IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Unrestricted

S CI 2013 01744

Menahem Waks — Plaintiff

v

~~Velvel Serebranski &~~ Ors. (according to the attached schedule) — Defendants

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JUDGE:	Forbes J
WHERE HELD:	Melbourne
DATE OF HEARING:	2 September 2019
DATE OF JUDGMENT:	17 February 2020
CASE MAY BE CITED AS:	Waks v Cyprys & Ors
MEDIUM NEUTRAL CITATION:	[2020] VSC 44

ASSESSMENT OF DAMAGES – Common law damages - Childhood sexual abuse – Institutional abuse - Ongoing psychiatric and/or psychological consequences of abuse – General damages for pain and suffering, loss of enjoyment of life – Special damages for loss of earning capacity and medical expenses – Concurrent tortfeasors *Baxter v Obacelo* (2001) 205 CLR 635 – Earlier abuse by different tortfeasor - *Malec v JC Hutton Pty Ltd* (1900) 160 CLR 638 – *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 – *Smith v Gellibrand* [2013] VSCA 368 - No award for aggravated and exemplary damages against perpetrator - *Gray v Motor Accidents Commission* (1998) 196 CLR 1 - *Carter & Anor v Walker & Anor* (2010) 32 VR 1.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S Burt	Mazzeo Lawyers
For the Second Defendant	Self-Represented	

HER HONOUR:

1 Menahem Waks, or Manny as he prefers, was a thirteen year old student at Yeshivah College in 1988 when he was sexually abused by David Cyprys. Mr Cyprys was variously a caretaker, security guard, karate teacher and locksmith at the school over the time that the abuse occurred. He has subsequently been convicted and sentenced in relation to charges concerning Manny Waks and other students.

2 In this proceeding Mr Waks claims damages for psychiatric injury from Mr Cyprys, who is the Second Defendant, and eleven other defendants who are associated with the Yeshivah Centre and Yeshivah College.[1] Mr Waks has settled his claims against the eleven Yeshivah defendants at mediation in September 2018. Mr Cyprys did not participate in the mediation. Mr Waks has a judgment against Mr Cyprys entered in default of a defence and my task is to assess the damages to which he is entitled in accordance with that default judgment. At the time of hearing Mr Cyprys was incarcerated and participated by videolink.[2]

3 For the reasons that follow, I assess the compensatory damages in the sum of $804,170 comprising:

General Damages		$ 200,000
Medical and other expenses	Past	$ 37,348
	Future	$ 25,000
Loss of earning capacity	Past & Future (including Super)	$ 541,822
	TOTAL	$ 804,170

Assessment of Damages in default of a defence - the pleaded facts.

4 Mr Waks pleads that the defendant is liable to him for damages as the sexual abuse was a series of batteries. Judgment in default of a defence was entered under Order

1 The Third to Thirteenth Defendants who have settled with the Plaintiff are collectively described as 'the Yeshivah defendants'.

2 As Mr Cyprys is the only participating defendant in the proceeding I have simply referred to him as the 'defendant' in this judgment.

21.02 of the *Supreme Court (General Civil Procedure) Rules* 2015. Such judgment is interlocutory as the claim is one for damages.[3] As interlocutory judgment has been entered, the effect of the failure to file a defence is that the defendant is taken to have admitted the facts pleaded in the statement of claim.[4] The assessment of the quantum of damages is undertaken so that the interlocutory judgment can be made final.[5] The plaintiff's entitlement to damages is to be assessed on the basis of the pleaded facts.

5 The statement of claim[6] pleads that during 1988 Mr Cyprys sexually abused Mr Waks on multiple occasions. The sexual abuse was particularised in paragraph 12 as:

a) In 1988 the Second Defendant was about 20 years of age. The Plaintiff was about 13 years of age.

b) The Plaintiff commenced karate classes organised by Yeshivah. The classes were mostly held on the grounds of Elwood Synagogue once or twice per week. The classes were run by the Second Defendant.

c) The Second Defendant pinched the plaintiff's buttocks.

d) The Second Defendant would transport the plaintiff and other students by van to and from Elwood Synagogue in Elwood. The Plaintiff was instructed to sit next to the Second Defendant in the front passenger seat at which time the Second Defendant would regularly touch the plaintiff's groin area over his clothes.

e) On one occasion, after a private session with another student, the Second Defendant dropped the other karate student off afterward and then returned the Plaintiff to the Centre and took him to the male Mikveh (ritual bath) at the Centre. The Second Defendant instructed the Plaintiff to undress and enter the ritual bath. The Second Defendant did likewise and told the Plaintiff he was going to teach him floating techniques. He then started to help the Plaintiff float and started touching his thighs and penis by rubbing his hand up and down the Plaintiff's penis. At some stage the Second Defendant moved the Plaintiff's hand so it would touch the Second Defendant's genitals. The Plaintiff started to feel dizzy and then got out of the bath

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3 *Supreme Court (General Civil Procedure Rules)* 2015 (Vic) r 21.03(1)(b).

4 *Parkville Court v Salvaris* [1975] VR 393. See also *Stewart v Coughlan* (1885) 11 VLR 279; *National Bank of Australasia v Cohen* (1896) 22 VLR 269; *Cribb v Freyberger* [1919] WN 22; *Nixon v W Phelan & Son Pty Ltd* [1959] VR 83; *Lombank Ltd v Cook* [1962] 3 All ER 491 at 498.

5 *Victorian Economic Development Corporation v Cloverdale* (1992) 1 VR 596.

6 Plaintiff, 'Amended Statement of Claim filed pursuant to the orders of his Honour Justice Keogh dated 10 November 2019', ('Plaintiff's Statement of Claim').

and sat on the floor in the drying area. The Second Defendant then continued rubbing the Plaintiff's penis again. The Plaintiff felt like he was blacking out and at some point the Second Defendant stopped touching the Plaintiff and soon after the Plaintiff got dressed and left.

f) During a karate class the Second Defendant claimed that the Plaintiff did something wrong. The Second Defendant, as purported punishment, then took the Plaintiff around the back of the Centre and gave him an ultimatum to either do something which was impossible, or jog around the yard with his pants and underpants around his ankles in his view exposing his genitals.

g) During a karate class the Second Defendant grabbed the Plaintiff's genitals from behind while the Plaintiff and the rest of the class were practicing karate moves.

h) In addition to the particulars from (a) – (g) herein, the plaintiff was abused on multiple occasions before and after karate classes by being touched on his genitals and also touched whilst sitting in the van used by the Second Defendant.

i) The abuse ceased when the Plaintiff was around 14 and a half years old.

6 Mr Cyprys was charged and pleaded guilty to a number of offences including three offences which related to the events outlined in particulars (e) and (f) above.[7]

7 The plaintiff had made a pre-trial submission that the defendant not be permitted to cross examine the plaintiff. That application was not heard nor determined by me. Mr Cyprys did not seek to cross examine the plaintiff and remained silent when asked by me if he wished to ask any questions in cross examination.[8] In his written submissions[9] filed after the hearing he raised matters appropriate to the quantum of damages. As they included matters not put to the plaintiff during the hearing and received after the filing of the plaintiff's submissions, I gave the plaintiff an opportunity to respond.[10]

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7 Plaintiff's Exhibit P5, '*Director of Public Prosecutions v David Cyprys* [2013] VCC 'Reasons for Sentence' (Wischusen J)' (20 December 2013) 20 -21.

8 Transcript of Proceedings, *Manahem Waks v Velvel Serebrancski & Ors.* (Supreme Court, S ECI 2013 01744, Forbes J, 2 September 2019) ('Transcript') 100 [15] – [19]: Mr Cyprys was asked 'is there anything that you want to add at this stage in proceedings?' He answered 'well nothing that I can – no.'

9 Supplementary Submissions of the Second Defendant, 13 September 2019 and 15 September 2019 ('Second Defendants submissions').

10 The response was outlined in the Submissions of the Plaintiff: Plaintiff, 'Submissions of the Plaintiff in response to the second defendant's submissions dated 13 September 2019 and 15 September 2019', 9

8 Other submissions made by Mr Cyprys contested matters that went to the circumstances of the batteries. Mr Cyprys disputed the accuracy of evidence given as to the period of time over which the abuse occurred, the description of some abuse 'over 100 times'[11], and the characterisation of his position of authority and access to keys to Yeshivah premises. It is not appropriate that I engage in fact finding as to the nature and extent of the conduct as I would be required to do in a contested hearing. By not filing a defence Mr Cyprys lost the opportunity to contest the circumstances of offending as set out in the statement of claim. By entering judgment the plaintiff is limited to those matters contained in the pleadings. As to the conduct amounting to the batteries and the circumstances of that conduct I have proceeded on the basis of the matters as pleaded between paragraphs 9 and 16 of the statement of claim and in particular the events as described in paragraph 12. I note that the pleadings describe that the Defendant 'had unrestricted access and/or was permitted to be on the grounds and in the buildings of the Centre and was provided with keys to the premises and the Centre.'[12]

9 In the task of assessing both pecuniary and non-pecuniary damages the following issues arise:

(a) First, what is the proper approach to assessment of damages of a tortfeasor when other tortfeasors have paid damages in settlement for the same injury?

(b) Second what is the effect of earlier occasions of abuse by a different person which are not the subject of the proceeding?

(c) Third, is the plaintiff entitled to recover aggravated and/or exemplary damages against the defendant?

The First Issue: Settlement with the Yeshivah defendants

10 I am assessing the defendant's liability in circumstances where the plaintiff has

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December 2019 ('Plaintiff's submissions in response to Second Defendant').

11 Transcript of Proceedings (n 8) 27.

12 Plaintiff's Statement of Claim (n 6)[11].

already been paid damages by the Yeshivah defendants for the same loss and damage.

11 The claim against the Yeshivah defendants was a claim in negligence for breach of their duty of care as persons carrying out the activities and functions of the Yeshivah Centre. The claim against those defendants also pleaded aggravated and exemplary damages. The terms of settlement[13] were tendered. They include a term that the settlement sum be kept in strict confidence by all parties. The terms of the agreement makes reference to the claim for compensation, and the claim for aggravated and exemplary damages. It describes the Yeshivah defendants as paying the settlement sum in satisfaction of any and all liability.

12 In submissions[14] filed prior to the hearing the plaintiff submitted that the Yeshivah defendants and Mr Cyprys are each jointly and severally liable to pay the entirety of damages. The settlement by some but not all tortfeasors made clear that it was only in satisfaction of all claims against the Yeshivah defendants, and as such the plaintiff can continue his action against the non-participating tortfeasor.

