IN THE EMPLOYMENT COURT
AUCKLAND

AC 63/06
AEC 16/01

IN THE MATTER OF	a claim for damages
BETWEEN	MARIE WHELAN Plaintiff
AND	THE ATTORNEY-GENERAL IN RESPECT OF THE CEO OF THE CHILDREN & YOUNG PERSONS SERVICE Defendant

Hearing: 7 August 2006
(Heard at Auckland)

Appearances: R Hooker, counsel for plaintiff
S Dyhrberg, counsel for defendant

Judgment: 16 November 2006

JUDGMENT OF JUDGE B S TRAVIS

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[1] In my judgment of 21 December 2004, ([2004] 2 ERNZ 554, "the substantive judgment") I found the defendant had breached its contractual duty of care to avoid reasonably foreseeable ill health consequences to the plaintiff, by failing to provide a safe system of work. I found that the breaches of her employment contract caused the plaintiff's ill health, her need for medical treatment and her subsequent losses.

[2] The question of damages was reserved, to be dealt with either by agreement or by a subsequent hearing. The parties were unable to agree and the plaintiff sought a further hearing to determine the damages payable to her. On 9 December 2005, the plaintiff applied to the Court for an interim payment, but the parties partially settled aspects of the remedies and costs and a partial payment was made to her.

[3] At the subsequent hearing of the damages claims the plaintiff sought:

a) Lost earnings of $580,409.00;

b) damages for distress of $80,000.00;

c) interest on the distress compensation;

d) medical expenses of $2,500.00;

e) loss of superannuation, $15,239.47.

Further medical evidence

[4] For the plaintiff the Court heard again from Professor Gorman, a professor of medicine and an acknowledged expert and specialist in the field of occupational medicine. Since the substantive judgment Professor Gorman had interviewed the plaintiff on 1 November 2005 and 12 July 2006. In November he had significant concerns about her mental health and in particular the propensity for self harm. The situation had improved by July. He referred to her progress as being somewhat of a roller coaster but noted that overall she had responded well to psychotherapy which had assisted her to develop behaviour which was situation avoiding. In addition she has been taking anti-depressants. Professor Gorman was able to say that although she was suffering from a major depressive disorder, which is in the moderate to severe category without psychotic features, it was reasonable to conclude that she has a stable disability, has had a good response to treatment but that no further improvement or deterioration should be anticipated. He also recommended the earliest possible resolution of the current litigation so that the plaintiff could get on with her life.

[5] This latter comment raised an issue as to whether there could be some improvement in the plaintiff's health once this litigation has finally been completed. It was the plaintiff's own evidence that despite receiving regular ongoing psychotherapy treatment and the anti-depressant medication, her health remained fragile. To avoid relapses of the depression she was limiting her professional work as a self-employed clinician in private practice to a maximum of 25 hours per week.

[6] Professor Gorman's evidence supported this approach. He noted that she had made at least three attempts to increase her workload beyond the range of 20 to 25 hours over the proceeding six months but these attempts had been unsuccessful and

had been accompanied by a deterioration in her mental health. He considered she could only work to around half of her previous capacity.

[7] Professor Gorman said this litigation has been a stressor in her life and it was a very reasonable personal view on her part to wish to have it behind her. He remained adamant that the end of this litigation will make very little difference to her work capacity and there was a very low probability of either improvement or deterioration. Overall he thought the intelligent prediction would be the status quo.

[8] I accept Professor Gorman's evidence and have approached the claim for damages, and in particular the claim for future loss, on the basis that the current situation is unlikely to improve and therefore a substantial increase in the plaintiff's earning capacity is not to be expected.

The likelihood of promotion

[9] The likelihood of the plaintiff being promoted if she had remained in employment with the defendant (CYPS) was an important issue. The plaintiff gave evidence that during the 17 years she worked for CYPS she received consistently commendable performance reviews throughout. In the substantive judgment I found that she had received assessments of the highest quality. She claimed to have had an expectation since her early years that she was being groomed for management. An early example she gave was being sent for a week long management course while she was only a basic grade social worker at Papakura. She was the only social worker sent on that course, everyone else who had attended was in a senior position.

[10] Whilst in Tauranga she was appointed as one of two site experts for the introduction of a new computer system and was also the sole Manitoba Risk Assessment site expert, having been appointed in 1997. These positions required her to gain expertise ahead of her colleagues and to train and coach them to a point of competency.

[11] She also sought tertiary level training to improve her promotional opportunities and this study was financially supported by CYPS. She spent some two years on the study programme financed by CYPS and, as the substantive judgment records, this was entirely successful and she achieved outstanding results.

[12] The management of CYPS supported her secondment to a policy development role in the national office in Wellington in 1993. Unfortunately she was unable to accept this secondment due to the deteriorating health of her mother which required the plaintiff to remain in Tauranga. The secondment may well have led her to be permanently placed in the policy team, set her on a completely different promotional path and have avoided her subsequent experiences in Tauranga. Because her mother had passed away in 1996 and her father in 2000, there were now no longer any restrictions on her ability to have accepted promotion because of her need to remain in Tauranga. She claimed the farm property she and her husband operated would also not have been any restriction to her accepting management roles in other centres.

