ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

ORDER PROHIBITING PUBLICATION OF THE FACT THAT THE DEFENDANT HAS BEEN CHARGED WITH MURDER UNTIL NEXT APPEARANCE BEFORE HIGH COURT.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA431/2021
[2022] NZCA 54

BETWEEN	NIKLAS GEBHARDT Appellant
AND	THE QUEEN Respondent

Hearing:	29 September 2021
Court:	Goddard, Woolford and Mander JJ
Counsel:	A M McCormick for Appellant F R J Sinclair for Respondent
Judgment:	15 March 2022 at 10.00 am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is allowed.

C The statement made by Mr Gebhardt on 30 October 2020 is not admissible at his trial.

D Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or

other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

E Order prohibiting publication of the fact that the defendant has been charged with murder until his next appearance before the High Court.

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REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] Niklas Gebhardt is charged with murdering his son, Lachlan, by deliberately crashing his car with his son in the back seat. The car left the road at high speed and became airborne, hit a tree and caught fire. Mr Gebhardt survived the crash through the assistance of a passer-by, who pulled him out of the car. Mr Gebhardt suffered significant injuries and burns. His son died in the fire.

[2] Mr Gebhardt was interviewed by the police after he was discharged from hospital, around two months after the crash. He said he had no recollection of how

the crash occurred. He denied intending to commit suicide, or intending to kill his son. Following that interview he was charged with dangerous driving causing death. In June 2020, some six months later, the charge was amended to manslaughter.

[3] On 30 October 2020 Mr Gebhardt turned up at the Kaiapoi Police Station and requested a second interview. He said he did not want his lawyer present. He wanted to make a statement. He was interviewed by police. He said he had "murdered Lachlan Gebhardt … with a car". He said his son's death was "intentional". He emphatically rejected suggestions he was suicidal, saying he expected that he would survive the crash. He refused to elaborate on these bald admissions: he declined to answer any questions about what he had been thinking at the time, or why he intended to kill his son, insisting that he had said it was intentional and "it's enough". He made it clear that he expected to be arrested and taken into custody immediately, and appeared to be surprised and disappointed when that did not occur.

[4] Later the same day, and on the following day, he told family members and the police that the admissions he had made at this second interview were not correct. He now says that at the time he made those admissions he was grieving for his son, for whose death he felt responsible. He was experiencing severe guilt for his (non-intentional) part in his son's death, and felt he deserved to be punished. He was frustrated with the legal process. He wanted to bring that process to an end, by telling the police what they wanted to hear.

[5] Mr Gebhardt is not suffering from any major mental illness, but has been diagnosed with "complicated grief", or "persistent complex bereavement disorder". Both before and after the second interview he engaged in intermittent bizarre behaviours, including presenting at the Christchurch Central Police Station, stripping naked, and demanding to be arrested. At the hearing of the charge that resulted from this incident, he asked to be (and was) imprisoned.

[6] Mr Gebhardt says that the statement he made on 30 October 2020 (the statement) is unreliable. It should be excluded at trial under s 28 of the Evidence Act 2006.

[7] The Crown applied under s 101 of the Criminal Procedure Act 2011 for the statement to be ruled admissible at trial. The High Court held that the statement is admissible.[1]

Application for leave to appeal

[8] Mr Gebhardt applies for leave to appeal to this Court under s 217(2)(b) of the Criminal Procedure Act. It is in the interests of justice for the admissibility of the statement to be determined before trial. Accordingly, we grant leave to appeal.

The case against Mr Gebhardt

[9] The Crown case against Mr Gebhardt was summarised in the Crown's submissions before the High Court:[2]

> 5. On 5 November 2019, the defendant picked his son, Lachlan, up from the Dudley Swimming Pool complex on Church Street in Rangiora. The defendant drove from the swimming pool travelling out of Rangiora and onto Lehmans Road travelling north.
>
> 6. This was a road very familiar to the defendant with a posted speed limit of 80 km/h. As the defendant drove along Lehmans Road he accelerated heavily. Approximately 1 km prior to the end of Lehmans Road the defendant has overtaken another vehicle in his lane, swerving sharply back into his lane to avoid a collision with an oncoming vehicle.
>
> 7. The defendant continued driving at high speed towards the end of Lehmans Road where there was a sharp right-hand bend just prior to an intersection with River Road. This bend has an advisory speed limit of 25 km/h.
>
> 8. To the west of this intersection is an unrelated stop bank road which runs parallel to River Road and perpendicular to Lehmans Road. Beyond the stop bank is a forested area with well-established trees.
>
> 9. The defendant did not brake or attempt to slow the vehicle as he approached the intersection. He made no attempt to swerve or take the right-hand corner.
>
> 10. The defendant continued driving in a straight line off the sealed road and onto the grass, striking the bottom of the left corner of the 25 km/h advisory speed sign with the right side of the vehicle.

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1 *R v Gebhardt* [2021] NZHC 1728 [Judgment under appeal] at [92].
2 At [5].

11. The vehicle continued up the rise towards the stop bank, which caused the vehicle to vault, becoming airborne. The vehicle has travelled approximately 24 metres through the air until it impacted with a tree seven metres higher than the vehicle's take off point. The take-off speed range was between 131 km/h to 139 km/h.

12. The vehicle has spun to the left and come to rest on the ground where it caught fire. Members of the public in the area witnessed the incident and responded to it.

13. As the fire began to spread, a member of the public was able to partially open the front passenger door where the defendant was located. He was extracted from the vehicle.

14. As the fire began to consume the vehicle, members of the public were unable to approach it again. Once the defendant was out of the vehicle he was heard to say, "put me back in, swap me with my son, I want to swap" and "my sons in the back, he's such a good boy, he's such a nice boy, I want to swap" and "I need a bullet".

15. Lachlan died at the scene from thermal injuries. The defendant sustained burns to approximately 30% of his body, a fractured femur, and facial injuries.

Mr Gebhardt's first interview — 24 December 2019

[10] Mr Gebhardt was first interviewed by the police at the Christchurch Central Police Station on 24 December 2019. The interview lasted approximately an hour and a half and was recorded on DVD. At that stage, Mr Gebhardt was still recovering from his injuries, which included a number of bone fractures and burns.

