THE TEST IN *KELLY V HENNESSY* AND ARTICLE 82(1) OF THE GENERAL DATA PROTECTION REGULATION

Abstract: In this article, I examine the test for recovery of non-material damages in Irish law. I argue that the existing tortious test for the recovery of such damages, established in Kelly v Hennessy, is applicable to such claims. However, it is also argued that several recent decisions have failed to engage, or engage fully, with the way in which that test should be applied in data protection cases. I argue that this has resulted in a poorly defined cause of action and that clarity is needed--not only to resolve this foundational concern of legal certainty, but also in light of the possible conflict with EU law which the test in Kelly represents following the decision in Case C-300/21 Austrian Post.

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Introduction

Over the last three years the award of non-material damages for breaches of the General Data Protection Regulation ("GDPR"),[1] the procedures by which such awards are to be made, and their quantum, have become issues of increasing debate before the European,[2] and national,[3] courts. In this article, I am concerned with how Irish courts have dealt with the award of non-material damages and the thresholds imposed under Irish law for successfully claiming such awards. In doing so, I focus specifically on the extent to which the test in *Kelly v Hennessy,*[4] which governs the award of non-material damages in tort cases involving negligent infliction of 'nervous shock' (as psychiatric injury is still often referred to in Irish law), can be reconciled with the *dicta* of the Court of Justice of the European Union ("CJEU") in Case C-300/21 *Austrian Post* to the effect that '[m]aking compensation for non-material damage subject to a certain threshold of seriousness would risk undermining the coherence of the rules established by the GDPR."[5]

I begin, in part one, by outlining the law governing the award of non-material damages under the GDPR, with a particular emphasis on the decision of the CJEU in *Austrian Post* and the affirmation of that decision in subsequent cases. In part two, I then turn to consider how non-material damages are dealt with in Irish law under the Data Protection Act 2018 and as a matter of tort law, and the approach of the Irish courts to claims for non-material damages. In part three, I turn to analyse whether the application of the test in *Kelly* to claims for non-material damages in data protection cases can be reconciled with the CJEU's approach to the award of damages in *Austrian Post.*

[1] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, [2016] OJ L 119.

[2] In this article I will focus, in particular, on the decision in Case C-300/21 *Österreichische Post (Préjudice moral lié au traitement de données personnelles)* EU:C:2023:370 (henceforth '*Austrian Post*') but see also, Case C-741/21 *GP v Juris GmbH* EU:C:2024:288; Case C-687/21 *MediaMarktSaturn* EU:C:2024:72; Case C-340/21 *VB v Natsionalna agentsia za prihodite* EU:C:2023:986. See also the pending decision Case C-189/22 *SO v Scalable Capital GmbH.*

[3] In the national context see, *Cunniam v Parcel Connect* [2023] IECC 1; *Kaminski v Ballymaguire Foods* [2023] IECC 5; *Keane v CSO* [2024] IEHC 20; *Dillon v Irish Life Assurance PLC* [2024] IEHC 203.

[4] [1995] 3 IR 253.

[5] *Austrian Post* (n 2) [49].

Non-Material Damages under the General Data Protection Regulation

While the Data Protection Directive 1995 made no specific provision for the award of non-material damages, Article 23 of the Directive provided that Member States should make provision to ensure that those who suffered damage as a result of unlawful processing of their personal data were entitled to receive compensation.[6] That provision has now been replaced by Article 82(1) GDPR which provides, *inter alia*, that any data subject who has suffered material or non-material damage as a result of an infringement of the Regulation shall have the right to receive compensation for the damage suffered.

The Regulation provides no definition of damage, though the third sentence of Recital 146 GDPR states that 'the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation'. Looking to how Article 82(1) GDPR should be interpreted given this provision, and in light of the tenor of the Regulation more generally, the CJEU in *Austrian Post* determined that the definition of damage under the GDPR should be subject to a reading which 'fully reflect[ed] the objectives' of the Regulation.[7]

The Decision in Case C-300/21 *Österreichische Post*

In *Austrian Post* the national postal service of Austria had collected information on the political affinities of the population and, subsequently, sold that data to various organisations for use in targeted advertising. The plaintiff discovered this use of his data, to which he had not consented, and claimed to have suffered upset, a loss of confidence and a feeling of exposure as a result. The plaintiff sought compensation in the form of €1,000 for non-material damage under Article 82 GDPR.[8] A central question which the CJEU was required to answer in the subsequent hearing was whether there was, or could be, a restriction on the right to claim for non-material damage under Article 82 GDPR such that only damage which reached a certain threshold of seriousness could ground an award.

In its decision, the CJEU adopted a two-tiered interpretative approach. First, the Court found that based on the wording of Article 82 GDPR—which provided that 'damage' must have been 'suffered'—indicated that an award of damages required three cumulative conditions, namely an infringement, damage and a causal relationship between both.[9] On that basis, the Court reasoned that an infringement of the Regulation, *prima facie*, could not ground a claim for damages. Rather, some actual, rather than hypothetical harm, was required.

The Court then turned to undertake a contextual reading of the relevant provisions of the Regulation which, it found, supported their initial, more focused, literal interpretation. The Court found, in particular, that Recitals 75, 85 and 146 supported their reading of Article 82 GDPR to the effect that any damage compensated under the Regulation must be actualised rather than potential,[10] while also noting that other remedial provisions of the Regulation

[6] European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, Article 23 and see also Recital 55. This was transposed, in Irish law, through s 31 of the Data Protection Act 1988 (as amended).
[7] *Austrian Post* (n 2) [46].
[8] ibid [12]-[13].
[9] ibid [32].
[10] ibid [46]-[47].