13 The defendants are concurrent tortfeasors, jointly and severally liable for the same loss and damage sustained by the plaintiff as a result of their independent tortious acts. The plaintiff submitted that they are joint tortfeasors. The submission referred to *Baxter v Obacelo*.[15] In *Baxter*, Gleeson CJ and Callinan J quote from *Thompson v Australian Capital Television Pty Ltd*[16] to demonstrate the difference between joint tortfeasors and several concurrent tortfeasors:

> The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage. As was said in *The 'Koursk'*, for there to be joint tortfeasors 'there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage'.[17]

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13 Plaintiff's Exhibit P1, Terms of Settlement, 14 September 2018.
14 Plaintiff, 'Outline of submissions of the Plaintiff', July 2019, ('Plaintiff's Submissions).
15 (2001) 205 CLR 635 ('*Baxter*').
16 (1996) 186 CLR 574 ('*Thompson*').
17 *Baxter* (n 15) quoting *Thompson* [603-604] per Gummow J; *Bryanston Finance Ltd v de Vries* [1975] QB

14 Examples of joint tortfeasors include persons one of whom is principal or vicariously liable for the act of another, or persons upon whom the same duty is jointly imposed, or persons acting in concert in committing the tort. In *Baxter*, the defendants were joint tortfeasors as one was vicariously liable for the negligence of the other. There is no such pleaded relationship or concerted acts that would make the defendant a joint tortfeasor rather than a concurrent tortfeasor. The defendant is liable for the intentional tort of battery, the Yeshivah defendants are liable for breach of a duty of care. They are not responsible for the same tort, only the same damage.

15 However nothing turns on this as, whether concurrent or joint tortfeasors, the second to thirteenth defendants are jointly and severally liable for the same injury, loss and damage. I accept that I am to assess that loss and damage in full. If the damages that I award are greater than the settlement sum, then I will be bound to give credit for the amount already received from the Yeshivah defendants in the settlement.

The Second Issue: Earlier abuse by a person not party to the proceeding.

16 Mr Waks alleges an earlier period of sexual abuse by a different adult, Velvel Serebranski who was a part of the Yeshivah community ('earlier abuse'). This also occurred while he was a student at Yeshivah College. Although originally named as the first defendant, that man's actions did not form any part of the pleadings. The Yeshivah defendants have not paid damages to Mr Waks for any liability they might have associated with the earlier abuse.

17 Mr Waks gave some evidence as to the earlier abuse.[18] He said it happened a handful of times over a maximum of 6 months. He confirmed it was at the age of about eleven. The details of the earlier abuse are also before the Court from the history given to Professor Dennerstein.[19] It was described as occurring both in

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703 at 730, per Lord Diplock.

18 Transcript (n 8) 43 - 44.

19 In particular her first report dated 23 September 2014. Part of plaintiff's Exhibit P6, Lorraine Dennerstein, *Medico-legal Report*, 23 September 2014 ('Dennerstein report').

synagogues and in areas located outside the synagogue and involved touching of genitals at times over clothes and at other times while naked and occasions where the adult engaged in oral sex on the plaintiff. The abuse by Mr Cyprys was said to have commenced about six months after this earlier abuse stopped.[20] The earlier abuse is still subject to investigation by Victoria Police.

18 The two periods of abuse occur close in time and at a time of immaturity of the plaintiff because of his young age. The medical evidence opines that the 'experience of sexual abuse by both Velvel and Cyprys has caused the development of the psychological conditions'[21].

19 The state of the medical evidence directed at causation in light of the earlier abuse identifies the assaults by Mr Cyprys as a cause of his psychiatric injury. This is sufficient to give rise to a liability to pay damages for the entirety of the psychological conditions. In assessing those damages the defendant takes the plaintiff as he finds him. However, in assessing those damages, the possibility of impact from earlier unrelated events on enjoyment of life or earning capacity is not ignored. If, as here, there is evidence of earlier sexual abuse which itself was a cause of some psychiatric injury, the effects of which are not established on the balance of probabilities, then the possibility of ongoing consequences cannot be disregarded in arriving at proper compensation.

20 In *Malec v JC Hutton*, when specifically discussing damages for loss of earning capacity, the Court said:

> Hypothetical situations of the past are analogous to future possibilities: in one case the court must form an estimate of the likelihood that the hypothetical situation would have occurred, in the other the court must form an estimate of the likelihood that the possibility will occur. Both are to be distinguished from events which are alleged to have actually occurred in the past.[22]

In assessing both past and future losses the court must hypothesize what would have happened or what was likely to happen absent injury. Neither inquiry is an

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20 Ibid 6-7.
21 Ibid 21.
22 (1990) 169 CLR 638, 639 ('Malec').

exercise in proof of historical fact.

21 In *Seltsam v Ghaleb*, Ipp JA described this approach in evaluating possibilities as providing 'appropriate allowances' for contingencies. He said:

> Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.
>
> Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.[23]

22 The defendant could have, but did not, lead evidence to prove on the balance of probabilities the extent to which injury caused by the earlier abuse would, without more, have impacted upon enjoyment of life and capacity to earn. No evidence was led by Mr Cyprys on this question to discharge this evidentiary burden of proof.[24] In my view the approach that I should take in having regard to the occurrence of the earlier abuse is as described by the Court of Appeal in *Smith v Gellibrand*, albeit in the context of a judge's direction to a jury:

> It was correctly regarded by the trial judge to be a case where evidence had been led which was capable of being accepted by the jury as showing the existence of medical conditions which could be taken into account by the jury when assessing the likely condition and fitness for work of the appellant but for any injury the jury found to have been sustained as a result of the respondent's negligence. That is, it was correctly regarded by his Honour as a vicissitude case and the jury was then given relevant and unimpeachable directions about vicissitudes generally and the vicissitudes in this particular case.[25]

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23 [2005] NSWCA 208 [106 - 107].

24 *Purkess v Crittenden* (1965) 114 CLR 164 [171] (Dixon C.J, Menzies and Windeyer JJ) quoting *Watts v Rake* (1960) 108 CLR 158 [160] (Windeyer J): "If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributory cause."

25 [2013] VSCA 368 [77].

23 Accordingly, I assess damages for the entirety of the plaintiff's psychiatric injury. I consider the evidence as to the possibility of contributing effects of the earlier abuse as a factor in arriving at an appropriate allowance for vicissitudes to be applied to those damages.

Assessing the extent of injury, loss and damage suffered

24 Mr Waks is the eldest son and second eldest child in a family of 16 children. He grew up within a Chabad community, an ultraorthodox Hasidic sect. His father had grown up in a more secular environment and maintained some practices which were more flexible than the orthodoxy in which the family otherwise lived. Generally however he grew up in a religious environment insulated from wider secular society where every aspect of life was dictated by religion.

Education

25 Mr Waks received very little in the way of secular studies. He had two years of schooling at an ultra-orthodox school in Israel before coming to live in Australia at the age of seven.[26] He attended Yeshiva College in Melbourne from mid-Grade 4 until mid-year 7. He described only a short period of secular studies.[27] Mr Waks went to Israel from mid-Year 7 and did 6 months of full religious studies there. Upon returning to Melbourne he was taken out of general schooling studies and was placed in Year 9, full time religious studies.[28]

26 He did not know what was planned for him by embarking on religious studies rather than general studies.[29] Generally the path chosen for him by his family contemplated a life focussed on religious observance and instruction.[30] It was not addressed in evidence what sort of preparation such a religious education might be for an adult working life in a secular environment. It was not the equivalent of

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26 Dennerstein report (n 19) (September 2014) 4.
27 Transcript (n 8) 21.
28 Ibid 22.
29 Ibid 40.
30 Ibid.

attaining a VCE or HSC.[31] Mr Waks himself did not know what might have been planned.

27 The period of abuse by the defendant began before the six month period when he was sent to Israel to study. He said he was a troublemaker there and returned to Melbourne at which time the abuse by the defendant resumed.

Early response

28 From the age of about 14, Mr Waks said he began to rebel in every possible way. In particular he deliberately failed to make religious observances. He was punished harshly for such behaviour – thrown out of classes and belted by his parents on a daily basis.[32] At times between the ages of 14 and 17 he was sent away and his education during this time was significantly disrupted. At times he was suspended from the Melbourne Yeshiva Centre. His parents sent him to Yeshiva Gedola in Sydney to further religious studies[33] but he was later expelled from that institution. He then attended further Yeshiva's in Melbourne and Sydney but was also expelled from those schools. In evidence, Mr Waks said one of the reasons for his expulsions was for displaying a completely secular lifestyle.[34] He did not complete his religious studies.

29 He described being a troublemaker, a 'rebellious child'.[35] From the age of 14 he began abusing alcohol and illicit drugs,[36] not eating kosher and deliberately desecrating the Sabbath. He described his behaviour as challenging himself to show how much he hated his religion.[37] He had not disclosed the abuse to anyone during this period.

30 Shortly after his eighteenth birthday, in April 1994, Mr Waks went to Israel. He

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31 Ibid.
32 Transcript (n 8) 36.
33 Ibid 38.
34 Ibid 39.
35 Ibid 36.
36 Ibid 42.
37 Ibid 35.

went, 'to escape from the Melbourne Jewish community, my local community, my family, my environment and just go pretty much as far away as I could'.[38] He described shaving off his beard on the flight – an act contrary to his religious observance and a shedding of his past identity.[39] He joined the Israeli army in November 1994 and found the military experience difficult partly through not knowing Hebrew and partly as it was not what he anticipated. He described 'pushing boundaries' in many ways including drug and alcohol use. He described being angry and that Mr Cyprys was regularly on his mind.

31 In 1996 he had a month's leave of absence and returned to Melbourne. While here he heard on radio of a police operation, Operation Paradox, seeking victims of child sexual abuse to come forward and report their experiences. He spoke to his father of his experiences and he and his father gave police statements. At that time he also reported the occurrences of the abuse to the head of the Yeshivah Centre.

32 Despite having only one month leave of absence Mr Waks remained in Australia for five months. During this time Mr Waks describes ongoing substance abuse issues.[40] It was undoubtedly a difficult time disclosing the abuse to his family, to the Yeshivah rabbi and to the police. On finally returning to Israel he did not rejoin his military unit. As he was absent without leave he was arrested by the military police and went to military jail for 45 days.

33 He described generally the difficulties associated with sexual relationships as a young adult and meeting his wife in 1997 after he returned to Israel. They returned to Australia in March 2000. He and his wife began a family with their children being born in 2004, 2006 and 2008. Their relationship broke down in approximately 2016.

