

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

GARY WILLIAM OWEN ATKINSON

Plaintiff;

-and-

**CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND**

Defendant.

COLTON J

[1] The plaintiff in this action was born in February 1969. He joined the RUC in 1989. He has continued to serve in the Police Service and currently is an Inspector in the PSNI.

[2] He claims that in the course of his employment he was exposed to excessive noise primarily from exposure to weapons as a result of which he has suffered hearing loss and tinnitus. He claims that this has been caused by reason of the negligence and breach of statutory duty of the defendant, his servants and agents. The plaintiff gave a history of exposure to noise in the course of his employment to the three consultant ENT surgeons who examined him for the purposes of this claim namely Mr D'arcy, Mr Ullah and Mr Kerr. He also gave evidence that from the commencement of his employment in 1989 he was obliged to attend weapons training sessions initially in Garnerville and subsequently in Ballykinler. He suggested that in the initial years he attended two to four training sessions per year including refresher training sessions. He indicated that when he was a member of the specialised units for three years there was more frequent training at Ballykinler. He says that the training involved the discharge of weapons including pistols, revolvers, rifles, sub-machines and riot guns and that he was in the vicinity of others discharging the said weapons whilst he was waiting his own turn. He also gave

evidence to the effect that he was required to travel in helicopters from time to time as a consequence of which he was also exposed to excessive noise levels.

[3] He says that during the initial period of his employment he was provided with plastic ear defenders which fitted poorly and were not used whilst waiting in the queue for the firing range. He could not recall being given any health and safety advice with regards to the danger of exposure to noise during the initial period of his employment. Whilst he was somewhat vague about the specific dates it appears that proper double ear protection was provided in either the late nineties or early 2000s and also at that stage he did receive briefings with regard to the importance of hearing protection.

[4] The plaintiff gave evidence that his hearing was good when he initially joined the Police Service and indeed this is supported by the plaintiff's records where an entry in his occupational health file dated 12 January 1989 on being recruited into the RUC suggested that his hearing was normal on that occasion.

[5] He gave evidence that he first noticed symptoms in his ears in the early 90s with a ringing sensation which would last for one or two hours. At that stage he did not know what it was. In association with this he noticed having difficulties in hearing conversations in crowded rooms and also with hearing his television or hearing conversations on the telephone. He was particularly conscious of a "high pitched hissing" in his ears when he was tired or under pressure at work. These symptoms have continued and in particular he complains about the high pitched hissing/humming sound in his ears keeping him awake at night. He indicated that he already takes painkillers for a previous injury to his left foot and that using this medication before he goes to sleep helps him relax and can help him sleep. However he did indicate that it can take him up to an hour before going to sleep. In order to mask the tinnitus he turns on the television before finally falling asleep. He also indicated that his tinnitus can occur during the day particularly if he is tired or working long hours and that it can affect his concentration. He did not seek any medical attention for his condition until after he had seen Mr D'arcy on 23 November 2009 for the purposes of obtaining a medical report for this claim.

[6] The plaintiff also gave evidence that since 2004 he was a member of the PSNI Pistol Club and engaged in shooting on a recreational basis. He was extremely vague about the extent to which he engaged in this activity and the range of weapons he used. However he was adamant that at all times he had the benefit of double ear protectors whilst shooting as a member of this club.

[7] I had the benefit of a medical report from Mr D'arcy, consultant ENT surgeon, dated 23 November 2009 who reported on behalf of the plaintiff, a report from Mr Kerr, consultant ENT surgeon, dated 13 September 2012 with an addendum dated 14 January 2013 who reported on behalf of the defendant and also an up-to-date medical report for Mr Ullah, consultant ENT surgeon, who examined the

plaintiff on 12 May 2015. On each occasion a pure tone audiogram was performed and the respective results are set out below.