[11] The detective conducting the interview explained Mr Gebhardt's rights to him under the New Zealand Bill of Rights Act 1990 (NZBORA) and Mr Gebhardt confirmed he understood them. The detective then took Mr Gebhardt through the events of the day of the accident, and also questioned Mr Gebhardt on his relationship with his ex-partner, Kim, Lachlan's mother. Mr Gebhardt acknowledged some difficulties following their separation, but said they had settled down to a reasonably amicable 50/50 custody sharing arrangement with their son. He confirmed that she was planning to take Lachlan on a short trip to Australia over a weekend that he would normally have Lachlan, so it was arranged for him to pick up Lachlan on an earlier day than normal to make up for the weekend he would be in Australia with his mother. Mr Gebhardt had also asked his ex-partner to show him the tickets to confirm return flights had been booked for Lachlan.

[12] When the evidence of eyewitnesses, who saw Mr Gebhardt's vehicle speeding and overtaking them on Lehmans Road, was put to him by the detective, he said he did not recall any of that. He confirmed he knew the road had a hard right hand turn with a 25 km/h speed limit as he had travelled it many times. He was unable to explain why he hit the corner at speed and made no apparent attempt to brake or swerve. He accepted he may have overtaken a car but could not explain why the crash analysis had estimated he hit the stop bank at 131 to 138 km/h. When it was put to him that he was intending to commit suicide, he said he was definitely not suicidal.

[13] Throughout the interview he was relatively subdued in demeanour and was still suffering some discomfort from his injuries. When he was first taken through the aftermath of the accident he was tearful, but he regained his composure for the balance of the interview.

Mr Gebhardt's conduct prior to the second interview

[14] Mr Gebhardt's family reported that some six months following the crash, Mr Gebhardt's mental health and coping appeared to significantly deteriorate. He engaged in a series of unusual behaviours, which led to the family expressing concerns. He was referred to mental health services. He expressed thoughts that "people would blow up" after hearing the news of his son's death. On his son's birthday, he took a parcel and placed it in the fire. He walked outside naked in the rain, saying that he was waiting for someone to give him a job as a train conductor.

[15] In September 2020 Mr Gebhardt went to the Christchurch Central Police Station. He stripped naked and demanded to be arrested. He was arrested and charged with indecent exposure, and held in custody overnight. When he appeared in the District Court the following day, he pleaded guilty to the charge and asked to be sentenced immediately without waiting for a pre-sentence report. He told the Court he wanted to be imprisoned. He was sentenced to one month's imprisonment. After serving two weeks in prison, he was automatically released. Mr Gebhardt reported to a psychologist that he had "found the isolation quite good for my mental

health", because it removed him from his family home and the community, and all the pressure and judgment he perceived from them.[3]

[16] On the day of the incident at Christchurch Central Police Station, Mr Gebhardt had been to see a neuropsychologist who was providing ACC-funded treatment following the crash. The neuropsychologist recorded that when she saw Mr Gebhardt, he told her that he had appeared in Court and been charged with manslaughter. She described him as "very rigid in his thinking … [he] stated that he must be punished and wanted to be placed in prison; he was unable to consider alternative actions." It appears that he went from the treatment session to Christchurch Central Police Station, where he engaged in the behaviour described above.

The second interview — 30 October 2020

[17] At the time of the second interview, on 30 October 2020, Mr Gebhardt was bailed to his parents' address in a rural location north of Rangiora. He went to the Kaiapoi Police Station, where he told counter staff that he wanted to "confess to murder". Detective Belinda Campbell was contacted by staff at the Kaiapoi Police Station. She travelled there and met with Mr Gebhardt. She conducted the interview with Mr Gebhardt, which was recorded on DVD. The interview lasted approximately one hour.

[18] At the outset of the interview, Detective Campbell explained Mr Gebhardt's NZBORA rights to him and he confirmed that he wanted to make a statement about what had happened and that he did not want to talk to a lawyer. She expressly asked him whether he wanted to see Andrew McCormick, the lawyer who was representing him on the car crash charge, and he said he did not want to speak to Mr McCormick or any other lawyer. She then asked him about the medication he was currently taking and he explained he was on medication for headaches, being codeine and amitriptyline. He was also asked whether he had been drinking and he said he had had one cider earlier in the day. Detective Campbell also confirmed whether Mr Gebhardt was feeling alright, saying "how are you feeling … in yourself today?" and he answered "I feel like, like myself".

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3 At [48].

[19] In the next part of the interview he was asked to recount what he had done that day and he explained that he cycled to Rangiora to deal with some health issues associated with an ACC claim. He then went to the police station in Rangiora. However, it was closed and he was directed to the Kaiapoi Police Station, so he cycled there. He explained that he spoke to the lady at the front counter of the police station. He then said "I murdered Lachlan Gebhardt … with a car".

[20] He then recounted the accident, saying that he drove down Lehmans Road, overtook a car at about 130 km/h, sped up to the corner, hit the bank at about 176 km/h and hit a tree. When asked what his intention was in doing that, he said "to murder Lachlan". When asked "why did you want to murder Lachlan?", his answer was "um, I don't know but it was intentional". When the detective tried to tease out more about what he was thinking at the time, he said "I would like to leave it at that". She then asked how he knew he was going at 176 km/h, and he said that it was just a "guess-timation". He also said his seatbelt was not plugged in, although Lachlan's was, and when he hit the bank he hit the dashboard which caused his eye to pop out of its socket. He then remembered being pulled out of the car, and said by then he had "second thoughts but it was already done".

[21] Detective Campbell then checked how things were going before the accident in terms of arrangements with Lachlan and he replied it was "going alright". She then asked "so what changed from everything going okay to that day when you're in the car with Lachlan?". Again, he shut the question down saying "I don't wanna talk about that". When she asked when it was that he made the decision to crash the car, he said it was "probably a few weeks prior", but then did not elaborate on why he made that decision, he said "I just made it".

[22] He confirmed to her that he was very familiar with the road, having driven it "probably around, a few hundred times". He then accepted that he wanted to have a car crash where he would survive and Lachlan would die, but when the detective tried to test why, suggesting it was "to punish Kim", his response was that it was not, and "I don't wanna talk about that". When she queried whether he was suicidal at that time, he denied that.