Return to Education

34 On return to Melbourne in 2000 he embarked upon completing secular VCE studies

38 Ibid 44.
39 Ibid 45.
40 Ibid 54.

part time by evening classes. He described finding VCE challenging having mostly only completed religious studies and due to the disruption caused to his education. However he found the studies 'empowering and satisfying'[41] as it was the first time his mind was opened to the prospect of study beyond religious texts.

35 On finishing VCE in 2002 Mr Waks enrolled in a Bachelor of Arts transferring to a Bachelor of International Relations at La Trobe University completing the degree in 2005. He has also obtained a Diploma in Project Management.[42]

Employment history

36 Mr Waks has had a varied work history since 2000. While studying VCE he worked during the day as an integration aide at a Jewish school. He described having less work while at university but at least some part time work. Following completion of his degree he described planning to go to America where he 'pretty much secured a job'[43] assisting his brother in the building business. However, he did not take this up as he was offered work as the executive officer of the Anti-Defamation Commission. He worked in this role for two years from 2006 to 2008. He described finishing that role on 'not ideal terms'.[44]

37 He then joined the commonwealth public service ('CPS') and worked in Canberra from 2009 in an executive level position. He was an Assistant Director at the Office of Transport Security in the Department of Infrastructure and Regional Development.

38 During his time in Canberra he also held senior leadership positions in the Jewish community there as the President of the local Jewish community and Vice President of the Executive Council of Australian Jewry. He described this as fulfilling, at least in some ways.[45] Although not much attention was paid in evidence to this, I infer

41 Ibid 58.
42 Dennerstein report (n 19) (September 2014), 4.
43 Transcript (n 8) 61.
44 Ibid 64.
45 Ibid 62.

that this represented a lessening of the rebellion against his religion that had dominated his life from the age of 14 to his mid-twenties and a resumption of some level of religious involvement and observance.

39 In 2011 Mr Waks publically disclosed the circumstances of his own experience of abuse. He described being contacted by many people as a result and began public speaking and advocacy for victims of childhood sexual abuse in institutions. This involvement became increasingly demanding on his time. In August 2011 he underwent a session with a psychologist where he discussed the stress and difficulty the public disclosure was causing him and how he was coping with the consequences of his experiences. A second session with a different psychologist occurred in December 2011. Both sessions were provided through his employment with the Department of Infrastructure and Transport.[46]

40 Mr Waks made a decision to return to Melbourne. He obtained another role with the department that permitted him to move to Melbourne and remain in the CPS. However a role at a comparative executive level was not available. He worked in Melbourne until resigning in early 2013.

Paid and voluntary advocacy

41 Ultimately, the reason for resigning his employment with the CPS was a decision to take on a full-time role as advocate and support for victims of child sexual abuse in institutions, particularly within the Jewish community. He 'decided… this would be a good way to see if… there's a need… a desire for a new organisation dealing with this issue[47]. Mr Waks said 'out of the Victorian Government inquiry[48] and my evidence there it was clear that I had to leave the public service, which I did… at great personal risk and I lost a fair bit out of that and even financially… '[49] He described his public service career as a 'safe employment environment' and 'a great

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46 Part of plaintiff's Exhibit P10, Ray Smith, ('Session Notes' Optum, 16 December 2011 and 15 August 2011) ('Optum notes').

47 Transcript (n 8) 75.

48 Royal Commission into Institutional Responses to Child Sex Abuse.

49 Transcript (n 8) 75.

job with a career path' which he made a conscious choice to leave and follow the sense of mission which imposed upon him the need to advocate for victims.

42 He commenced working fulltime as an advocate and public speaker addressing the issue of child sexual abuse. He conducted this activity through an organisation he founded in December 2012 called Tzedek,[50] a support group for Jewish survivors of childhood sexual abuse. When he resigned from the public service he took on a full time role as Chief Executive Officer of Tzedek. Mr Waks held the office of President of that organisation until 2014. Although that work was initially on an unpaid basis, it was agreed that if funds were available he would be paid a salary similar to what he was earning in the public service. Funds did become available and he was paid for the full period of his time at Tzedek. At times this involved work of up to 60 hours per week.[51]

43 The work of Tzedek led to conflict and animosity towards Mr Waks from within the Jewish community. He resigned from Tzedek and left Australia in late 2014. He describes a 'backlash' from his religious community that affected him, his parents and his wife significantly. Dr Dennerstein described this as:

> He and his wife now feel that they must leave Australia as his wife feels she can't walk in certain streets which are used by community. She is very anxious in certain areas or going to events and he is similarly anxious. His children have pointed out to him that everyone is looking at him. He feels he has a mark on his head as a victim and that this has rebounded on them.[52]

The family left Melbourne and now live in Tel Aviv, although Mr Waks and his wife have since separated.

44 In 2016 in Israel Mr Waks established an organisation known as Kol v'Oz. It is also an advocacy and support group for survivors of childhood sexual abuse in the global Jewish community. Kol v'Oz has within the last year been registered as a formal not for profit organisation in Israel. The website for Kol v'Oz[53] describes it

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50 The Hebrew word for Justice, Transcript (n 8) 76.
51 Dennerstein report (n 19) (August 2015) 15.
52 Ibid (September 2014) 15.
53 Plaintiff's Exhibit P14, Mr Michael J Lee, '*Supplementary Forensic Accountant's Report in the matter of Menahem Leib* Waks' (11 September 2018) ('Forensic Accountant Report') 95 [App 6].

undertaking activities including: maintaining a website and facebook group, compilation of best practice material, holding workshops and conferences for professionals, a continuing media campaign, training speakers and professionals to present workshops, providing support advice and expert testimony to relevant agencies, Mr Waks undertakes a variety of activities promoting the objects of that organisation on a voluntary basis. He describes being in charge of things with other volunteers who do some of the preparatory work drafting and writing. He maintains a level of public speaking and a media profile. Some of his speaking engagements are paid.[54]

45 Additionally, he has written and published a book about his experience and derived income from that activity. The level of income is dependent upon sales and is described as modest. I have two tendered bank receipts dated November 2015[55] and October 2016[56] in relation to income from the book. Together they total $8,617.50. No evidence was given as to income for 2017-2019 in relation to book sales or overall income.

46 He also gave evidence of being engaged in paid research work through Monash University. He was unclear on the period. The work could be conducted flexibly over hours determined by Mr Waks. The Monash University payslip dated 15 March 2018[57] noted total nett payments for the 2018 year to date at $10,606.00. Another document, an invoice[58] for 'M Waks' (with an ABN) described as 'Invoice #54' was dated 16 July 2016 and was for 8.75 hours at $250 per hour for International Society for Music Education totalling a nett payment of $2,187.50.

47 The documentary evidence of paid employment since 2015 was incomplete and the oral evidence was similarly vague and incomplete. It is not possible on the evidence presented to accurately assess actual earnings from 2015 onwards.

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54 Transcript (n 8) 84.
55 Part of plaintiff's exhibit P2, Commonwealth Bank receipt, 6 November 2015.
56 Ibid 14 October 2016.
57 Part of plaintiff's exhibit P4, Payslip from Monash University, 15 March 2018.
58 Ibid, Tax Invoice for Invoice #54, 16 July 2016.

48 Generally he says of his years in Israel and his present situation that he is able to do very little work-like activity. He describes days where he has a sense of paralysis and is unable to function at any level, and other days when he is able to be more productive and can do significantly more than just a few hours. He has a long term goal of being able to function in a traditional setting of regular and prescribed work hours without the flexibility afforded by his present arrangements.

49 His present 'work' causes triggers and traumas but he also describes it as 'his mission' and derives a healing element from it.

50 Beyond the effects on his work capacity, Mr Waks gave evidence of the pervasive effects of the abuse on his personal life. The abuse was a factor in the breakdown of his marriage in 2016. There are divisions between himself and some siblings which have been disrupted by their respective experiences of abuse and are only now in the process of being mended.[59]

51 Presently he contrasts times of being able to be productive giving him a sense of empowerment with other times of feeling futility and turmoil. Apart from medical treatment detailed below, he has tried various activities to promote wellbeing, improvement in mood and healing. He has utilised yoga and Pilates at times as well as physical activity – presently cycling an hour each way into the centre of Tel Aviv as often as he can, at times up to five times a week.

Medical treatment

52 Mr Waks has been diagnosed with chronic post-traumatic stress disorder, an adjustment disorder with depressed mood, major depression and polysubstance abuse/dependency. The medical evidence detailed below notes the manifestation of symptoms in close time relation with the abuse and accepts that the psychiatric conditions diagnosed are as a result of abuse.

53 In terms of medical treatment or formal medical assessment, apart from the two

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59 Transcript (n 8) 86.

sessions in Canberra in 2011[60] there has been no evidence of any medical treatment in Australia.

54 Two medical legal assessments were made for the purpose of Mr Waks' Victim of Crime Compensation application. The first was by psychologist Dianne Dockery who consulted Mr Waks on 15 October 1996. Her report of 24 January 1997 makes reference to both perpetrators of abuse and described the abuse of Mr Cyprys, particularly the events in the Mikveh as 'more vivid and more disturbing' for the Plaintiff.[61] She diagnoses symptoms consistent with post-traumatic stress disorder resulting from the experiences of abuse.

55 Secondly, Susan Hook, clinical psychologist, assessed Mr Waks in August 2000. [62] She described connections between the abuse and the rebellious behaviour and alienation from school and family that were only recently being made. She describes some improvement in family relations at the time he was newly arrived back in Australia from Israel. He was thought to be in need of treatment for significant symptoms that impacted upon his ability to function. Therapy and progress were thought to be partly dependent on his ability to find work. Following Susan Hook's assessment Mr Waks was able to sustain work and returned to study to complete secondary school and undergraduate university studies as outlined above. There is a reference to attending six sessions out of ten approved therapy sessions through the Victims of Crime process.[63]

56 In 2014 medical treatment was advised by Professor Dennerstein, who saw Mr Waks in September 2014 shortly before he again left Australia. She recommended treatment by psychiatrist or psychologist and consideration of the use of antidepressant medication under psychiatric supervision. Like the earlier assessors, Professor Dennerstein diagnosed post- traumatic stress disorder and an associated adjustment disorder with depressed mood. She felt that the symptoms had become

60 Optum notes (n 46) 15 August 2011.
61 Plaintiff's Exhibit P8, Report of Dianne Dockery, 24 January 1997 ('Dockery's report').
62 Plaintiff's Exhibit P9, Report of Dr Susan Hook, 7 August 2000.
63 Dockery's report (n 61) 13.

more manifest in the years leading up to 2014. She also diagnosed substance abuse that had involved alcohol, marijuana and other drugs described by her at that time as Marijuana Dependency. She also diagnosed Oppositional Defiant behaviour which has since resolved. This diagnosis encapsulated Mr Waks' behaviour in later teens and through the later 1990s.

