Evidence Act, s 30(5).

place formerly played in evidence exclusion by the Judges' Rules). The current Practice Note on Police Questioning was issued on 16 July 2007.[159]

[142] For the reasons to be given, I am of the view that the application of s 28 determines the appeal. Although the Court of Appeal did not rely on s 28, its evaluation of the circumstances and its rejection of the findings made in the High Court, with which I am in substantial agreement, establish the conditions in which s 28 requires the statements to be excluded.

[143] The statements were obtained by threats, promises or misrepresentations which raise issues as to their reliability (as the Courts below and the other members of this Court agree). In addition, I consider that the circumstances and manner in which the respondent was questioned to obtain the statements themselves or in combination with the inducements raise issues as to the reliability of the statements.

[144] I conclude there was no basis on which a judge could be satisfied that "the circumstances in which the statement was made were not likely to have adversely affected its reliability", as s 28(2) requires as the condition of admissibility. In the assessment required by the statute, I consider that it was not open to the Judge in the High Court to decide the question of admissibility on the basis of his view that the statements were substantively reliable. That was, in my view, the wrong question for a judge considering admissibility under s 28(2). Section 28, like the common

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[159] *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297. As is relevant, the Practice Note provides:

1. A member of the police investigating an offence may ask questions of any person from whom it is thought that useful information may be obtained, whether or not that person is a suspect, but must not suggest that it is compulsory for the person questioned to answer.
2. Whenever a member of the police has sufficient evidence to charge a person with an offence or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:
   (a) that the person has the right to refrain from making any statement and to remain silent;
   (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme;
   (c) that anything said by the person will be recorded and may be given in evidence.

…

4. Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.
5. Any statement made by a person … in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

law before it, sets up a precautionary approach to presumptively unreliable statements. They are treated by the statute as unreliable if the circumstances in which they are made do not provide reassurance in terms of s 28(2). The judge does not inquire into actual unreliability of the statements under s 28(2) just as, under the common law, the judge did not inquire into the truthfulness of a statement obtained by inducements by a person in authority.[160] Such statement was treated as involuntary and inadmissible.[161]

[145] Since I am in the minority in this view as to the proper interpretation of s 28 and the other members of the Court take the view that the statements made should be admitted as reliable under s 28, I indicate why I consider that the evidence of the admissions should in any event be excluded in application of s 30 of the Act. I am in substantial agreement with the reasons given by Glazebrook J as to why the evidence of the statements was improperly obtained within the meaning of s 30. In particular, and in disagreement with William Young J, I am of the view that the Practice Note is relevant to the question of unfairness under s 30, even though the police officers who obtained the statement were acting undercover. I differ from William Young, Arnold and O'Regan JJ in being of the view that exclusion of the statements was not a disproportionate response in the circumstances. I would affirm the decision of the Court of Appeal.

Background

[146] The respondent's daughter, a twin, was born in October 2008 when the respondent and his partner were aged 17 and 16. The babies were premature, being born at 25 weeks gestation. The daughter was admitted to hospital in May 2009 with pneumococcal meningitis and died four months later, in September 2009. The cause of death was put by the paediatricians who examined her as being severe and permanent brain injuries suffered at the time of an earlier admission to hospital on 4 March 2009.

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160 *Wong Kam-ming v R* [1980] AC 247 (PC) at 256–257 and per Lord Diplock in the course of argument, citing *Ibrahim v The King* [1914] AC 599 (PC) and *Chan Wei Keung v The Queen* [1967] 2 AC 160 (PC).

161 See below at [259]–[265].

[147] The respondent had been at home alone with the twins on 4 March. He later acknowledged to the police that he had shaken his daughter but said it was in an attempt to start her breathing after her breathing had stopped. He described performing CPR on the child (as he had been taught to do because of the risk of apnoea in premature babies), which he said resulted in her starting to breathe again. He also called an ambulance.

[148] The medical report later obtained indicates that the brain injuries were consistent with severe shaking immediately before the child's admission to hospital on 4 March 2009. Although the report does not entirely exclude the injuries having been inflicted in the circumstances described by the respondent to the police, it expresses the view that the shaking required would have been severe and non-accidental and unlikely to have been caused in an attempt at resuscitation. Other non-accidental fractures also consistent with shaking had been suffered although they were not able to be dated with any certainty and an earlier brain injury was also discovered although, again, it could not be dated.

[149] The respondent was interviewed by the police on three occasions. The first was a brief interview at the hospital on 6 March. The two more formal interviews took place in the presence of the respondent's lawyer on 11 March and 5 November 2009. Each of the two later interviews resulted in signed statements.

[150] In the first two interviews, on 6 March and 11 March, the respondent said that on 4 March the baby had choked and was not breathing. In both interviews, the respondent acknowledged shaking her. In the 11 March interview he described the head "flopping around" during the shaking. The respondent said he had shaken the baby in an attempt to revive her and had performed CPR until she started breathing again, at which stage he called the ambulance.

[151] At the third police interview on 5 November 2009, the respondent was cautioned in the terms required by the Practice Note which in New Zealand since 2007 has replaced the Judges' Rules.[162] After confirming that he was happy to answer questions and understood the rights explained to him, the respondent

[162] The Judges' Rules applied in New Zealand were those adopted in the United Kingdom in 1912.

answered the further questions put over some hours. They included questions based on a report of the paediatrician, not available at the time of the earlier interview on 11 March.[163] Although the respondent expressed some reluctance at going over what he had already said in his earlier statements, he answered all questions put to him as to the sequence of events. His account did not vary from that given in the interview on 11 March.

[152] The transcript of the interview extends to some 21 pages. It was put to the respondent that his partner had described the child as crying for lengthy periods in the days leading up to her admission to hospital on 4 March and that she had been crying when the partner left the house before the episode that led to the hospital admission. He disagreed with both suggestions. The interview ended shortly after these questions had been put but only after the respondent's counsel objected to two questions suggesting that the respondent did not seem concerned that the injuries appeared to be child abuse or to find out who was responsible and that he had been hiding from the police.

The undercover operation

[153] The undercover police operation was launched in December 2012, three years after the last police interview in November 2009. By then, the respondent was 21.

[154] The operation was patterned on a model developed by police in Canada, and described in outline at paragraph [133] above. Twenty-one staged scenarios were employed targeting the respondent, over a period of five months. As is usual in such operations, the target is involved in the apparent criminal activity of the organisation, usually of escalating seriousness during the course of the operation.

[155] The respondent was involved first in repossession of vehicles and other collection of debts in circumstances suggestive of standover. He later assisted with the movement and storage of apparently stolen property and delivery of a stolen passport obtained from a corrupt official. The passport was explained as to be used in the flight of a member of the organisation, Craig, who was being investigated by

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[163] It was typed on 18 March and approved on 27 May 2009.

the police for sexual offending against underage girls. The respondent was brought into contact with "CJ", who was an apparently corrupt police officer who was a member of the organisation. The respondent was given large amounts of cash to count and handle in circumstances which suggested it had been stolen. He was given the task of setting up an alibi for a member of the organisation seemingly involved in serious offending. He was involved in the delivery of a large quantity of cannabis at a country airfield at night-time. Later he participated in a staged exchange of the cannabis and some firearms with men posing as members of a triad for diamonds and cash.

[156] In some operations based on the Canadian model, the organisations and some of the scenarios have been violent.[164] In the present case, the members of the organisation stressed to the respondent that the organisation was non-violent. Nevertheless there was inevitably some background of menace engendered by the escalating criminality of the activities. And an enacted expulsion of a member of the organisation for loose talk and bad attitude was accompanied by verbal abuse.

[157] During the period in which a suspect targeted by an operation of this sort is drawn into the activities of the organisation, he is encouraged to become fixed on being admitted as a full member of the organisation. That is done by befriending him, flattering him with attention and praise, and providing some material incentives (including money, meals in expensive restaurants and travel). The prospect of significant further material benefits, glamorous lifestyle and personal status as well as the companionship of other members are held out to him as the consequence of admission to the organisation. The person targeted may, as here, be encouraged to dress smartly and tidy up his appearance. (The respondent was praised for his weight loss and better dressing.) His self-esteem may be consciously boosted. He receives some money but it is made clear that if he is admitted to the organisation he can expect substantial material rewards. As designed, it is evident that those who are isolated or immature or otherwise vulnerable will be especially susceptible to being drawn into dependency on the organisation in this way.

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[164] See, for example *R v Terrico* 2005 BCCA 361, (2005) 199 CCC (3d) 126.

[158] The person targeted is led to believe that the final hurdle to membership is that he must convince the powerful head of the organisation (referred to by other members of the organisation as "the boss") that he is entirely loyal and trustworthy. Complete honesty with the boss is stressed throughout the operation to be essential. It is a common feature of the design of such programmes that the suspect will be told that the organisation cannot afford to admit those with unresolved problems with the law. The target will be told that the boss is able to fix any problem with the law as long as he is told about it, because he has corrupt agents within the police and other government agencies. He may be given examples of ways in which problems with the police have been fixed for other members of the organisation.

[159] In the present case, the respondent was told repeatedly that the organisation's values of trust, honesty and loyalty were key to his admission as a member of the organisation. He was told that the boss was someone who could fix any problem with the law provided he was told the truth and was convinced of the loyalty of the person. The scenario in which Craig was helped by the boss to avoid prosecution for offences against underage girls was used to illustrate the fact that the boss "did not care" what anyone had done, if they had demonstrated loyalty, and that he could "fix anything". He was led to understand that the corrupt police officer, CJ, had managed to remove several pieces of physical evidence from police custody but had been unable to obtain the medical examination kit, which had already been sent for analysis before the boss had been alerted to the problem.

[160] The culmination of the whole staged operation is the interview that will determine whether the suspect is admitted to the organisation. Its purpose, the purpose of the entire operation, is to obtain admissions of guilt in relation to the criminal offending which is the real subject of the investigation. In the present case, the suspect was taken to a city in which he was known to have no contacts for the purposes of the interview. As explained in evidence by the officer in charge of the investigation, this was to isolate him from his family and social contacts. Two days before the interview, the respondent had participated in the most serious of the staged criminal activities, entailing arms and cannabis dealing apparently with members of a triad. He was led to believe that a big operation was about to take

place in Melbourne and the prospect of his own involvement in it was dangled before him.

[161] A few days before the interview, a member of the police called on the respondent's mother at her work to advise her that the coroner would be conducting an inquiry into the child's death at which members of the family would be witnesses. The contact with the family was not instigated by the coroner and was timed to put pressure on the respondent before the interview. The officer who gave evidence at the pre-trial hearing said this contact was made so that the respondent would have the matter of the child's death "in the forefront of his mind" at the time of the interview. This ruse was successful. The day of the interview, the police intercepted a telephone conversation between the respondent and his partner in which she told him about the coroner's investigation. In the intercepted conversation, the respondent and his partner clearly thought it was likely that the respondent would be charged in relation to the death.

[162] At the interview, the respondent's initial denials of the offending under investigation were not accepted by the head of the organisation, "Scott". Scott referred to the paediatric report, which he said had been obtained for him from the police file by CJ. The medical report of the injuries suffered by the victim was used to cross-examine the respondent. It was put to him by Scott that the doctors knew what they were talking about and had no axe to grind. The respondent was reminded that he could not join the organisation unless the head of the organisation believed he was being totally honest. And he was left alone and told to think about "truth and honesty" when the interrogation seemed at an impasse. The inculpatory statements were then made when the undercover officer returned to the room. It is necessary to refer to the interview in some detail because it is the point to which the whole operation was directed and because it discloses the circumstances which are critical to the questions of reliability, impropriety and fairness which are in issue on the appeal.

The interview with "Scott"

[163] The statements in issue on the appeal were made at the interview which is the end of the operation. The interview was secretly recorded. A police officer posing as the boss, Scott, conducted the interview. The respondent had already been told by other members of the organisation that the interview would determine whether he could join the organisation. Scott started by explaining that he liked to "sit down … and have a chat and just sort of see how things are progressing" with "all of the guys that work for me". The object was to "[s]ee if they're happy and just make sure everything's … okay". He thanked the respondent for coming in to have the chat.

[164] The interview began with Scott asking about the work the respondent had been undertaking for the organisation and praising the "good attitude" he had displayed and the efforts he had made to smarten up his appearance. Scott then indicated that there were "opportunities coming up" in the organisation because the business was getting busier. It was necessary for him to take on more staff. The men who had been giving the respondent jobs were Scott's "recruiters" and they had recommended him. It was important to Scott to know that the people in his organisation all subscribed to the values of the organisation. They boiled down to three words. Because of the preparation the respondent had received during the operation, he was able readily to identify the values as trust, honesty and loyalty. Scott said he would come on to talk about those values more "a little bit later". He then embarked on some preliminary remarks which, since they have some significance in relation to the questions of propriety and fairness which are raised in the appeal, need to be referred to and set out in context.

[165] Scott told the respondent that those who worked for him "all work for me because they want to". So if the respondent was not happy he would want to know about it and resolve it. Anyone who wanted to leave the organisation was able to do so with "no problem whatsoever". It was "not an issue". The same was true of "you and me sitting here today …":

> … if you said to me look … I'm not comfortable here today, is it okay if I leave, absolutely, because you know the door that you came in that's, that's the door that you go out. … So look if you wanna go, you just walk on out. … I mean are you, you happy enough sitting here today, having a chat?

[166] After the respondent replied that he was "more than happy boss", Scott explained that he wanted to be "up front" and then repeated "[s]o as I said, you, look at any stage mate, you're free to go":

> So if anyone in my organisation decides to leave, in my team, and there have been people that have left, look I'll shake their hand … I'll look them in the eye and I'll say thank you very much for what you've done. I'll pat them on the back and we'll part as friends … Okay? Everyone that has left, has parted as a friend. Because that's, that's just the way I am. … You know I'm not … I don't hold grudges, I don't … you know. If anyone wants to leave, free to leave … and that includes you. Do you understand that?

This explanation, it should be noted, seems to have been scripted more with an eye to subsequent admissibility (as is discussed below at [305]–[306]) rather than being directed to the evidently eager new recruit at this preliminary stage of the interview when the only subject under discussion was whether the respondent wanted to join the organisation.

[167] Scott next moved to ask the respondent to "tell me a bit about yourself". That led to the respondent describing his upbringing and family and his partner and their children.

[168] Without prompting, the respondent referred to things going "all wrong" from the time his own father left home: "[m]y daughter got um sick, she, she got hurt, you know. … someone hurt her and ah yea ah … the night that um I found out about it all um, I was looking after the kids and ah she, she stopped breathing right next to me and I had to perform CPR on her". The respondent described the background of the premature birth of the twins, the involvement of Child Youth and Family (CYF), because "they didn't think we were old or wise enough to raise twins … [s]o they kind of jumped in and got involved straight away". The respondent said that his daughter "started getting better and then … she got meningitis". He indicated that the children had been taken away by CYF and that he and his partner had split up for a while but had got back together again and had moved to Auckland, where his father lived.

[169] Scott did not intervene to direct the conversation at this point. There was then some discussion about rugby league and other members of the family as well as

the circumstances in which the respondent and his partner were living in Auckland. This conversation went on for some eight pages of transcript until Scott brought the preliminary part of the interview to an end by thanking the respondent, explaining that "I like to know a bit about … the people that … potentially work for me or do work for me". At this point he redirected the interview to the organisation.

[170] Scott referred again to the values of the organisation and the fact that it was "not violent" (eliciting an expression of approval from the respondent) and was "just a tight family". This led Scott back to, "as I touched on a bit earlier", the values of trust, honesty and loyalty, which Scott said were "really, really, important". Scott explained that he needed to be satisfied that he could trust the respondent "entirely" and it was important "to satisfy myself that you understand how important that trust is to me":

> So … and, obviously for me to trust you … I need to know that you'll never lie to me and you'll never deceive me. That's basically it. … and then, then we've got mutual trust. Okay, it's pretty simple.

[171] If a mistake was made, Scott needed to be sure he would be told about it "straight away": "You tell me about it and I'll fix it and that's how we're successful. Does that make sense?"

[172] The respondent then referred to his understanding that the boss could fix problems. Ben had told him the boss could "just sort anything or fix anything". The respondent said he had been surprised that the boss had been able to fix the problem Craig had with sexual offending, something the respondent had thought "was kind of something you only see on the movies". It had been explained to him that the boss had fixed things for Craig because he had been loyal and honest. The respondent told Scott:

> I definitely see that and um feel super um, … I don't know how to say it, but I feel definitely um very safe and um very trusting of you all, ultimately trust, trust you, you know like … I feel like, as long as I follow all your instructions and all your rules that everything's going to be fine for me, you know and ah it's a good feeling … It's a good feeling. I feel … just very safe, you know … and comfortable.

Scott in reply said that he was glad the respondent had the opportunity to see "first hand how things get fixed … You know that's, it goes away".

[173] Having "covered off the trust", Scott then talked about honesty. When the respondent had some difficulty in explaining how honesty differed from trust, Scott told him not to be concerned about putting it into words, "I mean I just like to get a gauge and look I, I'll talk to you about honesty":

> Um … as you've spoken about in relation to Craig, I can fix anything. I can fix anything and you've seen that … and you have to believe me when I say that, okay? There's, there's nothing that I can't fix. People have come to me for a while now when I've been in this position … with problems, some big problems, some small problems. Some problems that other people might go oh that's hideous, but they come to me with their problems and I fix them and I fix them because I can and because I want to. The only way I can't fix something, is if I don't know about it. Okay? And that's fairly obvious. … if I don't know about it, I can't do anything about it, I can't fix it. … I mean that's fairly obvious, isn't it? Okay. And … and the reality is … I don't actually give a fuck what it is that they've done, I really don't. For me, the important thing is that they are honest about it … they tell me about it straight away and then I fix it and I make it go away forever. Okay so look, I can't say enough. I don't care what they've done.

[174] Scott used Craig as an example and emphasised that he would always maintain the confidence. No one would hear about it from him. He explained he would not himself have raised Craig's problem if the respondent had not found out about it himself. Scott explained he needed to deal with situations such as Craig's because "it would potentially cause problems for … myself and the organisation" because the police would be watching someone with unresolved problems with the law and might end up paying attention to the organisation and Scott himself.

[175] The conversation then moved to loyalty. After a discussion of what loyalty entailed Scott concluded the conversation about values by saying "as I said about Craig, the reason that I need loyalty and, and honesty is that I can fix things. … I don't like things hanging over us. … You know that needn't be hanging over us":

> If they can be fixed, which they can, let's fix them and get rid of them. I don't like having to look over my shoulder at all. … We're always looking forward in this organisation.

[176] At page 43 of the transcript Scott turned to the main purpose of the interview. He raised the fact that, with the progress that the respondent had made, he had got to

a point where he needed to have him "checked out" and for that purpose he had turned to CJ. The respondent confirmed he knew CJ and understood him to be a policeman who worked for the organisation. Scott said that CJ had told him "there is something that … I should discuss with you in relation to … the death of a kid, I think in two thousand and nine, back in the Hutt". As Scott reminded him, this was something that the respondent had already touched on earlier in the interview. Scott told the respondent that it was not necessary for him to talk about the matter:

> If you're comfortable enough can you, can you tell me about that? … If, if you don't want to, you don't have to.

[177] It should be noted this is the last reference in the interview to there being no need for the respondent to talk about the matter of his daughter's death. As discussed below at [210] it is before Scott gave any indication that he had specific information about the death.

[178] The respondent said that it was "hard for me to talk about" it, but explained what had happened in terms that reflected his statements to the police. Scott did not direct the discussion but let the respondent talk for five pages of transcript. The respondent suggested that others in the extended family might have been responsible for the injuries but that he did not like to raise that because he thought his partner would not forgive him if he pointed to her relations. He also thought that it was not clear exactly what had happened because "it's not confirmed that she was … hurt by people":

> … this could have been cos she was born too early and … you know the breaks could have been from, her bones weren't, weren't formed enough and the nurses handle her too hard and you know the lawyers told us all a bunch of different stuff, but yeah I honestly don't know … exactly what happened to her and I, and I'm a bit scared to try and find out because I don't want to upset my missus.

[179] At this stage, Scott indicated that CJ had given him "some bits and pieces some … stuff to read, I've read today … about the, the day in March or something … The day that did, the kid went to hospital" and asked "just on that day what, what actually happened?"

[180] The respondent gave the same account that he had given the police about the events. Scott asked him about the degree of force used in shaking the baby to revive her. He acknowledged "a bit of a shake … pretty decent shake" trying to "get her to, to wake up". Scott asked whether the head was "[f]lapping around" and the respondent confirmed that "the head definitely shook around … definitely did shake a little bit" but he was "really scared that she wasn't breathing" and so "wasn't thinking about all that at the time".

[181] Scott intervened to say that CJ had "obviously talked to me and … some things that we need to make sure about you know … If I can sort things out". He then put to the respondent questions about how long the shaking went on for and asked him to demonstrate the shaking with a pillow. The respondent said it was only five seconds, and "[j]ust a bit of a shake to try and wake her up and she didn't wake up so I put her down". He explained then doing CPR and getting the breathing going, which made him feel "really proud". And he reiterated that "didn't last long, didn't last long".

[182] At that point, Scott referred to the medical report which he said CJ had provided amongst the other materials. He said "these doctors they do this day in, day out and they're experts":

> You know they, they know what they're talking about … and they've got no reason to make stuff up … And in that report … the doctor says that the … baby had, had some brain injuries … That had been caused on, on that day that we're talking about now in March I think … and that … the injuries couldn't have been sort of accidental. So, you know … if we're talking shaking, we're not talking a gentle shake. I mean … we're … doctor report says it had to be a fairly good, hefty shake.

The respondent agreed that it "was a good shake, but wasn't, wasn't long". "[M]aybe like five seconds, you know just to try and wake her, wake her up I guess, yeah".

[183] The interview continued with Scott reminding the respondent "I don't really care what you've done … but what I care about is just making sure I, I know everything about the situation so that I can fix it":

> So that's why I'm sort of trying to … dig in a little bit about what I need to know so that I can make it go away… And this is, this is the point where … from you I need, I need one hundred percent honesty. Because mate I don't care, I don't care what you've done, I really don't care. Okay? But what I do care about is my organisation and my people, so um … I'm just going to go to the loo and … Be back in a second, okay. So just, you know just give it some thought in relation to, truth and honesty brother.

[184] When Scott returned he started again on honesty and the ability to fix the problem:

> Okay, so … so yeah look, honesty is a big thing here mate, if that, I can't say enough, I don't care, I don't care what's done, what's happened, what you've done, okay, but what I need to be able to do is know everything so that I can fix it.

[185] Further questions about the shaking elicited the same reply that the "pretty good shake" had been for five seconds or less. At that point Scott asked about the historic injuries consistent with earlier shaking and asked "has that happened before with, with baby?"

[186] The respondent then acknowledged that it had happened once before, departing from the account he had previously given to the police. He described the circumstances – that he had been tired and stressed and the baby "just wouldn't stop crying" and that he had become "real frustrated and just kind of lost it and um gave her a bit of a yeah quite a, quite a good shake" and felt very bad. He said he had never told anyone of this episode before.

[187] Scott followed up by asking whether the same thing had happened in March, with the same crying and his frustration. The respondent agreed that it had and apologised for having lied before. He said he had never told anyone this before. Scott then asked him to "fill me in about that day again" and the respondent explained that the child would not stop crying and then he shook her to try to make her stop crying:

> … it made her stop crying, you know she did, she stopped crying when I shook her but … you know no, then she just wouldn't start crying again or anything, you know … yeah so I've just freaked out. Didn't, didn't, didn't want that to happen at all and then … pretty much the rest of the story is the same.

[188] The respondent acknowledged in response to a further query that the version of events he had given to the police was not true. And he confirmed that his earlier suggestions that others in the family might have been responsible were lies too. The respondent said he thought he had "tricked myself for so long into believing the story that I told everyone … That I forgot the truth … In a way or didn't want myself to believe it … just tricked myself into thinking that I didn't do that … and now that I remember what I did I feel scared".

[189] The interview concluded with Scott telling the respondent that he had passed the test and was part of the organisation. Other members were called in to congratulate him. He was sent the next day to Wellington and told to wait at a hotel for a delivery. He was arrested there and charged with the manslaughter of his daughter.

Criminal justice

[190] Rules of proof and evidence, originally developed through judicial decisions, guard against the risk of wrongful conviction and abuse of criminal process. They protect foundational principles of the criminal justice system such as the presumption of innocence and the privilege against self-incrimination, affirmed as fundamental by the New Zealand Bill of Rights Act. Today, many of these rules are found in statutes prescribing minimum standards of criminal procedure, including provisions in the New Zealand Bill of Rights Act itself, or are contained in guidelines for official conduct or practices observed by law enforcement officers, such the guidelines for police questioning contained in the Practice Note of 2007 which replaces the former Judges' Rules.

[191] The courts have also long exercised statutory and inherent jurisdiction to prevent unfairness to an accused both in the processes of trial and in the investigation of criminal offending. It is jurisdiction that exists "to see that what [is] fair and just [is] done between prosecutors and accused".[165] This is a process that is "still continuing"[166] as new circumstances arise. Such development is necessary to

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165 *Connelly v Department of Public Prosecutions* [1964] AC 1254 (HL) at 1347 per Lord Devlin.
166 At 1348.

maintain public confidence not only in the result in the particular case but in the due administration of justice for the future.[167]

[192] The principal way in which observance of fundamental principles of criminal justice and fairness in criminal process is protected is through the exclusionary rules of evidence developed to protect against unreliability and unfairness or to prevent impropriety in the use of public powers of investigation of crime and prosecution of offenders. These rules of evidence are addressed in New Zealand under the framework of the Evidence Act.

[193] The rules of evidence do not however exhaust the responsibility of a trial judge to ensure fairness in criminal process.[168] Outside their scope, courts in New Zealand, as in other jurisdictions,[169] have inherent and implied powers to ensure that their processes are not abused.[170] The existence of other sanctions "cannot justify the abdication by the Court of responsibility for control over its own processes".[171] Substantial codification of the law of evidence does not affect the responsibility to prevent abuse of process.[172] And in ensuring that the processes of the court are not abused, it is necessary to consider "the whole course of the criminal process" and not simply the trial.[173]

[194] Abuse of process may arise if a fair trial cannot be provided: "the public interest in holding a trial does not warrant the holding of an unfair trial" and "it is inconceivable that a trial which could not fairly proceed should be compelled to take place on the grounds that such a course did not constitute an abuse of process".[174] But abuse of process, as Richardson J pointed out in the Court of Appeal in *Moevao*

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167 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 481 per Richardson J.

168 The High Court of Australia has made the point that "the practices and procedures governing [trial] are found elsewhere than in the Evidence Act" and the Evidence Act itself falls to be considered in the context of those practices and procedures: *R v Soma* [2003] HCA 13, (2003) 212 CLR 299 at [26].

169 In the United Kingdom, see *R v Horseferry Road Magistrates Court; ex parte Bennett* [1994] 1 AC 42 (HL); in Australia see *Jago v The District Court of New South Wales* (1989) 168 CLR 23; in Canada, see *R v Jewitt* [1985] 2 SCR 128, particularly at [6]–[25].

170 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

171 At 481 per Richardson J.

172 Section 11 of the Evidence Act provides that the inherent and implied powers of a court are not affected by the Act except to the extent otherwise provided in it.

173 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 29 per Mason CJ.

174 At 29 and 31.

v Department of Labour, arises also where there is no unfairness in a particular case but official conduct is an affront to justice.[175]

[195] I have referred to the power of the court to ensure that its processes are not abused for completeness and because in other jurisdictions scenario operations have been assessed both in terms of the rules of evidence and the jurisdiction to prevent abuse of process. In the present case, however, it has not been suggested that there is any proper basis on which the scenario operation here undertaken could be treated as so inherently wrongful that it would justify the court acting to protect its processes from abuse outside the framework provided by the rules of evidence.

[196] Abuse of process might have arisen, tainting the processes of the court, had the scenarios here entailed actual violence, real criminality, or co-option of the courts into the deception practiced by the police. Evidence obtained in such circumstances might perhaps be excluded as more prejudicial than probative, in application of s 8 (although s 8 may provide limited basis for excluding evidence by way of confession because of its high probative value).[176] But in cases of abuse I do not think the court would be confined to the prejudicial/probative calculus if it considered that its own processes would be tainted by the admission of even highly probative evidence.

[197] It is necessary only to advert to this possibility. It was not suggested in the present case that fundamental denial or abuse of process of fair trial arose. Rather, the issues for determination on the appeal are whether the statements of the respondent were obtained in circumstances in which their exclusion is required by the rules of evidence contained in the Evidence Act.

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175 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J. And see *Moeavo* at 476 per Woodhouse J.

176 I have some doubt whether s 8 is concerned with reliability of evidence, as opposed to its materiality as a matter of proof. Since a confession is highly probative in the latter sense (because, if accepted by the trier of fact, it is sufficient for conviction), the scope for application of the balance indicated in s 8 may be circumscribed in the case of an inculpatory statement. There is no process failure such as occurred in *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 (where there was no ability to challenge the unrecorded statement because of the refusal of the witness who gave evidence of it to answer questions). In the case of the simulated offending here, which was very different from the offending under investigation and so unlikely to give rise to impermissible propensity reasoning, any potential prejudice at trial from the preparedness to engage in criminal offending is likely to have been adequately addressed by a jury direction. It is therefore not surprising that the respondent did not develop the argument that the evidence should have been excluded under s 8.

The High Court decision not to exclude the evidence

[198] In the High Court Collins J identified the two questions for him as being:[177]

(a) whether the statements made by the respondent to Scott were inadmissible under s 28 of the Evidence Act; and

(b) whether they were in any event improperly obtained under s 30 of the Act and their exclusion was proportionate to the impropriety.

(1) The application of s 28

[199] The respondent gave evidence at a voir dire. He said that his earlier statements to the police had been true and his admissions to Scott had been false. He said that he told Scott what Scott had wanted to hear. Collins J did not accept this evidence. He said he reached this conclusion "because the scenario during which [the respondent] made his admissions did not provide a context or incentive for [him] to falsely admit the injuries he caused [his daughter]":[178]

> On the contrary, a significant reason why [the respondent] made the admissions was so Scott could "fix" [his] problems with the police. A false admission would have been totally inconsistent with the standards of trust and honesty [the respondent] was trying to demonstrate to Scott.

[200] Collins J considered that the respondent had not raised a threshold issue as to reliability on the basis of the nature of the questions put to him by Scott.[179] He came to this conclusion on the basis of the transcript of the interview which he considered had been conducted without pressure to participate in the conversation and "in a relaxed manner".[180] The respondent "was told he could leave at any time". He "was not pressured in any way into making the admissions he made". The way in which the questions were put "did not influence the way in which [the respondent] responded".

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177 *R v Wichman* [2013] NZHC 3260 (Collins J) at [1].
178 At [34].
179 At [69].
180 At [70].

[201] At [300]–[306] I express disagreement with the conclusion reached on the nature of the questions. I am of the view that they put pressure on the respondent to confess and amounted to cross-examination that would not have been permitted in a police officer acting openly.

[202] On the other hand, Collins J considered that the threshold as to reliability was passed in relation to the promises and representations made by Scott. He found that the respondent "was induced into making his admissions" by Scott: the respondent was misled into believing Scott could "fix" his problems with the police if he made admissions; he was misled into believing that anything he said to Scott would be kept confidential; he believed he needed to make the admissions in order to demonstrate honesty so as to enable him to be admitted into the organisation; he wanted to become a member of the organisation in order to benefit financially and from the "camaraderie associated with the organisation".[181] In addition, Collins J was satisfied the admissions would not have been made had the respondent known that Scott was a police officer and that his admissions were being recorded for use in evidence.[182]

[203] Because he considered that the inducements and deception (though not the nature of the questions) raised the issue of reliability of the statements, Collins J had to address the s 28(2) question whether "the circumstances in which the statement was made were not likely to have adversely affected its reliability". His approach was to ask whether the statements made by the respondent were unreliable and ought to be ruled inadmissible under s 28 of the Act. As is further explained below at [266]–[285], I think this approach was in error in focussing not on whether "the circumstances in which the statement was made were not likely to have adversely affected its reliability" but rather on whether the statements themselves were in substance reliable.

[204] Collins J considered the reliability of the statement by considering not only the factors set out in s 28(4) but "other factors I believe are relevant to assessing the

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181 At [35].
182 At [36].

reliability of [the] admissions".[183] He came to the conclusion that there was "nothing in [the s 28(4) factors] that raise any doubt about the reliability of [the] admissions": the respondent had no disability; the questions put to him were mixed, containing both "open and direct" questions.[184] Importantly, in Collins J's view:[185]

> [The respondent] was told that he was free to leave Scott's apartment. The whole tenor of Scott's questions involved [the respondent] being assured he did not have to say anything and that it was entirely over to [the respondent] to decide if he wanted to speak to Scott about [the child's] injuries and death. Any direct questions which Scott put to [the respondent] were innocuous and not of a kind that could cause any doubt about the reliability of [the respondent's] answers.

[205] The Judge identified "seven other factors" (although they seem to be eight) which caused him to be satisfied on the balance of probabilities that the statements were not made in circumstances likely to have adversely affected their reliability:[186]

(a) the admissions did not "have the hallmarks of a false boast, bravado or puffery", suggesting that the scenario technique employed did not encourage exaggeration about criminality;

(b) there was "nothing implausible about [the] admissions" such as "obviously false statements accompanying the confession";[187]

(c) the admissions "were of no assistance to the organisation that [the respondent] wanted to join";

(d) the respondent was "obviously relieved after he had made his admissions" in a way that appeared "genuine and cathartic" and "[t]his increases the likelihood of his admissions being reliable";

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183 At [74](b).
184 At [75]–[77].
185 At [76].
186 At [79]–[87].
187 In listing this factor, Collins J acknowledged that the truth of the statement was not the focus of the assessment but rather "the impact of the surrounding circumstances on the reliability of [the respondent's] statement". It is difficult to know how this factor could have been relevant except as bearing on the truth of the confessions.