Mr D'arcy 23 November 2009

Frequency	Right	Left
250 Hz	15dB	20dB
500 Hz	10dB	15dB
1 kHz	10dB	10dB
2 kHz	10dB	10dB
3 kHz	15dB	10dB
4 kHz	25dB	30dB
6 kHz	25dB	40dB
8 kHz	30dB	25dB

Mr Kerr 13 August 2012

Frequency	Right	Left
250 Hz	15dB	20dB
500 Hz	15dB	20dB
1 kHz	10dB	15dB
2 kHz	15dB	15dB
3 kHz	10dB	20dB
4 kHz	20dB	25dB
6 kHz	25dB	30dB
8 kHz	25dB	30dB

Mr Ullah 12 May 2015

Frequency	Right	Left
250 Hz	25dB	25dB
500 Hz	20dB	20dB
1 kHz	25dB	20dB
2 kHz	20dB	20dB
3 kHz	25dB	25dB
4 kHz	30dB	55dB
6 kHz	40dB	70dB
8 kHz	30dB	45dB

[8] I heard evidence from Mr Ullah and Mr Kerr and there was a large measure of agreement between them. Mr Ullah was of the view that a normal reading would be between 20 to 25dB in each frequency. Anything above 25 would certainly represent a restriction in the hearing. Mr Kerr was of the view that 20 was the

normal reading and that anything above 20 represented a restriction or interference with normal hearing. Mr Ullah agreed with the suggestion that the best hearing results were the most reliable indicators of the actual hearing loss. Both the experts agreed that the findings indicated that at the time of their examination the plaintiff was suffering from a minimal degree of high tone inner hearing loss. They both agreed that this was due to exposure to firearms training in the course of his employment. The hearing loss was greater in the left ear than in the right ear which was what one would expect to find for a right-handed marksman such as the plaintiff. It was also agreed that for everyday hearing the plaintiff should have few problems as the findings between the frequencies at 500Hz to 3kHz were in the normal range.

[9] The findings on the audiogram performed by Mr Ullah suggested a deterioration in his hearing between September 2012 and May 2015. Mr Kerr was categorical that any deterioration could not be attributed to noise exposure in the PSNI given the level of ear protection available. All that Mr Ullah could say was that any deterioration may be partly due to the ageing process but also possibly due to noise exposure but as to how he could not comment. Therefore for the purposes of this action the hearing loss attributable to noise exposure in the course of his employment which is actionable is the minimal hearing loss demonstrated in the audiograms performed by Messrs D'arcy and Kerr.

[10] In terms of the tinnitus about which the plaintiff complains the experts are agreed that tinnitus is an entirely subjective condition and one which is not capable of objective testing. Mr D'arcy and Mr Ullah on the basis of what they were told by the plaintiff categorised the tinnitus as moderate and indicated that it would be permanent. Mr Kerr had great difficulty in accepting the plaintiff's complaints about tinnitus. He described the history as "less than convincing". His scepticism arose from what took place at his consultation with the plaintiff. Mr Kerr give evidence to the effect that when he first addressed Mr Atkinson in a normal conversational voice in the quiet waiting room he looked at him blankly as if to indicate he had not heard what he had said. He addressed the plaintiff on a further two occasions before he acknowledged that he knew what he was saying. In the course of the consultation in the consulting room Mr Kerr give evidence that he addressed the plaintiff in a normal conversational voice at a distance of a few feet in response to which the plaintiff asked him to speak up. Mr Kerr indicated that as the consultation progressed he showed almost normal audio-metric responses and he had no difficulty in hearing him when he spoke at a normal voice. In terms of the tinnitus he had difficulty in understanding why the plaintiff did not take his painkilling medication in sufficient time before he went to bed to assist him in sleeping so that the tinnitus would not keep him awake. He also recorded that the plaintiff used an MP3 player four to five nights a week to mask his tinnitus. Thus he was of the view initially that the plaintiff was feigning the extent of his hearing loss and he was not convinced about the account of how the tinnitus was affecting him in the daytime and particularly at night time. He also thought it significant that the plaintiff had never sought medical advice about his tinnitus until he was asked to do so by

Mr D'arcy in the context of a medico legal report. If asked he was of the view that any tinnitus from which the plaintiff suffered should be classified as mild.