(notably Articles 77 and 78 GDPR, and Articles 83 and 84 GDPR) applied without a requirement to prove damage.

The Court considered that it followed from this differentiation that a causal relationship was required as between the breach of the Regulation and the harm suffered in the case of Article 82. On this basis the Regulation was not, and could not be, read as imposing a strict liability standard,[11] and the Court concluded that Article 82(1) must be interpreted as meaning a mere infringement of the GDPR was insufficient to ground an award of damages without some resulting harm.[12]

For the purposes of this article, the most significant aspect of the CJEU's decision was its consideration of whether Article 82(1) GDPR must be interpreted to preclude a national rule or practice which makes compensation for non-material damage subject to a requirement that the damage suffered by the data subject reaches a certain degree of seriousness.[13]

The court noted that neither a literal interpretation, nor the context of Article 82 GDPR, supported a finding that a breach must have reached a certain threshold of seriousness in order to attract compensation. The Court noted that the Regulation did not confine the concept of damage to an award based on any particular threshold,[14] and that the context of Article 82 tended to militate against the adoption of such an approach.[15]

The Court based this latter conclusion, in particular, on the third sentence of Recital 146 GDPR which provides that 'the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation'. It would be contrary to that broad conception of 'damage', the Court found, to limit the availability of an award to those cases where damage reached a certain degree of seriousness.[16] Moreover, a conclusion that a certain threshold was required to be reached would risk undermining the coherence of the rules established by the GDPR, as any such threshold would be liable to fluctuate according to the subjective assessment of the courts seised of the case.[17]

Crucially, the CJEU noted that absent any reference to national law in Article 82, it was to be presumed that the provision was fully harmonising, and that non-material damage constituted an autonomous concept such that it should be interpreted in a uniform manner by all Member States.[18] On this basis, no Member State could impose a requirement that claims for non-material damage must exceed a certain threshold of seriousness. Nevertheless, the Court found that in the absence of EU rules, it was for each Member State to establish its own procedural rules to give effect to this view, and to facilitate claims pursuant to Article 82.[19]

It is, perhaps, worth quoting the relevant passages of the judgment in this respect in detail:

[11] ibid [42]. A view which was echoed by the Court of Appeal in *Shawl Property Investments Ltd v A. & B.* [2021] IECA 53 [10.3].
[12] *Austrian Post* (n 2) [50].
[13] ibid [43].
[14] ibid [45].
[15] ibid [46].
[16] ibid.
[17] ibid [49], [51].
[18] ibid [29].
[19] ibid [53]-[54].

> 53. In that connection, it should be recalled that, according to settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not, in situations covered by EU law, less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments of 13 December 2017, El Hassani, C-403/16, EU:C:2017:960, paragraph 26, and of 15 September 2022, Uniqa Versicherungen, C-18/21, EU:C:2022:682, paragraph 36).
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> 54. In the present case, it should be noted that the GDPR does not contain any provision intended to define the rules on the assessment of the damages to which a data subject, within the meaning of Article 4(1) of that regulation, may be entitled under Article 82 thereof, where an infringement of that regulation has caused him or her harm. Therefore, in the absence of rules of EU law governing the matter, it is for the legal system of each Member State to prescribe the detailed rules governing actions for safeguarding rights which individuals derive from Article 82 and, in particular, the criteria for determining the extent of the compensation payable in that context, subject to compliance with those principles of equivalence and effectiveness (see, by analogy, judgment of 13 July 2006, Manfredi and Others, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 92 and 98).

The decision has been reaffirmed in subsequent cases including Case C-456/22 *VX v Gemeinde Ummendorf*,[20] in which the CJEU confirmed that there is no *de minimis* threshold for a successful claim for compensation under Article 82 GDPR. In Ireland, the DPA 2018[21] does not provide for any procedure for claiming, or measuring, non-material damages. However, in a series of recent decisions the Irish courts have sought to establish the criteria which must be satisfied to recover under Article 82 GDPR.

Non-Material Damages under Article 82 GDPR in the Irish Courts

At a national level, s 117 DPA specifically provides that a data protection action is deemed 'an action founded on tort,'[22] and permits a court hearing a data protection matter to grant relief by way of an injunction or declaration, or by way of compensation.[23] Whelan J in *Shawl Property Investments Ltd v A. & B* has expressed the view that s 117 transposes the provisions of Article 82(1) GDPR.[24] However, it is not immediately obvious that this is the case. Section

[20] Case C-456/22 *VX v Gemeinde Ummendorf* EU:C:2023:988.
[21] I do not deal, in this article, with the 1988 Act in light of its limited application.
[22] Data Protection Act 2018, s 117(2). Which retrenches the position under s 7 of the Data Protection Act of 1988 which provided that, 'For the purposes of the law of torts and to the extent that that law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned.'
[23] ibid, s 117(4), as amended by s 77 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 which grants the District Court concurrent jurisdiction over data protection matters valued as falling under the Court's monetary jurisdiction.
[24] (n 11) [114].

117 stipulates that it provides a judicial remedy for the infringement of a 'relevant enactment' which is defined as the DPA, or any regulation made thereunder.

Thus, a claimant would be required, in relying on s 117, to establish that they had an actionable right for non-material damage flowing from a particular provision of the DPA or Ministerial Regulations made pursuant to its provisions.[25] As such, the transposition of Article 82 GDPR is partial at best. However, the GDPR as a Regulation is directly effective, thus providing a remedy in damages for any individual who wishes to directly invoke Article 82 GDPR before national courts in respect of the breach of a data protection right not provided for in the DPA.