[13] The plaintiff had carried out her CYPS competency qualifications between 1993 and 1995 ahead of her peers and prior to it becoming compulsory. She had been told by the site manager at the time that if she wanted to become a practice consultant then this qualification would be required. She received directions from the then area manager to apply for a practice consultancy role which was identified as a pathway to management in 1996. She felt she would have secured that position but her site manager, Mr Short, objected on the basis of lack of resources in Tauranga.

[14] She had also received some delegated management roles, in particular liaison with the Police in relation to threats made to other social workers.

[15] There was an issue as to the plaintiff's qualifications to hold a management position. The defendant called Anne Marie Taggart the Manager of Human Resource Operations, a role she had held since April 2005. Ms Taggart referred to senior positions such as the site manager role and the service centre manager role which, according to their position descriptions, required key accountabilities which were quite different from the social work supervisor and practice leader roles. These accountabilities include "*inter-sectoral duties, financial and budget accountability and high level leadership*"**.** Ms Taggart contended that the specifications for these positions would involve prior experience which would have been difficult to acquire from a social work background alone. An appointee to the senior management roles would have to have demonstrated the ability to think strategically and to manage, as well as to lead people. Although a social work qualification may be desirable, it was

by no means a pre-requisite and many current site managers did not hold social work qualifications. She concluded therefore that the plaintiff would not necessarily be qualified, or have expected to have become qualified, to hold such management positions and would therefore not earn more than the top of the practice leader range.

[16] The plaintiff gave evidence that a number of her social worker peers were promoted to management positions, including Mr Sorrenson who became the site manager after Mr Short resigned. Mr Sorrenson had come from a social work background and was one of the plaintiff's staff who was then promoted to practice consultant. She said he had no management training prior to assuming this role. She also referred to five other persons who had previously had a background of social work who had held management positions. The plaintiff said it was her intention to have applied for promotion and she considered, on the basis of her previous experience, that there was a very real likelihood that she would have succeeded in securing a senior management role. She considered that had she been in a position to stay with the defendant beyond March 1998, she would have been promoted to practice manager within two years and then would have gained sufficient managerial experience to apply for more senior management positions, either in Tauranga or elsewhere, within a further two years.

[17] The plaintiff had previously been in receipt of the highest amount then being paid for a social worker position and when she moved to the position of supervisor she negotiated a salary that was close to the top of the band for that new position. She therefore believed that had she obtained a more senior position, she would have been able to negotiate a starting salary at the very least at the mid-range of the relevant role and would have moved to the top of the particular band reasonably swiftly.

[18] The plaintiff said that her ambitions were to exceed middle management and she had expected from her training that she was being groomed for a career within the organisation at a very high level. She accepted that other management positions, unlike that of practice manager, included competencies of leadership and financial accountability. She contended that she would have been able, like Mr Sorrenson, to have acquired such competencies and financial management as she went along and had always indicated a willingness to undergo additional studies. It was put to her that she had, during her time of employment with CYPS, voiced quite strongly held

beliefs and criticisms of national office and Government policy at the time and that had she sought higher promotion she would have had to have implemented policies with which she did not necessarily agree. She claimed that when she was appointed to a higher position she had adapted and had demonstrated high levels of excellence, including the ability to negotiate through some quite troubled waters involving departmental vision, mission statements and the like. She said that she had interacted with head office previously and helped shape policy and contended that she had demonstrated an ability to "*toe the party line and deliver the job*", but also felt that she had a responsibility to express caution when she could see dangerous services being delivered.

[19] Ms Taggart set out the salary movements in the roles of social work supervisors for which there had recently been pay increases and the effective rates from July 2006 were a range of $52,850 to $66,758. She also reviewed the terms applicable to the positions which sat at or above the social work supervisor position. The position of practice consultant later became practice manager. At the time the plaintiff left her employment with CYPS the practice manager role existed and Ms Taggart accepted the plaintiff was qualified for that position. The practice manager role had been refocused and the accountabilities split with site manager positions taking the managerial positions and practice leader positions taking the clinical supervisory positions. The current negotiations for the pay rates for practice leader positions indicated a range of $62,797-$81,266. Most practice managers became practice leaders with salary and contractual arrangements remaining the same. Ms Taggart considered that the practice leader position was the closest fit to the practice manager role. She gave evidence that the next two levels of position above practice leader were quite different from that of the supervisor and practice leader roles. The site manager role has a salary range of $71,078-$91,983 and was a managerial job at tier 5. The service centre manager role was paid at $84,931-$109,909 and was a tier 4 management position.