57 Between 2014 and July 2016 the reports of Professor Dennerstein demonstrate a worsening of the depressive symptoms such that a Major Depressive Disorder was diagnosed by 2016 along with a continuing Polysubstance Abuse/Dependency. In 2016 Mr Waks was in the throes of his marriage ending. His psychological conditions at that time required active treatment and it remained to be seen whether they would respond to treatment. Unfortunately Professor Dennerstein has not examined Mr Waks since July 2016, shortly after the commencement of treatment.

58 From January 2016 treatment was provided in Israel by a clinical psychologist Orna Sieradzki. This was intensive; twice weekly psychotherapy initially and then psychoanalysis four times a week from April 2016 and then three time per week from December 2017. The psychologist diagnosed PTSD, anxiety and depression. Her report was dated 1 May 2017.[64] In an email of 28 August 2018,[65] an updated report is provided in substantially identical terms to the first report.

59 From May 2017 he has been under the care of a general practitioner, Dr Yosef-Ayalon. She describes oversight by a psychiatrist and the prescription of Seroxat for anxiety and depression. From the beginning of 2018 Mr Waks has also been prescribed medicinal cannabis which is assisting with anxiety and sleeping. As at June 2018 the general practitioner describes some slight improvement since their initial meeting a year earlier and opines that ongoing significant support is needed to assist the healing process and rehabilitation.

60 In Israel, Dr Caspi, psychiatrist has been treating Mr Waks. In his report of August

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64 Part of plaintiff's exhibit P11 , Reports of Orna Sieradzki, ('Sieradzki report'), 1 May 2017.
65 Ibid 28 August 2018.

2018[66] he describes treating Mr Waks for 'several years' but it is not clear when he first became involved in treatment. He observed treatment as leading to 'only a slight improvement'. He is treating prolonged symptoms of post-traumatic stress disorder manifesting in symptoms including depression and anxiety and personality changes. Medication has been an anti-psychotic medication Olanzapine in the past and medicinal cannabis since the beginning of 2018 licenced by the Israeli Ministry of Health. As at August 2018 Paroxtine daily was also prescribed.

61 Dr Caspi's report describes Mr Waks as being unable to maintain 'any occupational stability'.[67] He does not express an opinion as to future capacity. He observes that Mr Waks has recently been 'recognised as a 100% disabled person for the purpose of employment by the Israeli National Insurance Institute'.[68] There is no explanation as to how this recognition was arrived at.

62 In addition to reports from treating practitioners, Mr Waks has undergone medico-legal assessments by Professor Dennerstein a psychiatrist, and Dr Sillcock an occupational physician.

63 I have referred to the reports of Professor Dennerstein earlier in this judgment. As at 2016 when last examined she opined that he would not be able to work full time or in his previous paid employment and that this would continue for the foreseeable future. She thought he had a part time capacity for consultancy work which he was then able to do a few hours a day at his own pace. An increase in the amount of work was dependent on response to treatment which at that time had only recently commenced. At that time the development of Kol v'Oz was also relatively new.

64 Dr Sillcock first examined Mr Waks in March 2017.[69] She obtained an occupational history of work as an integrations aide 'for short periods' in the early 2000's and two years at a Jewish organisation addressing anti-Semitism. His longest employment

66 Plaintiff's Exhibit P13, Report of Dr Asaf Caspi, 8 August 2018 ('Dr Caspi report').
67 Ibid.
68 Ibid.
69 Plaintiff's Exhibit P7, Reports of Dr Amanda Sillcock ('Dr Sillcock's report').

was noted to be with the Australian Government in Canberra between February 2009 and later 2012 or early 2013. After that she describes: 'He has also worked as a consultant on small projects. He has worked intermittently in the child sexual abuse field in an organisation that he established but he also fell out with this board.'[70] Mr Waks works with an organisation based in Israel in work that is 'largely voluntary and he rarely gets paid anything for it'.[71]

65 Dr Sillcock opined that Mr Waks' capacity for employment was limited by his mental state and in particular his substance abuse which appears to be getting worse. In an updated report[72] based on an assessment in July 2018, Mr Waks described himself 'a little better' than when last seen. He was still a heavy cannabis user, including medicinal cannabis. On this history, Dr Sillcock expressed the view that he remained incapable of working on a consistent and reliable basis. She was of the view that he had minimal capacity for paid employment. Mr Waks' psychiatric injury has impacted upon every aspect of his life, altering the trajectory of his education and employment as well as affecting his capacity for those activities.. That impact has consequences that are likely to be lifelong.

Quantifying the loss

66 Quantifying that impact and assessing damages is not an easy task. The principle upon which damages are awarded is well known:

> …a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries.[73]

In effect, the purpose of damages is to restore the injured person to the position they would have been in had the tortious conduct not occurred, at least in so far as money can do.

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70 Ibid 30 March 2017, 2.
71 Ibid.
72 Ibid 12 July 2018.
73 *Todorovic v Waller* (1981) 150 CLR 402 ('*Todorovic*') [412].

67 It is readily apparent that damages cannot restore a quality of life and so pain and suffering damages are an attempt to recognise the loss suffered so far as money can do. Pecuniary loss damages recognise the impact of the injury on a capacity to earn as well as medical and like expenses needed to manage the injury.

68 The Defendant's submissions as to quantum of damages raised the following arguments:

(a) 'Kol v'Oz is a significant international organisation, which was founded by the Plaintiff in 2016, and has the potential to generate significant income for the Plaintiff in the not too distant future'.[74]

(b) He submits that 'the Plaintiff is leading a very active and productive life.'

(c) That 'during the plaintiff's evidence, he stated that he was unable, or afraid to venture outside. However the information about his activities with Kol v'Oz appear to suggest the opposite is the case.

I've had regard for the defendant's submissions in assessing the evidence but have not had regard for any attempt to introduce further evidence through those submissions.

General Damages

69 The effect of the defendant's assaults on Mr Waks has been profound. The final assault at the Mikveh with the religious significance of that location remains particularly disturbing for the plaintiff. The reckless and rebellious behaviour of his teenage years and twenties has disrupted his transition from adolescence to adulthood.

70 I accept that the period serving in the Israeli army was difficult and certainly disrupted by his lengthy return to Melbourne and period of being absent without leave. It was also a period characterised by significant use of alcohol and illicit

74 Second Defendant's submissions (n 9) 2 [9].

substances. Nevertheless he remained serving in the army over a period of approximately four years.

71 On return to Melbourne he was able to complete his VCE while working and obtain an undergraduate tertiary degree. For a young man with little secular education behind him this is a significant achievement.

72 While in Australia between 2000 and 2014, he maintained regular and consistent full time employment. While studying his VCE he maintained work as an integration aide. He held some part time work while at university and after graduation he maintained fulltime executive level employment for some years.

73 I was impressed by the resilience and ability of Mr Waks to overcome the initial rebellious and reckless behaviour so that the Oppositional Defiant behaviour has resolved. With maturity, he has been able to complete studies and become a contributing member of his religious and secular community. This is not to underestimate the hardship associated with these achievements. Nor does it discount the impact of isolation and exclusion by his faith community when he made a public disclosure of the abuse. That exclusion and ostracism extended to his family members which had an impact on his own sense of self.

74 There was something rehearsed in the way he gave evidence as to the events and their effect on him. This is not surprising given that he has spoken publicly on a number of occasions prior to giving this evidence: on occasions of sworn testimony such as at the Royal Commission, and in the course of his advocacy work[75] and the making of a documentary.[76] Despite this it remained difficult for him to maintain composure at times while giving his evidence. I accept he remains distressed by recall of the events and takes steps to avoid stimuli of his own memories and associations of the events.

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75 Transcript (n 8) 69.

76 In New York with ABC where there was an attempt to confront Mr Serebranski. Dennerstein's report (n 19) August 2015.

75 The course of his symptoms has fluctuated. As described earlier, from the age of about 14 years old his symptoms were significantly disruptive. Alcohol and on occasion drugs were used indiscriminately from around 15 years old so that any psychiatric injury remained undiagnosed and untreated. The effect of the injuries on his capacity to function seems to have lessened, without formal medical treatment, upon his return to Australia from 2000.

76 In 2014 Dr Dennerstein describes:

> He has periods of lowered mood lasting for some hours and occurring frequently. He is easily tearful.
>
> He continues to have re-experiencing of the abuse in the form of intrusive thoughts of the abuse which occur daily, flashbacks which are easily triggered and dreams….
>
> He continues to have guilt feelings associated with the abuse.
>
> He continues to feel anger towards the institution involved (Yeshiva)…
>
> He now feels empowered by his actions of disclosure and forming Tzedek and giving testimony.
>
> He continues to have psychic and somatic anxiety…. He has increased anxiety with the knowledge he is leaving his job and that they must leave Australia.[77]

77 In August 2015,[78] by Skype assessment from France where Mr Waks was then resident, Professor Dennerstein observed that substance abuse had increased and suicidal ideation had increased. She held the view that the depression had worsened in recent months such that Mr Waks then met the criteria for a Major Depressive Episode. Urgent treatment was recommended. In part treatment was needed to reduce reliance on self-medication with marijuana and alcohol.

78 In July 2016 a further Skype review assessment[79] was undertaken. On this occasion Professor Dennerstein noted increased depression, intensified suicidal ideation, frequent panic attacks and, although he was undergoing psychoanalytic counselling

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77 Dennertsein's report (n 19) September 2014.
78 Dennersetin's report (n 19) August 2015.
79 Dennerstein's report (n 19) July 2016.

with Dr Sieradzki by this time, he remained resistant to the idea of antidepressant medication. In her view Mr Waks still required urgent active treatment. In part that treatment needed to be directed at his continuing substance abuse and dependency.

79 Treatment has been more intensive since this assessment. The short reports from the treating practitioners provide some assistance in understanding the changes that are emerging with treatment. In 2018 Dr Yosef-Ayalon describes meditation and massage therapy to be greatly assisting and that significant daily physical activity is needed to maintain a healthier physical, psychological and emotional state. She observed 'slight improvement' and notes the risk of deterioration of the various remedial actions are not maintained.[80] Again Dr Caspi describes a 'slight improvement' with a need for ongoing combined mental health care with intensive psychotherapy and medication.

