

SUPREME COURT OF QUEENSLAND

CITATION: *K v G* [2010] QSC 13

PARTIES: **K by her litigation guardian C**
(plaintiff)
v
G
(defendant)

FILE NO: BS 4029 of 2008

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 29 January 2010

DELIVERED AT: Brisbane

HEARING DATE: 28 April 2009; further submissions on 26 November 2009, 7 December 2009 and 21 January 2010

JUDGE: Daubney J

ORDER: **1. Judgment for the plaintiff against the defendant in the sum of \$629,855.**
2. The plaintiff will be heard as to costs.

CATCHWORDS: DAMAGES – personal injury – sexual assaults for which defendant was convicted and imprisoned – basis for assessment of damages – whether aggravated damages ought be awarded

AM v KW [2005] NSWSC 876
Paten v Bale [1999] QSC 265
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118
Civil Liability Act 2003 (Qld)
Civil Liability Regulation 2003 (Qld)
Criminal Offence Victims Act 1995 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

COUNSEL: Mr R A Myers for the plaintiff
No appearance for the defendant

SOLICITORS: Shine Lawyers for the plaintiff

[1] In this proceeding, the plaintiff claims damages for personal injuries she has suffered as a consequence of being sexually assaulted by the defendant.

- [2] Although the claim is endorsed as being one for “damages ... as a result of the negligence of the defendant”, no case of breach of duty was pleaded or advanced on behalf of the plaintiff. Counsel for the plaintiff, when queried as to the cause of action, expressly relied on and formulated the case on the basis of the assaults particularised in paragraph 4 of the statement of claim.
- [3] Paragraph 3 of the statement of claim alleged that, from about 25 December 1996 (at which time the plaintiff was eight years old), the defendant “importuned and groomed the plaintiff for a sexual relationship”, particularising such matters as rubbing his penis against the plaintiff while they were in the swimming pool, exposing himself to her and exposing her to pornographic videos and photos.
- [4] Paragraph 4 of the statement of claim then pleaded that this culminated in the defendant seducing the plaintiff, and that “between 21 January 2003 and 23 February 2003 the defendant maintained an unlawful relationship of a sexual nature with the plaintiff”. There were then particularised numerous indicia of that relationship, each of which, if proved, clearly constituted an act of actionable assault, viz:
- touching the plaintiff’s vagina and breasts
 - digitally penetrating the plaintiff’s vagina
 - passionately kissing the plaintiff
 - having sexual intercourse with the plaintiff
 - engaging in mutual oral sex
 - inserting a vibrator into the plaintiff’s vagina
- [5] The particulars also extended to alleging that the defendant forced the plaintiff to perform oral sex on him and compelled her to watch pornographic videos.
- [6] The defendant did not appear when this trial started. Accordingly, the plaintiff proceeded under *UCPR* r 476 to call evidence to establish her entitlement to judgment. The plaintiff requested, and I directed under r 476, that such evidence could be adduced by affidavit.
- [7] The plaintiff swore an affidavit confirming that she was born on 1 August 1988 and had known the defendant, a friend of the family, since she was about seven years old. She recalls meeting him when she was in about Grade 2. In her affidavit she details early inappropriate sexual conduct, including the plaintiff rubbing his penis against her backside when they were in a swimming pool (this happened on numerous occasions over a number of years), exposing his genitals to her, showing the plaintiff pornographic videos involving, *inter alia*, group sex and lesbian sex. She says that sometimes the plaintiff touched her on the outside of her clothes while he was showing her the videos. He also showed her pornographic magazines with material similar to that depicted in the videos. She also says that on one occasion, two or three years after first meeting the defendant, he took a video of her after she had come out of the shower.
- [8] In respect of the matters relied on as constituting actionable assaults, the plaintiff deposed to the following:
- “16. I can remember school holidays at Christmas time 2002. My family and I had been to Gold Coast and we returned to our home on or about 4th January 2003.

17. I had been speaking to [G] on the phone. We were talking about sex and what we would like to do together. [G] said that he would like to have sex with me, touch me and have what he called a 69.
18. I remember I went out that evening with [G] in his car. He took me to an area around Arana Hills or Albany Creek. [G] undid his pants and removed his penis. I put the whole of his penis in my mouth and sucked on it. When I stopped, [G] leaned over to me. He put my seat back. He undid my bra and felt my breasts. He pushed my shorts down to my ankles and inserted his fingers into my vagina. During that time we kissed each other.
19. On Monday 27th January 2003, [G] came over and picked me up. We drove to [G's] place. We went into the lounge room of the home and [G] put on some of the pornographic videos that I had seen earlier. While we were watching the video, [G] undressed himself, he hugged me and reached over and undid my bra. He felt my breasts. I then took off my clothes.
20. We subsequently got up and went into [G's] bedroom. I lay down on the bed on my back. We lay down with our heads at opposite ends to each other and gave each other a head job. I sucked on his penis while he kissed and licked my vagina.
21. Later, [G] put on a condom. After this we had sex together. I lay on my back and he put his penis into my vagina. He pushed his penis in and out of my vagina about five to seven times. He then stopped and took off the condom and put it in the bin.
22. About ten or fifteen minutes later, [G] got another condom out of a box. We then had sex the same way as we had done before, with me on my back and him lying on top of me. I remember that [G] also used a vibrator on me. He pushed it inside my vagina while it was turned on.
23. I can't remember exactly what order we did things in, but I know that we had sex three more times that afternoon. I know that each time it happened it was on [G's] bed in his bedroom. He used a condom each time we had sex.
24. I can remember on one occasion I was kneeling on the floor and [G] was trying to push his penis into my vagina from behind. He also used the vibrator on me again in the afternoon. [G] left a pornographic video running the whole time when we were together."

