CITATION: Barkley v. Sloan et al, 2025 ONSC 6057
COURT FILE NO.: CV-16-57260
DATE: 2025/10/27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ALEXA BARKLEY	)	J. Cavanaugh and O. Sant, for the Plaintiff
Plaintiff	)	
– and –	)	L. Covens and T. Sood, for the Defendants
PATRICK SLOAN and FERGUSON BARRISTERS LLP	)	
Defendants	)	**HEARD:** October 7, 8, 9, 10, 11, 15, 16, 17, 18, 21, 22, 23, 24, 28, 30, November 4, 5, 7, 8, 12,14, 2024 February 14, March 9 and April 29, 2025

REASONS FOR JUDGMENT

THE HONOURABLE MR. JUSTICE R. J. NIGHTINGALE

[1] The plaintiff Alexa Barkley claims damages against the defendants her former lawyers Patrick Sloan and Ferguson Barristers LLP. She alleges that their negligence and breach of contract resulted in the improvident settlement on May 12, 2014 of her claims for accident benefits payable pursuant to the *Statutory Accident Benefits Schedule-effective September 1, 2010, O.Reg.34/10* (" *SABS")* because of her injuries sustained in a motor vehicle accident of November 14, 2012.

[2] As a result, she claims damages for her mental distress and lost opportunity to:

a) receive income replacement benefits,

b) receive other significantly enhanced accident benefits as she would likely have been able to be designated catastrophically impaired after the settlement from approximately September of 2016 to 2017 and

c) settle her accident benefits claim for a significantly higher sum on the basis that the accident benefits insurer would have had significant exposure to those substantially enhanced benefits because of her potential catastrophic impairment.

[3] Mr. Sloan denies that he was negligent or breached his retainer agreement and he denies that Ms. Barkley sustained any significant damages in any event including loss of opportunity damages.

Factual Background

[4] Ms. Barkley and her spouse Scott Barkley purchased a trailer hitch and had it installed on their minivan for their family's camper trailer. Ms. Barkley then attended at the residence of the vendor of the trailer on November 14, 2012 who showed her how to attach the trailer to the hitch.

[5] Ms. Barkley left with the trailer on her way back home. Unfortunately, while driving, the trailer started to violently sway back and forth striking the rear and side of her vehicle. Ms. Barkley had significant difficulty maintaining control but was able to pull over to the side of the road where she saw the damage to her vehicle and trailer hitch.

[6] She did not believe she was injured but was very upset emotionally. After the trailer was removed by a tow truck, she drove for a short time but stopped and called her spouse to pick her up because she was panicking and not able to drive any further.

[7] Ms. Barkley stated that that night she experienced loss of sleep and nightmares but and did not immediately seek medical help. Ms. Barkley stated that she had some muscle aches and tension immediately after the accident but was not initially worried about the pain.

[8] She was able to maintain her work from her home as a self-employed chartered accountant doing tax returns for individuals and small businesses and corporate bookkeeping. Shortly before the accident, she was working without physical limitations an average of 30 to 40 hours per week and was fully functional.

[9] Ms. Barkley negotiated directly with her insurer Belair Insurance Company Inc. ("Belair") and resolved the property damage claims for her vehicle and trailer on the basis that she was not at fault for the accident. Ms. Barkley and her spouse also initially investigated their potential tort claim and together handled their accident benefits claims with Belair reporting to Belair that Ms. Barkley had suffered no injuries.

[10] On January 11, 2013, Ms. Barkley noted she was unable to move her neck because of her tension. She reported from nausea, dizziness, numbness and tingling in her left arm, finger and face. She sought treatment from her family doctor and began physiotherapy and chiropractic treatment. Shortly after she attended at Credit Valley Hospital's emergency department with complaints and numbness in her face and left arm. Her family doctor referred her to a physiatrist and she was subsequently referred to a neurologist Dr. Shandling because of continuing tingling and numbness.

[11] Ms. Barkley stated that her medical condition continued to deteriorate. It affected her ability to work from January to March 2013 as she found it difficult to focus because of her pain and arm going cold. Nevertheless, she continued to work at reduced hours.

[12] She stated that she had no experience with motor vehicle accident claims or accident benefits including in her job. She completed her application for accident benefits herself on January 14, 2013. Belair paid for the initial physiotherapy and chiropractic treatments.

[13] Ms. Barkley admitted she received and read an accident benefits package of materials from Belair which contained an explanation of all available benefits to her and that she had read the entire document. That package included information with respect to applying for accident benefits, catastrophic impairment designation, income replacement benefits ("IRBs"), medical/rehabilitation, attendant care ("ACBs") and housekeeping benefits.

[14] The package also contained an explanation of the "incurred" requirement for medical/rehabilitation, ACBs and housekeeping benefits and an explanation of the various limits of benefits payable under both catastrophic impairment and non-catastrophic impairment categories.

[15] That explanation included the maximum medical/rehabilitation benefits amount of $3,500 for a Minor Injury Guideline ("MIG") category, $50,000 over 10 years for a non-MIG, non-catastrophic category and significantly increased benefits for catastrophic impairment injuries of $1 million for incurred ACBs, $1 million in medical/rehabilitation costs, lifetime housekeeping benefits and IRBs.

[16] While Ms. Barkley stated that she did not do any other formal research regarding accident benefits before retaining Mr. Sloan, I am satisfied that she was also provided with some information regarding her entitlement to accident benefits from her treating psychologist Dr. Bautz and from her spouse who stated that both he and Ms. Barkley did do some research online about how accident benefits work of which I conclude she would have been aware. Both of them were involved initially and were aware of each other's handling and communicating with Belair regarding Ms. Barkley's accident benefits claims.

Barkley/Sloan Telephone Call February 26, 2013

[17] Ms. Barkley stated they did not have any treatment plan denials but were looking for legal help regarding how to deal with Belair. She called Mr. Sloan's firm on February 26, 2013 on a referral from her family lawyer.

[18] Mr. Sloan was in his fourth year of law practice with a firm which worked mostly in personal injury including motor vehicle tort claims and accident benefits claims. Mr. Sloan stated he had some catastrophic impairment based files by that time. He did not know whether he had dealt with a file where it was disputed whether or not a plaintiff was catastrophically impaired.

[19] There is some variance in the evidence of Ms. Barkley and Mr. Sloan before and at the mediation settlement of May 12, 2014.

[20] Ms. Barkley indicated that her first contact with Mr. Sloan was a telephone call where she and Scott set up the date for Mr. Sloan to come and meet them. Initially, she did not provide any details of that call in her evidence.

[21] In cross-examination she admitted she did not recall much from that call as it was 11 years ago. She could not remember if it was a long telephone call. She admitted that accident benefits were discussed but was not sure if the types of benefits available including medical/rehabilitation, ACBs, IRBs, catastrophic impairment, noncatastrophic and MIG were also discussed.

[22] Mr. Sloan's evidence based on his memory, dockets, notes and his standard practice was clear that that telephone call of February 26, 2013 lasted for approximately one hour wherein they discussed how the accident occurred and what if any injuries Ms. Barkley sustained. He said Ms. Barkley told him she was fine and did not have any symptoms for about two months after.

[23] He then explained her rights including a potential claim against whoever might be at fault, the limitation period and categories of tort compensation.

[24] Mr. Sloan explained her entitlement to no-fault accident benefits. They discussed the various benefits available including medical/rehabilitation, IRBs and ACBs as well as the levels of benefits including MIG, non-MIG or non-catastrophic and the higher level of benefits under the catastrophic based category increasing to $1 million for medical/rehabilitation expenses for life if catastrophic. They then discussed how he could help either in a contingency agreement or general retainer agreement.

[25] Ms. Barkley did not dispute Mr. Sloan's evidence regarding their having those detailed discussions in that initial lengthy telephone call. Her spouse Scott has no recollection of the contents of that call. I accept Mr. Sloan's evidence regarding that initial telephone call.

Barkley/Sloan Meeting – March 14, 2013

[26] Ms. Barkley contacted Mr. Sloan's office to arrange a meeting with her and Mr. Barkley at their residence on March 14, 2013. They advised him of her progress and were looking to him for information as to how to get Ms. Barkley out of the MIG which restricted her treatment funding to only $3,500 and unlock more funding for her treatment. Mr. Sloan explained that if there were pre-existing issues or if her physical and mental state was severe enough, she could be removed from the MIG.

[27] Ms. Barkley stated that they also reviewed with Mr. Sloan her potential tort claim for her injuries and damages sustained against the manufacturer and retailer of the trailer hitch. Mr. Sloan explained to the Barkleys he would act

on a contingency fee basis under which the Barkleys understood they would be ultimately responsible for the disbursements.

[28] Ms. Barkley admitted that at this initial meeting Mr. Sloan explained the process of claiming accident benefits and the different categories of the potential *SABS* claims including for MIG, non-MIG and catastrophic impairment type injuries. Mr. Sloan also explained the maximum dollar amounts available to her under each category of the *SABS*. Ms. Barkley believed Mr. Sloan also explained the tests for each category and what potentially would be required to get her into the category of catastrophic impairment.

[29] Mr. Sloan made detailed notes of that meeting. His evidence was that he had a vivid memory of that meeting. He confirmed that in that meeting, which lasted for several hours, he discussed many aspects of Ms. Barkley's claims for accident benefits including her entitlement to IRBs, medical/rehabilitation benefits, the need for treatment plans before treatment occurs, her right to dispute the insurer's denial and the litigation process that might ensue thereafter. They also discussed the potential tort claim.

[30] Mr. Sloan stated he also explained the potential of significantly increased benefits for people who sustain catastrophic impairment injuries including by way of quadriplegia, paraplegia, severe brain injuries, severe psychological based injuries or 55% whole person impairment ("WPI") after an assessment which he did not see was applicable to her but was not impossible.

[31] Mr. Sloan stated that he explained the assessment process for determining the 55% WPI threshold. He advised her that she did not want to resolve her case until, in his words, she had a better handle of what her future entailed because once her case was resolved, she could not open it back up again.

[32] Ms. Barkley admitted and accordingly knew after that initial meeting with Mr. Sloan that a fairly substantial percentage of her body had to be affected before the catastrophic impairment category would come into play for her.

[33] Mr. Barkley has no memory of that first meeting discussions with Mr. Sloan.

[34] Although Ms. Barkley stated in that meeting they did not discuss the procedure required to apply for catastrophic impairment, for the reasons noted below regarding the credibility and reliability of the evidence of Ms. Barkley and Mr. Sloan of their conversations throughout his retainer, I accept that there

was at least a general discussion of that required assessment process under the *SABS* although perhaps not all the specific details.

[35] Mr. Sloan described the Barkleys as knowledgeable, sophisticated people asking good questions but admitted he did not know if they had any previous experience in dealing with accident benefits claims.

[36] Mr. Sloan's evidence confirms that in that meeting, as was his standard practice at the time, he discussed the nature and details of her injuries and her potential tort claim for damages. He stated that Ms. Barkley again told him that it was on January 13, 2013 when she first started to experience physical symptoms of pain, whiplash, pain between her shoulder blades and down her left arm and numbness after the November 12, 2012 accident. Ms. Barkley did not deny telling him that.

[37] Ms. Barkley admitted that her physiotherapist on February 11, 2013 had completed a *SABS* OCF-3 confirming that Ms. Barkley was not substantially unable to perform the essential tasks of her employment at the time of the accident and that although she was experiencing pain, she could return to work on modifying hours and/or duties.

