



# Litigation & Dispute Resolution Update

February 2008

## Claim for failed sterilisation

**Case: Byrne v Ryan [2007] IEHC 206**

**Facts.** The plaintiff decided that she did not want to have any more children and underwent sterilisation by tubal ligation. She then fell pregnant but was allegedly advised that the pregnancy occurred as a result of her being pregnant at the time of the tubal ligation. It was not until the plaintiff gave birth for a second time that it became apparent that the operation was unsuccessful and she then underwent a second sterilisation. She sought damages to compensate her for having to undergo the second procedure; undergo pregnancy and childbirth twice; and to rear two more children.

**Decision.** The High Court held that the first sterilisation procedure was a failure due to the negligence of the surgeon and awarded the plaintiff general damages of €90,000 for having to undergo a second tubal ligation and for the pain, suffering and inconvenience involved in the pregnancy and birth of the two children. However it declined to award damages for the costs of rearing the two children as it would be unfair and unreasonable to impose this cost on the negligent surgeon in question. The court held that it was proper to exclude damages in these circumstances on policy grounds and also that it would be incongruous to award damages given the acknowledgment of the happiness that the two children had brought the plaintiff.

**Comment.** The court considered the position in other jurisdictions such as the UK and believed that like the majority of decisions in those common law jurisdictions that Irish law should not be extended to allow the recovery of damages in the circumstances outlined above.

## Electronic discovery

**Case: Dome Telecom v Eircom [2007] IESC 59**

**Background.** The purpose of discovery is to make available evidence which either supports or undermines the respective parties' cases.

**Facts.** The plaintiff was an Irish company which carried 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 reserved 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.

## Law reform: proposals for the future

The Law Reform Commission's Third Programme of Law Reform 2008 – 2014 was launched on 17 December 2007. It was prepared following consultation with the Attorney General, members of the public and public representatives, Government Departments and non-governmental voluntary and community organisations. 37 areas of law have been identified for review including debt enforcement and securing interests over personal property; limitation of actions; alternative dispute resolution; consolidation and reform of the Courts Acts; documentary evidence and technology; hearsay in civil and criminal cases; advance disclosure of defence cases; forensic evidence; expert evidence; and damages in contract and tort law.

For more detail see <http://www.lawreform.ie/3rd%20Prof.pdf>



## Litigation: third party funding

For many years the law refused to recognise arrangements whereby litigation was funded by third parties. This was designed to prevent third parties from profiting from litigation in which they have no legitimate interest. However, the English courts have started to relax their view of third party funding, except where such arrangements might interfere with the administration of justice. Therefore to the extent that a funding agreement is champertous (under which a third party would maintain an action in return for a share of the spoils of litigation) and involves an element of impropriety it is void and unenforceable.

In June 2007 a report by the UK Civil Justice Council recommended that third party funding should be recognised as an acceptable option for mainstream litigation (*"Improved Access to Justice – Funding Options & Proportionate Costs"*). It states that "properly regulated third party funding should be recognised as an acceptable option for mainstream litigation. Rules of Court should also be developed to ensure effective controls over the conduct of litigation where third parties provide the funding." Other jurisdictions are also investigating the usefulness of such funding. It remains to be seen whether new funding methods will change the nature of commercial litigation in the UK or in our own jurisdiction.

## Barristers: fee estimates

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.

## New District Courts

The first review for almost 50 years of District Court areas has resulted in a redistribution of work in the eastern half of the State. Following a review of demand, court venues, sittings and workloads, there are now two new Districts and two extra judges assigned in the first phase of the reorganisation. This involves the following counties: Waterford, Wexford, Wicklow, Kildare, Carlow, Kilkenny, Louth, Cavan, Monaghan and Meath. These Districts are now more closely aligned with county boundaries than they were previously.

### Litigation and Dispute Resolution Department

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 of the Litigation and Dispute Resolution solicitors below.

Claire Callanan (Head of Litigation and Dispute Resolution)  
Mark J. Heslin  
Gabriel Daly  
Philip Smith  
Pauric Heraghty  
Emma Keegan  
Madeleine Delaney  
Adrian Flynn  
Maeve Walsh

c.callanan@beauchamps.ie  
m.heslin@beauchamps.ie  
g.daly@beauchamps.ie  
p.smith@beauchamps.ie  
p.heraghty@beauchamps.ie  
e.keegan@beauchamps.ie  
m.delaney@beauchamps.ie  
a.flynn@beauchamps.ie  
m.walsh@beauchamps.ie

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### Beauchamps Solicitors

Riverside Two, Sir John Rogerson's Quay, Dublin 2  
Tel +353 (1) 418 0600 Fax +353 (1) 418 0699  
email [info@beauchamps.ie](mailto:info@beauchamps.ie) web [www.beauchamps.ie](http://www.beauchamps.ie)

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