[9] According to a Certificate of Conviction tendered as part of the plaintiff's case, on 20 May 2004 the defendant pleaded guilty in the District Court to the following counts:

"Count 1: Indecent treatment of a child under 12 / on the 25th day of December, 1997 at Brisbane in the State of Queensland.

Count 2: Maintaining a sexual relationship with a child with a circumstance of aggravation / between the 21st day of January, 2003 and the 23rd day of February, 2003 at Brisbane in the State of Queensland.

Counts 3 & 4: Indecent treatment of a child under 16 (under care) / on the 22nd day of January, 2003 at Brisbane in the State of Queensland.

Counts 5-8, 11 & 13: Indecent treatment of a child under 16 (under care) / on the 27th day of January, 2003 at Brisbane in the State of Queensland.

Counts 9, 10 & 12: Carnal knowledge of a child under 16 (under care) / on the 27th day of January, 2003 at Brisbane in the State of Queensland.”

Counts 3-13 were clearly incidents of indecent treatment and carnal knowledge which occurred in the course of the sexual relationship referred to in Count 2.

- [10] The defendant was sentenced to three and a half years’ imprisonment for the offence of maintaining the sexual relationship with the plaintiff, and was sentenced to two years’ imprisonment for each of the other offences.
- [11] This evidence all supports findings that the defendant committed the assaults particularised in the statement of claim as indicia of the unlawful sexual relationship which he had with the plaintiff. The plaintiff has proved her case in this regard.
- [12] I will turn shortly to look at the evidence concerning causation and damage. Before doing so, however, it is appropriate to observe that there is a dearth of authorities concerning the proper approach to the assessment of damages in cases such as this. In *Paten v Bale*,¹ M Wilson J was required to assess damages for the personal injuries suffered by the plaintiff in that case as a consequence of five sexual assaults committed over a two year period. In the course of judgment, her Honour made the following observations:

“[13] The plaintiff has brought an action for damages against the defendant for five assaults, and I am obliged, as best I can, to award damages in respect of each incident, on the basis that each constituted a separate tort. There is a certain unreality about this, because the abuse was ongoing, and the incidents in relation to which the plaintiff has sued (being the same as those in relation to which the defendant was convicted) are representative only. Moreover the evidence scarcely distinguishes between the incidents with respect to the plaintiff’s injuries. The problem was touched upon in an article by Feldthusen ‘The Canadian Experiment With the Civil Action for Sexual Battery’ in Mullany (ed) *Torts in the Nineties*. I have been able to find surprisingly few Australian cases on the assessment of damages for assault in this context. It seems not to have been resolved in other common law jurisdictions. I have found several cases where the issue has been addressed in the context of criminal compensation legislation, but of course those cases are not determinative of the issue in torts.

[14] Doing the best I can on the material before me, and adopting a broad and commonsense approach, I consider that it is likely that the first assault resulted in the greatest injury to the plaintiff, and that the initial injury was aggravated by the subsequent assaults. I propose apportioning 80 per cent of the damages to the first assault and five per cent to each subsequent one.”

¹ [1999] QSC 265.

- [13] In *AM v KW*,² Harrison AJ tried a case in which the plaintiff claimed that he had suffered psychological injuries from sexual assaults perpetrated on him by the defendant babysitter. After finding the sexual assaults to have been proved, her Honour then turned to consider the assessment of damages, and said:

“50. To assess damages, I looked for some guidance from other decided cases. Like Wilson J in **Paten v Bale** (1999) 135 QLD 36, I have found surprisingly few Australia cases on the assessment of damages for civil assault. In that case, Wilson J approached the assessment of damages for five assaults by awarding damages for each incident, on the basis that each constituted a separate tort. However, as Wilson J commented that there is a certain unreality about this, because the abuse was ongoing, and the incidents in relation to which the plaintiff had sued were representative only. This problem was touched upon in an article by Bruce Feldthusen “The Canadian Experiment with the Civil Action for Sexual Battery”, *Torts in the Nineties*, Mullany (ed) (LBC Information Services, 1997: 274-304), at 279.

51. It is my view that to approach damages by assigning a monetary value to each assault is artificial. In **Paten**, Wilson J attributed 80% to the first assault and 5% to each one thereafter. In this case before me it is my view, after the first assault occurred, each subsequent act made the sexual abuse more firmly entrenched in the plaintiff’s mind. The approach that is most appropriate is to assess a global sum to reflect general damages. If I had to attribute a monetary value to each one, I would apportion the money equally between them.”

