Neutral Citation Number: [2008] IEHC 7

THE HIGH COURT

[2002 No. 5340P]

BETWEEN

THOMAS DONNELLY

PLAINTIFF

AND

**THE COMMISIONER OF AN GARDA SÍOCHÁNA,
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM,
IRELAND AND THE ATTORNEY GENERAL.**

DEFENDANTS

Judgment of Mr. Justice Quirke delivered on the 18th day of January 2008

The Plaintiff is a member of An Garda Síochána who has at all times material to these proceedings been employed by the defendants as a dog handler. He is claiming damages from the defendants on the grounds that he has suffered personal injuries, loss and damage as a result of negligence, breach of duty, breach of statutory duty and breach of contract on the part of the defendants.

He claims that during the course of his employment with the defendants between 1979 and March, 2002 he was, for lengthy periods of time, exposed to noise levels which were excessive, dangerous to his health and significantly greater than the levels permitted in the workplace by law.

He claims that, in consequence, he has suffered significant permanent and irreversible loss of hearing in both ears which has interfered with and restricted his life and lifestyle. He claims damages to compensate him for his injuries and the associated loss which he says he has suffered as a result.

Relevant Facts

1. The plaintiff has worked as a dog handler for An Garda Síochána since 1979 and remains so employed. He is now fifty-five years old and is married. He has five children.

His duties as a dog handler have required him to accommodate and care for German Shepard dogs at all times material to these proceedings. He participates in the training of the dogs and is entrusted with them when they are approximately fifteen months old. He accommodates them in kennels at his own home and transports them daily between his home and his place of work at Kilmainham Garda Station.

The dogs are required to assist the Gardaí with crowd-control and public order difficulties. They also assist in the detection of drugs and explosives. During daytime the dogs accompany the plaintiff on mobile patrol in vans. Patrols take up to six hours during daytime and up to seven hours at night-time. Approximately twenty minutes of each patrol is spent walking in the streets of Dublin City. During the remainder of the patrol the dogs are accommodated within the vans.

At all material times two types of van have been used to transport the plaintiff and the dogs. One type of van has been a small vehicle which accommodates two dogs in the rear of the van. The other van has been a large Transit van which accommodates four dogs in cages at the rear of the vehicle.

In the smaller vehicle, one dog was accommodated in a cage and the second dog was allowed to roam free in the remainder of the rear of the vehicle. Until 2001, no partition existed between the drivers and passengers and the cages which accommodated the dogs at the back of the vehicles. Sometimes dogs have been permitted to sit directly behind the plaintiff as he drove the vehicle or sat in the passenger seat.

2. By nature and training the dogs are aggressive and will react to strangers and members of the public aggressively by barking loudly and continuously. They respond efficiently to orders from their handlers in various ways (including disabling potential assailants and seeking out unlawful substances at particular chosen locations).

In evidence the plaintiff stated that when the dogs are driven in the vans in the city centre they tend to bark most of the time. He said that he can command the dog to be quiet and the dog will obey the command but may become startled within a short time (at traffic lights or by the presence of pedestrians close to the vehicle) and will begin to bark again. He said the dogs have acted in that manner at all times material to these proceedings.

3. The plaintiff stated that until 2002 no measures were taken by the defendants either;, (a), to abate or reduce the level of noise within the vehicles which resulted from the barking of the dogs or, (b), to create a partition between the plaintiff and the drivers of the vehicles and the dogs at the back of the vehicles. He said that no steps were taken to insulate the walls of the vehicle to reduce the sound levels and no sound-proofing of the vehicle was undertaken until 2002. Neither the plaintiff nor any of the other dog handlers were provided with hearing protection by the defendant before 2001.

4. The plaintiff stated that in October, 2001 the members of the Garda Dog Unit were requested to attend the defendant's Medical Officer Dr. Collins in order to undergo an audiogram test. The plaintiff did so and was required to attend again for further tests.

He was advised by Dr. Collins that both of his ears showed evidence of damage resulting from exposure to noise.

He was examined by a Dr. McShane in Tallaght Hospital towards the end of November, 2001 and it was confirmed that he had suffered hearing loss in both ears. On the advice of Dr. McShane he sought and obtained ear defenders from the Garda stores and wore them when confined within the vehicles in the presence of the dogs. He continues to do so.