Article 82 GDPR makes no provision for the precise character of the action which the provision foresees–as the CJEU has observed. In contrast, s 117 DPA specifically characterises an action under the Act as 'an action founded on tort' and limits the compensation available to the relevant court's jurisdiction in tort.[26] This framing is in keeping with the decision of the High Court in *Collins v FBD Insurance plc*.[27]

This, then, provides a bifurcated system for claims for non-material damage at a national level.[28] However, the case-law, to date, does not display any great differentiation, in itself or by reference to the underlying pleadings, between s 117 claims and directly effective Article 82 actions. While this may, of course, be a function of the fact that the decisions to date do not replicate, or consider in any real detail, the pleadings themselves, it does result in a loss of specificity in respect of the arguments made and their legal basis.

This has been averred to by O'Donnell J in *Dillon v Irish Life Assurance PLC*[29] and remains an issue to be unpicked in future decisions. As a result, in the proceeding sections it has not proved feasible to draw out the differences in treatment between s 117 and Article 82 claims. Rather, I have addressed the cases regarding non-material damages which have come before the Irish courts, as at the date of writing, differentiating between those which fell for consideration under the Data Protection Directive and, more recently, the GDPR.

Decisions under the Data Protection Directive and the Data Protection Act 1988 as amended

The text of the Data Protection Acts 1988 and 2003 (as amended) implies that, similar to under the current s 117, an action for breach of data protection rights is an action in the form of a tort.[30]

Collins v FBD Insurance plc

The starting point in a consideration of non-material damages is the pre-GDPR decision in *Collins v FBD Insurance plc*. The plaintiff in *Collins* had sought damages for breach of the duty

[25] For example, that the data subject's rights in respect of the processing of special categories of data was not carried out in compliance with s 45 DPA 2018.
[26] In addition, s 27 DPA 2018 provides that an action for breach of the right under s 26 (the prohibition on disclosure of confidential information) shall be deemed an action in tort.
[27] [2013] IEHC 137.
[28] Though the precise relationship between s.117 and the transposed provisions of the Law Enforcement Directive, as opposed to the GDPR, within the DPA 2018.
[29] (n 3).
[30] See, in this respect, Data Protection Act 1988, s 7.

of care owed to him by the defendants pursuant to section 7 of the then Data Protections Acts 1988 (as amended) which transposed the Data Protection Directive into Irish law.[31] The plaintiff was a customer of the defendant company which insured his vehicle. His vehicle was stolen during the period of insurance, and he made a claim on his policy with the defendant.

An initial review by a claims management company engaged by the defendant determined the plaintiff's claim was genuine and should be paid. The defendant, having received this report, hired a private investigator who also determined the claim was genuine but uncovered evidence that the plaintiff had been convicted of a summary offence in respect of an unrelated theft of goods from a vehicle. There followed an exchange of correspondence in which the defendant refused to discharge the sum the plaintiff claimed was owed under the policy, and the plaintiff sought copies of the personal data belonging to him and held by the defendant on the basis of which his claim had been denied. On the basis of the refusal of this latter data the plaintiff made two complaints to the Data Protection Commissioner (DPC).

The DPC determined that the defendant had failed in their s. 7 duty to furnish the defendant with a copy of his personal data, and to establish a lawful basis (through a contract) for the processing of the plaintiff's personal data by the private investigator, and had accessed sensitive data (in the form of data relating to a criminal conviction) in a manner not prescribed by law and thus had failed to sufficiently guarantee the presence of appropriate technical and organizational measures for the processing of the defendant's data.[32] The plaintiff then commenced Circuit Court proceedings against the defendant for breach of his rights under s 7, seeking damages, and was successful.

On appeal, the High Court was tasked with considering whether the award of general damages made by the Circuit Court was appropriate. The plaintiff contended that he was entitled to damages for breach of his s 7 rights *simpliciter*,[33] while the defendant maintained that an award of damages could be made only where actual loss or damage was proved.[34]

Feeney J noted that Article 23 of the Data Protection Directive required only that compensation be available for damage suffered as a result of unlawful processing.[35] He further noted that s 7, in transposing this requirement, provided neither for a strict liability offence nor an automatic payment of compensation.[36] Rather, the section limited itself to establishing a tortious duty of care and, as such:

> … the entitlement is not to damages for breach of duty, but compensation for breach of duty. Compensation is intended to place an individual in the position which that individual would have been apart from the wrong done. In general, an entitlement to damages for distress, damage to reputation or upset, are not recoverable save where extreme distress results in actual damage, such as a recognisable psychiatric injury.[37]

[31] *Collins* (n 27).
[32] ibid [1.2].
[33] ibid [1.3].
[34] ibid [3.6], [38], [4.2].
[35] ibid, [36].
[36] ibid [36], [4.1], [4.2].
[37] ibid [4.3].

Feeney J then noted that this entitlement was further limited by the additional rules laid down by the law of torts—making specific reference to the decision in *Larkin v Dublin City Council*.[38]

Two things are thus, immediately, striking about the decision in *Collins*. The first, is the differentiation between compensation and damage, and how closely the reasoning of the Court in assessing when damages shall be awarded echoes the approach adopted by the CJEU in *Austrian Post* nearly a decade later in requiring actualised damage, and a causative relationship with the loss or harm alleged. The second, is the specific finding by reference to the decision in *Larkin* that the rules in respect of recovery for certain tortious heads of damage–including damage for psychiatric injury or 'nervous shock'–apply to data protection claims under Irish law.