- [14] The case before me is different from that considered by M Wilson J in that the assaults which are relied on as constituting the actionable conduct for the purposes of pursuing the claim for damages in the present case occurred only over a period of weeks. That is quite a different situation from that which confronted her Honour, where there were five discrete assaults which occurred over a period of two years. It seems to me that it would be manifestly unrealistic, and an exercise in artificiality, in the present case to attribute particular amounts of damages to particular elements of the assaulting conduct.
- [15] In her affidavit, the plaintiff said that as a result of her treatment by the defendant her life has changed completely. She became depressed. She lost her self-esteem. She felt that her right to say “no” had been taken away from her and that her life was no longer her own.
- [16] She recounted the difficulties she had in sleeping after first having sex with the defendant, saying she had to rely on sleeping tablets, would wake at night with nightmares, needed to take medication for depression, and put on more than 20 kilograms in weight. She then described the psychological symptoms she has suffered, including panic attacks and feeling unsafe. She has been admitted to hospital adolescent units for emotionally disturbed children, which itself has made her feel like she is different. She described having suffered panic attacks at school, causing her to miss school many times due to emotional problems. Her grades suffered. She lacked concentration in class. She had trouble talking with boys.

² [2005] NSWSC 876.

- [17] She attended rape counselling, but said it was too emotional to discuss the events involving the defendant. She said that she does not seem to be getting over the trauma of the events, and every time she talks to a counsellor she has to relive the events, which she finds traumatic.
- [18] She described continuing to have flashbacks of the sexual abuse, which caused her to become upset, and said that these experiences can occur at any time, particularly if she has to talk about the abuse in consultations. Shortly prior to the trial, she was examined by a psychiatrist for the purposes of preparing a medico-legal report. This caused her to relive the abuse, and she was admitted to hospital.
- [19] She deposed to the following:
- “33. I experience waves of depression, particularly after thinking about or talking about being sexually abused and I frequently need days off from TAFE because of low moods.
 - 34. As a result of [G’s] abuse, I felt confused at his manipulation. He was a family friend and he said I would get into trouble if I told anyone. I was young and I didn’t understand at that time that he was manipulating me to seduce me.
 - 35. It was after I disclosed the sexual abuse that I was getting very depressed and was eventually hospitalised. My learning problems became worse. I missed a lot of study and had to give up my plans to study nursing. I no longer think that I would have the ability to be a nurse. I can do little other than administrative work.”
- [20] The plaintiff’s mother has also sworn an affidavit in this proceeding. Relevantly, she deposed to the following:
- “8. I notice a substantial change in [K’s] demeanor after return from our holidays in January 2003. She had become very clingy, she was nervy and had trouble sleeping, and she seemed to me to be a completely different child. As time progressed, I noted more and more changes in [K].
 - 9. In the years prior to 2003, [K] had been quite personable and was willing to go out and talk to people. From 2003 on she had been very depressed and became moody very easily. She seemed to have trouble maintaining friendships and said she lacked trust in people.
 - 10. [K’s] enthusiasm for school and her hobbies waned. Her enthusiasm would vary greatly according to her moods. Her progress at school was significantly affected and she required psychological treatment. Her depression did not stabilise in spite of medication.
 - 11. After she left school, [K] commenced a course in numeracy and literacy at TAFE. She continued to suffer severe depression and took time off from TAFE because of low moods. She was very sensitive about talking about the sexual abuse and I had to endeavour to distract her to settle her down.

12. [K] relied heavily on me. She has no concept of budgeting and handling her money and I am required to pay her bills and her TAFE accounts. I have to advocate for her to see she gets the right treatment at the Royal Brisbane Hospital. She has a lack of insight into her own problems.
13. [K's] father suffers with deteriorating dementia. She is not coping with her father's ill health because of her ongoing depression and the need that we have for respite. I have now arranged regular respite care every six to eight weeks.
14. [K] will no longer talk to male friends of the family and she no longer relates well to her father. This is depriving her of support and social contact with a number of very worthwhile people in my social network. [K] remains very affected by depression and mood swings and very reliant on me for supervision and support.
15. Prior to 2003, [K] was a happy go lucky little girl. She was a slow learner but was keeping up with her peers at school. She was coping well with life generally prior to the abuse of 2003. Afterwards, she became very depressed and unstable and had a major personality change.
16. Over the years since the incident, [K] has tried to kill herself on a number of occasions. She has attempted to jump off the wall outside the Royal Brisbane Hospital onto Bowen Bridge Road. Every time she has been talked down off the wall by hospital staff, security guards and me.
17. [K] cuts herself and there was a long period when [K] would harm herself regularly. On many occasions, we have had to call the police to escort [K] to hospital. The police would forcibly remove [K] from our house as she was a danger to herself and taken to hospital where she would be admitted to the Mental Health Unit.
18. [K] has also tried to kill herself by taking an overdose of her pain killers. This happened when [K] was taken by ambulance to the hospital with severe chest pains. I was unable to take [K] as her father was sick so we had called an ambulance. [K] took about 100 sodium valporate tablets, resulting in her going into a coma and admission to the intensive care unit at the Royal Brisbane Hospital.
19. Prior to this incident, it had been [K's] intention to become a nurse and look after people. [K] has now been deprived of this opportunity. Prior to 2003 [K] was of great assistance to me in the household and did her share of housework. Her moods are such that she no longer participates in any domestic activities.
20. [K] has not been able to be left alone. She has difficulty undertaking any more than one task at a time and becomes angry and violent. I complete all her washing, cleaning and cooking tasks and driver her for her appointments. On average, I estimate that I have provided [K] with care for approximately ten hours per day over the past six years.

