

# 3,000 cases worth up to €2.6bn

INCIDENT/HAZARD CATEGORY	NUMBER OF ACTIVE CLAIMS
Clinical Care	3,163
Crash/Collision	487
Exposure to behavioural hazards	1,393
Exposure to biological hazards	257
Exposure to chemical hazards	275
Exposure to physical hazards	2,147
Exposure to psychological hazards	2,514
Property damage/loss	202
Unknown	9

**GRAND TOTAL**  
**10,447**

of the SCA will today appear before the Dáil's Public Accounts Committee (PAC) which is looking into the CervicalCheck controversy.

Last night PAC chairman, Fianna Fáil TD Seán Fleming, said the committee will question the SCA on why the associated legal costs for clinical claims are "five times greater" than those for

general claims, given the vast majority are resolved outside the courts.

The SCA previously told the PAC it was dealing with cases where estimated liabilities totalled more than €2.6bn at the end of 2017.

Almost €2bn of this sum related to the 2,976 active claims in clinical cases at the time.

In a letter to the PAC earlier this year, the SCA said its approach to managing such claims is guided by the principle that "where it is just and proper, people who have suffered a personal injury as a result of a clinical negligence event must be compensated appropriately and as quickly as the circumstances of their cases permit".

Mr Breen said the SCA deals with plaintiffs and their families who in many instances have "suffered enormous trauma and pain" and the organisation is conscious that it has "a duty to act fairly, ethically and with compassion in all its dealings".

He added it must ensure no one is under-compensated but no one is over-compensated.

## 'Bombshell' on cancer audit was known by health officials for years

Kevin Doyle

THE 'bombshell' that only half of cervical cancer cases were subjected to a routine audit was common knowledge in the HSE for years, it has emerged.

Health Minister Simon Harris stunned the Dáil last week when he revealed that the National Cancer Registry of Ireland (NCRI) was not sharing data with CervicalCheck.

As a result some 1,500 cases were excluded from a review process which is used to establish whether women were the victims of a delayed diagnosis.

Mr Harris was only told of the issue 20 minutes before taking to his feet for a Dáil debate on the scandal which has engulfed the country for the past fortnight.

But it has now emerged that CervicalCheck, which is under the control of the HSE, knew it was not gathering information on all cases.

The lack of communication between the service and the NCRI is being blamed on a "data protection issue" which was quickly resolved after the controversy erupted.

The HSE's Serious Incident Management Team (SIMT) is still working its way through the 1,500 files to decide whether any of the cancer sufferers were given inaccurate smear test results.

The HSE's director general Tony O'Brien confirmed there was "knowl-

edge within CervicalCheck that it was not receiving NCRI data".

"They were aware that the numbers they audited only included those cancers which had been notified to CervicalCheck through its own process which relates to gynaecology clinics and colposcopy clinics," Mr O'Brien said.

The HSE chief admitted that when the crisis erupted in the wake of Vicky Phelan's court settlement an "understanding was given" that all cases of cervical cancer were audited.

However, in reality audits were only carried out in 1,482 cases which was less than half the incidences of cervical cancer in Ireland over the past decade.

Pressed by Labour TD Alan Kelly as to how long CervicalCheck would have been aware that it was not auditing all cases, Mr O'Brien replied: "I think they always knew that."

Mr Harris told the Oireachtas Health Committee yesterday that it was "bizarre" that the two bodies were not sharing information.

"This is the body that knows all about all the types of cancer in this country and the learnings that can be learned from that.

"How we ever got to a situation where one of our cancer screening programmes did not get its data from there, seemed to tell some people that it did get its data from there, and this seems to go on for years and years and years, is beyond me," he said.

## Why minister should first check up on contract law if axe is to fall on O'Brien

Anne O'Connell  
Analysis



THE recent controversy in relation to the smear test scandal has led to demands that the Health Minister dismiss the director general of the HSE, Mr Tony O'Brien.

Mr O'Brien has held the office of director general of the HSE for two three-year terms. In March 2018, he announced that he was not going to seek to apply for a new contract. Therefore, he will cease to hold office at the end of July 2018 irrespective of anything that happens in relation to the smear test scandal.