[23] The interview then turned to his response once the crash had happened. He described being highly upset and trying to undo Lachlan's seatbelt and grab him, but was unable to do so. He also said he tried to direct the others attending the accident to get Lachlan out of the back. He was then grabbed out of the car by a man and was moving in and out of consciousness. He said he told the person who pulled him out of the car to go back and get Lachlan out. He continued to explain how he endeavoured to get Lachlan's seatbelt off and grab him but it "obviously didn't work".

[24] When the detective asked why Mr Gebhardt said he could not remember anything in his first interview, his response was that the memories of the crash came back in "the last couple of days or maybe the last week or so". When the detective went back to Mr Gebhardt's decision-making process, he confirmed that he made a decision to kill Lachlan but did not talk to anyone about it. When she tried to test him on why he made that decision, he again would not elaborate, saying "I'm not gonna to talk about that".

[25] The interview returned to the driving which led to the crash. Mr Gebhardt confirmed that he "intentionally drove off the road", and that he knew there was a 25 km/h corner and that he was going "way, way, way, way over the speed limit". He said he put his head down under his right arm because he didn't want to see, and "I wanted to smash my head against the um against the dashboard". When she reminded him he said he did not want to die in the crash, he agreed that he did not want to die, but could give no explanation for why he thought Lachlan would die, but he would not. When she tested him on why he knew he was going to survive, he modified his position saying "I didn't know yeah nah I didn't know, no idea, absolutely no idea", and, "that was a lie" (that is, saying he knew he was going to survive). However, when the detective then checked whether he in fact wanted to die, he said, "no that's not what I said". In the end he accepted that he knew he probably could die as well.

[26] The interview then returned to how things were before the crash with his relationship with Lachlan's mother. At first, he said, compared with the average New Zealander with co-parenting, "it was very good", but then, he said, from "my personal point of view of co-parenting, absolutely shit".

[27] Mr Gebhardt then asked if he could take a break to go to the toilet. The exchange reflects Mr Gebhardt's expectation that, having confessed to murder, he would be arrested and taken into custody:

15.13.55

NG That um I could h-, go to the toilet, to go to the bathroom?

BC Yeah.

NG Do wees?

BC Yeah.

NG Go outside and have a ciggie and continue?

BC Yeah that's no ...

NG Is that okay?

BC Yeah that's no problem.

NG Like I'm not going anywhere.

BC Yeah that's no problem.

NG And ha, I know, [*crosses wrists as if handcuffing*] that's fine.

BC You're not under arrest, you're not ...

NG Why not?!

BC Because you're not, you've already been charged in relation to the crash, we're just getting ...

15.14.20

NG Yeah but ...

BC ... a further statement ...

NG … but that's ...

BC … from you.

NG … m-murder like …

BC I understand what you're saying to intentionally…

NG It's …

BC … kill someone ...

NG ... it's m- ...

BC ... is murder...

NG ... it's murder…

BC ... yeah.

NG … it is murder.

BC Do you want to be arrested today Nik?

15.14.30

NG Yes please.

BC Why do you want to be arrested today?

NG Because it's the right thing to do.

[28] When Mr Gebhardt returned from the toilet and cigarette break, he went into some detail about not being able to go to the toilet the first time, but when he went the second time, he "wanted to do wees", and "it worked". These comments come across as unusual and inappropriate for the context.

[29] The detective returned the conversation to his seemingly contradictory statements about co-parenting. Mr Gebhardt explained that in his experience it was not common for couples to have 50/50 co-parenting, but he thought it worked with him and Kim. He also thought that the two of them communicated in an "alright" way about co-parenting issues. He said that at the start there was a little bit of "normal bickering", but they worked towards a 50/50 arrangement over approximately two years. When she asked how he got on with Kim's new partner, he said it was "amicable". He also confirmed he had a "really good relationship" with Lachlan.

[30] The detective then asked about his personal circumstances at the time of the accident, pointing out that he had left his job and was relying on foreign exchange trading for income, but it was not going so well, and he was living with his parents but they wanted him to find another place to live. When she summed up his circumstances at the time, saying "you've got no job … you've got 50/50 care with Lachlan … you're living with your parents, you've got no money, there's not a lot of positive things going in your life at that time?", he agreed with that statement. However, when she said "I believe you wanted to kill yourself and you were taking Lachlan with you", he

replied "well you're wrong", but again refused to give any further explanation, and the interview concluded shortly afterwards.

Retraction of admissions

[31] Following the interview, Mr Gebhardt was taken by police to Christchurch Hospital for an assessment of his mental health. He was met there by his brother. Mr Gebhardt told his brother that he had made false admissions of murder.

[32] Mr Gebhardt also told his parents that he had made false admissions that he had murdered his son on either the same day or the following day.

[33] On 31 October 2020 Mr Gebhardt's father told Mr Gebhardt's lawyer about the admissions that had been made to police at the second interview.

[34] Also on 31 October 2020, Mr Gebhardt contacted Police to ask about retrieving his mother's bicycle, which was still at the Kaiapoi Police Station. He told the operator that "the statement I gave cannot be used by them". He spoke to Detective Campbell that day and she recorded in her job sheet that Mr Gebhardt advised her that he had "spoken to Comms and it will be recorded, he told them that the Crown Prosecutor cannot use his statement that he made to me."

Events following the second interview

[35] On 3 November 2020, a few days after the second interview, Mr Gebhardt attended an appointment with the neuropsychologist who was treating him. Mr Gebhardt presented at that appointment "very unsettled, highly tangential, verbose, energetic and … [with] racing thoughts." Mr Gebhardt told the neuropsychologist that he had an axe in his car and alluded to a primal urge to murder others to protect women and children. He was uncertain why he placed the axe in the car, and said it was "just in case".

[36] Police were called, and Mr Gebhardt was admitted to Hillmorton Hospital for inpatient treatment for three weeks.