21. There are periods when [K] does seem to be improving in terms of her health. There are then setbacks which seem to be associated with flashbacks to the abuse that was perpetrated on her. [K] was required to see Dr Andrew Byth on 3rd March 2009 for an assessment in relation to her current claim.
22. After the occasion of that examination, [K's] condition seemed to deteriorate significantly to the extent that after six or seven weeks she required readmission to hospital. [K] remains a hospital inmate. [K] is currently undergoing treatment and I am informed by her doctors, and verily believe, that she is unlikely to be released from hospital before the end of this month."

General damages

- [21] The injury suffered by the plaintiff as a consequence of the assaults is psychiatric in nature. For the purpose of assessing the general damages to compensate her for having suffered that psychiatric injury, evidence was put before me in the form of two reports by Dr Andrew Byth, psychiatrist, together with a PIRS assessment. In his first report, dated 8 March 2006, Dr Byth confirmed having interviewed the plaintiff individually and jointly with the plaintiff's mother, who provided some collateral history. Dr Byth, after obtaining a history from the plaintiff, discussed the psychological symptoms then being suffered by the plaintiff, including complaints of flashback memories of being sexually abused, nightmares, hearing voices, depressed moods, suicidal thoughts, anxiety, difficulty in relating with men, and inhibition on career ambitions. He noted that after the sexual abuse was disclosed in 2003, the plaintiff developed severe depression, self-harming behaviour and re-living experiences suggesting a post-traumatic stress disorder (PTSD). She was treated at the Royal Children's Hospital and the Child and Youth Mental Health Service, including many admissions for self-harming behaviour and depression. Dr Byth referred to the various medications prescribed to the plaintiff over the time since 2003, including the anti-depressant Zoloft, the major tranquiliser Largactil and the minor tranquiliser Serepax. When he first saw her in 2006, she was still taking anti-depressants, anti-psychotic agents and a mood stabiliser. Her then current treatment consisted of occasional admissions to the Royal Brisbane Hospital Adolescent Unit and outpatient follow up with her private psychiatrist. In the course of taking her history, Dr Byth noted that the plaintiff had some prior learning difficulties and a probable sensitive pre-morbid personality trait before 1997. He said that there was some evidence of borderline personality traits since 2003 reflected in her unstable moods and self-harming behaviour.
- [22] In his 2006 report, Dr Byth gave the following diagnosis:

"11. Diagnosis

- 11.1. Her main diagnosis under DSM-IV of **Posttraumatic Stress Disorder** (PTSD) and she also has features of Borderline Personality Disorder.
- 11.2. She also has a background history of learning disabilities and probably some anxious and sensitive premorbid personality traits in her early childhood i.e. prior to puberty.

- 11.3. She displays features of PTSD including her exposure to highly distressing events threatening her integrity, followed by persistent reliving experiences (nightmares and flashback memories).
- 11.4. She describes triggering of reliving experiences by related stimuli and some avoidance of related stimuli.
- 11.5. Her other features of PTSD include social withdrawal, emotional numbing, anxiety and depression, and hyperarousal, as are described in DSM-IV.
- 11.6. Her PTSD symptoms have been in the marked range of severity. They have required inpatient and outpatient specialist psychiatric treatment, and have involved considerable depression and withdrawal from her family and peers.
- 11.7. Since the sexual abuse was disclosed in 2003, she has also displayed features of **Borderline Personality Disorder**. This is reflected in her marked mood swings, difficulty handling relationships, recurrent self-harming behaviour and deficient sense of identity.
- 11.8. At times, her depression has been quite intense, and would have temporarily warranted the diagnoses of either Adjustment Disorder or Major Depression. Alternatively, these periods of severe mood swings can be seen as part of the emotional instability of Borderline Personality Disorder.
- 11.9. Her complaints of periodic hallucinations and delusions are not uncommon amongst borderline patients, and, whilst not indicating the presence of Schizophrenia at the moment, are seen as indicators of increased risk of Schizophrenia in the future.”

[23] In respect of the plaintiff’s prognosis, Dr Byth thought her likely outcome was in the poor range, in view of the continuing symptoms and despite treatment and recurrent hospital admissions. He thought that her risk of completed suicide would be quite high, and might well shorten her life expectancy by 10-20 years. He expected her to make only a modest improvement with specialist counselling and psychotropic medication over the ensuing 5-10 years, and thought it likely that the plaintiff would be left with chronic marked psychiatric impairment despite the additional treatment he had recommended. He considered the plaintiff would be at greatly increased risk of developing major depression or schizophrenia in her adult life. He concluded:

“Following a period of sexual abuse between 1997 and 2003, [K] has been suffering from PTSD and borderline personality disorder.