[20] Ms Taggart was not familiar with most of the people who were listed by the plaintiff as having been social workers who had progressed to management positions but she accepted in broad terms the correctness of the evidence given by the plaintiff. Ms Taggart had not examined how many management positions are now held by persons who had previously been social workers. Ms Taggart said that practice

leader positions and social work supervisor positions still had an emphasis on clinical ability and practice excellence rather than management confidence and skill. She indicated that a really effective social work supervisor and practice leader would generally be a strong advocate for their staff, be warm and caring and do an exceptional job in managing through extremely difficult clinical circumstances. Her evidence was that this was not the situation with purely management positions within CYPS where difficult calls have to be made and departmental policy adhered to, rather than the managers being advocates for staff members.

[21] Mr Taggart observed that people with a social work background can come through to management positions because they may have additional tertiary training or qualifications, experience gained outside of social worker roles, or inherent qualities and competencies. Since 2004, there had been a significant restructuring within CYPS and a much clearer focus on recruiting from outside rather than from within. Site manager positions were advertised externally whereas those with a more inherent social work position tended to be advertised internally as a promotion opportunity.

[22] As to the significant staff salary increases that had been bargained for, Ms Taggart's evidence was that there had been no pay increases applied to the social work group since 2001 and so there was a significant need to bring these up to date. She was of the opinion that such a large increase would be unlikely in the next round of collective bargaining.

[23] The defendant accepted that in all likelihood if the plaintiff had stayed with CYPS she would have been promoted to practice manager at some point. Ms Taggart's concerns were about the plaintiff being appointed to positions senior to that of a practice leader. On the basis of her understanding that the plaintiff was an exemplary staff member, Ms Taggart had no reason to doubt that the plaintiff would have been appointed to the practice leader position but was unable to fix a date on it. When Mr Short left in 1999 his position was taken by Mr Sorrenson who was then a practice manager. Ms Taggart accepted there was some logic in concluding that had the plaintiff still been in employment she might then have been appointed to the position of practice manager. Ms Taggart also accepted in cross-examination that there was a possibility of the plaintiff acquiring skills which might have enabled her to go onto the next management level, although there was a difference in the new

competencies required for managers in the last couple of years. She also accepted that there were levels of promotion inside the policy advisor section and that it was possible that the plaintiff could have increased her promotion chances by going through that section and becoming a manager there. However, a large number of policy advisors reported to the one manager which would have led to a narrowing of opportunities. Ms Taggart accepted that there has been a much more recent focus for the CYPS to provide specific management training.

[24] Ms Taggart confirmed that the positions that were previously practice consultants, and then practice managers, were changed to become practice leaders. Their management responsibilities had been largely removed and this had focused the roles more specifically on providing appropriate levels of supervision, without getting caught up in the day to day tasks of management. Two separate lines were created to allow a much more specific promotional opportunity for social workers. They could seek promotion to a management role but they were more likely to be appointed to the practice leadership role.

[25] I shall give my conclusions on the likelihood of promotion, and when this might have occurred, after considering the actuarial evidence.

Subsequent employment

[26] The plaintiff gave detailed evidence of her subsequent employment after leaving the defendant. There was no issue taken by the defendant that the plaintiff's decisions to leave her position with the Special Education Services and her next position as a resource teacher, in which she was receiving somewhat in excess of $42,000 per annum, were linked to the events that I have found rendered the defendant liable in damages to the plaintiff. There was a real issue however, as to whether her resignation from a 35 hour week position with Te Tuinga Whanau Family Development Services Trust (the Trust) at the end of 2000, constituted a break in the chain of causation between the breaches of duty by the defendant and the subsequent losses of income suffered by the plaintiff.

[27] The plaintiff was employed by the Trust as an co-ordinator at the rate of $16 per hour for a 35 hour week and was second in charge to the manager. Her role involved the allocation of referrals, organising alternative schooling for children and fundraising, advocacy services, information provision, family/whanau support and

budgeting. She commenced that work in July 2000 and left some six months later. She claimed she left because the manager was inappropriately using funding monies assigned to social service delivery and training for food catering and a new housing initiative. She said she had no alternative other than to resign as her professional credibility was at stake. She had signed the applications for funding and was required to produce progress reports on that funding. She said that her relationship with the manager was untenable and that she was so concerned that she reported the matter to the defendant's funding co-ordinator and, as a consequence, funding was cut to the Trust. She claimed that all six staff, with the exception of the receptionist, left the Trust for the same reasons.

[28] After leaving the Trust she returned to work as a relieving resource teacher on a part time basis. She said that required her to work in an environment of constant dispute and staff conflict which she could not cope with, even though it did not involve her personally. She therefore left that position and in September 2001 became a self employed clinician in private practice. She was still working in this practice as at the date of the damages hearing.

