THE HIGH COURT

Record Number: 1998 No. 2799P

Between:

Padraig Byrne

Plaintiff

And

The Minister for Defence, Ireland and the Attorney General

Defendants

Judgment of Mr Justice Michael Peart delivered on the 26th day of April 2005:

1. The plaintiff joined the armed forces in August 1974 when he was seventeen years of age, and served for three years until 1977. During that time he was exposed to noise from rifles, mortars and machine guns. He states that his exposure to rifle fire and machine gun fire was on a weekly basis during these years, whereas exposure to noise from mortars might been only a couple of times per year.

2. He also stated that during his time in the army he spent about one year on border duty, during which time he endured what he described as "horrendous noise" from within Armoured Patrol Vehicles while on patrol. It appears that when inside such vehicles personnel are located in the immediate vicinity of the engine of the vehicle, which is very noisy.

3. He stated in evidence that at no time during this exposure to noise was he provided with ear protection.

4. Following his discharge from the army he was unemployed for a period of about ten months, and thereafter obtained employment with a packaging company. His work there was in what was described as a factory environment. He is and has always been provided with ear muffs and/or ear plugs, and he has always worn the protection provided, except at times when he would be working in a part of that premises where there is no machinery.

5. Prior to his time in the army he had no trouble with his hearing and he stated in evidence that while he might have experienced some ringing in his ears for an hour or so after firing weapons, he did not develop a hearing difficulty as such until about 1998. At that point it appears that he started to notice a difficulty hearing when in a group of people, or when watching television on his own he might often have to put his hand to his ear to hear properly. This difficulty was stated to exist only in his right ear. He described that if he covers his left ear completely he cannot hear in his right ear and this distresses him greatly. However under cross-examination, he stated that he had been aware of some hearing difficulties for perhaps twenty years but that it had only gradually got to a stage where he thought to try and do something about it.

6. He believes that what started off as a ringing noise in his right ear when he came off the firing ranges when he was in the army, has now developed into the present complaint of tinnitus in that same ear. It was however pointed out to him in cross-examination, and this was confirmed by Mr Dougan when he gave evidence on behalf of the plaintiff, that a person who fires from the right shoulder will suffer difficulties in the left ear and vice versa. Nevertheless the plaintiff still believes that it was noise from gunfire between 1974 and 1977 which is the cause.

7. The plaintiff accepted that even though he had been aware of some hearing difficulty in the years following his leaving the army, he did nothing about it. He explained that when one is young you tend to put these matters to the back of the mind. But he said that it got very gradually worse, and when all the publicity started about claims for hearing loss by members of the army he went to his solicitor and it was his solicitor who sent him to Dr H.S.Jones for a test. He had never attended a doctor prior to that for investigation or treatment. It was forcefully put to him by Mr Clarke that he went to his solicitor in order simply to seek compensation rather than to get any treatment, but the plaintiff was adamant that he went in order to see what could be done about the hearing problem which he has. The plaintiff also made the point that he is not the sort of person who goes to the doctor very often, and that it was not in his nature to do so.

8. In relation to tinnitus, he said that this is a constant difficulty. He experiences a constant hollow ringing noise, and sometimes has difficulty with his balance. It has got worse in the last few years and has levelled off now. It apparently is not sufficient to cause him not to get to sleep though. He has apparently decided in recent times to go and find out if anything can be done about this problem, and he stated in his evidence that in fact he had an appointment for about a month hence at Tallaght Hospital. However, the Court has received no medical report in relation to the results of any examinations carried out to date, and none has been furnished to the defendants in these proceedings.

9. He also gave evidence of getting matters investigated at the present time in Tallaght Hospital. He states that he has been told that he has a severe problem with his right ear. Mr Clarke, quite rightly in my view, pointed to the fact that the defendants had not been given the benefit of sight of any report dealing with these investigations, and I shall return to that. But the plaintiff stated to Mr Clarke in cross-examination that he had sought the advice of Tallaght Hospital because he had developed a tendency to lose his balance. Even though Mr Clarke suggested that the loss of balance might be caused by a quite different type of ear problem, the plaintiff remains convinced that it results from his exposure to firearms fire between 1974 and 1977. This loss of balance commenced about seven years ago in 1998, and he commenced going to Tallaght Hospital about it about three years ago.