Her PTSD arose from the psychological trauma she experienced at the time of the sexual abuse, when she was highly anxious about being raped, threatened with violence if she told anyone, and felt unable to tell her parents.

Her borderline personality disorder probably arose in her early adolescence, and was most likely predominantly caused by the stress of the sexual abuse during her pre-puberty (latency) and pubertal years. She had difficulty

coping with the demands of the adolescent stage of her life because of sexual abuse, along with her previous problems with learning disabilities and sensitive personality traits; which led to her developing borderline personality disorder.

...

Her current occupation is a student, and her future a possible work would be markedly impaired by her current psychological state. Has relates to her problems with mood swings, hallucinations, social withdrawal and intrusive negative thoughts from PTSD and borderline personality disorder.”

- [24] Dr Byth concluded that, even with psychiatric treatment over the next 5-10 years, the plaintiff was likely to make only a partial improvement, and would be left with chronic marked psychiatric impairment arising from the sexual abuse.
- [25] Dr Byth saw the plaintiff again on 3 March 2009, and provided a further report dated 6 March 2009. He confirmed in that report that overall the plaintiff’s diagnoses had not changed since his previous report. Her borderline personality disorder and depressive features had marginally improved with treatment, but he thought they were still moderately severe, as reflected in the plaintiff still needing specialist treatment, needing time off from college, and being very reliant on her mother for supervision. He noted that the plaintiff remained socially withdrawn and psychomotor retarded, indicative of moderately severe depression.
- [26] In terms of the elements of abuse which were causative of the psychiatric injuries from which the plaintiff suffers, Dr Byth is of the opinion that the plaintiff’s development of PTSD and borderline personality disorder, along with associated depression, “can be adequately explained in terms of the exposure episode in 1997, and the fully blown sexual relationship in 2003, without any necessary contribution from the swimming pool incidents prior to 2003”. He noted that, in clinical practice, one sees many cases of PTSD attributable to single traumatic events, or to a string of events over a short period such as a week, as is commonly seen in road trauma, bush fires and other natural disasters, sieges and combat situations. Dr Byth also thought that the sexual abuse in 2003 had exacerbated such pre-existing learning difficulties as the plaintiff had (which he thought were minimal). He said that, in particular, the plaintiff’s psychomotor retardation and social withdrawal from depression would have significantly impaired her capacity to study efficiently and reliably. Her PTSD and borderline personality disorder would also have affected her ability to study. In addition, after 2003, she had significant periods of time in hospital and was required to take combinations of medication which would have made study difficult.
- [27] The method of assessing general damages under the *Civil Liability Act* 2003 (“*CLA*”) is prescribed by s 61:

“61 Assessment by court of injury scale

- (1) If general damages are to be awarded by a court in relation to an injury arising after 1 December 2002, the court must assess an injury scale value as follows -

- (a) the injured person's total general damages must be assigned a numerical value (*injury scale value*) on a scale running from 0 to 100;
- (b) the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind;
- (c) in assessing the injury scale, the court must -
 - (i) assess the injury scale value under any rules provided under a regulation; and
 - (ii) have regard to the injury scale values given to similar injuries in previous proceedings.
- (2) If a court assesses an injury scale value for a particular injury to be more or less than any injury scale value prescribed for or attributed to similar particular injuries under subsection (1)(c), the court must state the factors on which the assessment is based that justify the assessed injury scale value."

[28] For the purposes of s 61(1)(c), one has regard to the *Civil Liability Regulation* 2003, and specifically s 6 of that Regulation which, together with schedules 3 to 6 of the Regulation, provides the rules under which a court must assess the injury scale value for an injury. By s 6(2) of the Regulation, schedule 4 to the Regulation provides the ranges of injury scale values for particular injuries that the court is to consider in assessing the injury scale value for those injuries. Schedule 3 to the Regulation sets out a number of matters to which the court is to have regard in the application of schedule 4. Specifically, s 6 of schedule 3 provides:

"6. Mental disorder

- (1) This section applies if -
 - (a) A court is assessing an ISV; and
 - (b) A PIRS rating for a mental disorder of an injured person is relevant under schedule 4.
- (2) The PIRS rating for the mental disorder of the injured person is the PIRS rating accepted by the court.
- (3) A PIRS rating is capable of being accepted by the court only if it is -
 - (a) assessed by a medical expert as required under schedules 5 and 6; and
 - (b) provided to the court in a PIRS report as required under schedule 5, s 12."