[11] When these matters were put to the plaintiff when he gave evidence he strongly challenged the account given by Mr Kerr. He indicated that the initial conversation which Mr Kerr described arose in circumstances where Mr Kerr came out to the waiting room and asked "do you want a cup of tea". The plaintiff said he did not know Mr Kerr and did not appreciate that the question was directed towards him as there were other persons present in the waiting room. He alleges that Mr Kerr said to him "are you pretending to be deaf". The plaintiff gave evidence to the effect that he was not feeling well and actually suggested that the consultation should be put off to which Mr Kerr allegedly responded that "if the consultation didn't go ahead that he would be liable to pay for it". He specifically denied that he told Mr Kerr that he uses an MP3 player. He was adamant that did not have an MP3 player and indeed it was Mr Kerr who suggested to him that he might use this as a masking device. In general terms the plaintiff indicated that he was not feeling well on the day of the consultation. He was suffering from a cold and from a headache. Apparently the plaintiff has a history of idiopathic intracranial hypertension and it may be that the symptoms about which he complained were related to that condition. Interestingly Mr Kerr has recorded in his report that "Mr Atkinson looked less than well, to the extent that I enquired if he was in fact feeling all right. He seemed surprised to be asked and said he had a bit of a headache."

[12] It may well be that the plaintiff was unwell at the time of this consultation and that this has contributed to the apparent conflict between the plaintiff's account of what took place in the consultation and that of Mr Kerr's. In terms of that conflict I prefer the evidence of Mr Kerr. He gave his evidence in a measured fashion and referred specifically to the notes he took at the time of the consultation. He frankly admitted that he did not have a particular recollection of the plaintiff but had prepared detailed notes of those matters about which he gave evidence and which were in contention. I also had the opportunity to assess the plaintiff when he gave his evidence and on occasions he was less than impressive. For example, when he was cross-examined by Mr Aldworth about the extent of his gun use in the PSNI Pistol Club and about the number and range of weapons he had he was less than forthcoming. He kept repeating that he "couldn't answer the question as he would need to check his records" - something I also note he said to Mr Kerr when he was asked about his history of noise exposure in the course of employment. Whilst I accept of course that the plaintiff may not have been able to answer the questions asked in detail I would have thought that he could have made a better effort to provide the information that was being sought. My impression was that the plaintiff was somewhat introspective and overly defensive in his evidence and did not respond well to perceived challenges.

[13] The plaintiff also relied on a report from Mr Glen Houston who is a hearing aid specialist in support of a claim for special damages totalling £4,650 for the cost of hearing aids which it is alleged will be required as a result of the damage caused to

his hearing. In terms of the medical evidence on this issue Mr Ullah was of the view that the plaintiff “may” require a hearing aid earlier than might otherwise be the case as a result of his hearing loss. The experts agreed that the average age at which an adult male requires a hearing aid is 75. Mr Ullah said that as a result of the damage to his hearing he may require a hearing aid five to ten years earlier (although obviously to some extent he was influenced by the deterioration he found in the audiogram performed on his examination on 17 May 2015). However when cross-examined on this point he agreed that this was very much a matter of speculation. He accepted that he may not need a hearing aid at all and that one has no idea about the state of technology or the potential costs of hearing aids in 20 years’ time. Mr Kerr’s evidence was that it was likely that there would be some deterioration due to increasing age in the plaintiff’s hearing but that he will not necessarily ever need to use a hearing aid.

Decision

[14] I note that the defendant pleaded a limitation defence and also cross-examined the plaintiff on the reason for his delay in bringing proceedings in this matter. The writ of summons was issued on 13 October 2010 notwithstanding the fact that the plaintiff alleges he was suffering symptoms since the early to mid-90s. He indicated that he only approached a solicitor about making a claim because he was aware of media reports in relation to hearing loss and because of advice he received from his staff association. My understanding is that the matter of limitation was not actually pursued by the defendant but in any event this is a case in which I would have readily exercised my discretion under the Limitation (Northern Ireland) Order 1989 to permit the action to proceed. I would have done so primarily because I believe that the cogency of the evidence available to the defendant has not been affected by any delay. I also bear in mind that many hundreds of similar claims have been dealt with by the defendant without any limitation defence being relied on.

[15] I have no difficulty in finding liability against the defendant and indeed it was accepted by the defence that the plaintiff had developed hearing loss by reason of noise exposure in the course of his employment with the police and for a relevant period of time he was not provided with adequate ear protection or adequate health and safety advice or training.