80 The evidence indicates that the conditions are chronic and they will continue to affect his life into the future requiring long term medical treatment and maintenance of a range of activities such as yoga, exercise and meditation to assist in his healing. Mr Waks himself expresses hope of some improvement with time and the continuation of treatment.

81 These matters all give cause for some optimism that the level of symptoms will continue to become more manageable.

82 The Plaintiff did not submit any specific figures as to the quantum of the plaintiff's pain and suffering claim. Instead the plaintiff submitted that the court should be guided by the decisions of *Erlich v Leifer & Anor*[81], *P2 v D2*[82] and *Walker & Anor v Hamm & Ors (No 2)*[83] when quantifying appropriate compensatory damages.

83 In particular, the plaintiff submits that the facts in *P2 v* D2 are alike to those of this

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80 Plaintiff's Exhibit P12, Dr Yosef-Ayalon, *Medical Report*, 26 June 2018 ('Dr Yosef-Ayalon report June 2018').
81 [2015] VSC 499.
82 [2019] NSWDC 84 ('*P2 v D2*').
83 [2009] VSC 290.

matter 'being that the Plaintiff, was sexually abused between the age of 12 and 16 (by her foster father).'[84] In this case *Russell* J said '… the court should aim towards the upper limit of the wide range of damages which might conceivably be justified.'[85] Whilst cases with similar facts may be of assistance, the pain and suffering caused to each individual by virtue of the abuse, turns on its own facts and therefore a finding as to an assessment of damages in one case is not binding on another. Other cases such as *Hand v Morris*[86] also illustrate the individuality of any damages assessment.

84 I assess general damages at **$200,000**.

Pecuniary loss/damages

85 In *Todorovic,* the Court described the task of assessing damages for future pecuniary loss comparing 'what the plaintiff might have earned if he had not suffered the injury with what he is likely to earn in his injured condition' as engaging in 'a double exercise in the art of prophesying'.[87]

86 The task of identifying the course of a life and career of a person injured as a young child is difficult. It is necessary to set some benchmark against which to measure the restoration to be made by an appropriate award of damages. The double prophesying applies to both past and future loss. In some cases a comparison can be made informed by educational progress and vocational aspirations to inform an assessment of what a child might have been able to go on to earn without injury. The difficulty is compounded in the situation here where the plaintiff's childhood was in a closed religious community and his schooling was largely confined to religious education which would not have led to qualifying him for entry into secular tertiary studies. The plaintiff himself understandably did not know what was planned for the future when he was entered into religious studies.[88] It is not possible to set a

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84 Plaintiff, Supplementary Submissions of the Plaintiff, Submission in *Manahem Waks v Velvel Serebranski Ors.* S CI 2013 01744, 6 September 2019, ('Plaintiff's Supplementary Submissions')5 [2.8].
85 *P2 v D2* (n 82) [47].
86 *Hand v Morris & Anor.* [2017] VSC 437.
87 *Todorovic v Waller* (n 73) [412] quoting *Paul v Rendell* [1981] 55 ALJR [372].
88 Transcript (n 8) 40.

benchmark for assessing loss of earning capacity based upon aspiration or by reference to other factors that pre-date the injury. The first part of the prophesying – what the plaintiff might have earned had he not been injured is on the evidence completely speculative.

87 I propose to use his earnings as a Commonwealth public servant as a benchmark against which to measure the loss occasioned by the injury. The plaintiff calculated his loss upon that basis. I use this benchmark for two reasons. First, the plaintiff has completed secular educational qualifications and obtained and maintained work in the Commonwealth public service. It is clear from this that his capacity to study and engage in work as a tertiary graduate no doubt existed. It seems that in the midst of his rebellious and destructive behaviour he nevertheless set upon a path of study and work that accorded with his secular interests. As such, I accept that the earnings as a Commonwealth public servant are an appropriate benchmark against which to measure the loss of capacity to earn. Although these events occurred after injury, the completion of study and the maintenance of executive employment between 2009 and 2013 is the best demonstration of capacity absent any other evidence.

88 Second, in looking to the future, public service employment encompasses a large and relatively stable workforce with a long median length of service.[89] As such, it decreases the underlying level of speculation that might be necessary as to the plaintiff's unknowable intentions.

89 However, using this as a measure for assessing compensatory damages is not an acceptance that but for injury this would have been the career path taken by the plaintiff. The calculations of Mr Lee are based upon various assumptions as to how an intended career path might progress in such an occupation. Those assumptions are not borne out by the evidence. In particular, Mr Lee's report provides two alternate scenarios based upon different career paths within the public service.

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89 Forensic Accountant Report (n 53) 14, [6.10(iv)].

There is no evidence that would allow me to find one or other scenario more probable than not.

90 Mr Lee's report calculates superannuation losses based upon the particular Public Sector Superannuation Scheme which, unlike general employment superannuation legislation, provides a defined benefit and pension scheme. As I am using public sector earnings as a benchmark rather than as a probable career path, it is in my view more appropriate to use general employer superannuation provisions, more particularly employer compulsory contributions of presently of 9.5% of gross earnings.[90]

91 Therefore, I am assisted by those aspects of Mr Lee's report that identify relevant nett or gross amounts appropriate to use in adopting a measurement of Mr Waks' capacity to earn had it not been compromised. Those figures assist in determining a loss of capacity not a loss of particular career.[91]

Past loss

92 The plaintiff's claim for past loss is set out in particulars dated 13 September 2018.[92] It claims past loss on the basis of Mr Lee's calculations as at September 2018 without updating the figures to the time of trial. The calculations measure without injury earnings on the assumption that VCE would have been completed in 1994 and tertiary study by 1997, with entry into the Commonwealth public service at the beginning of 1998 and maintaining that employment to date. I do not accept these assumptions as they do not take into account that schooling in religious studies to 1994 would not have allowed for progression to tertiary studies.

93 In my view any loss of capacity prior to graduation is not demonstrated. First, there is no evidence of actual loss of earnings from 1998 onwards while in Israel. During that period the plaintiff was a fulltime serving member of the Israeli defence force or,

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90 Superannuation Guarantee Administration Act (1992) presently provides 9.5% although the actual percentage has varied over time.

91 *State of NSW v Moss* (Heydon JA) 54 NSWLR 536, 553 [71].

92 Plaintiff, Particulars of Special Damages, 13 September 2018 filed with the Court.

as instructed to Mr Lee, was working in security. I cannot be satisfied that the plaintiff has established a loss of capacity to earn prior to his return to Australia.

94 On return to Australia the plaintiff undertook the necessary secular studies for entry into graduate work. It is clear that such study would have been necessary in order to pursue a public service career even without injury. The pattern of work and study prior to graduation does not demonstrate a loss during those years. Absent any evidence of loss of capacity during that period I have not taken those years into account in determining loss. I have calculated a past loss of earnings from 1 January 2006 on the commencement of graduate work.

95 As at 2006, according to Mr Lee's report, graduate after tax earnings for a CPS employee were approximately $815.67 per week.[93] This figure is subject to incremental increases of between 2.5% to 4% per year. Mr Lee has also factored in career progression[94] so that by 2019 the weekly nett earnings would be approximately $1374.[95] Attached as Schedule 1 to these reasons is a table extrapolating the relevant figures from Mr Lee's schedules from 2006 onwards and forming the basis of my assessments of past and future earning capacity.

96 The assessment of loss for the period 2006 to the time of hearing is undertaken on the basis that the plaintiff's hypothetical capacity is measured by nett notional earnings for the past period from 2006 to the time of hearing. The past hypothetical nett earnings from January 2006 – December 2014 would be $536,346.00 and the past hypothetical earnings from January 2015 – December 2019 amounts to $349,662.00. This gives a total past theoretical capacity for the period January 2006 – December 2019 of $886,008.00. In my view, it is appropriate therefore to allow a measure of past hypothetical capacity to earn as being represented by this sum.

97 In assessing the measure of loss, account must be taken both of actual earnings and

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93 Forensic Accountant report (n 53) 45: Annual figure $60,118.00 gross/$42,578.00 nett as per Schedule 1, Table 1.

94 Ibid 18 [8.4, Table 6; 8.5].

95 Ibid 45: Annual figure $103,507 gross/$71,724 nett as per Schedule 1, table 2.

of any residual earning capacity during this past period of loss.

Past loss in Australia 2006 - 2014

98 Mr Waks'australian actual earnings as derived from tax returns have been set out by Mr Lee. I reproduce those figures below in Schedule 1, Table 1. His report records taxable earnings but not nett earnings. I have therefore approximated the relevant nett figures as best I can.

99 I accept that between 2006 until leaving Australia at the start of 2015, the plaintiff was working full-time but it was with difficulty and that his actual earnings are a fair reflection of the extent of his residual capacity. Past nett loss from January 2006 to December 2014 therefore assesses as $49,499.00. This amount is calculated on notional earning capacity of $536,346.00 less actual earnings of $486,847.00.

100 By the beginning of 2015 the plaintiff ended his engagement with Tzedek. He described this as ending badly and Professor Dennerstein refers to ongoing difficulties with authority figures. At this time he also felt the need to leave Australia.

Loss of capacity since leaving Australia

101 Assessing the loss of his capacity to earn from this time requires consideration of what retained residual earning capacity he has from 2015 onwards. The incomplete evidence of actual earnings and the voluntary nature of his work-like activity do not permit an assessment of capacity that draws largely on actual earnings. Medical evidence relied on from 2015 is to the effect that he does not have any capacity for employment or has only limited capacity. From the medico-legal perspective, Professor Dennerstein examined him on three occasions. On the first in 2014, he was working but had reduced his hours from in excess of 60 hours to less than 40 hours per week. In 2015, she offered no opinion as to capacity. In 2016, with the deterioration in an untreated condition and in the midst of marital breakdown, she opined that he would not be able to work full-time or in previous paid employment.

She thought he had a capacity to do consulting and advocacy and policy work a few hours a day at his own pace.[96] At that time treatment had only recently commenced and Professor Dennerstein's comments about work prognosis depend upon the efficacy and outcome and response to treatment. Professor Dennerstein has not had the opportunity to examine and opine on these matters since July 2016.