10. Mr Dougan gave evidence which is relevant to the claim for tinnitus, as well as hearing loss, and I will deal with it now. He was asked about the evidence given by the plaintiff that he was being seen at Tallaght Hospital in relation to loss of balance. Mr Dougan stated that loss of balance, dizziness and tinnitus can be reasonably attributable to the plaintiff suffering from Menieurs Disease. He also opined that low tone hearing loss, which is what the audiograms in this case has disclosed, can indicate an inner ear problem. He expressed the view at one point of his cross-examination that it was a probability that the plaintiff's difficulties resulted from an inner ear disease, and agreed that losing balance, hearing loss and tinnitus were all symptoms of Menieurs Disease. However, at a later stage of his evidence, he stated that the plaintiff was without doubt exposed to levels of noise above 160 dbs, and that this was a huge factor in the case of the plaintiff as opposed to somebody who had not been so exposed. I take this to mean that while the symptoms of Menieurs Disease could include an element of hearing loss, the fact that the plaintiff was exposed, albeit so long ago, to noise levels in excess of 160dbs means that it is probable that this exposure would have caused the hearing loss, such as it is, in the case of the plaintiff, even if he has other symptoms pointing to Menieurs Disease.

11. Mr Dougan stated that the hearing loss, as opposed to tinnitus, which was disclosed in the audiograms was mild to moderate. He said it was very slight. He used the phrase "mild to moderate" to describe the level of loss. He also felt that the plaintiff was in fact confusing hearing loss and tinnitus in his mind, and that whereas the tinnitus may be significant, his hearing loss was only mild and that it taken alone should not impact that much on his life.

Delay:
12. Gerard Clarke SC on behalf of the defendants has submitted, first of all, that as a result of the time which the plaintiff has permitted to elapse before commencing his proceedings they are greatly prejudiced in the conduct of their defence to these proceedings. There is a plea also under the Statute of Limitation, 1957, as amended, but while the point is pleaded, the Court received no submissions in that regard, and I propose to deal in die course with the delay point on the basis only of prejudice, rather than by reference to the Statute plea.

13. The plaintiff was asked why he had delayed for so long before deciding to bring a claim, in circumstances where he was admitting that for upwards of twenty years he had been aware of some difficulty with his hearing, and that he also was sure in his own mind at that time that it had been caused by his time in the armed forces. The plaintiff's explanation, as I have already referred to, is that the difficulty was not that bad and that it was only as it got worse in the late 1990s that he thought to go and have it checked out. It was pointed out to him by Mr Clarke that his first port of call to have his complaint checked out was his solicitor and not his doctor, but the plaintiff insisted that he had gone to his solicitor in order to see what could be done medically. When it was put to him again that he had waited for twenty one years before doing anything about the claim, the plaintiff stated that he was just young at the time and perhaps naïve.

14, Mr Clarke has submitted that the delay caused by the plaintiff in the commencement of his claim had prejudiced the defendants in the defence of this claim in relation to causation. Having said that, Mr Clarke did accept as a proposition, that exposure to high levels of noise can induce hearing loss. But he made the point that, where the delay as in this case is in the order of twenty years, there are so many other ways in which during that period of time a plaintiff might in the ordinary course of his life have been exposed to high levels of noise, it was impossible for the defendants to inquire, investigate or adduce evidence as to what other factors in the plaintiff's life up to the present time may have caused or contributed to what is accepted as being a very minor degree of noise induced hearing loss. He gave examples of perhaps exposure to loud music at discos, street traffic noise and so on. This was so in circumstances where the plaintiff could not, and in fairness could not be expected to, remember everything in his life during those years.

15. In making these submissions, Mr Clarke referred the Court to the judgment of Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526 where the learned judge was dealing with an application by the defendant to dismiss a plaintiff's claim in circumstances where the injury was alleged to have been sustained some 50 to 60 years prior to commencement of proceedings. The learned judge was of the view that this delay was inexcusable, and that the defendant was prejudiced. Needless to say the facts of that case are entirely different to the present claim, and that is an important consideration when considering whether the principles enunciated in that case ought to be applicable in the present case. The learned judge found that there was a real and serious risk of an unfair trial on account of the consequences to the defendant of the plaintiff's delay which he was satisfied had not been excused by any evidence adduced by the plaintiff.