- [29] PIRS is the acronym for “Psychiatric Impairment Rating Scale”. Schedule 5 to the Regulation sets out the matters relevant to a PIRS assessment by a medical expert, including the steps that need to be followed by the medical practitioner in making the assessment, while schedule 6 sets out the various percentage impairment ranges which apply to levels of impairment within the relevant classes of assessment.
- [30] Dr Byth, as a specialist psychiatrist, is a medical expert who is appropriately qualified to perform a PIRS assessment. He has provided a PIRS report and has made an assessment as required under schedules 5 and 6 to the Regulation. Dr Byth has assessed the plaintiff’s level of psychiatric impairment using PIRS at 44 per cent.
- [31] When one has regard to schedule 4 to the Regulation, item 10 “Extreme Mental Disorder” indicates a range of ISV of 41 to 65. The PIRS rating is relevant to making an assessment of an “extreme mental disorder” for the purposes of schedule 4 because the specific example given within schedule 4 of the sort of injury which falls within the ambit of “extreme mental disorder” is stated as “a mental disorder with a PIRS rating between 31% and 100%”.
- [32] For the avoidance of doubt, I make it clear for the purposes of s 6 in schedule 3 to the Regulation that I accept the PIRS rating for the mental disorder of the plaintiff assessed by Dr Byth.
- [33] In assessing the plaintiff’s ISV, I therefore have regard to the PIRS rating of 44 per cent. I also have regard to the following matters:
- (a) The plaintiff clearly has insight into her psychiatric difficulties;
 - (b) She is a young woman who, despite the possibility of shortened life expectancy referred to by Dr Byth, still faces the prospect of many years of mental suffering;
 - (c) The mental disorder has clearly caused significant suffering and anguish to this plaintiff, and will continue to do so;
 - (d) There has been a significant loss of enjoyment of the amenities of life by reason of the psychiatric disorders;
 - (e) There is nothing to suggest that the plaintiff would have suffered the psychiatric disorders in any event.
- [34] After taking all these matters into account, I assess the plaintiff’s ISV at 45. That assessment yields an award of general damages of \$80,900.

Past and future care

- [35] The availability and assessment of damages for gratuitous services is governed by s 59 of the *CLA*:

“59 Damages for gratuitous services

- (1) Damages for gratuitous services are not to be awarded unless

- (a) the services are necessary; and
- (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
- (c) the services are provided, or are to be provided -
 - (i) for at least 6 hours per week; and
 - (ii) for at least 6 months.
- (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
- (3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.
- (4) In assessing damages for gratuitous services, a court must take into account -
 - (a) any offsetting benefit the service provider obtains through providing the services; and
 - (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[36] In particularising this claim, the plaintiff has tendered a schedule of the assistance rendered by others, specifically her mother. Her mother has given sworn evidence, confirming that the schedule was completed by the plaintiff's solicitors in consultation with her and that she was the person responsible for providing the instructions in relation to the nature of the duties performed by her and the times taken performing those duties. She further deposes:

"I say that I continue to perform, on behalf of [K], the domestic activities particularised in the care schedule. I continue to drive [K] to her psychology appointments, twice per week, her psychiatric appointments once per week and I spend an additional five hours each week administering [K's] money, taking her shopping and arranging payment of her accounts. I have also been the person responsible for conveying [K] to hospital for treatment, to shops as necessary, because she is no longer capable of travelling by herself, and for respite."

[37] Many of the tasks particularised in the schedule are clearly services of the same kind which would have been provided by the plaintiff's mother to the plaintiff before the breach of duty happened. So, for example, significant time is claimed in relation to domestic duties such as cleaning, vacuuming, mopping, cooking and so on. There are, however, particulars of services, such as driving the plaintiff to psychologist and psychiatrist appointments, administering her money, administering

her medication, and similar, which I would regard as services which were and are necessary for the plaintiff, the need for which arose solely out of the psychiatric injuries in relation to which the present award of damages is being made. I would also accept, on the evidence before me, that these services have been provided for at least six hours per week and for at least six months since the need for them arose as a consequence of the sexual assaults.

- [38] It is clear on the material that the plaintiff's mental condition deteriorated over time after the sexual assaults, necessitating the provision of the gratuitous services. Whilst there have been periods during the time since the sexual assaults when the amount of time which the plaintiff's mother has needed to devote to care for the plaintiff has been more extensive than in other times, it is also clear that there has been a continuous need for care, and that need is ongoing.
- [39] Doing the best I can on the material before me, it seems appropriate to make an award on the basis of the plaintiff's mother having provided 10 hours per week gratuitous care to the plaintiff since the time of the sexual assault. This approach will reflect the sorts of variances to which I have already referred. The plaintiff has claimed for the gratuitous services at the rate of \$12.50 per hour, which is a rate significantly less than a commercial rate of care (deposed to by Ms Susan De Campo of Lifecare). Allowing 10 hours per week at this rate for the seven years since the assaults yields an award for past care of \$45,500.
- [40] The plaintiff has an ongoing requirement for care. Ms De Campo has provided a report which would have the plaintiff under a regime of receiving two hours care each morning plus an attendant to sleep over, and has assessed the commercial cost of provided such a level of care at a minimum of \$1,229 per week.
- [41] The plaintiff, of course, has the significant benefit of her mother's support. The plaintiff is still a young woman, and will require care for many years to come. The best I can do, on the relevantly limited material before me, is to make a global assessment which would represent an allowance for the provision of gratuitous services in the future, whilst incorporating a significant discount for vicissitudes. An appropriate global award would, in the circumstances, be \$100,000.