102 The plaintiff's evidence about matters since 2016 was as follows:

> I'm not at my lowest point right now, but it was probably about two years ago, one year ago and I am still getting out of that lowest point, and when I mean lowest point, I mean getting up in the morning and just wanting to be dead. Just – and then having that feeling throughout the day….I'm away from that, but - I can't remember where – the point that got me there.[97]

103 Of the effective treatment, especially the medication that he now takes, he said:

> …I felt a big difference from when I didn't take it, um, and when I started taking it, which is why I started taking medication at the age of 40…so for me it was – it helped calm me down a lot, just brought things down. I was – I remember having less nightmares, um, after that, um, I mean, in particular for me some of those things are from the medical cannabis, which I got a while later, but that also - all of those things I felt, um, significantly improved my lifestyle.
>
> Q. What about its impact on your ability to work?---Yes, I mean, there's no doubt that they place [sic] a certain role in helping the depression and helping the anxiety, um, and mood swings and generally just, ah, give me a better, um, quality of life, um, when I'm awake - and also appetite, of course, 'cause at time I'm not interested in eating, but, um, it also does make you tired, ah, losing concentration, ah, there are the negative aspects to taking these types of, um, medications.[98]

104 I accept that with sustained treatment now since 2016 Mr Waks' capacity to undertake work-related activities (paid or unpaid) has improved from that which he was able to do when he first left Australia.

105 The more recent opinions of Dr Sillcock in 2017 and 2018 noted that employment capacity was still limited by mental state and substance abuse, which it appeared to her to be getting worse.[99] This first examination seems to coincide with the low

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96 Professor Dennerstein's report (n 19) July 2016, 9 [7].

97 *Transcript* (n 8) 69 [22]

98 *Transcript* (n 8), [70- 71].

99 Dr Sillcock's reports (n 69).The reference by Dr Sillcock appears to refer to a worsening over the last

point identified by Mr Waks in his evidence. Dr Sillcock's later report does not record any significant change or improvement. Whatever might have been the situation when he saw her, certainly by the time he gave evidence he did describe improvement of some significance. Dr Sillcock's reports also work from an understated employment history. She described employment in Australia between 2000 and 2014 as 'short periods in the early 2000s as an integration aide', three to four years with the Australian government between 2009 and 2012/2013, two years at a Jewish organisation addressing anti-semitism, 'a consultant on small projects' and intermittent work in child sex abuse field in an organisation he founded. As to current work as at 2017, she noted it was largely voluntary and that Mr Waks rarely gets paid anything for it. She therefore concludes '(h)e has not managed to hold down jobs for any significant periods but does intermittent and part-time work both paid and voluntary'.[100]

106 I do not accept her conclusions as to capacity. As can be seen, between 2006 and 2014 Mr Waks sustained regular, full-time work. At least in respect of the public service job he left by choice not because he was unable to hold the position. There is no real analysis of the amount or extent of paid or unpaid work that has been undertaken since leaving Australia.

107 The treating doctors reports from Israel give only brief opinions as to capacity. The general practitioner notes significant time needed to undertake therapy and significant daily activities to maintain a healthier physical and emotional state. I accept that this time impacts upon the hours that are available to exercise a work capacity.

108 As mentioned earlier, his psychiatrist describes that Mr Waks is unable to maintain any 'occupational stability'.[101]

109 Mr Waks' emotional state in 2014 when he first saw Professor Dennerstein was one

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couple of years as at 2017.

100 Ibid 30 March 2017, 6 [6].

101 Dr Caspi report (n 66).

where he was living with "guilt, shame, pain and a profound sense of disempowerment".[102] I accept, with what he described as the backlash from the community, that by the end of 2014 he was unable to continue working and so for 2015 he effectively had no capacity to engage in remunerative employment.

110 From 2016 he has, in an unpaid capacity, built a not-for-profit organisation called Kol v'Oz. This has involved him in travel, writing, public speaking and organising. It is similar to the work that he was doing in Australia at Tzedek, the difference being it is largely unpaid. I accept as he says that the work, by its exposure to stories of abuse told by others, is both challenging for him as well as being something from which he derives healing, solace and a sense of purpose. This role is more akin to self-employment, where hours of work are flexible. It allows for demanding times such as speaking to the United Kingdom inquiry into sex abuse to be balanced with time for preparation and recovery. Indeed, the available evidence of paid work during these years follows a similar pattern; it is described as consulting work which can be done with a fair degree of autonomy. Much about the commitment to Kol v'Oz is a choice about where Mr Waks places the energies and capacity that he does have. A choice he says compelled by circumstances but nevertheless a choice.

111 It is appropriate in my view to have regard to both his voluntary and paid work activities in assessing his retained capacity. By doing so, what is measured is the loss of capacity as distinct from the loss of earnings which can be ascertained. The voluntary services provided to Kol v'Oz are similar to the services for Tzedek for which he was paid in Australia at a rate commensurate with his public service salary. From 2017 onwards, in light of his work for Kol v'Oz and other consulting there is a level of activity which I would assess as demonstrating a residual capacity for engagement and therefore capacity to earn. The amount of time spent in pursuing such activity is difficult to assess. As at 2016 Dr Dennerstein described capacity at 'a few hours a day at his own pace'.[103]

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102 Dr Dennerstein's report (n 19) (September 2014), 18.

103 Dennerstein's report (n 19) July 2016.

112 I will allow an average of 15 hours per week from January 2016. The growth of Kol v'Oz and the additional consulting work done from time to time, demonstrates a level of improvement in capacity from 2016 and a likely increase in the hours committed to the work of Kol v'Oz. This is consistent with and coincides with the commencement of treatment. In light of the strong work history prior to leaving Australia it is not a surprising development in my view. I would allow a residual capacity of 20 hours per week until the time of trial. The calculations consistent with this, based upon a salary commensurate with public service rates, are included in the table at Schedule 1. The actual earnings from consulting work appear able to attract a higher hourly rate than the calculations I have used but the evidence does not allow for any assessment of those actual nett earnings.

113 In summary Mr Waks had at the time of trial a retained the capacity to work for an average of at least 20 hours per week. Had he had the capacity to work full time from 2015 to the time of trial his hypothetical earnings would calculate at $325,761.50. His past residual capacity for the period from January 2015 to September 2019 consistent with the above reasoning is calculated at $121,229.74. An appropriate allowance for past loss since 2015 is therefore $204,531.76.

114 Adding his past loss from 2006 – 2014 at $49,499 to his past loss from 2015 – September 2019 at $204,523.41 brings the total undiscounted past loss of earning capacity to **$254,030.76.**

Future loss of earning capacity

115 The medical evidence refers to the effect of substance abuse on capacity for employment. That particular contributor to incapacity seems to play a lesser role now that the prescription of medicinal cannabis has been instituted by his practitioners in Israel. It is also clear now that Mr Waks is receptive to and wanting to engage in rehabilitation to overcome this substance abuse. On the evidence available, this seems to favour a further improvement in capacity if successfully undertaken. The strong past work ethic and commitment to voluntary activities demonstrated to date underpins this approach. I accept that battling an ongoing

addiction might result in future relapses with consequent effect of at times reducing work capacity. In this way any further benefit sustained into the future might be compromised at times. In those circumstances, it is my view that a holistic approach allowing a loss of capacity of 40% is appropriate. If looked at in hours of work, that would be a retained capacity to work approximately 24 hours per week on average with the prospect of periods of greater capacity but also periods of relapse.

116 Therefore as a calculation, present earnings in the public service would be $1,373.00 nett per week, 40% of which is $549.00. The appropriate 5% multiplier for a 43 year old man to age 65 is 703.9 or to age 67 is 737.9. Therefore future loss of earning capacity to age 65 would calculate on this basis at $386,441.00 without discount for vicissitudes. The same calculation to age 67 results in the sum of $405,107.1 undiscounted. In the circumstances, I allow an undiscounted figure of **$400,000** for future economic loss.

Superannuation

117 The plaintiff has lost the benefit of accumulated superannuation on lost earnings. As outlined above at [90] I am assessing superannuation entitlements on the basis of compulsory employer superannuation contributions applicable to employees generally rather than on the basis of specific provisions applicable to the commonwealth public service. As at August 2018 the superannuation guarantee rate for employer contributions was 9.5% of gross ordinary time earnings.[104]

118 Therefore, using the figures from Schedule 1, superannuation on gross hypothetical earnings to the date of trial would have been approximately $124,942. Superannuation on actual earnings for 2006 - 2019 was $59,536. Therefore past loss of superannuation amounts to $65,406.

119 In relation to future superannuation 9.5% of $1,982 is approximately $188.00 per week. On a 60% residual capacity (or 40% lost capacity), the weekly loss amounts to

104 Forensic Accountant's report (n 53) [9.2].

$75.00. Using the relevant multipliers (to 65 years or to 67 years) future loss of superannuation is in the realm of $52,792 to $55,342. I allow $54,000.00 for future loss of superannuation.

120 It is in my view appropriate to allow $120,000 for past and future superannuation loss.

121 Therefore past and future damages for loss of earning capacity undiscounted total $774,030.76.

122 As explained above both past and future damages for loss of capacity to earn are subject to a reduction for the vicissitudes of life. There is no evidence of any other unrelated medical conditions that might affect an assessment of vicissitudes. However, for the reasons outlined at [17] to [22], it is appropriate in my view to take account as a vicissitude, the prospect that the earlier abuse by Serebranski might itself have led to symptoms that impacted to some degree on capacity, independent of the later abuse that is the subject of this assessment. The significance of such a possibility is ameliorated by the evidence of past efforts to maintain work and participate productively that have been achieved despite the effects of both periods of abuse. This demonstrates significant resilience by the plaintiff. In all the circumstances an allowance of 30% reduction is appropriate for general vicissitudes including the specific circumstances of the effects of earlier abuse.

123 Therefore loss of earning capacity damages past and future assess at **$541,822**.

Medical expenses and other costs claimed as special damages

124 Two specific matters requiring consideration have arisen. The first is the prescription of medicinal marijuana in Israel from the beginning of 2018. It is not clear whether the plaintiff's general practitioner ('GP') or Psychiatrist is prescribing this but the GP notes that the prescription is greatly assisting with anxiety and sleeping issues.[105] Claiming for the cost of this is outlined below. The second issue is that inquiries

105 Dr Yosef-Ayalon report June 2018 (n 80).

were made with an inpatient rehabilitation program in America at Onsite Workshops. In evidence before me was an email dated 11 August 2017[106] from this body sent to Mr Waks. It provided information about a 'Milestones' program' that the admissions specialist thought might be 'a good fit' and sought completing of an information form so that a clinical judgment could be made about which program was most appropriate. It requested completion of an application to attend the program so that Onsite would be able to make sure clinically they could say what 'would be the best place for you'. The Milestones program had inpatient programs that varied from 15 days to 90 days at costs ranging from $15,000 to $90,000. The program is described as focused on 'Trauma and Co-dependency'. The email made mention of a 30 day Milestones program at $28,000 or a Healing Trauma Program at $4,800 for 7 days. The length of stay is determined by clinical need and recommendation. Mr Waks has forwarded this email on to his psychologist Ms Sieradzski. Admission is subject to a number of medical requirements. These include abstinence from mood/mind altering substances including alcohol for a minimum of 15 days prior to admission and undergoing psychological and medical evaluation prior to acceptance. The program is described as supporting the 'healing process'. Staff are described as licenced counsellors and/or helping professionals. Participants are described as clients in a community. The program consists of educational and group sessions, meetings, meals and events and participants are expected to complete reading, writing and other assignments. I cannot find anything in the material that in any way suggests that this program is run under the auspices of medical health care professionals.