[16] The plaintiff is therefore entitled to damages for any personal injury attributable to that noise exposure. As in all cases involving the assessment of damages the court has to engage in a careful scrutiny of the evidence, draw conclusions about the nature and extent of the injuries complained of by the plaintiff and the impact of those injuries on him. In terms of hearing loss sustained by the plaintiff there is little difficulty. The expert evidence points towards the plaintiff suffering from a minimal to mild hearing loss in the upper frequencies more pronounced in the left than the right. Whilst I have commented on concerns about the plaintiff’s reliability as a witness and historian above the most important factor

in his favour is that the audiogram readings were consistent. These are an objective means of establishing the degree of any hearing loss and both Mr Ullah and Mr Kerr accepted that he made no attempt to mimic hearing loss whilst these tests were conducted. Thus when tested the plaintiff proved to be a reliable and honest witness in terms of his hearing loss. This goes a long way towards persuading me that the effect and consequences of his hearing loss are genuine. This must also have an impact on my assessment of whether I can accept his evidence in relation to tinnitus. As has been pointed out tinnitus is an entirely subjective condition and one is therefore reliant on the history of the plaintiff in this regard. As Mr O'Donoghue QC who appeared on behalf of the plaintiff with Mr Potter has pointed out and indeed Mr Kerr accepted the symptoms about which the plaintiff complained are consistent with and typical of patients who suffer from tinnitus. There was significant debate between the experts as to the appropriate classification for this tinnitus. When pressed, although sceptical, Mr Kerr was of the view that any tinnitus from which the plaintiff suffers should be categorised as mild. Mr Ullah who gave evidence agreed with Mr D'arcy's written opinion that the tinnitus should be classified as moderate. I am obliged to Mr Aldworth QC who appeared with Mr Sharpe BL for the defendants for submitting a paper on the guidelines for the grading of tinnitus severity; the results of a working group commissioned by the British Association of Otolaryngologists, Head and Neck Surgeons 1999. This paper was prepared against the background of "a rising tide of medico-legal claims for tinnitus". It was against this background that the remit of the group was set; to try and produce guidelines to allow a more accurate and uniform approach to the grading of tinnitus severity". In relation to the suggested gradings of mild and moderate (Grade 2 and Grade 3) Grade 2 was described as "easily masked by environmental sounds and easily forgotten with activities. May occasionally interfere with sleep but not daily activities". Grade 3 - moderate. May be noticed, even in the presence of background or environmental noise although daily activities may still be performed. Less noticeable when concentrating. Not infrequently it interferes with sleep and quiet activities". Clearly the symptoms the plaintiff describes would fall into the Grade 3 category i.e. moderate. Nonetheless my assessment of the degree to which the plaintiff is suffering from tinnitus has to be tempered by the conflict between himself and Mr Kerr and my own view that I preferred the evidence of Mr Kerr in terms of what took place at the consultation. That being so it is difficult to accurately assess the degree of tinnitus from which the plaintiff suffers.

[17] However these types of issues are matters to which the court is well accustomed in assessing general damages. Guidelines both in terms of the paper to which I have referred and in relation to the publication by the Judicial Studies Board for Northern Ireland in relation to the assessment of general damages in personal injuries cases, which I also have considered, are just that namely guidelines. They are not straightjackets and ultimately the appropriate level of damages requires a degree of judgment by the court.

[18] In terms of the claim for special damages for hearing aids I could not be satisfied that the plaintiff has established his entitlement to this claim to the requisite

standard. However I take the view that the risk that he may require a hearing aid earlier than would otherwise be the case is a matter which I can legitimately take into account in assessing general damages.

[19] Accordingly I take the view that the plaintiff has suffered a minimal hearing loss as a result of his exposure to noise in the course of his employment worse in the left ear than the right. I accept that that hearing loss should not interfere with the majority of his day to day activities but that it will come against him in certain environments and in certain situations, for example hearing conversations in crowded areas or hearing his television at normal levels. I bear in mind that whilst this condition is minimal it will be permanent and that he has suffered from this condition since his 30s at least. The court should not easily dismiss the fact that the plaintiff will therefore suffer these symptoms for a very significant period of time. As far as the tinnitus goes I take the view that it is not as significant a problem as the plaintiff suggests in his evidence. I accept that he does suffer from tinnitus and that this has a very minor effect on him in the course of the daytime. I accept it does interfere with him getting to sleep but that this is something with which he can easily deal. In terms of categorisation it probably is at the borderline between mild and moderate.

[20] In taking all of these matters into account I assess general damages at £18,500, to include a figure of £1,000, for the risk that he will require a hearing aid earlier than might otherwise be the case and I enter judgment for the plaintiff for that amount.