(e) the respondent had commented about his "embarrassment" in earlier denying wrongdoing and the Judge took the view that "[t]his initial reluctance to admit the truth has been recognised in similar circumstances as a factor that enhances the reliability of the subsequent admissions" (a proposition for which he cited the second, post-trial *Cameron* judgment at [31], although it is not easy to extract support from the proposition made there or the citation in *Cameron* from the judgment of Gleeson CJ in *Tofilau*, which is concerned rather with the point that people vary in their reactions: while some wear guilt "lightly", others may be ready to unburden themselves because guilt weighs heavily on them);[188]

(f) the admissions were "entirely consistent with the pathology and medical evidence" and "[t]his enhances the reliability of his admissions";

(g) the emphasis throughout was on "trust, honesty and loyalty" so that "[t]he fact the admissions were made in the context of [the respondent] needing to demonstrate honesty adds to the reliability of his admissions"; and

(h) there was no question of error in the recording of the admissions, which were recorded.

[206] On the basis of these considerations, the Judge concluded:[189]

> I am very satisfied there is nothing in the circumstances in which [the respondent] made his statements that are likely to have adversely affected its reliability. On the contrary, the circumstances under which the statement was made strongly suggest [the] admissions are reliable. Accordingly I conclude that [the] admissions should not be excluded under s 28 of the Act.

[207] In what follows at [287]–[291], I express disagreement with this evaluation. It was made by the Judge on the basis of the transcript of the interview alone, as he

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188 *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [19].
189 *R v Wichman* [2013] NZHC 3260 at [88].

indicates.[190] More importantly, for the reasons given at [266]–[285], I consider that the passages quoted show that the Judge asked himself the wrong question – whether the answers given were reliable – rather than whether the circumstances were such as to be unlikely to cause statements obtained to be unreliable.

(2) The application of s 30

[208] In the High Court, it was argued for the respondent that the statements were improperly obtained and ought to be excluded because they were obtained in circumstances constituting breach or effective evasion of the rights to counsel and to silence contained in ss 23(4) and 25(d) of the New Zealand Bill of Rights Act and because they were unfairly obtained (including by reference to the standards looked to in the Practice Note on police questioning).

[209] Collins J considered that the evidential threshold for breach of the New Zealand Bill of Rights Act had not been made out because there was no evidence that the police had made a decision to charge the respondent before the admissions were obtained.[191] The Judge considered whether the statements were nevertheless obtained in breach of the respondent's "common law right" to remain silent, a right closely linked to the privilege against self-incrimination.[192] Without deciding whether such right survived enactment of the Evidence Act, Collins J considered that there was no infringement of any right to remain silent because the respondent was effectively "cautioned" by Scott and "chose" to speak:[193]

> The transcript of the discussion that took place on 2 May 2013 reveals [the respondent] was told by Scott that he did not have to speak to him about the circumstances surrounding [his daughter's] death. Scott asked [the respondent] if he was comfortable telling Scott what had happened to [the child]. [The respondent] said "yep". Scott said "if you don't want to, you don't have to". Notwithstanding this "caution", [the respondent] chose to speak to Scott. This is not a situation in which [the respondent] had previously refused to speak to the police [a circumstance which the Judge noted in Victoria was treated as precluding recourse to the scenario technique]. Nor was he compelled to do so on 2 May 2013.

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190 At [70].
191 At [97].
192 At [101].
193 At [102].

[210] As is explained at paragraphs [305]–[306] I do not accept that the indication from Scott, at an early stage of the introduction of the topic of the child's death is appropriately treated as a "caution", with the effect that the respondent "chose" to speak about the matter. At the point Scott made the statement, the sole purpose of the interview still appeared to the respondent to be about his suitability as a recruit for the organisation. This may be contrasted with a normal police interview in which the person interviewed is told what the subject of the interview is. The "caution" preceded any indication that Scott had information about the circumstances of the child's death which he wanted to put to the respondent. At paragraph [305] I suggest that this formulaic approximation of proper practice would have passed over the head of the respondent, who had no context within which to assimilate it because of the elaborate deception being played out.

[211] Collins J's reliance upon the indications given by Scott that the respondent was not obliged to speak about his daughter's death also strikes me as unrealistic if assessed in the context of the artificial world in which the interview was being conducted. The respondent had no option but to answer the questions put to him by Scott if he wanted to join the organisation. Because of the elaborate and extensive deception, he lacked any basis to appreciate that the purpose of the interview was not his membership of the organisation but his admission of criminal culpability. The indications given by Scott (again in rough approximation of proper police practice) that there was no obligation to answer questions and that he was "free to go" were also given in circumstances where there was no context in which they could be understood. They occurred at the very outset of the interview which purported to be simply about admitting the respondent to the organisation and his level of comfort with the organisation.

[212] Having rejected the arguments that the evidence had been improperly obtained for breach of law or rules governing police questioning, the Judge considered whether the statements had nevertheless been improperly obtained under the unfairness leg of s 30.

[213] Collins J found that there was nothing unfair about the way in which the respondent was questioned by Scott, relying on the reasons earlier given for the

conclusion that the manner in which the interview was conducted did not raise concern about the unreliability of the statements. As indicated, I disagree with this evaluation, (for reasons explained at [286]–[291]) as indeed the Court of Appeal did (as discussed at [219]–[224]).

[214] The Judge found however that there was an evidential basis on which it was necessary for him to consider on the balance of probabilities whether the statements were improperly obtained because of unfairness arising out of "the nature of the scenario technique and the way it was put in place in this case after [the respondent] had been interviewed by police in the presence of his lawyers".[194] The Judge expressed "misgivings" about the fairness of the scenario technique used to obtain confessions.[195] He was concerned about the "trickery" by the police and the "circumvention of police obligations" to warn before questioning and to provide opportunity for legal representation.[196] He considered that ordinary New Zealanders might think it unfair that the statement "was made in circumstances far removed from those where [the respondent] might expect his statement to have evidentiary consequences".[197] Finally, he pointed to the potential prejudice of disclosure to the jury of the respondent's preparedness to be involved in a criminal organisation.

[215] Despite these misgivings, Collins J thought it significant that the highest courts in Canada and Australia had found the technique to be legitimate (although he did not further consider whether the legal conditions in which the decisions were made were comparable with the position in New Zealand).[198] And he considered himself bound by the decision of the Court of Appeal in *Cameron* to decide that the technique in itself was not an unfair method of obtaining admissions:

> [124] It will, however, be apparent that I would have been unlikely to have reached this conclusion if it were not for *Cameron.* I would have decided the scenario technique is unfair because in my assessment, an ordinary New Zealander properly informed of all relevant circumstances would not expect the police to engage in lies, deception and blatantly misleading conduct of the kind that occurred in this case. I am reinforced in this opinion by decisions in which, in my assessment, the unfairness involved in obtaining admissions was far less serious than what occurred in [the

194 At [105].
195 At [122].
196 At [122].
197 At [122].
198 At [123].

> respondent's] case and yet, in those other cases, the way in which the admissions were obtained was held to be unfair.

[216] Collins J next considered the argument that the statements were unfairly obtained because they circumvented the requirements of the Practice Note in connection with cautions and the opportunity to obtain legal advice, particularly in circumstances where the respondent had exercised the right to have legal representation at the time of the earlier interviews. He thought this ground was difficult to advance if there was nothing inherently unfair in the scenario technique because it did not matter at what stage of a police investigation it was put in place: "a scenario technique undercover operation will always result in bypassing a suspect's ability to be cautioned and their right to be advised that they can be assisted by counsel".[199] More importantly, however, Collins J was of the view that the Practice Note was not engaged because there was insufficient evidence to charge the respondent at the time he made his admissions and he was not in custody. In addition the respondent had been told by Scott that he did not have to talk about the death "and that if he did so it was entirely his choice".[200]

[217] Collins J was "driven" to the conclusion that the statement was not obtained unfairly.[201] Although this conclusion meant that it was unnecessary to consider whether exclusion of the statements would have been proportionate if they had been unfairly obtained, the Judge nevertheless expressed the view that exclusion would be a disproportionate response. That was because:[202]

(a) the statement was "crucial to the prosecution case" and there was no doubt about its "authenticity";

(b) any impropriety in obtaining the evidence was "more than counterbalanced by the gravity of the alleged offending";

(c) the scenario technique was "the only effective method available to the police to gain [the] crucial admissions"; and

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199 At [128].
200 At [129].
201 At [130].
202 At [132]–[133].

(d) the statements were "obtained lawfully", the admission of the statements in evidence was "consistent with an effective and credible system of justice".

[218] In addition to considerations of fairness under s 30, the Judge considered whether the evidence should be excluded under s 8 because of the potential prejudice in the disclosure of the respondent's participation in apparent criminal behaviour. He concluded that there was no justification for such exclusion.[203] First, it was a matter for the respondent to decide whether to put in issue the other scenario evidence about criminal offending, since the Crown did not think it necessary to adduce the evidence for the prosecution. Secondly, any prejudice could be countered by a direction to the jury from the judge.

The decision in the Court of Appeal to exclude the evidence

[219] In the Court of Appeal, the respondent did not challenge in oral argument the conclusion reached in the High Court on direct application of s 28 (although his notice of appeal had challenged it). The Court of Appeal recorded that counsel for the appellant "recognised that it would be difficult on appeal to displace a finding reached after hearing the appellant".[204]

[220] It may be noted here that I do not think the basis on which Collins J decided that s 28 did not render the statements inadmissible (described at [199]–[206] above) turned on any finding of fact "reached after hearing the appellant". Although the Judge did not believe the evidence given by the respondent on the voir dire that he had lied in his statements to Scott, that was on the basis that "the scenario during which [the respondent] made his admissions did not provide a context or incentive for [him] to falsely admit the injuries he caused …".[205] It seems to me that the Court of Appeal was entirely correct to reject this evaluation. As it said, the incentives offered for the answers Scott clearly wanted were "membership of a 'family', material rewards, and relief from the spectre of prosecution".[206] Given Scott's expressions of disbelief towards the respondent's exculpatory answers, there was

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203 At [141].
204 *Wichman v R* [2014] NZCA 339 at [35].
205 *R v Wichman* [2013] NZHC 3260 at [34].
206 *Wichman v R* [2014] NZCA 339 at [66].

considerable incentive for the respondent to tell Scott what he evidently wanted to hear, and no detriment given the assurances of confidentiality and the circumstances created by the deception. It seems to me that the reasons of the Court of Appeal (with which I am in substantial agreement) invoke the policy of s 28 even if the jurisdiction under that section was not formally invoked and the analysis proceeded on the basis of exclusion under s 30.

[221] Instead of dealing with the matter on the basis of s 28, the Court of Appeal considered it under the unfairness limb of impropriety under s 30. It emphasised, rightly in my view, the flexibility of the concept of unfairness but noted that it will often arise where there are breaches of the New Zealand Bill of Rights Act or the Practice Note.[207] The Court of Appeal was of the opinion that unfairness under s 30 requires either something that "undermine[s] the justice of the trial" or otherwise violates the community's expectations of the criminal justice system.[208] As explained at [325], I am of the view that this standard was higher than is set by s 30 and in this I prefer the approach taken in the High Court.

[222] The Court of Appeal concluded that the confession was unfairly obtained. In reaching that conclusion, it did not hold that all evidence obtained through the scenario technique was inherently unfair (a position that had not indeed been contended for on behalf of the respondent).[209] The unfairness recognised arose out of a combination of the risks inherent in the technique and the scale and nature of the technique as used in the case, having regard to the characteristics of the suspect.

[223] The Court considered too that it was relevant that the respondent would be placed at a substantial disadvantage at trial because, since the impact of the technique on his confession was likely to be the central issue at trial, it would be necessary for him to deal with the scenarios, indicating his willingness to involve himself in serious criminal offending: "if the confession was unfairly obtained he should not lightly be put in that position".[210] Although the confession did not breach legal rights or infringe the terms of the Practice Note, the Court considered that "the

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207 At [40].
208 At [41].
209 At [65].
210 At [72].

decision whether a non-custodial interrogation was unfair for purposes of s 30 may be informed by considering whether the resulting confession was involuntary or unreliable".[211] Although deceit was acknowledged to be part of all undercover operations, it was a "material factor in this case": "[i]t was used to elicit a confession in circumstances amounting to an interrogation".[212]

[224] Having concluded that unfairness had been established, the Court considered the application of the proportionality test for exclusion in s 30(2). It considered that the circumstances pointed to exclusion. The considerations favouring admission were outweighed in the particular circumstances of the case by "the degree of unfairness" (which the Court described as "seriously unfair"), the risk of unreliability (given the "combination of substantial inducements and interrogation"), and "the element of undermining rights".[213]

Treatment of Mr Big scenarios in other jurisdictions

[225] The rules of evidence in United Kingdom, Canada, and Australia are derived from a common law root. At common law, incriminatory statements by an accused tendered by the prosecution as an exception to the hearsay rule (because they were against interest) were inadmissible unless they were shown by the Crown to have been "voluntary".

[226] Confessions were treated as always involuntary if coerced and as potentially not voluntary if induced by "hope" or "fear"[214] through some advantage or disadvantage held out by the person procuring the statement. The general rule was affirmed in *Ibrahim v The King*:[215]

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

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211 At [73].
212 At [75].
213 At [80] and [83].
214 *The King v Warickshall* (1783) 1 Leach 263, 168 ER 234 (KB).
215 *Ibrahim v The King* [1914] AC 599 (PC) at 609–610.

[227] The application in New Zealand of the approach in *Ibrahim* was confirmed by the Court of Appeal in *Naniseni v The Queen*.[216] Before a confession could be admitted in evidence, the Crown was required to prove affirmatively that it had been made voluntarily in the sense used in *Ibrahim*. Commonly recurring examples of promises treated as capable of inducing a false confession were promises that charges would not be pressed if the defendant confessed or that a lesser charge would be preferred. Delivering the judgment of the Court of Appeal in *Naniseni*, Turner J said that promises or threats made by a person in authority and "capable of inducing a confession" required "no more … to vitiate the statement".[217]

[228] Even when a confession was proved to be voluntary, *Naniseni* held that the court had a discretion to refuse to admit it on the grounds of unfairness or impropriety,[218] including those derived from non-observance of the Judges' Rules in the manner of police questioning of suspects.

[229] The exclusionary common law rules relating to coercion and promises of advantage or disadvantage are now covered in New Zealand by ss 28 and 29 of the Evidence Act. The common law discretion to reject evidence on the basis of unfairness or impropriety is now covered by the rules of exclusion in s 30.

[230] In the post-trial *Cameron* decision the Court of Appeal said that the scenario technique "has been held to be lawful in Australia, England and Canada".[219] Although Collins J in the present case had serious misgivings about use of the scenario technique (and would have held it to be unfair if not constrained by the decision of the Court of Appeal in *Cameron*),[220] he reflected that "the scenario technique has been carefully examined by the highest courts of Canada and Australia and has been found to be a legitimate means of police investigation".[221] In this Court, William Young J questions the conclusions reached in the Court of Appeal in the present case on the basis that "it differ[s] from the approach taken previously in

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216 *Naniseni v The Queen* [1971] NZLR 269 (CA).
217 At 271.
218 At 271.
219 *R v Cameron* [2009] NZCA 87 at [20].
220 *R v Wichman* [2013] NZHC 3260 at [124].
221 At [123].

New Zealand and in other similar jurisdictions".[222] I question whether this view is justified.

[231] The policing technique using scenarios to obtain confessions was developed in Canada. It was first considered by the Supreme Court of Canada in *R v Grandinetti*.[223] There, the challenge to the admissions was made on the basis that, being obtained through inducements, they were not voluntary, with the consequence that they had to be excluded under the common law rule.

[232] It should be noted that Canada has never had an equivalent of the Judges' Rules. Until the Supreme Court held that breach of the rights of observance of the principles of fundamental justice recognised by the Charter required better protection,[224] there was no discretion to exclude a statement based on unfairness once it was found to be voluntary.[225]

[233] In *Grandinetti*, the Supreme Court held that the statements obtained through the scenario technique did not come within the confessions rule because they were not made by the inducements of "a person in authority" when made to the police officer acting undercover. There was therefore no evidential basis to raise the question of involuntariness. In adhering to the person in authority requirement and identifying it with those who are understood by the person making the statement to exercise "the uniquely coercive power of the state",[226] the Court applied its earlier decision in *R v Hodgson*.[227] The Supreme Court was however careful to say that the person in authority test "is not a categorical one".[228] Rather, it took the view that "absent unusual circumstances an undercover officer will not be a person in authority since, from the accused's viewpoint, he or she will not usually be so viewed".[229] It was not enough that the person making the statement believed the person making the inducement was able to achieve the outcome promised outside the exercise of the powers of the state. The Court therefore rejected the argument that

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222 See above at [130].
223 *R v Grandinetti* 2005 SCC 5, [2005] 1 SCR 27.
224 As occurred in *R v Hebert* [1990] 2 SCR 151. See 167–173 and 178 per McLachlin J.
225 *R v Wray* [1971] SCR 272; also see *Rothman v The Queen* [1981] 1 SCR 640.
226 *R v Grandinetti* 2005 SCC 5, [2005] 1 SCR 27 at [35].
227 *R v Hodgson* [1998] 2 SCR 449.
228 *R v Grandinetti* 2005 SCC 5, [2005] 1 SCR 27 at [40].
229 At [40].

the pretended access to corrupt police officers transformed the undercover officer posing as a criminal boss into a person in authority for the purposes of the rule.

[234] The Supreme Court did not consider the legitimacy of the Mr Big scenario more generally in *Grandinetti*. A more general challenge to the technique was raised in *R v Hart* in 2014.[230] There, the Court pointed out that a confession obtained by a Mr Big operation "comes with a price" as to reliability and risk of abuse.[231] It recognised that "the law as it stands today provides insufficient protection to accused persons who confess during Mr Big operations".[232] Indeed, it was acknowledged in *Hart* that suspect confessions had been obtained in two cases where the policing technique had been used.[233]

[235] The Supreme Court did not revisit the rejection of undercover police officers as "persons in authority" in *Grandinetti*, which meant that the common law exclusion of statements involuntary by reason of inducements did not apply in scenario cases. Instead, in *Hart* the Supreme Court repositioned the approach in Canada to scenario confessions by developing a new rule of exclusion for Mr Big cases and by "reinvigorat[ing]"[234] the concept of abuse of process, in a "two-pronged" approach. This new approach was justified by Moldaver J for the majority as necessary because "as the law stands today, unlike our approach with the confessions rule, we have failed to adopt a consistent approach to assessing the reliability of Mr. Big confessions before they go to the jury".[235]

> This is so despite the obvious nature of the inducements these operations create. In my view, it would be dangerous and unwise to assume that we do not need to be concerned about the reliability of Mr. Big confessions simply because the suspect does not know that the person pressuring him to confess is a police officer.

[236] First, statements obtained through the technique are prima facie inadmissible under a "new common law rule of evidence".[236] The presumption of inadmissibility is overcome when the Crown demonstrates on a balance of probabilities that the

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230 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544.
231 At [5].
232 At [67].
233 At [62].
234 At [114].
235 At [72].
236 At [84].

probative value of the confession outweighs its prejudicial effect. The Supreme Court considered that "[i]n this context, the confession's probative value is a function of its reliability" while "[i]ts prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission".[237] That assessment looks first to the circumstances in which the statement was made and then to "markers of reliability" in the confession itself.[238] It was accepted that corroborative evidence may also provide powerful support for reliability. The prejudice to be weighed includes not only prejudice in reasoning to verdict but "moral prejudice" (because of the accused's preparedness to be involved in criminal activity).[239] This approach, the Court thought, was sufficient to deal with concerns about reliability and prejudice arising out of Mr Big operations.

[237] The "second prong" of the approach adopted in *Hart* was a "reinvigorate[d]" doctrine of abuse of process to deal with concerns about unacceptable conduct by police and other government actors.[240] Although particularly concerned with coercion and manipulation of vulnerabilities "like mental health problems, substance addictions, or youthfulness",[241] the majority judgment noted that when an operation breached the threshold of abuse was impossible to identify by a precise formula and would have to be assessed in each case.[242]

[238] It is to be noted that, in effect, the reasons of the majority in this Court adopt an approach that is equivalent to the first prong of the approach adopted by the Supreme Court of Canada in *Hart* in relation to concerns about reliability under s 28. The presumptive exclusion of evidence obtained through promises and misrepresentations is overcome, on this approach, if the statements obtained are shown to be reliable in fact (at least to a "threshold" standard for admissibility). In that assessment internal indications of reliability and corroborative evidence are treated as relevant. For the reasons given at [266]–[285], I am of the view that this approach is inconsistent with s 28 of the New Zealand Act, a provision which applies

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237 At [10].
238 At [105].
239 At [106].
240 At [114]. Such 'reinvigoration' was necessary to overcome the earlier decision of the Supreme Court in *R v Fliss* 2002 SCC 16, [2002] 1 SCR 535.
241 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [117].
242 At [115].

equally to statements made though inducements by a person in authority (which in Canada remain subject to exclusion under the strict common law involuntariness rule for inducements made by persons in authority) as to statements obtained by promises and representations made by others.

[239] It is also worth noting that the second prong of the approach adopted in *Hart* (the "reinvigorate[d]" concept of abuse of process to deal with impropriety in the obtaining of confessional evidence) in New Zealand sits largely under the exclusionary principles for impropriety and unfairness exercised before adoption of the Evidence Act and which are now regulated by s 30 rather than under the exceptional jurisdiction to act to prevent abuse of process.[243] The scheme of the New Zealand legislation does not easily admit the probative value/prejudicial effect calculus used in *Hart*, which would cut across the considerations under s 30 and which is the subject in any event of s 8.

[240] Because of the different legislative and common law context, care needs to be taken with analogies from Canadian cases. More importantly for present purposes, the reasons given by all members of the Court in *Hart* indicate the anxiety with which Mr Big operations are regarded in Canada and the need for close attention to the facts of each case.

[241] Justice Karakatsanis, in her concurring reasons, referred to the "elaborate false realities" such operations create for their targets.[244] In these false realities, "[t]hreats and inducements are tailored to exploit suspects' vulnerabilities, and confessing becomes necessary for their new lives to continue".[245] Justice Karakatsanis thought that "the very structure of Mr Big operations":[246]

> … creates circumstances that (1) compromise the suspects' autonomy, (2) undermine the reliability of confessions, and (3) raise concerns about abusive state conduct. In addition, Mr. Big operations create prejudicial evidence of criminal propensity which has the potential to compromise accused persons' ability to make full answer and defence, undermining the fairness of the trial.

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243 See Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, 1999) at [105].
244 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [172].
245 At [172].
246 At [172]–[175].

> … Existing safeguards that govern confessions made to the state are rooted in traditional investigative techniques and fail to properly regulate Mr. Big operations. The confessions rule does not apply in a Mr. Big operation because the suspect is not aware that he is speaking to a person in authority … nor does the right to silence, which arises only upon a suspect's detention … Thus, Mr. Big confessions fall into the gaps between the traditional rules.
>
> The Court cannot countenance this void. The existing rules [the confessions rule, the right to silence, the principle against self-incrimination] assist in identifying the interests affected and dangers generated by Mr. Big operations and in structuring a principled and responsive legal framework. …

[242] In New Zealand, there is no comparable "void". Section 28 does not continue the rigidity of the common law requirement of a "person in authority" in the manner determinative in *Grandinetti* in Canada and in *Tofilau* in Australia. The New Zealand Law Commission in a Preliminary Paper on the evidence reform took the view that "the admissibility of a potentially unreliable statement should not turn on who obtains the statement", although questions of authority were not irrelevant.[247] In its final report, the Commission specifically acknowledged in the commentary to what became s 28:[248]

> There is no requirement that the person who obtained the statement be a person in authority. Although statements are very often made to police officers, this will not always be so. The rules apply to statements made to anyone, including parents, acquaintances or employers.

[243] The position and authority of the person who obtains a statement by promises, threats, or misrepresentation may be an important circumstance in deciding whether an issue as to reliability in a particular case arises (in the scheme of s 28, an essentially causative inquiry). But such authority and its effect on reliability is a matter for assessment, rather than turning on any particular category of actor.

[244] In my view, the solutions adopted in Canada (a presumptive rule of exclusion displaced on a probative value/prejudicial effect assessment which includes reliability of the statements and a rule of exclusion of evidence it would be unfair to admit at trial as an abuse of process) are both unnecessary given the provisions of the Evidence Act and would cut across the terms and schemes of the provisions in that Act.

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247 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 104.

248 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, vol 2) at [C128].

[245] New Zealand law under the Evidence Act also differs from the Australian position at common law (considered by the High Court of Australia in *Tofilau* in the context of confessional evidence obtained through scenarios staged by undercover police officers) and under s 85 of the Evidence Act 1995 (Cth), the reliability provision of the model Commonwealth legislation equivalent to s 28 (under which admissions made to "an investigating official" are presumptively inadmissible, but "investigating official" is defined to exclude "a police officer who is engaged in covert investigations under the orders of a superior").[249]

[246] In the four cases considered by the High Court in *Tofilau*, the argument that the confessions should be excluded under the common law requirement of voluntariness failed. The Judges in the majority were not prepared to treat the undercover officer who induced the statements as a person in authority. The Judges in the majority considered that it was not necessary to extend the scope of voluntariness in order to better accommodate considerations of fairness and prevention of improper police conduct, because those considerations permitted exclusion of evidence under the discretionary jurisdiction, as *R v Swaffield* illustrated.[250]

[247] The decision of the Canadian Supreme Court in *Grandinetti* was influential in the reasoning of the majority in *Tofilau*. *Tofilau* was decided before the Supreme Court of Canada in *Hart* developed a new common law rule for Canada, in recognition of the lack of protection for suspects in Mr Big cases. In the one case of the four considered in *Tofilau* where the discretionary ground of exclusion for unfairness and impropriety was also invoked on the appeal (that of Clarke), the majority held that the grounds were excluded on the facts by findings of the trial Judge.[251]

[248] Kirby J dissented. He preferred a "functional, as distinct from a purely historical or verbal, approach to the inducement rule".[252] Kirby J considered that the

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249 Evidence Act 1995 (Cth), s 85 and Dictionary. See the discussion in *R v Weaven (No 1)* [2011] VSC 442.

250 *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159.

251 *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [114]–[115] per Gummow and Hayne JJ and [414] per Callinan, Heydon and Crennan JJ.

252 At [187].

undercover police officers were "*in fact* unquestionably persons with authority" and "were believed by each of the appellants to be such".[253] In such circumstances he considered it would be "formulaic" and inconsistent with "the substance of the common law rule" to treat the statements as outside the scope of the rule.[254] In addition, the confessional evidence was in breach of the more fundamental requirement of voluntariness because in each case the suspect's choice whether to speak was overborne by the tactics used, which struck at the fundamental legal right to remain silent in the presence of police investigators.[255]

[249] Kirby J considered that state coercion could be brought to bear on the will of a suspect "not only by those who are *known* to be public officials but also by those who appear to *control* the levers of state power, although apparently holding no state office themselves".[256]

> [176] To limit the class of "persons in authority" to those whom an accused *knows* or *believes* to have lawful authority makes no sense if the reason for the rule is to discourage officials from exploiting hope or fear to procure confessional statements from suspects against their own interest. There is no point to requiring that the person in authority must act, and be believed to act, in a *lawful* way. By definition, any public official, with relevant power, who represents to a suspect that power over a criminal prosecution will be used in a manner favourable to that suspect is, regardless of the strict legal merit of the representation, acting unlawfully. No public official – police officer, prosecutor or otherwise – may utilise such powers in any way alien to the purposes for which those powers are afforded to them by law.
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> [177] It is therefore of the essential nature of statements and representations of the kind addressed by the inducement rule that, normally, they will have been made for *unlawful* purposes, alien to the reasons for which the power was granted to the public official concerned. To impose a requirement that the suspect must be *aware* that the person making the inducement is, himself or herself, a person in authority (as distinct from one able to pull the levers of authority) restricts the operation of the rule in an unnecessarily artificial way. Even more clearly, to limit the rule to cases where the person in authority operates, or is believed to operate, *lawfully* is quite unrealistic. Indeed, it is counterproductive when the very nature of the power that engenders the hope or fear is such that it will be deployed unlawfully and corruptly.

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253 At [188] (emphasis in original).
254 At [188].
255 At [204].
256 At [184] (emphasis in original).

[250] In the *Cameron* post-trial decision, the Court of Appeal referred to the decision of the English Court of Appeal in *Regina v Christou*[257] to justify its statement that the scenario technique had been held to be lawful in England.[258] *Christou* is a case far removed from the technique employed in Mr Big cases. Although it involved a deception carried out by undercover police officers, its purpose was not, as in the Mr Big scenarios, to set up an interview at which admissions would be sought through questioning of the suspects in respect of past offending.

[251] In *Christou* the police had set up a sham jewellery shop apparently willing to purchase stolen property. The purpose of the operation was to recover stolen property and obtain evidence against those who were selling it. The sting resulted in a large number of people being charged with offences of dishonesty. During the course of the exchanges between the undercover police officers running the shop and those selling the jewellery some incriminatory statements were made by the sellers. Most of these arose in the context of the purchasing and in the course of the officers maintaining their cover. The only question asked to which incriminating answers were made was in the course of what was described as "banter" about what parts of London it would be sensible to avoid in reselling the jewellery, something the Court of Appeal considered in any event to be "the sort of questioning to be expected from a shady jeweller".[259]

[252] *Christou* did not involve the common law voluntariness rule of exclusion of statements obtained though inducements. Instead, it was argued that all the evidence obtained (which included video recordings of the transactions and fingerprints lifted from the paperwork transacted) was unfairly obtained under the common law rule of exclusion recognised in *R v Sang*.[260] It was further argued that such statements as were obtained should be excluded under s 78 of the Police and Criminal Evidence Act 1984 (PACE) because obtained without the suspects having been cautioned, as required by a provision in one of the PACE Codes (which in the United Kingdom apply where there are "grounds to suspect" a person of an offence).

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257 *Regina v Christou* [1992] QB 979 (CA).
258 *R v Cameron* [2009] NZCA 87 at [20].
259 *Regina v Christou* [1992] QB 979 (CA) at 985 and 991.
260 *R v Sang* [1980] AC 402 (HL).

[253] The English Court of Appeal expressed its agreement with the conclusion of the trial Judge that there was no adverse effect on the fairness of the trial in the trick employed. As the trial Judge had put it:[261]

> Nobody was forcing the defendants to do what they did. They were not persuaded or encouraged to do what they did. They were doing in that shop exactly what they intended to do and in all probability, what they intended to do from the moment they got up that morning. They were dishonestly disposing of dishonest goods. If the police had never set up the jewellers shop, they would, in my judgment, have been doing the same thing, though of course they would not have been doing it in that shop, at that time. … They were tricked into doing what they wanted to do in that place and before witnesses and devices who can now speak of what happened. I do not think that is unfair or leads to an unfairness in the trial.

[254] With regard to the claim that the absence of a caution should have led to the exclusion of the admissions under s 78 of the PACE, the Court of Appeal accepted that the provisions of the Code applied "where a suspect, not in detention, is being questioned about an offence by a police officer acting as a police officer for the purpose of obtaining evidence".[262] It held that the Code did not apply to the case because the conversation "was on equal terms" and "there could be no question of pressure or intimidation" from persons "actually in authority or believed to be so".[263] The Code did not apply in such a context.

[255] Despite that conclusion, Lord Taylor, who delivered the judgment of the Court, said "we should ourselves administer a caution":[264]

> It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it.
>
> Were they to do so, it would be open to the judge to exclude the questions and answers under section 78 of the Act of 1984.

[256] The Court of Appeal agreed with the trial Judge that the questions and comments from the undercover officers "were for the most part simply those necessary to conduct the bartering and maintain their cover" and were not questions

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261 *R v Christou* [1992] 1 QB 979 (CA) at 988.
262 At 991.
263 At 991.
264 At 991.

"about the offence".[265] The only exception related to the discussion about which parts of London it would be best to avoid in on-selling the jewellery. Since this conversation was "partly to maintain cover" and did not entail extensive questioning designed to elicit admissions, no caution was required.[266]

[257] This review of the comparative case law relied upon in *Cameron* and by Collins J in the present case does not support the view that the courts of Canada, Australia and the United Kingdom have acquiesced in the Mr Big technique. In Canada, recognition of the fact that the Court's earlier decision in *Grandinetti* left suspects with insufficient protection, led the Supreme Court to refashion alternative rules of exclusion in *Hart*. The decision of the High Court of Australia in *Tofilau* was decided before the Canadian decision in *Hart*. More importantly, it was taken against legal rules of exclusion very different from those that apply in New Zealand under the Evidence Act. I agree with the concerns expressed by Kirby J in his dissenting judgment. A formalist approach to the question when a statement is obtained by promises or inducements (presumptively treated as unreliable under s 28(2)) which concentrates on the character in which an interrogation is conducted rather than its substance is insufficiently protective of fundamental principles of criminal justice. Section 28 was designed to avoid such result, as the Law Commission reports make clear.

[258] What can be taken from the comparative case-law referred to is that other jurisdictions have found the Mr Big technique to be deeply troubling. If their design and application has the effect of avoiding protections that would otherwise be available, the courts must be careful not to countenance that result, as Lord Taylor recognised in *Christou*.

Section 28 exclusion of statements made by a defendant

(1) The pre-existing law as to statements obtained by coercion or inducement

[259] Confessions obtained by violence or coercion are clearly not voluntary. In addition, as restated in *Ibrahim*, the common law treated a confession or statement as

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[265] At 991.
[266] At 991.

not shown to be voluntary if preceded by an inducement either by fear of disadvantage or hope of advantage if offered by a person in authority.

[260] The precautionary principle of the common law came into play whenever there was a foundation for a claim that a confession had been induced by threat or promise of advantage capable of producing a false confession. The perceived ability of the promisor to accomplish the inducement was relevant to whether the confession was capable of producing a false confession and underlies the person in authority requirement referred to in *Ibrahim* and later cases such as *Deokinanan v The Queen*[267] (although it should be noted that Lord Mansfield and other judges before the mid-nineteenth century had not so limited the rule).[268]

[261] While statements procured by threats, violence, or compulsion were always excluded at common law as involuntary (and exclusion is now required under s 29), statements procured by hope or fear held out by the person obtaining the statement could formerly be admitted if it was not in fact likely that the inducement would produce an unreliable statement. That essentially causative link was captured in s 20 of the Evidence Act 1908:[269]

> A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

As can be seen, the words in parenthesis ensured the rejection of evidence obtained by force or compulsion without more. The same effect is achieved in the Act by s 29 for statements obtained by violence or compulsion.