There is, perhaps, an argument that Feeney J's remarks in respect of psychiatric injury were *obiter* given the case before him. However, it does logically follow from the Judge's finding, that a claim for damages in tort is subject to such limits, where they arise on the facts of the case. The decision in *Collins* has been reaffirmed more recently in the decisions of O'Donnell J in *Kaminski v Ballymaguire Foods*[39] and *Keane v CSO*[40] and (in the context of the GDPR) *Dillon v Irish Life Assurance plc*.[41]

Keane v CSO

In *Keane v CSO*,[42] which also considered the law prior to the entry into force of GDPR, the plaintiff claimed, *inter alia*, damages for breach of her data protection rights pursuant to s 7 following from the defendant's erroneous disclosure of her P45[43] to third parties following the end of her employment.[44] The plaintiff described her symptoms following her discovery of the breach, as including 'severe stress and anxiety' which affected her daily life, negatively impacted her appetite and her sleep and exacerbated a pre-existing condition of psoriatic arthritis.[45]

When the matter came before O'Donnell J in the High Court, the case centred on whether the appellant's claim for non-material damages could succeed in circumstances where the respondents alleged that her claim was in the nature of a claim for personal injuries and that she had failed to obtain prior authorisation as required pursuant to s 12(1) of the Personal Injuries Assessment Board Act 2003.[46] O'Donnell J, in considering the application of the 2003 Act to data protection claims, noted that the 2003 Act also adopted the definition of 'personal injury' used in the Civil Liability Act 1961 which defines 'personal injury' as including 'any disease and any impairment of a person's physical or mental conditions, and notes that the term "injured" shall be construed accordingly.'[47] O'Donnell J found that the actions in respect of which the plaintiff sought damages were clearly 'wrongs' within s 2 of

[38] ibid [4.4]; *Larkin v Dublin City Council* [2008] 1 IR 391.
[39] *Kaminski* (n 3) [10.1].
[40] *Keane* (n 3) [10] (here the plaintiff themselves had invoked the case).
[41] *Dillon* (n 3) [19].
[42] *Keane* (n 3) [6].
[43] A P45 is a tax certificate issued by an employer to an employee following the end of their employment which provides a number of details concerning an individual's salary, and their tax liability during the period of their employment. See, <https://www.revenue.ie/en/jobs-and-pensions/changing-jobs/when-you-leave-your-job.aspx> accessed 25 October 2024.
[44] *Keane* (n 3) [5].
[45] ibid [7].
[46] Section 12(1) requires that a person seeking to bringing a personal injuries action must, prior to commencing an action, make an application to the Personal Injuries Board.
[47] *Clarke v O'Gorman* [2014] 3 IR 340, §18 per O'Donnell J.

the 1961 Act, while the only damage expressly identified by her was in the form of 'stress, anxiety, distress and a consequent exacerbation of her psoriatic arthritis,' injuries which were, *prima facie,* personal injuries and that prior authorisation was thus required pursuant to s 12(1).[48]

Noting that the matter pre-dated the entry into force of the GDPR (and thus Article 82(1) of that Regulation) O'Donnell J found that the relevant preceding provision was Article 23(1) of the Data Protection Directive[49] and s 7 of the 1988 Act (as amended).[50] The result of the decision in *Keane* was that the plaintiff was unsuccessful in claiming damages in circumstances where she had not satisfied the procedural requirement of making an application to the Personal Injuries Assessment Board (PIAB) for an assessment of her claim prior to commencing proceedings.

Crucially, the Court rejected the plaintiff's argument that an action under s 7 should be treated differently to other torts causing the same injuries.[51] The Court, equally, rejected the 'contradictory' claim made by the plaintiff that because she would be unable to recover damages in respect of general stress and anxiety (in the absence of a recognised psychiatric illness) that this meant that her claim was not one which fell for authorisation by the PIAB.[52]

This is an interesting argument in that, while contradictory, it evidences an awareness on the part of the plaintiff that the requirements of the test under *Kelly* are applicable to such claims. O'Donnell J, however, made no observations in relation to the application of the test in *Kelly*, instead continuing to consider only the procedural requirement to obtain a PIAB authorisation.

This fits with the approach which has, perhaps surprisingly, emerged in other cases which hint indirectly to the applicability of the test in *Kelly* but do not address the issue head on, as illustrated in *Kaminski v Ballymaguire Foods*[53] which was the first reported Irish case to consider an award of non-material damages under the GDPR following the decision in *Austrian Post*.

Decisions under the GDPR

Kaminski v Ballymaguire Foods

In *Kaminski v Ballymaguire Foods*[54] O'Connor J, in the Circuit Court, was confronted with a claim for damages under s 117 DPA 2018 and/or pursuant to the GDPR. [55] In *Kaminski*, the plaintiff, an employee of the defendant company, was captured on CCTV while at work. The footage was subsequently used to demonstrate incorrect workplace practice. The plaintiff was identifiable in the footage and claimed he had been exposed to humiliation and embarrassment as a result of the events.

O'Connor J affirmed the applicability of the decision in *Austrian Post* to the effect that there is no minimum threshold of seriousness required for a claim of non-material damage

[48] *Keane* (n 3) [20], [22], [33].
[49] ibid [28].
[50] ibid [30], a position which the plaintiff did not seek to query [31].
[51] ibid [23], [25].
[52] ibid. A similar argument was made by the plaintiff in *Dillon* (n 3) [41].
[53] *Kaminski* (n 3).
[54] ibid.
[55] ibid [1.1], [4.10].

following a breach of data protection law.[56] The Judge went on to note that even where non–material damage can be proved and is not trivial, damages may be modest and found that, absent other guidelines, the factors outlined in the Judicial Council Personal Injuries Guidelines 2021 in respect of the category of minor psychiatric damages were instructive in calculating the quantum of any award. On that basis he concluded that such damages might be valued below €500 in cases of minor psychiatric damage.[57]

