A

LAISIASI BALEIWAI NAIGULEVU

v.

RAM JATTAN & ANOTHER

[SUPREME COURT, 1976 (Kermode J.), 24th March]

B

Civil Jurisdiction

Evidence and proof— conviction as evidence in civil proceedings—Evidence (Amendment) Act 1975—Civil Evidence Act 1968 (Eliz. 2 c. 64) (Imp).

C *Damages—personal injury—child—assessment of special and general damages.*

Once a defendant had been convicted before a court, the burden of proof was on him in ensuing civil proceedings to establish that the offence had not been committed.

Per curiam: The view of Buckley J. was to be preferred to that of Lord Denning in D *J. W. Stupple v. Royal Insurance Co.* [1970] 3 All E.R. 230, namely that proof of such a conviction gave rise to a statutory presumption of negligence.

The plaintiff sufferred severe head injuries in a traffic accident when 8 months old which left him with a degree of disability to his left hand side and the risk of developing epilepsy in later life. General damages of $10,000 were awarded.

E Other cases referred to:

Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587; [1943] 2 All E.R. 35.
Langton v. British Transport Commission & Ors The Times October 17 1956.
Gold v. Essex County Council [1942] 2 K.B. 293; [1942] 1 All E.R. 326.
Prudence v. Lewis The Times May 21 1966.
Lowe v. Pollock Kemp & Kemp on damages (3rd ed.) p.251.
F *Leanse v. Nicholls* Kemp & Kemp (3rd ed). p.242.
Stephenson v. Cook Kemp & Kemp (4th ed.) para. 3318.
Oliver & Ors v. Ashman & Anor [1961] 1 Q.B. 337; [1960] 3 All E.R. 677.
Jones v. Griffiths [1969] 2 All E.R. 1015; [1969]1 W.L.R. 795.
Hawkins v. New Mendip Engineering Ltd. [1966] 3 All E.R. 228; [1966] 1 W.L.R. 1341.

G Action in the Supreme Court for damages for injuries received in a road traffic accident.

KERMODE J.: [24th March 1976]—

This is a claim by Laisiasi Baleiwai Naigulevu a male infant suing by his next H friend Annie Naigulevu for damages for injuries sustained by him in a road accident which occurred on the 1st day of November 1969 at Kings Road Nasinu 5½ miles.

The plaintiff, then an infant aged about 8 months was a passenger in Colonel Mate's private car registered T.100 which was involved in an accident with a passenger bus registered No. E494 owned by the second defendant company and driven at the time by the first defendant acting in the course of his employment. A

The defendants in para. 2 of their defence denied each and every allegation in para. 4 of the statement of claim and this despite the fact that all the facts stated in para. 4 of the statement of claim were later admitted at the hearing, except the allegation of negligence, and it is clear that the facts were never in dispute. B

Where facts are not in dispute they should be admitted and it is not sufficient for the defence merely to traverse an allegation.

The basic facts in this action are as follows: Col. George Tawake Mate was on the 1st day of November 1969 driving his private vehicle T.100 on the Kings Road at about 9.45 a.m. on a journey from Nabua to Nausori Airport. There were in all nine persons in the vehicle, six adults and three infants. The plaintiff, an infant of about 8 months, was being nursed on the lap of his grandmother Annie Naigulevu. Near Rishikul School at 5½ miles Nasinu Col. Mate was travelling at between 40-50 m.p.h. He saw ahead of him bus E494 on the left hand side of the road which was then stationary. As he approached closer to the bus it started to move. Col. Mate pulled over to his right and seeing the road clear ahead speeded up to 50 m.p.h. to overtake. When he was close to the bus it turned right across the road in front of him. His vehicle collided with the bus on the right hand side between the front and back wheels. The first defendant admitted in evidence that he was in the process of turning into Caqiri Road, a side road off Kings Road on the right hand side of Kings Road facing Nasinu. This turn necessitated the first defendant moving from his left side of the road across Kings Road to turn into Caqiri Road. In the collision the plaintiff received serious injuries. C D

The foregoing are facts about which there was no dispute and I find them proved. E