Mr Gebhardt's explanation for the statements at the second interview

[37] Mr Gebhardt gave the following account of the circumstances leading up to the second interview to Mr Ghazi Metoui, a clinical psychologist who was instructed to prepare a report in connection with the admissibility hearing:

> 87. Mr Gebhardt reported that leading up to making his admissions to the police, he had been in a "*bad way*". At the time he could see no positive way out or experience even partial relief from any of his circumstances. He said these were about Lachlan dying and never being able to see him again. That he would always feel "guilty", hateful of himself, and at fault for the death of Lachlan. He also felt overwhelming guilt for the suffering caused to his own family, Ms Manson and her family, and the friends and community that Lachlan belonged [to].
>
> 88. He also believed at the time of making his admission to the police that he would never know with any certainty the reason he drove off the road. He said "*the not knowing, wanting to know, never knowing*" kept circulating his mind.
>
> 89. He could see no imminent end point to his Court matters that was causing him immense stress and distress – particularly the uncertainty over proceedings and how he would be eventually dealt with in terms of his culpability and his sentence. He reported that he was "angry" and "frustrated" at the police for their handling of the case, and essentially blamed them and the protracted Court process for making his life even more difficult than what it already was.
>
> 90. He reported that on the day of making his admissions to the police and whilst out on his bike that morning, he came to a sudden realisation that he could bring closure to most of his problems by simply going to the police and making a false admission that he murdered Lachlan. He assumed that such an admission would result in his immediate imprisonment and therefore serve as his deserved punishment for the death of Lachlan, irrespective that it was an (alleged) accident. He felt it would put to rest any further police probes as he believed it "*gave the police what they wanted* [a murder charge against him]". He reported that he also had it in his mind that would somehow bring a swift resolution to Court proceedings. That is, he imagined he would be instantly imprisoned and this would simplify matters leaving only his sentencing to be determined.
>
> 91. Mr Gebhardt reported there were two additional circumstantial factors that were important to his decision making on that day. First, it was fast approaching the anniversary date of the crash and death of Lachlan. He reported that his ruminations, fragile state of mind, and need to self-punish and self-harm were rising exponentially higher day by day over that period [as] it approached the actual anniversary date.
>
> 92. Mr Gebhardt by then also had the experience of prison in relation to the Indecent Exposure offence. Mr Gebhardt reported that his

2 weeks in prison in some ways was a favourable experience for him as it provided him with much needed respite. He said "*I found the isolation quite good for my mental health*" because it removed him from his family home and community surrounds and all the (perceived) pressures and judgements he felt from them. He said this then allowed him some rest from all his ruminations and eased his grieving somewhat.

93. Mr Gebhardt said "*I just remember thinking, this will sort it out* [making false admissions], *it will end it*." Mr Gebhardt reported it was in this spirit he cycled to the police station with the decision firmly made to make the (alleged) false admissions of murder. He reported that within himself at the time he also "*knew it was a stupid thing to do*", but he ignored that thinking and remained committed to his first instincts.

Admissibility of the statement: s 28 Evidence Act

[38] The admissibility of the statement is governed by s 28 of the Evidence Act, which provides:

> **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 or, if applicable, a co-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
>
> (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.
>
> (3) However, subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered only 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.
>
> (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.

[39] It is common ground that there is an evidential foundation for raising the issue of the reliability of the statement. It follows that the statement must be excluded unless the Court 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. That is, the starting point is exclusion of the statement; the burden is on the Crown to establish, on the balance of probabilities, that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

Expert evidence

[40] In March 2021 reports were obtained under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, to ascertain whether Mr Gebhardt was fit to stand trial. The reports confirmed that Mr Gebhardt did not meet the criteria for a "mental disorder" as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992.[4] Nor did he have a mental impairment which would make him unfit to stand trial. However, the health assessors noted that Mr Gebhardt had manifested some abnormal behaviour since the accident. One of the assessors, Dr Simone McLeavey, said:

> … he has presented intermittently with an abnormal state of mind characterised by a disorder of volition in the last year of a severity seriously diminishing his capacity to maintain himself to a reasonable standard in the community culminating in his hospitalisation at which time no enduring major mental illness was diagnosed. …

[4] Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2(1).

[41] Dr Karen McDonnell and Dr Maxwell Panckhurst, the other health assessors, noted that since the motor vehicle accident:

> Problems in relation to grief and trauma were identified, but he was not felt to meet criteria for follow up with Specialist Mental Health Services and was referred to his General Practitioner in February 2020 for follow up.

[42] They went on to note that since the accident, Mr Gebhardt:

> … has presented with intermittent and transient bizarre behaviours that have been unable to be explained medically or psychiatrically with the prevailing view that they have arisen in the context of complex grief, trauma, the ongoing stress of the Court process, and brain injury. In relation to the diagnosis of Post-Traumatic Stress Disorder (PTSD) the Defendant has consistently denied the clinical features of this disorder. However, his family describe the emotional numbing, negative emotional states (guilt, horror), social withdrawal and detachment that could reflect an underlying Post-Traumatic Stress Disorder.

[43] Mr Metoui, who as already mentioned had prepared a psychological report, was called as a witness by Mr Gebhardt at the High Court admissibility hearing. Mr Metoui reviewed relevant background material, spoke to clinicians who had treated Mr Gebhardt and met with Mr Gebhardt and members of his family.

[44] Mr Metoui agreed with the health assessors that Mr Gebhardt did not have an enduring major mental disorder. His clinical presentations since the crash related principally to "complicated grief". Mr Metoui explained that someone suffering from complicated grief essentially remains stuck in their lives, unable to accept, adjust or integrate the death into their lives as time passes. While complicated grief (or persistent complex bereavement disorder) is not a recognised mental disorder in the DSM-V,[5] it is listed as a recognised condition which warrants further study.

[45] Mr Metoui's report concludes with an assessment of the risk that the statements were not reliable, by reference to the academic literature in the field of forensic psychology on causes of false confessions. Mr Metoui dismissed the possibility that this was a pressured or coerced false confession. Rather the question was whether this was a "voluntary false confession" in the absence of external pressure. Motivations for such confessions include morbid desire for notoriety; to expiate guilt over previous

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5 *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, Arlington, United States, 2013).

transgressions; loss of reality testing (psychotic people); desire to aid and protect the true perpetrator; hope for leniency in sentencing; and to take revenge on another. Mr Metoui expressed the opinion, on the balance of probabilities that:

> … there was substantial risk that Mr Gebhardt could have made a false admission through this particular psychological mechanism, calling into question the reliability of the admissions of murder that he gave the police.