The Guidelines which O'Connor J cited, note that recovery for psychiatric injury is subject to the test established in *Kelly v Hennessy*.[58] They state that:

> It is important for judges in all courts to remember that not all damage warrants an award of compensation. In the absence of physical injury, recovery is permitted only in respect of recognisable psychiatric injury (see: *Kelly v. Hennessy* [1995] 3 I.R. 253). For example, upset, distress, grief, disappointment and humiliation, do not attract compensation (see for example: *Knowles v. Minister for Defence* [2002] IEHC 39, *O'Connor v. Lenihan* [2005] IEHC 176, *Hegarty v. Mercy University Hospital* [2011] IEHC 435).[59]

O'Connor J did not explicitly consider whether the test in *Kelly v Hennessy* could bar recovery on behalf of the plaintiff in *Kaminsky*, and indeed went on to award the plaintiff €2,000 in damages.[60] The decision is interesting for two reasons. The first is its endorsement of the decision in *Collins* in a post-Directive context and in light of *Austrian Post*. The endorsement of *Collins*, in itself, is in turn an implicit endorsement of the application of the test in *Kelly* to data protection claims (and that decisions made under s 7 have continuing relevance) quite aside from the invocation of the Judicial Council Personal Injuries Guidelines. The second is the failure to define, either in their divergence or their interconnection, the relationship between actions for non-material damages under s 117 and Article 82–an issue which O'Donnell J would return to in his subsequent decision in *Dillon v Irish Life Assurance plc*.[61]

Dillon v Irish Life Assurance plc

In *Dillon v Irish Life Assurance plc* O'Donnell J was presented with a case in which the plaintiff asserted a claim for non-material damages on the basis of breach of statutory duty as provided by s 117 as a measure implementing the GDPR,[62] though no greater specificity in respect of pleadings was provided in the judgment.[63] The plaintiff in *Dillon* was the owner of a life assurance policy with the defendant company who, the plaintiff alleged, had negligently sent six letters containing his personal information to a third party without a legal basis.[64] As a result of this, the plaintiff claimed to have suffered 'distress, upset, anxiety, inconvenience, loss and damage' and sought, *inter alia*, 'damages for negligence and breach of duty.'[65]

[56] ibid [11.6].
[57] ibid. See, The Judicial Council, 'Personal Injuries Guidelines' (2021) 15 Those guidelines provide for a general damages band of €500-€15,000 for minor psychiatric injury in which cases, a full recovery will have been achieved, and only modest or no intervention was required in terms of treatment.
[58] *Kelly* (n 4).
[59] See, The Judicial Council (n 57) 14.
[60] *Kaminski* (n 3).
[61] *Dillon* (n 3).
[62] ibid [25]-[28].
[63] ibid [24].
[64] ibid [4].
[65] ibid [6].

O'Donnell J reaffirmed his articulation from *Keane* of the role of the PIAB Act 2003 and the Civil Liability Act 1961 in relation to breaches of data protection pursuant to the GDPR and provided welcome clarification in that regard.[66] His judgment is also significant for providing a series of further clarifications, and comments, in respect of claims for non-material damages in Irish law. The first, was the observation made by the judge that he was not entirely satisfied that a claim for non-material damages was entirely captured by s 117.[67] I certainly think that on a complete reading of s 117 this is correct–as I noted at the outset of this piece.

The second (related) observation made by O'Donnell J was that, building on his decision in *Keane*, the fact that a claim is made under the compensation provisions of the GDPR (rather than s 117 DPA) does not exclude a claim from the procedural requirement to obtain PIAB authorisation.[68] Nor did the Judge consider that such a procedural requirement presented any difficulty as a matter of EU law.[69] The requirement for PIAB authorisation does not establish a *de minimis* threshold for claims for non-material damages as prohibited by *Austrian Post* and, as O'Donnell J observed, as long as the principles of equivalence and effectiveness are observed, the requirement for a procedural pre-requisite should not be considered problematic.[70]

Finally, and perhaps most importantly for the purposes of this piece, O'Donnell J made several remarks in respect of awards of non-material damages for psychiatric injury. First, he noted that the definition of personal injury in Irish law includes any impairment of a person's mental or physical condition, bringing claims for psychiatric injury within the requirement for PIAB authorisation.[71] The plaintiff in *Dillon* had sought to argue that distress, upset or embarrassment in ordinary language cannot be described either as a '*disease*' or as an '*impairment of a person's physical or mental condition*' such that they fell within the requirement.[72] While O'Donnell J noted that the language used by the plaintiff could be understood as a kind of 'reflexive boilerplate pleading'[73] he emphasised that claims for damages based on worry, distress and of the kind pleaded by the plaintiff could be successful in tort only where they were established by reference to a recognisable psychiatric injury.[74] Interestingly, and somewhat confusingly, O'Donnell J went on to note that in the case before him 'the recoverability issue does not appear to arise where the claim is that the plaintiff suffered non-material damage as provided for by section 117 of the Data Protection Act 2018.'[75]

It is not clear precisely what O'Donnell J intended by this remark. The most obvious conclusion is that he meant to indicate only that in the case before him, the issue for decision was whether the matter required prior authorisation from PIAB (as he indeed went on to find), and not whether the damage alleged by the plaintiff could ground recovery of the sums sought.[76]

[66] ibid,[10].
[67] ibid [25].
[68] ibid,[26]-[28].
[69] ibid [29].
[70] ibid [29], [32]-[35]. In this respect, O'Donnell J noted that while requirement for PIAB authorisation may be 'cumbersome' it is a procedural pre-requisite applicable to all cases within certain categories.
[71] ibid [41].
[72] ibid [44].
[73] ibid [46].
[74] ibid [48] citing the recent decisions of the Court of Appeal and then Supreme Court in *Murray v Budds & ors* [2017] 2 IR 178.
[75] *Dillon* (n 3) [50].
[76] ibid [52].