[29] Her practice involved external or clinical supervision of people carrying out community work, providing health promotion, advocate and educational services, professional development and personal support. She does not discuss specific cases, as she used to when working for CYPS, and does not counsel social workers. She travels extensively throughout the Bay of Plenty servicing clients, working from her car, or visiting sites to carry out supervision work or renting rooms on an hourly basis in Tauranga and Whakatane. She employs casual typing services when needed. She does not use computers because it adversely reminds her of her time at CYPS. She is now working approximately five hours per week as a supervisor having reduced this area of her practice because of the regression in her health. She believes that is related to ongoing and unresolved issues that she has with the CYPS. To compensate for that loss of income she has increased her assessment and reporting work which is far less prone to stimulating an emotional or mental response but, because it is less skill demanding, it pays less than half of clinical supervision.

[30] At present the plaintiff is working between 20 and 25 hours per week and believes that she can manage her health if she manages her hours. She is mainly contracted to the Ministry of Education and her hourly charge out rate is set by the

terms offered to her. She referred to the difficulty of negotiating increases in her supervision contract rates, which are based on the going rates in the area, taking into account her experience and qualification. At the same there has been an increase in fuel costs and venue hiring costs.

[31] In cross-examination the plaintiff accepted that there had been a steady increase in her practice since she established it and that her income in the last financial year was the highest it had been.

[32] The plaintiff called Karen Campbell, a chartered accountant, who had prepared the accounts for the plaintiff's practice. Mrs Campbell expressed the view that the consultancy overhead expenses set out in the accounts were attributable to the practice and were an actual cost attributable to earning the income in question. She also expressed the opinion that to imply an inflationary rate of 3 percent to the plaintiff's future earnings, as Mr John Errington, the actuary called by the defendant, had done, would be unrealistic because her hourly rate could not be increased by anywhere near that percentage on such a regular basis. She expressed the view that for the bulk of the plaintiff's work for Government agencies she would be unlikely to be able to increase her hourly rate, since the last increase in July 2005, for another 5 years or so.

Actuarial evidence

[33] The plaintiff called Andrew Day a self employed actuary practicing in Auckland. The defendant called Mr Errington, an actuarial partner with the Wellington office of PriceWaterhouseCoopers. At the instigation of the Court, the actuaries met during the hearing with a view to endeavouring to agree on points of agreement and difference. Unfortunately as a result of that meeting, the gap between the actuaries actually widened considerably. I have had considerable difficulty reconciling the salary figures they each produced to the Court in their briefs and supplementary briefs of evidence and the various tables attached to them. I have therefore relied principally on the table they jointly produced as exhibit 3 which shows four key gross income streams after expenses, but before tax for the years ending 31 March 1998 to 31 March 2017. Both actuaries had access to the scales of salary ranges for the various relevant positions with CYPS that the plaintiff may have occupied if she had stayed with CYPS until 2017. I have made the assumption

that the figures contained in exhibit 3 are accurate, the differences being explained by how the actuaries took into account different contingencies. The actuaries were also able to produce an agreed statement of the points of agreement and difference between them (exhibit 2) and, where relevant, I have taken the positions set out in exhibit 2 in attempting to reconcile the differences and to explain the position that I have adopted. For these reasons I do not consider it to be of any help to attempt to summarise in excess of 135 pages of evidence and tables which the two actuaries produced. I shall set out my conclusions on the actuarial evidence when making my assessment of damages under the various headings counsel addressed in their submissions.

Economic loss and future earnings – legal principles

[34] I accept Ms Dyhrberg's submissions that the now well known cases in this jurisdiction have established the following principles:

- Proven financial loss arising from breaches of duty should be recoverable to compensate a prematurely terminated employee for the loss of promised contractual benefits such as salary;
- It is the plaintiff's onus to prove the losses were caused by the breaches and they are to be assessed on the facts of each case.
- Once an employee has proved, on the balance of probabilities, that the employee had lost something of value as a result of the breach, difficulties in assessing damages should not deprive the employee of a remedy as long as the employee can show the loss was caused by the breach: *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (CA) (paras [95], [96] and [107]).
- For future losses the Court must take into account contingencies which might have affected the achievement of the benefit, but the starting point would be the number of years between the termination and the normal retiring age, reduced to take into account the chance of death or early retirement, ill health or otherwise and the value of obtaining a lump sum for future benefits in today's money.

- Each case is dependent on its own facts and the assessment of the probabilities and contingencies.

Loss of income to 31 March 2001

[35] The defendant accepted liability for the plaintiff's actual net loss (grossed up for tax) to 31 March 2001, although the plaintiff left work on 22 January 1998 for her holidays and never returned. Her retirement on medical grounds was accepted with effect from 23 March 1998. The defendant has already paid the plaintiff a sum in respect of that loss which represented the difference in earnings between the social work supervisor salary the plaintiff would have earned during the period between her medical retirement from CYPS and her actual earnings from other work she obtained after her departure.

[36] Ms Dyhrberg submitted the plaintiff's career decisions from the end of 2000 constituted a break in the chain of causation between the breaches of duty by the defendant and the subsequent losses she has suffered. Since leaving the 35 hour per week position at the Trust the plaintiff has not had full time employment although the defendant has accepted that the work she has performed has greatly mitigated her potential loss. Ms Dyhrberg submitted that, as a matter of principle, once the plaintiff had demonstrated that she was fit for full time or near full time work and had made a deliberate decision not to continue with that work, the defendant's liability for any subsequent losses of income should end.