125 I endeavoured to understand how it was that this particular program was recommended. Mr Waks gave evidence that he'd been in touch with Milestones. He could not say who had made the recommendation other than 'I think they were just people. Not my treating ones, no.'[107] They were not his treating practitioners. He

106 Plaintiff's Exhibit P3, Sadi Eggers (Admission Specialist), *Onesite Workshops email*, 11 August 2017 ('Onesite email').

107 Transcript (n 8) 87.

had a long discussion on the telephone from which the email and accompanying documents were sent. The process has been taken no further. In particular no clinical judgment from Milestones was in evidence. Professor Dennerstein is asked to comment on treatment needs including the Milestone program. She understood it to be a rehabilitation program to assist in recovery from substance abuse. She is supportive of an inpatient rehabilitation program to assist with finding strategies other than drug use to deal with distress. The primary need for rehabilitation in her view is to treat for substance abuse. She assumes Milestones involves an inpatient admission.[108]

126 The Milestone's material does not describe itself as a rehabilitation facility that has expertise in withdrawal from substance abuse. It is significant that none of the treating practitioners have written in support of this particular program. Professor Dennerstein's support is of a need for rehabilitation to treat the substance abuse. She understands Milestone to be such a program with an inpatient admission. I am not satisfied on the evidence before me that Milestone is an inpatient rehabilitation program focused on recovery treatment from substance abuse. Nor am I satisfied that the treating medical practitioners, who are presently prescribing medicinal cannabis have considered and approved such an inpatient treatment. Whilst I accept that there is a need for a rehabilitation program, given the significant cost claimed for the Milestone program I am not persuaded that the evidence demonstrates on balance that it is medically justified.

Medical and Other Expenses

127 The plaintiff has incurred various treatment expenses in Israel which are claimed. The medical evidence reveals an ongoing need for treatment and future costs are also claimed.

Past expenses

128 The plaintiff claims past attendances on psychologist Ms Sieradzki. From her report

108 Dennerstein's report (n 19) (August 2017) 2.

she began seeing Mr Waks in January 2016 and she sets out the frequency of attendances from that time until September 2018.[109] As at September 2018 she was seeing Mr Waks three times per week. The claimed cost to that date is $30,602.00. I accept this figure is appropriate.

129 There is an additional 12 month period in the past from September 2018 until trial. Extrapolating from the present estimate of psychology costs of $100 per weekly session upon which the claim for future expenses was based, as set out in the particulars of special damage, I allow a further $5,200.00 for psychological treatment for a further 52 weeks between September 2018 and the date of hearing.

130 In addition, I allow the psychiatric expenses of Dr Caspi and a single session with a different psychiatrist, Dr Mitelpunkt, as claimed totalling $1,546.00.

131 This brings these past medical expenses to **$37,348**.

132 A number of massage, mediation and gym expenses have been claimed. The general practitioner notes that physical activity, meditation and massage assist in various ways and I have no doubt that such activities generally assist in the maintenance of wellbeing. However given the intensive psychological treatment at three times per week or more, I am not persuaded that such activities, whilst beneficial in maintaining a healthier physical and emotional wellbeing, are reasonable to award over and above fairly significant psychological support.

133 There are expenses claimed in relation to attending a J Harrison about which there is no evidence and I do not propose to allow that item.

134 Finally, both past and future costs associated with the prescription of medicinal cannabis in Israel since February 2018 are claimed. Medicinal cannabis is being legally prescribed there to the plaintiff. The evidence also indicates that during this period the plaintiff has continued to use cannabis on occasions beyond the prescribed level. This is in part giving rise to the claim for future rehabilitation

109 Sieradzki's report, 1 May 2017 (n 64).

treatment to address substance abuse issues, as outlined above and dealt with under the Plaintiff's claim for future medical expenses.[110]

135 The plaintiff made supplementary submissions that the expense is recoverable on the basis of need rather than the legality of the expense incurred. The submissions cited a move away from the test in older authorities such as *Blundell v Musgrave*[111] to a test as propounded in *Griffiths v Kerkemeyer*.[112] While there is evidence of the treating doctors that the prescription is benefitting the plaintiff's management of sleep and anxiety issues, no medical practitioner has commented on the desirability of so prescribing in circumstances of an ongoing diagnosis of polysubstance abuse. Absent such evidence, I would not be satisfied that it would be reasonable to award damages to compensate for the expense of prescription of medicinal cannabis.

136 Further, the damages claim brought in Victoria is to be determined by substantive Victorian law. There is no evidence that cannabis is a registered medicine in Victoria or that an appropriately qualified medical practitioner might be approved in order to prescribe in accordance with Victorian law. Accordingly I am not prepared to allow damages for the prescription of medical cannabis in Israel as either a past or future expense.

137 The plaintiff also claims relocation expenses for himself and his family associated with leaving Melbourne and moving to France. This sum was estimated at $10,000 without any elaboration. There was no evidence directed at this aspect of the claim demonstrating for example that France rather than some other destination was a reasonable relocation destination. Nor were submissions directed at how costs associated with other family members are recoverable as damages. I do not propose to award damages for costs associated with relocation.

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110 Plaintiff's Exhibit P15, Medical and Like Expenses, undated.
111 (1956) 96 CLR 73.
112 (1977) 139 CLR 161.

Future costs

138 I will allow future costs of medication, the psychologist and the psychiatrist as claimed. Each has been estimated for the next 18 months of treatment[113] at $60 per month for medicine, $350 per month for psychiatric treatment and $416 per month for treatment with the psychologist. Converting these three to a weekly figure gives an amount of $190 per week. For the immediate 18 month period into the future, this gives a total of $14,867.00. The plaintiff has made no claim for these treatment expenses beyond the 18 month period. However, in my view it is reasonable to make some allowance for attendances that might be required beyond that time.

139 The plaintiff also seeks the future cost of a rehabilitation program I mentioned earlier. The need or desirability for such a program is mentioned by the psychologist and commented on by Professor Dennerstein. The Plaintiff claims the cost of a 90 day program.

140 I've outlined above the evidence about Milestones. There is nothing in that evidence that demonstrates that this is a medically supervised rehabilitation clinic. Relevantly the program was not recommended or sourced by any of the treating practitioners and none of them have commented as to their views on its appropriateness. There is no evidence that this particular program, which the plaintiff heard about through people other than his treating practitioners (and it would seem not through medical recommendation at all) to demonstrate why this program rather than one located in Israel with an interaction with the treating practitioners, was a reasonable expense. I am not satisfied that a 90 day admission to this workshop at a cost of $109,000 is a reasonable expense.

141 I do however accept that some inpatient rehabilitation might be necessary in order to deal with polysubstance abuse. For this together with medication, psychologist or psychiatrist that may be required in the future I will allow the present sum of $10,000 for this future possibility.

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113 Being 18 months from September 2018 but I will work on the basis of 18 months from the date of trial.

142 In total I will allow a rounded sum of **$25,000** for future medical expenses.

The third issue - Aggravated and exemplary damages

143 The plaintiff submits that I should assess and award claimed aggravated and exemplary damages from the defendant. The particulars of exemplary damages relevant to Mr Cyprys are set out as:

> The Second Defendant's breach of trust and exploitation of the Plaintiff was a disgrace which demands condign punishment;'[114]

144 Further lengthy particulars are set out relevant to the acts and omissions of the Yeshivah defendants between 1991 and 2016 going to their liability for exemplary damages.

145 Exemplary damages are awarded to punish the defendant. In *Carter & Anor v Walker & Anor*[115] the Court of Appeal said:

> Exemplary damages are damages over and above those necessary to compensate the plaintiff. They are awarded to punish the defendant. They are intended to act as a deterrent to the defendant, and to others minded to behave in a like manner. They are also intended to demonstrate the court's disapprobation and denunciation of such conduct (citations omitted).[116]

146 However, in this case Mr Cyprys' conduct also resulted in conviction and sentence in the criminal justice system. Where the criminal justice system has imposed punishment, what role is there for an award of civil damages that will also punish the perpetrator?

147 In *Gray v Motor Accident Commission*[117] *('Gray')* the High Court dealt with an appeal from a refusal of a judge to award exemplary damages against a defendant. The case arose in a claim for injuries received by Mr Gray in a motor vehicle accident. The driver of the vehicle had deliberately driven at and struck the plaintiff. The driver

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114 Plaintiff's Supplementary Submissions (n 84) [7].
115 (2010) 32 VR 1 ('*Carter*').
116 Ibid 53 [284].
117 (1998) 196 CLR 1 ('Gray').

was convicted of grievous bodily harm and sentenced to a period of imprisonment. At trial the judge decided not to award exemplary damages as the driver had already been punished by the criminal court.

148 The Court observed that the civil proceeding, although framed in pleadings as an action in negligence, was conducted on the basis of the defendant's deliberate wrongdoing and may give rise to an award of exemplary damages. However, the majority said:

> Where, as here, the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded. We say "may not" because we consider that the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding *is a bar to the award; the decision is not one that is reached as a matter of discretion* dependent upon the facts and circumstances in each particular case (emphasis added).[118]

The majority gave two reasons in principle for this:

> First, the purposes for the awarding of exemplary damages has been wholly met if substantial punishment is exacted by the criminal law. The offender is punished, others are deterred. There is, then, no occasion for their award.
>
> Secondly, considerations of double punishment would otherwise arise.[119]

149 I was referred in the plaintiff's written submissions[120] to the reasons of both Kirby J and Callinan J in *Gray* as to how they would approach the award as one where the Court retains a discretion exercised in light of the facts and circumstances of the criminal conviction. I am bound by the majority decision of Gleeson CJ, McHugh, Gummow and Hayne JJ that this is not a matter of discretion for me. In *McFadzean v CFMEU*[121] Ashley J in considering a claim for exemplary damages, noted *Gray* and observed that an award of exemplary damages is an exercise of discretion save for the particular context, where a substantial criminal punishment has been imposed which removes the discretion.[122]

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118 Gray (n 117) 40.
119 Ibid 42-43.
120 Plaintiff's supplementary submissions (n 84) 7 [3.9].
121 (2007) 20 VR 250 (Ashley J).
122 Ibid: not disturbed on appeal.