The plaintiff's case is that the first defendant had stopped at a bus stop or bay and was proceeding on his way towards Nausori. None of the witnesses called for the plaintiff saw any signal indicating the bus was turning right. Col. Mate pulled over to his right intending to pass the bus and seeing the road clear ahead accelerated to overtake the bus and when about to do so the bus turned right across Kings Road into the path of Col. Mate's car. Col. Mate was unable to avoid a collision in which the plaintiff was injured. F

The first defendant's case is that he had pulled up on Kings Road preparatory to turning into Caqiri Road. He signalled his intention to turn right and after allowing a bus approaching from Nausori to pass he made sure that the road ahead and behind him was clear and then proceeded to turn right. He was over the white centre line of the road when he saw Col. Mate's car 2—3 chains away. As there was room behind him for a car to pass he proceeded on his way and the car collided with him when the front of his bus was actually in Caqiri Road. G

In the defence the defendants denied negligence and alleged the driver of T100 (Col. Mate) was negligent and alleged seven particulars of negligence. As to the seventh particular—failure by Col. Mate to sound his horn or otherwise give warning of his approach, Col. Mate was not asked whether he sounded his horn nor did the first defendant make any mention of not hearing a horn blown and I find this allegation not proved. H

I would have expected, in view of the nature of the defence, that Col. Mate would have been made a party to the action and the defence so framed as to also allege contributory negligence on the part of Col. Mate. He was not made a party and while I have to consider the defence a finding of negligence on the part of the first defendant which was a factor in the accident will be sufficient to establish the liability of the two defendants.

I propose to first consider the manner in which Col. Mate drove in all the circumstances prevailing at the time.

The accident occurred in daylight; no evidence was given as to the state of the weather—there is no evidence that weather conditions were such as to throw an extra duty on Col. Mate to drive with care such as fog or rain. Kings Road is a main highway and tar sealed. The carriage way is 24 ft wide. From the bus bay on the left of road facing Nausori the distance to Caqiri Road junction is 185 ft. Approaching this bus bay from Suva there is a slight rise in the road and a slight bend—not a blind bend. The distance from the centre of this bend to the Caqiri junction is 738 ft and for at least 1100ft past the junction there is clear visibility. Col. Mate had at least this distance ahead of the bus to see an approaching vehicle.

Col. Mate approached a slowly moving bus at between 40–50 m.p.h. No evidence was given that there was any speed restriction in force in the area concerned or that Col. Mate's vehicle was restricted. Speed was high in terms of figures but not unusual for a private vehicle on a tar sealed main highway. Col. Mate moved from his left towards the right hand side of the road and seeing the road clear ahead accelerated to overtake the bus. In my view this manoeuvre was a normal one and not indicative of dangerous or careless driving. He was presented with a bus turning across the road in front of him and was unable to avoid a collision despite his efforts to stop his car. He stated in evidence that there was no opportunity to take evading action.

The police sketch plan exhibit P. 1 admitted by consent indicates two sets of brake marks made by Col. Mate's car. The first a single mark 9 ft long on the right of the centre line moving from left to right and two marks further on one 12 ft and the other 14 ft long stopping at the rear of the car. From the beginning of the first mark to the back of the car the distance is 58 ft. These marks establish that Col. Mate was on the right hand side of the road and had used his brakes and are consistent with the story he told. The plan shows an area of glass on the right of the road and this shows up on photo B exhibit P. 2. This area apppears to be the area where the collision occurred and indicates the bus was at right angles to the road completely blocking the right hand lane. Evidence indicates that the bus and the car were moved after the accident to enable rescuers to remove an injured passenger from the car. Position of the vehicles shown on the plan and in the photos are therefore of no assistance.

It is clear that Col. Mate as he was about to overtake the bus was not aware that the bus was about to turn into a side road on his right hand side of the road. If in fact the first defendant indicated by trafficator lights that he was turning right this could have indicated to Col. Mate that the bus was pulling out of the bus bay. He thought the bus was going towards Nausori. In all the circumstances I consider Col. Mate was entitled to assume that the bus was proceeding on its way to Nausori after pulling out of the bus bay and he could not have anticipated a turn by the bus across the road to enter a minor side road.