He also installed plastic sheeting within the vans to reduce the level of noise in the vehicles. In July, 2002 the relevant Garda vehicles were fitted with bulkheads and insulation. These measures greatly reduced the noise levels to which the plaintiff and his companions were exposed.

4. Sergeant Kevin Morrissey who is a Garda Sergeant attached to the Health and Safety Section of An Garda Síochána stated in evidence that he attended Kilmainham Garda Station in November, 1999 and measured the noise pressure levels within two Garda vehicles using a noise- meter. He identified the vehicles as a Garda Transit van. The smaller vehicle was identified as a Garda Ford Courier van.

It has been acknowledged by the parties that these and similar vehicles were used by the plaintiff to transport the Garda dogs on

patrol and otherwise, from the commencement of his duties as a dog handler with the Gardaí and that the conditions within the vehicles, and in particular the noise levels, would have been similar to those assessed by Sergeant Morrissey in December, 1999.

Sergeant Morrissey said that his task was to monitor the noise levels within the vehicles to establish whether they were within the parameters identified in the 1990 Regulations. He said that during the course of his tests dogs were in the vehicle and he estimated that they were barking approximately 40% of the time but he could not be sure of that figure.

He said that the meter recorded certain measurements. Those measurements were downloaded by computer and printed on a document which was adduced in evidence. The readings indicated that the noise pressure levels within the vehicles were in excess of the levels permitted by the Regulations of 1990 in a number of respects.

Sergeant Morrissey said that, subsequent to his examination and assessment of the vehicles in November, 1999 he advised the Garda authorities that there was a need for ear protection to be worn within the vehicles by members of the dog unit and that "*in the long term*" the vehicles would have to be looked at in order to reduce the noise levels created by the barking of the dogs.

5. On the 21st March, 2005, Mr. Niall Lydon, who is an experienced civil engineer trained in the measurement of noise levels, carried out an assessment and tests upon the two Garda vehicles referred to earlier for the benefit of the plaintiff. His examination and assessment took place whilst the Garda dogs were in the vehicles. In evidence he stated that the interiors of the two vehicles had been adapted in 2001 by the installation of bulkheads separating the rear of the vehicle from the driving and passenger seats

Mr. Lydon carried out four tests on the Ford Courier vehicle and three tests on the Ford Transit vehicle. The tests within the Ford Courier vehicle took place over periods of time ranging from twenty-five seconds to fifty-five seconds. Tests within the Ford Transit vehicle ranged over periods of between thirty-five seconds and seventy-six seconds.

Noise levels within the vehicles varied between 65 decibels when the hatches in the Ford Transit vehicle were closed and 110 decibels when a microphone was placed 400mm into the dog cages within the rear of the Ford Courier vehicle.

In respect of the Ford Courier Mr. Lydon found that during one of the tests the noise levels were such that there would be no requirement under the Regulations of 1990 for hearing protection over an eight hour period. During three of the tests the noise levels were sufficient to require hearing protection pursuant to the Regulations of 1990; (a) during an eight hour period, (b) during a period of four minutes and forty eight seconds and (c) during a period of thirty minutes and seventeen seconds.

In respect of the Ford Transit van two tests disclosed noise levels indicating no requirement for hearing protection under the Regulations of 1990 for periods of up to eight hours. One test disclosed a requirement for hearing protection for any period in excess of one hour and twenty-five seconds.

Referring to the readings adduced in evidence by Sergeant Morrissey arising out of his assessment of the vehicles in December1999, Mr. Lydon said that some of those readings disclosed that the noise levels within the vehicles were, for particular periods of time, in excess of the 90 decibels permitted by the 1990 Regulations.

5. Dr. Alexander W. Blayney, who is a consultant ear, noise and throat surgeon stated in evidence that he examined the plaintiff on the 17th January, 2002, with the benefit of an audiogram which had been undertaken earlier at the Mater Hospital.

He said that the plaintiff advised him that he had had no exposure to noise from the use of weapons and there was no history within his family of congenital ear disease or hearing loss.

Dr. Blayney said that the audiograms which he examined demonstrated a bilateral frequency sensory neural deafness which is an inner ear deafness. The audiogram demonstrated a dip or a trough at levels between 4000Hz and 6000Hz. He said that this dip or trough was generally indicative of noise injury and, whilst the findings on the left side were less specific, the audiogram on the right side had the hallmark of noise as "*an agent in its genesis*".