Another conclusion, though it is not obvious on the face of the judgment in *Dillon*, and would seem to contradict earlier statements made in the decision, as well as in the decisions already discussed in this article, is that a s 117 action is a tort exempt from the test in *Kelly* either because it is not framed by reference to negligence specifically,[77] or because as a statutory tort it should be treated in a distinct manner. It is also worth noting that if either of these approaches were, or are, correct, it is not clear that the same logic could except the recovery of a claim of damages under Article 82 GDPR–raising issues both of equivalence and effectiveness in EU law.

Procedural Requirements to Claim

What emerges from the, admittedly limited, sample of decisions on this issue to date is a picture of an area of law whose broad parameters are defined–but in which much remains to be confirmed. The causation-led approach taken in *Austrian Post* is clearly in evidence–with a similar approach in evidence even from the decision in *Collins*. In *Dillon*, in particular, O'Donnell J was careful to emphasise that the requirement for PIAB authorisation is not a bar to recovery (and thus a *de minimis* threshold similar to those precluded by the CJEU in *Austrian Post*) but a procedural requirement for recovery. Nor, it appears, did the O'Donnell J consider that requirements to prove non-material harm by way of a medical report, were inconsistent with *Austrian Post*.

There may be some plaintiffs who seek to argue that the requirement for PIAB authorisation, and such reports, are prejudicial to the principles of equivalence and effectiveness under EU law. There is some argument (in light of the remarks by O'Donnell J in *Dillon* regarding the scope of s 117 in particular) that as Article 82 GDPR makes no provision for the precise character of the action through which it is directly enforced, it may be subject to different treatment to s 117 with the result that only a subset of non-material damages claims would be subject to the requirements of PIAB authorisation–thus raising an issue in respect of equivalence.

This is, however, speculative, and the likely result of O'Donnell J's reasoning is that, based on the nature of the injury and the wrong involved, direct Article 82 GDPR claims would be treated in the same manner as those made pursuant to s 117. There might, equally, be those who seek to argue that the requirement for medical reports as part of a PIAB process is a concern in respect of the principle of effectiveness–this, however, would be to conflate matters of proof, which are by their nature procedural, with substantive barriers to recovery.[78]

A broader consideration of the application of the principles of equivalence and efficacy to the system established by the decisions in *Keane* and *Dillon* is beyond the remit of this article.[79] What I wish to focus on here is, instead, the as yet unaddressed issue of the application of the test in *Kelly v Hennessy* to claims under Article 82 GDPR.

The applicability of the test is hinted at throughout the judgments considered above. In *Collins*, Feeney J remarked that rules in respect of recovery for certain tortious heads of damage–including damage for psychiatric injury or 'nervous shock'–apply to data protection claims under Irish law, given their characterization as torts. In *Kaminsky*, the judicial injuries

[77] Though it should be noted that s 7 was not defined by reference to an action in negligence either, but instead as a tort based on a violation of the duty of care without reference to the consequences of either a negligent or intentional breach of its requirement.
[78] In which respect see the decision in Case C-276/01 *Joachim Steffensen* EU:C:2003:228.
[79] See generally, Case C-66/95 *Sutton* EU:C:1997:207; Case C-231/96 *Edis v Ministerio delle Finanze* EU:C:1998:401.

guidelines which are referred to by O'Connor J note the test's application to claims for 'nervous shock' injuries of the type at issue in these cases, while in *Keane* O'Donnell J appeared to aver to the applicability of the test without considering it.

There has thus been no direct engagement, or none evident, from the reported judgments in these cases, with the compliance of the test in *Kelly v Hennessy* with the *dicta* of the CJEU which precludes a national rule or practice which makes compensation for non-material damage subject to a requirement that the damage suffered by the data subject reaches a certain degree of seriousness. This is the case even though, as the Supreme Court remarked in *Fletcher v Commissioner of Public Works*[80] in the absence of any specific statutory provision entitling the plaintiff to recover damages for psychiatric injury, the usual tortious principles as to liability must apply.

The Test in *Kelly v Hennessy*: Procedural v Substantive Barriers to Recovery

The Irish courts have, historically, been reluctant to permit recovery in respect of what came to be referred to as 'nervous shock' (and is now generally referred to as negligently inflicted psychiatric injury) on the basis that too broad, or too ready, a recognition of non-material harms of that kind might lead to 'a multiplicity of claims by plaintiffs taking unrighteous or groundless actions.'[81] This view has changed in recent times and recovery is now permitted for non-material harm pursuant to the tests established in *Kelly v Hennessy*[82] and, to a lesser extent, *Fletcher v Commissioner of Public Works.*[83]

These cases moved Irish law away from the traditional position that damages for non-material harm could be awarded only where there was a concurrent physical injury to the plaintiff.[84] However, the recovery permitted for such harms in the law of tort remains limited. There are two primary limitations which are particularly important in the context of this article. The first is the requirement that the non-material harm suffered by the plaintiff take the form of a 'recognised psychiatric illness' and, the second, is that the illness must (in general) follow from either an actual or apprehended injury to the plaintiff, or to a person 'close' to them which they have apprehended or which they come upon soon after its occurrence.

In *Kelly v Hennessy*, the plaintiff was informed by phone that her husband and daughters had been seriously injured in a road accident. The medical evidence subsequently provided in support of the plaintiff's claim established that she had suffered immediate shock on receiving the phone call which manifested in physical symptoms including vomiting and that she had been gravely affected by the scenes of her husband and daughters which she witnessed at the hospital resulting in ongoing post-traumatic stress disorder and serious depression.

