# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Tamlyn v The Nominal Defendant* [2007] QSC 071 |
| PARTIES: | **GARRY NEVILLE TAMLYN**<br>**(Plaintiff)**<br>**v**<br>**THE NOMINAL DEFENDANT**<br>**(Defendant)** |
| FILE NO/S: | BS 11696/03 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 13 April 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 19, 20, 21 March 2007 |
| JUDGE: | Mackenzie J |
| ORDER: | **1. Judgment is entered for the plaintiff in the sum of $250,480.70**<br>**2. Unless written submissions seeking a different order are delivered to my Associate and served on the other party within seven days, the defendant is ordered to pay the plaintiff's costs of and incidental to the claim, including reserved costs, if any.** |
| CATCHWORDS: | DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where plaintiff an academic in a specialised area of music – where plaintiff had career aspirations to advance to the rank of Pro-Vice Chancellor status – where motor vehicle accident resulted in plaintiff suffering 15-20% impairment due to head injury and subsequent depression – whether accident causative of the loss of pre-accident and/or post-accident earnings – whether plaintiff would have advanced through the academic rankings as envisaged<br><br>TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOK-OUT – PEDESTRIAN ACCIDENTS – where plaintiff struck by unidentified vehicle while crossing road – |

where plaintiff suffered head and shoulder injuries – where liability is not an issue – whether plaintiff contributory negligent

*Baird v Roberts* [1977] 2 NSWLR 389, distinguished

COUNSEL: M Grant-Taylor SC, with C S Harding, for the plaintiff
D H Tait SC for the defendant

SOLICITORS: Bennett & Philp Solicitors for the plaintiff
DLA Phillips Fox Solicitors for the defendant

[1] **MACKENZIE J**: This is a claim for personal injuries by the plaintiff, who was, at the time of the accident, and is still, pursuing an academic career in music. Liability is not an issue. At the commencement of the trial it was predicted, accurately as it turned out, that contributory negligence and economic loss were likely to be the principal issues remaining unresolved.

[2] The evidence establishes that the plaintiff formed an intention to pursue a career in music from an early age. At the time of the accident he was 37 years of age and a Lecturer at the Queensland Conservatorium campus of Griffith University. Early in his career, he worked at James Cook University, also as a Lecturer. He appears to have been enthusiastic and ambitious. He was well regarded as a teacher. He had thought through a scenario for advancement in the academic world. He planned to move quickly through the levels of his academic discipline, with the aim of eventually reaching high academic status, at least Pro-Vice Chancellor status.

[3] While at James Cook University, he proposed to the university authorities the formation of an institute of popular music for the purpose of bringing popular music study into the university. According to the plaintiff, the proposal was not well received. Shortly afterwards, the Queensland Conservatorium advertised for a musicologist to teach music history and theory and to develop a subject in popular music. He found that prospect appealing and, after applying, was appointed in late 1994 to the position as a tenured lecturer. While he remained at Lecturer level, he did not see the move as a sideways move but "an opportunity of bigger things". That view was supported by evidence of other witnesses, Professor Bon, who had been a colleague at James Cook University, and Associate Professor Holtham, of whom more will be said later.

[4] On Friday 14 March 1997 he was walking home from a function at the Art Gallery to his residence in Kangaroo Point. There is no evidence that he was adversely affected by alcohol. The only evidence on the subject was that over the period of the evening he had two glasses of champagne. Just prior to the accident in which he was injured, he had emerged from a walkway under Main Street, Kangaroo Point, leading from the western side of the Story Bridge to the eastern side. His evidence was that before he began to cross the carriageway upon which he was struck, he looked both ways and saw a motor vehicle no less than 50 metres away heading north with its left indicator flashing. From that he concluded that the vehicle would turn left at a street leading to Main Street to the south of where he was intending to cross the road. He began to cross the road. As he did so he became aware that a

vehicle was about to collide with him. By then, it was too late to take effective evasive action and he was hit. The vehicle was never identified.

[5] After that, he remembered nothing for two days. When his awareness returned, he was in his unit, suffering from injuries. After seeing his general practitioner, he was admitted to hospital for about two days. He was away from work for, he thought, about two months.