As to the seven particulars alleged by the defendants indicating negligence by Col. Mate I find as follows: A

1. Col. Mate did not fail to keep a proper lookout. He was presented with a manoeuvre by the bus that he could not have reasonably anticipated.
2. He was travelling at a high speed but in all the circumstances this speed was not excessive or reckless.
3. He did attempt to stop but I am satisfied he had no opportunity of avoiding the accident. B
4. He was on the right hand side of the road but this was due to his overtaking the bus and no accident would have occurred if the bus had not turned across the road.
5. He did not drive carelessly and without due care and attention.
6. I am satisfied he had proper control of his vehicle. C
7. There was no evidence as to whether he signalled his approach and I find this allegation not proved.

Having fully considered the manner in which Col. Mate drove his vehicle I am of the view that there was no negligence on his part and I so find.

I turn now to consider the manner in which the first defendant drove his bus. D

According to his story he does not remember stopping at the bus bay near Caqiri Road and believes he did not do so. Near Caqiri Road junction he slowed down and stopped because a bus was approaching from the Nausori side. In his own words as recorded by me he stated:

> "I slowed because bus coming from Nausori side. I gave signal, saw clear both sides and turned towards Caqiri Road. I gave trafficator signal. I turned and when bus at right angles to road I saw black car coming from Suva direction travelling very fast. He applied brakes but could not stop. He bumped into middle of my bus on right hand side." E

He later in evidence in chief said:

> "Before I started turn I saw road was clear back and front. I looked very carefully." F

Under cross-examination he stated:

> "As soon as bus passed I started my turn I look at back and front. I saw nothing at the back. I could see as far as the bend at the back—about 4 chains back. Nothing there when I started to turn."

He stated he first saw the car 2–3 chains back after he had made the turn and was at right angles to the road. He was moving slowly (he admitted stating in a court below he was travelling 3 m.p.h.). He did not stop or increase speed but continued on his way because he believed there was room behind him to pass and did not think a collision would occur. His bus was 36 ft in length. G

It is not necessary for me to decide whether the first defendant stopped at the bus bay 185 ft from the Caqiri Road junction and moved off from there. Plaintiff's witness were adamant that he did. The accident happened over 6 years ago and the first defendant cannot be expected to remember all details. To determine the issue of negligence I can consider the first defendant's version of what happened. H

A He had stopped at the road junction preparatory to turning into Caqiri Road. He had a clear view at the rear to the bend a distance of 738 ft, a distance of over 11 chains, and considerably more than the 4 chains he stated in evidence.

He first saw the car when it was 2–3 chains away. After it had travelled at least 8 chains after coming round the bend.

In my view if the first defendant had been keeping a proper lookout he should
B have seen the car immediately after it came around the bend. Whether he used his trafficator lights or not to indicate turn to the right is immaterial in the circumstances. Col. Mate was obviously close to the bus when it started its turn and travelling fast. It was incumbent on the first defendant to ensure that the road behind him was clear and that it was safe to make the turn. He was not entitled merely to signal a right hand turn and then make the turn without ensuring that he could safely do so. On the facts as he related them this is what he apparently did. The car could have been
C visible 11 chains back had he exercised due care and attention to his driving but he only saw 2–3 chains away. Col. Mate's evidence and the brake marks shown on the plan and the distance travelled by the bus albeit slowly indicate the car must have been much closer to the bus than 2–3 chains. On my consideration of the facts as he stated them he was clearly negligent and this negligence was the cause of the accident in which the plaintiff received his injuries. As the first defendant was the servant of the second defendant acting in the course of his employment, the second
D defendant is liable for the first defendant's negligence.

I find both defendants liable for the injuries sustained by the plaintiff.

In considering the liability of the defendants I have based by finding in the main on the story told by the first defendant. The same result could have been arrived at on consideration of the evidence of three witnesses called by the plaintiff who were impressive and credible witnesses.

E

There is also exhibit P. 14 the certificate of the first defendant's conviction of careless driving in the Magistrate's Court Suva in Criminal Case 4461 of 1969 on 24th February 1970. This charge arose out of the accident in which the plaintiff received his injuries.

This certificate was admitted under the provisions of the Evidence (Amend-
F ment) Act No. 6 of 1975. The first defendant admitted the conviction was in connection with a charge arising out of the accident with which I am concerned. This Act is based on the English Civil Evidence Act 1968 which reversed the effect of *Hollington v. F. Hewthorn & Co. Ltd* [1943] K.B. 587.

The Evidence (Amendment) Act throws the burden of proof on the defence to establish that the offence was not committed.