Special damages

- [42] The plaintiff has claimed special damages, which fall into two broad categories. First, there are travelling expenses totalling \$463.50. These should be allowed. There is also, however, a raft of other claims, such as for "wear and tear on car", pet expenses, and other such claims which clearly are not compensable as special damages. I propose simply to allow \$1,000 as a global amount for the special damages claimed.

Economic loss

- [43] The plaintiff has suffered, and will continue to suffer, a diminution in her capacity to earn income as a consequence of the psychiatric injuries she has suffered.
- [44] Dr Byth reported that the plaintiff had some learning difficulties in primary school, and had some possible sensitive pre-morbid personality traits. She had repeated Year 1, but had subsequently kept up with her peers academically up to 2003. Since

2003, she developed borderline personality traits which were reflected in unstable moods and self-harming behaviour.

[45] The plaintiff's school reports were put into evidence. Having reviewed them, it cannot be said, in all fairness, that the plaintiff, even before the incidents of 2003, was anything but an average student, at best. The reports as to her pre-2003 behaviour, however, are consistently good, evidencing a well behaved child who tried her best, and worked satisfactorily. There is a marked change in the school reports from 2003, when there is a record of troublesome behaviour by her and troubling conduct, including fairly regular presentation with suicidal thoughts.

[46] Since finishing school, the plaintiff has had some minimal part time employment in the catering industry.

[47] In his latest report, Dr Byth expressed the following opinion:

“17.5 K told me she had previously had always wanted to be a nurse, however, since the sexual abuse, she had been struggling to slowly finish some TAFE numeracy and literacy subjects, and she hoped to eventually be able to work in childcare or business administration. My impression was that these 2 latter occupations would be beyond her because of PTSD and Borderline Personality Disorder, and because of her lack of social intuition and her emotional instability.

17.6 In my opinion, she might be able to work eventually in some supported or sheltered workshop, with close supervision, probably working alongside other workers with psychiatric or intellectual impairments. I doubt that she could currently cope with processing, retail, clerical or parking attendant work because of her psychiatric conditions.

17.7 She will probably very restricted to half-time duties in low-paid or voluntary work because of PTSD and Borderline Personality Disorder. She will probably need 2-3 months off work each year for inpatient and outpatient of these mental illnesses. This situation will continue indefinitely.”

[48] In all the circumstances, I am inclined to accede to the submission made on behalf of the plaintiff that, adopting a relatively conservative approach, the plaintiff could have been expected to undertake, at the very least, part-time work entitling her to, say, \$250 net per week. Allowing that over the four years since the incident would yield an assessment of \$52,000, with interest thereon of \$10,400. Further, she would be entitled to recover lost superannuation benefits on that amount of \$4,680.

[49] An accurate assessment of the plaintiff's future economic loss is simply not possible. On first principles, of course, the damages being assessed under this head represent diminution of her capacity to earn income, and, in this case, the base from which one proceeds is that she was an average student with possible sensitive pre-morbid personality traits. Those factors raise the clear prospect of necessary limitation of the range of occupations which would have been open to her. Prediction of the future course of this plaintiff's life is also difficult. She has not completely been deprived of her capacity to earn income, but it has certainly been significantly adversely affected. In all the circumstances, I am again inclined to

adopt the submissions advanced on the plaintiff that a conservative approach to the matter would be to allow her future loss of income at the rate of \$400 net per week over, say, 44 years to her notional retirement, yielding \$377,600, which I would then discount by 40 per cent to account for the vicissitudes of life, the prospects of finding gainful employment, and as representative of the risks by reason of her pre-incident academic and psychological state. The amount allowed for future economic loss will therefore be \$226,560. In addition, the plaintiff will be awarded \$20,390 by way of an employer's lost contributions to her superannuation entitlements.

Future expenses

- [50] It was submitted for the plaintiff that the evidence suggests that she will need respite care of three to four nights every six to eight weeks for the foreseeable future. In fact, the evidence about this appears in Dr Byth's second report, where he notes that the plaintiff's mother reported to him that the mother "has organised regular respite care for her every 6-8 weeks because of her depression and the family needing a break". There was, however, no further evidence put before me, nor any detail as to the costing of such respite care. Accordingly, I am unable to make any assessment in that regard.
- [51] Dr Byth did, however, say in his first report, and confirm in his second report, that the plaintiff would benefit from specialist psychiatric treatment, including inpatient and outpatient treatment, over the next 5-10 years, and this would cost \$14,000 per year. Converting that to an average weekly cost of \$270, over, say, 7.5 years, yields \$88,425 after appropriate discounting.

Aggravated damages

- [52] The plaintiff claims an award of aggravated damages. It has been submitted on her behalf that the amount to be awarded under this head ought be equal to the amount awarded for general damages.
- [53] Professor Luntz³ has noted the following conditions for the award of aggravated damages (omitting references to authority):⁴

"As with exemplary damages, aggravated damages may be awarded where the defendant has acted, either in committing a tort or thereafter, with contumelious disregard of the plaintiff's rights, in an insulting or high-handed way or with malice. The additional factor, which is required is that such conduct must have increased the plaintiff's suffering."

