

# Data Protection Actions (How to make money from GDPR)

William McLoughlin BL

087 780 1480

Barrister & Mediator

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# Generally Speaking:

**Data protection action is under GDPR**  
*(not DPA 2018 but some exceptions)*

**Watch out for Law Enforcement Directive!**  
*(i.e. GDPR may/does not apply)*

“competent authority” - prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties

# **Art. 5.1 Data Protection Principles**

- a. Fair, lawful and transparent processing of data
- b. Purpose limitation principle
- c. Data Minimisation
- d. Accuracy

# Art. 5.1 Data Protection Principles

e. Proper Data Retention Periods

f. Data Security

Breach of these Principles are the cause of action  
(in addition with other Articles)

***Art. 5.2 “be able to demonstrate compliance”***

*(Arguably Reverse Burden of Proof?)*

# Data Subject Rights

1. Right to be Informed
2. Right of Access
3. Right of Rectification
4. Right of Erasure
5. Right to Restrict Processing

# Data Subject Rights

6. Right to Data Portability

7. Right to Object

8. Rights relating to automated decision making and profiling

*These rights can be a cause of action (must prove damage)*

# **Most GDPR claims are Data Breaches/illegal processing under:**

Art 6.1 or Art 9.1 for no “lawful basis to process the data” (especially if wrong)

Art. 5.1.a – lawful, fair and transparent processing of personal data.

# **Most GDPR claims are Data Breaches/illegal processing under:**

Art. 5.1.d – Inaccurate processing (errors)

Art. 5.1.f, 24.1 & 32.1 failure to have any “technical and organisational measures” to prevent data breach.



# **S. 117 Data Protection Act 2018**

- New tort of “Data Protection Action”
- HC & CC (Not DC) [CC Costs]
- Damages (material & non-material)
- Declaration
- Injunctive Relief

# S. 78 of Courts & Civil Law (Miscellaneous Provisions) Act 2023

- Part 12 Amends DPA 2018
- 31 July 2023 Courts & Civil Law (Misc. Provisions) Act Commencement Order 2023 – SI 389 of 2023
- s. 77 not yet enacted (amends s. 117)

***Change on the horizon!***

# Damages – Art. 82 GDPR:

Any person who has suffered **material or non-material damage** as a result of an infringement of this Regulation shall have the right to receive compensation from the **controller or processor** for the damage suffered.

# Material Damage:

- Quantifiable
- Out of Pocket
- Special Damages

**Pre-GDPR (Data Protection Acts 1988 & 2003) only material damage was recoverable**

*Collins v FBD Insurance plc* [2013] IEHC 137 Feeney J: No general damages for distress for breach of data protection legislation.

# Non-Material Damage:

Recoverable Under Art. 82 GDPR & s.117(10) 2018 Act.

- Genuine distress, upset, annoyance, etc.
- Loss of Control of Data (Current ECJ Referral).
- Risk of identify theft or illegal processing (ECJ Referral).
- Any infringement on another right (ECJ Referral)

*Settlements with CC costs or an 'All in' figure.*

# Non-Material Damage:

*Case C-300/21 – UI v Österreichische Post AG*

## “Austrian Post Case” - ECJ Ruling - 4 May 2023:

- No “automatic damage” (i.e. not actionable *per se*)
- Member States cannot impose threshold of damages (cannot require a ‘certain degree of seriousness’)
- Member States must apply domestic rules on compensation in accordance with EU law (e.g. GDPR).

# Non-Material Damage:

Current ECJ Referrals (we're all watching):

[Case-340/21 – VB v Natsionalna agentsia za prihodite \(Bulgaria\)](#) - worry, fear & anxiety over data breach? Need more than mere upset caused an infringement of GDPR?

[Case-687/21 – BL v Saturn Electro-Handelsgesellschaft mbH Hagen](#) Very minor breach that lasted approx 30 mins before rectification. Are minor breaches/trivial upset recoverable.

[Case-741/21 – GP v juris GmbH](#) – impairment of a data subject's legal position itself damage?