[37] The issue appears to be whether the plaintiff's voluntary resignation from the Trust was a reasonable course of conduct or whether it amounted to a rejection of viable employment. If the remuneration was lost not as a result of the defendant's breach but for other reasons such as a failure to mitigate, this may well break the chain of causation.

[38] The plaintiff's uncontested evidence was that there was developing conflict in the Trust over the manager's inappropriate use of funding which may well have led to blame falling on the plaintiff, who had an involvement in obtaining that funding, if the plaintiff had stayed on. All but one of the other staff resigned as a result. There was also a threat of layoffs of staff due to the lack of funding. There was some suggestion that the damage to the plaintiff's health made it difficult for her to deal with any conflicts and this may well have been a contributory factor.

[39] Her actions were reasonable in the circumstances. If she had not taken these steps it is likely that the funding difficulties would have led to her termination by the Trust in due course. Further the ongoing damage to the plaintiff's health has led to a state of permanent disability, which has made it difficult for her to develop her private practice on a full time basis or to involve herself fully in the most highly paid, but stressful activity of social worker supervision.

[40] Those health difficulties are directly attributable to the defendant's breaches and I therefore conclude that the chain of causation has not been broken. The evidence establishes that "*but for*" the damage to her health she suffered as a result of the defendant's breaches of duty, she would have been able to have obtained gainful full time employment at a level which would not have produced any lost past or future remuneration. The plaintiff has lost and continues to lose income as a result of the injuries she sustained as a result of the defendant's breaches of duty. Her claim for economic loss can therefore extend beyond 31 March 2001.

Past loss of income

[41] Ms Dyhrberg, not surprisingly, relied on the approach taken by Mr Errington in calculating the plaintiff's net lost income to 1 July 2006, as being the sound basis for assessing the proper compensation range. Mr Errington's calculations assumed that the plaintiff would have remained in employment with CYPS to the date of hearing because that is highly probable. He then deducted her outside income using three scenarios based on her actual earnings, to try and assess what he considered would have been a reasonable and fair level of earnings she could have obtained, recognising the choices the plaintiff made.

[42] The principal difference between Mr Errington's calculations and that of Mr Day is that Mr Errington has not deducted the actual earnings the plaintiff received since leaving CYPS from what she would have earned had she remained, but has deducted what he has called her expected actual earnings, a blend of his three scenarios of what might have been obtained from her private practice.

[43] Mr Day however, has deducted her net practice earnings after expenses, but before tax, from the amount that she would have received as a CYPS supervisor.

[44] I prefer Mr Day's approach on this aspect because it has the advantage of turning on what actually happened, rather than making assumptions of what might

have happened in the past had the plaintiff approached her practice in another manner. There has been no criticism of the way she has approached the matter and the close analysis of her continuing health difficulties produced by Professor Gorman satisfies me that the fluctuations in her earnings are attributable to the fluctuations in her mental health.

[45] However I do not accept Mr Day's approach to the possible promotion to practice manager during the period up to the remedies hearing. Mr Day made the assumption that there was a 100 percent possibility of the plaintiff being appointed to the position of practice manager with effect from 1 April 2000 and at the higher end of the salary range. On Mr Day's figures for the year ending 31 March 2001, this showed an increase of $9,000 over what she would have earned at CYPS, without promotion, a figure increasing to nearly $10,000 for the year ending 31 March 2006.

[46] By contrast, Mr Errington valued those possible earnings following a promotion as being worth only a maximum of some $1,900 in the year ending 31 March 2006, and in some of the earlier years at even less than what she would have earned if there had been no such promotion.

[47] In *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 at 477, Goddard CJ addressed the issue of how one was to value the loss of a chance to secure promotion and the income attaching to it. After referring to the decision of the House of Lords in *Spring v Guardian Assurance plc* [1995] 2 AC 296; [1994] 3 All ER 129, he stated:

> *The plaintiff must show positively that he had a real or substantial chance as opposed to a speculative one but if he succeeds in doing so the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other.*
>
> (para [103])

[48] That assessment must be carried out not only in relation to the issue of whether or not the plaintiff would have secured the promotion but also as to when that would have occurred and which point in the range of salaries she would have received. I am not persuaded from the evidence that it was an absolute certainty that the plaintiff would have been appointed to the position of practice manager. Other candidates may have presented themselves. However, as conceded by the defendant,

in all likelihood she would have been so promoted, and may have been appointed to the position some time after Mr Sorrenson received his promotion to practice manager after the end of 1999. I also consider that the plaintiff would have been successful in negotiating a salary point which would have given her an increase over what she was earning as a supervisor, taking into account the bonus she had been receiving. It is therefore likely that she would have received a reasonably substantial increase as a result of the promotion but it is unlikely to be as much as the $9,000 assessed by Mr Day.