[262] In *R v Fatu*, the Court of Appeal considered the meaning of s 20. Cooke P, for the Court, said of s 20 that "[it] places the responsibility of deciding [the question whether an inducement was "not in fact likely to cause an undue admission of guilt

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267 *Deokinanan v The Queen* [1969] 1 AC 20 (PC).

268 *The King v Rudd* (1775) 1 Leach 115 at 118, 168 ER 160 (KB) at 161. See also *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [135]–[136] per Kirby J.

269 Evidence Act 1908, s 20, as amended by the Evidence Amendment Act 1950.

to be made"] on the Judge so far as the admission of evidence is concerned".[270] The appeal in *Fatu* was post-conviction and the question on appeal was whether (since the jury must have accepted the statement as truthful) it was "safely admitted".[271]

[263] The Court was of the view that the jury acceptance of the reliability of the confession did not answer the question it had to address:[272]

> The only relevance of the jury's verdict is that it shows that they must have found that what was said … did not in fact cause untrue admissions of guilt. The accused is still entitled to a ruling from the Court on the question of likelihood. It is a different question, focusing on the tendency of the inducement rather than the actual result. The section leaves it to the Judge as a protection for the accused.
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> We accept that the correct test in deciding it is to ask, as Wilson J did in *R v Hammond* … whether or not an innocent person in the position of the accused and in the circumstances in which he was placed would be likely to confess to a crime which he had not committed. The words "in fact" in the section emphasise that regard is to be had to reality in the particular circumstances. As to the meaning of "likely" in the section, in accordance with the usual approach in criminal law this is to be interpreted as importing a real or substantial risk. The prosecution must negate such a risk; it is not enough to show merely that more probably than not the confession would be untrue. [sic, this appears to be a misprint for the word "true".]

[264] In *Fatu* the Court of Appeal was satisfied that the inducement there offered (a lower charge) was not likely in fact in the circumstances to have influenced the confession. It followed, rather, an indication from one co-accused that the police "knew what had happened" and was explained by the efforts of all the accused, experienced criminals, to minimise their culpability and blame others as being more culpable.[273]

[265] This is the background against which sections 28 and 29 of the Evidence Act were enacted.

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270 *R v Fatu* [1989] 3 NZLR 419 (CA) at 430.
271 At 430.
272 At 430.
273 At 430.

(2) The meaning of s 28

[266] The Evidence Act follows the recommendations of the Law Commission[274] in replacing the common law rule of exclusion of confessions not shown to be "voluntary" with distinct provisions which address coercion and "unreliability". Under the Evidence Act, coercion is the subject of s 29 and unreliability is the subject of s 28.

[267] It is clear from the Law Commission preliminary papers and reports that the separation out of the elements of the common law requirement of voluntariness was not intended to change the values of the pre-existing law.[275] The legislation does not follow the Law Commission recommendation exactly: the requirement of an "evidential basis" was introduced in the Parliamentary processes; and the requirement that the Judge be satisfied "on the balance of probabilities" that the circumstances in which the statement was made are "not likely to have adversely affected its reliability" is contrary to the Law Commission recommendation that the common law proof beyond reasonable doubt be retained.[276] But in respects other than the burden of proof and the necessity for an evidential basis to be raised, the substance of the Law Commission recommendations was accepted in the legislation.

[268] Sections 28 and 29 apply to all statements by a defendant, inculpatory as well as exculpatory. Section 28 is also not confined to statements presumptively unreliable because obtained through promises, threats, or other inducements. Anything which raises an evidential basis for questioning reliability may be put forward. Such grounds could include, for example, indications of unreliability on the face of the statement or external indications, such as the mental health of the defendant or contradiction of the statement by other, perhaps incontrovertible, evidence.

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274 See Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, 1999); and Law Commission *Evidence: Code and Commentary* (NZLC R55, vol 2, 1999).

275 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 100; Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, 1999) at [94] and [109]; and Law Commission *Evidence: Code and Commentary* (NZLC R55, vol 2, 1999) at [C127].

276 See Law Commission *Evidence: Code and Commentary* (NZLC R55, vol 2, 1999) at 78–81 for the text of the Commission's draft provision; and Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, 1999) at [96]–[101] for commentary.

[269] Under s 20 of the Evidence Act 1908, statements obtained by "promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion)", although involuntary at common law, were admissible "if the Judge … [was] satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made". Under the Evidence Act 2006, statements obtained as a result of oppression are inadmissible under s 29 whether or not truthful, as was the effect of the parenthetic exclusion of compulsion in s 20[277] and as s 29(3) of the current legislation expresses more helpfully by providing that "it is irrelevant whether or not the statement is true".

[270] Section 28(2) of the 2006 Act, as the Law Commission proposed,[278] corresponds with the former s 20 in providing that the judge "must exclude the statement" once an evidential foundation for unreliability is shown "unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability". The difference in language reflects the fact that s 28 applies to all statements of a defendant and looks to unreliability caused by circumstances other than inducements in obtaining the statement (such as through mental incapacity). In referring to "reliability" instead of "truthfulness" s 28(2) does not materially change the substance of the former s 20 in its application to confessional statements and is necessary change to reflect the wider scope of s 28. The saving from exclusion remains that *the circumstances in which the statement was made* (which is to be compared to *the means by which the confession was obtained*) were not *likely* to have adversely affected its reliability (formerly, its truth).

[271] Further textual indication in s 28(2) that the approach under s 20 of the Evidence Act 1908 remains appropriate and that it is the tendency of the circumstances in which the statement is made that is the subject of inquiry, rather than the reliability of the statement itself, is to be found in the matters listed for mandatory consideration under s 28(4), where relevant. All are concerned with circumstances at the time the statement was made:

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277 Set out at [261].

278 Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, 1999) at [109].

(a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):

(b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):

(c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:

(d) the nature of any threat, promise, or representation made to the defendant or any other person.

[272] The considerations that may be relevant in a particular case are not restricted to this list. But clearly consideration of any circumstance in which the statement was made which may bear on the s 28(2) inquiry for the judge does not invite an assessment of whether the statement was in fact reliable, the question for the jury. The inquiry for the court in considering admissibility under s 28(2) is not the actual reliability of the statement (once some doubt about reliability has been raised) but whether the circumstances in which the statement was made could have caused unreliability. It is an attempt to capture the common law notion of voluntariness in cases which fall short of actual coercion in the sense used in s 29.

[273] There is no textual indication in s 28(2) that the actual reliability of the statement (a question for the jury) is to be assessed in determining whether the circumstances in which it was made were not likely to have affected its reliability.[279] Similarly, there was no textual indication in s 20 of the 1908 Act that the truthfulness of a statement was irrelevant to the task for the judge, as it was authoritatively held to be.

[274] I do not think it is significant that s 29 specifically provides that the truth of a statement obtained by compulsion is irrelevant. The reference to truth is necessary under s 29 because the judge has the task of deciding (to the standard beyond reasonable doubt) whether a statement "was not influenced by oppression". The exclusion of truth as a relevant consideration under the section precludes argument

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[279] Section 28 may be contrasted in this respect with s 45(2) (the court must be satisfied beyond reasonable doubt that "the circumstances" in which visual identification evidence which does not follow a formal procedure has been made "have produced a reliable identification") and s 46 (voice identification cannot be admitted unless the prosecution proves on the balance of probabilities that "the circumstances in which the identification was made have produced a reliable identification").

that the truth of the statement is relevant to that inquiry as tending to show for example why it was not the oppression but the defendant's need to unburden himself of the truth or truthfulness that influenced the statement.

[275] By contrast, under s 28(1) the judge is not called upon to decide reliability (but only whether a question as to reliability is raised) and is not called on to decide if the circumstances at the time that the statement was made in fact affected its reliability. The scheme of s 28(2) is rather that the judge must decide on the balance of probabilities whether "the circumstances in which the statement were made" were "likely" to have adversely affected its reliability. It is concerned with tendency, objectively assessed. In reality, it is unlikely that the essentially causative link the judge assesses under s 28(2) will operate to exclude statements in the normal course except where there are questions of voluntariness arising out of the defendant's own characteristics or promises and other inducements given to him at the time the statement was made.

[276] That is the structure and sense of s 28, despite the awkwardness of what is in effect a rule of admissibility being buried in a statement of exclusion which is the exception to the rule. Its effect is that statements of doubtful reliability, if relevant and not more prejudicial than probative (under the general rules contained in ss 7 and 8) are admissible unless the doubt about reliability is referable to the circumstances in which the statements were made. Then they must be excluded unless the judge is "satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability". Apparent unreliability of the statement itself may be relevant to the threshold issue of reliability, but actual reliability of the statement is not something the judge is required to consider in considering the question of exclusion because the reliability of the statement is irrelevant to the question of admissibility determined in application of s 28(2).

[277] There is good sense in this. Exclusion of a statement may deprive the jury, as trier of fact, of information useful to its task. That is both because the statement may in fact be found by the jury to be reliable and because an unreliable statement by an accused may be probative evidence in itself. A cautious approach to exclusion is

therefore the understandable policy of the legislation. Once a threshold issue as to reliability is raised, the policy of s 28 is for exclusion only where it is the *circumstances in which the statement was made* that may have affected its reliability. If the judge is satisfied on the balance of probabilities that the circumstances in which the statement was made are *not likely to have adversely affected its reliability*, the statement is admissible. If not, it must be excluded. Unless the judge is affirmatively satisfied in terms of s 28(2), there is no discretion to admit the evidence, except "as evidence of the physical, mental, or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made" under s 28(3).

[278] Section 28(2), so understood, operates as a brake on admissibility of doubtful statements where the risk of unreliability is high because of the circumstances in which the statement was made. The concentration on the circumstances in which the statement is made ensures that most issues of reliability are left to the jury. Where however doubts as to reliability concern the circumstances in which the statement was obtained (whether because of the capacity of the defendant or because of external pressures or otherwise), the policy of the legislation, like the earlier policy of the common law relating to voluntariness, is concerned to ensure the risks of unreliability are addressed as going to admissibility even though the statements do not fall within the exclusionary rule provided by s 29.

[279] The legislation follows the deliberate policy recommended by the Law Commission in not imposing an explicit requirement that the promise be made by someone "in authority" although that circumstance may be highly relevant to the threshold consideration of whether reliability has been raised as well as to assessment of "the nature" of any threat, promise, or representation for the purposes of applying s 28(2). Whether the person making the threat, promise, or inducement is believed to have the capacity to deliver on it is important in what are likely to be the key determinations in such cases – whether an evidential basis is shown for the statement having been procured by threat promise or inducement and the s 28(2) consideration whether the likelihood that it adversely affected the reliability of the statement is excluded to the satisfaction of the judge.

[280] Since enactment of the Evidence Act, most decisions on s 28 have continued to treat the circumstances rather than the reliability of the statement itself as the matter to be determined in application of s 28(2). That was the view expressed by two members of this Court in their reasoning in *Bain v R*.[280] It was the approach indicated by the Court of Appeal in the present case in saying that the court in considering exclusion does not focus "on whether a given statement is true" but on whether the circumstances are likely to have affected its reliability.[281] Truthfulness "is a matter for the jury".[282]

[281] A similar approach was taken in the pre-trial decision in the Court of Appeal in *Cameron.*[283] Although the differently constituted Court of Appeal held in the post-conviction appeal that the reliability of the statement was relevant to the decision under s 28(2),[284] I consider that approach was contrary to the terms of the legislation, its legislative history, and previous authority, for the reasons given. The court applying s 28(2) is not concerned with "the actual result", but with the "tendency" when deciding whether a statement in respect of which an evidential basis for raising the question of reliability should nonetheless be admitted.[285]

[282] The terms of s 28(4)(d) make it clear that promises and representations must be considered in application of s 28(2) where they are relevant to the case. Where a promise or representation is made, the suspicion of the common law continues to be the policy of the legislation. Since conviction may be based on admissions alone, the risk of miscarriage of justice if an unreliable confession is admitted is high and justifies the presumptive exclusion which is displaced only where the circumstances are such that the judge can be satisfied there was no tendency to produce unreliability. The soundness of that approach may be borne out by modern research into the incidence of false confessions, discussed in the reasons of Glazebrook J at [394]–[402].

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280 *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 at [63] per Elias CJ and Blanchard J.
281 *Wichman v R* [2014] NZCA 339 at [46].
282 At [46].
283 *R v Cameron* [2007] NZCA 564 at [61].
284 *R v Cameron* [2009] NZCA 87 at [35]–[36].
285 *R v Fatu* [1989] 3 NZLR 419 (CA) at 430. See [263] above.

[283] Such interpretation is also consistent with the policy of the Act (seen in s 6 and s 8) in avoiding the sort of collateral inquiry that prolongs proceedings and may raise matters of fact not easily resolved in pre-trial determinations of admissibility and which are appropriate in any event for jury determination. In the present case it is not at all clear that the accused would have been put in the position of giving evidence at the voir dire were it not for the view that the reliability of the statement was a matter the court was obliged to consider. What I consider the correct textual interpretation also avoids intrusion into the task for the jury, a consideration in my view not overcome by the suggestion that the judge's task is a threshold inquiry into reliability only.[286]

[284] The Commission in a review of the Act in 2013 recommended that the divergence of view exposed by *Cameron* should be resolved by an amendment to s 28(2) to make it clear "that the truth of the statement is irrelevant to the application of [the] section".[287] The draft Bill has not picked up the suggestion although it is uncertain whether Parliament will enact the draft in its present form.[288] The amendment suggested by the Law Commission may well be undesirable if it excludes questions relating to the truth of a statement being relevant to whether a question of reliability is raised, as I suggest is the case under s 28(1) at [276]. And on the view I take of the meaning of s 28(2) explained at [275] I do not think that the absence of reference to truth being irrelevant is of significance because it is excluded on the structure and language of the provision. Any other view is also likely to cause cost and delay and (where the judge rules the evidence inadmissible because of substantive unreliability, even if assessed to a threshold level) to have the effect of depriving the jury of probative evidence of relevance to its task.

[285] I am therefore unable to agree with other members of the Court that in the s 28(2) assessment the Court is concerned with the jury question of actual reliability of the statement. I come to that conclusion both in application of the case-law on the former s 20, referred to above from [262], and on the basis of the text of s 28(2), as explained above from [270]. I consider that the interpretation of s 28(2) adopted in

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286 Compare Glazebrook J at [431].

287 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.73]–[3.87] and Recommendation 5.

288 Evidence Amendment Bill 2015 (27-2).

the second *Cameron* decision in the Court of Appeal was contrary to the text and purpose of the legislation and contrary to long-standing authority. It is the responsibility of this Court to correct it.

(3) The s 28(2) determination in the High Court

[286] For the reasons already given, I consider that Collins J was wrong to treat the s 28(2) inquiry as one into the actual reliability of the statements. That is not I think the effect of s 28(2) properly understood. And it does not accord with the values of the common law. The Law Commission thought those values had been preserved in its recommendations. And in this respect the legislation does not depart from the strict and precautionary approach of the common law.

[287] Apart from what I consider to be the erroneous focus on the reliability of the statements, Collins J took into account a number of factors in concluding that the statements should not be excluded under s 28. Those factors are set out in paragraphs [204]–[205]. I deal with the matters concerning the conduct of the interview at paragraphs [300]–[306]. But it is necessary to explain why I do not accept that either separately or in combination the factors identified by Collins J can be treated as satisfying the s 28(2) requirement before statements presumptively unreliable should be admitted.

[288] I agree that the admissions themselves did not contain exaggeration or obvious implausibility. In themselves however the absence of such internal markers of unreliability could only be neutral when looking to assurance of reliability.

[289] I consider that the medical evidence is itself neutral in the same way. That the injuries were consistent with shaking was not in doubt. The respondent knew the substance of the medical report from the interview in November 2009. He had provided the information that he had shaken the baby in his March 2009 statement. There were issues of the degree of force and duration of the shaking which were explored in the interview with Scott (but on which the respondent's account remained fairly consistent with his earlier police statement). The new information as to sequence and what had occasioned the shaking which was elicited in the Scott interview bore on culpability and might in itself be thought to cast some doubt on the

account given of the severity of the shaking but it is difficult to see that the medical evidence provided confirmation about the reliability of the statements simply because they were not inconsistent with the injuries being caused by shaking.

[290] The behaviour of the respondent after making the statements was relied upon by Collins J as being consistent with their reliability because it appeared "cathartic" and he was "embarrassed". These strike me as dangerous markers of reliability. On any view the interview was harrowing both because of the subject matter of the child's death and the respondent's anxieties in that connection and because the interview was itself the test the respondent had to overcome to be accepted by Scott. The reluctance of the respondent to admit more culpability than he had already admitted was overcome by expressions of disbelief by Scott and against the background of the respondent's hopes of joining the organisation and his fear of the police investigation. These were emotionally highly charged circumstances.

[291] I do not accept that the circumstances of the scenario of the interview provided the assurances of reliability the Judge took from it. The fact that the admissions "were of no assistance to the organisation that [the respondent] wanted to join" is neither here nor there in circumstances where they have been elicited by active questioning and against the background that the new recruit must demonstrate truth and loyalty to be accepted into the organisation. In the same way, I do not understand how the context of the need for "honesty" emphasised in the scenario "adds to the reliability of [the respondent's] admissions" when the respondent was being openly disbelieved by Scott and told to reflect on "truth and honesty" while Scott was out of the room. The scenario was set up so that he could only demonstrate "truth and honesty" by telling Scott what he wanted to hear. On that turned his acceptance into the organisation.[289]

(4) Could the Court be satisfied in terms of s 28(2)?

[292] Once a question of reliability has been properly raised (as it is accepted to be here because of the circumstances in which the statement was made, including in

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[289] In emphasising the importance of truthfulness to the organisation as a factor pointing to reliability of the statement, the Judge may have picked up on similar suggestions from the Court of Appeal in the *Cameron* decisions: see *R v Cameron* [2007] NZCA 564 (Pre-Trial) at [62]; and *R v Cameron* [2009] NZCA 87 (Post-Trial) at [29] and [35].

particular the inducements), I consider that there is no basis on which the Court could be satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability. In explaining why I come to this conclusion it is necessary to review the features and risks of the scenario technique here employed, its actual deployment against the respondent, and the reasons why I disagree with the decision in the High Court and agree with the conclusion reached in the Court of Appeal. Although the Court of Appeal reasons focussed on questions of fairness, in application of s 30, rather than whether the "circumstances in which the statement was made were not likely to have adversely affect its reliability", many of the features the Court of Appeal identified as bearing on fairness in the obtaining of the statements for the purposes of s 30 also impact on the question under s 28(2).

(a) The design of the operation

[293] The whole purpose of the operation, as designed, was to set up the conditions in which a police officer whose identity was concealed could interrogate a suspect about the commission of a crime in order to obtain admissions of culpability. The deception may not have been deliberately undertaken in order to circumvent the protections of law for those who are questioned by the police, but it inevitably had that effect. The target of a Mr Big operation does not have notice of the real subject-matter of the interrogation before he is drawn into it, has no opportunity to obtain legal representation or advice, and is not cautioned even when such caution would become necessary in an open police interview properly begun without a caution being administered (as would have happened here at the latest as soon as inculpatory statements were obtained about the earlier episode of shaking – even if I am wrong in the view taken at [311] that there was sufficient evidence to have charged the respondent with manslaughter in November 2009).

[294] The respondent was manipulated by scenarios enacted over considerable time to regard his interrogator as someone trusted and able to ensure that he was admitted to the organisation which offered him success, belonging, friendship, material rewards, and safety from the threat of prosecution. The scale of the deceit here employed allowed the police to construct a virtual world in which "the boss" was set

up as the person with the authority to deliver on the two promises held out to the respondent: membership of the organisation and freedom from the risk of police prosecution.

[295] I do not think it detracts significantly from the inducements or the pressure the respondent was subjected to that there is no suggestion in the scenario that the organisation was violent. The profiling of the respondent and the design of the operation may well have recognised that the respondent was more likely to be drawn to the organisation if it seemed relatively non-violent. And psychological pressure is coercive too. Although the respondent was not shown to have special vulnerabilities, he was young and inexperienced. It is apparent that he was readily manipulated in the scenarios. Before the interview was staged, he was subjected to the stress of being led to believe the coroner's inquest would reactivate the police inquiry. He was deliberately taken to Dunedin to isolate him from his family. And the interview was the final hurdle to being admitted as a member of the organisation.

[296] Substantial resources of the state were mobilised to construct this make-believe world. They were used to draw the respondent into the orbit of the operation and to isolate him at the critical time of the interview. The power of the state was used to play on the respondent's hopes and fears. Police officers in uniform (CJ in body armour in one scenario and the officer who called on the respondent's mother at her place of work to tell her about reactivated coroner's inquest) as well as officers acting under cover were used in the scenarios. The whole end of this elaborate deception was to stage the interview in which a police officer, in disguise, examined and conducted the evidentiary interview with the respondent, without his understanding that was happening.

[297] The purpose of the interview was to obtain the respondent's self-incrimination. The confessional evidence sought and obtained was, by its nature, sufficient evidence, if accepted by the jury, for a conviction. The Mr Big technique was employed to secure that result. This was not a case in which the operation was designed to obtain physical evidence or other information relevant to the investigation other than the admissions bearing on criminal culpability in the actions the respondent had already described. The operation was designed to

self-conscript the respondent into proving the case against him, a project which inevitably risked encroaching on fundamental principles of criminal justice. As the Court of Appeal said, the deceit of the operation "was used to elicit a confession in circumstances amounting to an interrogation".[290]

(b) The inherent risks in the Mr Big operation

[298] I agree with the Court of Appeal's identification of the risks in the Mr Big technique:[291]

(a) the admissions are not statements knowingly made against interest but rather were set up to appear both "costless and beneficial" through inducements "designed to place the suspect under psychological pressure [including through isolation], although they may be offset to some extent by the technique's emphasis on complete honesty";

(b) the scenario technique is designed to set up the boss (in fact a police officer) as someone in a position of authority in relation to the suspect;

(c) the undercover police officer is able to interrogate and challenge the suspect "exploiting details from the suspect's police file"; and

(d) the technique may be used to circumvent rights, justifying intervention in order to protect such rights "generally".

[299] The Court of Appeal referred to academic literature which suggests that the technique poses a substantial risk of false confession.[292] After referring to a High Court decision[293] where the operation was of very short duration and did not entail the elaborate false world set up in the present case or promises about "fixing" the prosecution of the offence really the subject of the investigation, the Court pointed

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290 *Wichman v R* [2014] NZCA 339 at [75].
291 At [47]–[50].
292 At [56]. See also judgment of Glazebrook J from [394]–[402].
293 *R v Wilson* HC Hamilton CRI-2-11-419-10, 9 December 2011.

out that "the scenario technique need not invariably exhibit all of the features seen in the present case".[294]

(c) The course of interview

[300] All the reasons for the precautionary approach taken to elicitation of statements by inducements offered by someone in authority were present in reality in this case. Although under the Evidence Act it is not necessary that an inducement be offered by someone in authority, Scott had been built up through the scenarios to be in reality a figure of considerable authority with respect to the respondent, a circumstance of significance in assessing the application of s 28(2).

[301] I agree with the view of the Court of Appeal that even though the tone of the interview between the respondent and Scott was "apparently friendly", the critical parts "took the form of an interrogation … and the interview exploited the trust that had been established".[295]

[302] Scott promised the respondent two things if he could be assured of his loyalty and truthfulness: membership of the organisation, something the respondent had been groomed to fix his hopes on over a period of months; and resolution of the risk of prosecution for a serious crime. Both were significant inducements in themselves and particularly powerful in combination and in the context of the altered reality that had been created in the respondent's life over five months. Although the respondent did not understand Scott to be a police officer, it had been demonstrated to him through the provision of the medical report used to cross-examine him by Scott that Scott had the ability to intervene in the police prosecution. In the circumstances, there was little to be lost by confession to Scott, a risk factor in terms of reliability. The respondent had been assured of confidentiality and had no basis for thinking the admission might be used against him.

[303] The respondent was skilfully cross-examined under sustained pressure. Scott punctuated the respondent's exculpatory answers by expressions of disbelief, which

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294 *Wichman v R* [2014] NZCA 339 at [61].
295 At [71].

at first the respondent resisted. Scott made it clear that he did not believe the answers he was being given. The respondent's future with the group was clearly represented to be in the balance. When the interrogation seemed to be getting nowhere he was told to think about "truth and honesty" while the boss left the room for a few minutes. As is seen in the transcript of the interview at [183], this brought matters to a head, as it was clearly intended to do, and led to the first admission against interest.

[304] Collins J accepted that an evidential basis for unreliability was raised by the promises and representations made by Scott. They were the basis on which he found that the respondent "was induced into making his admissions".[296] On the other hand, he did not accept that the nature of the interview, which he thought "relaxed" in manner raised any issue as to reliability.[297] I consider the Court of Appeal was correct to take the view that the conduct of the interview as well as the inducements offered raised issues as to the reliability of the confessions.

[305] It is I think quite unrealistic to think that the respondent had any choice about whether to answer the questions put to him by the boss. The whole scenario had been built around the importance of impressing the boss and the desirability of the respondent being admitted to membership of the organisation. Against that background, Scott's suggestion at the beginning of the interview that the respondent was "free to go" must have been incomprehensible advice in the context of what was set up as a job interview. The indication can only have been given in order to comply as far as consistent with the ruse with the requirements imposed by law on police officers interviewing suspects.

[306] There was no suggestion that the respondent was physically detained and that there was any compulsion in that sense. But he was well and truly hooked. In that context the Judge's reliance on Scott's statement that the respondent was able to leave "at any stage" as indicating that there was no pressure exerted or that he had a choice about whether to answer questions is hard to accept. At most it may have made it clear that there would be no hard feelings if the respondent did not want to

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296 *R v Wichman* [2013] NZHC 3260 at [35].
297 At [68]–[70].

join the organisation. But if he wanted to join the organisation, he had to pass the interview test, as had been made very clear to him by others in the group. And he had no basis for suspicion at the outset of the interview, when the "door is open" comment was made, that he would be questioned about his involvement in the death of his child. The invitation to leave at any time was not repeated.

(d) The absence of rights protection

[307] The use of an undercover police officer to interrogate a suspect risks infringing rights and principles important to the criminal justice system. The respondent had not been arrested or detained and the rights contained in ss 23 and 24 of the New Zealand Bill of Rights Act were therefore not directly engaged. But the procedure designed actively to elicit inculpatory statements through interview by deception trenched upon minimum standards of criminal procedure and fairness including the bundle of rights and interests developed around the privilege against self-incrimination, the presumption of innocence and the accusatory system of criminal trial, and the right to obtain legal advice. These rights and interests are part of the background against which questions of impropriety and fairness in the obtaining of evidence are considered under s 30. But for present purposes what is of significance is that these values are not only free-standing ones associated with the dignity of the individual, they are important protections against error and in particular the risk of unreliable confessions. The extent to which the scale and nature of the Mr Big operation effectively deprived the respondent of these protections bears directly on the s 28(2) assessment whether the judge can be satisfied "that the circumstances in which the statement was made were not likely to have adversely affected its reliability".

[308] It is relevant to the s 28(2) question that the respondent had earlier sought to have legal advice and to have his lawyer present when interviewed by the police. Although, as the Court of Appeal said, this circumstance was not "dispositive" (because voluntary statements to informers or undercover officers are not for that reason alone treated as an evasion of the right to legal advice), it considered that the courts were justified in taking a different view if the behaviour tended to undermine

rights.[298] That could be the case "where the police, knowing that the suspect has exercised his right to silence, use an undercover interview to interrogate or otherwise actively elicit information that would not normally have been disclosed in conversation".[299] I agree with that approach.

[309] I consider that the Court of Appeal was correct to draw on the principles discussed in *R v Barlow*,[300] and the Canadian cases of *R v Hebert*[301] and *R v Broyles*[302] to find assistance in the test of "active elicitation", since considered by this Court in *R v Kumar*[303] in the context of a prisoner in custody, when considering the question whether the statements were unfairly obtained. Because the respondent had previously exercised his right to counsel and the police might have chosen to undertake another formal interview to put the medical evidence to him, the Court considered that "the inference is irresistible that they chose the scenario technique so that they could interview him in very different circumstances":[304]

> … the point is not that it was improper for the police to question him without a lawyer in the circumstances such that the confession might be excluded for that reason alone; the point is that he had previously exercised his rights and the police must have appreciated that he would do so again, if interviewed formally.

[310] I agree. The respondent had previously been prepared to speak to the police only with legal support. The inference to be drawn from that circumstance is that without such legal advice he would have exercised his right to silence. This was not a case where the statements made were made without active elicitation. The effect of the deception here used was that the interview allowed the undercover police officers to obtain information that would not have been disclosed in conversation or in the absence of legal advice.

[311] I think it is well arguable that, objectively assessed (as is required by the Practice Note), the police had indeed sufficient evidence to charge the respondent before they embarked on the scenario operation. The respondent had admitted

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298 *Wichman v R* [2014] NZCA 339 at [68].
299 At [68].
300 *R v Barlow* (1995) 14 CRNZ 9 (CA).
301 *R v Hebert* [1990] 2 SCR 151.
302 *R v Broyles* [1991] 3 SCR 595.
303 *R v Kumar* [2015] NZSC 124.
304 *Wichman v R* [2014] NZCA 339 at [70].

shaking the baby. It had been impressed on him in the post-natal training he had undergone that a baby should never be shaken under any circumstances. The medical evidence was consistent with the injuries having been caused by shaking and had identified earlier injuries consistent with similar abuse. The respondent was alone with the twins when the injuries occurred. His partner had told the police that the baby had been crying a great deal before the hospitalisation and was crying when the partner left him alone with the twins on 4 March 2009, something the respondent had denied (a variance in the accounts that the respondent was unable to explain at the police interview). The partner had also reported an occasion when she had been woken one night by a "thumping" noise when the respondent was holding the baby. That may well have been sufficient evidential foundation for a charge of manslaughter. If so, the police were obliged to observe the cautions and other guidelines contained in the Practice Note and, on charge, the rights contained in ss 23 and 24 of the New Zealand Bill of Rights Act would come into play. And even if some margin of doubt is permitted to the police, on any view the interrogation of someone as deeply implicated by the information already available meant that the scenario technique involving interrogation of the respondent by deception was high risk.

[312] The risk of effective circumvention of rights was realised at the latest when the respondent first made the admission of earlier shaking in response to the child's crying. In a police interview conducted frankly it would have been necessary at that stage for a caution to be given and for the respondent to be advised of his rights to consult a lawyer.

[313] Because it bears on the question of infringement of rights, it is necessary to indicate that I do not accept the view expressed by Collins J that there was no infringement of any right to remain silent because the respondent was "cautioned" by Scott and "chose" to speak. This view turns on the indication given by Scott to the respondent that he did not need to speak about the death of his daughter unless he was comfortable about doing so.

[314] The sequence of the interview with Scott is set out at paragraphs [163]–[189] above. It will be recalled that the indication that it was not necessary for the

respondent to answer questions about the child's death unless he was "comfortable" about doing so came at an early stage of the introduction of the topic of the child's death into the interview. The background continued to be that the sole purpose of the interview was to satisfy Scott that the respondent was a suitable recruit. The "caution" preceded any indication that Scott had information about the circumstances of the death and that he wanted to put questions to the respondent about the death. This may be contrasted with police interviews where someone cautioned will have been told what the subject of the interview is. Although the respondent had earlier given interviews to the police, the two earlier formal interviews had been in the presence of his lawyer, and it seems reasonable to infer that, if approached openly, the respondent would have wanted his lawyer to be present and to obtain advice before being willing to answer further questions.

[315] The elaborate deception here, with its creation of false reality, makes it artificial and dangerous to draw analogies with usual policing practice. The script for the undercover officer may have tried to approximate proper practice as far as possible, but such formulaic rehearsal seems more explicable as being with a weather eye to admissibility, understandable only to those in the know. The "caution" would have passed entirely over the head of someone in the respondent's position, lacking any context in which he could have appreciated the jeopardy in which he was in.

[316] These questions of effective evasion of rights were considered by the Court of Appeal in connection with the application of s 30 of the Evidence Act. But for the reasons given at [307], I am of the view that they are important circumstances in considering s 28(2). They deprive the court of the reassurance of the system's protections against false confessions and error in process as well as fairness to the individual.

(e) Incentive to lie?

[317] In the High Court, Collins J considered that the technique as deployed in the present case offered the respondent no incentive to lie. I agree with the Court of Appeal in the reasons it gave for taking a different view. As the Court of Appeal

said, the scenarios used offered the respondent three such reasons: membership of a "family", material rewards, and "relief from the spectre of prosecution".[305] The scenarios, it thought, "were likely to place the appellant under substantial psychological pressure to confess":[306]

> There were many of them, and they occurred very regularly over a substantial period. Police officers befriended him, they made 16 payments totalling $2,600 to him, and they repeatedly exposed him to an affluent lifestyle that would be his if admitted to membership. The phone call to the appellant's mother was apt to place him under pressure. There is no evidence that the appellant exhibits special characteristics, but we do know that he was young, with limited income (although he came from an affluent background) and little experience of life and no meaningful criminal history. The evidence indicates that he was vulnerable to the technique's appeal to familial loyalty; so effective was it that he told Scott "I feel like, as long as I follow all your instructions and all your rules that everything's going to be fine for me … it's a good feeling … I feel just very safe".

(f) Conclusion on s 28

[318] In reality, as Glazebrook J says, the respondent had no option but to make the admissions.[307] The design of the scenario of the interview ensured that. It entailed developing over many months the dependency of the respondent on the organisation and its boss. The immaturity and youth of the respondent were exploited in this programme conducted by agents of the state. The end always in view of the operation was the interview with the boss. He was a police officer, subject to s 3 of the New Zealand Bill of Rights Act and expected to act in accordance with the guidelines for police questioning contained in the Practice Note. His obligations could not be put aside because he put on a disguise, for reasons I expressed tentatively in *R v Kumar* and adopt here, and in agreement with Glazebrook J at [476]. In reality, the end in view of the undercover operation was a police interview.

[319] In any event, the operation itself was calibrated to ensure that the boss would be seen by the respondent as a person in authority, able to deliver the inducements he promised in the interview. In some cases it may be relatively clear that a promise or threat is "not likely to have adversely affected the reliability" of a statement because the person making the threat or promise cannot have been thought to be able to

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305 *Wichman v R* [2014] NZCA 339 at [66].
306 At [67] (citations omitted).
307 At [501].

deliver on it or has no hold over the person who makes the statement such as might give rise to an unreliable statement. The statement may be more plausibly attributed to another inducement or influence, as *Fatu* illustrates.