Mr. Blayney compared the audiogram to an audiogram taken on the 1st April, 2005, and said that the presentation on the left ear was similar in both audiograms whilst a slight "*return*" at 8000Hz in the first audiogram had dropped off in relation to the right ear.

Comparing both audiograms to an audiogram taken by Mr. McShane on the 30th November, 2001, Mr. Blayney stated that "*the overall appearance of Mr. McShane's, audiogram, if I can call it that, is very similar to mine… . One can certainly say that all three audiograms are similar*".

In summary, Mr. Blayney said that he found evidence of hearing loss in the audiograms and stated "*I would be very unhappy to state that noise has not played a definite part in the genesis of this hearing loss*".

He said it was impossible to try to quantify the extent to which noise had played a part in damaging the plaintiff's hearing. Pointing out that he had not heard evidence as to the precise noise levels to which the plaintiff had been exposed and the periods of exposure, he indicated that "*I think it would be very difficult to state categorically that the noise of dogs in a confined space would be sufficient to produce quite a severe hearing loss like this. I think it would be up to the court to try and quantify between the two, but I think there are two cofactors here and I think it would be very difficult to negate one from the other*".

Pointing out that he had not been provided with evidence indicating that the plaintiff had been exposed to noise levels in excess of what was permitted by law he stated that if engineering evidence established that the statutory limits had been exceeded then that would "*increase the proportion of hearing loss that can be attributed to noise as opposed to …. other factors…*".

6. Mr. Dermot Dougan who is an audiologist stated in evidence that in 2005 he was retained by the plaintiff's solicitors to advise the plaintiff and was provided with certain reports and a number of the plaintiff's audiograms which had been taken between the 30th November, 2001, and 15th February, 2006.

He said that, having examined the audiograms, he was of the opinion that the plaintiff suffered a moderate to severe high-frequency hearing loss with particular application to his left ear.

He said that his "*educated guess*" would be that this was a noise-induced hearing loss. The plaintiff had provided him with his family and occupational history which was as described above.

He laid particular emphasis upon the fact that the audiograms showed no particular deterioration during the 5 year period between 2001 and 2006. He was of the opinion that this was because the plaintiff used ear defenders whilst working during that period. He stated that this fact supported his view that the deterioration demonstrated in the earlier audiograms was noise-induced.

He said that Mr. Lydon's evidence suggested sound levels of between 89 decibels and 110 decibels for "*approximately 40% of the time*" during work shifts of "*6 to 7 hours*" hours throughout a period of twenty -six years and he stated that it was "*certainly believable, feasible and I believe . . . probable that this extent of hearing loss could and did occur*".

7. Applying the so called "Green Book" principles, the levels of disability recorded in five separate audiograms undertaken between the 30th November, 2001, and the 16th February, 2006, varied between 13.44% (with an estimated disability at age 62 of 20.03%) and 20.94% (with an estimated disability at age 62 of 25.36%). All of the expert witnesses who testified in the proceedings agreed that the five audiograms, when appropriate margins of error were taken into account, were similar to and consistent with one another.

Duty of the Defendants
It has been argued by Mr. McCartan S.C. on behalf of the plaintiff that the duty owed by the defendants to the plaintiff has at all material times been twofold, that is; (a) a duty at common law and, (b) statutory duties pursuant to (i) the Safety, Health and Welfare at Work Act, 1989 and (ii) the European Communities (Protection of Workers) (Exposure to Noise) Regulations, 1990 (S.I. No. 157 of 1990).

Legislative Provisions
Mr. McCartan S.C. contends that the defendants have failed to comply with the provisions of ss. 6(1) and (2)(a) of the Safety, Health and Welfare at Work Act, 1989 (hereafter the Act of 1989).

Those subsections provide as follows:-

> *"6.— (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees.*
>
> *(2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular—*
>
> > *(a) as regards any place of work under the employer's control, the design, the provision and the maintenance of it in a condition that is, so far as is reasonably practicable, safe and without risk to health. . ."*

A "*a place of work*" for the purposes of the Act of 1989 has been defined in s. 2 of the Act in the following terms:

> *"place of work" includes any place, land or other location at, in, upon or near which, work is carried on whether occasionally or otherwise and in particular includes—*
>
> > *(a) a premises,*
> >
> > *(b) an installation on land and any offshore installation (including any offshore installation to which the Safety, Health and Welfare (Offshore Installations) Act, 1987, applies),*
> >
> > *(c) a tent, temporary structure or movable structure, and*
> >
> > *(d) a vehicle, vessel or aircraft"*

Section 60 of the Act provides *inter alia* as follows:

> *"(1) Nothing in this Act shall be construed—*
>
> > *(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by or under sections 6 to 11, or*
> >
> > *(b) as affecting the extent (if any) to which breach of a duty imposed by any of the existing enactments is actionable.*
>
> *(2) Breach of a duty imposed by regulations made under section 28 shall, so far as it causes damage, be actionable except in so far as regulations provide otherwise……"*

The Act of 1989 came into force on the1st November, 1989.