[38] Ms. Barkley admitted that Mr. Sloan also explained that IRBs were available to her under the *SABS* but stated they did not discuss eligibility, how to apply for them or what losses had to be incurred in order to be entitled to them. Mr. Sloan did not deny that in his evidence.

Sloan's Retainer – March 22, 2013

[39] Ms. Barkley then contacted Mr. Sloan to retain him to act for her on a contingency fee arrangement for both her potential tort claim for her injuries sustained and also her claims for accident benefits against Belair. Mr. Sloan sent the Barkleys his letter dated March 19, 2013 confirming his firm's retainer and attached a contingency fee agreement which she signed and returned on March 22, 2013. The agreement appears to refer only to Ms. Barkley's claims in tort actions commenced in this court but nothing specifically with respect to her accident benefits claims.

[40] Mr. Sloan's firm started investigating the tort claim, requested medical records in the accident benefits file and assisted Ms. Barkley in obtaining documentation of her psychological issues to get her out of the MIG.

[41] The Barkleys continued to deal directly with Belair regarding her submission and its approval of her treatment plans and expense claims forms with supporting invoices. The Barkleys kept Mr. Sloan and his office updated with respect to her continued medical and health concerns and claims for benefits against Belair. Scott also communicated with Belair directly regarding its position of the disputed benefits payable to Ms. Barkley.

[42] Before the May 12, 2014 mediation, Ms. Barkley admitted she received and read nine OCF-18 responses from Belair which clearly set out the dispute resolution process under the *SABS* with respect to her claims for expenses and benefits under the policy. That process, if she wished to dispute Belair's denial of her claim, required her to first apply for mediation of the denial of the claim and then proceed with either arbitration or litigation available at that time if mediation failed to resolve the outstanding issues.

[43] Mr. Sloan had also provided that information by email directly to her on July 15, 2013.

Sloan's IRBs Advice

[44] By March 2013, Ms. Barkley stated she was only working part time as she was unable to work full-time. Just prior to Mr. Sloan's formal retainer, Belair had requested detailed financial documents from her in order that its accounting firm could calculate her potential entitlement to IRBs.

[45] Ms. Barkley emailed Mr. Sloan on May 3, 2013 and told him she understood that as she was still making more than $400 a week in her self-employed accounting business, she was not eligible to receive IRBs even if she lost $1,000 of income. She stated that she believed it was likely Mr. Sloan who had initially told her that. She advised Mr. Sloan that she did not think it made sense to pull together, in her words, the "ridiculous amount of information" but said Belair needed her advice in writing that she would not be pursuing her lost wages claim. Ms. Barkley wanted Mr. Sloan to confirm that was okay.

[46] Mr. Sloan immediately confirmed by email of May 3, 2013 that she was not entitled to IRBs as she was entitled to receive 70% of her earnings to a maximum of $400 per week. He advised her to send the letter to Belair confirming she was not claiming IRBs as her income, although less now, likely disqualified her from this benefit.

[47] Ms. Barkley did so. Belair emailed Ms. Barkley that although she was eligible to receive IRBs because she suffered a substantial inability to perform the essential tasks of her occupation, her IRBs has been ceased based on their mutual agreement.

[48] Mr. Sloan admitted at trial that he thought Ms. Barkley was earning too much money after the accident to qualify for IRBs but that he was wrong in his advice to her.

[49] I will comment further on this allegation of Mr. Sloan's breach of the required standard of care when he gave that incorrect advice to her.

Barkley's Medical Condition as of May 12, 2014 (the Date of the Settlement)

[50] A review of Ms. Barkley's medical condition at the time of the settlement is in order. It is relevant to Mr. Sloan's knowledge and the standard of care expected of him including how he should have advised her regarding the potential settlement of her accident benefits claims.

[51] Belair rejected a physiotherapy treatment plan submitted by Ms. Barkley in May 2013. Ms. Barkley then advised Mr. Sloan in writing that her pain had taken a turn for the worse and she was coping poorly with her pain and mental health struggles. Ms. Barkley and Scott were asking Mr. Sloan questions but were essentially dealing with Belair themselves.

[52] In a telephone call between Scott and Mr. Sloan on June 18, 2013, Scott discussed their frustration with Belair not removing Ms. Barkley from MIG and his desire to send a letter of complaint. After reviewing the letter, Mr. Sloan encouraged Scott not to do so and Scott followed that advice.

[53] Ms. Barkley's evidence at trial was that her severe pain and numbness, temperature changes and discolouration in her left arm and shoulder and her mental health got worse in the summer of 2013 making it very difficult to work and she was only able to work part-time. She struggled financially.

[54] Mr. Sloan's office received the accident benefits file from Belair at the end of June 2013. By email July 15, 2013, Mr. Sloan advised Ms. Barkley that he would file an application for mediation when she was denied a treatment plan for her chiropractic and physiotherapy services and that if the mediation fails, she would have the right to sue Belair. Ms. Barkley said she paid for these treatments out-of-pocket.

[55] On July 16, 2013, Belair removed Ms. Barkley from the MIG because of her condition. Mr. Sloan's office was made aware of this by Ms. Barkley.

[56] Dr. Maureen Shandling, Ms. Barkley's treating neurologist from June 2013 to July 2014, initially did not diagnose the cause of her significant pain in her left shoulder radiating down her arm as Chronic Regional Pain Syndrome ("CRPS") but rather as neuropathic pain. After an MRI, Dr. Shandling concluded there was no evidence of nerve root impingement or brachial plexus injury. She prescribed pain medication and referred her to a pain clinic for consideration of nerve block injections.

[57] Dr. Shandling noted that Ms. Barkley's symptoms worsened and in February 2014, she had severe pain down her left shoulder, tingling, numbness and her her left arm was cold, discoloured and in pain.

[58] Mr. Barkley emailed Mr. Sloan on September 11, 2013 stating that although he did not think initially there was any chance that Ms. Barkley's condition would be labelled catastrophic, she was now having pain in both arms and seeing a psychologist and stated he assumed they would not settle with Belair until they knew the extent of her injury or for how long it was going to impact her.

[59] Mr. Sloan advised that they continue to be vocal with Belair and explore treatment options. He explained the dispute resolution process by mediation and that if the mediation fails, Belair would look to do a full and final settlement of the accident benefits case which they could not do until one year following the accident. However, Mr. Sloan did not specifically respond to the issue of catastrophic impairment raised by Mr. Barkley. Mr. Sloan stated that he believed there was no need to as Mr. Barkley was simply acknowledging the discussions they had at the outset.

[60] An occupational therapist assessment was arranged in September 2013 at Mr. Sloan's request. It confirmed Ms. Barkley's entitlement to attendant care benefits of $56.06 per month.

[61] The Barkleys became frustrated with Belair denying her physiotherapy and chiropractic treatment plans. Both Mr. Sloan and Ms. Barkley confirmed Ms. Barkley was eager to proceed with the mediation application.

[62] Mr. Sloan was advised in January 2014 that Mr. Barkley had left his job to join Ms. Barkley starting a new accounting corporation which resulted in their

loss of his benefits for her medical expenses. Ms. Barkley inquired regarding the status of the mediation. Mr. Sloan did not provide any advice to the Barkleys regarding the potential impact the new corporate structure could have on her IRB entitlement.

[63] Mr. Sloan replied that no mediation dates were yet obtained, that he did not believe Belair would make an offer of settlement that would be sufficient and that a lawsuit was required to encourage Belair to deal with them fairly.

[64] Ms. Barkley emailed Mr. Sloan on February 17, 2014 to advise him of her worsening condition noted by Dr. Shandling and report that her pain was "through the roof". She advised Mr. Sloan that Dr. Shandling was investigating the possibility she had CRPS and asked Mr. Sloan whether "CRPS and Psych could give us cause to argue for the catastrophic impairment".

[65] Mr. Sloan responded by email on February 18, 2014 acknowledging that her pain was continuing and seemed to be getting worse but did not respond to Ms. Barkley's question on catastrophic impairment. His evidence was that Ms. Barkley was just stating her knowledge of the process and how one might move into catastrophic based impairment as he had initially explained the 55% WPI to her.

[66] Ms. Barkley's evidence was that because Mr. Sloan did not respond to her question regarding CRPS and her psychological condition resulting in catastrophic impairment, she assumed she had no chance to be found catastrophically impaired.

[67] Dr. Shandling prepared a report of March 21, 2014. She diagnosed Ms. Barkley with CRPS, increased her dosage of Elavil, started her on Prednisone and recommended regional nerve blocks at the Wasser Pain Clinic. She noted that Ms. Barkley was now reporting bouts of excruciating pain with swelling and purple discolouration in her left hand and arm. An EMG was normal which confirmed no neurological cause of her symptoms.

[68] Dr. Shandling's clinical notes and records which included this information were also provided to Mr. Sloan's office on April 28, 2014, well before the mediation date.

[69] Dr. Gabrielle Bautz was Ms. Barkley's treating rehabilitation psychologist from May 2013 until December 2018. Ms. Barkley complained of being very

anxious and depressed, having suicidal ideation, nonrestorative sleep and appetite disturbance because of the accident. Dr. Bautz diagnosed her with having major depressive disorder, PTSD and anxiety all caused by the accident. She treated Ms. Barkley's depression and anxiety with cognitive behavioural therapy and supportive psychotherapy. She noted that Ms. Barkley's work as an accountant was affected and she worked less hours due to her condition. Her mental health was deteriorating.

[70] Dr. Bautz's report of April 30, 2014 confirmed her diagnosis of Ms. Barkley suffering from PTSD, depression and anxiety. Dr. Bautz stated that the diagnosis of CRPS had been extremely disheartening for Ms. Barkley and that these symptoms were worsening noting that the physical symptoms were now affecting Ms. Barkley's other hand. Dr. Bautz stated:

> Miss Barkley continues to need a significant amount of pain medication in order to function, especially at work which reduces cognitive and physical function. A short trial of prednisone was attempted and ended when the side effects on physical and cognitive functioning were so onerous that she could not function at all. She could barely walk and could not drive at all.
>
> She continues to attend physical treatment, including physiotherapy, chiropractic and massage therapy for which she is paying out-of-pocket but has to balance the necessity of treatment with the need to manage a challenging workload. The stress of the balancing act is also increasing anxiety which in turn affects muscle tension and pain. The pain medication is starting to have less effect, however, and pain is interfering with sleep. Stress related emotional eating has caused weight gain, which she is having difficulty losing.

[71] This report suggested Ms. Barkley feared she would end up completely incapacitated.

[72] Dr. Bautz's clinical notes and records were also provided to Mr. Sloan before the mediation date.

[73] Dr. Paul Tumber was Ms. Barkley's treating anaesthesiologist with considerable experience in pain management at Toronto Western Hospital Pain Clinic. Ms. Barkley attended at the pain clinic for treatment 16 times from her first session on May 2, 2014 until September 2018.

[74] Dr. Tumber confirmed in his evidence and in his clinic's report of May 2, 2014 symptoms of puffiness, slight wasting, coldness and discolouration and complaints of significant pain in her left arm, sleep difficulties, weight gain and cognitive difficulties.

[75] That report stated that it was challenging to give a confident diagnosis and that Ms. Barkley's left upper extremely pain may be a manifestation of whiplash associated disorder. He indicated that Ms. Barkley probably did have CRPS Type I . Ms. Barkley was booked for a trial of stellate ganglion nerve blocks.