G The English Act has its critics and its supporters and I confess I include myself amongst the critics. It is no easy task for a defendant to prove an offence has not been committed by him faced with a conviction in another court. In the Fiji context and particularly in motor vehicle accident cases where a person is injured, due in part to the knowledge that compulsory insurance covers injured persons, there is a tendency by defendants to admit traffic offences rather than to face the cost of a defence and delays in hearing cases. In the case of *J. W. Stupple v. Royal Insurance Co. Ltd*
H [1970] 3 All E.R. 230 Lord Denning M. R. referred to the Civil Evidence Act 1968 and the effect of admitting a conviction in evidence in a civil action. Lord Denning's view was that the Act shifted the legal burden of proof and if the defendant did not

establish he was not negligent "he loses by the very force of the conviction". Buckley J. differed from this view and considered proof of conviction under the section of the Act gave rise to a statutory presumption. He considered no weight should be given to the mere fact of conviction in deciding whether any other evidence adduced was sufficient to discharge the onus resting on the defendant. The trial judge still had to consider the evidence before him. Of these two views I prefer that of Buckley J. It must still be established by evidence, in my view that the offence involving negligence was a cause of the accident in which the plaintiff was injured. If this is the correct view proof of the confiction has more of a prejudical effect than evidentiary value.

Admission of a certificate of a prior conviction makes it difficult for another court to view the evidence before it with an open mind when the defence seeks to establish that the offence was not committed.

The Act is law and I am bound by it. My finding of negligence against the first defendant based on consideration of the evidence before me is supported by the first defendant's conviction of careless driving which caused the accident, in which the plaintiff was injured. The defence has failed to rebut this evidence that the first defendant committed the offence.

I turn now to the injuries received by the plaintiff. He sustained an extensive fracture of his skull involving the whole of the left hemisphere of his skull from the frontal bone to the occipital bone in the back across the anterior middle and posterior fossae. The injury was a very serious one and would normally have proved fatal in a child of 8 months of age. That he survived is due to the medical attention he received in hospital and without doubt to the subsequent care and attention given by his grandparents, one a doctor and the other a nursing sister. He was before the accident a normal healthy child.

He was unconscious for several days and an emergency operation had to be performed to his brain. It was noticed in hospital after the operation that he had a left-sided haemiplegia i.e. paralysis. He made gradual recovery and when seen in December 1970 by Mr S. C. Ramrakha, then Consultant Surgeon, there was some movement noticed in the left side of his body.

The child is now about 7 years of age. After examination of the child by Mr Ramrakha on 1st March 1976 he reported as follows:

> "I examined this boy again on 1st March 1976. I am told that he is of average intelligence. He has a tendency to fall and sustained a fractured tibia in 1970 and fractured radius in 1971.
>
> On examination, he walked with a limp.
>
> The right (sic) upper limb including the deltoid muscle was moderately wasted. There was generalised weakness of all the muscles of the limb and he was rather clumsy with the use of his fingers. All reflexes were exaggerated.
>
> There was no wasting of the left lower limb but all reflexes were exaggerated. There was no definite weakness. The limp appeared to be due to incoordination of his muscles due to damage to his motor centres in the brain.
>
> *Opinion:*
>
> 1. This child has a permanent brain damage which has affected his limbs on the left side. The degree of disability is likely to be permanent.

2. He has a risk of developing epilepsy in later life.

A

3. The degree of brain atrophy and hydrocephalus has not been assessed in view of the slight but definite risks involved in carrying out the test which consists of performing a lumber puncture and injecting air in the sub-dural space and taking x-rays. Subsequently should he develop further symptoms, this may become necessary."

It appears to me that reference to the right upper limb is an error and the
B reference should have been to the left upper limb.

This is borne out by opinion (1) above. There was no evidence of any injury to the right arm apart from a minor fracture after the accident and no evidence that this fracture left any weakness in this arm.

This medical report indicates two things:

C *(a)* The child has a residual weakness of his left arm and a limp in his left leg which is permanent and due to brain damage.

(b) The possibility of the plaintiff developing epilepsy in later life.

Dr Holmes examined the child on 5th December 1970 (Exhibit P. 4). His growth was then normal and he was of normal intelligence. Left sided paralysis was present but obvious only on careful examination. Dr Holmes considered improvement
D should continue slowly.