If Mr O'Brien was the chief executive of a private-sector business and his employer did not want him to work out the balance of his term then the obvious way to proceed would be terminate Mr O'Brien's contract without cause by paying him the balance of his entitlements under the contract.

Employment contracts – even contracts for a fixed term – invariably provided for termination "for good reason, bad reason or no reason at all" on the giving of notice. They also typically provide for payment in lieu of notice. This type of dismissal is called a "no-fault" dismissal.

Where an employer exercises the right to terminate on the giving of notice and provide that the employer makes it clear that the termination is not for cause then an employee has little or no recourse other than bringing a claim for unfair dismissal. An employee on a fixed-term contract – such as Mr O'Brien – has even less options.

In the hypothetical 'private-sector' scenario outlined above, by paying Mr O'Brien the balance of

his remuneration under his contract and by making clear that the dismissal was not for cause, a private sector employer could send Mr O'Brien home now with no exposure to legal risk.

It is important to note that there are cases that say that an employee who is "no faulted" cannot bring court proceedings on the basis that the real reason for his or her dismissal was misconduct and that he or she is therefore entitled to fair procedures.

The Courts have said they will not interrogate the motivation for the dismissal provided the stated reason is that it is not for cause.

### The precise status of individuals in his position is a complex question

The problem for Health Minister Simon Harris is that the demands to dismiss Mr O'Brien are based upon the proposition that he bears culpable responsibility for the smear test scandal and should therefore be punished. Dismissing Mr O'Brien on that basis is not compatible with the conservative and risk adverse "no-fault" approach explained above.

Under the relevant legislation, Mr Harris may at any time remove the director general from office for a number of stated reasons which include a situation if – "in the minister's opinion" – the director general has "committed stated misbehaviour" or if it "appears to the minister to be necessary for the [HSE] to perform its functions in an effective manner" or if he "has consistently failed to have regard to the requirements in relation to

his or her functions under this act."

Relying upon any of these grounds as a ground for dismissing Mr O'Brien would expose the Health Minister to the risk of court proceedings in which it would be inevitably alleged that Mr O'Brien is being dismissed for misconduct and is therefore entitled to fair procedures.

The precise status of individuals in the position of Mr O'Brien – whether they are employees or "office holders" – is a complex question as is the extent to which the powers given to the minister can be the subject of challenge or review.

However, in the famous case of *Garvey v Ireland*, the Supreme Court found that the commissioner of An Garda Síochána – a pure office holder who served at the will of the minister – was entitled to fair procedures where he was being dismissed for cause.

IN conclusion, given that Mr O'Brien is going to be finishing work at the end of July 2018 it makes little or no sense for the minister to go down the road of attempting to dismiss him for cause.

It might also be observed that in Ireland there is no established culture of executives accepting corporate responsibility for failures that occur "on their watch" even if they are not personally implicated in them.

It is often said that this is particularly the case where the executive in question is a government minister.

This feeds into the analysis set out above, ie that dismissing somebody in the position of Mr O'Brien in the teeth of a scandal and public outrage is equivalent to firing somebody for wrongdoing without giving them the benefit of a fair hearing.

Anne O'Connell is a Dublin-based solicitor specialising in employment law

HSE chief Tony O'Brien does not expect huge interest in his job when he finishes

## kind of 'no confidence'

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Mr Donnelly has proposed Mr O'Brien stand aside 'without prejudice' – a sort of voluntary no-fault exit

In March 2017, when details of one million falsified driver tests emerged, Fianna Fáil leader Micheál Martin called on then Garda commissioner Nóirín O'Sullivan to "consider her position".

But when the Opposition parties tabled a motion of no confidence in then-commissioner O'Sullivan, Fianna Fáil did not support it.

Its justice spokesman Jim O'Callaghan excelled himself in explaining that it was

wrong of any party to target any individual for removal from office. It would create a lamentable precedent, Mr O'Callaghan argued.

So, these differing shades of "no confidence" mean Mr O'Brien will see out the tail end of his seven-year term.

"I respectfully decline your invitation to resign," he told the Health Committee yesterday.

Any wonder the man himself could gently but firmly refuse calls on him to resign.