[6] It is not in dispute that the plaintiff suffered organic brain damage which is consistent with his claim of reduced level of verbal skills, memory and concentration difficulties, tinnitus and loss of senses of smell and taste. He also suffers from headaches. The neurologist Dr Todman and the neurosurgeon Dr Weidmann were not far apart in their degree of impairment arising from the head injury. Dr Todman suggested 20%. Dr Weidmann suggested 15% without taking into account the tinnitus and conceded that if tinnitus were added 20% would not be unreasonable; but he maintained his opinion that it would be closer to 15%. Dr Saines, a neurologist, said that a 20% disability representing the cognitive deterioration was higher than he would have anticipated. Whatever the precise quantification, it was a significant head injury. Mrs Anderson, a clinical neuropsychologist, made findings after testing that were consistent with the reported site of the injury. The plaintiff also suffered an injury to his shoulder which was ultimately operated on and may possibly lead to removal of a pin at some future time.

[7] There is evidence that the plaintiff has suffered a very significant change in personality since the accident. Ms Hooper, with whom he was in a relationship from about the end of 1995 until late 2004, gave evidence that he had changed from being a vibrant, sociable man who was very particular about his appearance to a person who, after the accident, cut himself off from his former social network and was far less meticulous about his grooming. He has been diagnosed with depression, for which he is being treated by Dr Joan Lawrence. The depth of the condition has from time to time been a cause of concern, although the pattern seems to be, at least at some times, that when prescribed medication and treatment is persisted with, he is better than when he is not taking it. He has insight into this, since he recently decided to try on his own to extricate himself from the condition but now realises that professional help is likely to be necessary.

[8] At the time the accident happened, the plaintiff had almost finished his PhD thesis entitled "The Big Beat – The History and Development of Snare Backbeat and Other Accompaniment Rhythms". As the plaintiff explained it, it was concerned with where the most prominently heard musical rhythm in popular music originated. The thesis concluded that, contrary to common belief that it came from rhythm and blues, with roots in Africa, the empirical evidence was that it originated in country and western performers in "western swing, sort of the white trash…music of the time." The plaintiff observed that the conclusion "upset a lot of people at the time". He said that when the results of his research became known, he was invited to numerous places to talk about his research, including Chicago, where he was invited by the Director of the Institute for Black Music Research there to "come over and have a chat".

[9] At the time of the accident, there was only a short section of the thesis to be completed which the plaintiff described as an end summary and future projection; nothing else had to be completed or re-written. He said that he had expected it would be submitted to his supervisors within a few weeks. As it turned out, the degree was conferred in 1998, according to his CV submitted in connection with an application for promotion to Associate Professor.

[10] While still serving his probation period as a Lecturer following his appointment as from the beginning of 1995, the plaintiff applied for promotion to Senior Lecturer in September 1997. In February 1998, he was advised that his promotion application had been unsuccessful but was advised at the same time that his appointment as a Lecturer had been confirmed. At the end of 1998 he again applied for promotion to Senior Lecturer and was successful.

[11] In 2003, he was promoted from Senior Lecturer to Associate Professor which rank he still holds. A copy of his application and the report of the Queensland Conservatorium Staff Committee which recommended promotion were in evidence. The report analysed three career aspects, teaching, research/professional practice and service. For the moment, it is sufficient to note that there were some reservations about the level of his research output, but the Committee was in agreement that he had "demonstrated a solid level of achievement" in the area of research. By this time, the plaintiff was working at the Gold Coast campus, as he was at the time of the trial. The Committee also observed that his heavy workload, as the only continuing fulltime Lecturer on the Gold Coast, and his heavy involvement in leadership in developing the department could have impacted on his research publication record.

**Economic loss**

[12] It is against that background that the issue of whether the accident has affected and, if so, by how much, the plaintiff's progression as an academic.

[13] There was an opinion from Ms Welshe, an occupational therapist, that but for the accident, the plaintiff would have obtained yearly promotions, becoming a Professor by February 2000. This opinion was based on a perception, from what the plaintiff had told her, that he had achieved his goals up to the time of the accident. She concluded that he would continue to do so, as he had mapped out for himself. Her evidence did not suggest that she had a deep understanding of the way in which academic institutions operate. Her prediction about his limited prospects of promotion was overtaken by his promotion within a short time of her report. I am not satisfied that her understanding of the processes involved in progression through the ranks of the academic profession was sufficient for her opinion to be acted upon.