Comparing Dr Holme's report with Mr Ramrakha's made over five years later does not indicate any marked deterioration of the child's physical condition. There were still signs of weakness of the left upper limb but if anything an improvement in the left leg which showed no signs of weakness. The limp was due to incoordination of the muscles due to brain damage.

E It would appear from these reports that the child's physical condition has stabilised.

Two medical reports made by Dr L. B. Naigulevu were admitted in evidence. Dr L. B. Naigulevu is the plaintiff's grandfather and not an independent witness. He was a very good witness but where his reports expresses his opinion I have ignored such opinion except where supported by independent evidence. From facts stated in
F his report supported by his own testimony and that of his wife Annie Naigulevu there is a history of the plaintiff's progress after coming out of hospital up to the date of the hearing and the effects of injury the child sustained.

The child was on drugs (phenobarbitone) for at least two years to prevent the onset of fits. He had three minor surgical operations to his head for an abscess and to remove bone chips. He was slow to walk and had weakness in left arm and leg and
G was prone to falls. He suffered two falls resulting in fractures to his leg and arm. He suffered headaches usually once a month when at school and sometimes a fever and vomitting. He was sometimes forgetful, he was excitable and when excited did not appear to comprehend what was said to him. He started kindergarten at four years of age and school at six and in a class of 34 children he was placed 17th. He has progressed normally with the other children in school.

He has been debarred from partaking in organised sports due to the condition of
H his left leg.

Ignoring at this stage the possibility of epilepsy it is clear the child has a weakness of his left arm and a leg with a limp which are permanent disabilities. Mentally

he is of average intelligence and otherwise physically normal. He does suffer from headaches and occasional fevers and vomitting. He is excitable and sometimes forgetful. These disabilities are minor compared to the permanent physical disabilities and are disabilities often suffered by persons who have had no injury to the brain.

Assessment of damages in a case such as this is always very difficult and particularly where the evidence indicates the possibility of the child developing epilepsy in later life.

On the question of epilepsy there was evidence available which would have been of assistance to the court. The child was taken to New Zealand and was examined by a neuro physician who made a report. Mr Chauhan had a photocopy of this report which he sought to tender in evidence. Mr Reddy objected because Mr Chauhan had previously objected to it being tendered and Mr Reddy did not seek to tender it. The report apparrently contains matters which assisted both the plaintiff's case and the defendants'. I have no doubt it would have been of considerable assistance to the court. Mr Reddy repeated his objection and in the circumstances I have to rule against the admission of a copy of the report.

I accept Mr Ramrakha's evidence that the injury to the brain sustained by the plaintiff makes him a candidate for epilepsy. Mr Ramrakha stated he was not qualified to assess the chances of the plaintiff contracting epilepsy. Dr Naigulevu assessed the chances as 50/50. Although I believe this was his honest opinion he is not a neurological expert and his relationship to the plaintiff is so close that I cannot safely accept his assessment.

All I can and do accept is that there is a possibility of the child contracting epilepsy either the minor or major form i.e. petit mal or grand mal. Mr Ramrakha believed the child would be more likely to develop grand mal but as he admitted he was not qualified on this subject. He has survived six years without any signs of epilepsy and this despite the fact that for some years now he has not been taking phenobarbitone. In an adult such a brain injury could produce epilepsy six months to twenty years later. I have no evidence of any acceptable assessment of the chances of epilepsy developing later but am satisfied that the chances exist.

The difficulty I face is expressed in *Kemp and Kemp "The Quantum Of Damages Personal Inquiry Claims"* Fourth Edition at part 3 para. 3313 referring to the Times Report on May 21, 1966 of the case of *Prudence v. Lewis.*

> "The difficulty in fixing an award in such a case was that, in the future, the award must be wrong, because, if in fact the boy was free from epilepsy, the award would appear to the defendant to have been too high, and if the boy did develop it, the award would appear to him to have been too low. A compromise had to be made in fixing the damages before the medical position became certain."