[320] I do not think the fact that the person to whom the statement is made has some lawful authority in relation to the person making the statement is what is significant in this inquiry, for the reasons given by Kirby J in his dissent in *Tofilau*: in most cases the exercise of any such authority by a public official would be unlawful.[308]

[321] There may be questions of degree in a particular case which make line-drawing difficult. There is no such difficulty here. The scale of the operation was such that it created a distorted reality for the target, as it was designed to do.

[322] I consider that the statements made should have been excluded under s 28 because the circumstances in which they were made do not exclude the tendency of the inducements made at the time to produce unreliability. It is not possible to be satisfied that the circumstances are not likely to have adversely affected the reliability of the statements.

[323] I would dismiss the appeal on the basis that the statement was obtained by inducements and means which raise a question about its reliability and it is not possible to be satisfied that the circumstances in which the statement was made are not likely to have adversely affected its reliability.

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[308] *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [176].

Exclusion under section 30

(1) The statements were improperly obtained because unfairly obtained

[324] As has been described at paragraph [140], s 30 of the Evidence Act requires exclusion of "improperly obtained" evidence where exclusion is "proportionate" to the impropriety. Evidence is improperly obtained if obtained in breach of any enactment or rule of law by a person subject to s 3 of the New Zealand Bill of Rights Act (as police officers are) and "unfairly" (including after taking into account the guidelines in any practice note issued by the Chief Justice). It was not argued that the evidence here was in breach of an enactment or rule of law (although the enactments prescribing proper procedure are part of the context in which the fairness of what happened falls to be assessed). For the most part, the minimum standards of criminal procedure to be found in the New Zealand Bill of Rights Act attach on arrest or when someone is in custody. Overarching principles of criminal justice such as the presumption of innocence and the privilege against self-incrimination might have been, but were not, developed as standalone arguments that the statements were obtained in breach of these principles as rules of law. Instead, these principles too were treated as important background in assessment of the fairness of the manner in which the statements were obtained. In particular, the use of undercover police officers to elicit statements raise questions about propriety because they had the effect of circumventing the protections that would have been available at an open police interview, such as occurred at the interview on 5 November 2009.

[325] Although the Court of Appeal was of the opinion that unfairness requires either something that "undermines the justice of the trial" or otherwise violates the community's expectations of the criminal justice system,[309] I am of the view that was to pitch the concept of unfairness as used in s 30 too highly. I agree with Collins J that under s 30 the question of fairness is a threshold only, reflecting the scheme of the section that unfairly obtained evidence is excluded only if exclusion is proportionate in the circumstances.[310] The position under s 30 may be contrasted with the former basis of exclusion of evidence for unfairness where exclusion was

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309 *Wichman v R* [2014] NZCA 339 at [41].
310 *R v Wichman* [2013] NZHC 3260 at [115]–[116].

determined by the finding of unfairness. It is understandable that a higher standard (perhaps touching on trial fairness) was looked to under the former law.[311] It should also be noted that s 30 is not concerned with trial fairness in the use of evidence at trial (as a provision like s 8 is). It looks to improper or unfair conduct of officials in the obtaining of evidence. Matters of trial fairness are assessed under s 30 in the balancing by which it is decided whether unfairly obtained evidence will be excluded, not in the assessment of impropriety in obtaining the evidence.

[326] I consider that the Court of Appeal was correct in the view that there is overlap between the provisions of the Evidence Act.[312] Circumstances giving rise to questions of unreliability, which do not in the end cause the court to exclude a statement under s 28, may nevertheless be relevant in the assessments of proportionality in the exclusion of improperly obtained evidence under s 30.

[327] The Court of Appeal was also right to draw attention to the features of the Mr Big scenario technique that bear on fairness under s 30: under the scenarios the suspect is deprived of insight into the fact that he is under psychological pressure to make statements against interest; the scenario sets up the Boss (in fact a police officer) in a position of authority over the suspect, distinguishing these cases from other cases where undercover police officers are deployed; the purpose of the operation is to put the boss in a position in which he can "interrogate and challenge the suspect, exploiting details from the suspect's police file";[313] the risk of effective evasion of rights. I agree too with the Court of Appeal's view that the unfairness arose out of "the nature and scale of the technique used in this case ... having regard to the characteristics of the suspect".[314] The information was obtained by "active elicitation" and without the opportunity for the respondent to have legal assistance after he had "previously exercised his right to counsel".[315] It was, the elicitation of a confession "in circumstances amounting to an interrogation".[316]

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311 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at [170].
312 See *Wichman v R* [2014] NZCA 339 at [73].
313 At [49].
314 At [65].
315 At [70].
316 At [75].

[328] This Court in *R v Kumar* found the concept of "active elicitation" to be a useful touchstone in deciding whether a statement was improperly obtained by an undercover police officer from a person in custody.[317] I expressed reservations in that case about the extent of the "activeness" required in the context of elicitation of statements from someone in custody. I expressed the view that anything beyond "merely passive" listening or observation was improper in circumstances where the suspect was in custody and disagreed that it was necessary to show that the elicitation "prompted, coaxed or cajoled" the statement from the suspect.

[329] Here the respondent was not in custody. But the whole operation in which he was the target was built around the interview which was conducted as the "functional equivalent of interrogation" by a police officer in disguise. (Indeed, the "active elicitation" here did entail prompting, coaxing and cajoling.) In *Barlow*, Cooke P favoured the "simple" test adopted by Iacobucci J in *Broyles*: "would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?"[318] In relation to the Mr Big scenario conducted here, the answer to the question could only have been "no". *Barlow* and *Broyles* were cases where the elicitation occurred after the suspects had been arrested, although in *Barlow* after release on bail. While those circumstances may be critical in whether there has been breach of any enactment or rule of law, I consider that the extent to which the statements were actively elicited through "the intervention of the state or its agents" is highly material to the questions of unfairness and effective circumvention of rights.

[330] I am of the view that the Court of Appeal was right to obtain assistance from the judgments in *Barlow* despite the fact that the respondent had not been arrested. Richardson J expressed concern about evasion of proper process through "masquerade" in the "functional equivalent of an interrogation".[319] Hardie Boys J considered that if the elicitation which led to the statement was made by an agent of the police, it would subvert the "right to silence".[320] McKay J looked to whether the statement was obtained through something "akin to an interrogation" by the police

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317 *R v Kumar* [2015] NZSC 124 at [27].
318 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 23.
319 At 37–38.
320 See 42–44.

acting through an informer.[321] Nothing approaching the scale of the Mr Big scenario, with its creation of an artificial reality in which the target was deliberated enmeshed, was in contemplation by the judges in *Barlow*. But a number of the statements made, including those concerning the need to ensure that fundamental rights are not treated as empty through police deception, are apposite in the present context. So too, are the remarks of Lord Taylor, referred to at [255] above, that the adoption of disguise cannot be permitted to allow questions to be put in a manner that has the effect of circumventing proper process.

[331] It would be difficult to imagine anything more appropriately described as the "functional equivalent of interrogation" than the Mr Big scenario deployed to obtain a confession from the respondent. As described in paragraphs [307]–[310] above, the effect of the scenario was that the respondent was not advised of his rights to remain silent or to have the assistance of counsel, as would have been the case if the police had sought to re-interview him again. Nor was he told at the outset of the interview what its true subject was. The effect of the stratagem was that the undercover police officer was able to obtain information that would not have been disclosed in conversation. Given that the respondent had previously exercised his right to counsel, it seems likely that he would have exercised it again if approached openly. As the Court of Appeal said, the technique allowed the police to interview him "in very different circumstances".[322] Although the deception may not have been deliberately undertaken to circumvent protections, it inevitably had that effect.

[332] The elaborate deception meant that in design and through the questioning considerable psychological pressure was brought to bear on the respondent. That pressure was only able to be harnessed through state resources. At paragraphs [293]–[317] I have indicated in connection with the s 28 analysis the features of the design, its inherent risks (including to rights), the manner of questioning, and the inducements (which could not have been made legitimately by a police officer acting openly) which led me to conclude that it was not possible for the Court to be satisfied that "the circumstances in which the statement were made were not likely to

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321 At 61.

322 *Wichman v R* [2014] NZCA 339 at [70].

have adversely affected its reliability". The same considerations lead me to conclude that the statement was unfairly obtained.

[333] In addition, I agree with the reasons given by Glazebrook J at [469]–[491] and at [537] for her conclusion that the Practice Note applies to police officers, whether acting openly or undercover. They accord with the view I expressed tentatively in *R v Kumar* at [143].

[334] The Practice Note sets out standards which are to be taken into account under s 30(6) in considering whether evidence is improperly obtained through unfairness. A breach of the rules contained in the Practice note does not necessarily render a statement obtained unfair for the purposes of s 30. Conversely, the terms of s 30(6) which require the court to "have regard" to any Practice Note in deciding whether evidence has been unfairly obtained mean that conduct which does not formally infringe a rule in the Practice Note but offends its spirit may well be unfair.

[335] As foreshadowed at [311], I consider that it is well-arguable that the police had sufficient evidence to charge the respondent before they embarked on the scenario operation. And on any view I consider that a caution should have been given as soon as the respondent made the admission of shaking the child on a previous occasion. On that basis, I consider that the use of the Mr Big scenario to question the respondent without caution and without opportunity for him to consult a lawyer was in breach of Rule 2 of the Practice Note. There were potential breaches also of Rules 4 (because the substance of the medical report was not fairly put) and Rule 5 (because the respondent was given no opportunity to review the recorded statement at the time), but it is unnecessary to deal with these because it is the breaches of Rule 2 which are inconsistent with important principles of criminal justice.

[336] It is unnecessary to decide whether there was sufficient evidence to charge the respondent. The matter on any view was finely balanced. Given the evidence the police had, including the statements earlier made by the respondent, I consider it was unfair, having regard to the proper procedure indicated in the Practice Note, to embark upon an interrogation of him by deception. The deception was not only in

the staging of the interrogation but in the manipulation of the respondent over the preceding five months. It is highly significant in this assessment that the particular evidence set out to be obtained was confessional evidence, with the risks to important elements of criminal justice such evidence entails. Real evidence or other information of interest to an investigation obtained through undercover scenarios may not be as readily characterised as unfairly obtained.

[337] Quite apart from breaches of Rules 2, 4 and 5 of the Practice Note (which turn on whether there was already enough evidence to charge the respondent), I am of the view that Rule 1 was engaged. In the circumstances of the scenario interrogation, Scott was certainly suggesting to the respondent that he must answer. I have already referred at paragraph [305]–[306] to the reasons why I consider that the reference at the outset of the interview to the respondent being "free to go" was decontextualised to the extent that it would have been incomprehensible to the respondent as an indication of lack of compulsion. The dialogue set out from the transcript at paragraphs [163]–[189], at what was the end of a lengthy softening up, indicates the substantial pressure brought to bear on the respondent. It is most evident in the statements made by Scott set out in paragraphs [182]–[183]. Against the background that the respondent had been manipulated throughout the operation to set his heart on joining the organisation and against the building up of Scott as a person of considerable authority, I consider that the respondent was given the impression that he had no choice but to answer the questions, and indeed answer them in a way that would satisfy Scott. The application of Rule 1 must be assessed realistically.

[338] I conclude that the statements were improperly obtained, because unfairly obtained for the reasons given. It is accordingly necessary for me to consider whether their exclusion is proportionate to the impropriety.

(2) Exclusion of the statements is proportionate to the impropriety

[339] When considering at [292]–[317] whether the Court could be satisfied in terms of s 28(2) that it was safe to admit the evidence, I relied on considerations the Court of Appeal treated as going to the question of fairness under s 30. I too think

these same considerations go to fairness. It is unnecessary for me to repeat them here. Relying on them, I consider that the unfairness entailed was extremely high, as the Court of Appeal thought. Although the police evidently considered that they were acting lawfully, I do not think that assumption (even if substantiated by legal advice) counters the unfairness. Still less do I think that perhaps understandable belief that what was planned was not objectionable should draw the Court into acquiescing in the course followed. Such approach leads to inevitable erosion of standards and rights. So too does the view that the acceptability of the Mr Big operation carried out here is to be assessed against other Mr Big operations.[323] Deliberate risk-taking with legal limits or simulated violence in the operation itself might well have exacerbated impropriety, but I do not think their absence cures the objective unfairness arising out of the nature and scale of the operation directed solely at obtaining confessional evidence from the respondent.

[340] It will be recalled that Collins J was of the view that exclusion of the statements would be a disproportionate response to the impropriety for four reasons: the statement was "crucial to the prosecution case"; any impropriety was "more than counterbalanced by the gravity of the alleged offending"; the scenario technique was "the only effective method available to the police to gain [the] crucial admissions"; because the statements were "obtained lawfully" their admission was "consistent with an effective and credible system of justice".[324] I deal briefly with these points in turn.

[341] As indicated when discussing whether there was sufficient evidence for the police to have charged the respondent, I am of the view that the respondent's admissions in the earlier police interviews that he had shaken the child, the fact that he was alone with the children when his daughter suffered the injuries before her admission on 4 March, his partner's statements about the child being unsettled and crying, and the medical evidence all pointed to the respondent's responsibility. He was unable to suggest that he was ignorant of the dangers of shaking a baby, because of the training he had received when the twins were born. In those circumstances,

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323 Compare William Young J at [118].

324 *R v Wichman* [2013] NZHC 3260 at [132]–[133].

the admission that the shaking had been provoked by the child's crying does not strike me as critical.

[342] I accept that the offending under investigation was serious. It resulted in the death of a child. But "an effective and credible system of justice" (which must be taken into account in balancing the impropriety against the exclusion under s 30(2)(b)) requires that questions of fairness and proper process are not reserved for less serious cases. It cannot be the case that the seriousness of the offending "more than counterbalanced" the serious unfairness here. Such emphasis on ends over means would be in itself destructive of an effective and credible system of justice.

[343] As already indicated when discussing whether there was sufficient evidence to charge the respondent, I do not consider that the admissions, although compelling evidence for the prosecution if accepted by the jury, were "crucial" to the case. Nor do I accept that obtaining inculpatory statements through the elaborate deception of the Mr Big operation was the only effective way to gain further evidence. The police could have sought to interview the respondent again and to have put to him the case against him. The fact that the respondent might have sought to obtain legal advice and to exercise his privilege against self-incrimination cannot justify working around these protections of the criminal justice system for procedural fairness. More fundamentally, the idea that gaining admissions from someone suspected of a crime is an end that justifies unfair means when the suspect maintains silence is contrary to our system of criminal justice and is a slippery slope.

[344] Finally, the lawfulness of the police action (even if accepted here, a subject on which I have some doubts although the matter was not pressed in argument) does not exhaust the concern of s 30 with the fairness of how the evidence is obtained.

[345] Section 30 is a provision that applies to all evidence. The nature of the evidence here as confessional is properly a factor to take into account both in assessing the fairness of how it was obtained and in the decision under s 30(2) whether its exclusion is an appropriate response to the impropriety. It is relevant that, as was recognised at common law, confessional evidence needs to be treated with care both because it is sufficient in itself to found a conviction and because it

may be unreliable, particularly when obtained in circumstances of pressure or inducement. The fact that reliability is sufficiently shown to permit the admission of evidence under s 28 does not mean that these considerations are irrelevant in assessing whether exclusion is proportionate, especially when the evidence has been obtained through an operation designed to obtain admissions through inducements and psychological pressure. Section 30(3)(c) directs the court to look at "the nature and quality of the improperly obtained evidence".

[346] The rights effectively circumvented by the operation to obtain the admissions were fundamental to the criminal justice system. Obtaining self-conscripted confessional evidence by deception is particularly serious in that context. The impropriety may not have been deliberately undertaken to circumvent rights, but it was nevertheless a deliberate plan, which entailed using substantial state resources. This was not inadvertent unfairness but unfairness by design. If the only "investigatory technique" available was by obtaining confessional statements, it is not acceptable to obtain such statements through active elicitation in interrogation after deception and manipulation of the suspect to the extent here undertaken. That course is unfair. These are the reasons why I agree with the view taken in the Court of Appeal that the exclusion of the statements was a proportionate response to the impropriety.

Conclusion

[347] For the reasons given, I would affirm the judgment in the Court of Appeal to exclude the evidence of the statement obtained in the interview with Scott. I consider it should be excluded in application of s 28(2) because it is not possible to conclude that the circumstances in which the statement was made were not likely to have adversely affected its reliability. I would also, in agreement with the Court of Appeal, exclude the statement in application of s 30(2). The impropriety in the manner in which it was obtained by the police means that exclusion is a proportionate response.

[348] If the views I have expressed mean that Mr Big scenarios to obtain confessional evidence cannot be undertaken, I think that is the price of observance of

fair process. There is much in a scenario technique that is unexceptional and may properly be deployed in a police investigation.[325] It is its culmination in an interrogation without procedural safeguards against the background of a reality constructed by state deception that I consider to be unacceptable.

[325] See above at [299].

GLAZEBROOK J

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Introduction

[349] On 1 October 2008, Mr Wichman's partner gave birth to twins (a boy and a girl). The twins were born approximately 15 weeks premature. At the time of the twins' birth, Mr Wichman was 17 and his partner was 16. Child, Youth and Family Services were notified when hospital staff raised concerns about the new parents' lack of interaction with the babies. The couple was given intensive training in baby care, safety and resuscitation techniques. On 22 January 2009, the twins were discharged from hospital into the care of Mr Wichman and his partner.

[350] On 4 March 2009 the girl twin (T) was admitted to hospital with brain injuries. Her condition stabilised and she was discharged from hospital on 27 March 2009. She was re-admitted on 9 May 2009 with pneumococcal meningitis and remained in hospital until she died on 8 September 2009. Her death was as a result of the injuries sustained in March. A medical report by specialist paediatrician, Dr Patrick Kelly,[326] concluded that, as well as the March brain injuries, there had been an earlier "severe" brain injury.

[351] During the police investigation of T's injuries, a number of her caregivers (including Mr Wichman) were interviewed on at least two occasions in 2009. In a police interview on 11 March 2009, Mr Wichman accepted that he had shaken T but maintained that this was in the course of an attempt to resuscitate her. No charges were laid at the end of the investigation in 2009.

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[326] Dr Patrick Kelly is the Clinical Director of Te Puaruruhau – the "specialist team within the Auckland District Health Board which deals with children and young people where there are concerns about possible abuse and neglect". Dr Kelly also has other roles such as consultant general paediatrician at Starship Children's Health and Honorary Clinical Senior Lecturer in Paediatrics at the University of Auckland Faculty of Medicine and Health Sciences.

[352] In 2012,[327] the police decided to mount an undercover operation designed to extract admissions from Mr Wichman. This was organised into a number of what were termed "scenarios",[328] beginning in December 2012 and ending in May 2013 after an interview with "Scott", the purported boss of a fake criminal organisation. The operation was based on a Canadian model[329] similar to that dealt with by the Court of Appeal in *R v Cameron*.[330] This type of operation has been colloquially termed overseas, the "Mr Big" technique.

[353] In the interview with Scott, Mr Wichman admitted shaking T on two occasions and said his earlier statement to the police that he had shaken T in a resuscitation attempt was untrue.

[354] Mr Wichman has now been charged. For the earlier injuries, the charge is causing grievous bodily harm by reason of reckless disregard for the safety of others.[331] In relation to T's death, the charge is manslaughter by the unlawful act of assault.[332]

[355] The issue for this appeal is the admissibility of the statement made by Mr Wichman in the course of the undercover operation.[333] In the High Court, Collins J ruled the evidence admissible.[334] His decision was overturned on appeal to the Court of Appeal.[335]

[356] Before turning to the admissibility issue, I outline aspects of the initial investigation into T's death, provide a more detailed analysis of the undercover operation and discuss the legislative scheme and legislative history.

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327 There is no explanation before the Court about the delay between the end of 2009 and 2012.

328 The Crown provided a summary of the crime scenarios. In addition, the defence provided its own summary of facts. In this judgment I have drawn on aspects of both as it appears that neither party has taken particular exception to the other party's summary of facts.

329 Devised in the late 1980's by the Royal Canadian Mounted Police. However, as William Young J notes in his judgment at n 6, a version of the technique appears to have been used by the Canadian police as far back as 1901: see *The King v Todd* (1901) 4 CCC 514 (Man KB). The technique has been used in New Zealand since 2006.

330 See *R v Cameron* [2007] NZCA 564 [*Cameron* (Pre-Trial)], dealing with the issue before trial; and *R v Cameron* [2009] NZCA 87 [*Cameron* (Post-Trial)] dealing with the issue after trial.

331 Contrary to s 188(2) of the Crimes Act 1961.

332 Contrary to ss 160(2)(a) and 171 of the Crimes Act.

333 This Court granted leave to appeal on 10 October 2014: see *R v Wichman* [2014] NZSC 142 [*Wichman* (SC) (Leave)].

334 *R v Wichman* [2013] NZHC 3260 (Collins J) [*Wichman* (HC)].

335 *Wichman v R* [2014] NZCA 339 (Randerson, White and Miller JJ) [*Wichman* (CA)].

The initial investigation

Medical report

[357] A child protection report on T's injuries was first drafted on 18 March 2009 by Dr Kelly. The report was finally approved for release on 27 May 2009. Dr Kelly's opinion was that T had been subjected to repeated episodes of child abuse. There had been two head injuries, as well as injury to T's ribs[336] and femora.[337] The injuries to the femora and the ribs could have occurred together during an episode of shaking. The older head injury could not be dated with any precision and radiology could not establish the exact time of the second brain injury.

[358] Dr Kelly said that it is common for a child to stop breathing (apnoea) in the case of head trauma, particularly as a result of child abuse. He said that it was likely that T had at least impaired breathing at the time of the second head trauma and that this was a significant contributor to her brain injury.

[359] Dr Kelly noted that it had been suggested that the shaking in March occurred in an attempt to resuscitate T. He said that this explanation is often advanced by caregivers. If Mr Wichman's explanation were true, there had to be another explanation for T stopping breathing but there was no known past medical history of choking. He could not, however, exclude the possibility that there had been a choking episode.

[360] Dr Kelly said that he was not aware of any example where head injuries of this kind had occurred as a result of a corroborated resuscitative measure. Any shaking in the course of such a measure "would presumably have to be of the same intensity and severity as child abuse".

Mr Wichman's accounts to the police in March

[361] A detective spoke to Mr Wichman at the hospital on 6 March 2009. In that discussion, Mr Wichman said that, on the evening of 4 March 2009, T had started to

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336 Dr Kelly explained that "rib fractures are often a consequence of violent squeezing of the chest with the child suspended in the hands of the offender".

337 The type of injury to the femora was typical of child abuse.

wake for a feed and was grizzling. She coughed, choked and became unresponsive. He said that he panicked and shook her five times: "a couple of little ones to start and then a couple more". Then he performed cardiopulmonary resuscitation (CPR) and called the ambulance.[338]

[362] There was a formal interview on 11 March 2009, in which a lawyer, Mr Trotter, was present. This interview occurred before Dr Kelly's medical report had been received. In that interview Mr Wichman said that he had been left alone with the twins on the night in question while his partner went to pick up her parents who were coming to stay overnight. T was on their bed. Mr Wichman heard her cough and then make a little choking sound. A bit later he saw saliva and milk around her mouth and realised that she was making no noise. He touched her chest and rubbed her to see if she would react. He then picked her up and could feel that she was not breathing: "I started to panic. I was scared. She was floppy like a rag doll". He then said:

> I picked her up by putting my fingers around her back and thumbs on her chest. I tried to shake her a bit lightly to see if she would react to it then I shook her a bit harder. I don't know how long I shook her for the first time. *The second time I shook her was the same as the first time only a bit harder. I do not know how many times I shook her backwards and forwards. When I shook her I was still holding her with my fingers at her back and thumbs on her chest. Her head was flopping around.* She didn't react to the shaking so I hit her in the chest. I used my right palm and hit her in the middle of her abdomen. I don't know how hard I hit her. When I hit her I was holding her with my left hand but I am not sure how. (Emphasis added)

[363] After this, Mr Wichman said that he considered what to do for a couple of seconds before commencing CPR and ringing the ambulance. T was breathing before the ambulance arrived but slower than usual.

Later police interview

[364] In his interview of 5 November 2009, Mr Wichman was accompanied by his lawyer, Mr Paino. He was cautioned and told that he was not being detained or arrested and was "free to go at any time".

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[338] The Court has not been provided with the notes of this interview. This summary is taken from the Crown submissions. I do not understand Mr Wichman to have taken issue with that summary.

[365] Mr Wichman was taken through the birth of the twins and the training he and his partner had had on looking after them, including training in CPR. The interview covered a number of matters that had arisen in other interviews and through Dr Kelly's report. Mr Wichman was asked again about the events of 4 March. He answered some questions but then said he did not "want to go through it again, repeating the exact same stuff".

[366] There was then a break of ten minutes. After the interview resumed, Mr Wichman answered five questions relating to whether the monitor had been on T on the evening of 4 March, whether it had gone off, and whether T had been crying in the days leading up to, and including, 4 March.[339] Mr Wichman's lawyer then (understandably) objected to the content of two further questions put by the police interviewer and the interview was terminated.

Undercover operation

[367] After the interviews in 2009, the investigation, as the High Court and Court of Appeal accepted, reached an "impasse".[340] There appears to have been no further investigation until 2012 when the police decided to mount the undercover operation.[341] Advice from a psychologist was available to the police throughout the Mr Big operation but that advice was given orally and there was no record of the contents of this advice before the High Court.[342]

[368] The operation began in December 2012 by Mr Wichman purportedly winning a prize for completing a market research survey. Mr Wichman's "prize" was taken in February 2013 and, in the course of the prize day, Mr Wichman met "Ben", an undercover police officer, who recruited him to assist in some "jobs". The work was at first not overtly criminal, merely involving repossession of vehicles. The

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339 In relation to the suggestion that T had been crying on the night of 4 March 2009, Mr Wichman said "No she was asleep when [T's mother] left to get her parents, she wouldn't be in the room by herself if she was crying".

340 See *Wichman* (HC), above n 334, at [16]; and *Wichman* (CA), above n 335, at [14].

341 According to the Crown, the police received advice from the Crown Solicitor on 5 April 2012. It appears this advice may, in part at least, have related to whether there was sufficient evidence to charge.

342 It would be expected in future cases that the contents of any advice would be before the court. As it was not, the Court does not know the extent to which the operation may have, on the basis of that advice, been targeted to take into account Mr Wichman's characteristics: see William Young J's judgment at [89].

scenarios became more and more clearly criminal, culminating in one of the last scenarios in Dunedin on 30 April 2013, which involved the organisation purportedly selling 33 pounds of cannabis and 12 military style semi-automatic weapons to "Asian"[343] gang members. While the gang members were undercover police officers, the cannabis and firearms were real. The purported sale price was $20,000 cash, diamonds and an electronic money transfer of an undisclosed amount.

[369] From the beginning and throughout the scenarios, the values of the organisation of professionalism, loyalty, respect, trust and honesty were stressed. Mr Wichman was given assistance with his appearance and clothing, meals were paid for, and he stayed in hotels and motels arranged by the group. At various points throughout the scenarios Mr Wichman was given large sums of money, ranging from $1,000 to $16,000, to count. He was also at one point given a firearm to hold.[344] Mr Wichman was paid a total of $2,600 for his involvement in the various scenarios.

[370] Two of the earlier scenarios are of particular significance. The first involved "AJ" who was fired from the organisation in Mr Wichman's presence for having a "bad attitude" and asking "too many questions". This scenario involved verbal abuse but no violence.

[371] The other set of scenarios involved a confederate, "Craig". Mr Wichman was told that Craig had "got into some trouble with young girls" but that this would be "sorted" by the organisation, as long as Craig was upfront and honest with the boss. At a later date, Mr Wichman met "CJ", an undercover police officer posing as a corrupt police officer. CJ purported to have the evidential exhibits relating to a sexual violation offence Craig had committed against a young girl but, because Ben had got onto the situation too late, CJ had not managed to uplift crucial evidence that had already been sent for forensic testing.

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343 According to the defence summary of facts, the "Asian" gang consisted of two "Asian" men and a "huge Maori man".

344 Supposedly, a Desert Eagle, a .50 calibre handgun and one of the most powerful semi-automatic handguns in the world. He was given this gun to hold during a "firearms burglary" scenario which involved the purported theft of numerous firearms, including two AK47s and a small machine gun.

[372] Just over a week later, Mr Wichman was given $5,000 to pay a supposedly corrupt Department of Internal Affairs agent to provide a false passport to Craig. Mr Wichman was then involved in taking Craig to the airport where Craig was given a further $5,000. Mr Wichman had earlier talked with Craig:[345]

> Craig spoke about his attraction to younger girls and how it had got him in trouble, but Scott was sorting it out for him as he had been loyal to Scott, trusting of the group and honest to Scott about his illegal offending with underage females.

Background to interview with "Scott"

[373] There are three aspects of the interview with Scott that are of relevance:

(a) The first is that it took place in Dunedin. The evidence in the pre-trial hearing before Collins J was that Dunedin was chosen in order to isolate Mr Wichman.[346]

(b) The second is that Mr Wichman was led to believe, on the evening of the Dunedin Asian gang scenario (30 April 2013), that there was a "big job" coming up in Melbourne. On the morning of the interview with Scott, Ben told Mr Wichman that "the day he met the boss was the day his life would change".[347]

(c) The third is that on the day of Mr Wichman's arrival in Dunedin (and the day of the Asian gang scenario, 30 April 2013), Detective Senior Sergeant Miller contacted Mr Wichman's mother and met with her at her work.[348] It is alleged that Detective Senior Sergeant Miller said to Mr Wichman's mother that Mr Wichman was about to be charged in

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345 This is taken from the Crown's summary of the crime scenarios.

346 The police witness at the pre-trial hearing was Detective Senior Sergeant John Robert Mackie.

347 This is Mr Wichman's account taken from the defence's summary of facts.

348 On the following day Detective Senior Sergeant Miller also made a telephone call to Mr Wichman, leaving a message to say that Mr Wichman and his partner would be called as witnesses at an inquest into T's death. Mr Wichman says he did not get this message. According to Detective Senior Sergeant Miller's job sheet, Mr Wichman's father was also told via telephone about the Coroner wanting to hold an inquest.

relation to T's death.[349] Whether or not this happened, it seems that Mr Wichman and his partner inferred from Mr Wichman's mother that this was the case. This is evident from a call intercepted between Mr Wichman and his partner on 2 May 2013 (the morning of his interview with Scott).[350] It was confirmed in evidence before Collins J that the purpose of Detective Senior Sergeant Miller contacting Mr Wichman and his mother had been to ensure T's death was at the forefront of Mr Wichman's mind at the time of the interview with Scott.[351]

Interview with Scott

[374] Ben took Mr Wichman for the interview with Scott at about 1 pm on 2 May 2013. Ben and "Tom"[352] were there for the start of the interview. Tom talked about the Jeep Cherokee he had picked up the day before and how he "couldn't be happier".[353] Ben recounted how he had to wait for his vehicle as the dealer did not have the colour he wanted. This conversation appears to have been designed to highlight to Mr Wichman the rewards of being a part of the organisation.

[375] After discussing restaurant bookings and flight bookings to Melbourne for the "[f]our of us", Tom and Ben then left Mr Wichman alone with Scott. Scott complimented Mr Wichman on his weight loss and how he had "smartened up". Mr Wichman said that he felt better as people looked at him "in a good way" instead of as a "hoodlum". Scott said that all the people who work for the organisation enjoy their work "and this sort of work gives them a lifestyle that they like".

[376] Scott stressed that anyone who wished to leave the organisation could do so and there would be "absolutely no problem whatsoever". He told Mr Wichman that

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349 Detective Senior Sergeant Miller did not give evidence before Collins J and the Detective Senior Sergeant Mackie who gave evidence at the hearing was unsure of the precise contents of the telephone call.

350 In the telephone call, Mr Wichman's partner said that "if worse comes to worse" and one of them was charged, they could just "[l]eave the country and get fake id's".

351 In response to defence counsel's suggestion that it was a "co-ordinated trick to provoke the defendant's mother [into] telling him that something was going to happen", the Detective replied "yes".

352 Tom had been involved in various other scenarios previously.

353 As at 18 December 2015, new Jeep Cherokees had a list price starting at $47,490 plus other on road coasts: see Chrysler Group LLC <www.jeep.co.nz>.

at any stage he was free to go.[354] Scott also stressed the non-violent nature of the organisation which Mr Wichman said was one of the things that attracted him.[355] Scott then talked about the organisation's values of trust and honesty for some time, finishing with an exhortation to Mr Wichman never to lie to him.

[377] Mr Wichman said that he had seen what had happened with Craig and admired how he had been helped by the organisation, linking that to the trust, loyalty and honesty Craig had shown to the organisation. Scott promised that he could fix anything as long as he was told about it and that it did not matter what the person had done. In addition, Scott stressed anything Mr Wichman said would remain between them.

[378] Scott explained that it had got to the point that both he and Ben were happy with Mr Wichman's progress and so it had been time to get him "checked out". Scott explained that he used CJ (the supposedly corrupt police officer) to check out all new people. CJ told Scott to check with Mr Wichman about the "death of a kid". Scott said that if Mr Wichman felt comfortable enough he could tell him about the death.[356] In response, Mr Wichman repeated the version of events from his police interview: essentially that he had shaken T in a resuscitation attempt. Scott challenged Mr Wichman on this version, saying that it was inconsistent with the medical evidence, that the doctors "know what they're talking about" and that "they've got no reason to make stuff up". Scott reiterated that he did not care what Mr Wichman had done. He just needed to know what occurred so that he could "fix it".

[379] After telling Mr Wichman to give some "thought" to "truth and honesty brother",[357] Scott left the room and there was the sound of a toilet flushing. On his return to the room, Scott returned to the topic of the claimed resuscitation attempt. Mr Wichman agreed that the baby's head was going backwards and forwards and

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354 I agree with the Chief Justice that this was unrelated to any indication that the interview would relate to T's death. I therefore agree with the Chief Justice that this cannot be seen as akin to a caution for the reason she gives: see her judgment at [210] and [305]–[306].

355 As the Chief Justice states, the fact that the organisation was not violent might even have been designed to attract Mr Wichman: see her judgment at [295].