[14] There was evidence from Associate Professor Holtham from the Faculty of Music, University of Melbourne. He did not know the plaintiff personally. The effect of his opinion was that the timetable the plaintiff had set was unlikely to be achieved, especially if internal promotion within the institution where he was employed was the aim. Professor Holtham pointed out that external promotion depended mostly on a vacancy becoming available. The plaintiff's career trajectory had been reasonably rapid within the Australian context. Associate Professor Holtham was

unable to discern any sense of delay or any sense of career retardation surrounding the late completion of the PhD. The first unsuccessful promotion application was, in his opinion, consistent with the view being taken that it was premature; he was still on probation at the time. In a number of Australia's most reputable universities where music is taught at a significant level, of which Griffith University would be one, rapid promotion was not normal.

[15] There was also evidence from Professor Johnson, whose primary discipline was English literature but who had later diversified, as he describes his research interests, into the history of the modern era acoustic phenomenon; the role of sound in the confrontations which generated modernity as mapped through such demarcations as class, gender, nation state, race. The work involved such areas as literacy and literature as an information economy competing with sound and visual technologies, the acoustics of the modern city and music.

[16] Objection was taken to some parts of his evidence on the basis that it was of the nature of opinion evidence that had not been disclosed in accordance with the rules. The evidence includes opinion evidence which was not disclosed in a timely way. However, I am not persuaded that it will cause any undue prejudice to the defendant. Professor Johnson had known the plaintiff since about 1990. He noted his absence from conferences and symposia and from scholarly networks subsequent to the accident. He had only met the plaintiff once since the accident, when Professor Johnson visited Brisbane in the late 1990s. Part of the evidence objected to was the opinion that, on the basis of the plaintiff's activities prior to 1990, in particular his research, it would not have surprised Dr Johnson if he had reached the rank of Professor by the present time. The opinion was also expressed that, as things stand, it seems that he has little prospect of ever reaching the rank of Professor. The increasing number of popular music studies programmes and of international appointments in popular music studies over the past few years suggested to him that the plaintiff could have achieved a significant position internationally. The opinions expressed are expressed as personal opinions in quite general terms and do not give very detailed reasoning for them.

[17] Professor Holtham pointed out that in Australia, the opportunity for someone specialising in popular music was limited. At least in traditional fields of music, in countries overseas, appointment of people fluent in the language of the country of appointment was the usual course. He also pointed out that on the wider international stage of major tertiary music institutions around the globe, the vast majority are centrally still involved in the teaching of the core curriculum of classical music rather than popular music.

[18] Of these witnesses I found Associate Professor Holtham of the most assistance. His evidence was the most comprehensive on the processes likely to affect promotion to higher ranks in the academic hierarchy, particularly in Australia. While accepting that studies of popular music and associated studies are coming more into vogue, it is still a fairly specialised area largely dependant on the will of academic institutions to create positions or departments in which positions may be obtained. The number of positions in Australia is limited. There is no reason to doubt, on the basis of the plaintiff's evidence alone, that there are institutions overseas with a focus on popular music, but there is little concrete evidence about the realistic prospects of an

individual obtaining a high level position in them. As Associate Professor Holtham said, given the nature of academic institutions, creation of institutions or units in them does not necessarily lead to a proliferation of senior positions.

[19] Having regard to that conclusion, I am not satisfied that it has been established that the course of the plaintiff's progression through the academic ranks has been productive of economic loss to the date of trial. Other past economic loss is considered later.

[20] The allowance for future economic loss raises other issues. All of the academic witnesses emphasised the importance of a continuing record of research in furtherance of an academic career. Publication and participation in conferences is necessary to establish a reputation in the discipline. Withdrawal from such activities would be disadvantageous to progression in an academic career. As mentioned previously, there was reference in the report of the committee that considered the plaintiff's promotion to Associate Professor to reservations about the level of research output, which were rationalised on the basis of heavy teaching and administrative workloads in his current position.