I find myself facing the same difficulty. English cases I have read indicate that doctors are in a position to make an assessment five years after a person has sustained a head injury causing brain damage. The fact that the child has to date has not developed epilepsy although he has been off phenobarbitone for about 4 years is an indication to me that the chances of the child developing epilepsy in later life would not appear to be very high. With virtually no material to work with I am not in a position to make an assessment percentage wise as to the possibility of the plaintiff developing any form of epilepsy. The best I can do is to recognise that the possibility

exists and allow for this possibility. The award I decide on must of necessity to an
A arbitrary one.

I discount but do not ignore the evidence that the disability on the left side precludes the plaintiff from gainful employment involving physical labour. This is not a case where a labourer has been injured. His physical disability does not preclude him from receiving education and training to fit him for a position not requiring physical labour, a position likely to be more rewarding financially than a labouring
B position. Ignoring epilepsy I do not consider the injury will cause loss of future earnings.

Pain and suffering caused by the injury was minimal and experienced at an age when he has no memory of such experience. His recurring headaches and other minor disabilities prevent him from enjoying a normal life.

The permanent disabilities of his left arm and leg do prevent him from enjoying
C the life of a normal person. He has never enjoyed such a life and has no doubt adjusted or will adjust his life to such disabilities. Looked at objectively he has suffered a loss of future amenities and this must be taken into account. He should experience a reasonably normal life and his ability to provide for himself is not impaired except as to the possibility of developing epilepsy for which he will be compensated. There is no evidence that the injury he suffered may shorten his life.

D I have fully considered the factors and principles to be applied in assessing damages in such a case.

As to the possibility of developing epilepsy I am faced with great difficulty. It may never occur. It may occur 20 years hence or next year. It may take the severe or mild form. The child may from other causes not live to maturity.

In a case involving the amount to be awarded to an infant plaintiff a court should
F not be influenced by the fact that the award would have increased very considerably by accumulation of interest by the time the infant comes of age. This was held in *Gold v. Essex County* [1942] 2 K.B. 293.

This case was distinguished in *Langton v. British Transport Commission and Others* 1955 C.A. referred to at page 181 of 4th Edition of *Kemp and Kemp.* This was a case where an injured infant plaintiff faced a contingent prospect of contracting arthritis
F at some future date. Damages were awarded on the basis that the damages awarded if left alone would accumulate into a larger sum. The Court of Appeal upheld the trial judge. Jenkins L.J. said in this case:—

"In Gold's case the child had sustained an immediate injury with present consequences....."

"The present case is entirely different. The matter the learned judge had to deal
G with in the present case was a contingent prospect of the plaintiff contracting arthritis at some future time....."

In arriving at my decision as to the amount I should award I have been influenced by both the aforementioned cases. I have considered the plaintiff's present disabilities as being permanent with no prospect of developing epilepsy. I have also considered the possibility of the plaintiff developing epilepsy at some time in the
H future. The first approach fully compensates the plaintiff as at the present time ignoring epilepsy. The second approach attempts to compensate today and for the imponderables of the future with the possibility of epilepsy in mind. The sum I award which if allowed to accumulate and wisely invested should accumulate into a

sum which will provide a reasonable income for the plaintiff if he should choose to continue the investment after attaining his majority, and provide an income if he shall then or prior to attaining his majority be unable to work through developing epilepsy. To ensure this course is followed I propose to order payment of the sum awarded to the Public Trustee for the benefit of the plaintiff with liberty to apply such sum for the education and maintenance of the child should occasion arise. As Dr Naigulevu and his wife propose to adopt the plaintiff it is hoped that the plaintiff will obtain the maximum benefit from this fund when he comes of age.

In considering my award of damages I have considered a number of English cases involving young children who have suffered head injuries. Of all the cases five cases involved injuries similar to those suffered by the plaintiff.

The first case was the case of *Prudence v. Lewis* which I have already referred to This case involved a child of 2 years of age who was 6 years old at the time of the trial It was established that there was a 10% possibility of epilepsy developing. The brief report does not indicate what other injuries the child sustained other than the injuries to the head. The award was £3,000.

In the case of *Lowe v. Pollock* referred to at page 251 of the 3rd Edition of *Kemp and Kemp* a boy aged 18 months was involved. He sustained a very severe head injury with damage to the brain resulting in marked ataxia of left arm and leg. Lack of coordination would handicap him socially and he would not be able to indulge in normal games. His state was such that he could not become a craftsman or do clerical work. He could only do simple routine work. Report does not mention possibility of epilepsy. General damages awarded was £5,500.