16. I am of the view in the present case that there has undoubtedly been inordinate delay in bringing these proceedings. As far as explaining or excusing that delay is concerned, I am satisfied on the balance of probability that it was not until 1998, when the symptoms of Menieurs Disease and in particular the loss of balance he experienced, first manifested themselves, that the plaintiff realised that he had a problem of any substance. This was a time also when there was a good deal of publicity about army deafness claims generally, and I have little doubt that the plaintiff's mind was alerted to the possibility that what he was experiencing in relation to hearing difficulties could be the subject of a claim against the defendants. To that extent I do not consider that the delay is excusable in the sense of there being a reason sufficient to justify that delay occurring. The reality I believe, from the evidence given by the plaintiff is that until his symptoms (which he has admitted he had for many years to one degree or another) took a turn for the worse with the development of a loss of balance, the problems which the plaintiff was experiencing up to that point were not considered by him to be sufficiently serious to merit doing anything about, either medically or legally.

17. The delay is 'explained' by the evidence which has been given by the plaintiff, but there is a distinction which must be drawn between mere explanation on the one hand and that explanation constituting a valid 'excuse' on the other. The question which arises in those circumstances is whether that lack of adequate excuse is sufficient to justify this Court in dismissing the plaintiff's claim on grounds of the delay, even where the Court is not satisfied that the defendants are prejudiced. Put slightly differently, the question is whether, in a case where there both inordinate and inexcusable delay in the commencement of proceedings, the Court may nevertheless refuse to dismiss the case where it is satisfied that no prejudice has resulted to the defendant.

18. A similar though not identical question arose in *Kelly v. O'Leary,* and which Kelly J. in effect left over to another case to consider.

19. I had an opportunity of considering that question in a case of *MacH v. M,* unreported, High Court, 3rd March 2004. In that case I decided that what I will call the Primor principles were applicable in cases of post-commencement delay by a plaintiff, and where a defendant sought to dismiss the plaintiff's case for want of prosecution, and the principles arising from the judgments in *O'Domhnaill v. Merrick* and *Toal v. Duignan* were more applicable to cases of pre-commencement delay, which is what the present case involves. In so finding, I stated:

> "I am of the view that there are two separate and distinct tests, one, the Primor test in respect of post-commencement delay, and the other, the *Toal v. Duignan* test, if I can so describe it, in respect of pre-commencement delay. First of all, the distinction reflects the different and respective contexts in which the delay took place in each case. But besides that, I am of the view that there are sound and logical reasons why the test in each instance ought to be different.

20. In the case of post-commencement delay, it is usually the case that the proceedings have been commenced within the period permitted by the Statutes of Limitations, although that fact of itself does not preclude a court from regarding the delay as inordinate. That would be the case, most often, with a case commenced by a plaintiff who has reached his or her majority, and within three years thereof, institutes proceedings in respect of a claim which arose sometime during his or her minority. But in most cases, the proceedings would be commenced within three years of the event giving rise to the claim, and again in most cases, a defendant would have notice of the likelihood that proceedings will be commenced before commencement. The delay giving rise to a motion to dismiss arises only out of delay in the actual prosecution of the case to trial. In the case of inordinate delay, there can be some reasons which are regarded as excusable, and others which are not. Even in the case of reasons which do not excuse or justify the delay, there will in many cases be no real or significant prejudice to the defendant. 21. For example, in a claim for damages for personal injuries arising out of a traffic accident, there could easily, and probably often is, a delay of six months since the entry of an

appearance by the defendant and the delivery of the plaintiff's statement of claim. The reason for that delay might be simply be that the plaintiff's solicitor never got round to doing it. That is an inordinate and inexcusable delay, but the court would go on and consider the balance of justice issue, and might well decide that to dismiss the plaintiff's claim would be an unnecessarily draconian consequence of that type of delay. If, on the other hand, there was a justifiable excuse for not delivering the statement of claim, it would make no sense if the court could nevertheless consider the balance of justice and perhaps dismiss the claim, in circumstances where (1) the delay was inordinate in the sense of abnormal or out of the ordinary, and (2) was excusable.