[21] In a case like this there are no absolutes. In his oral submissions, Mr Grant-Taylor frankly and realistically accepted that it would, on the one hand, be illusory in the notional situation to suppose that the plaintiff would be appointed as a Professor immediately and, on the other, to suggest that there was an absolute disentitlement to advance his career from his present level. On that basis a sum of $100,000 as a global sum for loss of future earning capacity comprising both salary and extra-curricular activities was proposed. Mr Tait for the defendant submitted that $75,000 to $100,000 represented a global sum which was appropriate for past and future loss. That submission was made on the basis that the case was really about loss of opportunity rather than calculation of a sum that was quantifiable in the usual way. It was submitted that there was a multiplicity of factors affecting achievement in life and these had to be taken into account while not underestimating the plaintiff's demonstrated commitment and ability.

[22] Determination of damages in this kind of case is necessarily imprecise. At the time of the accident the plaintiff was an examiner for AMEB. Earlier in his career he had taught woodwind privately, according to his evidence, but at the time of the accident he was not doing much teaching because of the demands of the PhD on his time. He said that he had an intention of increasing his teaching and returning to performing, a field in which he had been active in earlier times, once his PhD was complete. This did not happen subsequent to the accident.

[23] He told Mr Maynes who prepared a forensic accounting report in 2003 that he expected to do eight hours private tutoring per week for 39 weeks a year at $30 an hour. Examining for AMEB, he said, would occupy 16 hours per week for 22 weeks a year at $38 an hour. According to Mr Maynes' calculations this would average $436 per week. The tax returns tendered show only two years (1994-5 and 1995-6) when income was declared from teaching. The former was the sum of $1,712 which represents 57 hours at $30 per hour. Alternatively it represents $44 per week over 39 weeks. The latter was only $150.

[24] In the plaintiff's taxation returns, there are gross sums amounting to $11,083 earned in the financial years 1996-7 to 2001-2 and $5,806 in the years 2002-3 to 2005-6, paid by the Department of Education or Education Queensland. In supplementary submissions invited by me, since the nature of the payments was not explored in evidence, it was said on behalf of the plaintiff that except for the period between 2003 and 2006 the monies were for acting as an AMEB examiner. Most of the payments from 2003 to 2006 were for attendances on the Minister's Education Advisory Panel. According to the figures, in the years after the accident the plaintiff was still examining and earning varying sums averaging about $1,850 per year. Analysis of the figures show that in the years after he came to James Cook University until the accident, he did not earn much from examining, presumably because of the demands of his PhD thesis. The peak year after the accident was 1998-9 when he earned $2,703. The figures do not suggest that there was any appreciable economic loss in relation to examining although it is fair to say that the amounts earned did decline after the 1998-9 spike.

[25] All that can sensibly said is that the amount lost in the years since the accident and the future amount to be derived from services outside employment is speculative. To what extent such activities would have projected into the future is also speculative especially as the plaintiff went into increasingly more responsible positions, as in fact he did. Some allowance should be made for the possibility that additional income would have been earned in the past and into the future especially by extra-curricular teaching or resumption of performing but it should be a modest sum. There is evidence that he had committed to contributing to encyclopaedias but had that opportunity withdrawn because he could not complete the entries in a timely way because of the effects of the accident. Allowance should be made for that as past loss. Since there is little reliable evidence as to loss, a global award is appropriate for both past and future loss. The item for future economic loss will reflect the risk of loss of future income as an academic and other future loss of income as a combined global sum.

**Agreed items**

[26] Special damages and interest thereon were agreed as $7,865.60 and $2,572.10 respectively. Past care, including interest, was agreed at $2,000. No future gratuitous care award was sought. In all cases where interest is due, the defendant did not argue that it should be limited to less than the whole period before trial. With the exception of the issue of the possibility of future hospitalisation, future psychiatric treatment including medication was agreed at $35,000. The difference between the parties with regard to future psychiatric hospitalisation was whether that was likely or not. The sum sought against this possibility was $4,500 in the plaintiff's submissions. The methodology was explained by Mr Grant-Taylor and appears in the record. It involves heavy discounting. I have decided to allow that sum principally on the basis of Dr Lawrence's evidence supported by that of his former partner Ms Hooper.