[49] Taking into account the small degree of uncertainty as to the promotion ever taking place, its date, and the likely income level, and assessing them in the round, I consider Mr Day's calculations of the value of the promotion to practice manager should be reduced by 25 percent from 1 April 2000 on his varying figures of around $9,000 to $10,000. For the years ended 31 March 2001, 2002, 2003 and 2004 I have reduced the $9,000 shown in Mr Day's figures on exhibit 3 to $6,750 per annum and for the years ended 31 March 2005 and 2006, the $10,000, used by Mr Day, down to $7,500 per annum.

[50] I have added these figures not to Mr Day's calculations of the earnings the plaintiff would have received without promotion as from 1 April 2000 to the year ending 31 March 2006, but to Mr Errington's figures of her earnings at CYPS, without promotion during that same timeframe. I prefer to use Mr Errington's figures because they were based on the salary the plaintiff had when she left CYPS of $51,000 and a bonus of $4,000 together with the defendant's superannuation contribution. When the salary scales were increased Mr Errington did not apply the bonus. His evidence was that he was aware that the bonus was discretionary and that in his experience it was not wise to assume that a certain level of bonus would continue indefinitely into the future. There was insufficient evidence to support the assumption that the bonus would have continued indefinitely, especially after a notional promotion to a practice leader's role.

[51] Mr Errington's figures are based on the salary scales produced by Ms Taggart. Instead of taking the top of the scale plus a bonus which may or may not have happened in the future, Mr Errington chose to take a mid point of the scale plus the amount that she had previously had above the mid point of $7,000, which brought it up to the $55,000 level and then used that as a constant addition above the

mid point for the year 2006 and inflated that mid point from 2006 onwards. This gave some recognition to the element of a bonus and allowed amounts above the mid point. It also met the contingency that when the scales changed the person would not necessarily remain on the top of the scale.

[52] I have also used Mr Errington's figures because they take into account the superannuation contribution of $520 per annum net of the superannuation scheme's contribution withholding tax, as an addition to the salary that would have been earned.

[53] I have annexed a schedule in which I have reassessed the lost earnings to 31 March 2006 on the basis of the actual net earnings the plaintiff has received which total $386,135. I have deducted this sum from what I have assessed she would have received had she remained with CYPS, less a deduction for the contingencies concerning her possible appointment to practice manager. This totals $573,216. This leaves a shortfall of lost remuneration of $187,081 as at 31 March 2006.

[54] The figures were all before tax. From the gross figure of $187,081 must be deducted the interim payment made to the plaintiff on account of lost income to 31 March 2001, plus the tax paid direct to the Inland Revenue Department by the defendant. I do not have those exact figures and will leave it to the parties to calculate the final figure which will, I anticipate, be in the vicinity of $154,000 before tax.

Future lost earnings

[55] I have included under this head actual lost and potential lost earnings from 1 April 2006 to 31 March 2007. In assessing the future lost earnings I have, with some exceptions I shall shortly set out, preferred Mr Errington's approach to that of Mr Day's. The reasons for this are as follows.

[56] Mr Day was only prepared to project an increase in the plaintiff's earnings from her consultancy at the rate of 1 percent but was prepared to accept an increase to what might have been her salary at CYPS at 2 percent or a little higher. Mr Errington viewed the comments of both the plaintiff and Mrs Campbell relating to the plaintiff's inability to increase earnings as being of a temporary nature and in view of the higher earnings she has received in earlier years, I consider that may well be so. I find, contrary to the evidence of the plaintiff and Mrs Campbell there is

room for an improvement in the plaintiff's consultancy earnings if the mix of her work was to change and the full effect of the rate increases she has already applied have yet to be seen. I also consider it fair and reasonable to assume the 3 percent suggested by Mr Errington, based as they were not on the particular circumstances of the plaintiff's particular consultancy, but on projections for the economy as a whole. This has the additional advantage of using the same percentage for both her projected earnings and the future increases in CYPS's salaries.

[57] I also prefer Mr Errington's assessment of the unlikelihood of a further promotion to senior manager occurring when the plaintiff reaches the age of 60 years. Mr Day factored that promotion in as a certainty but I agree with Mr Errington's assessment that its occurrence is far from certain. The management positions in CYPS have changed their structure, placing much more emphasis on financial and management aspects rather than knowledge and experience in social work. That is a growing trend within CYPS which is likely to continue. The plaintiff may not have had the qualifications to have successfully obtained such a senior management role. Further, there is the likelihood that she would have had to have moved from Tauranga and that may have had an impact on her current arrangements where she shares the work on their farm with her husband. For these reasons I conclude that the probability of a further promotion is speculative and would only just qualify as a real possibility. This would reduce the quantum to be assessed for the non-promotion to a senior management position so substantially as to render it a factor to be disregarded.