[76] On May 5, 2014, Ms. Barkley emailed Mr. Sloan and advised him she had been seen at the Toronto Western Hospital Pain Clinic where they confirmed her CRPS diagnosis and put her on a list to receive nerve blocks.

[77] Belair had earlier conducted its own in-home occupational therapy assessment of Ms. Barkley on March 4, 2014 which confirmed the deterioration, loss of function and significant decrease of strength in her hands and significant pain in her neck and arms since the previous occupational therapy assessment arranged by Mr. Sloan in September 2013. The report noted her diagnosis of CRPS and recommended an increase of the ACBs from $56.06 per month in the original September 2013 assessment to $252 per month. It also confirmed that Ms. Barkley had reduced her work hours and workload by at least 50% and that her husband had quit his job in January 2014 to help Ms. Barkley with her own clients.

[78] A copy of that report was provided to Mr. Sloan before the mediation date of May 12, 2014.

[79] On March 21, 2014, Ms. Barkley advised Mr. Sloan's office that her hands were swollen, purple and cold to the touch and that her oxycodone medication was not touching the pain. On March 24, 2014, she advised Mr. Sloan's office that the increase in the ACBs made sense because she had become much worse since her physiotherapy had stopped.

[80] On April 13, 2014, she advised Mr. Sloan's office that with the new diagnosis of CRPS, "I was bad before and now I'm terrible."

[81] Mr. Sloan acknowledged in his evidence that prior to the mediation date and settlement of the *SABS* claim on May 12, 2014, he was aware of the working diagnosis of CRPS for Ms. Barkley by her treating specialist doctors, that the

condition could be serious and that nerve blocks were planned for her by Dr. Tumber.

[82] Based on all the medical evidence at trial, including that of Ms. Barkley and Scott, I conclude that as of May 12, 2014, Mr. Sloan was aware that Ms. Barkley was complaining that her physical and psychological symptoms were serious and significantly worsening because of her increased pain and financial stress and that she was only able to work part-time.

[83] However, the evidence of Ms. Barkley and the medical evidence at the time of the mediation and settlement of May 12, 2014 did not establish or suggest that Ms. Barkley met any of the criteria of catastrophic impairment under the *SABS* which will be referred to in more detail herein. Ms. Barkley admitted at trial that her medical condition caused by the accident would not have met the test of catastrophic impairment at the time of the settlement on May 12, 2014.

May 12, 2014 – Mediation and Settlement

[84] Ms. Barkley's evidence was that she was eager to proceed with mediation in the fall of 2013 because she was paying large amounts of her medical/rehabilitation expenses herself on their line of credit. Her spouse was going to be leaving his job eliminating his medical benefits in January 2014 resulting in her paying even more for her medical/rehabilitation expenses if Belair was not going to.

[85] Mr. Sloan's law clerk Deanna Middleton advised Ms. Barkley on March 13, 2014 that the mediation application pertaining to Belair's denial of four treatment plans for her physiotherapy, chiropractic and occupational therapist in-home assessment which totaled $4,769.68 was almost complete. Belair had agreed to pay the increased ACBs of $252 monthly. Ms. Barkley advised her to wait a few days before finalizing it because of her upcoming bone scan.

[86] The mediation date of May 12, 2014 was scheduled likely sometime in April. Ms. Barkley's evidence was that the mediation start time was at 4 PM.

[87] Belair then confirmed with Mr. Sloan's office they were interested in resolving the matter on a full and final settlement basis before mediation and asked that Mr. Sloan send over a proposal for settlement.

[88] Mr. Sloan's evidence was that he then spoke to Ms. Barkley on April 10, 2014 about whether she was interested in a full and final settlement that included

her releasing her claim to all accident benefits including IRBs and the possibility of her pursuing catastrophic impairment. He stated Ms. Barkley was interested in doing so and their office then proceeded with preparing an initial summary of the anticipated treatment needs of Ms. Barkley to the 10 year mark which was provided to her on April 11 when Mr. Sloan spoke to her again.

[89] Ms. Barkley's evidence was that leading up to the mediation/settlement conference, they were looking to settle with the insurance company and wanted to get the settlement money as they were already out-of-pocket and wanted to put it on her line of credit.

[90] Ms. Middleton also advised Ms. Barkley by email of April 16 of that information and that as soon as they had the medical expense information from the Barkleys, they could present an offer. Ms. Middleton advised her that basically she had $50,000 maximum to work with for medical/rehabilitation benefits and prescription medication costs only for 10 years less amounts paid to date and that Belair had no obligation to pay the full amount either and rarely do come close.

[91] Mr. Sloan admitted that that maximum $50,000 in benefits referred to non-catastrophic medical/rehabilitation benefits under the *SABS* and not the $1 million lifetime medical/rehabilitation benefits and $1 million in lifetime ACBs potentially available if Ms. Barkley was found to be catastrophically impaired.

[92] Ms. Barkley accordingly understood she could achieve a maximum settlement of her medical/rehabilitation costs claim of no more than $50,000 within 10 years of the accident less the payments Belair had already made to her.

[93] An April 22, 2014, Ms. Middleton advised Ms. Barkley that Belair had set up an insurer's examination on May 13, 2014, the day after the scheduled mediation because of her physiotherapy claim. Ms. Barkley admitted that frustrated her and advised Ms. Middleton that she was totally confused why it would be the day after the mediation especially since it sounded like Belair wanted to settle before mediation. She stated "keeping up with these people is exhausting".

[94] Mr. Sloan admitted that from April 2014 when his office started having discussions with Belair's adjuster to put together an opening settlement

proposal until the morning of the mediation of May 12, 2014, he had no discussions with Ms. Barkley of Belair's obligations to fund the assessment costs of her potential catastrophic impairment.

[95] Mr. Sloan also admitted that during that time period, he did not discuss with Ms. Barkley whether she would meet or not meet the test of catastrophic impairment at that time or provide his opinion on whether at any point in the future she would have the potential to meet the test of catastrophic impairment under any of the categories.

[96] As indicated above, Mr. Sloan also admitted he had not specifically responded to the Barkleys' concerns regarding the potential of Ms. Barkley's catastrophic impairment in Mr. Barkley's email of September 11, 2013 or Ms. Barkley's email of February 17, 2014.

[97] On April 24, 2014, Mr. Sloan's office, after receiving from and reviewing further information with Ms. Barkley, prepared a final draft schedule of ongoing or anticipated expenses for Ms. Barkley's medical/rehabilitation and attendant care costs totaling $64,056.51.

[98] This amount was based on 10 years maximum of medical/rehabilitation benefits and two years of attendant care costs for non catastrophic impairment injuries under the *SABS*. Mr. Sloan stated this amount demonstrated Belair's exposure based on Ms. Barkley's current usage in those categories of benefits less the payments already received from Belair. It did not include approved (but unbilled) treatment as noted in the document.

[99] No claim was made in that first proposal for the potential of Ms. Barkley becoming entitled to enhanced catastrophic impairment benefits. No claim was made for past and future IRBs as Ms. Barkley had been advised by Mr. Sloan that she was not eligible for them.

[100] That draft schedule was forwarded to Belair before the mediation.

[101] Ms. Middleton emailed Ms. Barkley on May 6, 2014 confirming she had just followed-up with Belair's adjuster who was attempting to get instructions to make an offer to settle.

[102] Ms. Barkley's evidence was that no arrangements for the Barkleys to meet with Mr. Sloan or telephone calls with Mr. Sloan were made for them to prepare for the mediation.

[103] Ms. Barkley's evidence was that Mr. Sloan called her on the morning of the Zoom conference mediation of May 12. He said that Belair had made an offer which she thought was around $10,000.

[104] Ms. Barkley's evidence was that during that telephone call which she said lasted approximately one half hour, there was no discussion with Mr. Sloan regarding the uncertainty of her diagnosis, prognosis or medical condition that day. She said there was only a cursory discussion of catastrophic impairment and she was informed that she would have to pay for the assessment herself. She said "it was along the lines of what I believe to be true that CAT was not really an option in my case" and that "it wasn't put to me as something that we should be holding off this mediation for her".

[105] Ms. Barkley said she was not told what the cost of the catastrophic assessment would be or that there were benefits available from Belair to help pay for the cost. She understood that Mr. Sloan recommended that she should not be looking into catastrophic impairment as it was not worth pursuing. Ms. Barkley said there were no discussions with Mr. Sloan about not resolving the case on a full and final basis on that day and that he did not recommend that she not settle that day.

[106] Ms. Barkley stated that later that day there were short phone calls with Mr. Sloan back and forth as the offers were exchanged. Ultimately, Belair made a final offer of $25,000 of which she understood she would get $18,000 after payment of Mr. Sloan's legal fees and disbursements. She was not sure if Mr. Sloan specifically recommended she accept that amount but said that Mr. Sloan stated that was the best that they were going to do. Mr. Sloan did not recommend against settling on that number.

[107] Based on her conversations with Mr. Sloan and Ms. Middleton, Ms. Barkley understood that the $25,000 settlement amount that she accepted also required that any treatment plan expense that had been approved but not yet invoiced prior to mediation was also to be paid by Belair. She stated it was a relief to have her dealing with the insurance company over with but was unhappy at the end of the mediation. The $18,000 was not a lot of money but she felt like she did not have much of a choice to settle because of the maximum available of $50,000 less medical/rehabilitation expenses already paid.

[108] Mr. Barkley could not recall any of the details of the discussions with Mr. Sloan they had that day.

[109] Mr. Sloan's evidence was that on the morning of May 12, 2014 and prior to the Zoom conference mediation hearing, he received an offer from Belair to pay $15,000 to Ms. Barkley on a full and final basis with respect to her claims for *SABS*. He and Ms. Middleton then had a lengthy telephone conference call with Ms. Barkley and Scott for over an hour to go over that offer and review her options.

[110] Mr. Sloan indicated that his evidence of what was discussed with the Barkleys that day was based on his specific recollection of what was said and on the notes of his assistant Ms. Middleton which she prepared during the telephone discussions they both had with the Barkleys. Mr. Sloan personally did not make his own notes. Ms. Middleton confirmed that she made those notes at that time but otherwise could not remember any other details of the discussions.

[111] He then discussed with the Barkleys the implications of attempting to settle her accident benefits claim on a full and final settlement basis which included her giving up any rights to continue with her claim for accident benefits including on a catastrophic impairment basis. His evidence is that the Barkleys wanted to try and settle on a full and final basis and then manage Ms. Barkley's care going forward themselves.

[112] Mr. Sloan's evidence was that he discussed catastrophic impairment in some detail including if Ms. Barkley wanted to pursue that, the potential for Mr. Sloan's office arranging for a catastrophic impairment assessment by submitting a treatment plan on her behalf if Ms. Barkley was prepared to cover some of the costs. Mr. Sloan stated he did not think Belair would approve any or all of the treatment plans for the multiple assessments for catastrophic impairment which he anticipated might cost $5,000-$10,000.

[113] Mr. Sloan admitted that on May 12, 2014 when they were discussing Belair's initial $15,000 offer, he did not advise the Barkleys regarding the likelihood of whether she could be found to be catastrophically impaired at some point in the future. He stated he never advised her that she would be or would not be.