**Pain and suffering**

[27] The plaintiff submitted that $70,000 should be allowed by way of general damages in this regard. The defendant submitted that $60,000 was appropriate. The issue of

where the boundary between this kind of damages and economic loss lies was discussed during submissions. Prior to the accident the plaintiff was a prolific writer, having produced his thesis and a very long book on the history of music (which was never commercially published, but used for teaching). After the accident, according to his evidence, he essentially recycled parts of his thesis to present papers; some of these appear as publications in his CV. One of the presentations, at a conference in Turku, was judged by him to be "a disaster" because he had not put the contents of the paper in a proper context.

[28] He says that his acquired brain injury as a result of the accident has seriously diminished his ability to write to a standard expected of an academic of his standing. He has ceased publishing. To the extent that this is productive of future economic loss, it should be compensable under the heading of economic loss. It should be understood that, without in any way diminishing the evidence about the degree of his injury, he still presented, despite that, as a person who could express himself fluently. He said that he had prepared in advance, as was his practice since the accident, what he might wish to say, lest he should appear foolish. That fear was unfounded. He also seemed to be more relaxed in those parts of his evidence when he was not being cross-examined.

[29] The evidence supports the view that he has lost much of the enjoyment of life that he previously enjoyed. Ms Hooper's evidence and the psychiatric evidence support this conclusion. He has lost much of the enjoyment of social situations that he enjoyed before the accident. He has lost interest in playing the clarinet in which he was very proficient. He was cross-examined about a number of initiatives he is pursuing on the Gold Coast. He rationalises them as, firstly, an extension of his university work and, secondly, an attempt to perform to a useful level as part of the university community. The inference to be drawn is that they are not of the same character as his previous social activity. It is also the case that while he has managed to perform at a level that was considered to justify promotion to Associate Professor, he has had to work much harder than he did before the accident to achieve those standards.

[30] My assessment of him was that he has considerable insight into the change that has occurred. That he has suffered psychiatrically as a result of the accident is not disputed. So far as research is concerned, essentially, the plaintiff no longer enjoys the feeling of exhilaration that can be derived from application of an inquiring mind to a subject that is of interest to the inquirer. It was not suggested by the defendant that there was any cause for it but the accident. In all the circumstances it seems to me that the sum propounded by Mr Grant-Taylor can be justified in the particular circumstances of the case and will be awarded.

**Contributory negligence**

[31] It was submitted by the defendant that the applicant should be found to have contributed to his injuries. The submission essentially was that the plaintiff should have kept the vehicle under observation rather than have acted on his conclusion that the vehicle was going to turn left before reaching the spot where he was crossing the road. It was submitted that 10% to 15% was the appropriate range of

contribution. It was also submitted that the wearing of dark coloured clothing, which was undisputed, was a further factor.

[32] Mr Grant-Taylor submitted that contribution should not be found on the part of the plaintiff. He relied on the uncontradicted evidence of the plaintiff that the vehicle was more than 40 or 50 metres away and had its left indicator on. As there was a street to the south of where the plaintiff intended to cross, it was not unreasonable for him to conclude that the vehicle was about to do a left hand turn and that it was safe to cross the street. There was nothing to suggest that the colour of his clothing was sufficiently causative to warrant a finding against him. Mr Grant-Taylor relied on *Baird v Roberts* [1977] 2 NSWLR 389 as an example of a case where, in slightly less meritorious circumstances, a trial judge's finding of contributory negligence was reversed by the Court of Appeal. While arguing such issues by reference to other cases may point to factors to be taken into account, each case must stand on its own facts. I am satisfied in the present case that it was not negligent of the plaintiff to commence to cross the street, having not unreasonably formed the opinion that the operation of the indicator on the car meant that it would not be a threat to him. No reduction will therefore be made for contributory negligence.

**Damages**

[33] Damages are assessed as follows:

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| Pain and suffering | 70,000 |
| Interest @ 2% to trial | 6,016 |
| Past economic loss | 15,000 |
| Interest @ 5% to trial | 7,520 |
| Future economic loss | 100,000 |
| Past gratuitous care | 2,000 |
| Future medical expenses | 39,500 |
| Special damages | 7,865.60 |
| Interest @ 5% to trial | 2,579.10 |
| | $250,480.70 |

**Orders**

1. Judgment is entered for the plaintiff in the sum of $250,480.70
2. Unless written submissions seeking a different order are delivered to my Associate and served on the other party within seven days, the defendant is ordered to pay the plaintiff's costs of and incidental to the claim, including reserved costs, if any.