150 Mr Cyprys was convicted of nine months' imprisonment on a representative charge of gross indecency involving Mr Waks and another student. On two other charges of indecent assault relating to his conduct in the Mikveh he was sentenced to twelve and nine months imprisonment respectively. On a charge relating to requiring the plaintiff to run without trousers, he was sentenced to six months imprisonment. Charges relating to other individuals were also subject to the overall sentence and principles of cumulation and concurrency as well as consideration of a plea of guilty in respect of the charges relating to Mr Waks. These considerations all affected the overall sentence and non-parole period that were ultimately fixed. I accept that the criminal punishment of Mr Cyprys for his offending in relation to Mr Waks is substantial punishment.

151 In those circumstances I have no discretion to award exemplary damages. In the event that the criminal sentence is not such to remove the discretion I would nevertheless decline to exercise my discretion as to do so would raise the prospect of double punishment through the imposition of a civil penalty for conduct already punished by a criminal prison sentence.

152 Aggravated damages are principally compensatory in nature. They are directed at redressing indignity and humiliation caused by the reprehensible conduct of the defendant. However, the distinction between compensating and punishing is less than clear in aggravated damages. In *De Reus v Gray*[123], Winneke P said:

> In contrast to exemplary damages, aggravated damages are compensatory in nature, and are "awarded for injury to the plaintiff's feelings caused by the insult, humiliation and the like". Because they are compensatory in nature attention is therefore focused on the harm to the plaintiff caused by the manner in which the hard has been inflicted. However, because such damages, albeit awarded to compensate the plaintiff, are to be measured by the manner in which the wrong was done – and indeed by the defendant's attitude down to the time of trial – the distinction between aggravated and exemplary damages has often been characterised by looseness of expression to the point where it is, perhaps, more easily conceptualised than described. Indeed, it is because aggravated damages are awarded for the increased hurt to the plaintiff caused by the manner in which the defendant has committed the wrong that Windeyer J was constrained to acknowledge in *Uren v John*

123 (2003) 9 VR 432.

Fairfax & Sons Pty Ltd that there is an element of the punitive in aggravated damages (citations omitted).[124]

153 A key requirement for the award of aggravated damages is that the manner of the actions has increased the plaintiff's suffering or has caused insult. Those actions may be in the commission of the tort or in subsequent actions. There is no doubt that the commission of intentional torts on children by way of sexual abuse generally is something that is by its very nature likely to cause humiliation and distress. In this case that humiliation and insult has led to the development of psychiatric injury.

154 In submissions dated 6 September 2019 the plaintiff relied on the following factors:

a) Some of the abuse took place in close proximity to Mr Waks' siblings (relevant to particular 12(h));[125]

b) Other abuse took place in front of classmates (relevant to particular 12(f));[126]

c) Some abuse took place at a site of spiritual significance (relevant to particular 12(e));[127]

d) Subsequent conduct amounting to intimidation by continuing to work at Yeshivah subsequent to the offending, a lawyers letter sent to Mr Waks threating action for defamation and by attending trial.[128]

155 However, the only particular of the offending pleaded was that the commission of the tort itself was a breach of trust. That is undoubtedly so. The occurrence of offending is such that by its occurrence it has led to hurt and humiliation and to psychiatric injury. None of matters relied on by the plaintiff are raised on the pleadings. Evidence was given as to those matters and the defendant's submissions sought to contest various aspects. As I said earlier it is not for me, on assessing damages in default of a defence, to engage in a fact finding exercise about circumstances of aggravation beyond matters pleaded. To my mind nothing identifies particular batteries as bringing about an increase in that suffering beyond that for which the plaintiff is already compensated by damages for his psychiatric

124 Ibid 452 [28].
125 Plaintiff's Statement of Claim (n 6) 7.
126 Ibid.
127 Plaintiff's Statement of Claim (n 6) 6-7.
128 Plaintiff's submissions (n 84).

injury occasioned by those acts.

Conclusion

156 In conclusion I assess compensatory damages at $804,170. I do not award exemplary or aggravated damages. Account must be taken of the settlement sum which is defined to include both a sum paid on settlement and a sum previously paid by way of redress by the Yeshivah defendants for which adjustment must be made in the judgment to be entered. I will hear the parties on that issue.

SCHEUDLE OF PARTIES

S CI 2013 01744

MENAHEM LEIB WAKS	Plaintiff
- and -	
~~VELVEL SEREBRANSKI~~	~~First Defendant~~
SHMULE DAVID CYPRYS (also known as DAVID SAMUEL CYPRYS)	Second Defendant
~~CHABAD PROPERTIES INC.~~	~~Third Defendant~~
~~YESHIVA & BETH RIVKAH COLLEGES INC.~~	~~Fourth Defendant~~
~~CHABAD INSTITUTIONS OF AUSTRALIA INC.~~	~~Fifth Defendant~~
~~THE YESHIVAH & BETH RIVKAH COLLEGES INC.~~	~~Sixth Defendant~~
~~RABBI AVROHOM GLICK~~	~~Seventh Defendant~~
~~HARRY COOPER~~	~~Eighth Defendant~~
~~DON WOLF~~	~~Ninth Defendant~~
~~MICHAEL GOLDHIRSCH~~	~~Tenth Defendant~~
~~MAX NEW~~	~~Eleventh Defendant~~
~~SHMUEL GUREWICZ~~	~~Twelfth Defendant~~
~~SHLOMO WERDIGER~~	~~Thirteenth Defendant~~

SCHEDULE 1 – TABLE 1

CALCULATIONS FOR HYPOTHETICAL PAST EARNINGS AND ACTUAL EARNINGS

Year ending (except as stated)	Super guarantee (%)	Gross notional earnings	Employer Superannuation Contribution	Net notional earnings	Actual gross earnings	Actual earnings (nett)[129]	Plaintiff's actual superannuation[130]
1 Jan 2006 - 30 June 2006	9	$ 60,118.00	$ 5,410.62	$ 21,289.00	$ 6,498.00	$ 6,498.00	$ 1,133.00
2007	9	$ 65,386.00	$ 5,884.74	$ 46,362.00	$ 48,239.00	$ 40,567.00	$ 4,240.00
2008	9	$ 70,984.00	$ 6,388.56	$ 50,792.00	$ 52,478.00	$ 43,302.00	$ 4,432.00
2009	9	$ 81,769.00	$ 7,359.21	$ 58,436.00	$ 56,795.00	$ 46,086.00	$ 7,625.00
2010	9	$ 87,964.00	$ 7,916.76	$ 62.604.00	$ 77,696.00	$ 59,733.00	$ 10,759.00
2011	9	$ 92,832.00	$ 8,354.88	$ 65,523.00	$ 75,185.00	$ 58,075.00	$ 10,618.00
2012	9	$ 92,848.00	$ 8,356.32	$ 65,039.00	$ 86,815.00	$ 65,444.00	$ 11,525.00
2013	9.25	$ 94,264.00	$ 8,719.42	$ 66,144.00	$ 87,954.00	$ 66,145.00	$ 8,734.00
2014	9.5	$ 95,651.00	$ 9,086.85	$ 66,950.00	$ 96,573.00	$ 71,445.00	$ 470.00
1 July 2014- 31 Dec 2014	9.5	$ 47,825.00	$ 4,543.38	$ 33,207.00	$ 32,467.00	$ 29,552.00	
TOTAL				**$ 536,346.00**	**$ 620,700.00**	**$ 486,847.00**	**$ 59,536.00**

[129] Figures have been extrapolated from the Forensic Accountant's report at 11.5 (Table 10). Table 10 provides the plaintiff's gross actual earnings. The gross earnings have been re-calculated to nett earnings. The nett figures for 2006 – 2012 are calculated as estimates given that the forensic accountant report does not provide nett figures for the period.

[130] As per Schedule I of the Forensic Accountant's report.

1 Jan 2015 – 30 June 2015	9.5	$ 47,825.00	$ 4,543.38	$ 33,207.00			
2016	9.5	$ 98,059.00	$ 9,325.61	$ 67,963.00			
2017	9.5	$ 101,001.00	$ 9,595.10	$ 69,848.00			
2018	9.5	$ 103,172.00	$ 9,801.34	$ 71,070.00			
2019	9.5	$ 103,507.00	$ 9,833.17	$ 35,862.00			
1 July 2019- 31 Dec 2019	9.5	$ 103,507.00	$ 9,833.17	$ 35,850.00			
TOTAL LOSS			**$ 124,942.48**	**$ 313,800.00**			
TOTAL LOSS (2006-2019)				**$ 850,146.00**			**$ 69,308.00**

SCHEDULE 1 – TABLE 2

CALCULATION OF HYPOTHETICAL EARNINGS AND OF RESIDUAL CAPACITY HYPOTHETICAL EARNINGS 2015 TO DATE OF TRIAL

Period of time	Amount of weeks (rounded up)	Annual notional earnings after tax	Weekly earnings (full time,40 h/w)	Residual Earning Capacity (Hrs)	Actual Weekly Earning Capacity	Loss of Earning Capacity	Total loss of earnings
1 Jan 2015 - 30 June 2015	26.00	$ 33,207.00	$ 1,272.32	0	$ -	$ 1,272.32	$ 33,080.32
1 July 2015 - 31 Dec 2015	26.00	$ 33,981.50	$ 1,301.97	0	$ -	$ 1,301.97	$ 33,851.22
1 Jan 2016 - 30 June 2016	26.00	$ 33,981.00	$ 1,301.97	15	$ 488.24	$ 813.73	$ 21,157.01
1 July 2016 - 31 Dec 2016	26.00	$ 34,924.00	$ 1,338.08	15	$ 501.78	$ 836.30	$ 21,743.80
1 Jan 2017 - 30 June 2017	26.00	$ 34,924.00	$ 1,338.08	20	$ 669.04	$ 669.04	$ 17,395.04
1 July 2017 - 30 June 2018	52.00	$ 71,070.00	$ 1,361.49	20	$ 680.75	$ 680.75	$ 35,398.74

1 July 2018 - 30 June 2019	52.00	$ 71,724.00	$ 1,374.02	20	$ 687.01	$ 687.01	$ 35,724.52
1 July 2019 - 02 Sept 2019	9.00	$ 11,950.00	$ 1,373.58	20	$ 686.79	$ 686.79	$ 6,181.11
TOTAL		**$ 325,761.50**					**$ 204,531.76**