[114] Mr. Sloan stated that he provided the Barkleys with the following options:

> (i) negotiating and seeing what Belair's best offer was of a full and final settlement that resolved her entire accident benefits claim including

med/rehab, ACBs, IRBs and pursuing the possibility of catastrophic impairment;

(ii) failing the mediation and pushing on with the litigation for the outstanding claims; and

(iii) pursuing the catastrophic impairment process wherein his office could make those arrangements.

[115] Mr. Sloan stated they discussed "her ups and downs" in her condition and the recent recommendation for her having nerve block injections that may not be covered by OHIP . His evidence was that he told the Barkleys that the safest thing to do was to stay on claim.

[116] Mr. Sloan's stated that in that telephone discussion he repeated what was well known to the Barkleys before that the catastrophic impairment category increased their access to medical/rehabilitation funding from $50,000 over 10 years to $1 million lifetime and ACBs from $36,000 over two years to $1 million lifetime.

[117] Mr. Sloan stated that he encouraged the Barkleys at the end of that morning telephone call to take some time to think about it and scheduled a further telephone call for later on that afternoon. He was concerned about the costs associated with Ms. Barkley's nerve blocks and encouraged her to contact the pain clinic to find out if there was a personal cost for her. He stated he advised her that they had to decide if they wanted to continue with negotiations and try to achieve the best possible dollar amount for that day or to fail the mediation and continue on with litigating.

[118] Mr. Sloan's evidence was that the Barkleys called back that afternoon before the mediation hearing and indicated that their decision was that they wanted to try to maximize their recovery that day and learn what the best number was going to be on the table from Belair. They wanted to settle on a full and final basis because they had ongoing out-of-pocket expenses on their line of credit and they wanted the cash. They were not able to determine the cost of the nerve block injections but were prepared to personally manage Ms. Barkley's ongoing medical costs in the future.

[119] Mr. Sloan's evidence was that with Ms. Barkley's instructions, he then provided Belair a responding offer of $32,000 inclusive on a full and final basis allocating $4,000 for past med/rehab, $26,000 for future med/rehab and

$2,000 for attendant care. This was in addition to the amounts already advanced by Belair.

[120] Mr. Sloan's evidence was that he told Belair that day that his instructions were that any offer for a lump sum settlement was in addition to Belair paying for any treatment plans that had been approved and completed at the date of mediation but had not yet been invoiced. Mr. Sloan's evidence was that he had also said this to the Belair adjuster in April in a telephone conversation after hearing that Belair was interested in discussing a full and final settlement of the *SABS* claims.

[121] Belair responded with a $20,000 all-inclusive offer which Mr. Sloan again reviewed with Barkleys by telephone and which they rejected. Ms. Barkley was still trying to determine if funding was available for her nerve blocks. Eventually, Belair indicated their best settlement number was $25,000 all-inclusive to settle the accident benefits on a full and final basis.

[122] Mr. Sloan stated when he relayed that $25,000 offer in a final telephone call to the Barkleys, he did not say he recommended the $25,000 settlement. He stated that they were pleased enough with it and agreed to accept it.

[123] Ms. Middleton then sent a confirming email of the settlement to Belair which stated:

> I write further to our telephone discussions of today's date in relation to the all-inclusive settlement of this matter in the amount of $25,000.
>
> In this regard, I confirm that in terms of breakdown of funds, our office has no preference. If you would like to do $3000 for attendant care and $22,000 for past/future medical/rehabilitation benefits that would be sufficient.
>
> I further confirm that the above noted settlement will include payment of any approved and completed treatment to today's date not yet billed. I trust that you will follow-up with any treatment providers to ensure that their invoices are submitted for any completed treatment. We have advised Barkley that any future treatment will be her responsibility to fund.
>
> Lastly, I confirm that Insurer's Examination Assessment is scheduled to proceed tomorrow, Tuesday, May 13, 2014 at 12:30 PM. I trust that

> Alexa's attendance is no longer required at same. We appreciate receiving confirmation that your office to this effect that any last-minute cancellation charges will be the responsibility of Belair direct and not Ms. Barkley.
>
> I look forward to receipt of the settlement documentation at your earliest opportunity.…

[124] Mr. Sloan's evidence was that only insurance companies had access to the HCAI portal process which Mr. Sloan did not. Belair could check on that portal for what outstanding approved treatment plans existed at the time and reach out to those treatment providers to have them complete their invoices on approved treatment plans to May 12, 2014 and submit for payment by Belair in addition to the $25,000 settlement payment.

[125] Mr. Sloan did not believe his office received a response from Belair either agreeing or disagreeing with the contents of that email confirmation of settlement.

May 15, 2014 – Signing of Settlement Documents

[126] Ms. Barkley clearly stated in her examination in chief that Mr. Sloan's office emailed her the settlement paperwork to be completed and which she signed on May 15, 2014. She stated in her initial evidence that Mr. Sloan did not walk her through the details of the settlement documentation she was signing as he was not there with her. She believed that Mr. Sloan's signature on the documents would have been added after the fact as this was all done electronically. She understood that by signing the settlement documents, she was giving up her right to make any future claims for accident benefits.

[127] She did not remember specifically the term in the release documents that stated:

> This offer includes all expenses incurred for goods and services as previously approved, which includes Dr. Gabriel Bautz, CBI Mississauga, Triangle Physiotherapy and Multi Care Chiropractic Health Center and any other clinics involved.

[128] However, in cross-examination Ms. Barkley admitted "so maybe he did come down" and attend at their house on May 15, 2014 and did review all the

settlement documents and release forms in detail with them. She explained that she did not initially recall that.

[129] Mr. Sloan's evidence was that his office arranged a meeting on May 15, 2014 and he travelled from his Midland office and attended personally that day with both Barkleys at their house. In that one to two hour meeting, Mr. Sloan stated he reviewed with both Ms. Barkley and Mr. Barkley the direction and written instructions he had prepared associated with the settlement of the accident benefits claims.

[130] He also reviewed with them the settlement disclosure document he had received from Belair paragraph by paragraph and on each page. He explained again that it was a full and final settlement and also reviewed the release form confirming that. In Mr. Sloan's words, he explained that it was done and over with and they could not open it back up again even if they realized they got a bad deal or if her injuries are far worse than she originally thought.

[131] He also reviewed with them the summary of various benefits Ms. Barkley had access to under the *SABS* including Ms. Barkley's option of pursuing catastrophic impairment, including the language of 55% WPI or more and the two day cooling off period.

[132] After Ms. Barkley signed and initialled each page of the documents with Mr. Barkley witnessing her signature, Mr. Sloan then signed them as well where required.

[133] They then discussed the engineer's report in the tort claim.

[134] After the meeting, Mr. Sloan provided the signed settlement documents to Belair and requested the funds which arrived in early June and were dispersed to the Barkleys after deduction of his account.

[135] Mr. Sloan sent the Barkleys a brief reporting letter of June 4, 2014 which stated:

> Following our retainer, I confirm that we assisted you in gaining access to accident benefits. Although your insurer did approve some treatment, it did make certain denials of the claim which in our opinion ought not to be made. We initiated the dispute resolution process and were ultimately able to strike out negotiations and work towards a resolution

> of your claim. I confirm your instructions to accept the insurer's final settlement in the amount of $25,000 inclusive.

[136] Mr. Sloan's reporting letter did not indicate that Ms. Barkley had settled her claim over Mr. Sloan's recommendation not to settle it but to stay on claim. There is no reference in the reporting letter of Mr. Sloan having advised her of pursuing potentially catastrophic impairment assessments.

Credibility and Reliability Issues of the Evidence of Barkley and Sloan

[137] Because of the significant discrepancy in the evidence of Ms. Barkley and Mr. Sloan as to what specific advice he provided to the Barkleys on May 12, 2014, the credibility and reliability of their respective evidence must be determined.

[138] It is not simply a matter of accepting the evidence of one party over another based on how the witness performed in the witness box. The real test of the truth of the story of a witness must be in its harmony with the preponderance of probabilities which an ordinary and informed person would readily recognize as reasonable in that place in those conditions. *Pilotte v. Gilbert*, 2016 ONSC 494 at para. 360.

[139] Wilson J, as she then was, in *Rider v. Grant*, 2015 ONSC 5456 at para. 92 referred to the decision of *Morton v. Harper Grey Easton* (1995) 8 B.C.L.R. (3d) 53 (B.C.S.C.) where the trial judge noted, "It was my view that, all other things being equal, where there is a conflict between the version of the client and the version of the solicitor, the version of the client is to be preferred."

[140] It is not the case that wherever there is a conflict in evidence between a client and lawyer that the client's version must be preferred. That principle only pertains where the parties are on equal ground of credibility.

[141] This case, as Wilson J held in *Rider*, is not a situation where all other things are equal. For the reasons of credibility and reliability noted below, I find that most but not all of the evidence of Mr. Sloan as to what advice he provided to the Barkleys on May 12, 2014 is more credible and reliable than that of Ms. Barkley.

[142] Both Ms. Barkley and Mr. Sloan had the difficulty of trying to remember specifics of their conversations of May 12, 2014 which was more than 10 years before the trial. Ms. Barkley did not make any notes of those conversations and Mr. Barkley had no recollection of the discussions.

[143] Mr. Sloan also did not make personal notes on May 12, 2014 but had the benefit of notes referring to the general areas Mr. Sloan said he discussed with the Barkleys made contemporaneously during the telephone discussions by his assistant Ms. Middleton who otherwise had no recollection of the specific discussions that day. The absence of personal notes of Mr. Sloan does not mean that his evidence should be rejected or given little weight by the court. It is a factor to be taken into consideration along with the other factors in determining the credibility issues. *Rider*, at para. 93.

[144] The failure of Mr. Sloan to make personal contemporaneous notes of his discussions with the Barkleys on May 12, 2014 or memorialize those discussions in his subsequent reporting letter in my view does not undermine his credibility or the general reliability of his evidence.

[145] Ms. Barkley, in her evidence, at times omitted or was not able to provide the details of other significant conversations she had with Mr. Sloan. For example, in her examination in chief, she simply referred to their having their first telephone conversation on February 26, 2013 without providing any details except to say the call set up the fact that Mr. Sloan was going to come and meet them.

[146] She subsequently admitted in cross-examination that accident benefits were discussed in that telephone call but could not remember the details including the different levels of accident benefits or whether it was a long telephone discussion. She admitted she did not recall much of the discussion as it was 11 years ago.

[147] On the other hand, Mr. Sloan was able to provide clear details of the discussions they had over that one hour conversation including references in his notes that were made.

[148] Regarding their first meeting of March 14, 2013, as noted above, it appears clear in the evidence that Mr. Sloan had a significantly better recollection of what was said in that meeting regarding accident benefits than Ms. Barkley.

[149] Ms. Barkley initially in her evidence stated there were only three telephone discussion she had with Mr. Sloan, the first one being being February 26, 2013, the second one in June 2013 when they discussed getting her out of MIG, and the final one on the mediation date of May 12, 2014. She initially denied in cross-examination there were many more phone calls with Mr. Sloan. The clear suggestion was that although she had numerous discussions with Ms. Middleton, she had minimal personal contact with Mr. Sloan throughout his retainer and in particular leading up to the mediation date.

[150] In particular, she initially denied that she had spoken with or communicated by email with Mr. Sloan regarding what she was looking for to settle the *SABS* claim but rather stated that all those discussions were with Ms. Middleton.