[58] As to the rate of interest, although Mr Errington used varying 90 day bank bills net of tax and simple interest, as opposed to Mr Day using 5 percent compound interest, both were agreed that the effect on the results is not large and I have adopted Mr Errington's approach.

[59] Although both used mortality and disability assumptions and applied the same table and loading for disability, I prefer Mr Errington's figures which do not use Mr Day's three year age reduction.

[60] On the issue of taxation, both were agreed that taxation had to be taken into account but Mr Day preferred to approach the matter by simply grossing the figures up before tax. Mr Errington's calculations were more sophisticated and I consider

them to be more beneficial from the plaintiff's point of view because they effectively provide the plaintiff with enough money now to provide for her future lost net earnings, after allowing for taxation.

[61] Turning now to the exceptions that I have in totally adopting Mr Errington's figures, I first observe that they will need to be adjusted upwards to take into account my findings of a higher probability of promotion to the practice leader's position. This will mean the figures from the year commencing 1 April 2006 will have to be adjusted upwards based on the estimate of $71,793 for the year ended 31 March 2006.

[62] Second I have not accepted Mr Errington's approach in relation to the past lost earnings of "*blending*" his three different scenarios and have preferred to take the actual figures earned in the particular years by the plaintiff. For the year commencing 1 April 2006, and consistent with Mr Errington's approach of adding 3 percent per annum, the starting point should be the actual earnings from the year of $47,126 plus 3 percent.

[63] During the course of the hearing, counsel and the actuaries were kind enough to indicate that once the Court had made findings they would be happy to carry out their calculations based on them. I accept that offer with alacrity and therefore will reserve the final figure for future lost earnings. I would request the figures be calculated by the actuaries, and hopefully agreed, with leave to apply to the Court if agreement proves impossible. The final figure will be higher than Mr Errington's recalculations which he produced on 21 July 2006, and which are embodied in exhibit 5, but considerably lower than Mr Day's final assessment. There was no issue between the parties that the figure should be calculated up until the year ended 31 March 2017.

Superannuation

[64] A separate claim has been made on behalf of the plaintiff for superannuation but I am satisfied that Mr Errington's calculations properly take those contributions into account and that therefore no separate award under this heading should be made.

Medical

[65] Mr Hooker submitted that the plaintiff will have ongoing medical costs and $2,500 was sought under that head. He relied on Professor Gorman's evidence that she will be continuing treatment and therefore will incur further losses. Ms Dyhrberg observed that the defendant had already paid the plaintiff $7,500 in respect of out of pocket medical expenses and counselling assistance. She submitted that in the absence of any evidence of actual out of pocket losses or medical expenses incurred or likely to be incurred by the plaintiff, arising from the breaches of duty, this element of loss should be disregarded by the Court as having been met.

[66] The evidence is clear that the plaintiff is undergoing continuous treatment and this treatment has assisted her in working in her consultancy. The treatment was rendered necessary because of the injury she sustained as a result of the defendant's breaches of duty and therefore I do not consider them to be too remote as the defendant has contended. The amount sought is not large and I therefore award the amount sought of $2,500.

Non-economic loss

[67] The plaintiff sought $80,000 to compensate her for the distress and ill health she has sustained as a result of the defendant's breaches. Mr Hooker submitted that the plaintiff has endured stress which has been severe, unrelenting, and has permeated ever aspect of her life. It has left her with a life long disability and has affected her professional career and her personal life. Mr Hooker contrasted the plaintiff's exemplary career record, vivacious, robust personality, the high regard in which she was held by her peers, with her situation following the breaches of duty. She developed panic attacks, became depressed, lost her sense of humour, suffered personality changes which led to social and emotional withdrawal and isolation, visibly aged and had difficulties with sleeping. At various times she has had suicidal ideation and as late as November 2005 was still at risk of self harm. She continues to have a fear of regressions, has difficulty working in a team, and cannot deal with conflict. She has suffered these effects for in excess of nine years and has lost a bright, promising career doing work she was passionate about and which she performed exceptionally.

[68] Mr Hooker sought to compare the harm that had been suffered by the plaintiff to the harm suffered by the plaintiff in *Davis v Portage Licensing Trust* (2006) 3 NZELR 415. He submitted that at the very least some of the symptoms they both suffered from were comparable, although in comparison with Mr Davis, the plaintiff was extremely ambitious, had carved a good career for herself and that she had fallen a considerable distance. I concluded in *Davis* that an award of $50,000 for the distress, suffering and loss of enjoyment of life that the plaintiff there had experienced since the robberies would be justified, but reduced it for some mitigating factors relating to the counselling he had received to $45,000. In making that assessment I had regard to recent cases dealing with post-traumatic stress disorder or similar injuries. In *Gilbert* the Court of Appeal did not interfere with an award of $75,000 for general compensatory damages for distress. In *Brickell v Attorney-General* [2000] 2 ERNZ 529 the High Court awarded $75,000 and in *Benge v Attorney-General* [2000] 2 ERNZ 234 some four months later, one plaintiff received $70,000 for suffering and loss of amenities.