[46] Mr Metoui elaborated on this conclusion as follows:

> 162. My assessment of all the available information found that that there was clinical evidence supporting Mr Gebhardt being in a state of Complicated Grief concerning the death of his son; looking to expiate feelings of guilt for the death of his son; and not coping with the uncertainty of the judicial process. There was the potential that his thinking became so distorted, that he chose to embark on a self-destructive path believing that it was his last viable solution to end his various problems. It may also have provided him a semblance of control at a time in his life that he believed he had none. I do consider that the clinical context existed that he could have decided upon taking control of his circumstances by making the false admissions to the police in the manner that he did.
>
> 163. These may offer an explanation as to his unusual presentation in the interview with the police; that his accounts were often inconsistent and changeable; his refusal to give any motive for the alleged murder; his multiple hurried requests to be arrested; and of course his hasty retraction soon after making it (later the same day).
>
> 164. In my assessment, it has not been lost on me that defendants very commonly retract their previously made confessions to the police and give various excuses for having done so. Gudjonsson (2003), in answering "*how can true confessions be differentiated from false confessions?* [p.209]" presented the following argument that I consider highly relevant to Mr Gebhardt's case:
>
> > "No psychological confession technique is available that will demonstrate with complete certainty the truthfulness of the confession. What the psychological evaluation is sometimes able to do is to identify psychological vulnerabilities or mental health problems, which, when placed in the context of the totality of circumstances in the case, cast serious doubts on the reliability or trustworthiness of the confession. Each case must be considered on its own merit. [p.209]"
>
> 165. Taken together, in regard to the law, the relevant forensic psychological academic literature on retracted confessions, and the totality of circumstances of this case, it is my opinion on a balance of probabilities, there is a substantial risk that the evidence provided by Mr Gebhardt's admissions at the time of the recorded interview were not reliable. At the very least they must be treated with a high degree of caution.

[47] The Crown called evidence from Associate Professor Brinded, a Consultant Forensic Psychiatrist. Professor Brinded reviewed relevant background materials, and Mr Metoui's report. He did not interview Mr Gebhardt or speak with his family. Associate Professor Brinded was asked to comment on a number of specific questions. First, he was asked whether he accepted the diagnosis of complex grief. He agreed that the diagnosis of a complex grief reaction was appropriate.

[48] Secondly, Associate Professor Brinded was asked whether this condition could affect the reliability of Mr Gebhardt's admissions on 30 October 2020. His answer was as follows:

> It is possible in Mr Gebhardt's case that his symptoms of complex grief may have affected the reliability of his admission that he deliberately killed his son. This is due to the tendency for people with complex grief to experience intense guilt at the death of their loved one and a need to be punished for their actions. I note that following the motor vehicle accident and his son's death, Mr Gebhardt has on more than one occasion asked to be imprisoned and 'punished' for what he has done. In my opinion however the complex grief does not impact on Mr Gebhardt's ability to tell the difference between truth and lies nor is it likely to have affected his perception of reality. In my opinion you are correct in asking whether 'the impact on reliability in this case is better assessed as complex grief providing an explanation for why the defendant may knowingly lie to the Police in order to be 'punished'. … I would not suggest that people suffering from complex grief reactions always give unreliable statements.

[49] Associate Professor Brinded was asked whether he agreed with Mr Metoui's conclusion at paragraph 165 of his report, set out at [46] above. He said:

> In paragraph 165 Mr Metoui states 'taken together, in regard to the law, the relevant forensic psychological academic literature on retracted confessions, and the totality of circumstances of this case it is my opinion on the balance of probabilities there is a substantial risk that the evidence provided by Mr Gebhardt's admissions at the time of the recorded interview were not reliable. At the very least they must be treated with a high degree of caution'. From a clinical perspective I agree with that statement.

[50] Associate Professor Brinded was then asked to comment on whether Mr Gebhardt could have been suffering from guilt, and whether this could have affected his actions in speaking to the police on 30 October 2020. His answer was as follows:

> The information I have been provided with suggests that Mr Gebhardt indeed has been suffering intense guilt over the death of his son. This may well have

> affected his actions in speaking to the Police on 30 October 2020 consisting as it did with admission of deliberately killing his son, refusing to give any further details and subsequently retracting the admission on the same day.

[51] Mr Metoui also gave oral evidence and was cross-examined at the admissibility hearing. In the course of cross-examination, he summarised his views in relation to the reliability of the admissions as follows:

> This is how I formulate the risks with this particular admission that he made on that day. So, on the one hand you have got complex grief that's going on, but it's not just that on its own. There's within him this need to be punished, right. This is what he is talking about. So, "I am the person who is responsible for the death of my son and I need to be punished for that and I need to [be] wiped out of society, send me to jail, lock away the key, get rid of me." So that is one aspect of it, but the further very important layer in this is that he was, in addition to complicated grief, he was really struggling to cope with the entire court process with this, with the scrutiny and the charges that he had and also a hostile community response. So this is, allegedly, that the family have had things put in their letterboxes, they had text messages, calling him a murderer, you know, saying all sorts of things and he, not only did he want to self-punish but he wanted to get rid of this problem. As you know, about four weeks before this, he ends up in prison for a separate matter. Now, what he had said to me was he had found prison actually gave him a huge relief, gave him escape from everything and in that sense was the first time he was able to actually unburden himself, if you like, of call the distress and misery that he'd had. And so prison was quite a place that he looked upon, it's actually quite [positive]. So in other words, you've kind of [got] three things going on. You've got complicated grief, you've got immense guilt about what has happened, a need to self-punish and then this viable solution that he thought he (inaudible 10:42:18) everything where he could go to prison and at least it would get rid of all of this and he would just have to wait for his sentence, which he felt, "well that's okay, I can deal with that, but it gets rid of everything else." So these are the layers that exist in what he says took him to make that admission and these are very powerful drivers of that type of behaviour. When you're talking guilt, you're talking about a need to self-punish and the literature is very clear on that, when it's tried to understand why people make full submissions, because this happens. It happens in New Zealand, it happens in Australia, it happens in other western countries and what one model is, that we're trying to understand why people need voluntary false confessions, nobody is pressuring them to do this, they do it themselves and the literature is really clear that, and in some cases it's that feeling of guilt, the need to self-punish. These are strong drivers of that type of behaviour.