356 This also does not equate to a proper caution: see n 354.

357 This to me was the "change in the dynamic of the conversation" referred to as lacking by William Young J at [89].

sort of "flopping around". Scott then brought up the earlier injury. Mr Wichman admitted that he had shaken T on an earlier occasion to stop her crying. Scott asked whether in March the baby was crying too "and the same thing, frustration again?" Mr Wichman answered in the affirmative and apologised for lying.

[380] Mr Wichman said that no-one knew about this, including his partner: "She would never forgive me". Mr Wichman confirmed that the version he told to the police was not true. After confessing, Mr Wichman repeatedly expressed his relief in telling someone what had happened. He said that he felt "real bad" and "real embarrassed". Mr Wichman told Scott that he never thought he would tell anyone about the incident "even after they chuck me in jail for it I would never admit that to anyone". Mr Wichman also said that "I think I had tricked myself for so long into believing the story that I told everyone." At the end of the interview, Mr Wichman was told that he had been accepted into the organisation.[358]

Mr Wichman's pre-trial evidence

[381] In the pre-trial hearing before Collins J, Mr Wichman said that his admissions to Scott were untrue. He said that he was concerned that he would be fired from the organisation if he did not tell Scott what he wanted to hear. Mr Wichman also said that he was concerned about safety issues in Dunedin. Asked why, in the intercepted conversations with his partner and father, he had seemed so positive about the organisation, Mr Wichman said that, for their sakes, he "kind of just led them to believe that the organisation was a bit more friendly than they were".

[382] In cross-examination, Mr Wichman said that he liked the excitement and the money involved with the organisation but denied that he liked the sense of belonging. When asked about his becoming emotional in the interview with "Scott", Mr Wichman's position was that this was "all an act".

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[358] A more detailed exposition of the interview with Scott is recorded in the Chief Justice's judgment at [163]–[189].

Application of the Evidence Act

[383] Mr Wichman's statement to Scott would be admissible against him under ss 7 (being relevant) and 27 (defendant's statement offered by the prosecution), provided it is not excluded by ss 28, 29, 30 or 8(1)(a) of the Evidence Act 2006.[359] Before I examine those sections, starting with s 29,[360] I deal with a preliminary issue: whether the Court of Appeal should have made reliability findings when Collins J's conclusion with regard to s 28 had not been appealed against.

[384] Mr Wichman's notice of application for leave to appeal to the Court of Appeal did refer to s 28. That section was not, however, relied on in the conduct of the appeal.[361] However, a number of points relating to reliability were advanced on behalf of Mr Wichman in support of the contention that the scenario technique was unfair in terms of s 30(5)(c) and in assessing the nature and quality of the evidence under s 30(3)(c).

[385] The fact that the reliability challenge was not made under s 28 but under s 30 cannot inhibit this Court in its consideration of admissibility (or otherwise) under all relevant sections. In any event, the issue of admissibility of evidence gathered as a result of the Mr Big scenario technique is one of public and general importance and a full (rather than an artificially constrained) consideration by this Court of all relevant sections is necessary.[362]

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359 The specific sections of the Evidence Act 2006 dealing with confessions (ss 28 and 29) and the exclusion of evidence under s 30 should in my view logically be considered before the more general s 8.

360 Section 29 is the section dealing with the most serious conduct and therefore should be considered first.

361 *Wichman* (CA), above n 335, at [35]. This was said to be because "it would be difficult on appeal to displace a finding reached after hearing the appellant".

362 Subject to any natural justice issues. This Court indicated to the parties in a minute that its reasons would consider s 28 and gave them the opportunity to make further submissions. Both parties filed supplementary submissions: *R v Wichman* SC 80/2014, 26 June 2015 (Minute of the Court). Further, the Crown had the opportunity to prove reliability in the High Court and address the reliability issues raised under s 30 in the Court of Appeal. However, this was not the case with regard to the Practice Note, and in particular whether there was enough evidence to charge.

Section 29

[386] It was never Mr Wichman's contention that s 29 applied but I deal with that section first for completeness. Section 29 requires a judge to exclude a statement unless satisfied beyond reasonable doubt that it was not influenced by oppression.[363] For the purposes of this section, it is explicitly stated that it is irrelevant whether or not the statement is true.[364]

[387] It appears to me that the aim of the last few scenarios was to set up at least some apprehension in Mr Wichman of Scott. At the time of his interview with Scott, Mr Wichman had been deliberately made to feel isolated in Dunedin. The Dunedin scenario also had an air of menace (with firearms and the "Asian" gang). In cross-examination, Detective Senior Sergeant Mackie agreed that the simulated activity was "pretty heavy stuff".

[388] On the other hand, the firearms in the last scenario were not for the use of the organisation (other than to make money) and Mr Wichman had appeared excited about his role in the organisation when talking to his father and partner.[365] One could justifiably be sceptical about his suggestion in his evidence at the pre-trial hearing that this was so as not to worry them.

[389] While there is nothing necessarily incompatible between excitement and being scared, unlike in some of the Canadian cases,[366] there had been no suggestion in any of the scenarios that leaving (or lying to) the organisation would be met by violence. Indeed, Scott, in the interview, stressed the non-violent nature of the

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363 Section 29(2). Oppression under s 29(5) means "oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person" or "a threat of conduct or treatment of that kind".

364 Section 29(3).

365 It is not clear whether any of these conversations were after the Asian gang scenario. The telephone call that Mr Wichman had with his partner on the morning of his interview with Scott did not mention his involvement in that particular scenario: discussed above at [373](c).

366 For a particularly notable example, see the case of *R v Terrico* 2005 BCCA 361, (2005) 199 CCC (3d) 126. In that case, a mock beating of another undercover officer was arranged in a hotel room. In that case, the officers acknowledged that their objective was to convey the impression that the gang was "violent and ruthless and that one can get beaten up, if not worse, when one lies to them". A similar beating of another member occurred in *R v Bonisteel* 2008 BCCA 344, (2008) 236 CCC (3d) 170 at [15] purportedly because what the undercover officer said did not match up with what the fake police report indicated. If these scenarios occurred in New Zealand, they would almost certainly fall foul of s 29 of the Evidence Act.

organisation and Mr Wichman's ability to leave without hard feelings. The non-violent nature of the organisation was one of the reasons Mr Wichman gave to Scott for being comfortable with being part of the organisation.[367]

[390] In these circumstances, I consider that Mr Wichman rightly did not seek to argue that s 29 was engaged. The conduct of the undercover officers did not reach the threshold required by s 29.

Section 28

[391] I now consider s 28. Section 28(2) provides that a judge must exclude a statement "unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability".[368] Section 28(4) sets out a number of matters that the judge must take into account for the purpose of assessing whether to exclude the statement under s 28(2).

[392] I start my consideration of s 28 with a general discussion about false confessions and the concerns that have been raised concerning the reliability of confessions obtained through the Mr Big scenario technique. I then compare the approaches to reliability taken in the High Court and the Court of Appeal. After that, I discuss the legislative history of s 28 and consider what can be taken into account when determining a statement's reliability. Finally, in light of the above, I apply the test to Mr Wichman's statement to Scott.

False confessions

[393] The 1970 Chadbourn revision of *Wigmore on Evidence* expressed the concern that a person testifying that a confession was made (such as "[p]aid informers, treacherous associates, angry victims, and over-zealous officers of the law") often

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367 See above at [376].

368 Under s 28(1) the issue of reliability must be raised by the defendant (on an evidential foundation) or by the judge. In my view, Collins J's approach to this threshold issue was too rigid: see *Wichman* (HC), above n 334, at [67]–[74]. All that needs to be pointed to is some evidence that could conceivably affect reliability.

has a motive to lie.[369] On the other hand, if there is no doubt that a confession was actually made, then Wigmore said that this is evidence of the highest quality as "no innocent man can be supposed ordinarily to risk life, liberty, or property by a false confession".[370] Up until relatively recently most criminal justice professionals would have shared Wigmore's view and been sceptical as to whether false confessions were of real concern.

[394] This changed from the 1980s, with the increase in cases of proved miscarriages of justice.[371] For example, in the first 250 DNA exoneration cases, 40 (16 per cent) involved false confessions.[372] Of those 40 cases, 38 "contained detailed and persuasive incriminating facts that must have either wittingly or unwittingly originated from the police".[373] Further, many false confessions contain cues that inflate perceptions of their reliability. In a study of the content of 20 false confessions[374] researchers found that they contained not only vivid sensory details

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369 John Henry Wigmore *Wigmore on Evidence* (Chadbourn revision, Aspen Law & Business, United States of America, 1970) [*Wigmore*] vol 3 at §820b(2).

370 At §820b(1).

371 Gisli H Gudjonsson "False Confessions and Correcting Injustices" (2012) 46 New Eng L Rev 689 at 689.

372 Brandon L Garrett *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, Cambridge (MA), 2012) at 18 and 295. Professor Gudjonsson has called these cases just the "tip of the iceberg": Gudjonsson, above n 371, at 690. There is, however, no empirically tested estimate of the incidence of false confessions: see S Kassin and others "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34 Law & Hum Behav 3 at 5.

373 Gudjonsson, above n 371, at 691. See also Garrett, above n 372, at 19–20. The police say that "Ben" had purposefully not been briefed on any of the factual matrix of the suspected offending so that this could not occur. In this case that is probably not of great significance, due to the fact that there was little, if any, information that the police had about the alleged offence that Mr Wichman did not already know. However, in other cases, ensuring police officers dealing with a suspect could not have imparted information may be vital. In those cases, the courts would expect an affidavit to be sworn by all those involved in the undercover operations up to the time of the final interview swearing that they did not know any details about the crime being investigated.

374 Taken from Innocence Project case files and other cases in which the confessor was subsequently exonerated: S Appleby, L Hasel and S Kassin "Police-induced confessions: an empirical analysis of their content and impact" (2013) 19 Psychology, Crime & Law 111 at 113.

about the crime but "statements about the confessor's motivation, assertions that the confession is voluntary, apologies, and expressions of remorse".[375]

[395] There have also in recent years been a number of experiments testing whether, and in what circumstances, people may make false confessions. In one well known experiment an experimenter accused participants of causing a computer hard drive to crash by inadvertently pressing the "Alt" key.[376] Despite their actual innocence and initial denials, 48 per cent of the participants signed a written confession.[377]

[396] The Alt key experiment involved a relatively trivial matter.[378] It is not certain the extent to which the results would apply to more serious matters but there have been experiments where false confessions have occurred in cases where it may be thought not as easy to convince oneself that one had made a mistake (that is, pressed the Alt key inadvertently). In another experiment, participants were asked to play a computerised gambling game.[379] They were alleged to have "stolen" money from the "bank" during a losing round. The designers of the experiment manufactured false video evidence of the participants doing so. Presented with this false evidence, all participants confessed and most internalised belief in their own guilt.[380]

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375 S Kassin "The Social Psychology of False Confessions" (2015) 9 Social Issues and Policy Review 25 at 39. A particularly startling example is the case colloquially known as the "Central Park Five". In 1989, a female jogger was raped, beaten and left for dead in New York City's Central Park. While she could not remember anything from the attack, within 72 hours five adolescent boys confessed to the assault. Solely on the basis of their oral confessions, which were all vividly detailed though often erroneous, the boys were convicted and imprisoned. Thirteen years later, a convicted rapist and murderer admitted to the attacks; his independently corroborated guilty knowledge of the crime and the fact that the DNA samples originally recovered belonged to him, meant that the convictions of the five boys were overturned: see at 25–26.

376 The experimenter had explicitly instructed the participants to avoid that key.

377 Kassin, above n 375, at 34. See further S Kassin and K Kiechel "The social psychology of false confessions: Compliance, internalization and confabulation" (1996) 7 Psychological Science 125. In some cases a confederate said that she had witnessed the participant hit the forbidden "Alt" key. Where there was such a confederate, the false confession rate almost doubled to 94 per cent.

378 The reason that these types of experiments often use innocuous "wrongs" is because ethical approval is required and "entrapping people to cheat, steal, or otherwise commit an act that would cast them in a negative light would not be permitted": Kassin, above n 375, at 34.

379 See R Nash and K Wade "Innocent but proven guilty: Using false video evidence to elicit false confessions and create false beliefs" (2009) 23 Applied Cognitive Psychology 624.

380 This study is said to show the "coercive effects of false evidence": Kassin, above n 375, at 34.

[397] Various risk factors for false confessions have been identified, including situational and dispositional risk.[381] Situational risk factors include isolation, length of interrogation, minimisation techniques and promises or threats.[382] Dispositional risk factors include young age and immaturity, intellectual disabilities as well as mental health issues.[383]

[398] There are also two structural factors that may cause false confessions. The first is that interrogation is generally a guilt-presumptive process: where an interrogator strongly believes in guilt this "provides fertile ground for the operation of cognitive and behavioural confirmation biases".[384] The second is what has been termed the "Milgramesque" nature of the interrogation process.[385] In interrogations, suspects are isolated, confronted by an authority figure, and led to believe that confession serves their personal self-interest better than denial.[386]

[399] Promises of leniency have been shown to induce false confessions.[387] Experiments have shown that minimisation (for example suggesting that actions were justifiable by external factors) can be subtler but nevertheless also productive of false confessions.[388] In one experiment it was found that minimisation, just like an explicit promise of leniency, increased the rate of true confessions over cases where there were no promises or minimisation from 46 per cent to 81 per cent of guilty suspects confessing. Worryingly, however, the rate of false confessions also increased from six per cent to 18 per cent of innocent participants.[389]

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381 See Kassin and others, above n 372, at 16–23. There is also the "innocence risk" factor: ironically, innocence can be a risk factor as an individual may believe that truth and justice will prevail and thus they are less likely to exercise their legal rights such as the right to counsel.

382 Gudjonsson, above n 371, at 699–700. See also Kassin and others, above n 372, at 16–19.

383 Gudjonsson, above n 371, at 700. See also Kassin and others, above n 372, at 19–22.

384 Kassin, above n 375, at 31.

385 Milgram conducted an obedience experiment in which 65 per cent of participants obeyed commands to administer supposed electric shocks to a confederate of the researcher: see S Milgram "Behavioural study of obedience" (1963) 67 The Journal of Abnormal and Social Psychology 371.

386 Kassin, above n 375, at 31–32.

387 See MB Russano and others "Investigating True and False Confessions Within a Novel Experimental Paradigm" (2005) 16 Psychological Science 481 at 485.

388 Kassin, above n 375, at 35. Minimisation produces an expectation of leniency and can encourage false confessions from innocent suspects who feel trapped and unable to extricate themselves.

389 At 35. See Russano and others, above n 387, at 484.

[400] The problem of false confession is particularly acute for the criminal justice system because confession evidence is very powerful.[390] Surveys show that most people believe that they would never confess to a crime they did not commit and that they evaluate others accordingly.[391] In addition, studies have shown that people (including law enforcement agents)[392] are unable to distinguish between true and false confessions.[393]

[401] Further, mock jury studies have shown that people trust confessions and have difficulty disregarding them even when there are good reasons to do so.[394] In one experiment mock jurors were presented with a confession obtained by violence. The conviction rate was 44 per cent, compared to a 19 per cent conviction rate in the no-confession control group. The high conviction rate was despite the fact that the "vast majority of participants in this group knew that the high-pressure confession was involuntary, correctly recalled that it had been stricken from the record, and said it had no impact on them".[395]

[402] In addition to the fallibilities of confessions identified above, confessions may also influence the way in which other evidence is gathered and interpreted.[396] Once a suspect confesses, "police often close their investigation, deem the case

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390 Kassin, above n 375, at 37.

391 At 38, citing L Henkel, K Coffman, and E Dailey "A survey of people's attitudes and beliefs about false confessions" (2008) 26 Behaviour Sciences and the Law 555; and R Leo and B Liu "What do potential jurors know about police interrogation techniques and false confessions?" (2009) 27 Behaviour Sciences and the Law 381.

392 In one study, despite being less able to distinguish a false confession from a true one than the student participants, the confidence of law enforcement agents in their ability to do so was higher than that of the students: S Kassin, C Meissner and R Norwick "'I'd Know a False Confession if I Saw One': A Comparative Study of College Students and Police Investigators" (2005) 29 Law & Hum Behav 211 at 222.

393 Kassin, above n 375, at 37.

394 See S Kassin and L Wrightsman "Prior Confessions and Mock Juror Verdicts" (1980) 10 Journal of Applied Social Psychology 133. See also S Kassin and K Neumann "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21 Law & Hum Behav 469 where the authors said at 471 that "confession evidence is inherently prejudicial and that people do not discount it even when [it is] legally appropriate to do so".

395 S Kassin and H Sukel "Coerced Confessions and the Jury: An Experimental Test of the 'Harmless Error' Rule" (1997) 21 Law & Hum Behav 27 at 42. Similar results occurred when the participants were "experienced judges" see D Wallace and S Kassin "Harmless error analysis: How do judges respond to confession errors?" (2012) 36 Law & Hum Behav 151; see also Kassin, above n 375, at 38.

396 S Kassin "Why Confessions Trump Innocence" (2012) 67 American Psychologist 431 at 436.

solved, and overlook exculpatory evidence or other possible leads". This occurs even if there is good reason to doubt the reliability of the confession.[397]

Issues with "Mr Big" technique

[403] In Canada, it appears that the Mr Big technique has resulted in false confessions.[398] Despite these real life examples, researchers have not been able (because of ethical rules)[399] to test the "Mr Big" technique empirically but they have raised the following risks relating to false confessions arising from the technique (not all of which apply in this case):

(a) suspects are encouraged to speak enthusiastically about their crimes, ensuring that, when they do confess, they present themselves in the worst light possible;[400]

(b) threats and inducements are offered and in some cases financial inducements are offered to persons in dire financial straits;[401]

(c) often an atmosphere of oppression is engendered;[402]

(d) offers of social inclusion, in some cases where a suspect may have been rendered vulnerable to social isolation through state action, such as where the person has been charged and bailed;[403]

(e) promises to make the investigation of alleged wrongdoing or charge(s) disappear;[404]

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397 Kassin and others, above n 372, at 23. I also agree with William Young J's comments on the dangers of "misclassification" as set out in his judgment at [75].

398 On this point, see William Young J's judgment at [20].

399 See above at n 378. See also TE Moore, P Copeland and RA Schuller "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2010) 55 Crim LQ 348 at 395–396.

400 Amar Khoday "Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60 Crim LQ 277 at 282.

401 At 283–284.

402 At 284. See also Jonathan Cross "The Mr. Big Sting in Canada" (LLM Thesis, University of Saskatchewan, 2013) at 41 and 123.

403 Kohday, above n 400, at 285. As Dickson CJ observed in *R v Oakes* [1986] 1 SCR 103 at 119–120, an "individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms".

(f) no cost and no adverse consequences in confessing;[405] and

(g) ability to circumvent protective rules.[406]

[404] Due to concerns about reliability, prejudice and the potential for police misconduct, the Supreme Court of Canada in *R v Hart* has re-evaluated its approach to Mr Big operations.[407] The Court did not alter the jurisprudence concerning voluntariness and the established law on the requirement for a "person in authority".[408] Nor did it alter the Canadian law on the right to silence and to receive an appropriate caution, which is not engaged until an individual is detained.[409] Instead, the majority of the Supreme Court devised a "two-pronged approach"; one dealing with balancing probative value and prejudicial effect, and the other concerned with abuse of process.[410] Mr Big confessions are inadmissible if they fail on either (or both) limbs.

[405] As to the first limb, the Supreme Court promulgated a new rule under which Mr Big evidence is prima facie inadmissible unless the Crown can establish that its probative value outweighs its prejudicial effect. The majority said that the confession's probative value turns on an assessment of its reliability, whereas its "prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context".[411]

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404 Kohday, above n 400, at 285.

405 Moore, Copeland and Schuller, above n 399, at 388.

406 Kohday, above n 400, at 295.

407 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544. The previous approach is summarised by William Young J at [32].

408 See discussion below at [413] on the common law voluntariness rule. For a thorough discussion of the voluntariness rule in Canada, see *R v Oickle* 2000 SCC 38, [2000] 2 SCR 3 at [47]–[71]; and *R v Grandinetti* 2005 SCC 5, [2005] 1 SCR 27 at [34]–[43].

409 See *R v Hebert* [1990] 2 SCR 151 at 184 per Dickson CJ, Lamer, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ and s 10 of the Canadian Charter of Rights and Freedoms.

410 *R v Hart*, above n 407. The majority consisted of McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. Cromwell J in a separate judgment concurred with the majority's two-pronged approach: at [152]. Karakatsanis J wrote a separate judgment in which she agreed with the result; however, her reasoning differed from that of the majority. In this context, the Canadian concept of abuse of process aligns with s 30 of our Evidence Act, rather than with the New Zealand concept of abuse of process discussed in *Wilson v R* [2015] NZSC 189.

411 *R v Hart*, above n 407, at [85].

[406] As to the second limb, the majority said that there needed to be a more "robust" conception of the doctrine of abuse of process.[412] They said that it was "impossible to set out a precise formula for determining when a Mr. Big operation will become abusive". They nevertheless attempted to give some guidance. In essence they said that, while the mere presence of inducements is not problematical, it becomes so when it approaches coercion. It will be coercive when physical violence is involved and also when it preys on the vulnerabilities of a subject.[413] The new *Hart* approach has been welcomed (cautiously) by many academics, although there is concern that it does not go far enough.[414]

High Court judgment

[407] Collins J accepted that Mr Wichman was induced into making the admission and that he would not have done so had he known Scott was a police officer.[415] On the other hand, there was nothing to suggest Mr Wichman was not speaking frankly to Scott. He had no mental, intellectual or physical disability,[416] the questioning by Scott had been fair, and it was made clear that Mr Wichman was free to leave at any time.[417] In the Judge's view, the representations that Scott could fix the problems with the police were not calculated to cause a false confession. If Mr Wichman had done nothing wrong, there was nothing to fix.[418]

[408] Further, the admissions did not have the hallmark of a false boast, they were not implausible and they were consistent with the medical and pathology evidence.[419] Mr Wichman's admissions were of no assistance to the organisation but were consistent with the emphasis on honesty in the organisation.[420] Mr Wichman

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412 At [84]. The abuse of process doctrine in Canada is therefore now much wider than the "shock the conscience/community" test referred to by Collins J: see *Wichman* (HC), above n 334, at [42], [111] and [116]. Indeed, even before *Hart*, the "shock the conscience/community" test was not the only test used in Canada to ascertain whether the general discretion to exclude evidence should be exercised: see David M Paciocco and Lee Stuesser *The Law of Evidence* (6th ed, Irwin Law, Toronto, 2011) at 338–339.

413 *R v Hart*, above n 407, at [115]–[117].

414 See for example, H Archibald Kaiser "*Hart*: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014) 12 CR (7th) 304.

415 *Wichman* (HC), above n 334, at [35]–[36].

416 At [75].

417 At [76].

418 At [77].

419 At [80]–[81] and [85].

420 At [82] and [86].

also appeared relieved after he made the admissions and his embarrassment appeared to have been genuine and authentic.[421] Collins J did not accept Mr Wichman's evidence at the pre-trial hearing that his admissions were fabrications.[422]

Court of Appeal judgment

[409] The Court of Appeal, in its assessment of reliability in the context of s 30, said that there were three incentives for Mr Wichman to lie: "membership of a 'family', material rewards, and relief from the spectre of prosecution".[423] There was, in the Court of Appeal's view, "substantial psychological pressure to confess" over a "substantial period".[424] Mr Wichman was young, with limited income and little life experience. He had no meaningful criminal history and was vulnerable to the technique's appeal to familial loyalty.[425]

[410] The critical parts of the interview took the form of an interrogation that "exploited the trust that had been established".[426] The Court considered that the technique was unfair and that the "combination of substantial inducements and interrogation also raises serious doubts about the confession's reliability".[427] The Court accepted that the account given by Mr Wichman was plausible but said "this is not a case in which the Court can take comfort from independent evidence which confirms the likely truthfulness of the confession".[428]

Difference in approach

[411] It seems fair to say that the difference in approach between the High Court and the Court of Appeal is that the High Court concentrated on the actual reliability of the statement,[429] whereas the Court of Appeal (albeit not in the context of s 28) concentrated on the circumstances in which the statement was made, while including

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421 At [83].
422 At [34].
423 *Wichman* (CA), above n 335, at [66].
424 At [67].
425 At [67].
426 At [71].
427 At [80].
428 At [80]. I think the Court meant that there was no independent evidence discovered as a result of the confession. The Court was obviously aware of the existence of the medical report.
429 *Wichman* (HC), above n 334. Despite the Judge saying, at [81], that truth was not relevant to his inquiry.

a consideration of the individual circumstances of Mr Wichman. The question therefore is which approach is correct under s 28 of the Act. In assessing this, the legislative history of s 28 is of assistance. But, before turning to that, I deal with a criticism of the Court of Appeal decision by the Crown: that the Court's findings on reliability were made without the benefit of expert evidence.[430]

[412] Traditionally judges and juries have been considered well able to assess reliability issues without the benefit of such evidence. While now expert evidence may be admitted more readily on issues relating to reliability (and would have been helpful in this case), it is not mandatory. Nor, if admitted, would it be controlling. The decision on reliability is still the decision of the judge (or jury). In any event, the onus was on the Crown under s 28 to prove reliability (once the evidential threshold had been met). If expert evidence had been necessary to establish that any confession obtained was not sullied by the pressures inherent in the technique, it should have been called by the Crown in the High Court.[431]

Legislative history of s 28

[413] Historically, confessions have been treated as a special category of evidence governed by particular rules of admissibility.[432] Before the Evidence Act 2006 was passed, confessions could be excluded on the basis that they were not voluntary[433] (but subject to s 20 of the Evidence Act 1908).[434] For a confession to have been voluntary the will of the accused could not have been overborne by that of any other person.[435] Lack of voluntariness could not lie in some factor internal to the person[436]

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430 Of course the same can be said of Collins J's judgment.

431 The defence did not have access to any of the psychological advice relied on by the police. In the hearing before this Court, the Crown submitted that the expert psychologist's help may have been to ensure there was no coercion. However, if that was the case, it may be thought particularly surprising that the Crown did not call him or her to give evidence in the High Court.

432 My description of the law is largely taken from Law Commission's 1992 Preliminary Paper entitled *Criminal Evidence: Police Questioning* as it shows the background against which the Law Commission considered it was operating: Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) [Law Commission *Criminal Evidence: Police Questioning*].

433 *R v McCuin* [1982] 1 NZLR 13 (CA). See also the classic statement of Lord Sumner in *Ibrahim v The King* [1914] AC 599 (PC) at 609 where he stated "[i]t has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement …".

434 They could also be challenged on the basis that they had been obtained by oppression, that they were obtained in breach of the Bill of Rights, or under the "unfairness" ground.

435 *Naniseni v The Queen* [1971] NZLR 269 (CA) at 274.

and there also had to be a causal link between any inducement and the making of the confession.[437] Lesser inducements (a "fear of prejudice or hope of advantage") deprived a confession of its voluntariness only if they emanated from a person in authority.[438] Serious inducements, such as violence emanating from any person, deprived a confession of its voluntary nature and rendered it inadmissible, assuming a causal link between the confession and the serious inducement.[439]

[414] Even if a confession elicited by a person in authority through a lesser inducement was not voluntary at common law, admissibility was subject to s 20 of the Evidence Act 1908.[440] That section provided that such a confession was admissible if the judge "is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made". The view of the Law Commission was that the issue under s 20 was not the truth or untruth of the statement but merely the likelihood that "the improprieties may have

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436 Such as lack of sleep or consumption of alcohol, except where these had been brought about or aggravated by some other person: at 274. See also Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 66.

437 *Director of Public Prosecution v Ping Lin* [1976] AC 574 (HL).

438 *Ibrahim v The King*, above 433, at 609. See also Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 67. In *Deokinanan v The Queen* [1969] 1 AC 20 (PC) at 32–33, the Privy Council referred to *The King v Todd*, above n 329, at 376, where it was said that "[a] person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him". This may have been too wide a definition of the concept: see John Huxley Buzzard, Richard May, and MN Howard *Phipson on Evidence* (13th ed, Sweet & Maxwell, London, 1982) [*Phipson on Evidence*] at [22.18]. See also *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [6] per Gleeson CJ, at [33]–[44] per Gummow and Hayne JJ and at [268]–[284] per Callinan, Heydon and Crennan JJ for a discussion of the voluntariness rule. Also see discussion in *R v Grandinetti*, above n 408, at [44].

439 Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 67. The Law Commission's summary on this point may be too simplistic a summary of the voluntariness rule. It may be that serious inducements by other than a person in authority would have been excluded under the residual fairness discretion (discussed below) and not the voluntariness rule: see *Phipson on Evidence*, above n 438, at [22–07], [22–30] and [22–31]–[22–32]. Relevantly, the Law Commission also recognised that the fairness discretion may provide a means to deal with inducements emanating from those who cannot be classified as "persons in authority" noting that it may be used to "mitigate the complexity and rigidity of the voluntariness rule": Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 82.

440 The Law Commission explained the rationale for s 20. It said that it was a "reaction against what was seen as the over-protectiveness of the common law voluntariness rule in its exclusion of reliable confessions which had not been forced from the defendant by any serious police misconduct": Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 68.

caused an untrue admission of guilt".[441] Likely in that context meant importing a real or substantial risk.

[415] The Law Commission recommended abolishing the common law voluntariness rule, repealing s 20 of the Evidence Act 1908 and replacing them with reliability and oppression rules. This, however, was not intended to abolish the values underlying the voluntariness rule and s 20.[442]

[416] The Commission did not propose any change to what it considered to have been the position under s 20 whereby the court did not consider the actual truthfulness or otherwise of the statement but merely the likelihood that reliability had been affected. The Commission considered that, if a court was required to consider whether the statement was in fact true, this would subvert the function of the jury. It may also lead to the court considering a large volume of material and being "diverted from questions of improper police conduct".[443]

[417] The issue of what should occur if subsequently discovered evidence confirmed the reliability of a statement was discussed by the Commission and a number of alternatives mooted.[444] The provisional conclusion was that "an express exception to the reliability rule is inconsistent with the way in which the rule is framed".[445] The issue was the likelihood of reliability being affected and not the statement's actual truth.

[418] The Commission considered, however, that in many instances any real evidence arising from an inadmissible confession should not be excluded even though improperly obtained.[446] The Commission discussed whether the parts of the

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441 Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 69–70 relying on *R v Fatu* [1989] 3 NZLR 419 (CA) at 430. An old edition of *Cross on Evidence* also states: "[t]he Judge is not entitled to have regard to any view which the Judge may have formed as to whether the admission actually made was true, and is restricted to considering the tendency or otherwise of the accused, assuming him or her to be innocent, to admit guilt": DL Mathieson (ed) *Cross on Evidence* (7th ed, Butterworths, Wellington, 2001) at 692.

442 Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 100. The Commission recommended a third rule to replace the fairness and the Bill of Rights discretions: an improperly obtained evidence rule which became s 30.

443 At 106.

444 At 106–107.

445 At 107.

446 At 124.

inadmissible confession linking the defendant to the real evidence should be admitted.[447] It said that, under its proposals, the whole statement would remain inadmissible.[448] This remained the position of the Commission through its subsequent reports.[449] In its draft code, there was a section providing that the truth of a defendant's statement was irrelevant for the purpose of the reliability, oppression and improperly obtained evidence rules.[450]

[419] In the Evidence Bill 2005 (256-1), as originally introduced, however, what is now s 28(2) provided that the judge must exclude a statement unless satisfied on the balance of probabilities either that the circumstances in which the statement was made were not likely to have adversely affected its reliability or that the statement was true.[451]

[420] The Select Committee took a different approach. It said that "the truth of a statement should not be used to justify its admissibility, and that the truth of a statement should be determined when the guilt or innocence of the defendant, not the admissibility of evidence, is considered".[452] The amendment proposed by the Select Committee, and accepted by Parliament, was to remove from what is now s 28(2) the ability of the judge to admit the statement if satisfied on the balance of probabilities that it was true. The Select Committee did not propose adding a subsection similar to s 29(3) explicitly saying that, for the purposes of s 28, it is irrelevant whether or not the statement is true. The Select Committee was presumably aware of the views expressed by the Law Commission on a number of occasions that the Commission's version of s 28 was concerned only with the likelihood of unreliability and not with

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447 At 124.

448 At 124, noting that had been the result in *Lam Chi-ming v The Queen* [1991] 2 AC 212 (PC).

449 Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [108]–[110]. At [109] it was said that to "require truth to be established at this preliminary stage would usurp the function of the jury". See also the Law Commission's draft Evidence Code: see Law Commission *Evidence: Code and Commentary* (NZLC R55 vol 2, 1999) at [C155] where it was said "subsequently discovered real evidence may not be offered at a hearing to determine the admissibility of a defendant's statement, if the only purpose of that evidence is to confirm the truth of the statement".

450 See Law Commission *Evidence: Code and Commentary*, above n 449, at 88–89. A similar section had not been included in the Law Commission's earlier proposals in its *Criminal Evidence: Police Questioning* preliminary paper: Law Commission *Criminal Evidence: Police Questioning*, above n 432.

451 In the Law Commission draft, the standard of proof had been beyond reasonable doubt: see Law Commission *Evidence: Code and Commentary*, above n 449, at 78; see also Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 105 and 204.

452 Evidence Bill 2005 (256-2) (select committee report) at 4.

truth. The Select Committee may therefore have considered that its suggested amendment removing the requirement to consider truth sufficed to achieve its stated purpose.

[421] In its report on its review of the Evidence Act in 2013, the Law Commission recommended that s 28 should be clarified to make it clear that the truth of the statement is irrelevant.[453] The Commission considered that to consider truth at the threshold admissibility stage would usurp the function of the jury and risk diverting the court's attention from questions of "improper police conduct" to the consideration of large volumes of corroborating evidence.[454]

[422] The Evidence Amendment Bill 2015, which was introduced on 27 May 2015, has not adopted the Law Commission's suggested amendment. The Justice and Electoral Select Committee's report on the Bill did not recommend any change to this position.[455] In its initial briefing to the Select Committee, the Ministry of Justice explained that it had not adopted the Law Commission's proposed amendment to s 28 because it considered that a blanket rule requiring courts to disregard the possible truth of a statement was too restrictive.[456] The apparent truth could be the only way to assess reliability: for example, if a confession reveals an aspect of the crime only the offender would know.[457]

[423] At the Select Committee's request, the Ministry of Justice elaborated further on 22 September 2015.[458] The Ministry said that the Government had decided to allow the courts to have the flexibility to adopt an appropriate approach over time to the issue of whether actual reliability could be considered under s 28. It said that a

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453 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.87]. The requirement for periodic reviews is pursuant to s 202 of the Evidence Act.