[151] However, when confronted with Mr. Sloan's telephone dockets, she conceded that there were at least 12 to 14 telephone calls between March 2013 to July 2, 2014 that she personally had with Mr. Sloan in addition to the telephone discussions she had throughout with Ms. Middleton. She admitted she could not recall any specific details regarding some of those telephone calls.

[152] She then admitted that she did speak with Mr. Sloan as he said they did on April 10 and April 11, 2014, which are the dates Mr. Sloan said they discussed the mediation, Belair's interest in doing a full and final settlement and Ms. Barkley's position with respect to that.

[153] Ms. Barkley also admitted having a discussion with Mr. Sloan about whether her nerve block injections in the future would be fully funded by OHIP or an out-of-pocket expense for her and that she was going to contact someone to check. However, she did not think or believe that happened on the day of the mediation.

[154] That was a significant issue regarding a proposed settlement on a final lump sum basis and I accept Mr. Sloan's evidence that those conversations indeed took place on the date of mediation of May 12, 2014.

[155] Ms. Barkley initially denied in cross-examination and then said she did not remember that she understood from Mr. Sloan earlier that she could try to resolve the issues in dispute and move to FSCO arbitration, sue or settle on a lump sum basis. She initially denied knowing that mediation was an actual step as part of the dispute resolution process.

[156] However, she then admitted that she had received nine letters from May to November 2013 from Belair which she read with information as to how to dispute her accident benefits claim and that mediation was a prerequisite in the dispute resolution process. She also admitted receiving an email in July 2013 from Mr. Sloan wherein he was clear in advising both her and Scott that applying for mediation was a necessary step to sue for any expense denial by Belair. Mr. Barkley confirmed that evidence.

[157] At trial, Ms. Barkley testified that she discussed the possibility of investigating catastrophic impairment with Mr. Sloan at the mediation. However, on her examination for discovery in July 2021, she stated that Mr. Sloan did not talk to her that day about pursuing catastrophic impairment, that catastrophic impairment and the $1 million limit was never brought up or discussed and Mr. Sloan never made it seem like it was any sort of option. This was a significantly different answer.

[158] Ms. Barkley explained at trial that on her examination for discovery she did not remember having that discussion but her seeing Mr. Sloan's notes after the examination, which had been disclosed prior to that, triggered her memory that there was "some cursory discussion" of it. There was no evidence that she had attempted to correct her previous answer on that examination before the trial.

[159] What was particularly concerning with respect to Ms. Barkley's credibility and reliability was her initial examination in chief evidence that Mr. Sloan simply sent her the settlement documents for her signature electronically by email and did not personally attend at her residence on May 15, 2014 to review and explain them with her before she signed them. In cross-examination, she confirmed that by saying she had only met Mr. Sloan the one time at the beginning (which was in March 2013).

[160] During cross-examination, she admitted there was no such email from Mr. Sloan and stated she did not remember Mr. Sloan coming to the house or sitting down with him at the table. Her evidence was "so maybe he did come down". After she reviewed an email of May 14, 2014 of Mr. Sloan's staff member confirming he would be attending at Barkleys' residence on May 15 for that purpose and the Barkleys' reply email to Mr. Sloan confirming they will see him tomorrow, her answer was she just thought the meeting got cancelled because she really did not remember Mr. Sloan being at the house.

[161] She also did not remember the meeting taking a long time with his going through all the documents with her. Mr. Sloan's evidence was that the meeting lasted 1 to 2 hours.

[162] Ms. Barkley's initial denial and lack of memory of that significant event of Mr. Sloan attending personally at their residence and his spending considerable time with both Barkleys reviewing the settlement documents for her signature and then acknowledging in cross-examination that he maybe did, reflects not only on her credibility on what was actually discussed with Mr. Sloan 10 years ago but certainly on the reliability of her evidence of the specific discussions with Mr. Sloan not just that day but also on May 12, 2014.

[163] Mr. Sloan frankly admitted that he wrongly advised the Barkleys in 2013 that she was not entitled to IRBs because of her post-accident income. His explanation that he did not respond to their inquiries in 2013 and 2014 regarding Ms. Barkley's potentially being found to be catastrophically impaired because they earlier had had those discussions seems marginally plausible although it did not excuse his obligation to do so.

[164] I conclude based on all the evidence that on May 12, 2014, Mr. Sloan in that first telephone conversation when the Barkleys were considering Belair's first settlement offer of $15,000 all-inclusive advised them as follows.

[165] Mr. Sloan reviewed with the Barkleys the significantly increased amount of the benefits available to Ms. Barkley if she met the test of catastrophic impairment and the assessment process through a treatment plan to determine that at a cost between $5,000 to $10,000 of which Ms. Barkley may have to pay some because Belair could deny their obligation to do so.

[166] Mr. Sloan did not on May 12, 2014 or prior to that advise Ms. Barkley that she could potentially be found to be catastrophically impaired in the future and entitled to significantly enhanced *SABS* if her medical condition deteriorated.

[167] Mr. Sloan advised Ms. Barkley that she had three options that day. First, they could negotiate and see what Belair's best offer of a full and final settlement would be. That would resolve her entire accident benefits claims including medical/rehabilitation, ACBs, IRBs and the possibility of her catastrophic impairment claims. Second, they could fail the mediation and stay on claim and push on with the litigation for the outstanding claims. Third, if the

Barkleys did not want to settle but wanted to pursue the catastrophic impairment process, his office could make those arrangements for the assessment some of which cost they would likely have to pay for.

[168] Mr. Sloan did not advise Ms. Barkley that day that she should not be considering a lump sum settlement with Belair in exchange for the release of her claims for future *SABS* including significantly enhanced benefits if she was found to catastrophically impaired because her medical condition was deteriorating, she was only working part-time and there was no prognosis of whether she would improve or get worse.

[169] Mr. Sloan did not recommend that Ms. Barkley accept any of Belair's lump sum offers including the last $25,000 amount as a full and final settlement of her *SABS* claims. He did not advise her to reject any of those all-inclusive lump sum offers and simply proceed with the mediation on the four outstanding treatment plan claims of approximately $4,800 and not release her claims for future accident benefits.

[170] I do not accept Mr. Sloan's evidence as credible and reliable that he advised Ms. Barkley that "the safest way to proceed was to stay on claim." Even if Mr. Sloan had said that, it was clearly not meant with respect to the potential of her having a catastrophic impairment claim in the future.

[171] I come to that conclusion including because Mr. Sloan admitted that he did not advise Ms. Barkley whether she would or would not be catastrophically impaired or could potentially be found to be catastrophically impaired in the future entitling her to substantially enhanced benefits if her medical condition significantly deteriorated. In addition, he did not confirm that in his reporting letter which one would expect if he had said that.

Events of June and July 2014 Leading to Termination of Sloan's Retainer

[172] Mr. Barkley sent follow-up emails to Mr. Sloan on May 22, June 3 and June 5, 2014 asking about the settlement cheque.

[173] On May 30, 2014, Ms. Barkley and Mr. Sloan's office learned that two treatment plans of Dr. Bautz totaling approximately $1,000 ($218.28 and $741.40) completed but not invoiced as of the mediation date were not paid by Belair. Those two treatment plans were not included in the mediation application.

[174] Ms. Middleton accordingly emailed Belair shortly after confirming that the settlement was to include payment of any approved and completed treatment but not yet billed to the date of settlement.

[175] Mr. Sloan stated he contacted Belair on June 10, 2014 who advised him that they understood that the $25,000 settlement was full and final including all prior approved treatment plans not yet invoiced. Mr. Sloan reiterated his position with Belair throughout April and on May 12, 2014 that the settlement amount of $25,000 was in addition to Belair's obligation to pay those amounts.

[176] Mr. Sloan acknowledged that the language in the Middleton email of May 12, 2014 confirming the settlement used the word "included" where he would have preferred "in addition". Because of that language, he felt the issue in dispute was his fault.

[177] Ms. Barkley acknowledged that Mr. Sloan then advised her that she had an option to undo the settlement because there was no meeting of the minds but that she would have to repay the settlement amount.

[178] Mr. Sloan advised Ms. Barkley by email on June 23, 2014 that he did not anticipate Belair would change its mind in which case, they could try to sue to recover those two approved treatment plans amounts but the case would be stronger if they returned the settlement money. He stated, "there may be no settlement as there is no meeting of the minds" which Mr. Sloan explained meant she could try and rescind the settlement on that basis.

[179] Mr. Sloan recommended that Ms. Barkley get independent legal advice on the issue of whether she could set aside the settlement because of there being no meeting of the minds.

[180] Ms. Barkley then responded by email on June 25, 2014 that she could not pay the approximate $1,000 for the two Dr . Bautz invoices as it seemed like a lot and did not know what to do. She stated that the money from the settlement had already been put on the line of credit stating, "So I suppose that if I wanted to unsettle, I could take it back off. But I can't on top of that settlement."

[181] At trial, Ms. Barkley had initially stated that she did not think Mr. Sloan spoke to her about her option to set aside the settlement and that she did not understood that meant she could undo the settlement that had already

happened. She initially stated that she did not think Mr. Sloan said that she could unwind what was already done.

[182] However, she then admitted, as indicated above, that Mr. Sloan did state that moving to set aside the settlement was an option. Because the $1,000 was a small amount of money and there was a sense of relief that came from being through the process and not having to deal with the insurance company anymore, Ms. Barkley stated that it did not make sense to unwind or undo the settlement. She was not happy with the settlement which annoyed her. She stated Mr. Sloan's unwillingness to take responsibility for his mistake absolutely soured their relationship.

[183] Even though Belair had initially refused to pay both Dr. Bautz treatment plan amounts, on June 26, 2014 it paid for one treatment plan of $218.28 without any further discussion or agreement with Mr. Sloan. Mr. Sloan then advised the Barkleys on July 12, 2014 that his office would pay the other $741.40 invoice which would then be added as a disbursement in the tort file.

[184] Ms. Barkley, following Mr. Sloan's advice to get independent legal advice, did so shortly thereafter. She consulted with one of Ontario's highly respected, experienced and recognized expert lawyer in motor vehicle and accident benefits claims ("new counsel") and acknowledged that she told him everything about what had happened regarding the settlement, the mistake and said her new counsel understood why she was dissatisfied.

[185] On July 25, 2014, Ms. Barkley emailed Mr. Sloan that based on the issues surrounding the accident benefits settlement, they lost confidence in his ability to counsel them effectively and because Mr. Sloan seemed to have lost all motivation surrounding their case, they searched for a replacement lawyer who would be contacting him shortly.

[186] Mr. Sloan's office, on August 7, 2014, received a letter dated July 31, 2014 from Ms. Barkley's new counsel confirming he had taken over Ms. Barkley's file and requested a transfer of Mr. Sloan's file which letter included an undertaking to protect Mr. Sloan's reasonable account for services rendered from the proceeds of settlement and judgment.

[187] Mr. Sloan forwarded the contents of the file including the settlement information on the accident claim to Ms. Barkley's new counsel on August 8, 2014.

[188] Ms. Barkley admitted that she and her new counsel have taken no steps to set aside the settlement of May 12, 2014 if she were to return the settlement funds to Belair.

[189] Mr. Sloan's office made inquiries of Ms. Barkley's new counsel in April and early June 2016 regarding payment of their outstanding account of $12,245.58. They then received a copy of the statement of claim in this action.