Mr. McCartan S.C. also contends that the defendants have failed to comply with the statutory duty imposed upon them by article 4 of the European Communities (Protection of Workers) (Exposure to Noise) Regulations, 1990 (S.I. No. 157 of 1990) (hereafter the "Regulations of 1990").

The Regulations of 1990 were made pursuant to the provisions of the European Communities Act, 1972 in order to give effect to the provisions of Council Directive 86/188/EEC of 12 May 1986 on the protection of workers from the risks related to exposure to noise at work.

That Directive was declared to have been issued because:

> *"…… exposure to high noise levels is encountered in a large number of situations and therefore many workers are exposed to a potential safety and health hazard; …….a reduction of exposure to noise reduces the risk of hearing impairment caused by noise; ……. where the noise level at the workplace involves a risk for the health and safety of workers, limiting exposure to noise reduces that risk …..the most effective way of reducing noise levels at work is to incorporate noise prevention measures into the design of installations and to choose materials, procedures and working*

methods which produce less noise ….the provision and use of personal ear protectors is a necessary complementary measure to the reduction of noise at source, where exposure cannot reasonably be avoided by other means;"

Article 4 of the Regulations of 1990 provides as follows:

"(1) Noise experienced at work shall be assessed and, when necessary, measured from time to time by an employer in order to identify the workers and work places referred to in these Regulations and to determine the conditions under which the specific provisions of these Regulations shall apply.

(2) Every employer shall be responsible for the assessment and measurements referred to in paragraph (1) of this Regulation being competently planned and carried out at suitable intervals.

(3) Any sampling shall be representative of the daily personal exposure of a worker to noise.

(4) The methods and apparatus used in the measurement of noise at work shall be adapted to the prevailing conditions, particularly in the light of the characteristics of the noise to be measured, the length of exposure, ambient factors and the characteristics of the measuring apparatus…….

(6) The recording and preservation of the data obtained pursuant to this Regulation shall be kept for a period of three years by the employer concerned in the form set out in the First Schedule to these Regulations, and an inspector of the National Authority for Occupational Safety and Health and the workers concerned or their representatives shall be given access to the said data at all reasonable times on a request being made in that behalf of the employer concerned."

The Regulations of 1990 came into force on the 1st July, 1990.

Sections 2 and 3 of the Civil Liability (Assessment of Hearing Injury) Act, 1998 provide as follows:

"2. — This Act shall apply to all proceedings before a court, whether commenced before or after the enactment of this Act.

3. — Judicial notice shall be taken of the Report in all proceedings before a court claiming damages for personal injury arising from a hearing injury."

Section 1 of that Act provides *inter alia* that;

"the Report" means the Report to the Minister for Health and Children by an Expert Hearing Group, which was published by the Department of Health and Children on the 9th day of April, 1998, entitled "Hearing Disability Assessment".

That Report has been referred to in these proceedings as "the Green Book".

The Factories (Noise) Regulations, 1975 (S.I. No. 235 of 1975), (hereafter "the Regulations of 1975"), provided inter alia that:

"7. (1) Subject to Regulation 4 (1) of these Regulations, .a person employed shall not be exposed to sound pressure levels in excess of 90 dBA unless either—

(a) the duration and level of exposure is controlled so that its cumulative effect is unlikely to cause harm, or

(b) ear protection is provided which effectively reduces to a level which is unlikely to cause harm the sound pressure level at each ear of the person."

The Regulations of 1975 came into force on the 1st December 1975. It is acknowledged that, per se, they imposed no precise statutory duty upon the defendants. They were revoked by article 11 of the Regulations of 1990.

(a) Duty at Common Law
The duty at common law owed by the defendants to the plaintiff has, at all material times, been the duty owed by all employers to their employees that is the duty identified by the O'Higgins C.J. in *Dalton v. Frendo* (Unreported, Supreme Court, 15th December, 1977), "*to take reasonable care for the servant's safety in all the circumstances of the case*".