454 At [3.85].

455 See Evidence Amendment Bill (27-2) (select committee report). It was reported back on 25 November 2015. The report does not mention s 28.

456 See Nora Burghart "Evidence Amendment Bill – Initial briefing (Ministry of Justice, 8 September 2015). This is publicly available through the Parliamentary website: see <www.parliament.nz>.

457 At [12]. While I would not normally quote from advice by government officials to the Select Committee, it seems legitimate to do so in this case because further advice was sought by the Select Committee, it is publicly available, and it must be assumed the Committee accepted the advice because no amendment to s 28 was proposed when the Bill was reported back.

458 See Nora Burghart "Evidence Amendment Bill – Further Information on Unreliable Evidence" (Ministry of Justice, 22 September 2015), available at <www.parliament.nz>.

blanket prohibition on considering the apparent truth of a statement may hinder the court's assessment of reliability and the ultimate fact-finder's assessment of the case. It went on to say:[459]

> This issue is significant as the outcome of a finding of unreliability is exclusion of the statement. If the statement is excluded there will be no opportunity for the truth of the matter to be determined by the fact finder in the case (either the judge or jury). In effect, this itself may be seen to usurp the function of the jury (which was the mischief sought to be avoided by the Law Commission's recommendation). If the statement was not excluded, a defendant would still have the opportunity to challenge the truth of the statement before the court.

[424] Looking back to the Law Commission's recommendations on s 28, it is worth noting at this point that s 28 is not, contrary to the Law Commission's view, concerned with improper police conduct.[460] The person in authority requirement was not carried through to the current Evidence Act. A person's internal circumstances such as intoxication or mental illness (which may not be evident to the police) now come within s 28, as may actions of persons not associated with the police if they could affect reliability. This means in my view that any issues of police misconduct should be dealt with under s 30 rather than under s 28.[461]

[425] It is also worth noting that, before the Evidence Act was passed, a finding that there was a real or substantial risk that an inducement by a person in authority may have caused a false confession (determined without regard to the actual truth of the confession) did not necessarily lead to the confession being excluded. Indeed, confessions could be admitted despite reliability concerns. This was on the basis that the inducements did not cause the particular person to confess.[462] This causation requirement turned the inquiry into a subjective one based on the particular accused. This meant that the focus was no longer on issues related to reliability or the police conduct in offering the inducement. It meant that even strong inducements (such as the one in *Fatu*) could be held not to be operative in the particular case and the confession admitted, despite such inducements and the associated reliability concerns.

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459 At [10].
460 See above at [416] and [421].
461 Or s 29 if the conduct amounts to oppression.
462 See *Fatu*, above n 441.

What can be considered under s 28?

[426] The issue is whether the actual reliability of a statement is relevant for the purposes of s 28 or whether all that is looked at are the circumstances in which the statement is made.

[427] A strong textual indication that actual reliability can be taken into account is that there is no explicit statement (unlike in s 29) that it is irrelevant whether or not the statement is true.[463] Further, the particular conditions or characteristics of a defendant are taken into account, as are the nature of the questions and the threats or promises in the particular case.[464] This suggests that the inquiry is grounded in the particular circumstances of the case. The court is to have regard to the particular person and the particular confession, as well as a general inquiry into circumstances.

[428] On the other hand, the actual inquiry under s 28(2) is whether the "circumstances in which the statement was made were not likely to have adversely affected its reliability". This points towards the consideration being of the circumstances and not actual reliability. The legislative history[465] supports the view that s 28 is only concerned with the circumstances in which the confession was made, as does most of the caselaw[466] on s 28 to date, with the main exception of the second *Cameron* decision.[467]

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463 Evidence Act 2006, s 29(3). The Law Commission had obviously considered such a statement necessary as, in its draft, it had a section providing that the truth of a statement was irrelevant for the purposes of what became ss 28, 29 and 30: see at [418] above.

464 Section 28(4). Both the Crown and Mr Wichman attempted to rely on s 16 in their submissions. Section 16 is the interpretation section for the hearsay evidence subpart and defines "circumstances" for that subpart. Given the definitions in s 16 are explicitly limited to the hearsay subpart of the Evidence Act, I do not find it useful in interpreting s 28. See William Young J's discussion of s 16 at n 113 of his judgment.

465 See above at [416]–[420] where the Law Commission and the Justice and Electoral Select Committee (when considering the Evidence Bill in 2005) stressed that the truth of a statement should not be relevant under what is now s 28.

466 See Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV28.03(1)]; and Bruce Robertson (ed) *Adams on Criminal Law: Evidence* (looseleaf ed, Brookers) at [EA28.03(2)].

467 *Cameron* (Post-Trial), above n 330, at [35] where the Court said reliability "is concerned with whether what was said was sound". The Court also referred to corroborating evidence in assessing reliability under s 28: at [36]. This case was mentioned with disapproval by the Law Commission in its 2013 review of the Evidence Act: see Law Commission *The 2013 Review of the Evidence Act 2006*, above n 453, at [3.82]. In its review, the Law Commission recorded that there have been two other unreported cases in which similar comments have been made: see *Tahaafe v Commissioner of Inland Revenue* HC Auckland CRI-2009-404-102, 10 July 2009 at [41]; and also *R v McCallum* HC Auckland CRI-2006-004-17181, 29 August 2007 at [64].

[429] Another plausible interpretation of s 28(2), however, is that one way the Crown can prove on the balance of probabilities that the circumstances were not likely to have adversely affected a statement's reliability, is by showing that they did not do so.[468] Logically, if a statement is actually reliable, then there is not a real, substantial or significant risk[469] of its reliability having been adversely affected. I am conscious that, under the law as it was before the 2006 Evidence Act was passed, *Fatu* had held truth to be irrelevant to the assessment under s 20 of the Evidence Act 1908.[470] While legislative history can be helpful in providing background and context, however, the task of the Court is to interpret the words of the Evidence Act in light of their purpose.[471] Section 28 is concerned with reliability. It is not concerned with proper police conduct and the person in authority requirement has been removed. As s 28 has a different context and, to some extent, a different rationale than the old voluntariness rule and s 20, I do not consider that the restrictions in *Fatu* should be applied to it.[472]

[430] It is also significant that Parliament has not accepted the Law Commission's recommendation to add into s 28 a statement that it is irrelevant whether or not a statement is true. Parliament could easily have made it clear that the second *Cameron* decision was wrong by accepting the Commission's recommendation on

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468 This is the fourth interpretation discussed at [82] of William Young J's reasons and the one favoured in his reasons: see at [83]–[84]. I would leave open whether another means for the Crown to meet the test in s 28(2) would be by proving that the circumstances did not induce the confession (as in *Fatu*, above n 441, and the third interpretation discussed at [82] of William Young J's reasons). If it were the case, considerable caution should be exercised (and strong evidence required) before making such a finding in a case where the circumstances raise a strong risk of unreliability, such as where strong inducements to confess have been offered. The fact that there may have been other factors that may have influenced a suspect's decision to confess does not rule out that the inducements were also operative. Had it taken that cautious approach, it is likely that the Court of Appeal in *Fatu* would not have reached the conclusion on causation that it did.

469 I consider "likely" is used in s 28(2) in the sense of real or substantial or significant risk (as it was under s 20 of the Evidence Act 1908): see above at [414]. If the term likely required more (such as more likely than not), not only would this be duplicating the standard of proof (the Crown would have to prove it was more likely than not that it was more likely than not), it would be too easy for the Crown to meet that standard. Inducements are likely to lead to true confessions more often than they risk leading to false ones: see at [399] above for example.

470 *Fatu*, above n 441, at 430. In any event, the wording of s 20 of the 1908 Act and s 28 of the 2006 Act are very different.

471 Interpretation Act 1999, s 5. As the Court of Appeal recognised in *R v Healey* [2007] NZCA 451, (2007) 23 CRNZ 923 at [48], starting with the relevant statutory provisions, rather than the previous law, is the correct method as a matter of statutory interpretation and is consistent with the direction in s 10 of the Evidence Act to interpret the Act in a way that promotes its purpose and principles.

472 For the different context and rationale underlying s 20, see above at [414]–[416].

this point. By omitting to make the amendment (at least at this stage),[473] Parliament has arguably endorsed the view that the actual reliability of a statement may be relevant to s 28.[474]

[431] As stated above, the debate over what can be taken into account under s 28 must be considered in light of the purpose of s 28. The justification for the exclusion of evidence under s 28 is the concern about reliability, as the heading of the section indicates.[475] It is important to remember too that the task for the judge under s 28 is to assess the threshold reliability of the statement. Essentially, the question is whether it would be unsafe for the fact-finder to rely on the statement for the purpose the Crown submits it.[476] Looked at in this way, the reliability of a statement itself must at least be relevant to the threshold issue. In that regard, the judge is not engaged in an exercise of assessing the truth or otherwise of the admission (in the sense of a mini trial) but merely taking into account the contents of the statement and any obvious indications of reliability or unreliability with regard to other aspects of the case.[477]

[432] Professor Mahoney suggests that courts, when assessing reliability under s 28, should pay attention to actual indicators of unreliability in the statement such as inconsistencies or implausibilities.[478] He suggests that s 28 should be considered with the actual defendant in mind, meaning that indicators of actual unreliability in

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473 As noted above at [422] the Bill has been reported back from the Select Committee without the Committee adopting (or even referencing) the Law Commission's recommendations. This must indicate that the Committee accepted the advice of the Ministry of Justice: see above at [422]–[423].

474 I consider it legitimate to take the result of the Law Commission's review into account, given that the periodic review function is built into the Evidence Act (see s 202). There is also some analogy with *Attorney-General v Clarkson* [1900] 1 QB 156 (CA) and *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403 (CA). If Parliament had decided to accept the Law Commission's recommendation, this would have been a strong indication in favour of Elias CJ's view of the section's limited scope.

475 Other relevant rationale would be unfairness to the defendant and a threat to the integrity of the criminal justice system but that would be because of a lack of reliability and not as standalone rationale. This is consistent with the Ministry of Justice's advice to the Select Committee: see above at [422]–[423].

476 Given that s 27 and therefore s 28 can cover statements containing lies, the Crown will not always be relying on the truth of a statement. The same may be the case with any apparently exculpatory parts of a statement. The Crown will often wish to suggest that these are also lies.

477 I agree with William Young J's comments in his judgment to this effect: see at [84].

478 Richard Mahoney "Evidence" [2008] NZ L Rev 195 at 203–204. I comment that, while internal inconsistencies in the statement may be an indicator of unreliability, these may be on peripheral matters and thus may not necessarily affect its reliability. They may also not be so significant that the threshold test is not met: see below at n 490.

the statement should be considered on an equal footing with the factors set out in the non-exhaustive list in s 28(4) of the Act. I agree and consider this suggests that the converse should also apply: that indicators of actual reliability can also be considered.[479]

[433] It follows from this that a judge could also take into account any evidence discovered as a consequence of the statement in assessing threshold reliability.[480] As the main justification in policy terms for excluding a statement is because of concerns about reliability, then it would not be a sensible policy choice to exclude a statement which subsequent evidence shows to have been actually true. To exclude a confession that is true merely because, absent the subsequently discovered evidence, it risked being unreliable would be contrary to the policy of s 28 and would not be conducive to public confidence in the criminal justice system. Public confidence is important to the due administration of justice. The public would expect reliable and relevant evidence to be placed before the jury unless there were strong policy indications to the contrary.[481] In particular it would seem odd that a jury might be deprived of a true confession through the operation of s 28, the very section concerned with the reliability of statements.[482]

[434] Having said this, the primary consideration under s 28 is whether or not an innocent person in the position of the accused and in the circumstances he or she was placed would be likely (in the sense of there being a significant risk) to confess to a crime he or she had not committed.[483] An assessment of the circumstances should therefore be made before considering actual reliability. This is the approach taken by the Supreme Court of Canada in *Hart*, where the majority stated:[484]

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479 It is uncertain whether or not Professor Mahoney would agree with this reciprocity approach.

480 Subject to being satisfied that this subsequent evidence has not been tainted by the confession in the manner discussed above at [402].

481 This was effectively the concern of the Ministry of Justice when, in response to the Select Committee's request for clarification regarding s 28 and the Evidence Amendment Bill, the Ministry said that to exclude a statement without letting the jury determine its truth might be thought to usurp the role of the jury: see above at n 449.

482 A reliable confession could still be excluded under ss 29 and 30. As noted above, s 28 is not concerned with the police conduct or general unfairness.

483 If a statement is alleged by the Crown to be a lie, the question would, by analogy, be whether or not an innocent person in the position of the accused and in the circumstances he or she was placed would be likely to lie.

484 *R v Hart*, above n 407, at [102] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ.

> Thus, the first step in assessing the reliability of a Mr. Big confession is to examine those circumstances and assess the extent to which they call into question the reliability of the confession. These circumstances include — but are not strictly limited to — the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health.

[435] Further, the stronger the circumstances pointing to a risk that the confession is unreliable, the stronger the indicators of actual reliability should be. This is consistent with the majority's approach in *Hart*; where it was said that the "greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence".[485]

[436] Internal indicators appearing to point towards reliability (such as emotion, general plausibility, sensory details) should be regarded with caution, given their presence in proved false confessions.[486] In addition, care must be taken in assessing a confession's consistency with other evidence, given that knowledge of that other evidence may not come from being a perpetrator but from other sources (including from the police either advertently or inadvertently).[487]

[437] Judges should also be cognisant that surveys have indicated that people (and judges and juries are people) do not believe they would falsely confess and evaluate others accordingly.[488] Further, experiments have shown that people are not good at assessing whether a confession is false and that their view of other evidence (and indeed the other evidence itself) can be tainted by the existence of a confession.[489]

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485 *R v Hart*, above n 407, at [105] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. The majority also said at [105]: "Trial judges should consider the level of detail contained in the confession, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public (e.g., the murder weapon), or whether it accurately describes mundane details of the crime the accused would not likely have known had he not committed it (e.g., the presence or absence of particular objects at the crime scene). Confirmatory evidence is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability."

486 See above at [394].

487 As to the ability for confessions to taint other evidence, see above at [402].

488 See above at [400].

489 See above at [401] and [402].

[438] All of the above means that any finding on actual reliability should normally be made only where there is other clear and independent evidence of reliability.[490] Relying solely on a confession (and particularly a bare admission or one sketchy in detail) will almost certainly to be too dangerous in cases where the circumstances raise a significant risk of a false confession.[491]

[439] There remains an issue about whether there can be cross-examination in a pre-trial hearing (or voir dire) as to the truth of a statement. If it is remembered that this is merely a threshold question, then the answer would seem to be the same as under the old law: that cross-examination on the truth of a statement should not be allowed.[492] Where an accused gives evidence in a pre-trial hearing or in a voir dire the Crown should, however, in fairness put to the accused for comment the matters that will be relied on to indicate that the statement is reliable. In this case Mr Wichman chose to testify in the pre-trial hearing that his statement to Scott was false.[493] Where that occurs, given that there should not be a mini trial, the Crown should not extensively challenge that assertion. The cross-examination at the pre-trial hearing in this case remained within proper bounds.

Circumstances of the interview with Scott

[440] I now turn to the application of the above principles in the current case. I accept that the questioning by Scott was not aggressive and in this regard was very

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490 I do comment, however, that, given it is only a threshold issue, when assessing reliability a judge could decide that a statement is reliable enough to go to the jury, even if there are inconsistencies with other evidence. Such inconsistencies may be because the other evidence is unreliable or any inconsistencies may be on insignificant points. Inconsistencies may also be due to a suspect exaggerating their role for bravado or minimising aspects of which they may be ashamed.

491 See the comment of Karakatsanis J in *R v Hart*, above n 407, at [207] where she said "generally, an uncorroborated, unverified confession will not be sufficiently reliable and will be inadmissible".

492 I thus disagree with the approach taken in *R v Patten* HC Auckland CRI-2006-004-3200, 8 April 2008 at [14] and [22] allowing for the cross-examination of the defendant as to the truth of a statement.

493 Although he may have done so in the mistaken belief that he was obliged to testify as to the confession's falsehood. If and, to the extent that, [37] of the second *Cameron* decision would suggest that evidence from the accused to this effect is necessary, it is wrong: see *Cameron* (Post-Trial), above n 330.

different from the questioning in *Tofilau*.[494] There were, however, aspects of the questioning itself that would not have been acceptable in a normal police interview: the repeated exhortations to honesty and Scott making it very clear he did not believe Mr Wichman's account, including proffering his opinion as to the quality of the medical evidence: "they know what they're talking about" and "they've got no reason to make stuff up".[495]

[441] It is, in any event, artificial to look at the questioning in isolation because the whole operation could not have been undertaken, had the police been operating openly and in an official capacity. The interview must be assessed against the background of the sequence of scenarios in which Mr Wichman had been involved, aimed at getting him to confess. The scenarios had been carefully calibrated[496] to draw Mr Wichman gradually into the organisation and to make the organisation appear very attractive, both personally and financially. For example, Mr Wichman had had the companionship of Ben and had been "smartened up" so that people looked at him in a "good way".[497]

[442] While the financial rewards had been relatively modest up to the interview with Scott, the work had been easy, was accompanied by restaurant meals and accommodation, and Mr Wichman had been given a taste of more to come. He had been given money to count[498] and was given a tangible reminder just before the interview with Scott of the benefits of keeping in with the organisation, with the talk of the vehicles for Tom and Ben.[499] Mr Wichman may have been employed but the

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494 See *Tofilau*, above n 438, at [394] where Callinan, Heydon and Crennan JJ note that the trial Judge said that, in his discussion with the "boss", one of the appellants, Mr Clarke, was "hectored and harangued to a significant degree, in a manner which would be unacceptable in a formal police interview". This point is relied upon by William Young J at [71](e) of his judgment.

495 This went further than merely asking for comment on the medical evidence. See *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [104] where the majority of the Court (McGrath, William Young, Chambers and Glazebrook JJ) said that merely asking for comment on a prior inconsistent statement was not cross-examination.

496 This phrase was used by the majority in *R v Hart*, above n 407, at [68].

497 See above at [375].

498 See above at [369].

499 See above at [374].

organisation promised the possibility of true financial stability,[500] and without having to give up his current job.[501]

[443] There was also much to appeal to a young man's wish for excitement (but within safe boundaries): for example getting to handle a Desert Eagle hand gun but with no suggestion Mr Wichman or anyone in the organisation would use it.[502] The questioning must also be seen in light of the conscious effort to isolate Mr Wichman in Dunedin where a "triad"[503] gang bought firearms and drugs in an apparently substantial deal. This added a background of menace to the interview (albeit not amounting to oppression). I infer that this was the aim of that scenario.

[444] I agree too with the Court of Appeal that Mr Wichman's youth is a vulnerability factor to false confessions.[504] He was not a child[505] but he was still relatively young and, despite being a father, seemed relatively immature and naive. By contrast, Scott had been portrayed as the big boss, the person to respect and impress in order to receive the promised rewards,[506] but at the same time, a person not to cross by appearing dishonest or disloyal.

[445] All this means that, at the time of the interview with Scott, Mr Wichman was isolated, confronted by a respected authority figure and given promises of financial and social rewards if he were to become a full member of the gang. These

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500 Mr Wichman said in his evidence before Collins J that, despite being young and new to the organisation, Ben had a house, "never had to worry about money", went on "holidays overseas" and got "a new car every year, upgraded, like a nice car too".

501 One of the scenarios introduced Mr Wichman to another member, "Antz". He was described by Ben as a good example of how to have a balance of working in the organisation and managing to have a full time job.

502 This is a generic comment about young men in general. The evidential foundation that this was part of the design of the operation is the content of the scenarios and inferences drawn as to their aim: see William Young J's judgment at [89].

503 In his pre-trial evidence, Mr Wichman said that he thought triads were involved with the "Asian" gang scenario. The Detective in evidence did not agree that was necessarily the intent and he did not know whether "they were Triads in the defendant's mind". However, as noted above at [387], the Detective did accept in cross-examination that the scenario was "pretty heavy".

504 See *Wichman* (CA), above n 335, at [67].

505 In terms of the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) which defines a child in art 1 as a anyone under the age of 18 years.

506 For example, the defence's summary of facts records that in April 2013, at a dinner with other members and Scott, Scott gave Mr Wichman a disapproving look about his appearance. Ben later discussed with Mr Wichman the need to dress smartly.

situational, dispositional and structural factors[507] increased the risk of Mr Wichman making a false confession.

[446] The possibility of having the charges fixed through CJ was also a major risk factor for a false confession, contrary to Collins J's view.[508] As noted above, promises of leniency are major risk factors for false confessions.[509] Mr Wichman had a belief that he was going to be charged in relation to T's death. Even if this was not specifically suggested by Detective Senior Sergeant Miller, Mr Wichman's belief had arisen as a result of the police action in contacting Mr Wichman's mother and this was part of the design of the operation.[510] Being charged would (at the least) be a major inconvenience for an innocent person and there would be the fear of being the subject of a wrongful conviction. The possibility of having the charges "fixed" could thus appeal, even if Mr Wichman were innocent.

[447] The scenarios involving Craig showed that the organisation had been able to assist with Craig's charges through CJ and, when that failed because Ben had been too slow on organising CJ to uplift crucial evidence, arrange his flight from the country.[511] It had been stressed that this assistance was due to Craig's honesty and loyalty to the organisation and was rendered despite Craig being a paedophile. This gave context to Scott stressing to Mr Wichman that he did not care what he had done and also gave a concrete example to back up Scott's assertion that he could "fix anything". Minimisation has much the same effect as offers of leniency.[512] Here there was not direct minimisation of the particular crime but it was made very clear that anything he had done was not going to be judged and Mr Wichman had seen tangible proof of this through the help apparently accorded to the paedophile, Craig.

[448] One of the other reasons Collins J gave (and the Crown supports) for considering Mr Wichman's statement to Scott to be reliable was that a false admission would have been inconsistent with the values of the organisation of trust

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507 Discussed above at [397]–[398].

508 See *Wichman* (HC), above n 334, at [77]; and set out above at [407].

509 See above at [399].

510 The Detective giving evidence at the pre-trial hearing, while unsure as to the precise contents of the phone call, admitted the call was to ensure the inquest was at the "forefront of [Mr Wichman's] mind".

511 See above at [371]–[372].

512 See above at [399].

and honesty.[513] The difficulty with this proposition is that Scott had made it clear (through his comments on the medical evidence) that he did not believe Mr Wichman's account of a resuscitation attempt. Thus Scott would not view Mr Wichman sticking to that account as consistent with the values of the organisation. If Mr Wichman wished to remain in the organisation and continue to receive and enhance the benefits of membership (including making his problems "go away"), he had to change his account. This raises the real risk of a false confession.

[449] Further, while honesty, loyalty and trust may be (in the abstract) good values, this was in the context of a supposed criminal organisation with the incentives to lie discussed above. As a recent article has pointed out, the purpose of making the statement is to convince Mr Big that the target is dependable. Where the boss clearly does not accept a denial, there are clear financial and social incentives to say what the boss wants to hear: "in the inverted moral universe that the operatives have created the confession is in the target's self-interest. … He is motivated to lie to the 'boss', and to lie convincingly."[514]

[450] The authors of that article point out that the prosecution will often at trial draw attention to the number of times that the suspect was exhorted to tell the truth. In this context, however, they say that "the meaning of 'truth' has a shaky connection to its objective essence."[515] This is because an innocent suspect may well be concerned that, without the boss's help, he or she may face a long prison sentence. The target is vulnerable to being manipulated into pretending that the confession is the "truth". The authors' comment that it is:[516]

> … disingenuous to then transport this convoluted version of "truth" into court as if it had the same legal tender usually associated with the term "truth". Although it is the same word, we should not assume it has the same meaning at the trial as it did in the gang's depraved and fictitious fantasy world.

[451] I accept that Mr Wichman was not encouraged to boast about his offending but effectively all the above left Mr Wichman with no choice but to confess, whether

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513 See *Wichman* (HC), above n 334, at [34]. See also William Young J's judgment at [87].
514 Moore, Copeland and Schuller, above n 399, at 387–388.
515 At 388.
516 At 388.

or not he was innocent.[517] Further, confessing to the crime was "costless" in that the organisation's supposed values of honesty and loyalty led Mr Wichman to expect no risk in confessing.[518] Indeed, Scott made explicit assurances of confidentiality.[519] As a result, while his trust may have been misplaced, Mr Wichman had good reason to believe that what he told Scott would not be passed on to the police.[520] I thus agree with the Chief Justice and the Court of Appeal that there was a significant risk that the circumstances in which the confession was made were likely to have adversely affected its reliability.[521] If just the circumstances are taken into account, this would fail the test under 28. There was a significant risk that an innocent person in Mr Wichman's position would falsely confess.

Actual reliability

[452] I now turn to the issue of actual reliability. Any assessment of actual reliability has to be discerned from the other evidence in the case and the statement itself. As indicated above, this is not, however, a mini trial and it is important not to undertake a minute examination of other evidence in the case (particularly if that other evidence is likely to be contested). In cases where it is likely from an examination of the circumstances alone that the reliability of the statement was adversely affected, the indications of reliability in the other evidence and in the statement itself should be clear and obvious.

[453] In this case, Mr Wichman's statement has not led to any new evidence being located. Nor were there any details in Mr Wichman's statement that were known to

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517 The fact that some other people in similar circumstances may have made a choice to hold out is irrelevant: see at [89] of William Young J's judgment. The issue is the possible effect of the inducements and the circumstances generally on a person in Mr Wichman's position and with his characteristics. Further, contrary to what William Young J said at [89] there was every indication that any assistance with Mr Wichman's possible prosecution depended on an admission of guilt.

518 See the structural factors that may lead to false confessions detailed above at [398]. These are that interrogation is a guilt presumptive process and "Milgramesque" in nature due to the fact that suspects are isolated, confronted by an authority figure, and led to believe that confession serves their personal self-interest better than denial.

519 For example, Scott said "[n]o-one will ever hear anything from me" and went on to say "[b]etween ... you and me ... this is where it stops for me".

520 See above at [376]–[377].

521 I therefore largely agree with the Chief Justice's analysis of the interview with Scott: see her judgment at [294]–[295] and [300]–[306]. As a result, it follows that I disagree with William Young J's view of the circumstances: see his judgment at [86]–[87] and [92].

the police but which had not previously been disclosed to Mr Wichman.[522] It is significant, however, that this was not a case where there was any uncertainty as to what had happened to the baby and any issue as to the identity of the perpetrator. Mr Wichman had already admitted the shaking in his police statements. The only difference in the statement to Scott was the timing of the shaking, meaning that the apnoea would have been as a result of the shaking rather than the shaking being a response to the apnoea. The strength of the shaking (T's head flopping around) remained the same.

[454] The version of the March incident given to Scott accords much more closely with the medical evidence than his earlier account to the police of shaking in the course of a resuscitation attempt. This is not decisive, given that Mr Wichman was aware of the medical evidence. Indeed, he was challenged with the medical evidence by Scott and so could have moulded his story to fit in with that evidence (when it was clear his earlier version of the incident was not accepted as truthful by Scott).

[455] It is significant, however, as the Crown points out, that the admission to Scott of the earlier shaking occurred before the change of account with regard to the timing of the March shaking.[523] This adds to the statement's reliability. If he was indeed innocent of the earlier abuse, Mr Wichman could have continued to deny the earlier shaking or blamed it on another caregiver.[524] Instead, he said (before he changed his account of the March incident), that he had shaken her because she would not stop crying. He then admitted that this was the same reason he shook T in March. That T had been unsettled and crying was consistent with Mr Wichman's partner's evidence.[525] Further, while to be approached with caution,[526] I agree with

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522 One possible exception might be the explanation for the shaking – that T was crying. But that would have been an obvious reason for the shaking and Mr Wichman had been asked to comment on his partner's evidence about T crying during his official police interviews.

523 See above at [379].

524 I accept nevertheless that Mr Wichman, for the reasons outlined above, could have considered these answers unlikely to have convinced Scott he was telling the truth.

525 However, as noted above at [366] and n 339, Mr Wichman denied that T had been crying on the evening of 4 March.

526 See above at [394].

Collins J that Mr Wichman's emotional reaction during the interview with Scott reinforces the view that the statement is reliable enough to go to the jury.[527]

[456] In my view, even approaching the matter with great caution, it has been shown that the circumstances in which the statement was made did not in fact adversely affect its reliability. The statement is reliable enough to go before the jury. My conclusion would, however, have been different had Mr Wichman not made the earlier statements to the police admitting shaking T in March.[528]

Conclusion

[457] For all of the above reasons, I do not consider that Mr Wichman's statement to Scott should be excluded under s 28. Because the circumstances (considered alone) were such as to raise a real risk of a false confession, however, careful instructions would need to be given to the jury pursuant to s 122 of the Evidence Act, should the statement not be excluded under s 30. The circumstances in which the confession was made still raise reliability issues that would have to be considered by the jury. I discuss possible directions after discussing s 8(1)(a) below.

Section 30

[458] Section 30 applies to all evidence, including defendants' statements offered by the prosecution under s 27. Under s 30(5)(c), evidence is improperly obtained if it is found, on the balance of probabilities, to have been obtained unfairly.[529] Section 30(6) provides that, without limiting s 30(5)(c), in deciding if a statement obtained by a member of the police was obtained unfairly, the judge must take into account the "guidelines set out in practice notes on that subject issued by the Chief Justice". A practice note on police questioning was issued on 16 July 2007.[530]

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527 William Young J also makes this point in his judgment at [92].

528 And it is to be noted that Mr Wichman's first two statements to the police in March 2009 were made before the receipt of the medical report.

529 This replaced the old common law fairness jurisdiction. Under s 30(5)(a) and (b) evidence is also improperly obtained where it was obtained in consequence of a breach of an enactment or rule of law by a person to whom s 3 of the New Zealand Bill of Rights Act 1990 applies, or in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution.

530 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297 [Practice Note].

[459] Evidence that is improperly obtained may nonetheless be admissible. The judge must determine "whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice".[531] A non-exhaustive list of factors that may be taken into account in that balancing process are set out in s 30(3). Importantly for this case, the "nature and quality of the improperly obtained evidence" is included in this list.

The High Court judgment

[460] Collins J had a number of misgivings with regard to the Mr Big scenario technique.[532] He considered that it circumvented "police obligations to warn a suspect before they are questioned about their involvement in serious criminal offending," as well as the "need for police to ensure a suspect can exercise their right to legal representation".[533] In his view ordinary New Zealanders may consider it unfair to use the statement when it was "made in circumstances far removed from those where Mr Wichman might expect his statement to have evidentiary consequences".[534] Finally, the technique showed the suspect's apparent willingness to engage in serious criminal offending. The Judge said that he was concerned that a jury may draw adverse inferences from this.[535]

[461] Had it not been for the decision by the Court of Appeal in *Cameron*,[536] Collins J would have decided that the Mr Big scenario technique is unfair "because ... an ordinary New Zealander properly informed of all relevant circumstances would not expect the police to engage in lies, deception and blatantly misleading conduct of the kind that occurred in this case".[537] However, because of *Cameron* and the

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531 Section 30(2)(b). The old common law rule was an exclusionary one. This means, as the Law Commission pointed out, caution must be exercised when reviewing old cases given the different nature of the rule: Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 116.

532 *Wichman* (HC), above n 334, at [122].

533 At [122].

534 At [122].

535 At [122].

536 See above at n 330.

537 *Wichman* (HC), above n 334, at [124]. The test was taken from *R v Moresi (No 2)* (1996) 14 CRNZ 322 (HC) and *R v Roper* [2012] NZHC 1855 at [27] per Baragwanath and Dobson J, respectively. While that test can be useful when considering whether evidence is obtained unfairly, it cannot be the sole test for unfairness. This is for three reasons. First, it is inherently

approach of the courts in Canada and Australia, Collins J was "driven to the conclusion that the scenario evidence in itself is not an unfair method of obtaining admissions".[538] Even if he had been able to conclude that the evidence was unfairly obtained, however, he would have allowed the evidence to be admitted pursuant to the balancing test in s 30.[539]

The Court of Appeal judgment

[462] Although accepting that statements obtained through the scenario technique would not always be unfairly obtained, the Court of Appeal concluded that Mr Wichman's confession was unfairly obtained, given the "nature and scale of the technique used"[540] and "having regard to the characteristics of the suspect".[541] A number of features of the technique caused particular concern to the Court,[542] including Mr Wichman's understanding that confession would be both costless and beneficial, that he was isolated and subjected to the power and authority of the boss, and the fact that the technique was used to circumvent his rights.

[463] The Court said that normally courts would not intervene where a suspect has previously exercised a right to counsel and then speaks voluntarily to a person, taking the risk that the person may inform the police. However, the courts may intervene where "the police, knowing that the suspect has exercised his right to silence, use an undercover officer to interrogate or otherwise actively elicit information".[543] The Court relied on *R v Barlow* for that proposition.[544] Further, the Court considered that the question of whether a non-custodial interrogation is unfair

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difficult to gauge the views of a "diverse, pluralistic society whose members hold divergent views": *R v Labaye* 2005 SCC 80, [2005] 3 SCR 728 at [18]. Secondly, it may also be difficult to form such a view given the community might not know about or have fully considered all of the aspects of the conduct at issue: *R v Labaye* at [18]. Thirdly, it should be the Courts, not the public, setting standards as to police conduct; this was the original purpose of the Judges' Rules and the Practice Note. I accept that the comments in *R v Labaye* were made in the context of interpreting the concept of "indecency" with respect to the criminal law but, such criticisms are applicable to other vague standards derived from hypothetical community expectations or views.

538 *Wichman* (HC), above n 334, at [123].

539 At [132].

540 The Crown criticised the Court of Appeal's reliance on this factor. The majority in *R v Hart*, above n 407, at [102] did, however, identify "the number of interactions between the police and the accused" as a relevant factor in assessing the probative value of a confession.

541 *Wichman* (CA), above n 335, at [64]–[65].

542 At [47]–[50].

543 At [68].

544 At [69]. See *R v Barlow* (1995) 14 CRNZ 9 (CA).

for the purposes of s 30 may be informed by considering whether the resulting confession was involuntary or unreliable.[545]

[464] As to the s 30 balancing test, the Court considered the factors favouring admission included that homicide is serious (even with mitigating circumstances), that the technique was used as a last resort, that no express right was breached and that the police believed they were entitled to act in this way.[546] These factors were, in the Court's view, outweighed by the "degree of unfairness, the risk of unreliability and the element of undermining rights".[547] The statement was therefore inadmissible.

