



Informing Progress - Shaping the Future

Non-material damages claims under the GDPR

This FOIL Ireland learning event was held on 14th September 2023 and was presented by **Lorcan Moylan Burke** an Associate with **RDJ** and an expert in data protection and cyber security.

The speaker's slides are available using this link <https://www.foil.org.uk/update/data-breach-claims-under-the-gdpr-lorcan-moylan-burke-slides/>

Introduction

Since its introduction, the GDPR has created a regulatory framework for the enforcement and protection of data protection rights. As a result, claims for compensation are at the forefront of many practitioners' minds also in addition to compliance. For example, in 2022 there were 5,695 personal data reported breach notifications to the Data Protection Commission in Ireland and the speaker provided examples of how cyber breaches and cyber-crime have increased, across all sectors. Unauthorised disclosure was a major cause of breaches, all of which give rise for the potential of claims for damages being brought.

GDPR refresher

The speaker then ran through a brief refresher of the principal definitions within GDPR; how it is intended to protect an individual's rights and freedoms; and what constitutes a breach. He also pointed out the key provisions of the GDPR and the Irish Data Protection Act 2018 (DPA).

Another issue considered was the territorial application of the GDPR, including businesses not within the EU but providing services within the EU.

Finally in this section, the speaker looked at how the principles of the GDPR bind together: the fundamental principles that are applied ensure compliance.

Liability

This is not as clear cut as might be desired. As an example, reference was made to Article 82 GDPR and what constitutes a personal data breach. This led on to consideration of Article 32 (security of processing). Do these provisions give rise to strict liability? The speaker felt, from an Irish perspective, that there is not and should not be a strict liability regime and he set out his reasoning for adopting that standpoint.

An illustration was then provided of two breaches but where in one scenario, there might be a defence to a claim for damages.

Article 82 (2) and (3) suggest that strict liability might apply to a data controller, as the wording of the provision is much tighter. However, the CJEU 'Austrian Post' case, clarifies that a mere infringement of the GDPR is not sufficient to found a claim in damages, but there must be three cumulative conditions to be satisfied. This approach is reflected in Irish decisions under S117 of the DPA. However, the speaker issued a note of caution in the light of a recent Advocate General's opinion in *ZQ v Medizinischer*, which is out of synch with the Austrian Post case but contradicts it. *ZQ* and other cases waiting to be heard in the CJEU may have a bearing on this point.

Damages - material and non-material (Article 82)

Material damage is economic loss but non-material damage has been introduced by the GDPR. It is not defined but is understood to cover upset, inconvenience, stress and anxiety and is thus difficult to assess. The speaker then ran through the development of case law on this topic (including the application of the *de minimis* rule), culminating in a more detailed consideration of the Austrian Post case and the recent Irish Circuit Court judgment in *Kaminsky v Ballymaguire Food Limited (2023) IECC 5*.

The Austrian Post case did *not* adopt a limit for non-material damage. *Kaminsky* took account of Austrian Post and the judge set out a series of factors to be considered in non-material damages claims. Having found that there had been an infringement to the GDPR, and although there was no medical evidence put forward, the judge found the plaintiff to be a truthful witness, had suffered an *emotional experience and negative emotions of insecurity* and awarded €2,000 in damages.

What next?

The speaker concluded by flagging-up further developments likely to come from Ireland and the EU, both in statutory law and references to the CJEU that have yet to be decided. He also summarised the key areas for practitioners to be aware of.

Finally, the speaker ran through a number of procedural considerations of relevance to Ireland, including representative actions, which may arise in this context.