[52] Mr Metoui was asked about his conclusions at paragraph [165] of his report. He confirmed that he was saying that there is a substantial risk that the evidence provided by Mr Gebhardt's admissions at the time of the recorded interview are not reliable. He described that as his "overarching conclusion". When asked, he confirmed that that was his clinical point of view, and it was not for him to comment

on Mr Gebhardt's guilt or innocence. He was solely addressing the integrity of this one piece of evidence.

[53] Associate Professor Brinded also gave oral evidence and was cross-examined. He confirmed that clinically you cannot tell whether Mr Gebhardt was or was not telling the truth. He also confirmed that he agreed with Mr Metoui's statement that at the very least, Mr Gebhardt's confession must be treated with a high degree of caution. But he agreed it was not for him to express a view on the legal question of reliability.

High Court judgment

[54] The Judge noted that this case differs from the usual run of applications to admit statements which are challenged under s 28 because the sole circumstance relied on was Mr Gebhardt's complex grief disorder. Counsel had not been able to identify any other case under s 28 which relied solely on a psychological condition which might make the defendant volunteer to make a false confession. Usually the cases involve an interplay between internal vulnerabilities of the defendant and external pressures placed on the defendant in the course of the interview.[6]

[55] Mr Gebhardt's psychological condition was relied on, not to show that he may have unwittingly made a false confession, but rather, as a potential motive for him to falsely say he intentionally killed his son. The potential false confession was explained as a way of atoning for his feelings of guilt at being the driver who caused the accident, rather than because he in fact intended that his son die.[7]

[56] The Judge held that is not a circumstance which s 28 of the Evidence Act was intended to address. Section 28(2), the Judge said, is intended to operate to exclude statements where there are questions of voluntariness arising out of the defendant's own characteristics, or which arise from promises and other inducements given to him at the time the statement was made.[8] The Judge accepted the Crown's submission that

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6 Judgment under appeal, above n 1, at [77].
7 At [79].
8 At [80], referring to *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [275].

the legislative intent behind s 28 is not to protect the defendant from proof of statements in which he or she has chosen to lie, whatever the motive.[9]

[57] The Judge therefore considered that the test for exclusion in s 28(2) was not met. Complex grief syndrome could provide an explanation for why Mr Gebhardt would choose to lie, thus bringing into question the actual reliability of the statement, but was not a circumstance which, in itself, adversely affects the reliability of the statement by, for example, affecting Mr Gebhardt's memory or his ability to distinguish truth from lies.[10] This was precisely the kind of issue which should go to a jury. The jury:[11]

> … armed with information about complex grief syndrome and the congruence or otherwise of Mr Gebhardt's account with other evidence, can determine whether the statement is in fact truthful, and of utility in coming to their verdict.

[58] The Judge summarised her findings as follows:

> [90] Accordingly, while the diagnosis of complex grief disorder provides a motive to admit guilt, I am satisfied that this is a case where, on the balance of probabilities, the circumstances in which the statement was made were not likely to have adversely affected its reliability. There were no external factors identified which could give rise to the risk of unreliability. The pertinent mental or psychological condition of the defendant could explain why he would choose to falsely admit guilt, but did not alter his ability to provide a truthful account. Whether, in fact, the admission is false is something the jury can determine following hearing evidence from the health assessors as to the potential consequences of suffering from complex grief, along with the evidence of eyewitnesses and of the crash analysis.

[59] The Judge ruled that the statement given on 30 October 2020 is admissible in its entirety.[12]

Submissions on appeal

[60] Mr McCormick, who appeared for Mr Gebhardt, submitted that the Judge had not correctly applied the legal test to the facts of this situation. The Judge was wrong to say that this was not a situation which s 28 was intended to address. Section 28 can

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9 At [82].
10 At [83].
11 At [84].
12 At [92].

apply where the only factors that call the reliability of a statement into question are factors internal to the defendant. The diagnosis of complex grief, coupled with Mr Gebhardt's desire to be imprisoned in order to be punished for his son's death, led to him being interviewed and making the admissions. In these circumstances, the admissions were unreliable.

[61] Mr Sinclair, who appeared for the Crown, accepted that it is doubtful that voluntariness is the correct measure in deciding whether to exclude a confession under s 28 of the Evidence Act, where the factors that are said to render the statement unreliable are internal to the defendant. However, he submitted, the High Court was right to regard Mr Gebhardt's complex grief disorder as falling far short of the kind of mental state which renders a statement unreliable.

[62] Before the Evidence Act came into force, the question of mental state as a basis for excluding a confession appears to have been dealt with as a matter of judicial discretion, rather than as part of an exclusionary rule based on the concept of voluntariness: a distinction noted by the Supreme Court in *R v Wichman*.[13] In *Naniseni v R* this Court held that involuntariness cannot be produced from within, and it required the will of the person to be overborne by another.[14] That was also the approach adopted by this Court in *R v Cooney*, where the issue of the appellant's mental state — a serious depressive condition — was dealt with under the heading of "Fairness", and more particularly as a question of the weight and sufficiency of the evidence.[15]

[63] Mr Gebhardt's admissions were not influenced by a mental condition of the kind that would usually result in exclusion. The admissions harmonise reasonably well with what is known about the circumstances of the crash. That is sufficient for the Court to find, on the balance of probabilities, that the circumstances in which the statement was made did not affect its reliability.

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13 *Wichman*, above n 8, at [80].
14 *Naniseni v R* [1971] NZLR 269 (CA) at 274.
15 *R v Cooney* [1994] 1 NZLR 38 (CA) at 45–47.

Discussion

The test for exclusion by reason of internal factors under s 28

[64] As the Supreme Court explained in *Wichman*, s 28 of the Evidence Act carries out work previously performed by two quite distinct sets of rules:[16]

(a) the rules as to voluntariness of admissions resulting from threats and promises by persons in authority; and

(b) the discretion to exclude an admission which is unreliable for reasons "internal" to the person who made them (for instance, consumption of alcohol or mental illness).

[65] We agree with Mr Sinclair's submission that the application of s 28(2) in this case does not turn on an assessment of the voluntariness of the admissions made by Mr Gebhardt. Nothing in the language of s 28 requires that approach to be adopted. It is not easy to see how a "voluntariness" test could be applied to statements which are said to be unreliable for reasons internal to their maker. And that was not the approach adopted in cases of this kind pre-Evidence Act.