In the case of *Leanse v. Nicholls* referred to at page 242 of 3rd Edition of *Kemp and Kemp* a boy of 4 was involved who was 11 at the time of the trial. He had a very similar injury to the plaintiff. He had suffered two epileptiform seizures and it was possible but not probable he would develop epilepsy in the future. There were other features of similarity to the instant case. There was physical impairment causing clumsiness. He had had no fits during the period of 6 years since the accident which the medical expert stated was a good sign. He also thought that the absence of any fits after six months withdrawl of phenobarbitone was a reassuring sign. The details of this boy's after effects indicate that he was left more seriously affected than the plaintiff. The award was £7,000 general damages.

In the case of *Stephenson v. Cook* [1974] C.A. No. 292 reported in 4th Edition of *Kemp and Kemp* Part 3 at para. 3318 a child of 10 months was involved. She sustained an extensive closed fracture of the right side of the skull and as a result suffered from traumatic epilepsy. She had by the time of the appeal also had a series of minor attacks of epilepsy. The major form of traumatic epilepsy appeared when drugs were reduced. She would have to take drugs for many years. The award of £6,500 by the trial judge was increased on appeal to £8,500 as Ormrod L.J. said "I would substitute for it (i.e. £6,500) a figure of £8,500 recognising as I do, that I am merely putting one guess against another".

The last case is *Oliver & Others v. Ashman & Another* [1961] 1 Q.B. 337. A boy aged 20 months was involved. As a result of the accident the child had become a low grade mental defective. Epilepsy existed in a serious form. He was awarded £11,000 a figure which Widgery L.J. in *Jones v. Griffith* [1969] 2 All E.R. 1015 referred to as the maximum figure for the liability to epilepsy alone had there been a severe certainty of recurrence of attacks.

A I have also studied the case of *Hawkins v. New Mendip Engineering Ltd.* [1966] 3 All E.R. 229 referred to me by Mr Reddy. This case involved a man of 27 who suffered from temporal lobe epilepsy of the minor form. There was a serious risk of the major form developing. (50/50 chance). General damages awarded were £8,000 and this was upheld on appeal.

In my view the appropriate figure in the plaintiff's case lies somewhere between the £3,000 and £8,500 in the first four cases mentioned above.

B Doing the best I can on the evidence before me and with the guidance of the cases I have considered I award the plaintiff $10,000 general damages.

In my view this sum of $10,000 compensates the plaintiff for the injuries he suffered and his present disabilities and the possibility of his developing epilepsy in the future.

C There remains the question of special damages. The plaintiff claims the sum of $504 made up as follows:

Medical expenses.....	$500
Medical reports.....	3
Police Report	1
	$504

D

The last two items are not damages arising out of the accident. They are expenses incurred in connection with or incidental to this action and should not have been made the basis of a claim. The medical expenses were not incurred by the plaintiff but by his grandfather, Dr Naigulevu. His evidence was extremely vague and E amounted to a bald statement that he had spent $500 on a number of items. There was no break down of this $500 and included at least one item, a walking chair which cannot be said to be an expense reasonably arising out of the accident. No receipts were produced.

The plaintiff incurred no expenses and in any event there was no satisfactory evidence adduced to establish the claim for special damages. I disallow the claim for special damages.

F There will be judgment against both defendants for the sum of $10,000 with costs to be taxed.

I direct that the said sum of $10,000 with taxed costs be paid to the Public Trustee for the benefit of the plaintiff.

There shall be paid out of the said sum to the solicitors of the plaintiff the costs of G this action and the costs and disbursements incidental to the claim herein and consequent thereon to be taxed as between the solicitors and their client.

Leading counsels fees shall be treated as a disbursement.

There shall also be refunded to Dr Naigulevu any legal costs paid by him to the plaintiff's solicitors and any expenses paid by him and on account of his wife in relation to attending to consult the plaintiff's solicitors and attendances at court.

H The balance of the moneys held by the Public Trustee for the benefit of the plaintiff are, in the absolute discretion of the Public Trustee to be invested in trustee investments until the plaintiff shall attain the age of 21 years with full liberty to the Public Trustee to apply the whole or any part of the funds held by him for the maintenance, education and advancement of the plaintiff during his minority.

Judgment for the plaintiff is sum of $10,000.