- [54] In *Paten v Bale* (supra), M Wilson J refused to claim for aggravated damages in the circumstances of that case, saying:

"[16] The plaintiff claimed aggravated damages. These are usually given to compensate for the harm done to a plaintiff by a wrongful act that was aggravated by the manner in which it was done; The submission related to the trauma suffered by the plaintiff at the time of the criminal proceedings and again in relation to these civil proceedings. I accept that the committal and criminal trial proceedings were traumatic experiences for

³ H Luntz *"Assessment of Damages for Personal Injury and Death"* (4 ed).

⁴ At para 1.7.10.

the plaintiff, but there is no suggestion of any impropriety in the conduct or the defence of those proceedings. The defendant pleaded not guilty and was convicted only after a jury trial. It is a fundamental principle of our legal system that an accused person is innocent unless and until proved guilty, and he cannot be held liable in damages for the exercise of that right.

The plaintiff then focussed on the defendant's conduct in relation to these civil proceedings. He denied liability and accused the plaintiff of having told lies at the committal. As the result of an interlocutory application the plaintiff obtained judgment for damages to be assessed. The defendant subsequently sought unsuccessfully to have that set aside. He continued to maintain that he had not committed the assaults. However, insofar as the defendant's conduct in relation to the civil proceedings has been reprehensible, the plaintiff has been compensated in orders for costs. And of course in assessing compensatory damages for pain and suffering, I have taken into account trauma associated with reviving the memories of what happened. In all the circumstances I do not consider that this is a case for aggravated damages."

- [55] In the present case, the plaintiff cast her claim for aggravated damages on another basis, namely:

"The assessment of aggravated damages should take into account stress and humiliation and, in this instance, the circumstances of a significantly older family friend taking advantage of his position of responsibility and trust to inflict quite serious damages upon the plaintiff."

- [56] An award of aggravated damages is, fundamentally, compensatory in nature.⁵ To the extent that the plaintiff is to be compensated for pain, suffering and loss of amenities by reason of the trauma she suffered, the basis for and means of computation of those damages, within the mechanism and constraints provided for under the *CLA*, are set out above. In assessing whether, as an exercise of discretion, there ought be a further award of aggravated damages it is necessary to have regard to the circumstances of the case. One of the circumstances of the present case, which is admitted on the pleadings, is that the defendant has already paid the plaintiff the sum of \$34,500 pursuant to a compensation order made under the provisions of the *Criminal Offence Victims Act* 1995. Section 22 of that Act provided, *inter alia*:

"(1) A right, entitlement or remedy under this part is in addition to, does not limit, and is not in substitution for, any right, entitlement or remedy under common law or otherwise.

...

(3) Compensation provided to an applicant under this part is intended to help the applicant and is not intended to reflect the compensation to which the applicant may be entitled under common law or otherwise."

- [57] These provisions do not mean, however, that a court, when considering whether a plaintiff ought receive an award of aggravated damages, which is to compensate for

⁵ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 per Windeyer J at 151.

the manner in which the assault was committed and the effect of that conduct on the plaintiff's suffering, ought ignore the fact that a plaintiff has received an award of compensation under the *Criminal Offence Victims Act* 1995, albeit paid as compensation which is "intended to help the applicant and is not intended to reflect the compensation to which the applicant may be entitled under common law or otherwise".

- [58] It is certainly not the case that the making of a compensation payment under the *Criminal Offence Victims Act* 1995 disentitled the plaintiff from making a claim for aggravated damages. It is, however, I think a relevant circumstance to consider when assessing whether an award of aggravated damages ought be made.
- [59] Ultimately, having regard to the factors considered under the assessment of the plaintiff's general damages, and otherwise the circumstances of this case, I am not persuaded that this is an appropriate case for an award of aggravated damages. Aggravated damages are not awarded for a punitive purpose – quite properly, the plaintiff did not seek an award of exemplary damages. As M Wilson J noted in *Paten v Bale*,⁶ this was the correct approach, given that the defendant had already been punished by the criminal law. It seems to me, however, that the awards made in this judgment are the proper and appropriate compensation to which the plaintiff is entitled in this civil proceeding. In that regard, and for completeness, I should note that, this being a claim for personal injury damages caused by unlawful sexual assaults, the prohibition on an award of aggravated damages under the *CLA* is not applicable in this case – see s 52(2)(b).

Conclusion

- [60] In my opinion, the plaintiff has proved an entitlement to recover damages from the defendant for the psychiatric injuries suffered by the plaintiff as a consequence of having been the victim of the subject sexual assaults by the defendant.

- [61] In summary, the damages recoverable are as follows:

	\$
General damages	80,900
Past care	45,500
Future care	100,000
Special damages	1,000
Past economic loss	52,000
Interest on past economic loss	10,400
Lost past superannuation	4,680
Future economic loss	226,560
Lost future superannuation	20,390
Future expenses	<u>88,425</u>
Total	\$629,855

- [62] There will therefore be judgment for the plaintiff against the defendant in the sum of \$629,855. The plaintiff has asked for the opportunity to make further submissions on the question of costs.

⁶ At [15].