[69] Ms Dyhrberg fairly accepted on behalf of the defendant that the evidence led in both the substantive and remedies hearings established that the plaintiff has suffered considerable distress and fluctuating ill-health as a result of the defendant's breaches of duty. She contended that the harm suffered by the plaintiff was not as extreme as those cases summarised in *Davis* including that of Mr Davis himself. She observed that in those cases the various plaintiffs' health, wellbeing, day to day functions and capacity and their involvement in paid employment were all significantly impaired, more than that of the plaintiff in the present case. Ms Dyhrberg referred to the significant improvement in the plaintiff's condition from when she was first assessed and contended that it was highly likely that there would be a further degree of recovery. However, I have already accepted on the basis of Professor Gorman's evidence that the plaintiff's situation is now stable and there is unlikely to be any further improvement or deterioration.

[70] Ms Dyhrberg pointed to the plaintiff's ability to function well in paid employment and submitted that although that has fluctuated with her health the level of functioning has been considerably higher than that of the plaintiffs in the cases summarised in *Davis*. Ms Dyhrberg also relied on mitigating factors such as the defendant's attempt to resolve matters including mediation and the part payment on

account which enabled the plaintiff to obtain medical assistance when her urgent need was brought to the defendant's attention in later 2005. She contended that the $80,000 sought was at the higher end of the scale which she saw as being between $45,000 and $75,000 and submitted that the appropriate level for the plaintiff in this case should be in the region of $35,000.

[71] I accept the thrust of Mr Hooker's submissions that the plaintiff has suffered significant distress, clinical depression and has been unable to pursue a promising career to which she was highly committed and performing at the highest level. The effects of her injuries are apparent in both her professional and personal life. It is to her credit that she has performed so well in her consultancy practice and has adopted coping techniques which has enabled her to remain in such gainful employment. Had she not so performed, her awards for economic loss would have been much higher. It is clear however that the plaintiff has been severely impaired by her injuries and her enjoyment of life has been greatly reduced.

[72] It is extremely difficult to assess one plaintiff in comparison to another without taking into account the plaintiff's situation before the injuries and comparing them with the situation following them. Taking into account the defendant's actions to mitigate her loss, by making the interim payment, I consider that an award of $60,000 is appropriate.

Interest on non-economic award

[73] The plaintiff's sought interest on her distress claim in reliance on *Gilbert v Attorney-General* (supplementary judgment, unreported, Colgan J, 4 December 2003, AC 63/03) see paragraphs [93] and [94]. In *Gilbert* the Court awarded interest on a portion of the unpaid distress damages because of the long delays between injury and trial, trial and judgment, and judgment and payment. It observed that most of the consequences were incurred by Mr Gilbert in the first six years or so following his injury and dismissal and the rate of interest was fixed on two thirds of the distress damages at 5 percent per annum for 25 months, making a total of $5,208.33.

[74] Mr Hooker applied those factors in *Gilbert* to the plaintiff's claim and submitted that the time period between the plaintiff's injury and trial on liability was between six and six and a half years, the time between the hearing and the Court's

judgment was approximately five months, and there had been a further delay of some 17 months to the remedies hearing and the plaintiff had not received any payment towards her distress claim.

[75] The defendant submitted that no interest should be awarded on the non-financial compensation award as it is being formulated from the up-to-date evidence of Professor Gorman and the plaintiff. The evidence therefore takes into account the passage of time since the substantive hearing and covers the additional distress the plaintiff suffered.

[76] I accept Ms Dyhrberg's submission and consider that an award of interest on the non-economic loss is not appropriate in this case.

Costs

[77] At the request of counsel costs are reserved to enable the parties to attempt to resolve them. If they are unable to reach agreement they may file memoranda.

B S Travis
Judge

Judgment signed at 4.45pm on Thursday, 16 November 2006

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Schedule 1

CALCULATION OF LOST EARNINGS TO YEAR ENDING 31 MARCH 2006

Year ended 31 March	Actual Earnings	CYPS Earnings no promotion – based on Mr Errington's figures but including superannuation contribution	CYPS earnings using Mr Errington's CYPS earnings figures plus promotion to Practice Manager based on Mr Day's estimate of day of promotion and point on salary range reduced by 25%	TOTAL		
1998	48,686	55,520		55,520		
1999	53,147	55,520		55,520		
2000	50,505	55,520		55,520		
2001	42,978	56,420	+ 6,750	63,170		
2002	35,148	60,133	+ 6,750	66,883		
2003	25,561	61,270	+ 6,750	68,020		
2004	44,977	61,270	+ 6,750	68,020		
2005	38,007	61,270	+ 7,500	68,770		
2006	47,126	64,293	+ 7,500	71,793		
Total A	**386,135**		**Total B**	**573,216**	**Total B**	**573,216**
					− A	**386,135**
					TOTAL C	**187,081**

Net loss after expenses but before Tax = $187,081