# Non-Material Damage:

Irish position – 1 Reported DCC Case

*Kaminski v Ballymaguire Foods* [2023] IECC 5

Judge O'Connor considered Austrian Post case (11/7/23) and, upon my reading, stated 3 elements for compensation:

1. Breach of GDPR
2. Damage
3. Causation between breach and damage (€2,000 awarded)



**Data Protection Action: CAUTION!**

**Upset, distress, etc. Medical treatment?**

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graph TD; Q[Upset, distress, etc. Medical treatment?] --> YES[YES]; Q --> NO[NO]; YES --> A[PIAB Authorization & Personal Injuries Summons]; NO --> B[Equity Civil Bill];
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**YES**

PIAB Authorization &  
Personal Injuries Summons

**NO**

Equity Civil Bill

**Data Protection Action: CAUTION!**

**Mixed CC caselaw on PIAB:**

*Keane v Central Statistics Office* 2023 IECC 7

Justice McAleese - Waterford CC - 30/6/23:

Seeking damages for “upset and distress”

Damages constitute “a personal injury” ergo  
PIAB authorisation required (& Or 5A CCR)

**Data Protection Action: CAUTION!**

**Mixed CC caselaw on PIAB:**

*Fitzgerald v McAvinue* Waterford CC 2022/249

Oral judgement of Justice Meehan 30/11/23:

GDPR suggests compensation for genuine  
upset and distress below personal injuries

(Art. 15 claim - Plaintiff lost on damage/causation but was awarded  
injunction & declaration)

**Data Protection Action: CAUTION!**

**Mixed CC caselaw on PIAB:**

Anecdotal evidence suggests there are different judgments in different Circuit Courts on Art. 82.1 “non-material damage”.

HC Guidance is needed to assist and provide legal certainty.

# Data Protection Action: **CAUTION!**

## Arguably 3 levels of damage for GDPR:

1. Trivial (non-recoverable)
2. Above Trivial but below Personal Injuries  
(and recoverable as non-material damage)
3. Personal Injuries (PIAB required)

*We need HC guidance on non-material damage*

# **Data Protection Actions**

**What you need:**

**1. Proof of GDPR Breach**

**2. Damages**

# **Data Protection Action: 1 Breach of GDPR**

Often clients already have this by application of Art. 34.1 of GDPR, i.e. mandatory data breach notification to data subject where 'high risk' to data subject/data.

# Data Protection Action: 2 Damages

1. Upset, distress, concern, etc.
2. Loss of Control of data
3. Risk of identity theft or data being used for fraud or part of a scam.
4. Damages for the fact it happened (as applicable, e.g. BOI claims).



# Data Protection Action: Reliefs

1. Damages
2. Declaratory Relief
  - Under s.117(10) & **Equity**
3. Injunction (as applicable)

# Data Protection Action:

Initiated by way of Equity Civil Bill

1. Equitable Reliefs (not just s117)
  - Declaration
  - Injunctive relief
  - Any other order.
2. Estoppel Re: Art. 34.1 notification

**Data Protection Action:**

**Initiated by way of Equity Civil Bill**

3. Pre-empt s117 amendment

DC does not have jurisdiction for Equity

**CAN NOT** remit Equity Civil Bill to DC

You ensure CC costs instead of DC scale 😊

# **3 “types” of data protection actions:**

**1. Data Breach**

**2. Inaccurate/Incorrect processing**

**3. Others**

# 1. Data Breach:

To draft pleadings I need:

## 1. Proof of Data Breach

(notification by data controller)

## 2. Damages

- upset, etc.
- loss of control
- risk of fraud, identity theft, etc.

## 2. Inaccurate/Incorrect processing:

To draft pleadings I need:

### 1. Proof of incorrect processing

(E.g. Bank of Ireland, EBS, AIB, etc )

### 2. Damages

- upset, etc.
- loss of control
- how the error affected the data subject  
(e.g. credit rating, loss of credit, etc.)

### 3. Others:

To draft pleadings I need:

1. A statable case (flesh out with client)
2. Proofs of GDPR breach
3. Damages - upset, etc. loss of control, etc.
4. Viable Defendant (very important)

### **3. Others:**

If no case, tell lead/caller to complain to Data Protection Commission and if DPC rule in their favour you will review the DPC decision then.

Let the DPC do the work!



It's not our job to go off and get proofs for clients, e.g. SAR, copies of files, etc. unless there is a strong case there.

Data Protection Actions require *relatively* fast turnover with *relatively* little work (when compared to typical Personal Injuries cases)

# Case Study: EBS

BUSINESS

## EBS being sued by 14 mortgage holders 'denied credit by data breach'

Pavel Barter

Sunday July 12 2020, 12.01am BST,  
The Sunday Times



# Case Study: Bank of Ireland

Bank of Ireland could face civil cases after 47,000 customers hit by data breach



The Data Protection Commission handed down a fine of €463,000 to Bank of Ireland, but the matter could cost it a lot more than that.