It has been repeatedly confirmed by the courts that employers are not the insurers of their employees. They cannot ensure the safety of their employees in all circumstances and are not required to do so. The employer "*. . . will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances,*" see the judgment of Henchy J. in *Bradley v. CIE* [1976] I.R. 217 at p. 223.

No evidence has been adduced in these proceedings indicating or suggesting, that between 1979, when the plaintiff commenced working as a dog handler for the defendants, and the 2nd December, 1999, when Sergeant Kevin Morrissey first measured noise pressure levels within two identified vehicles in the presence of a barking dog or dogs, any dog handler employed by the defendants or by any other person, in this jurisdiction or elsewhere, has ever suffered an injury from the noise generated by the barking of a dog or dogs.

No evidence has been adduced indicating or suggesting that, during the same period, any dog handler, in this jurisdiction or elsewhere, has complained of hearing difficulties, discomfort or other symptoms arising out of exposure to the noise generated by barking dogs of any breed.

No evidence has been adduced indicating or suggesting that, during that period, the defendants could reasonably have foreseen that the plaintiff was at risk of any personal injury arising from the noise generated by the barking of dogs.

Mr. McCartan S.C. contends that the enactment of the Act of 1989 and, in particular, the Regulations of 1990 should have alerted the defendants to the risk of injury, and in particular the risk of hearing impairment, associated with the exposure of the plaintiff to noise generated from the barking of the dogs which were in his care.

He says that the statutory duties imposed by; (a) the Act of 1989 and (b) the Regulations of 1990 made the risk of injury reasonably

foreseeable by the defendants. He contends that this reasonable forseeability helped to create (or confirm) the duty of care owed at common law by the defendants to take steps to protect the plaintiff from the risk of an identified injury.

Legislation requiring employers to take particular measures in the interests of the safety, health and welfare of their employees may, and usually does, impose particular statutory duties and obligations upon employers. However it does not *per se* necessarily make specific risks reasonably foreseeable.

The Regulations of 1975 imposed a particular duty upon certain employers in respect of "*noise caused by any manufacture, machinery, plant, equipment, appliance or process;*" (see article 2 thereof). It did not make reasonably foreseeable the risk of hearing loss resulting from noise generated by the barking of dogs.

The provisions of s.6 of the Act of 1989 upon which Mr Mc Cartan S.C. relies, imposed upon employers a duty of care no greater than the duty already imposed upon employers at common law. A breach of its provisions does not *per se* afford a civil remedy to a person, (such as the plaintiff in these proceedings) who may have been adversely affected by the breach (see s.60 of the Act).

Subsection 1 of s.6 imposed upon employers a duty to ensure " *so far as is reasonably practicable, the safety, health and welfare at work of employees*". I cannot see how the imposition of that general obligation upon employers could have made the risk of hearing loss resulting from noise generated by the barking of dogs reasonably foreseeable .

Subsection 2(a) of s.6 requires that any " *place of work under the employer's control*" must be maintained safe and without risk to health ". . . so far as is reasonably practicable. . .". The imposition of that duty did not make the risk of an injury to the plaintiff's hearing from the noise created by barking dogs reasonably foreseeable to the defendants.

Since the duty of care required of the defendants at common law was to take whatever measures might have been required to protect the plaintiff from a reasonably foreseeable injury, I am satisfied on the evidence that the plaintiff has not established any breach by the defendants of their common law duty of care as the plaintiff's employers between 1979 and June, 1990.

Mr. McCartan S.C. argues that the enactment of the Regulations of 1990 alerted the defendants to the risk of an injury to the plaintiff's hearing resulting from the noise generated by the dogs.

He points out that article 4 of the Regulations imposed upon the defendants an obligation to assess and, when necessary measure the noise experienced at work in order "*to identify the workers and work places referred to in these Regulations and to determine the conditions under which the specific provisions of these Regulations shall apply*".

Undeniably article 4 imposed a statutory duty upon the defendants in the terms just outlined. It can be validly argued that when article 4 of the Regulations of 1990 came into force on the 1st July, 1990, employers to whom the Regulations applied (such as the defendants), were reminded of the potential risk of hearing and loss or damage to employees resulting from exposure at work to excessive noise levels and the need for employers to monitor those noise levels in the workplace and measure them from time to time in order to eliminate or reduce the risk of such injury.

