



Healthcare Update

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Electronic discovery: Supreme Court decision

Case: Dome Telecom v Eircom [2007] IESC 59

Background. The purpose of discovery is to make available such documentation as exists and must be shared, whether it is in support of or undermines the respective parties' cases.

Facts. The Plaintiff is an Irish company which carries on the business of supplier of call card and other freephone telecommunications services. The Plaintiff claimed that the defendant Eircom failed to impose transit charges evenly, simultaneously or fairly on all operators in the State for calls to freephone numbers originating from mobile phones and payphones and asked the defendant to produce a report based on information in its databases. The defendant refused, claiming that e-discovery did not cover the creation of new reports.

Decision. The Supreme Court held that it would be disproportionate to demand the report in this specific case but that it had the right to ask for such reports. So although the court did not order disclosure in this particular case, it does have the right to do so in other circumstances. It makes sense that an order of discovery can be made which involves the creation of documents which do not exist otherwise potential litigants could operate their computers in such a way that they would be able to evade any worthwhile discovery.

Comment. The decision aligns Irish law with the UK position, where e-discovery does cover the creation of reports based on the contents of databases.

Barristers: fee estimate requirements

Fee estimates will have to be given by barristers in advance of taking a case under a new ruling from the Bar Council in January 2008. From March 2008 every barrister will have to furnish an estimate of fees in writing to a solicitor (or a person having direct professional access). The estimate should set out the services to be provided, for example, drafting or attendance at consultations and the factors that are taken into account in determining the fee. If the matter is urgent, an oral estimate can be given until the written estimate is sent. The estimated fee can be altered subsequently in certain circumstances.

There are exceptions to this rule, but these usually relate to situations where, for example, the likely fees would already be known to the instructing solicitor because the particular barrister does a lot of similar work for that solicitor.

Retained swab case: €81,000 awarded

Facts. The Plaintiff claimed for neglect and breach of duty during the birth of her first child at Our Lady of Lourdes Hospital, Drogheda. The Health and Safety Executive admitted a surgical swab was left in her body after a procedure was carried out but sought proof of the injuries allegedly sustained and the loss and damage claimed.

Decision. Mr Justice Quirke in the High Court after questioning the Plaintiff was satisfied that she had suffered severe pain and therefore made an award of €81,000 in damages arising from the failure to remove the swab.

Damages for solicitor's delay in pursuing claim

A man who survived a car crash in which his parents and younger brother died has received €535,000 damages from a solicitor who admitted negligence in not bringing the man's claim for damages within the statutory two year time limit. When the case opened in the High Court in January 2008 liability was admitted and the judge's task was to assess damages only.



MSSA: £5 million compensation

English actress Leslie Ash has received £5 million damages after contracting MSSA, a strain of MRSA, at the Chelsea and Westminster Hospital in London. She was admitted in 2004 with a broken rib and punctured lung. Doctors gave her an epidural anaesthetic to relieve her pain and sent her home. It was claimed that the infection should have been noticed by doctors before she was discharged. She was partially paralysed for months afterwards and is still unable to walk properly.

She sued the hospital for negligence and the case was due to be heard at the High Court in London in April but the NHS Litigation Authority settled the case for £5 million. The hospital accepted there was a breach of duty in some aspects of her treatment but denied responsibility for the full extent of her injuries.

Inordinate and inexcusable delay

Case: Halpin v Smith [2007] IEHC 279

Facts. The Defendant sought an order dismissing the Plaintiff's claim for personal injuries on the grounds of inordinate and inexcusable delay. The Defendant claimed that the Plaintiff knew that the Defendant had been refused indemnity by an insurance company and that eight years after the accident he had advanced a different account of events.

Decision. It was held by Ms Justice Dunne in the High Court that there had been inordinate and inexcusable delay by the Plaintiff as he had not set out clearly the case against the Defendant and had delayed significantly in advancing the proceedings.

The Defendant remained passive during a four and a half year period while the Plaintiff allowed proceedings to remain dormant and delayed the issue of proceedings by some months.

The court noted that for weight to be attached to any delay it depends on whether or not the delay was active. Active delay is failing to take steps required of it in the course of the proceedings, for example, replying to particulars, filing pleadings and so on. The court found that there had been no material delay by the Defendant in the active sense of the word.

It was held that the Plaintiff's delay caused prejudice to the Defendant in respect of the issue of insurance. The Defendant did delay by not bringing a motion to dismiss for want of prosecution earlier and there was also some active delay in not filing a defence but that delay did not contribute in any significant way to the Plaintiff's inactivity.

Election of judge to the ECHR

On 22 January 2008 Ann Power SC was elected by the Parliamentary Assembly of the Council of Europe as a judge of the European Court of Human Rights. The previous Irish judge at the European Court of Human Rights, Mr. Justice John Hedigan, resigned in February 2007 to take up a position as a High Court judge in Ireland. We wish her every success in her new post.

The Healthcare Unit

If you have any queries on the contents of this update, or if there are other topics you would like to see us address in future editions, please contact any member of the Healthcare Unit listed below.

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