Standard of Care and Breach of Standard of Care

[190] A lawyer is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. *Central Trust Company v. Rafuse,* [1986] 2 S.C.R.147 at para. 58.

[191] Lawyers are not held to a standard of perfection. The court should avoid using phrases like "egregious, error and clearest of cases" when describing circumstances in which negligence allegations will succeed against lawyers.

[192] The reasonable lawyer standard demands that the lawyer bring to the exercise of his or her judgment the effect, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged, even if the decision proves to be disastrous. The lawyer's conduct is not to be judged with the benefit of hindsight. *Folland et al v. Reardon*, (2005) 74 O.R. (3d) 688 at paras. 43, 44 and 61; *Marmer Penner Inc. v. Purcaru*, 2021 ONSC 3785 at paras. 92 and 93.

[193] The reasonableness of the lawyer's conduct is to be viewed in the context of the surrounding circumstances, including the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client. *Lenz v. Broadhurst Main*, 2004 CanLII (Ont.S.C.) 5059 at para. 54.

[194] The standard of care of a reasonably competent lawyer can be affected by the terms of the retainer agreement and any representations made to the client concerning the lawyer's expertise. In this case, there was no limitation in Mr. Sloan's retainer in his acting for Ms. Barkley regarding her accident benefits claims.

[195] A lawyer has the responsibility to provide his client with complete advice to ensure that the client is making fully informed decisions on all matters

relevant to the retainer. A lawyer must have sufficient knowledge of the fundamental issues or principles of law pertaining to his client's case.

[196] A specialist in a certain area of law will be held to a higher standard than a generalist. *Pilotte v. Gilbert*, 2016 ONSC 494 at para. 4. In this case, the standard of Mr. Sloan takes into consideration that he restricted his practice and had particular experience in personal injury work and motor vehicle claims including accident benefits.

[197] An improvident settlement is assessed according to a standard of reasonableness. Prudent practice requires a reasonably solid prognosis before settlement should be achieved. *Ristimaki v. Cooper*, (2006) 79 O.R. (3d) 648, at paras. 60-62; *Rivait v. Montforton*, 2005 Canlii 40374 (Ont.S.C.) at para. 65.

[198] Ms. Barkley relied on the evidence of David Wilson who was qualified as an expert in motor vehicle accident benefits law and who provided his opinion with respect to the standard of care applicable to Mr. Sloan's handling of Ms. Barkley's accident benefits claim.

[199] Mr. Sloan relied on the evidence of Corey Schneider who also was similarly qualified to provide his expert opinion on those areas.

[200] Mr. Wilson's evidence was that Mr. Sloan fell below the applicable standard of care and breached his contract with respect to the handling of Ms. Barkley's accident benefits claims.

[201] Mr. Schneider's evidence was that Mr. Sloan did not do so.

[202] I accept and prefer the evidence of Mr. Wilson over that of Mr. Schneider regarding the applicable standard of care and whether Mr. Sloan breached that standard and his contract with Ms. Barkley.

[203] After his admission to the Ontario bar in 1972, Mr. Wilson's primary law practice has focused on motor vehicle accidents since 1976. Since 1990, most of his experience has involved plaintiff's accident benefits claims. He has lectured at numerous events for various professional bodies, has written numerous reports on lawyers' standard of care involving motor vehicle accident claims and has been previously qualified by this court as an expert witness in that area.

[204] Mr. Schneider was admitted to the Ontario bar in 2001 and worked almost exclusively in insurance defence work until 2019 when he cofounded a plaintiff's practice. In this time as a defence lawyer, Mr. Schneider would usually only get involved in accident benefits claims once there was a dispute as a result of the denial by the insurer. Although he also has made numerous presentations to insurance companies and at continuing education events on insurance-related topics and has been previously qualified by this court as an expert witness, it was clear that Mr. Wilson has had far more experience as a plaintiff's lawyer than Mr. Schneider and certainly in 2014. In my view, Mr. Wilson has significantly more insight and experience as to what the standard of care was required for a plaintiff's lawyer in the handling and settlement of an accident benefits claim at that time.

[205] Mr. Schneider unfortunately also appeared at times to advocate for Mr. Sloan being quite dismissive of the weight he thought should given to the evidence of Ms. Barkley's medical expert reports of Dr. Persi in 2022 and Dr. McKay in 2023 who opined on whether Ms. Barkley met the test of catastrophic impairment from 2015 to 2017. Mr. Schneider's doing so fell outside of his role to provide impartial expert testimony with respect to whether Mr. Sloan breached the required standard for care in 2014 and potentially causation. Additional reasons and details for my accepting the evidence of Mr. Wilson over that of Mr. Schneider are noted below.

[206] Mr. Wilson's evidence was that Mr. Sloan fell below the applicable standard of care and breached his contract with Barkley specifically as follows:

Income Replacement Benefits ("IRBs")

a) Mr. Sloan provided incorrect information about the calculation of Ms. Barkley's entitlement to IRBs and improper advice based on the incorrect information. Specifically, Mr. Sloan misunderstood that post-accident income was deducted dollar for dollar rather than as a 70% deduction from Ms. Barkley's IRBs entitlement according to s. 7(3)(b) of the *SABS*.

b) In addition, Mr. Sloan did not investigate before the settlement to assess whether a potential IRBs claim could be made by not requesting income-related documents from Ms. Barkley or conducting a calculation of her potential entitlement to IRBs.

c) Mr. Sloan did not advise and fully inform Ms. Barkley of her rights under the provisions of ss. 7(4) and 7(5) of the *SABS* which require insurers to compensate self-employed insureds to retain an accountant for the purpose of calculating their income and potential IRBs claim.

[207] Mr. Wilson noted that because a claimant's entitlement to IRBs could change weekly depending on their post-accident income, Mr. Sloan should have but did not over the course of his retainer revisit the issue of Ms. Barkley's entitlement to IRBs when her condition and ability to work was deteriorating as noted in the significant medical evidence that Mr. Sloan had received and reviewed before the mediation date and settlement.

[208] Mr. Schneider agreed that Mr. Sloan's understanding of the calculation of IRBs was incorrect. He disagreed that Mr. Sloan should have requested Ms. Barkley's financial documentation. However, he admitted that although someone may not at one point be eligible for a benefit, the standard of care required Mr. Sloan to follow-up on Ms. Barkley's employment status and that her entitlement to that benefit should have been revisited prior to a full and final settlement that would preclude a future IRBs claim. He agreed that the standard of care required Mr. Sloan to at least consider the potential that Ms. Barkley had an IRBs claim prior to settlement. Mr. Sloan never did so.

[209] I do not accept Mr. Schneider's evidence that Mr. Sloan was not negligent for failing to request Ms. Barkley's financial documentation or for further failing to advise her of her entitlement to an accountant's report at Belair's expense under ss. 7(4) and 7(5) of the *SABS* because it was consistent with Mr. Sloan's initial misunderstanding of the calculation of the IRBs. In my view, Mr. Sloan's initial mistake and negligence does not excuse his subsequent negligence or make it any less negligent.

[210] In any event, Mr. Schneider agreed in cross-examination that if Mr. Sloan had not made the mistake in the first instance or did not know Ms. Barkley's income, then perhaps he should have obtained the financial records and the accounting report.

[211] I accept Mr. Wilson's evidence that Mr. Sloan fell below the applicable standard of care and breached his contract with Ms. Barkley regarding her entitlement and potential entitlement in the future to claim IRBs.

Encouraging or Failing to Discourage Barkley from Settling her Accident Benefits Claim

[212] Mr. Wilson's evidence was that Mr. Sloan fell below the required standard of care by encouraging Ms. Barkley to settle her accident benefits claim prematurely or alternatively, by failing to discourage her from settling her claim on May 12, 2014.

[213] Mr. Wilson's evidence was that there was no reasonable justification for Mr. Sloan to enter into any full and final settlement discussions only 18 months after the accident when Ms. Barkley's physical and psychological condition was clearly deteriorating and her future prognosis was unknown.

[214] Mr. Wilson referred to the above-noted medical evidence that I accept as factual that Ms. Barkley's physical and psychological complaints leading up to May 12, 2014 were getting worse including her being diagnosed with CRPS, a serious and debilitating condition noted by Ms. Barkley's doctors, PTSD and depression. Ms. Barkley herself had advised Mr. Sloan and Ms. Middleton of her worsening condition. She was still unable to return to work on a full-time basis and her prognosis was unknown.

[215] Given those facts and it being only 18 months since the accident, I accept Mr. Wilson's evidence that there was no need or justification for Ms. Barkley to consider an overall full and final settlement of her accident benefits claim at that time which would include a release of her potential entitlement to future benefits including if she were found in the future to be catastrophically impaired even though her condition admittedly did not meet that test at that time. There was only approximately $4,800 of outstanding treatment plans that were subject to the mediation at the time and the settlement amount of $25,000 was not a substantial sum.

[216] Although I am not satisfied that Ms. Barkley was pressured by Mr. Sloan and Ms. Middleton to settle her accident benefits claim on May 12, 2014, she clearly was not advised prior to that date that there was no need for her to consider any full and final settlement against all future benefits on that date.

[217] Moreover, prior to or on May 12, 2014, Mr. Sloan did not discourage Ms. Barkley strongly or at all from considering such a full and final settlement given her worsening condition, her diagnosis of CRPS, PTSD and anxiety, the

absence of a realistic prognosis, her still being unable to work full-time and the fairly minimal amounts in issue on the mediation.

[218] On both matters, Mr. Sloan did not meet the required standard of care.

[219] Mr. Barkley and Ms. Barkley had specifically inquired of Mr. Sloan in September 2013 and February 2014 of her potential claim for catastrophically impaired benefits if she could now meet the test because of her deteriorating physical and psychological condition but Mr. Sloan did not specifically respond to those inquiries.

[220] Mr. Wilson stated Mr. Sloan's failure to respond to those inquiries breached the standard of care. Mr. Schneider also agreed that Mr. Sloan probably should have responded to those questions by talking to her and addressing the issue of catastrophic impairment.

[221] Specifically, Mr. Sloan also did not advise her that even though she may not have been catastrophically impaired on May 12, 2014, she should not be considering a full and final settlement of her accident benefits claims as she may be found to meet that test if her condition worsened in the future which would entitle her to considerably enhanced benefits as there was no time limit for her making those claims under the Belair policy.

[222] Moreover, Mr. Sloan at no time advised Ms. Barkley in writing of his advice with respect to her not considering a full and final settlement of her accident benefits claims before or on May 12, 2014 and the reasons noted above why she should not.

[223] As indicated above, Mr. Sloan simply advised Ms. Barkley that one of her options was to stay on claim. Even if Mr. Sloan on May 12, 2014 verbally advised Ms. Barkley to "stay on claim", in my view that was not sufficient for Mr. Sloan to meet the required standard of care.

[224] Mr. Sloan at no time put his advice in writing to her or required her to acknowledge that advice in writing. Mr. Sloan did not advise her or subsequently report to her in writing that he had advised her against settling her accident benefits claim on a full and final basis especially in the amount of only $25,000 on May 12, 2014 and his reasons for doing so including that she should stay on claim because of her potential catastrophic impairment in the future if her condition deteriorated and confirming that notwithstanding

that advice, she chose not to accept it and proceeded with the full and final settlement of her accident benefits claims.

