

Section 3.39 "Necessary Modification" Guidelines

How to use these Guidelines

Section 3.39 of the *Motor Accident Injuries Act 2017 (MAIA)* mandates that the Mental Harm provisions in Part 3 of the *Civil Liability Act 2002 (CLA)* apply to the payment of statutory benefits under MAIA in the same way they would apply to an award of damages, "subject to any necessary modifications and to any modifications prescribed by the regulations".

Clause 8 of the Regulations specifically modifies s 30(3) of the CLA to work in the statutory benefits arena. Otherwise, stakeholders are required to use their own judgment in deciding how the provisions in Part 3 of the CLA should be "necessarily modified" to apply to statutory benefits claims.

These Guidelines represent an attempt to apply "necessary modifications" to Part 3 of the CLA so that they apply to claims for statutory benefits. Pending guidance from the Courts or the Dispute Resolution Service, they are Guidelines only and do not represent decided law.

Section 29 CLA

Original Text:

In any action for personal injury, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock

Suggested Modification:

In any claim for statutory benefits, the injured person is not prevented from recovering statutory benefits merely because the personal injury arose wholly or in part from mental or nervous shock

Section 30 CLA

Original Text:

- (1) *This section applies to the liability of a person (**the defendant**) for pure mental harm to a person (**the plaintiff**) arising wholly or partly from mental or nervous shock in connection with another person (**the victim**) being killed, injured or put in peril by the act or omission of the defendant.*
- (2) *The plaintiff is not entitled to recover damages for pure mental harm unless:*
 - (a) *the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or*
 - (b) *the plaintiff is a close member of the family of the victim.*
- (3) *Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.*
- (4) *No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.*

(5) In this section:

close member of the family of a victim means:

- (a) a parent of the victim or other person with parental responsibility for the victim, or
- (b) the spouse or partner of the victim, or
- (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
- (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

spouse or partner means:

- (a) the person to whom the victim is legally married (including the husband or wife of the victim), or
- (b) a de facto partner, but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

Suggested Modification:

- (1) This section applies to the liability of the relevant insurer for pure mental harm to an injured person arising wholly or partly from mental or nervous shock in connection with another person (**the victim**) being killed, injured or put in peril by a motor accident.
- (2) The injured person is not entitled to recover statutory benefits for pure mental harm unless:
 - (a) the injured person witnessed, at the scene, the victim being killed, injured or put in peril, or
 - (b) the injured person is a close member of the family of the victim.
- (3) Any statutory benefits payable to the injured person for pure mental harm are to be paid in the same way as any statutory benefits may have been paid to the victim on the basis of the contributory negligence of the victim, such that:
 - (a) if the victim was not at fault, then the injured person is entitled to statutory benefits beyond 26 weeks (subject to other statutory limitations);
 - (b) if the victim was mostly at fault for their death or injury, the injured person is not entitled to statutory benefits beyond 26 weeks; and
 - (c) if the victim was partially at fault – but not mostly at fault – then the injured person's statutory benefits beyond 26 weeks will be reduced by the extent of the victim's contributory negligence.
- (4) No statutory benefits are to be paid to the injured person for pure mental harm if the payment of statutory benefits by the relevant insurer by or through the victim in respect of the accident would be prevented by any provision of this Act or any other written or unwritten law
- (5) In this section:

close member of the family of a victim means:

- (a) a parent of the victim or other person with parental responsibility for the victim, or
- (b) the spouse or partner of the victim, or
- (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
- (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

spouse or partner means:

- (a) the person to whom the victim is legally married (including the husband or wife of the victim), or
- (b) a de facto partner, but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

Section 31 CLA

Original Text:

There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

Suggest Modification:

There is no liability to pay statutory benefits for pure mental harm resulting from an accident unless the harm consists of a recognised psychiatric illness.

Section 32 CLA

Original Text:

- (1) *A person (**the defendant**) does not owe a duty of care to another person (**the plaintiff**) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.*
- (2) *For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:*
 - (a) *whether or not the mental harm was suffered as the result of a sudden shock,*
 - (b) *whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,*
 - (c) *the nature of the relationship between the plaintiff and any person killed, injured or put in peril,*
 - (d) *whether or not there was a pre-existing relationship between the plaintiff and the defendant.*
- (3) *For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.*
- (4) *This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.*

Suggested Modification:

- (1) *The relevant insurer is not liable to pay statutory benefits to an injured unless a person of normal fortitude might, in the circumstances of the accident, have suffered a recognised psychiatric illness.*
- (2) *For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:*
 - (a) *whether or not the mental harm was suffered as the result of a sudden shock,*
 - (b) *whether the injured person witnessed, at the scene, a person being killed, injured or put in peril,*
 - (c) *the nature of the relationship between the injured person and any person killed, injured or put in peril,*
 - (d) *whether or not there was a pre-existing relationship between the injured person and any driver responsible for the accident.*
- (3) *For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the injured person.*
- (4) *This section does not require the Dispute Resolution Service to disregard what any driver responsible for the accident knew or ought to have known about the fortitude of the injured person.*