WED, 06 APR, 2022 - 10:00

SEAN MURRAY



Bank of Ireland could face multiple civil cases after an investigation found the data of 47,000 customers was altered in a way that could have damaged their credit history.



Pic: RollingNews.ie

05 Apr 2022 / REGULATION

 PRINT

## BoI rapped over breaches of GDPR rules

The Data Protection Commissioner (DPC) has handed Bank of Ireland a fine of €463,000 and reprimanded it for a number of breaches of GDPR data-privacy rules.

# Case Study: Bank of Ireland

Incorrectly reported customers to the Central Credit Register.

Tens of thousands (maybe more) affected.

Data Protection Commission investigated/ruled:

1. Failed to report the breaches “without undue delay”, or without sufficient detail.

(Art. 33.1 breach)



# Case Study: Bank of Ireland

2. Failed to contact individuals quickly enough, in circumstances where the breaches were likely to result in a high risk to the data subjects' rights and freedoms

(Art. 34.1 breach)

3. failed to implement appropriate measures to ensure a level of security appropriate to the risk presented by its processing of customer data in transferring information to the CCR

(Breach of Art. 5.1(f), Art. 24.1 & Art. 32.1).

# Case Study: Bank of Ireland

## Data Protection Commission ruling is public

<https://www.dataprotection.ie/sites/default/files/uploads/2022-04/Summary%20of%20Inquiry%20into%20Bank%20of%20Ireland%20Group%20plc.pdf>

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Decision exercising corrective powers made under the Data Protection Act 2018

### Inquiry into Bank of Ireland Group plc

(IN-19-9-5)

**Date of Decision: 14 March 2022**

This inquiry was commenced in respect of 22 personal data breach notifications that Bank of Ireland Group plc ("**BOI**") made to the Data Protection Commission ("**DPC**") between 9 November 2018 and 27 June 2019. The notifications related to the corruption of information in the BOI's data feed to the Central Credit Register ("**CCR**"), a centralised system that collects and securely stores information about loans. The incidents included

# Case Study: HSE Data Breach

## The Journal



SHUTTERSTOCK

# CYBER ATTACK

**HSE brace for likely legal actions following cyber breach disclosures**

# Case Study: HSE Data Breach

- Personal data & Special Categories of Personal data Affected
- Some staff financial data affected, bank details, etc.
- Notified data subjects a year-and-a-half later (Art. 34.1 breach).
- Damages for loss of control of data
- Damages of the fact medical data was affected (special category)
- Damages for the fact data is online, on dark web, etc.
- Damages for the risk of identify theft, etc.
- Declaratory Relief



# **Suggested process to run a mass claim:**

1. Screen clients for proofs (only take on clients with proofs)
2. Sign up clients (get proof of breach)
3. Make sure no Personal Injuries (as PIAB required)
4. Instruct Counsel (send proof & damages to Counsel)

# Just to Note:

A Data Protection Action does not appear to be a Personal Injury Action under The Solicitors Advertising Regulations, 2019 (S.I. 229 of 2019)

Data Protection Actions do not appear to be a 'personal injury' under Legal Services Regulation Act 2015 (Advertising) Regulations 2020 (S.I. No. 644 of 2020)

*You appear to have a lot more freedom to advertise and seek clients.*

# Judicial Reviews:

*Ryan v Data Protection Commission* [2023] IEHC 511

DPC permitted to pause complaint to conduct 'own statutory enquiry'

*Meany v Data Protection Commission* 2020 820 JR – leave granted over 5-year delay (TBC)

*McShane v Data Protection Commission* 2022 699 JR – leave granted over 'non-work' personal data on HSE work phone (TBC)

# Cross/Parallel Claims:

If you have a:

1. Personal Injuries Action (Bullying/Harassment)  
and/or
2. WRC Claim (Unfair/Constructive Dismissal)

Then you may have a Data Protection Action too as data is processed in the investigation (depending on facts).

# Cross/Parallel Claims:

Example: Unfair Dismissal and Bullying & Harassment claim following flawed/unfair grievance procedure.

1. PI Claim (Bullying & Harassment)
2. WRC Claim (Unfair Dismissal)
- 3. Data Protection Action** (for breach of Art. 5.1(a) - lawful, fair and transparent processing due to flawed procedure).

# Data Protection Actions:

- New Revenue Stream
- Relatively quick turnover (compared to PI)
- Defendants more unlikely to go to trial  
*(except for the State, Departments, Ministers, etc.)*
- All Circuit Court costs
- Very simple to get leads, screen, etc.
- Mass claims
- Current window of opportunity.

Thank you for your time

Any Questions?

William McLoughlin BL

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