

OF

1960 <sup>no. 18</sup>  
**ORIGINAL**

IN THE HIGH COURT OF AUSTRALIA

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BRAUNACK

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V.

KUCHEL

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**ORIGINAL**

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**REASONS FOR JUDGMENT**

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Judgment delivered at SYDNEY

on Wednesday, 23rd November, 1960.

BRAUNACK

v.

KUCHEL

O R D E R

Appeal allowed with costs. Judgment of the Supreme Court of South Australia varied by substituting the sum of £6,066 for the sum of £2,316 wherever appearing therein, and the sum of £5,796 for the sum of £2,046 wherever appearing therein.

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BRAUNACK

v.

KUCHEL

JUDGMENT

KITTO J.  
MENZIES J.  
WINDEYER J.

BRAUNACK

v.

KUCHEL

The appellant, suing by her next friend, was the plaintiff in an action in the Supreme Court of South Australia in which she claimed damages from the respondent for his negligence as driver of a bus in which she was a passenger. The liability of the respondent was admitted at the trial. The question that Ross J. had to decide was what sum the appellant should have as damages. The learned judge assessed the damages at £2,316 of which £1,250 was for general damages and the balance special damages for medical and hospital and other expenses incurred by or on behalf of the appellant. The appellant contends that the sum of £1,250 is inadequate for the general damages that she has suffered. That is the only question that we have to consider.

At the time of the accident the plaintiff was eleven years old. She was returning in a school bus from Angaston to Tanunda when it came into collision with a truck. She was badly injured and taken to hospital. She was then suffering from shock and concussion, a fracture of the right femur, gross lacerations of the right leg and laceration of the abdominal wall and right buttock. This abdominal wound was extensive and serious and it was contaminated by wood splinters and dirt. The anatomical details of the injuries and of the surgical treatment need not be set out. It is enough to say that elaborate initial operations were necessary upon both the

abdomen and the right leg. She remained in hospital until 2nd December, her leg being either in a Thomas splint or a plaster back slab for most of that time. During her stay in hospital she had several subsidiary operations including a skin graft. In May 1956 she was back in hospital because of an infected sinus of the abdominal wall and cellulitis of the leg. She was discharged on 7th June. At various times since then splinters of wood have worked their way out of her various wounds. The right leg has become about an inch and a half shortened. When she first left hospital in November 1955 she had to use a walking caliper and toe raising spring. She was able to discard the caliper after seven months, but her leg movement remained impaired. In July 1958 she was operated on again - this time to remove scar tissue from the right thigh muscle and right knee joint to enable her muscles to give better control of the action of this joint and to remove this scar and that on her abdomen. She had become sensitive about this scarring; and naturally so, because the photographs tendered shew that at that time it appeared as a great mutilation. The scar ran in an irregular line across her stomach from one hip to the other. The operations in July 1958 were successful in increasing her knee movement from about 90 degrees to 130 degrees and in considerably reducing the width of the abdominal scar. In April 1959 she had another operation to remove scar on the right hip. Throughout 1956 and 1957 she had regular physiotherapy treatment in Adelaide travelling there from her home in Tanunda, usually about once a week.

The permanent effects of all these experiences are carefully stated by the learned trial judge and we need do no more than quote in full his findings in his own words: "She now has a thin scar running across her lower abdomen

from the left groin to the right thigh, and another similar scar running vertically from the right loin downwards across the front of the hip into the right thigh. These scars are soundly healed and stable. She also has ugly scarring on the right calf. No attempt has been made to improve the appearance of this scar by surgery for the reason that it is in the nature of a skin defect, measuring five inches by four inches and the only way to remove it would be to replace with a similar piece of skin taken from some other portion of the body. As she already has extensive scars on the abdomen - the most suitable place for providing skin for a graft - Dr Robinson advises against any such operation. The plaintiff was doing well at her school up to the accident but owing to the interruptions in her school attendances, caused by her accident and the treatment for her injuries, her proficiency fell off, and she fell behind pupils of her own age. Eventually, at the end of the second term 1959, she left school - and after a period at home, she took a business course and has now obtained a position as a comptometer operator at a wage of £7 per week. She has suffered much pain and inconvenience as a result of her injuries. Her present disabilities are:

1. A shortening of one and-a-half inches of the right leg. This requires the wearing of a built-up surgical shoe. With the use of this, she can walk without a limp but tires easily.

She can ride a bicycle and plays such games as table tennis and bowls. She could play lawn tennis, but would find it difficult to become proficient in any vigorous sport of this type.

2. There is a grating in the right knee and she has a feeling of instability in her knee. She cannot kneel or squat. Development of arthritis in this knee is probable at a later date.

3. She has a callus on her right heel which gives her some pain unless frequently removed.
4. She gets occasional stomach pains and headaches.
5. She is very self-conscious about the ugly scarring of her stomach and right calf. In bathing costume the stomach scars are hidden but nothing can be done to conceal the leg scar."

"Taking all the above factors into consideration," his Honour said, "I assess her general damages at £1,250."

We, however, consider that this sum is inadequate compensation for what the appellant has suffered and will suffer as a result of the accident - and so inadequate that it should not be allowed to stand.

It is not that his Honour left out of account any matter that he should have considered. And it is apparent that, considering how serious were the appellant's injuries and, how dire the consequences might have been, she has made a good recovery - as a result of skilful surgery and nursing, her mother's solicitude, and her own courage and determination. But the permanent consequences of her injuries are serious. She has to wear a surgical boot to correct the shortening of her leg. Without it she has a bad limp. It is unlikely that this will affect her in clerical employment. But there are some forms of employment and activity that are not available for her. For example, she had hoped to become an air hostess; and it might not now be easy for her to get that kind of work. To do ordinary household tasks, such as using a dustpan, she has to adopt unusual postures and methods. There is no reason to suppose that she may not get over her self consciousness and enjoy life as a happy young woman. But she has had a lasting physical injury and is entitled to be compensated for its consequences, so far as, in cases like this, money can be

regarded as a compensation - and not the less so because she has met her misfortune bravely. She is likely to become a sufferer from arthritis. And, as for the past, she has had long periods of pain, the mental and physical stress of many operations - more or less severe; and has had to spend in hospital, or in going for treatment, much time which would otherwise have been filled with happy childish pleasures.

We realise that in cases of this sort there can be no precise monetary standards by which to measure compensation. Judges are necessarily influenced by their own experience of what has seemed to be reasonable and proper in other cases, and by what may be called prevailing standards and appreciations. But we deprecate criticism of damages awarded in one case by comparison with what courts of appeal have thought proper to approve or allow in other cases. No two cases are wholly alike. Apparent similarities are often merely superficial. Moreover a statement by a court of appeal that a particular sum is proper, or not unreasonable, in a particular case does not mean that it is either the lowest or the highest sum that could be awarded in the exercise of a judicial assessment. A proper sum lies within the range of what is not so low as to be in a legal sense inadequate and not so high as to be in that sense excessive.

In our opinion the proper amount to be given as general damages in this case is £5,000. Substituting that for the £1,250 allowed by his Honour the judgment in the action should be for £6,066. The appeal will be allowed with costs.