22. Different considerations, I suggest, arise in relation to pre-commencement delay which is inordinate and yet excusable. There can easily be circumstances in which, in such a case, the balance of justice would be in favour of dismissing the claim. For example, even if Kelly J. had in *Kelly v. O'Leary*, found that the delay of 50 years was excusable, he could well have reached the conclusion based on the facts and circumstances of that case, that the defendant was so prejudiced as to her ability to defend the proceedings after such a passage of time, that the claim ought not to be allowed to proceed. That inordinate and excusable delay is of such a completely different category to the Primor-type delay, that it is perfectly understandable that a different rule should apply as to how the courts should assess the significance of the delay. In my view it must follow that the Primor principles must be confined to post-commencement delay, and that the wider discretion based on general fairness regardless of whether the delay is excusable or not, should be confined to pre-commencement delay."

23. The remaining question, and the one which arises in the present case is, as I stated earlier, whether, in a case where there both inordinate and inexcusable delay in the commencement of proceedings, the Court should nevertheless refuse to dismiss the case, even where it is satisfied that no prejudice has resulted to the defendant.

24. It is certainly unusual that a delay of some 20 or more years in the commencement of proceedings, be it excusable or inexcusable, would be regarded as not prejudicing a defendant in the defence of the claim. But a claim such as the present one, an army deafness claim, is perhaps in a category of its own, in view of the nature of the injury, its alleged causation, and the very large number of such claims which the defendants have been required to defend over the past decade. It is in those unusual circumstances that I do not believe that the defendants' capacity to deal with this claim has been hampered and prejudiced, and that there has not been a risk of an unfair trial. I suppose that it is worth noting that no application was made by way of motion prior to the case coming to trial to have the proceedings dismissed or stayed on the basis of this delay.

25. It is usually the situation therefore, at least in the case of a twenty year delay, that where a plaintiff has been guilty of inordinate delay, and the Court is not satisfied that it is excusable, the Court will proceed to dismiss the claim because the defendant will usually have been able to show that he/she is prejudiced. But I have not been referred to a case, and I am certainly not aware of one, where the pre-commencement delay is both inordinate and inexcusable and yet there has been no prejudice made out to justify a dismissal.

26. In addressing that interesting question, I believe that it would be proper to consider what interests are there to be considered and protected by the Court's inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay. Certainly there are competing interests. There is first of all the plaintiff's undoubted right of access to the Courts. There is also the defendant's right to an expeditious hearing of any claim brought against him, and to finality. Linked to this consideration is the defendant's right not to be adversely prejudiced in such defence by delay for which he bears no responsibility. Finally, there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the Courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation, as well as increase the cost to the Courts Service, and through that body to the taxpayers, of providing a service of access to the Courts which serves best the public interest.

27. It is really the final interest which is relevant to consider in the present case since I have already found that the defendant has not been prejudiced by the plaintiff's delay. The question is whether the public interest which I have identified trump the plaintiff's right of reasonable access to the Courts in the present case.

28. In the unusual circumstances of the present case, I believe that it does. I say that, because a feature of this case is that the major portion of the plaintiff's claim has fallen away, namely the claim related to tinnitus which emerged in about 1998. Prior to that the plaintiff had some difficulty with hearing loss, but it was not significant, and certainly not sufficiently significant to drive him to consult either a solicitor or a doctor. Mr Dougan has described his loss of hearing as mild to moderate and that it ought not to impact greatly. I have already stated that in all probability the plaintiff would not have brought a claim in respect of this hearing difficulty were it not for the emergence of the loss of balance difficulty which started in 1998.

29. The Court has therefore had to hear a claim whose only real justification was on the basis of tinnitus, rather than hearing loss. That claim for hearing loss, if it were to stand alone, could have been and should have been commenced much earlier than 1998, and certainly not in the High Court. By 1998 it was a stale claim in my view. The Court's jurisdiction to dismiss such an old claim is an important power in the public interest, regardless of prejudice to the defendant, yet one which must be used sparingly lest a plaintiff might unreasonably be deprived of a remedy to which he is entitled. If the Court were never to invoke that power it would send the wrong message, namely that the Courts will tolerate and indulge unreasonable delay in the bringing of claims where a defendant cannot show prejudice. That consideration must exist regardless of the existence of a defendant's right to plead the Statute of Limitations by way of defence pleading. That Statute has the capacity to protect the defendant's rights which I have identified, but it serves no purpose in the protection of the public interest to which I have referred.

30. With regret, I must dismiss the plaintiff's claim.