Issues

[465] I propose to examine first whether the Court of Appeal was correct to hold that there had been an undermining of Mr Wichman's rights. After that, I discuss the Practice Note issued by the Chief Justice on 16 July 2007.[548] I then discuss the scope of s 30 and consider a number of factors relevant to deciding whether the statement from Mr Wichman was unfairly obtained, including whether the Court of Appeal was correct to consider reliability under s 30. After this, I apply the balancing test. I finish with some comments on the future of Mr Big operations in New Zealand.

Undermining of rights

[466] The Crown submits that the Court of Appeal wrongly concluded that the police had acted deliberately to evade Mr Wichman's rights. In particular, it is submitted that the Court was wrong to undertake an elicitation analysis. The Crown submits that the Bill of Rights was not engaged as Mr Wichman was not detained

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545 *Wichman* (CA), above n 335, at [73].
546 At [79].
547 At [83].
548 Practice Note, above n 530.

and, unlike in *Barlow*, had never been arrested and released.[549] Further, the Court of Appeal accepted that the Practice Note was not engaged.[550]

[467] I agree that Mr Wichman was not detained during his interview with Scott. While it was true that he was deliberately isolated in Dunedin, he must have known that he was free to leave the hotel room, Scott having been at pains to stress that Mr Wichman could leave at any time.[551] Further, Mr Wichman had never been arrested or detained in the course of the earlier investigation. This means that I agree that the Court of Appeal's apparent reliance on *Barlow* was misplaced.[552] Equally, this case may be distinguished from *R v Kumar*.[553] In that case this Court approved a test of active elicitation but in the context of an undercover operation conducted while Mr Kumar was in custody on a murder charge.

[468] It is not necessary for me to discuss whether the Court of Appeal was right to develop the law to extend the elicitation analysis pre-detention in a case where it was accepted that the Practice Note was not engaged because, as discussed below, I consider that there has been a breach of the Practice Note. However, where, as here, a statute incorporates and references a prior common law concept, the intent must be to allow the continued development of the law.[554] Indeed, the Practice Note explicitly recognises that the law may continue to develop.[555] It is also clear from s 30(6) of the Evidence Act that the Practice Note is not a limit on s 30(5)(c) but merely one consideration.

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549 New Zealand Bill of Rights Act, s 23.

550 The Court of Appeal said "It is not in dispute for our purposes that the ... Practice Note on Police Questioning [was] not engaged; before the appellant made his admissions the police lacked sufficient evidence to charge him": *Wichman* (CA), above n 335, at n 8. In the High Court, Collins J said that the Practice Note was not engaged because the police did not have sufficient evidence to charge Mr Wichman and because he was not in custody: *Wichman* (HC), above n 334, at [129].

551 While there were major incentives to stay and some practical difficulties in leaving, these factors do not mean that Mr Wichman was detained.

552 See above at [463].

553 *R v Kumar* [2015] NZSC 124.

554 See *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [17] where Elias CJ, McGrath and Glazebrook JJ said "[u]nless a development of the common law would be inconsistent with the statute, Parliament in referring to common law concepts is to be taken to expect the common law to continue to develop to meet fresh facts and changing perceptions of what justice requires".

555 See below at [469].

The Practice Note

[469] The Practice Note says that it restates the former Judges' Rules with some developments and that it was not intended to change existing caselaw on the application of the Judges' Rules in New Zealand (apart from the developments noted). The old Judges' Rules were "laid down as rules of guidance on matters of principle; they are not rules of law and are not to be construed strictly, but police officers are expected to conform to their spirit".[556] Given that the Practice Note was not intended to change existing case law on the application of the Judges' Rules in New Zealand, the same approach must apply when considering the Practice Note.

[470] The first two rules in the Practice Note are: [557]

> 1. A member of the police investigating an offence may ask questions of any person from whom it is thought that useful information may be obtained, whether or not that person is a suspect, but must not suggest that it is compulsory for the person questioned to answer.
>
> 2. Whenever a member of the police has sufficient evidence to charge a person with an offence or whenever a member of the police seeks to question a person in custody, that person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:
>
> (i) that the person has the right to refrain from making any statement and to remain silent[.]
>
> (ii) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme.
>
> (iii) that anything said by the person will be recorded and may be given in evidence.

[471] The Practice Note provides that any questions of a person in custody or in respect of whom there is sufficient evidence to lay a charge must not amount to

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[556] FB Adams and others (eds) *Criminal Law and Practice in New Zealand* (Sweet & Maxwell (NZ) Ltd, Wellington, 1964) at 696, citing *The King v Voisin* [1918] 1 KB 531 (CA); *R v Wattam* (1952) 36 Cr App R 72 (Crim App); and *R v May* (1952) 36 Cr App R 91 (Crim App). Similarly, the Court of Appeal in *R v Rogers* [1979] 1 NZLR 307 (CA) at 314 said that the question is not whether there has been a "literal or technical breach but whether the spirit of the rules has been complied with".

[557] It was not alleged in the courts below or before us that rule 2 was engaged. However, in this Court Mr Paino did argue that there was a breach of rule 1.

cross-examination.[558] It also states that, whenever a person is questioned in such circumstances about statements made by others or other evidence, the substance of the statements or the nature of the evidence must be fairly explained.[559] The final rule is that any statement made should preferably be recorded by video recording and that the person making the statement must be given an opportunity to review the tape or written statement to correct any errors or add anything further.[560]

[472] I will first discuss whether the Practice Note applies to undercover officers and then examine some of the reasons William Young J considers that what he terms a "strict avoidance" approach is not appropriate.[561] The next issue is whether there was sufficient evidence to charge Mr Wichman and thus whether rule 2 was breached. I then discuss rules 3, 4 and 5. Finally, I examine whether rule 1 was breached.

Undercover officers and the Practice Note

[473] I consider that undercover officers are bound by the Practice Note. This is clear because of:

(a) the wording of the Practice Note;

(b) the need to uphold the fundamental values of our criminal justice system; and

(c) consistency with overseas authority.

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558 Rule 3.

559 Rule 4.

560 Rule 5.

561 See at [108] of his judgment. William Young J defines the "strict avoidance approach" as where the "use of the Mr Big technique is an improper avoidance of the rules which govern police interrogation and objectionable on that score". I do, however, note that William Young J accepts that the Practice Note is not irrelevant, and that deliberate circumvention of the Practice Note, even using undercover officers, may well result in evidence being unfairly obtained: see at [112]–[113].

[474] The Practice Note states that it applies to the police. A police officer remains a member of the police whether acting undercover or not.[562] The wording of the Practice Note thus means that the Practice Note applies to undercover officers.[563]

[475] The Judges' Rules and the Practice Note (in particular rule 2) reflect and reinforce fundamental values of our criminal justice system: the privilege against self-incrimination[564] and the "golden thread" running through the "web" of our criminal law that it is for the prosecution to prove guilt.[565] The Judges' Rules have long been utilised by the courts to supervise police conduct. The new manifestation of the Judges' Rules (the Practice Note) has now been given explicit legislative recognition in s 30(6). The fact that not every breach of the Practice Note will result in evidence being unfairly obtained does not mean that the police are not required to comply with the requirements of the Practice Note.

[476] It would be most unsatisfactory if the fundamental protections in the Practice Note could be undermined by a police officer removing his or her uniform and pretending not to be a police officer. To do so would make such rights and protections illusory. If it is unacceptable to circumvent the protection under the Bill of Rights by this device, as this Court held in *Kumar*,[566] it should be equally unacceptable with regard to a person's rights under the Practice Note. To hold otherwise would essentially constitute adherence to the Practice Note voluntary. The courts cannot and should not countenance such a result.[567]

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562 A similar comment was made by the Chief Justice in *R v Kumar*, above n 553, at [147].

563 At [111] of his judgment, William Young J cites *R v Jelen* (1989) 90 Cr App R 456 (CA) where the Court stated the English and Wales codes of practice only apply post detention. However, *Jelen* is not in accordance with established authority in England and Wales. It follows that I do not accept William Young J's suggested rationale for the Judges Rules (and therefore the Practice Note) at [102]–[103] of his reasons.

564 See below at [504].

565 *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481 where the House of Lords said "[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt".

566 *R v Kumar*, above n 553, at [62].

567 A similar point was made by Helman J with whom Fitzgerald P agreed, in *Swaffield v R* (1996) 88 A Crim R 98 (QCA) at 118 where it was said that "the requirements of the Judges' Rules could be avoided by the simple expedient of the investigating police officer's assuming a suitable disguise and then proceeding to interrogate the suspect. ... To approve of, or to turn a blind eye to their circumvention by a crude evasion would undermine the authority of the Rules, and thus an accused person's right to silence, to an unacceptable extent". The High Court decision in this case is discussed below at [480]–[482].

[477] Indeed, such an approach would mean New Zealand would be out of line with other jurisdictions where there are similar instruments.[568] In England and Wales codes of practice have been issued under the Police and Criminal Evidence Act 1984. Code of Practice C (dealing with the detention, treatment and questioning of persons by police officers) replaced the Judges' Rules. In *R v Bryce*[569] it was held that the Code applies to undercover officers. The Court of Appeal of England and Wales in that case endorsed its earlier obiter comment in *Regina v Christou* that "[i]t would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the code and with the effect of circumventing it".[570]

[478] The case of *R v Bow Street Magistrates' Court, ex parte Proulx* is also relevant.[571] In that case, the accused was suspected of murdering a woman in Canada. He had moved to England. In a Mr Big-type scenario operation, the Royal Canadian Mounted Police, together with the English police, undertook an undercover operation to extract a confession. While most of the judgement was concerned with extradition,[572] after considering numerous authorities such as *Bryce*, Mance LJ made an important obiter observation:[573]

> In the light of previous authority in this court, and in view of the nature and object of Operation Implore, I would, if the issue under s.78 related to a killing in this country and fell to be decided in a purely domestic context, expect the respondents to face very considerable difficulty in seeking to uphold a first instance decision which had admitted the applicant's

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568 Canada is the exception, having no equivalent instrument.

569 *R v Bryce* [1992] 95 Cr App R 320 (CA).

570 *Regina v Christou* [1992] QB 979 (CA) at 991. See also *Regina v Whiteley* [2005] EWCA Crim 699 at [12]; and *R v Smurthwaite* (1994) 98 Cr App R 437 (CA) at 441 where the Court of Appeal said that the issue in "deciding whether to admit an undercover officer's evidence, is whether he has abused his role to ask questions which ought properly to have been asked as a police officer and in accordance with the Codes". See also *R v H* [1987] Crim LR 47.

571 *R v Bow Street Magistrates' Court, ex parte Proulx* [2001] 1 All ER 57 (QB) at [75]. Newman J agreed with Lord Mance's judgment in its entirety.

572 The position taken in *Proulx* reflects the need for international comity. Compare William Young J's judgment, at [72], where he says that *Proulx* shows that "reasonable minds may differ" on the legitimacy of certain police tactics. International comity in the extradition context means that legitimate criminal justice systems might protect rights in different ways. For example, in Canada, unlike in England and Wales, a caution is only required to be administered on detention. It must be remembered too that, as a result of the recent decision in *Hart*, above n 407, Mr Big operations are more circumscribed in Canada.

573 At [75]. In New Zealand, admission of evidence is a question of law and not a discretion: see *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49]. As a result, the Court's comments in *Proulx* about the "Wednesbury approach to appellate review" are not applicable to New Zealand.

> confessions. I say this despite the margin allowed to such a court in a domestic context under the Wednesbury approach to appellate review.

[479] In Hong Kong, in *Secretary for Justice v Lam*,[574] the Court of Final Appeal set down guidelines as to when undercover operations would lead to the exclusion of evidence because of breaches of the Secretary for Security's rules and directions, which replaced the Judges' Rules.[575] It differentiated those cases where an undercover officer plays a passive role and hears or overhears a confession; in these cases the confession has been volunteered freely without interrogation.[576] However, the Court went on to say that, if an officer plays an active role in procuring the confession, this may engage the residual discretion to exclude the evidence. This is because, if the operation were not undercover, "the suspect would have to be cautioned reminding him of his right of silence and enabling him to make a choice whether or not to speak".[577] The Court went on to say that the discretion will likely be exercised where the officer actually questions a suspect in a manner that amounts to an interrogation.[578]

[480] The issue of the applicability of the Judges' Rules to statements made to undercover police officers pre-charge and pre-detention was dealt with by the High Court of Australia in *R v Swaffield.*[579] The appeal concerned two respondents, Messrs Swaffield and Pavic, who had made incriminating statements to an undercover officer and a police agent, respectively. Mr Swaffield objected to the

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574 *Secretary for Justice v Lam* (2000) 3 HKCFAR 168 (HKCFA).

575 At 178. This was not a Mr Big operation. However, it did involve a police agent, acting as a senior gang member and under the instructions of the relevant state agency, having numerous recorded phone conversations and interviews with the respondents in which they made a number of incriminating statements and confessions.

576 At 181, citing the cases of *R v Keeton* (1970) 54 Cr App R 267(CA); and *HKSAR v Ng Wai Man* [1998] 3 HKC 103.

577 *Secretary for Justice v Lam*, above n 574, at 181. The Court contrasted this with the situation where the undercover officer merely provided an opportunity for the suspect to speak.

578 At 181. However, the Court did not apply these guidelines to the facts of the case. The Court did not have the transcripts of the 39 tapes before it and thus it said it "[was] not possible for the Court to express a satisfactory view as to how the Trial Judge should have exercised his residual discretion": at 176. Once sent back, the Trial Judge exercised his discretion to exclude the evidence: *HKSAR v Lam* [2001] HKDC 222, [2001] 2 HKLRD 557 at [65].

579 *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159. Mr Swaffield was, prior to the admissions in question, charged and discharged after a committal hearing due to a lack of evidence with regards to arson charges. The police operation targeting Mr Swaffield was in respect of drug supplying; however, the relevant admissions were in relation to the arson offence. Mr Pavic was from Victoria and this case was before Victoria adopted the Uniform evidence laws. The cases were consolidated and heard together for the purposes of the appeal to the High Court of Australia.

statements being admitted on the basis of unfairness and a disregard of the Judges' Rules, which required a caution to have been administered to him before questioning. Mr Pavic claimed that it would be unfair to admit the evidence but did not rely on the Judges' Rules.[580]

[481] The majority of the High Court held that Mr Swaffield's admissions "were elicited by an undercover police officer, in clear breach of Swaffield's right to choose whether or not to speak".[581] By contrast, when considering Mr Pavic's admissions (in which breach of the Judges' Rules was not argued), the High Court did not disturb the trial Judge's discretion to admit the evidence.[582]

[482] William Young J accepts that *Swaffield* does not seem easily reconcilable with the High Court's decision in *Tofilau*, which upheld the admissibility of evidence arising from a Mr Big operation.[583] The difference in result does not, as William Young J suggests, seem to be explained by the approach to appellate review, with deference being given to the decision of the trial judge. In *Swaffield* the Supreme Court of Queensland, Court of Appeal had in fact overturned the trial judge's decision and that was upheld by the High Court. The difference in result may, however, be explained by there not being enough evidence (prior to the confessions) to engage the Judges' Rules in the case of the *Tofilau* defendants (and Mr Pavic). Certainly, the High Court in *Tofilau* was primarily considering the voluntariness rule. One defendant only in *Tofilau*, like Mr Pavic, argued exclusion under discretionary principles and none of the defendants invoked the Judges' Rules.

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580 See at [99].

581 At [98] per Toohey, Gaudron and Gummow JJ. In coming to that conclusion Toohey, Gaudron and Gummow JJ said that there "can be no doubt" that a police officer had, pursuant to rule 2, "made up his mind to charge a person with a crime". This was because Swaffield "had been charged ... just under a year before the conversation with [the police officer]": at [94]–[95]. However, as noted above at n 579, it appears that, at the time of the conversation with the undercover officer, Mr Swaffield had been discharged. Brennan CJ would have dismissed both appeals: at [37]. Kirby J agreed that, due to active elicitation, Mr Swaffield's statements should have been excluded but would also have excluded Mr Pavic's statements on the basis of the active elicitation test (see [157]–[164]).

582 See [103]. As stated above at n 573, in New Zealand, admission of evidence is a question of law and not a discretion.

583 *Tofilau*, above n 438, at [43]. The case in *Tofilau* was prior to and without reference to the Victorian Evidence Act 2008.

[483] The Crown criticised the Court of Appeal in this case for using an elicitation analysis in cases where the suspect had never been detained. It is clear from the above cases that an elicitation analysis has been used in pre-detention situations overseas where the Judges' Rules (or their equivalent) apply, even when undercover officers are involved. The reasoning in those cases is equally applicable in New Zealand, although the need for the police to caution arises at an earlier stage in England and Wales and Hong Kong (suspicion) than under the Practice Note (sufficient evidence to charge).[584]

The contrary view

[484] In rejecting what he calls the strict avoidance approach, William Young J says that, had the Practice Note been intended to apply to undercover officers, it would have addressed in some detail the circumstances in which a caution is required.[585] In fact, the Practice Note does already contain limitations – it only applies where a person has been "invited to make a statement or answer questions".[586] This would not apply in most undercover operations. It is also significant that, in most normal undercover operations, there is not the degree of control that is the very essence of Mr Big operations.[587]

[485] William Young J refers to comments in *R v Meyers*[588] to suggest that a different analysis, to that discussed above in the overseas cases, applied in New Zealand under the Judges' Rules and that this should be carried over to the Practice Note.[589] I do not agree. It is true that the Court in *Meyers* said that arrest, release on bail and an arranged interview with an undercover police officer is not

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584 The Police and Criminal Evidence Act 1984 Codes and the Hong Kong Secretary Security's rules and directions mirror the 1964 Judges' Rules, which, as William Young J explains at [28] were never adopted in New Zealand.

585 See William Young J's judgment at [106].

586 Practice Note, above n 530, rule 2. This effectively means there must be active elicitation of the statement by the police, as in the cases discussed above.

587 This point is made by Moore, Copeland and Schuller, above n 399, at 360. This also explains the result in *Christou*, above n 570, at 991 where the opportunity for statements to be made was given but the questions and conduct of the undercover police officers did not fall foul of the relevant Code of Conduct. The Court agreed with the lower Court's approach that the questions and comments from the undercover officers were for the most part simply those necessary to conduct the undercover operation and maintain their cover. They were not questions about the offence.

588 *R v Meyers* (1985) 1 CRNZ 656 (CA). This case concerned a person released on bail so would now be covered by *Barlow*, above n 544, in any event.

589 See William Young J's judgment at [104].

directly within the contemplation of the Judges' Rules and that the Rules provided little assistance in that case given that the undercover officer was not a person apparently in authority.[590] However, it had been held by the District Court Judge that there had been no elicitation of the confession by the undercover officer and no prior intent to extract admissions by trickery; instead, the confession came out "more by chance or accident as it were".[591] The Court of Appeal left open the question that arises in Mr Wichman's case of whether, if there had been a prior intent to extract admissions by trickery, the case could have been validly distinguished from the "planted listener" type of case and the evidence therefore excluded.[592]

[486] The Court of Appeal returned to this topic in *R v Williams*.[593] In that case, an individual agreed to be bugged by the police and converse with the appellant. The conversations included incriminating statements. In considering whether the evidence was obtained unfairly, the Court of Appeal referenced *Meyers* and the point left open by the Court in that case. The Court held that there was no need for a caution but only because there was insufficient evidence to engage rule 2 and the requirement for a caution. It was implicit in the Court of Appeal's approach in *Williams* that the Judges' Rules would have applied to the police agent had there been enough evidence to engage the need for a caution. If the Rules would have applied to police agents, then it follows that they would also have applied to undercover officers.

[487] I do not consider either, contrary to what the Court of Appeal said in the second *Cameron* decision, that there is an analogy between the cases where a complainant telephones a suspect at the instance of the police.[594] Those cases did

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590 At 657. As an aside, in my view this was wrong. It appears that in *R v Meyers*, above n 588, the Court conflated the rationale for the voluntariness rule and the Judges' Rules. Whereas the former is concerned with conduct by persons who a suspect subjectively views as a person in authority, the latter is concerned with proper police conduct.

591 *R v Meyers*, above n 588, at 657.

592 At 657–8. William Young J says at [104] that the approach taken in *Meyers* is consistent with that taken in *Christou*, above n 570. I agree but that is because, in *Christou*, the situation was that of affording an occasion to confess not eliciting a confession. However, as stated above at [477], the Court in *Christou* provided a caveat in situations where there was active elicitation and this was picked up by the Court in *Bryce*, above n 569. This point was also left open in *R v Meyers*, above n 588.

593 *R v Williams* (1990) 7 CRNZ 378 (CA).

594 *Cameron* (Post-Trial), above n 330, at [42].

not involve the complainant acting as an agent of the police and certainly did not involve the elaborate false reality created by the police in this case.[595]

[488] Finally, I address the issue of whether undercover operations would be unduly limited if the Practice Note is held to apply. As noted above, rule 2 of the Practice Note only applies where a person is being invited to make a statement or to answer questions. Thus, where there is not a functional equivalent of an interrogation,[596] there is no need to caution and any admission would not be unfairly obtained, at least on the grounds of breach of the Practice Note. Normal undercover operations, unlike the operation in this case, are not designed with a view to eliciting a confession through conducting what is effectively a police interview. Normal undercover operations are designed to gather evidence of wrongdoing.[597] I thus do not consider that normal undercover operations will be unduly affected.

[489] Even if undercover operations would be adversely affected, however, this is a function of the Practice Note and the choice made as to the time at which rights with regard to cautions arise: in New Zealand when there is sufficient evidence to charge a person. As indicated above, the courts should not be a party to attempts to subvert those rights and protections. To do so would be to value pragmatism over principle and the law. The fundamental protections enshrined in law, as the Chief Justice says, guard against the risk of wrongful conviction and abuse of criminal process.[598]

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595 See for example *The Queen v Ahamat* CA143/00, 19 June 2000 at [14]; *R v Ross* [2007] 2 NZLR 467 (CA); and *K (CA 106/2013) v R* [2013] NZCA 430.

596 *R v Kumar*, above n 553, at [62] where the majority of this Court stated "An undercover officer is entitled to engage a detainee in conversation. But he or she may not conduct the functional equivalent of an interrogation". This is similar to the approach taken in the English, Australian and Hong Kong cases discussed above at [477]–[483] and by the Supreme Court of Canada in *R v Hebert* [1990] 2 SCR 151 (post-detention). In distinguishing cases of mere covert surveillance from cases of infiltration, befriending and questioning, Professor Ashworth states that the latter "may be regarded as close to a 'trick about rights', in the sense that they are designed to bypass all the safeguards relating to interviews by police officers. Unlike cases of surveillance, there is a positive input from a police officer in this type of case, and that may bring the exchange within the definition of an interview and the attendant protections": Andrew Ashworth "Should the Police be Allowed to Use Deceptive Practices?" (1998) 114 LQR 108 at 134.

597 See the comment of Karakatsanis J in *R v Hart*, above n 407, at [216] where she said "[u]ndercover officers usually role-play within existing circumstances to observe suspects and *gather* evidence — not to *generate* confessions".

598 See the Chief Justice's judgment at [195] and [307].

Those rights and protections should not be rendered nugatory through police deception.[599]

[490] I accept that the line between undercover operations in which incriminating statements are passively obtained and those that are actively elicited (contrary to rule 2) may not always be one that can be drawn easily. However, those undercover operations (such as Mr Big operations), the sole purpose of which is to generate a confession, clearly cross the line. If there is sufficient evidence to charge a person, then the person should be charged and the police should not mount a Mr Big operation to coerce a confession in circumstances which avoid the limitations and the protections that the Practice Note would have provided, had the questioning been official.[600]

[491] While not agreeing that the Practice Note applies to undercover officers directly, however, William Young J does accept that a deliberate circumvention of the Practice Note through the use of undercover officers may result in evidence being unfairly obtained. As this is the case, the difference between us largely relates to the application of the Practice Note in this case, rather than one of principle.[601]

Was there sufficient evidence to charge Mr Wichman?

[492] In this case, the Crown submits that there was not sufficient evidence to charge Mr Wichman but accepts that the decision not to prosecute was "finely balanced".[602] The Crown referred to a number of aspects of the evidence including:

(a) Dr Kelly's opinion that T's head injuries could not have occurred during a genuine resuscitative manoeuvre. The injuries could well

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599 While I agree with William Young J (at [118]) that it is hard to differentiate between different types of deception, the issue with the Mr Big technique is not the deception itself. Instead, the issue is the fact that the deception results in the coercing of a confession and the overriding of a suspect's rights.

600 With regard to ordinary undercover operations, where a person confesses to a crime in the course of such an operation, an undercover officer could respond in the manner his or her role would require, as long as there is not the functional equivalent of an interrogation. In my view, the courts would be much slower to find that there was a functional equivalent of an interrogation in an ordinary undercover operation than in an operation, such as the one in *Kumar*, above n 553, where the sole object of the operation was to elicit a confession.

601 See above at n 561 where William Young J's position on the Practice Note is set out.

602 Mr Wichman did not seek to argue at any stage that there was sufficient evidence to charge him before the interview with Scott.

have occurred during a violent shaking, albeit "of the same intensity and severity as child abuse";

(b) the implausibility of Mr Wichman's account that, despite intensive and recent first aid instruction, he shook T violently prior to performing CPR;

(c) the evidence from Mr Wichman's partner that, in the week or so prior to 4 March, T was crying uncontrollably for lengthy spells in the evening and that she was also crying on the evening of 4 March when she left to pick up her parents. Mr Wichman denied this; and

(d) the evidence from Mr Wichman's partner that she woke one night to the sound of T screaming. She heard a loud slapping sound and asked Mr Wichman what was going on. He said he was burping T.[603]

[493] I would add the following points:

(a) T was in Mr Wichman's sole care when the March injuries occurred.[604] The Crown noted in its submissions that this was an unusual aspect of the case compared to many child abuse cases;

(b) in his interview of 11 March 2009 with the police, Mr Wichman admitted shaking T twice with her head unsupported and (at least on the second occasion) to the extent that her head was flopping around. Further, because she (allegedly) did not react, he "hit her in the chest";[605]

(c) it is apparent from the police summary of facts that the training given to Mr Wichman included that a baby should never be shaken; and

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603 In his police interview dated 5 November 2009, when this was put to him, Mr Wichman responded "I don't remember that".

604 From the submissions filed by Mr Wichman, it is not clear whether it would be accepted at trial that only Mr Wichman could have caused the March injuries. No other evidence is, however, pointed to as implicating anyone else.

605 See above at [362].

(d) in his report, Dr Kelly said that he was not aware of any example where head injuries of this kind had occurred as a result of a corroborated resuscitative manoeuvre and that the explanation that shaking had occurred in the course of a resuscitation attempt is often advanced by abusive caregivers.[606]

[494] I accept that there is a difficulty with being able to charge Mr Wichman with inflicting the earlier injuries in that these were not able to be dated and T had multiple caregivers, all of whom it appears would have been left alone with her at some stage.[607] On the other hand, as noted above, T was in Mr Wichman's sole care at the time the fatal injuries were inflicted. Importantly, Mr Wichman also admitted shaking T, albeit, he said, in the course of a resuscitation attempt.[608] Given this and the other evidence set out above, I would have thought that there was sufficient evidence to charge Mr Wichman with manslaughter with regard to T's death.[609] But, as the Court may not have all relevant information before it and the conclusion that there was insufficient evidence to charge Mr Wichman was not challenged before us or in the Courts below, I make no finding on this point.

[495] I assume therefore, as the Crown accepted, that the case was "finely balanced". Applying the spirit of the Practice Note,[610] I do not consider that it was appropriate to make fine distinctions in this case. Mr Wichman had already been interviewed twice with a legal advisor present. On the second occasion he was cautioned. There had been a long period since the last formal interview. Against that background, Mr Wichman should not have been subjected to an interrogation in

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606 In a study of non-accidental head injury in infants under two years (1988–1998), the resuscitation claim was made in six out of 39 cases: Patrick Kelly, Judith MacCormick and Rebecca Strange "Non-accidental head injury in New Zealand: The outcome of referral to statutory authorities" (2009) 33 Child Abuse & Neglect 393 at 396.

607 Given Mr Wichman admitted shaking T on the later occasion in March, a jury satisfied that this was abusive may, however, legitimately have been able to infer that the earlier abuse was also committed by Mr Wichman.

608 In this regard, s 152 of the Crimes Act 1961 may be applicable.

609 Whether there is enough evidence to charge is examined objectively. Despite the original Judges' Rules stating a police officer must caution a person whenever he "made up his mind to charge a person with a crime", this was interpreted objectively. As the Court of Appeal said in *R v Williams*, above n 593, at 383, "[a]lthough ex facie r 2 Judges' Rules indicates a subjective test the Courts approach the matter more objectively by deciding whether the officer had sufficient evidence to justify the making of a charge". See also *R v Rogers* [1979] 1 NZLR 307 (CA) at 314–315; and *R v McLean* CA 449/94, 30 May 1995. The Practice Note changed the wording of the Judges' Rules to reflect the prevailing interpretation of the rule.

610 See above at [469].

the course of a covert operation designed (with substantial inducements) to coerce a confession.[611]

[496] Even if I am wrong and it was legitimate to mount the operation and to decide not to caution because the case was "finely balanced" then, because the case was finely balanced, not much more evidence would have been needed to implicate Mr Wichman and "tip the scales". This must have occurred during the interview with Scott when Mr Wichman said that he had shaken T on a prior occasion.[612] Once Mr Wichman admitted his involvement with the earlier episode, then there was clearly enough to charge with regard to the earlier injuries. Mr Wichman's connection to the earlier injuries would in turn make it easier for a reasonable jury to infer that the fatal injury on March 4 was intentionally inflicted, rather than in the course of a genuine resuscitation attempt. This therefore would have tipped the scales for the March incident as well (assuming there was insufficient evidence to charge before the interview).[613]

[497] At the least, therefore, pursuant to rule 2, a caution should have been administered after Mr Wichman admitted (with some elaboration) to the earlier injuries in the course of the interview with Scott. But the better view is that, in the particular circumstances of this case, the interview should not have been embarked on at all without a caution. These breaches of the Practice Note would be sufficient in themselves to render the evidence unfairly obtained. This result would be consistent with the result in the overseas cases discussed above.

Rules 3, 4 and 5

[498] Rules 3 to 5 in the Practice Note only apply if there was sufficient evidence to charge Mr Wichman and I assume for this part of my discussion that there was. The medical evidence was put to Mr Wichman and fairly explained and thus there was no breach of rule 4. Merely putting the medical evidence to Mr Wichman and

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611 This was also, it seems to me, the conclusion of the Court of Appeal: see *Wichman* (CA), above n 335, at [68]. See also the Chief Justice's comments at [307].

612 See above at [379].

613 I make no definitive finding on the exact point that the caution should have been administered, however, as the Crown has not had the opportunity to make submissions on this point.

asking him to comment would not have constituted cross-examination.[614] However, Scott went further and commented favourably on the medical evidence. He extorted Mr Wichman to tell the truth and made it clear he did not believe Mr Wichman's explanation. This crossed the line into cross-examination, breaching rule 3.[615] The interview was recorded, but only the audio is available.[616] Mr Wichman was given no opportunity to review the tape. There was thus a partial breach of rule 5. If the breach of rule 5 was the only breach of the Practice Note, however, it would not be serious enough to render the statement unfairly obtained. The breach of rule 3 was, however, serious, given the background (including the substantial inducements) against which the interview was conducted.

Was rule 1 of the Practice Note breached?

[499] With regard to rule 1, the Court of Appeal in *R v Rameka* said that the object of this rule is to prevent the police telling a suspect or witness that the person has a legal obligation to answer questions or, in other words, that the police have power to compel the answer to a question.[617]

[500] I doubt that rule 1 only applies where there is a suggestion of a legal obligation to answer. That would be reading words into rule 1, which provides only that the police must not suggest that it is compulsory for the person to answer. In this case, however, I accept that Mr Wichman was told he could leave at any time and that he did not have to answer Scott's questions.

[501] While rule 1 is not directly engaged, I consider that its spirit was. For the reasons already canvassed, in practical terms, Mr Wichman had, in reality, no choice but to answer Scott's questions. This was exacerbated by the fact that the whole purpose of the scenarios had been to place Scott in a position of power over

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614 See above at n 495.

615 While not all leading questions amount to cross-examination (see *Hannigan v R*, above n 495), the manner in which the interview was conducted meant that it crossed the line. As noted above the interview in any event cannot be divorced from the background circumstances.

616 The Crown says that, although it was intended that the interview be filmed, due to technical problems, only the audio is available.

617 *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1 at [29]. It appears that Courtney J took a less rigid approach to rule 1 in *R v PK* [2012] NZHC 1045 at [46].

Mr Wichman and create an aura of deference.[618] If Mr Wichman did not answer Scott's questions in the manner Scott obviously wanted him to do, he would forfeit his place in the organisation, it being clear that this would be the result of Scott viewing him as a liar.[619] Thus he would forego the prospect of the material rewards and companionship that his membership of the organisation promised to bring. Further, and importantly in light of his belief that he was about to be charged with T's death, he would also lose the organisation's help with that charge. In addition, he was (deliberately) isolated in Dunedin and the last scenario had created an air of menace.[620]

Scope of s 30(5)(c)

[502] The inquiry as to whether evidence is unfairly obtained under s 30(5)(c) is not limited to assessing whether there has been a breach of the Practice Note.[621] Section 30(5)(c) was, despite the difference in terminology, intended to encapsulate the common law fairness discretion.[622] Indeed, because it is a threshold (subject to the balancing test) rather than an exclusionary rule, s 30(5)(c) is wider than the old fairness rule which contained the balancing test within it.[623]

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618 I agree with the Court of Appeal that the fact that this scenario involved an undercover police officer being placed in a position of authority and power over Mr Wichman means that it differs from most undercover police operations: see *Wichman* (CA), above n 335, at [48].

619 See above at [381]. In his pre-trial evidence, Mr Wichman also said "I just told him what I thought he wanted to hear so that he would – because I thought he thought I was lying when I told him what really happened you know."