It was established in evidence that in 1998, Sergeant Kevin Morrissey who was attached to the Health and Safety Section of the Garda Síochána underwent a Noise Assessment Trainers Course in order to acquaint himself with what he called "*modern thinking and best practice in relation to safety health and welfare matters*".

He said that it was part of his function to keep the Garda Commissioner advised in relation to such matters. Arising out of his attendance at the Trainers Course, a noise-meter was purchased for use by the Health and Safety Section of the Garda Síochána and a decision was made to measure the noise levels in the Firearms Unit, the Dog Unit and the Water Unit of the Garda Síochána.

I am satisfied that the risk to the plaintiff's hearing became readily foreseeable to the defendants after the assessment by Sergeant Morrissey of the noise levels within the vehicles. Thereafter, there was certainly a clear duty upon the defendants at common law to take appropriate steps to protect the plaintiff from the risk of injury resulting from the noise levels to which he was exposed from the barking dogs.

I am satisfied additionally, however, that the failure by the defendants to take the necessary, mandatory legal measures to acquaint themselves with appropriate health and safety standards as soon as possible after the enactment of the Regulations of 1990 comprised a breach of their duty at common law to take reasonable steps to protect the plaintiff from the risk of a reasonably foreseeable injury.

Had the defendants taken such mandatory steps then the risk of injury to which the plaintiff was exposed would, as a matter of probability, have been recognised in late 1990 or early in 1991.

Statutory Duty
With effect from the 1st July, 1990, there was a statutory obligation imposed upon the defendants by article 4 of the Regulations of 1990 to assess and "*when necessary….. (measure) … from time to time …*" the noise levels to which members of the Gardaí were, (and are) exposed. This assessment and measurement is required "*in order to identify the workers and workplaces referred to in these Regulations and to determine the conditions under which the specific provisions of these Regulations can apply*".

The "*workers*" to whom the Regulations of 1990 apply were and are deemed by article 3(2) of the Regulations to the "*workers to whom the Directive applies*". The plaintiff comes within that category.

It has been acknowledged on behalf of the defendants that the relevant Garda vehicles can be categorised as "*workplaces*" for the purposes of article 4 of the Regulations of 1990.

The assessment and measurement of the noise levels to which the plaintiff was exposed in his place of work with the defendant was not undertaken until December, 1999, when Sergeant Morrissey carried out his tests upon the relevant vehicles. Accordingly, a statutory duty which was imposed upon the defendants on 1st July, 1990, was not performed by the defendants until December, 1999.

The duty imposed by article 4 of the Regulations of 1990 is a strict duty which has not been qualified in the manner identified by the Supreme Court (Walsh J.) in *Doherty v. Bowaters Irish Wallboard Mills Limited* [1968] I.R. 277.

Arising out of their failure to comply with the provisions of article 4 of the Regulations of 1990, the defendants failed also to comply with (i) the provisions of article 4 of the Directive (which required information training and instruction of workers exposed to noise likely to exceed 85dB(A)), (ii) article 5, (which required defendants to reduce the risks resulting from exposure to noise exceeding 90dB(A)) and (iii) article 6, (which required the defendants to provide personal ear protectors to workers whose daily personal noise exposure exceeds 90dB(A)).

Shortly after Sergeant Morrissey had undergone a Noise Assessment Trainers Course in 1998, he was in a position to identify the Dogs Unit of the Garda Síochána (together with the Firearms Unit and the Water Unit) as a "workplace" where the noise levels should be assessed and measured from time to time.

No steps were taken by the defendants to reduce or eliminate the risk of hearing loss to the plaintiff until July, 2002, when the relevant Garda vehicles were fitted with bulkheads and insulation.

The plaintiff was examined by the defendants' medical officer Dr. Collins in October, 2001 and, later by Dr. McShane when it was confirmed that he had suffered hearing loss in both ears. On the advice of Dr. McShane the plaintiff sought and obtained ear defenders from the Garda Stores and he wore them continuously when confined within the vehicles in the presence of the dogs.

In the light of the foregoing, I am satisfied that the defendants were in clear breach of the provisions of article 4 of the Regulations of 1990 between July 1990 and December 1999. They were additionally in breach of Articles 4, 5 and 6 of the Directive between 1st July 1990 and the end of November, 2001.