[225] In my view, Mr. Sloan was required to do so in order to meet the appropriate standard of care of a reasonably competent lawyer in the handling and settlement of *SABS* claims and his failure to do so breached that standard.

[226] I do not accept the evidence of Mr. Schneider that it was reasonable to talk about a resolution of Ms. Barkley's accident benefits claims on a full and final basis on May 12, 2014. He provided that opinion based on her still working on a part-time basis and it being "unclear" whether her condition was going to get worse at the time whereas the medical reports Mr. Sloan had received and reviewed in fact confirmed, as I have found, that it was getting worse and that Ms. Barkley had also told him so. She was still unable to return to work full-time, it was only 18 months after the accident, she was diagnosed with CRPS, PTSD and anxiety and there was no other definitive diagnosis or prognosis.

[227] Mr. Sloan's job as counsel for Ms. Barkley was to advocate to the best of his abilities in her best interests as acknowledged by Mr. Schneider.

[228] He was obligated to not only provide Ms. Barkley with her available options on the mediation but to recommend which of the options were in her best interests and provide the reasons for that advice.

[229] As Mr. Wilson indicated, Mr. Sloan's not responding to Ms. Barkley's and Mr. Barkley's inquiries about a potential catastrophic designation because they appeared knowledgeable and capable of making informed decisions leading them to determine whether they wished to pursue a catastrophic impairment designation without his input was inconsistent with his role as counsel.

[230] I do not accept Mr. Schneider's opinion that it was reasonable at that time based on the existing medical evidence for Mr. Sloan not to have considered that there was a real catastrophic risk to Ms. Barkley in the future.

[231] Mr. Schneider agreed that whether or not the Barkleys made those inquires, it was incumbent on Mr. Sloan to give his opinion, even if it was negative, as to Ms. Barkley's likelihood of success on catastrophic impairment so she could make an informed decision before settling her accident benefits claim on a full and final basis.

[232] I conclude that Mr. Sloan's failure to do so breached the required standard of care.

[233] Mr. Schneider also agreed in his evidence that best practices for a lawyer would be to confirm in writing his advice to the client. He also acknowledged that Mr. Sloan had not documented his advice in writing for Ms. Barkley to "stay on claim". I do not accept Mr. Schneider's evidence as reasonable that a lawyer should memorialize their advice in writing to the client only if there was a "strong disagreement" with what the client's wishes were.

[234] Mr. Wilson stated that Mr. Sloan fell below the standard of care by failing to recommend to Ms. Barkley that she submit a treatment plan for the purposes of funding a CAT assessment.

[235] Mr. Schneider opined that Mr. Sloan was not negligent for failing to do so on the basis that there was a lack of evidence that Ms. Barkley's injuries were catastrophic at the time of settlement.

[236] In view of my findings that Mr. Sloan on May 12, 2014 did review with Ms. Barkley the catastrophic impairment assessment process with a treatment plan if she wanted to pursue that and Ms. Barkley's admission that she would not have been found to be catastrophically impaired then, Ms. Barkley has not established that Mr. Sloan breached the standard of care on that issue.

Failure to Determine Barkley's Future Care Needs and Entitlement to Attendant Care Benefits Prior to Settlement

[237] Mr. Wilson's evidence was that the standard of care required Mr. Sloan prior to settlement discussions to make inquiries into Ms. Barkley's future treatment needs over her lifetime or the next 10 years including their costs by at least consulting with Dr. Bautz and/or Dr. Shandling or requesting a future care costs report.

[238] By Mr. Sloan not having done so, Ms. Barkley did not have the information to give an informed consent to the proposed settlement and without one, Mr. Sloan should have actually discouraged Ms. Barkley from entering into a full and final settlement at that time.

[239] Mr. Schneider acknowledged that Ms. Barkley's future was impossible to know at the time of settlement but did not specifically dispute Mr. Wilson's

evidence regarding Mr. Sloan's requirement to make those inquiries before settlement.

[240] I accept Mr. Wilson's evidence in that regard.

[241] In addition, Mr. Wilson stated that Mr. Sloan before the settlement should also have requested Belair fund a further attendant care assessment after Belair's assessment of the monthly benefit of $252 in March 2014 which increased Ms. Barkley's own assessment of $56 monthly in October 2013.

[242] I am not satisfied that the standard of care obliged Mr. Sloan to arrange for another attendant care assessment once Belair's assessors determined a higher value for those ACBs than Ms. Barkley's own initial report. There was no evidence including from Ms. Barkley or Scott at that time that either believed or had reason to believe that there was any need of Ms. Barkley for increased ACBs in excess of $252 monthly. There was no significant evidence that another assessment would likely have determined an amount higher than that monthly figure.

Failure to Adequately Review the Settlement Disclosure Notice

[243] I am not satisfied on the evidence that Mr. Sloan failed to properly communicate to Belair his instructions to settle from Ms. Barkley that Belair was to pay for all approved and outstanding treatment invoices in addition to the $25,000 settlement.

[244] Mr. Sloan's evidence was clear and unequivocal that throughout the settlement negotiations, his instructions and any discussions he had with Belair throughout April and on May 12, 2014 were that any settlement offer being proposed on a lump sum full and final basis was to be in addition to Belair's obligation to pay for any treatment plans that had been approved but not yet billed.

[245] No sworn evidence from Belair's adjuster contradicting that was provided at trial.

[246] The Barkleys confirmed that those were their instructions and understanding throughout of the settlement discussions and actual settlement.

[247] Mr. Sloan's law clerk Ms. Middleton's email communication of May 12, 2014 to Belair confirming the settlement could have been worded more precisely

but given the context of the uncontradicted settlement discussions Mr. Sloan had with Belair throughout, sufficiently indicated Belair's obligation to check and make those payments for those treatment plans in addition to the $25,000 settlement amount.

[248] Mr. Wilson's evidence was that Mr. Sloan's failure to adequately review the wording of the settlement disclosure notice upon settlement to ensure that it did not include those two other outstanding treatment costs and that Belair had to pay those amounts in addition to the settlement was a substantial departure from his appropriate standard of care.

[249] Mr. Sloan admitted that he was in error in not noticing that.

[250] Mr. Schneider did not address that issue simply stating that Mr. Sloan dealt with the "mistake" made by paying part of Dr. Bautz's outstanding invoices. Mr. Sloan did so but then added it as a disbursement in the file.

[251] I accept that Mr. Sloan fell below the standard of care required by not ensuring that the settlement documentation and release clearly provided that Belair was to pay for those two outstanding but unbilled treatment plans in addition to its paying the $25,000 lump sum settlement.

Causation

[252] Both parties agree that the plaintiff Ms. Barkley must prove "but for" factual causation on a balance of probabilities to be entitled to damages.

[253] The Ontario Court of Appeal in *Folland* at para. 61 stated the following:

> "But for" factual causation has been employed in solicitor's negligence cases, particularly those where the plaintiff contends that he received negligent advice and would have acted differently had he received appropriate advice. In those cases, the plaintiff must show on the balance of probabilities that properly advised, he would have proceeded in a manner that avoided the damages suffered or obtained the benefit lost as a result of the negligent advice.
>
> See also *Pilotte v. Gilbert*, 2016 ONSC 94 at paras. 46 – 47; *Rider* at paras. 144-145.

[254] Ms. Barkley's action fails on the issue of causation for the following reasons.

[255] First, Chapnik J in *Pilotte* at paras. 340 to 343 following *Folland* confirmed that in professional negligence cases when evidence is based on hindsight, it should be assessed warily, with great caution and that a bare assertion that the client would have acted differently if he or she had received proper advice should be viewed with some scepticism. See also *Waters v. Furlong et.al.*, 2023 ONSC 3908 at para. 116.

[256] It is significant in this case is that there was no hindsight evidence or any evidence at all from Ms. Barkley or her spouse at trial that had they been provided with the proper legal advice from Mr. Sloan leading up to and on the settlement date of May 12, 2014, she would not likely have settled her *SABS* claim against Belair on a full and final basis for $25,000 which required her to release any claim to her potential future entitlement to substantially increased accident benefits if she was later found to be catastrophically impaired.

[257] Ms. Barkley admitted she would not have been found to be catastrophically impaired in May 2014. Mr. Sloan advised her of her three options:

a) negotiate and see what Belair's best offer would be which would resolve her entire accident benefits claims,

b) fail the mediation and stay on claim, or

c) proceed with a catastrophic impairment assessment arranged through Mr. Sloan's office for which she may have to bear some costs.

[258] Ms. Barkley's position is that she would likely have been found to be catastrophically impaired by September 2016 to 2017, more than two years after the settlement, when she ceased work altogether.

[259] Mr. Sloan admitted that he did not advise Ms. Barkley against settling on a full and final basis for $25,000 because she may potentially become catastrophically impaired in the future. Mr. Sloan also admitted his advice regarding her IRBs entitlement was wrong.

[260] However, Ms. Barkley provided no evidence including from herself or other evidence at trial that those omissions were material in the sense that they would have likely influenced her conduct or operated on her judgment to settle or not on that basis. Ms. Barkley was still working at 50% to 75% of

her pre-accident capacity. She admitted that she would not have met the test for catastrophic impairment at the time of the settlement. As noted further in my reasons, the subsequent calculation of her IRBs entitlement to the date of settlement was only approximately $2,400 and with an overall maximum entitlement of no more than approximately $6,500 when she stopped work altogether in September 2016.

[261] In addition, the evidence from both Mr. Sloan and Ms. Barkley was that Ms. Barkley was eager to file for mediation in late 2013 and the spring of 2014 because they were becoming frustrated with having to deal with Belair because of its treatment plans denials, they needed cash because of the amount owing on their line of credit which they had used to pay for some of their medical expenses and treatment plans and because Mr. Barkley was leaving his job and losing his medical benefits in January 2014.

[262] Mr. Barkley's evidence was that he and his spouse wanted to settle to move past dealing with Belair. It was a pain dealing with them and Ms. Barkley's plan was to just get the maximum money at that time going into the mediation, settle and move on.

[263] With the $18,000 net settlement funds (after deduction of Mr. Sloan's legal fees), they then paid off that line of credit and acknowledged to Mr. Sloan that they would be responsible for their future medical/rehabilitation costs.

[264] It should not be forgotten that the Barkleys were still proceeding with their tort claim at that time with new counsel for all of their damages incurred including their loss of income, medical/rehabilitation, attendant care, housekeeping expenses and other out-of-pocket expenses.

[265] Accident benefits payable under the *SABS* are not payable to Ms. Barkley in addition to tort damages for the same claims. I conclude by reasonable inference that the Barkleys were likely aware of that at the time from either Mr. Sloan or new counsel or both.

[266] They were likely aware that any additional amount for IRBs and health care expenses Barkley might receive from Belair under the *SABS* would result in a corresponding reduction in what they would receive in any settlement or damage award from the tort defendants for those same claims under s.267.8(1) and (4) respectively of the *Insurance Act*., R.S.O.1990, c.18. That would include the tort defendants' right to claim the benefit of a trust under s.

267.8(9) or an assignment under s. 267.8(12)(a) for any future entitlement to *SABS* Ms. Barkley would with certainty have in respect of her income loss or health care expenses.