620 See the Chief Justice's comments at [295] of her judgment. Similarly I agree with the Chief Justice, as noted above at n 355, the fact that the group was non-violent might have been designed to attract Mr Wichman.

621 See above at [468]. It is clear from the wording of s 30(6) of the Evidence Act that the Practice Note is not a limit on s 30(5)(c) but merely one consideration.

622 As a result, I disagree with the Court of Appeal's decision in *R v Fan* [2012] NZCA 114, [2012] 3 NZLR 29 at [30]–[31], in which it held that the common law discretion to exclude for unfairness was not fully codified by s 30 and therefore survives outside of s 30 of the Evidence Act. In my view, the common law discretion has been encapsulated and codified in s 30(5)(c), subject to the balancing test conducted separately. This is not to suggest that I necessarily disagree with the analysis in *Fan* as to the unfairness in the particular case, but it would be unfairness (in the sense of evidence being unfairly obtained) under s 30(5)(c) and not the common law.

623 See *Wichman* (HC), above n 334, at [116]. I therefore disagree with the Court of Appeal's rejection of that argument: *Wichman* (CA), above n 335, at [42]. The Chief Justice and I are in agreement on this point: see [325] of her judgment.

[503] The categories of unfairness are not, however, closed[624] and must adapt to changing social conditions, the need to enforce proper standards of official behaviour and the circumstances of the particular case at issue. The common law unfairness rule provided a power of exclusion of evidence even if other rules (such as the voluntariness rule) were met.[625] There is no reason to take a different approach under the Evidence Act. Confessions that are admissible under s 28 can nevertheless be excluded under s 30(5)(c).

Coerced self-incrimination

[504] The Court of Appeal in *Rameka* recognised that, even if rule 1 of the Practice Note is not engaged, a statement can still be unfairly obtained, if it were obtained through undue pressure.[626] It follows from the discussion above on the scope of s 30 that I agree. Section 30(5)(c) can apply to situations where a suspect has been effectively forced to confess. The Law Commission, in its preliminary paper on *Criminal Evidence: Police Questioning* described the protection against coerced self-incrimination as "a fundamental principle underlying the rules about voluntary confessions and the fairness discretion".[627] It also identified, as rationale for the old fairness discretion, failure to comply with standards of acceptable conduct (deterrence)[628] and upholding the integrity of the criminal justice system. [629]

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624 I agree with William Young J's comments at [119] that s 30 allows development of the law on a case by case basis.

625 See Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 83–84 where the Commission said "[t]he fairness discretion may be applied to confessions which are voluntary and reliable (in terms of the test in s 20 of the Evidence Act 1908). Though there is some precedent for the proposition that once the prosecution satisfies the s 20 test the confession is admissible and the discretion cannot be exercised, it seems clear that this is not the current law." The courts could still inquire if the questioner was a person in authority or an agent of the state. This inquiry, however, turned "on the propriety of the situation" and differed from the inquiry under the voluntariness rule.

626 See *Rameka v R*, above n 617, at [29] where in response to the appellant's allegation "that the police made threats and otherwise put pressure on her to answer questions" the Court said "[t]hat may be a basis for evidence being excluded on the basis that it was unfairly obtained, but that allegation has not been made in this case".

627 Law Commission *Criminal Evidence: Police Questioning*, above n 432, at 88.

628 At 90.

629 At 93. This relates to not allowing conduct that may bring the administration of justice into disrepute. It does not focus solely on the interests of the defendant due to the fact that the integrity of the criminal justice system may also suffer when relevant and reliable evidence is excluded, or when offenders are not prosecuted, or are acquitted on what is perceived to be a technicality.

[505] Both the right not to incriminate oneself and the regulation of police conduct were rationale for the voluntariness rule.[630] As is clear from the legislative history, the Law Commission did not wish to abolish the concepts behind the voluntariness rule.[631] It rather considered that its proposed provisions embodied that rule, while removing some of the common law restrictions, such as the requirement for a person in authority.

[506] Inducements to confess breach the principle of self-determination (and the right not to self incriminate) if they effectively remove the choice whether or not to make a statement. They may also not accord with proper police conduct. In this regard, and contrary to William Young J's view,[632] I do not consider that it is relevant that Mr Wichman did not know Scott was a police officer. Section 30 is concerned with the "propriety" or substance of a situation.[633] As already discussed, the whole design of the operation was carefully calibrated at great expense[634] to make Mr Wichman confess and effectively he had no choice but to do so.[635] In this sense therefore, even though he was not detained, the coercive power of the state had been brought to bear on Mr Wichman.[636] A recent article makes a similar point:[637]

> The state's "superior resources and power" are not restricted to the interrogation room or a jail cell. The engineering of a new social world and

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630 The concept of voluntariness was originally only a means of ensuring reliability: Mark A Godsey "Rethinking the Involuntary Confession Rule: Toward a Test for Identifying Compelled Self-Incrimination" (2005) 93 California L Rev 465 at 484. See also *Wigmore*, above n 369, at 350–351. As Gummow and Hayne JJ said in *Tofilau*, above n 438, at [43], however, during the twentieth century there was a "major conceptual shift" in the rationale for this area of law. First, the concept of "self-determination" became important (as emphasised by the Latin maxim *nemo debet prodere se ipsum* – "no one can be required to be his own betrayer") and secondly, there emerged a concern to regulate police conduct by excluding evidence obtained by inappropriate police action.

631 See at [415] above.

632 See his judgment at [101]–[106].

633 See above at n 625. I agree with Kirby J's analysis in *Tofilau*, where he said (albeit in the context of the voluntariness rule), "[t]o limit the class of 'person in authority' to those whom an accused *knows* or *believes* to have lawful authority makes no sense if the reason for the rule is to discourage officials from exploiting hope or fear to procure confessions statements from suspects against their own interest": *Tofilau*, above n 438, at [176].

634 The Crown accepts in its submissions that these types of operations are very expensive.

635 Karakatsanis J (concurring) in *R v Hart*, above n 407, at [213], [216] and [235] drew an analogy with entrapment. I agree with the Chief Justice that Mr Wichman was given the impression he had no choice but to answer the questions and indeed to answer them in a way that would satisfy Scott: see at [305]–[306] of her judgment.

636 Even if the coerced confession could be seen as not being the result of police action, however, it could still be unfairly obtained in my view: see the discussion of the law before the Evidence Act above at n 439.

637 See Moore, Copeland and Schuller, above n 399, at 378. See also at 359 and 384.

> the orchestration of the target's actions for months at a time may constitute, in psychological terms, quintessential "control". The state's agents are not rendered impotent simply because they are pretending *not* to be state agents.

Can reliability be considered under s 30?

[507] The Crown submits that the Court of Appeal should not have considered reliability under s 30(5)(c) as all reliability issues are dealt with under s 28. I do not accept that submission.[638] Section 28 is concerned with the risk of unreliability and whether (as a threshold issue) this risk has eventuated so that the evidence should not go before the jury. Thus, while I accept that the Court of Appeal should have considered the threshold question of reliability under s 28 rather than under s 30, it does not follow that all reliability issues are dealt with under s 28.

[508] As noted above, s 28 is not directly concerned with issues of police conduct. Where the police use a technique such as the Mr Big scenario technique there is, because of material inducements and promises of fixing charges, a significant risk of unreliability. The Courts cannot ignore the risks inherent in the technique, just because on the particular case the confession is reliable enough to go before the jury. That would be to sanction an "ends always justifies the means" analysis.

[509] I acknowledge that the police are very conscious that they need to ensure that official questioning of suspects minimises the risk of false confessions and that such questioning does not undermine the right to choose whether or not to make a statement. Even in the context of the Mr Big scenario technique, the police place limits on how the operations are conducted so that the technique, as employed in New Zealand, is a very mild version of the technique, compared to some of the operations in Canada and Australia.[639]

[510] The Court of Appeal was entitled to consider whether those safeguards went far enough (even if the High Court's conclusion on s 28 was not challenged). I agree with the Court of Appeal that the substantial risk of unreliability inherent in the

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638 It appears that William Young J's view is that reliability issues not dealt with by s 28 are usually a "trial management" problem and addressed through directions: at [70].

639 For example the New Zealand police guidelines require voluntary participation on behalf of the target; secondly, no actual offences are committed; thirdly, the interaction with the public is kept to a minimum; fourthly, no violence or threats of violence are used.

technique is one factor to be considered in deciding whether statements obtained through the Mr Big technique are obtained unfairly. The police should avoid techniques that create a real risk of false confessions (even if they increase the number of true confessions).

[511] Whether Mr Wichman's confession was reliable was also relevant to the balancing test (as the Crown acknowledges). One of the factors to be considered by the Court was "the nature and quality" of the improperly obtained evidence.[640] Given that it had been put in issue by Mr Wichman,[641] the Court of Appeal in this context was entitled to consider that it should examine this issue afresh and that it should not be bound by Collins J's decision under another section (s 28).[642]

Other concerns

[512] Three other aspects of the operation cause me concern. The first is the fact that Mr Wichman, who had no prior involvement in any serious criminal behaviour,[643] was gradually led step-by-step to take part in quite serious offending. This was of course not real offending but Mr Wichman was not aware of this and, while the sale to the "Asian" gang was feigned, the cannabis and firearms involved were real. This could well have had the effect of removing Mr Wichman's inhibitions if confronted with criminal opportunities in the future.[644] It will almost certainly have created resentment against the police on his part and it appears from

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640 Evidence Act, s 30(3)(c).

641 See above at [384].

642 Reliability was argued in the High Court where the Crown had the opportunity to prove reliability. In addition, as discussed above, Mr Wichman had argued issues relating to reliability in the Court of Appeal under s 30.

643 Detective Senior Sergeant Mackie, in his evidence before Collins J, confirmed that Mr Wichman had no history of serious criminal activity and had only "had very minor interactions with the police".

644 See for example, Moore, Copeland and Schuller, above n 399, at 396 where the authors highlight the ethical concerns whereby in Mr Big scenarios "[t]he target is essentially socialized into a life of crime. The state rigs situations where criminal acts are encouraged and reinforced. Outcomes are lucrative, with little or no risk to the target. These contrived scenarios are re-enacted with minor variations over and over again, sometimes for as long as two years. In some cases the operatives also become good friends of the target. As such, they are effective role models. The target learns to be a criminal. Many suspects had not, heretofore, engaged in any criminality, but the routine reinforcement and systematic cultivation of illegal activities may well affect the target's self image and psychological makeup."

Detective Senior Sergeant Miller's logbook records that it has created resentment of the police in Mr Wichman's father.[645]

[513] The second concern is the level of intrusion that operations of this sort can have in a suspect's life. In this case, although Mr Wichman retained his family ties and his work, he was nevertheless drawn into a false friendship with Ben and made to feel better about himself through his association with the organisation. Finding that his friendship with Ben and that his new world was false would have had obvious implications for Mr Wichman's psychological wellbeing.[646]

[514] The third concern is that at least some evidence showing Mr Wichman's willingness to engage in criminal conduct will have to be placed before the jury if he wishes to challenge the reliability of his confession.[647] This risks tainting the perception of him in the eyes of the jury. The dangers[648] of fact-finders inferring guilt from unrelated offences or behaviour has been an underlying rationale for the imposition of restrictions on the prosecution's ability to tender propensity[649] evidence about an accused.[650] As the Supreme Court of Canada warned in *R v Hart*, in Mr Big operations that induce a confession, "[t]he state creates the potent mix of a

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645 For example, Detective Senior Sergeant Miller's logbook records that he had a conversation with Mr Wichman's father two days after Mr Wichman's arrest. Those notes record that Mr Wichman's father was upset, came across "as extremely anti-police" and considered that the police had "set up his son".

646 See for example the case of Jason Dix who, as a suspect in two execution-style killings, was the subject of a 13 month Mr Big operation in Canada. No incriminating statements were made and Mr Dix eventually sued the Crown on numerous grounds, including breach of his privacy rights under the Canadian Charter, malicious prosecution and false imprisonment. He was awarded some CAD $750,000: see *Dix v Canada (Attorney-General)* 2002 ABQB 580, [2003] 1 WWR 436.

647 See *R v Hart*, above n 407. In *Hart*, the majority said at [7] such "evidence sullies the accused's character and, in doing so, carries with it the risk of prejudice. It also creates credibility hurdles that may be difficult to overcome for an accused who chooses to testify." At [203], Karakatsanis J said "… by design, the Mr Big operation creates prejudicial evidence of criminal propensity. The accused must either let the confessions stand or explain that he made it in order to continue his new criminal lifestyle."

648 The empirical research on the point was highlighted by the Law Commission in 1997: see Law Commission *Evidence Law: Character & Credibility* (NZLC PP27, 1997) at [37]–[51].

649 Defined in s 40(1)(a) of the Evidence Act as meaning "evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved".

650 Under s 43(1), the "prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant".

potentially unreliable confession accompanied by prejudicial character evidence".[651] That combination means that the "risk of a wrongful conviction increases accordingly".[652]

Conclusion on fairness

[515] There has been a breach of rules 2, 3 and 5 of the Practice Note, and the spirit of rule 1. In any event, the coercive power of the State was engaged to remove Mr Wichman's choice (in a practical sense because of the inducements offered) whether or not to make admissions. This was done in a way that would not have been possible had the police been acting openly in an official capacity. The techniques used also ran the risk of an unreliable confession and of lowering his inhibitions about engaging in future criminal activity. The operation risked affecting Mr Wichman's psychological well being. Further, at least some prejudicial evidence of Mr Wichman's willingness to engage in criminal conduct will need to be adduced if he wishes to challenge the reliability of the confession. For those reasons I consider that the evidence was unfairly obtained.[653]

[516] I do not consider that a decision that the evidence in Mr Big operations is unfairly obtained would put New Zealand out of line with the jurisdictions to which we compare ourselves.[654] I first make the point that it is for the courts here to set standards for New Zealand. While what occurs overseas may be helpful to consider, it cannot be controlling. In any event, as discussed above, the position in New Zealand would accord with the position in Hong Kong and in England and Wales.

[517] As to the position in Canada and Australia, there is a different legislative context. Canada retains the voluntariness rule and its associated person in authority requirement that has been abolished in New Zealand. In Canada there is no equivalent of the Judges' Rules. The High Court in *Tofilau* was also considering the

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651 *R v Hart*, above n 407, at [91]. See also at [73]–[77] per the majority; and at [165], [172] and [203] per Karakatsanis J.

652 At [8].

653 This would have been Collins J's preferred position and was the position reached by the Court of Appeal.

654 See William Young J's judgment at [130].

voluntariness rule.[655] As noted above, the Australian equivalents of the Judges' Rules were not put in issue.

[518] In any event, the approach I suggest (taking account of the different legislative context) is not that far removed from the new position in Canada under *Hart*. The presumptive inadmissibility in that case was largely because of concerns with reliability, which in New Zealand are dealt with under s 28, but it also took into account concerns about the coerciveness of the technique.[656] Further, the abuse of process test[657] approved in *Hart* contemplates the exclusion of even reliable confessions.[658]

Balancing process

[519] I now turn to the balancing process under s 30(2). The interest in prosecuting crime and the human rights of victims and their relatives, including for redress, must be taken into account.[659] It is relevant that there are real difficulties in prosecuting child abuse cases,[660] although this case was unusual in that T was in Mr Wichman's sole care and he did admit shaking her. There were, however, no other avenues of inquiry left to the police. Finally, there was no new evidence found as a result of the statement and there was little Mr Wichman said that could not have been based on material that had already been disclosed to him by the police during his interviews in 2009. Mr Wichman's statement is sufficiently reliable to go to the jury and the

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655 As noted above at n 579, this was prior to Victoria introducing its Evidence Act 2008 in accordance with Australia's uniform evidence law.

656 See at [115]–[117] of that case.

657 As indicated earlier, this Canadian concept of abuse of process in *Hart* equates with s 30, rather than with the New Zealand concept of abuse of process.

658 Karakatsanis J in *Hart*, above n 407, at [213] sets out ten factors to be taken into account in evaluating Mr Big operations and abuse of process. Those factors would provide useful guidance in New Zealand.

659 See for example, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* GA/Res/40/34 (1985); and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA/Res/60/147 (2005).

660 A 2003 United Kingdom Law Commission report suggests that fewer than one third of cases of child homicide or serious injury reported to the police result in successful prosecution: Law Commission "Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)" (Law Com No 282, 2003) at [2.29]. A New Zealand study suggests a slightly higher rate: 46 per cent of cases were prosecuted, resulting in convictions in 36 per cent: Kelly, MacCormick and Strange, above n 606, at 397.

indications of actual reliability come from independent medical evidence.[661] All the above factors point toward the evidence not being excluded.

[520] In light of the two *Cameron* cases and overseas authority, the police had reason to believe that the scenario technique was lawful and acceptable. While the Court does not know the exact contents of the Crown Solicitor's advice, the advice was sought before embarking on the operation and it can be inferred that nothing in the advice suggested the technique should not be used. This shows that there was no bad faith on the part of the police. A lack of bad faith would usually be a neutral factor in the balancing exercise. The fact that the police were acting on the basis of two Court of Appeal decisions does, however, make this a (mild) factor in favour of the evidence not being excluded.

[521] In my view, the fact that the crimes involved are serious[662] is neutral. As the seriousness of a crime increases so does the public interest in prosecution. On the other hand, where confessions and the principles relating to self-incrimination are involved, the more serious the crime, the more need there is the need for rights to be protected and safeguards to be enforced.[663] As Professor Andrew Ashworth has said:[664]

> … the seriousness argument is often presented as if the rights of the individual suspect remain constant in strength, while the weight of the public interest in crime detection increases as more serious crimes come into question; this neglects the argument that the presumption of innocence should also increase in weight with the seriousness of the crime alleged. On that basis, both sides of the equation may gain in weight, without altering the equilibrium, and the "seriousness of offence" argument leads nowhere.

[522] As to the factors weighing against admissibility, there was a breach of the Practice Note in the ways discussed above and the statement was coerced by the use

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661 In his written submissions, Mr Wichman rejects the Crown's submission that the medical evidence was put to Mr Wichman in his second interview. I disagree. When the medical evidence was put to Mr Wichman he said "I already know all that". When the interviewing Detective attempted to steer the interview towards the events on 4 March 2009, Mr Wichman stated "I've already made a statement about that. I will answer questions but I don't want to go through it all again". Mr Wichman had legal representation at both interviews and, if he wanted to say more, he could have organised to make another formal statement.

662 Albeit not as serious as murder.

663 Similar comments were made by a majority of the Supreme Court in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. See Elias CJ's comments at [65]; Blanchard J at [187]; and Tipping J at [230] and [239].

664 Ashworth, above n 596, at 122.

of State resources. The questioning by Scott, and the background to that questioning would not have been either possible or acceptable in a formal police setting. Further, all this occurred in circumstances that could have had an effect on Mr Wichman's psychological wellbeing, that invaded his personal privacy and risked reducing his future inhibitions about entering criminal activity and engendering a mistrust of the police in him and his family.[665] There was also a risk of a false confession. That risk was not met in this case (at the threshold level), but there are still public policy reasons why the police should not use methods that carry a significant risk of false confessions. There are also the issues associated with prejudicial evidence of a willingness to participate in criminal activity going before the jury.

[523] Weighing all the factors, in my view the exclusion of the statement is, in the particular circumstances of this case, proportionate to the improprieties. These improprieties were significant and related to fundamental rights and protections in our criminal justice system. My conclusion may have been different had Mr Wichman's confession to Scott led to the discovery of new evidence.[666] The "nature and quality" of the evidence[667] would have been much stronger in that case.[668]

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665 If this last factor stood alone it would not weigh heavily. The prejudicial evidence of willingness to engage in criminal activities would primarily be considered under s 8(1)(a) if the confession passed the s 30 balancing test.

666 Although it may be in such a case only the portion of the confession linking to the new evidence should be admitted. See *R v Dally* [1990] 2 NZLR 184 (HC) at 193 where the Court said to find the necessary degree of connection the court may exercise its discretion "to exclude parts of the [improperly obtained] evidence and to admit others capable of establishing a link between the accused and the real evidence". Contrast this with the Privy Council's approach in *Lam Chi-ming v The Queen*, above n 448, which excluded the whole confession in issue, including the portion connecting the accused to the real evidence (the murder weapon).

667 This is one of the considerations in s 30(3). In my view nature and quality of evidence refers to its cogency. It may also refer to the importance of the evidence to the Crown case. In *Hamed*, above n 663, at [201], Blanchard J accepted that, if improperly obtained evidence is reliable and probative evidence of guilt, this favours its admissibility. McGrath J at [276] made similar comments and stated that "the centrality of the evidence to the prosecution also goes to its quality". By contrast, Tipping J stated at [237] that he saw the "nature and quality" of the evidence as being limited to the character of the evidence itself and not concerned with the importance of the evidence to the Crown's case.

668 While I recognise that this could be seen as an "ends justifies the means" approach, consideration of the nature and quality of the evidence has been specifically legislated into the s 30(2) proportionality assessment.

Could the technique be used in the future?

[524] It is true that, if my conclusion on the unfairness of the Mr Big technique had prevailed, this would mean that the technique would probably not be used by the police in the future. This is because the police would likely think it not appropriate to continue to use an unfair technique, even if the balancing test could result in admissibility in the particular case. My view has not, however, prevailed.

[525] I accept that there are arguments that can be made in favour of the use of the technique. It is only used (both in New Zealand and offshore) in cases where the crime is serious[669] and where a conviction is perceived as unlikely absent a confession. While the technique may have resulted in some false confessions in Canada,[670] it has also resulted in true confessions and, in some cases, the discovery of remains, a matter of great importance to relatives.[671] Professor Ashworth has said that, "there remains a rights-based point that a State which authorised the use of deception to investigate some offences which could not otherwise be tackled might be said to be showing greater respect for rights, in general, than it would if it eschewed such methods".[672]

[526] Even if the technique can be justified, there are inherent dangers in its use. Some commentators have therefore suggested the regulation and independent review, oversight or prior authorisation of the use of the Mr Big technique.[673] Whether or not regulation and independent oversight is thought appropriate, I consider that there should be restrictions and limitations on the use of the technique.

[527] The first limitation is that the technique should not be used where that would entail a breach of rule 2 of the Practice Note. As Professor Ashworth has said "tricks about rights", including undermining rights that should be protected (such as those in

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669 I do comment that this case, while serious, may not have reached the level of seriousness one might expect for an operation of this kind to have been launched.

670 See the cases discussed by William Young J at n 21.

671 See for example the Canadian case of *R v Mack* 2014 SCC 58, [2014] 3 SCR 3 and the Australian case of *R v Cowan* [2015] QCA 87.

672 Ashworth, above n 596, at 123.

673 See for example K Puddister and T Riddell "The RCMP's 'Mr. Big' sting operation: A case study in police independence, accountability and oversight" (2012) 55 Can Publ Adm 385 at 400–405. William Young J makes a similar point at [126]–[127] and also highlights some of the issues with undercover operations more generally.

the United Kingdom Codes of Practice and our Practice Note), are wrong and "any attempt to justify it in terms of convicting the factually guilty is constitutionally and morally unsustainable".[674] While restricting the use of the technique, this is just a function of the fact that the police have more freedom at the stage of early investigation. As the adversarial process begins, the police have long been constrained by the need to caution under the Judges' Rules (and now the Practice Note). It is an important aspect of the criminal justice system that all officials in the system (including the police and the courts) respect these safeguards, rights, and protections.[675]

[528] The next limitation, it seems to me, is that the technique should be used as a last resort only. There should be no other avenues of legitimate investigation left. It should also only be used in cases where there is already other independent evidence and arguably only where there is the possibility of finding new evidence to corroborate any confession obtained.[676] The technique should be modified as far as possible to restrict the techniques shown to create the risk of false confession. There should be no violence or overbearing interrogation and the technique should not be used if there are particular vulnerabilities (for example mental illness) or with children or teenagers.[677] In addition, as noted above,[678] the police involved in the operation should not know the details of the crime being investigated.[679]

[529] I agree with William Young J that, where there is an admissibility challenge to evidence obtained through a Mr Big operation, the court should be provided with

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674 Ashworth, above n 596, at 138.

675 I recognise that the New Zealand police do generally have a commitment to upholding these values.

676 Such as the remains of a victim. There is much to be said for Mr Paino's submission that the only time a Mr Big operation can be justified is where there is a good chance of finding new evidence.

677 See the comments of the majority in *R v Hart*, above n 407, at [117] where the majority of the Court referred to particular vulnerabilities such as "mental health problems, substance additions, or youthfulness". As William Young J says at [40] of his judgment, the Canadian police have publicly indicated that the age, education level and economic condition of suspects will be considered before deciding whether to employ the technique, that investigators will strive to obtain confirmatory evidence and that operations will be shorter and better recorded: See Daniel LeBlanc "RCMP to keep 'Mr Big' sting tactic" *The Globe and Mail* (online ed, Toronto, 1 August 2014); and Mike Cabana "RCMP Statement Following the Supreme Court of Canada Decision in the Nelson Hart Case" (31 July 2014) Royal Canadian Mounted Police <rcmp-grc.gc.ca>.

678 See above at n 373.

679 Apart from the Mr Big who conducts the final interview.

details as to why the decision to deploy that operation was made and how the decision was made (including any advice received). The court should also in my view be provided with details of the matters touched on above.

Section 8(a)

[530] I now turn to s 8(a), assuming for this purpose that the evidence is admissible under the s 30 balancing test. Section 8(a) requires consideration of whether the probative value of the evidence is outweighed by the risk that it will have an unfairly prejudicial effect. The probative value of the evidence in this case is high.[680] The main prejudicial effect would be the placing before the jury Mr Wichman's willingness to engage in criminal behaviour.

[531] Mr Wichman submits that a sanitised version of the scenario technique in an agreed statement of facts, as suggested by the Crown, would not be attractive in a trial context. In his submission, the defence would need to expose the scenarios in detail in cross-examination so as to make clear the level of inducements and thus the incentives to lie. Further, he submits that, notwithstanding a judicial direction to the contrary, bad character evidence can be insurmountable.

[532] While accepting that there is an element of prejudice in outlining Mr Wichman's apparently enthusiastic embracing of criminal behaviour, I do not accept that it would be necessary to put detailed evidence of the scenarios before the jury. The tactics used by the undercover officers and the level of inducements would be able to be explored without such details. Further, the type of criminal behaviour in the scenarios is well removed from the trial allegations, which lessens any scope for inappropriate reasoning. There would also be a strong direction from the trial judge not to misuse the evidence. The probative value of the evidence would thus not be outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding.

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[680] Probative value in my view must encompass reliability. A statement of dubious reliability must be less probative than one of obvious reliability.

Jury directions

[533] As the majority take a different view on the admissibility of the evidence in this case, I makes some comments on jury directions. I consider that, as well as a direction on not misusing the evidence of fake criminal offending, there should also be a direction pointing out that there have been documented cases where there have been false confessions which have led to miscarriages of justice and that studies have shown people can rely too heavily on a confession even when there may be circumstances suggesting possible unreliability.[681] The jury should be told to consider carefully whether they can rely on the confession in this case in light of the factors outlined by the defence.[682] Some suggested directions in a recent article are included in the Appendix to this judgment.[683]

Conclusions

Section 28

[534] Once an evidential foundation is raised under s 28(1), the Crown must prove on the balance of probabilities that there is not a significant risk that the circumstances in which a confession was made adversely affected its reliability. One way of proving this is to show that the confession was actually reliable.

[535] The judge is not, however, conducting a mini-trial: the exercise is to assess the contents of the statement and any obvious indications of reliability or unreliability in relation to other aspects of the case and any subsequently discovered evidence.[684] Any finding on actual reliability should normally be made only where there is other clear and independent evidence of reliability. Internal indicators of

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681 See above at [401].

682 An example of the type of directions is given by the Supreme Court of Canada in *R v Mack*, above n 671, at [52]–[59]. Professor Kaiser has criticised the directions postulated in *Mack* as although they identified individual factors that may influence deliberations on reliability, prejudice and abuse, they failed to provide an "overarching consideration of the judicial uncommonness, social setting and psychodynamic of this police-contrived act": see H A Kaiser "*Mack*: Mr. Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak" (2014) 13 CR (7th) 251. As a result of these criticisms, Professor Kaiser suggested some possible content for a standard Mr Big Instruction that pays due regard to the "extraordinary features of the crime boss scenario".

683 This is included by way of example only. Some of the directions would clearly not be applicable in this case and it would be up to the trial judge in the particular case to assess the need for and content of the directions (including the content of a direction as to reliability under s 122).

684 See above at [431]–[436]. See also the discussion above at [402].

apparent reliability (such as emotion, sensory details, and general plausibility) should be treated with caution, given their presence in proved false confessions.[685] The stronger the circumstances pointing to a risk that the confession is unreliable, the stronger the indicators of actual reliability should be.[686]

[536] In this case, although the circumstances raised a significant risk of a false confession, there are sufficient indicators of actual reliability for Mr Wichman's statement to go before the jury.[687]

The Practice Note and undercover officers

[537] The Practice Note applies to undercover officers. A police officer does not cease being a member of the police by going undercover.[688] To hold otherwise would be contrary to the wording of the Practice Note, would effectively render compliance with the Practice Note voluntary and would be inconsistent with fundamental values of our criminal justice system. It would also not accord with overseas authority where similar instruments exist.[689]

The application of the Practice Note

[538] Assuming that the decision not to charge Mr Wichman was finely balanced, in the particular circumstances of this case, the spirit of rule 2 of the Practice Note was breached. A Mr Big operation should not have been embarked on to coerce Mr Wichman into confessing, where the last police interview had been conducted under caution and with his legal advisor present.[690]

[539] Even if it had been legitimate not to caution Mr Wichman at the beginning of the interview with Scott, he should have been cautioned once he admitted to the earlier shaking (with some elaboration of the circumstances). There would at that

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685 See above at [394] and [436].
686 See above at[435].
687 See above at [452]–[457].
688 See above at [473].
689 See above at [474], [476] and [477]. However, as mentioned above at [491], the difference between William Young J's approach and mine is one of application rather than principle.
690 See above at [495]. Rule 2 of the Practice Notice only applies, however, where there is questioning that is the functional equivalent of an interrogation: see above at [488].

point have been sufficient evidence to charge him, both with the earlier shaking and with T's death.[691]

[540] Assuming there was sufficient evidence to charge, rules 3 and 5 were breached.[692] There was also a breach of the spirit of rule 1 of the Practice Note because Mr Wichman was effectively forced to confess through the coercive power of the State.[693]

Section 30

[541] In this case, the inducements offered (material rewards and assistance with any charges) in reality left Mr Wichman with no choice but to confess.[694] Mr Wichman had been placed in that position by the coercive power of the State, with the undercover police officers using techniques to extract a confession which carried major risks of a false confession and which would not have been acceptable had the officers been acting openly in their official capacity.[695]

[542] The technique used also risked removing Mr Wichman's inhibitions in the future if the opportunity for criminal offending arose and it also risked engendering resentment of the police in Mr Wichman and his family, as well as having an effect on his psychological wellbeing.[696] Further, if Mr Wichman wants to challenge the reliability of his confession, it will, at least to some extent be necessary to put before the jury his willingness to engage in criminal conduct. This risks tainting the jury's perception of him.[697]

[543] For all the above reasons, including the breaches of the Practice Note,[698] Mr Wichman's confession to Scott was unfairly obtained.[699] The exclusion of the statement is proportionate to the improprieties.[700]

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691 See above at [496].
692 See above at [498].
693 See above at [501].
694 See above at [501] and [506].
695 See above at [506].
696 See above at [512].
697 See above at [514].
698 Mr Wichman did not seek to argue that rule 2 of the Practice Note was breached because there was sufficient evidence to charge him. It will be up to the High Court to decide if this can be raised in any renewed application for exclusion of the evidence.

Section 8(a)

[544] The probative value of the evidence would not be outweighed by the risk that it will have an unfairly prejudicial effect on the trial. Mr Wichman would not have to set out the scenarios in detail in order to challenge the reliability of his statement. Further, the simulated offending bears no resemblance to the actual offending and there will be strong jury directions to reduce the possibility of illegitimate reasoning on the part of the jury.

Jury directions

[545] The jury directions will need to cover the risk of a false confession, the concern that people may rely too heavily on confessions even where there are circumstances which may point to possible unreliability, and the risk of illegitimate reasoning from the evidence showing Mr Wichman's readiness to engage in criminal behaviour.[701]

Result

[546] I would have dismissed the appeal.

Solicitors:
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Paino & Robinson, Upper Hutt for Respondent

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699 See above at [515].
700 See above at [519]–[523].
701 See above at [533].

Appendix

Possible Content of an Explicit Mr. Big Instruction

- The reliability of the accused's confession is for the jury to determine.
- Accused sometimes falsely confess to a crime that they have not committed. Unreliable confessions have been responsible for many wrongful convictions, a spectre that the justice system in a democracy strives to avoid.
- The idea of a person incriminating him or herself when they are innocent may seem illogical at first glance, but one must try to put oneself in the place of the accused when the confession is given to understand the person's behaviour.
- The context for this confession is an elaborate scheme orchestrated by the police to induce the accused to make admissions.
- The Mr. Big or crime boss strategy deliberately enrols the accused in a series of simulated dubious enterprises or crimes. The scenarios provide many incentives for the accused's eager participation in an apparently thriving criminal organization, including material rewards, status, security, advancement and protection.
- Therefore, confessions made in Mr. Big scenarios are especially hazardous.
- Consider here the nature of this Mr. Big sting and how the following factors may have influenced the accused's confession:
    - The length of the operation;
    - The number of interactions with the police;
    - The relationship that the police developed with the accused;
    - The nature and extent of the inducements;
    - The presence of any direct threats to the accused;

        - The atmosphere of violence created by the police through their linking the scenarios in which the accused has participated to organized crime;
        - The way in which the final interrogation was conducted;
        - The alternatives, if any, the accused perceived he or she had to participation in simulated offences;
        - The initial vulnerability of the accused and the extent to which that susceptibility and dependence were magnified by the operation;
        - The mental health and intellectual ability of the accused;
        - The age and experience of the accused;
        - The suggestibility of the accused.
- Consider whether you think the accused's confession can be relied upon, based upon the following possible indicators of its truthfulness:
- Any evidence which tends to confirm the confession:
        - Its level of detail;
        - Whether it led to the discovery of new evidence which sustains the reliability of the confession;
        - Whether it reveals information for which there is no other way of gaining access, other than involvement with the offence.