[66] The pre-Evidence Act approach to exclusion of admissions that are unreliable for reasons internal to the defendant was considered by a Full Court of this Court in *R v Cooney*.[17] The defendant, Mr Cooney, made a number of admissions to friends and family members at a time when he was suffering from a major depressive illness. He was experiencing extreme guilt, and may have been experiencing delusions. There was expert evidence to the effect that it was possible that what he said was driven by his internal perception of himself rather than his knowledge of events to which he was confessing. The Court was satisfied that all the confessions made by Mr Cooney were voluntary. None were made to persons in authority. They arose without any substantial element of questioning.[18] The Court considered that whatever approach to the question of voluntariness might be adopted, Mr Cooney's statements

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16 *Wichman*, above n 8, at [80].
17 *R v Cooney*, above n 15.
18 At 45.

were voluntary: they were made at a time when Mr Cooney was capable of exercising his mind as to whether he wished to make the statements, and whether he should do so.[19]

[67] Having found that the statements were voluntary, the Court went on to consider whether the statements should be excluded because of factors internal to Mr Cooney. Under the heading "Fairness" the Court said:[20]

> It is necessary now to consider the discretion to exclude confessions even although they have been proved to have been made voluntarily. In *R v Horsfall* [1981] 1 NZLR 116 Cooke J, in giving the judgment of this Court, stated the law in the following terms at p 121:
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> > "Clearly the law of New Zealand is that there are two broad grounds on which in a criminal trial a confession obtained by the police from the accused may be ruled out by the trial Judge. One is that the Crown has not proved the statement to be voluntary; this ground is subject to the provisions of s 20 of the Evidence Act 1908 and need not be discussed further here. But in addition the Judge has a discretion to refuse to admit in evidence a statement which has been obtained unfairly. As in many other branches of the law, the requirements of fairness cannot be captured in a rigid code; '…unfairness to the accused is not susceptible of close definition' (*King v The Queen* [1969] 1 AC 304, 319; [1968] 2 All ER 610, 617, per Lord Hodson delivering the judgment of the Privy Council)."
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> When the real issue is the reliability of the confession itself rather than a criticism of the manner in which the confession was obtained a further principle arises for consideration. The Court in a criminal trial, at least in modern times, has always had a discretion to exclude evidence which is otherwise admissible if its probative value is of such limited extent that the prejudice arising from the admission of such evidence might in the circumstances be so great as to amount to an injustice.

[68] This Court noted that false confessions are sometimes, albeit rarely, made by persons as to crimes which they have not committed.[21] The Court considered that the problems that such confessions may give rise to may have been lessened by s 347 of the Crimes Act 1961, which empowered the Judge to direct that no indictment be

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19 At 45.
20 At 45–46.
21 At 46.

presented or to discharge an accused at any time before or after verdict.[22] In the present case, the Court said:[23]

> … if the Crown case were dependent solely on the evidence of the confessions we are of the opinion that the appellant should be discharged. But we do not believe this to be the case. On the depositions there appears to be substantial other evidence pointing to guilt.
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> The jury should be able to hear the evidence from the psychiatrists as to the reliability of the confessions once it is established that the appellant was suffering from a mental illness. There being no element of unfairness other than the fact of the illness the jury should be able to determine whether they accept or reject the validity of the confessions in the same way as they are required to accept or reject other evidence provided that there is sufficient evidence to support a guilty verdict.
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> Obviously the circumstances may require a special direction from the Judge as to the danger of accepting the confessions at their face value but that will depend on the psychiatric and other evidence given at the trial.

[69] This Court held that the confessions should be admitted in evidence.[24]

[70] Cases such as *Cooney* now fall to be considered under s 28 of the Evidence Act. The starting point is the text and purpose of s 28. Pre-Evidence Act authorities may be of assistance, but only so far as they are consistent with the provisions of the Act and the promotion of its purpose and principles.[25] In the present context, *Cooney* confirms that it is neither necessary nor appropriate to consider cases of this kind through a voluntariness lens. But when it comes to interpreting s 28 and applying that provision to cases of this kind, we have derived little assistance from *Cooney* or other pre-Evidence Act cases.

[71] As Glazebrook J explained in *Wichman*, in recent decades there has been an increased focus on the risks involved in false confessions.[26] The regime established by s 28 for exclusion of unreliable confessions is needed because confession evidence

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22 At 47.
23 At 47.
24 At 47.
25 Evidence Act, s 10.
26 *Wichman*, above n 8, at [393]–[402].

is very powerful, and studies suggest that people have difficulty disregarding confessions even when there are good reasons to do so:

> [400] The problem of false confession is particularly acute for the criminal justice system because confession evidence is very powerful. Surveys show that most people believe that they would never confess to a crime they did not commit and that they evaluate others accordingly. In addition, studies have shown that people (including law enforcement agents) are unable to distinguish between true and false confessions.
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> [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. 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".
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> (Footnotes omitted.)

[72] Against that backdrop, where there are concerns about the reliability of admissions made by a defendant, s 28 proceeds on the basis that the admissions should 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.

[73] In this context, "likely" means that there is a real and substantial risk that the circumstances adversely affected the reliability of the statement. It does not mean that it is probable that the circumstances adversely affected the statement's reliability.[27] So the statement must be excluded unless we are satisfied on the balance of probabilities that the circumstances in which it was made did not give rise to a real and substantial risk that it is not reliable.

Applying s 28 in this case

[74] In the present case, we consider that the circumstances in which the statement was made by Mr Gebhardt indicate a real and substantial risk that it is not reliable. The uncontested expert evidence in this case establishes that it is likely Mr Gebhardt

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[27] At [414], [429] and n 469 per Glazebrook J; see also *R v Fatu* [1989] 3 NZLR 419 (CA) at 430; and Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 69–70.

was acting under the influence of complicated grief. He was experiencing intense guilt in relation to the death of his son, and he appears to have engaged in punishment-seeking behaviour in response to that guilt. His conduct at the interview itself was peculiar: he was insistent on the fact that he had intentionally killed his son, but was unwilling (and perhaps unable) to respond to questions about when he had formed that intention, and why: questions that one would expect him to be able and willing to address if his admissions were indeed reliable. Mr Gebhardt's frustration with the legal process, and the protracted nature of the proceedings against him, are further factors indicating a real risk that the admissions were made to achieve closure, rather than because they were true.