The Supreme Court affirmed the view adopted by Lavan J in the High Court that the plaintiff was entitled to recover damages for the psychiatric injury she had suffered. Hamilton CJ

[80] [2003] 1 IR 465.
[81] Bryan McMahon and William Binchy, *Law of Torts* (Bloomsbury, 5th edn, 2013) [17.21].
[82] *Kelly* (n 4).
[83] *Fletcher* (n 80), 486.
[84] *Dillon* (n 3) [17.02].

delivered the judgment of the majority and outlined five requirements for a successful claim in such cases:

> 1. The plaintiff must establish that he or she actually suffered a recognisable psychiatric illness;
> 2. that illness must have been 'shock-induced';
> 3. that the shock must have been caused by the defendant's act or omission;
> 4. that shock must have been sustained by reason of an actual or apprehended physical injury to the plaintiff or a person other than the plaintiff and to whom the plaintiff was close. Recovery may also be permitted where the plaintiff comes upon the 'immediate aftermath'[85] of an accident causing such an injury to another person to whom they are close;[86] and
> 5. the defendant must have owed the plaintiff a duty of care not to cause him or her a reasonably foreseeable injury in the form of psychiatric injury or 'nervous shock' as opposed to personal injury in general.[87]

Denham J in a concurring judgment, emphasised the need for both relational and temporal proximity as between the plaintiff, and the other party who was injured if the physical injury or accident did not occur to or involve the plaintiff themselves. The test in *Kelly* has traditionally been presented by the Irish courts in a manner that suggests it represents the test for recovery of damages in cases of negligently caused, non-material harm. However, the reality of the test is that it presents criteria which go both to the recoverability of damage, but also the determination of whether there is a wrong in existence.

In this respect, Hamilton CJ noted at the outset of his analysis that it was the negligent infliction of a recognisable psychiatric injury following from shock which constituted the wrong for which recovery was sought.[88] In this respect, the first and second criteria outlined by the majority in *Kelly* are clearly directed to whether there was an actionable wrong, and the definition of that wrong. Indeed, Hamilton CJ specifically drew on the decision of the Australian High Court in *Jaensch v Coffey*[89] in which Brennan J defined the wrong at issue as a psychiatric illness which results either from a physical injury inflicted on him by the defendant or one induced by shock. Brennan J noted that psychiatric illnesses caused in other ways was not a recognisable tort and would attract no right to compensation,

> The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation: a parent made distraught by the wayward conduct of a brain damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child.

[85] *Kelly* (n 4) 261.
[86] ibid.
[87] ibid 258-259.
[88] *Kelly* (n 4) 258.
[89] (1984) 155 CLR 549.

The criteria of the test thus go to establishing whether a wrong which is capable of recognition is present, with the court undertaking an assessment of what damages, if any, are to be paid once these criteria have been established.

In considering the application of the test in *Kelly* to data protection claims, the first, second, third and fifth elements of this test could, in principle, be established where the plaintiff's data protection rights were breached as a result of an act or omission of the defendant, and they suffer a shock, and that any resulting non-material harm was reasonably foreseeable. The more problematic aspect of the test is fourth element which requires the existence of a recognised psychiatric injury and a shock which flows from the circumstances outlined in that element of the test.

Recognised psychiatric illness

The extent of the restrictions imposed by the test in *Kelly v Hennessy* has been exposed in the decisions in three cases namely, *O'Connor and Anor v Lenihan*,[90] and *Courtney v Our Ladies Hospital and Others* and *Larkin v Dublin City Council.*[91]

In *O'Connor and Anor v Lenihan* the plaintiffs were the parents of two infant children who had died during delivery and whose organs were retained by the defendant without the permission of the plaintiff parents. The plaintiffs sought damages for the 'anger, upset and grief' they experienced on discovering the retention. Peart J, in the High Court, dismissed the case on the basis that he was unable to discover from any of the medical evidence given 'any recognised psychiatric illness' suffered by the plaintiffs. This is to be contrasted with the decision in *Courtney v Our Ladies Hospital and Others,*[92] in which the plaintiff successfully claimed damages for the intense shock' and subsequent depressive illness she experienced after witnessing her infant daughter's rapid deterioration and death from undiagnosed meningitis following the negligent care provided by the defendant.

There can be little doubt, examining the decisions of the High Court in both cases, that generalised stress, distress or anxiety without medical evidence that they represent a, or a part of a, recognised psychiatric injury will not be successful before the Irish courts. This is illustrated still more precisely by the decision in *Larkin v Dublin City Council* in which the plaintiff sought damages for the 'undoubted upset, humiliation, sensitivity and disappointment' that he experienced after being told, in error, by his employer that he had been promoted only to be subsequently informed he had received no promotion. Clark J in the High Court found that no recognisable psychiatric condition had been established.

What is immediately striking from these decisions is that the judgment in *Kaminsky* appears to fly in the face of the well-established test in *Kelly*–a test which has been rigorously applied to cases involving far more serious factual basis for distress (see *O'Connor*, *Courteney*), as well as very similar ones (see, *Larkin*). Arguably, the same conclusion is harder to draw in *Keane* and *Dillon*, as the court was concerned with a dismissal on the basis of the failure to obtain PIAB authorisation and did not consider the merits of the claims themselves–but a similar problem would appear to obtain on the basis of the facts provided in both judgments.

[90] [2005] IEHC 176.
[91](n 38).
[92] *Courtney v Our Lady's Hospital & Ors* [2011] 2 IR 786.