Damages
It is claimed on behalf of the plaintiff that he suffered permanent and irreversible loss of hearing in both ears as a result of the negligence and breaches of statutory duty which have been identified and that he is entitled to recover damages on that account.

Dr. Andrew Blayney stated in evidence that audiograms which he examined in January, 2002 demonstrated a dip or trough at levels between 4000Hz and 6000Hz. He said that this dip or trough was generally indicative of noise injury and that whilst the findings on the left side were less specific, the audiogram on the right side had the hallmark of noise as "*an agent in its genesis*".

Comparing those audiograms with further audiograms taken on 1st April, 2005, he said that the presentation on the left ear was similar in both audiograms whilst the slight "*return*" at 8000Hz in the first audiogram had dropped off in relation to the right ear. His conclusion was that "*I would be very unhappy to state that noise has not played a definite part in the genesis of this hearing loss*".

However, he said that it was impossible to quantify the extent to which noise had played a part in damaging the plaintiff's hearing. He said that it was his opinion that if the plaintiff had been exposed to noise levels in excess of what was permitted by law then that "*would increase the proportion of hearing loss that can be attributed to noise as opposed to … other factors*".

Mr. Dermot Dougan said that his "*educated guess*" was that this was noise - induced hearing loss. He thought that it was "*certainly believable, feasible and I believe … probable that this extent of hearing loss could and did occur*".

Applying the "Green Book" principles, the levels of disability recorded in the audiograms undertaken between the 30th November, 2001, and the 16th February, 2006, varied between 13.44% (with an estimated disability at age 62 of 20.03%) and 20.94% (with an estimated disability at age 62 of 25.36%).

However, it is not without significance that, under the heading "*Noise Induced Hearing Loss (NIHL), the* "Green Book", (of which this Court must take Judicial Notice in proceedings such as this), describes the characteristics of noise-induced hearing loss (at para. 2.4) in the following terms:

> *"Noise induced permanent threshold shift usually occurs first around 4,000 Hertz (Hz) and then progresses to involve adjacent frequencies.*
>
> *The hearing loss at 4,000 Hz progresses over the first ten years of noise exposure and then tends to stabilise. It may take 30 years of ongoing noise exposure to involve the frequencies of 1,000 Hz and below (Alberti 1987a). NIHL has a recognisable audiometric pattern with the maximum damage usually occurring at 4,000 Hz but occasionally it may occur at 3,000 Hz or 6,000 Hz. . . . The maximum loss in the higher frequencies occurs over the first ten years of exposure to noise.*
>
> *Damage to the lower frequencies progresses with continued noise exposure. Once exposure ceases NIHL does not progress further. . .."*

It has been established on the evidence that the levels of disability recorded in the audiograms undertaken between 30th November, 2001, and the 16th February, 2006, were caused by reason of the plaintiff's exposure to the excessive noise levels between 1979 and November, 2001.

I am mindful also of the evidence of Mr. Blayney who said that there were two "*cofactors*" which caused the damage and that it was difficult for him to negate one from another.

I am satisfied on the evidence that the plaintiff has suffered significant permanent and irreversible noise related hearing damage as a result of exposure to excessive levels of noise from barking dogs between 1979 and November, 2001.

However, I am also satisfied on the evidence and by way of Judicial Notice that most of that damage was caused by his exposure to excessive noise levels between 1979 and July, 1990.

The plaintiff has failed to establish that the injury and damage caused to his hearing between 1979 and July, 1990 was the result of negligence or breach of any statutory or other duty on the part of the defendants.

It is likely that the plaintiff sustained additional damage to his hearing between July, 1990 and November, 2001as a result of negligence by the State, and by reason of clear (and largely unchallenged), breaches by the State of regulations which the State itself introduced in 1990. No precise evidence has been adduced as to the level of that additional damage.

I am reluctant to speculate or to accept Dr. Blayney's invitation to "*try and quantify between …*" the various factors which he

identified in order to try to measure the extent of the plaintiff's additional hearing loss. I can only conclude on the evidence adduced that it is likely to have been comparatively small. Its consequences for the plaintiff however cannot and should not be minimised or trivialised.

The plaintiff has suffered a serious permanent and irreversible injury in the course of his employment by the State. A part of that injury has been caused by negligence and breach of statutory duty by the State. In accordance with law he is entitled to recover damages from the State to compensate him for that part of his injury. I would assess those damages at €15,000.