[75] Reviewing the interview as a whole, it is difficult to avoid the impression that Mr Gebhardt was making statements that were designed to bring about a particular result — his immediate arrest and incarceration, and a prompt conclusion to the legal process — rather than seeking to lay out the facts to the best of his recollection.

[76] That view is confirmed by the events surrounding the second interview. His behaviour in September, when he stripped naked at the Christchurch Central Police Station and asked to be imprisoned, clearly demonstrates a desire to be punished.

[77] The expert evidence in this case was clear and consistent. Mr Metoui concluded that there was a substantial risk that the evidence provided by the admissions was not reliable. At the least, the admissions had to be treated with a high degree of caution. Associate Professor Brinded agreed with that assessment.

[78] Thus as in *Wichman*, the circumstances in which the admissions were made indicate a significant risk that an innocent person in that position would falsely confess.[28] But as the Supreme Court explained in that case, it is necessary to go on and ask whether there are indications that the statement is in fact reliable. The assessment of actual reliability must be based on other evidence in the case, and the statement itself. In cases where it is likely from an examination of the circumstances alone that the reliability of the statement was adversely affected,

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[28] At [451].

the indications of reliability in the other evidence and in the statement itself should be clear and obvious.[29]

[79] In this case, unlike *Wichman*, there are no clear and obvious indications that the admissions made by Mr Gebhardt are in fact reliable. His statement did not provide any details that were not previously known to police. To the extent that it included additional details that were not in his previous statement, that could equally well reflect his awareness of the disclosure he had received since making that statement.[30] Some of the "details" he provided, such as the suggestion his eye popped out of its socket, and that the car was travelling at 176 km/h, were clearly inconsistent with other evidence and suggest some element of fabrication, or at least inaccuracy.[31] His admission that the crash was intentional is consistent with the evidence that the car was driven off the road at high speed, without braking. But it is not easy to reconcile that admission with his insistence that he intended (and expected) to survive the crash himself: the statement lacks internal consistency and coherence. Mr Gebhardt's demeanour during the interview does not support the view that the statement is reliable, as was the case in *Wichman*: if anything, it points the other way. So this is not a case in which we can be satisfied, on the basis of other evidence, that the circumstances in which the statement was made did not in fact adversely affect its reliability.[32]

[80] The circumstances in which the second interview took place, and the risk of unreliability to which they give rise, fall squarely within the purpose of s 28. If Mr Gebhardt's admissions are admitted as evidence, they will exercise a powerful effect on the jury at trial. There is good reason to think that that influence will be disproportionate, even if the trial judge cautions the jury about the reliability of the admissions.

[81] Nor do we consider that the jury will be well placed to assess the reliability of the statement. As Mr Metoui and Associate Professor Brinded explained at the

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29 At [452].

30 Compare *Wichman* at [454].

31 See [20] above. Mr Gebhardt's eye did not come out of its socket, and other evidence suggests the car was travelling at between 131 and 139 km/h.

32 Compare *Wichman* at [92] and [456].

admissibility hearing, clinical evidence can identify the risk that Mr Gebhardt's admissions were motivated by complicated grief and a desire to be punished, rather than by a desire to tell the truth. But that is as far as the clinical evidence can go. At trial, clinicians would not be able to assist the jury to distinguish between those two scenarios. We struggle to see how the jury could meaningfully assess the reliability of the statements. To say that they could be assessed by reference to the other evidence does not take the matter further. As noted above, this is not a case where facts were revealed by the admissions that were not previously known to the police. The Crown's argument that the jury can find that the statement is reliable if it is congruent with facts established by other evidence is, in this case, essentially circular. And there is a real risk that if the statement is admitted, the other evidence will be viewed in light of the admissions it contains, however unreliable those admissions may be.[33]

[82] We return to the language of s 28(2), incorporating the approach to "likely" explained above. Can we be satisfied on the balance of probabilities that the circumstances in which the admissions were made did not give rise to a real or substantial risk of an adverse effect on their reliability? Posed in this way, and in light of the expert evidence, it seems to us that the answer is clear. Far from being satisfied on the balance of probabilities that the circumstances did not give rise to a real and substantial risk of unreliability, we are satisfied that those circumstances did give rise to such a risk.

[83] We emphasise that it is not just the complicated grief diagnosis that leads us to this conclusion. Rather, it is that diagnosis coupled with the factors identified at [74] above, including the episodes of bizarre behaviour immediately preceding and following the second interview, Mr Gebhardt's guilt and his punishment-seeking conduct, the immediate retraction of the admissions on the same day the statement was made, the consistent evidence of the two experts at the admissibility hearing, and the absence of any clear indications that the circumstances in which the statement was made did not in fact adversely affect its reliability.

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[33] *Wichman*, above n 8, at [402].

[84] It follows that the statements are not sufficiently reliable to be admitted in evidence: they must be excluded.

Result

[85] The application for leave to appeal is granted.

[86] The appeal is allowed.

[87] The statement made by Mr Gebhardt on 30 October 2020 is not admissible at his trial.

[88] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

[89] Interim orders were made in the High Court prohibiting publication of the fact that a murder charge had been laid against Mr Gebhardt, in circumstances where Mr Gebhardt was challenging the admissibility of the evidence that had led to that charge being laid.[34] There is a real risk of prejudice to Mr Gebhardt's fair trial rights if that charge is in the public domain, and the trial subsequently proceeds only on the basis of the alternative manslaughter charge. The orders made in the High Court continue until the final disposition of this appeal. We therefore make an order prohibiting publication of the fact that a murder charge has been laid against Mr Gebhardt until his next appearance before the High Court. Whether suppression should continue beyond that will be a matter for the High Court, in light of the Crown's decision on whether to proceed with the murder charge.

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Crown Law Office, Wellington for Respondent

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[34] *R v Gebhardt* HC Christchurch CRI-2019-009-11852, 19 March 2021; and *R v Gebhardt* HC Christchurch CRI-2019-009-11852, 13 July 2021.