The result of this first step in the *Kelly* test is that generalised stress, anxiety or some other general distress or concern is not recoverable. While this does not impose an immediately obvious *de minimis* threshold it does have the effect, albeit indirectly, of classifying some kinds of damage as less serious, and of excluding the possibility of compensation for such harm. On that basis, there is reason to think that the test is not in compliance with the criteria established in *Austrian Post*.

Actual or apprehended physical injury to the plaintiff or a person close to them

A significant concern in applying the test in *Kelly* to non-material damages claims under s 117 or Article 82 is the requirement detailed in the fourth point of the test outlined by Hamilton CJ that for recovery to follow the non-material harm must result from an actual or apprehended *physical* injury to the plaintiff or a person close to them.

This would seem to exclude an overwhelming majority of claims for non-material damages in data protection claims on the basis that they have, to date, been in a form where no physical injury has been suffered or apprehended. In this respect, even the facts of *Keane,* would not satisfy this requirement as the physical harm of an exacerbation of the plaintiff's psoriatic arthritis was not the cause of the shock but a symptom of it.[93]

On the basis of the fourth aspect of the test in *Kelly*, there would thus appear to be a substantive bar not only to non-material damages claims that fall below a certain threshold of seriousness but also a more general barrier to recovery full stop and, as such, an issue in respect of the principle of effectiveness in EU law, and arguably the related right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union. The other, albeit unlikely, result of this limb of the test to data protection claims would be that it simultaneously limits (quite significantly) the claims which may succeed to those where an actual or apprehended injury is present while also expanding recovery to cases in which the injury is not to the plaintiff data subject but to another person related to them who apprehends or comes upon the context of their injury. While it is hard to conceive of the facts, in a data protection action, where this might occur it is nonetheless a further inconsistency with the decisions of the CJEU which have limited recovery thus far to actions by data subjects in respect of their own rights.

Recovery based on reasonable foreseeability

Subsequent to *Kelly*, in *Fletcher v Commissioner of Public Works,* the Supreme Court reaffirmed the application of the test provided in *Kelly* but provided an additional and significant qualification. In *Fletcher*, the plaintiff came in contact with asbestos in the course of his employment, as a result of the negligence of his employer who knew of the presence of the material, and the dangers associated with exposure to it. The plaintiff subsequently learned of his exposure and was advised by a doctor that while there was no evidence that he had

[93] The decision in *Keane* does however have the advantage of showing that the action of the defendant had caused both physical and a non-material harm (in the form of the exacerbation of the plaintiff's psoriatic arthritis) such that the claim might be brought within the 'normal' rules for recovery and outside the test in *Kelly*.

contracted asbestosis or lung cancer he was at 'very remote' risk of developing mesothelioma later in life. The plaintiff, on learning of this, developed 'reactive anxiety neurosis.'[94]

The High Court noted that although the plaintiff's fear of developing mesothelioma later in life had no reasonable basis, it was nevertheless genuine and made an award of damages on that basis. This was overturned by the Supreme Court on appeal. The court found that a defendant could be liable only for a psychiatric injury which was reasonably foreseeable as flowing from their negligence in a special context. Keane CJ also noted the undesirability of permitting an award of damages for an unfounded fear, and the implications for both medical providers and the courts were the rules of recovery to be relaxed.[95]

This, then, would seem to impose some limit on the recoverability of damages in cases where the plaintiff in a data protection case makes an assertion in respect of a non-material harm which while possible is so remote as to be almost hypothetical or which is not 'well founded.' Certainly, this would seem align with the articulations of recoverable harm in the CJEU's decisions in Case C-340/21 *VB v Natsionalna agentsia za prihodite*[96] and, more recently, Case C-687/21 *BL v MediaMarktSaturn*.[97]

Conclusion

That the test in *Kelly v Hennessy* is applicable to cases of non-material damage under Article 82 GDPR, and s 117 DPA 2018 has not, to date, been explicitly confirmed by the superior courts and yet, its application is always implied–if never expressly stated. The language of s 117, as well as the references to the conceptualisation of data protection actions, and the tortious limits of such actions made throughout the (admittedly limited) case-law to date all establish that the test is, in principle, applicable to such claims.

If it is the case that the tortious action envisioned by s 117 and, apparently, applicable to Article 82 GDPR is not governed by or subject to that test it is not evident from the caselaw to date. The result is that any reader must conclude that either the test is applicable (and is not being consistently applied, as *Kaminsky* demonstrates) or that a new tortious standard has been established but that this is nowhere articulated.

If the latter is the case, it raises profound questions for the broader treatment of non-material harm in Irish tort law. If the general distress, anxiety or stress suffered by a data subject on foot of a data breach is recognisable–and remediable–it is hard to justify the continued exclusion from recognition or compensation of claims such as those made by the plaintiffs in medical negligence cases for example. It may be that this episode in Irish tort law could support a movement away from the test in *Kelly* more broadly– and towards an approach similar to that adopted by the Supreme Court of Canada in *Saadati v Moorhead*.[98]

If the former is the case, the pending appeal in *Dillon* may provide some clarity, though given the particular facts of the case, it is unlikely that the superior courts will have an occasion to consider the matter in anything beyond an obiter context. Clarity is, however, badly needed. On a straightforward reading of the test in *Kelly v Hennessy*, its requirements would exclude a significant number of data protection claims for non-material damage. The result, I would

[94] Fletcher (n 80).
[95] ibid 471.
[96] (n 2).
[97] (n 2).
[98] *Saadati v Moorhead* 2017 SCC 28.

argue, is that the test itself may present a barrier to claims which is contrary to the decisions in *Austrian Post* and *VX v Gemeinde Ummendorf* and frustrates the principle of effectiveness of EU law and, arguably, the right to an effective remedy under Article 47 CFREU.