[267] The Barkleys were given clear advice by Mr. Sloan that Ms. Barkley should consider moving to set aside the settlement on her repayment of the settlement funds because of the lack of meeting of minds regarding Belair's requirement to also pay the approved but unbilled Dr. Bautz treatment plans. Mr. Sloan also advised them to seek independent legal advice on that issue. They immediately did so retaining new counsel for that purpose and then to take over her tort and accident benefits files from Mr. Sloan's office.

[268] Had Ms. Barkley followed that advice and at least taken steps to set aside the settlement either through Mr. Sloan or subsequently through her new counsel, that would have provided some confirmation that but for the negligent advice of Mr. Sloan, she would not have settled on May 12, 2014 for the $25,000 amount.

[269] Ms. Barkley's evidence that she did not wish to set aside the settlement for only a $1,000 difference for the treatment plans of Dr. Bautz is not reasonable as she was upset with Mr. Sloan and could potentially become entitled to access substantially increased catastrophic impairment benefits and some IRBs from Belair in the future if the agreement was set aside.

[270] I have concluded that based on the evidence at trial, Ms. Barkley had the opportunity to set aside the settlement both before and after retaining new counsel. She would very likely have been successful with little to no risk to her had she tried through negotiations with Belair or mediation, or ultimately an application to set aside the settlement on her repayment of the settlement funds.

[271] I refer herein to my more detailed reasons and authorities noted below for that conclusion on the issue of mitigation of damages which also apply here.

[272] Ms. Barkley did not attempt to do so. She continued to choose to accept the settlement after retaining new counsel likely knowing then of the catastrophic impairment assessment process and her potential claims of significantly increased accident benefits from Belair if she became catastrophically impaired in the future. Ms. Barkley was not catastrophically impaired then and I conclude that she would have accepted the settlement on May 12, 2014

and in fact continued to do so thereafter despite her allegations of Mr. Sloan's negligent advice provided.

[273] Accordingly, I am not satisfied that Ms. Barkley has demonstrated on a balance of probabilities that but for the negligent advice of Mr. Sloan, she would have proceeded in a manner that would have avoided her damages she claims she sustained or obtained the benefit lost by rejecting Belair's $25,000 offer and would have taken her chances in pursuing her potential claim for significantly enhanced catastrophic impairment and other *SABS* benefits in the future.

[274] Second, the causal link to Mr. Sloan , if any, was broken when Ms. Barkley retained new counsel in time to undo Mr. Sloan's negligence.

[275] Lederer J on a motion for summary judgment in *Crawford-Montague v. Benjamin*, 2017 ONSC 6729 dismissed the action for negligence against the defendant lawyer on the issue of causation. The court, following the "but for" analysis in *Folland*, held at paras. 18 and 20 that the plaintiff's former defendant lawyer was not responsible for any damages the plaintiff sustained when new lawyers retained by the plaintiff received the file in time to bring the necessary motion to set aside or appeal an order dismissing the action, provided competent advice thereon but presumably with the client's instructions, determined not to proceed.

[276] Lederer J held that the causal link to the defendant lawyer was accordingly broken. Had the motion proceeded, there was every expectation that the order dismissing the action would have been set aside and the action allowed to continue.

[277] Morgan J in *Basandra v. Guerette*, 2018 ONSC 582 following *Folland* confirmed that in an action for lawyer's negligence, the caual link was broken where there was a rescission on consent in 2014 of a 2009 *SABS* settlement. The rescission was an intervening act and the lawyer's conduct was not the cause of the plaintiff's loss.

[278] I similarly conclude that there was every expectation that had Ms. Barkley attempted to negotiate with Belair and if necessary, bring an application through Mr. Sloan or her new counsel to set the settlement aside on her repayment of the settlement funds because of there not being a meeting of minds, it would have been successful.

[279] Based on all the evidence including the reasonable inferences therefrom, I conclude that Ms. Barkley, given that she advised her new counsel that she was upset at Mr. Sloan regarding the settlement and the mistake that was made, likely received some advice from her new counsel regarding her potentially setting aside the settlement on her repayment of the settlement funds by negotiating with Belair or mediation/application proceedings but for whatever reasons, new counsel did not do so presumably following her instructions.

[280] Because of this break in causation including my reasons and analysis under mitigation of damages, Mr. Sloan accordingly was not the cause of Ms. Barkley's loss with respect to her damages claims for the value of enhanced catastrophic impairment accident benefits and IRBs.

[281] Third, for the reasons noted below, Ms. Barkley has not established that she would likely have been found to be catastrophically impaired by September 2016 up to 2017, or lost that opportunity or chance which would have entitled her to significantly enhanced accident benefits from Belair. Accordingly, Ms. Barkley has not established that Mr. Sloan's negligence caused any loss of those enhanced benefits including any lost opportunity damages.

[282] Lastly, Ms. Barkley has not established that but for Mr. Sloan's negligence she would have received a much better recovery from Belair with no corresponding reduction from her tort settlement.

[283] In *Parlanis v. Reybroek*, 2022 ONSC 5135, a case involving an improvident settlement claim of accident benefits against the lawyer, the court following *Folland* at paras. 114-115 concluded that the plaintiff

> "had not demonstrated on a balance of probabilities that had he been advised by Rebroek to undergo a CAT assessment, he would have chosen not to accept the amount offered by Aviva and instead would have taken his chances in pursuing his accident benefits claims through the process set up for doing so, and that he would have been successful in achieving a much better recovery with no corresponding reduction in what he would have received from the tort defendants either by way of settlement or at trial."

[284] Even if Ms. Barkley did establish that she would have been found to be catastrophically impaired in 2016 the 2017 resulting in her entitlement to

claim enhanced accident benefits including IRBs, she has not established that but for Mr. Sloan's negligence, she would have received a much better recovery for *SABS* with no corresponding reduction in what she would have received from the tort defendants either by way of settlement or at trial.

[285] The Court of Appeal in *Cadieux v. Cloutier*, 2018 ONCA 903 at paras. 116 and 117 confirmed that the *Insurance Act* regarding accident benefits and tort damages is designed to put an injured plaintiff in the position he or she would have been had the accident not occurred and that any overlap or overcompensation should be avoided. Victims should be fairly compensated but not overcompensated.

[286] Ms. Barkley received a total of $30,487 from Belair for medical/rehabilitation benefits and $7,588 in attendant care benefits for those past and future expenses which included the $25,000 settlement. The tort defendants were entitled to deduct those amounts from Ms. Barkley's corresponding claims for such damages against them on a "silo" approach basis.

[287] The tort defendants after mediation in February 2020 settled Ms. Barkley's tort claim for $1.5 million in damages plus costs of $304,150. Ms. Barkley's evidence was that there was no breakdown of the settlement amount for the damages by the tort defendants. There was also no evidence at trial that that settlement took into account a deduction of Ms. Barkley's entitlement to accident benefits of any more than the amounts referred to in the previous paragraph.

[288] Ms. Barkley admitted that she settled the tort claim in that amount because she did not want to have to go to trial because of her time commitment and stress associated with that and that the settlement was in the range of what was reasonable compensation although low. Mr. Barkley said that that settlement number was accepted as a compromise on the numbers that had been advanced to avoid the risks of going to court.

[289] Ms. Barkley apparently claimed essentially the same damages for past and future healthcare, attendant care and housekeeping expenses in the tort action that she now claims in this action against Mr. Sloan. In that tort action, she relied on the reports of the occupational therapist Celina Grande and Terry Pearce, a future care costs expert, both of whom gave the same evidence in this case.

[290] Ms. Barkley also claimed significant past and future income losses herself of $2,568,958 for herself and $1,637,637 for her spouse totaling approximately $4.2 million relying on a 2018 report of Mr. Forbes of Price Waterhouse Coopers ("PWC").

[291] The only weight I place on that report is to prove that the Barkleys made those income loss claims of $4.2 million in that action.

[292] Mr. Forbes did not testify at trial with respect to the contents of that report. Mr. Paulin, Ms. Barkley's forensic accounting expert, did not comment on those claims at trial.

[293] Mr. Barkley's only evidence at trial was that he was familiar with the contents of that PWC report and the summary of the income loss claims therein.

[294] Ms. Barkley stated at trial that she had an income loss but provided no details other than referring to the income tax returns of herself and Barkley and Barkley Professional Corporation. Similar to Scott, she simply confirmed that those income loss claims noted in that PWC report were advanced in the tort action.

[295] Mr. Barkley stated in his evidence at trial that one of the big reasons he terminated his previous job to work with his spouse Ms. Barkley in December 2013 was because he was not happy with his employer which had made a change in their pension policy that was going to affect him and was not communicated to staff. In addition, he stated he could also work from home rather than travelling daily to Toronto which helped balance their family life and responsibilities, freed him up to help out with things and allowed him to go to Ms. Barkley's clients' sites if she could not. He stated that Ms. Barkley's difficulties were a reason to work with her.

[296] Ms. Barkley's evidence was that in the fall of 2013 they considered whether it made sense for Mr. Barkley to start working with her because she was turning away so much work and was unable to serve the clients but also because his employer had unilaterally changed the pension plan from a defined-benefit to defined contribution which cost Mr. Barkley a lot of money. Mr. Barkley ended up leaving his job in the middle of January 2014. They formed Barkley and Barkley Professional Corporation.

[297] Accordingly, there could have been a significant issue in the tort claim of Mr. Barkley establishing an income loss but for the injuries sustained by his spouse in the accident of November 2012.

[298] There is no admissible evidence that those tort claims in that PWC report had any validity, including the assumptions and projections of income made, and if so, in what amounts.

[299] The court in *Parlanis* at para. 91 referred to *Lauesen v. Silverman*, 2016 ONCA 327 at paras, 15 to 17:

> When a person settles in action, it is most often for an amount that is less than the full amount of the claim. It is based on a compromise reached by both sides in order to finalize the litigation without incurring the additional cost, time and risk of an uncertain result in proceeding the trial. Many factors go into the decision to settle an action rather than have a trial. They include the perceived strength of the case, the availability of necessary evidence, the credibility and reliability of that evidence, and the delay until the trial date, to name but some of the factors. The fact that the person accepts the settlement that is less than the full amount of the claim does not mean that the person has suffered an actionable loss. The person has made a calculated assessment of all of the relevant factors and decided to accept an amount that reflects that assessment and is acceptable on that basis.…

[300] Accordingly, I cannot and do not find that the Barkleys' tort settlement reached of $1.5 million plus substantial costs in February 2020 was significantly less than what the case was worth. Rather, as Ms. Barkley stated, it appears that it was likely in the range of what was reasonable compensation although low.

[301] If Ms. Barkley had pursued her claims for further accident benefits from Belair by either rejecting the settlement proposal from Belair of May 14, 2014 or by successfully moving to have the settlement agreement set aside, the tort defendants would have been entitled to a further deduction of any additional IRBs Ms. Barkley would have received from Belair against her loss of income claim for tort damages and for any additional health care, attendant care and housekeeping benefits received against her claims for those tort damages respectively. That includes their right to claim the benefit of a trust or an assignment of future *SABS* payable to Ms. Barkley from Belair.

[302] Accordingly, there is no basis for Ms. Barkley's evidence that the tort settlement would have been much higher if the tort defendants were entitled to deduct the accident benefits she now claims dollar for dollar from the tort damage award.

[303] *Folland* requires that Ms. Barkley show on a balance of probabilities that if she were properly advised she would have proceeded in a manner that avoided the damages suffered or obtained the benefit lost as a result of the negligent advice.

[304] The Supreme Court of Canada in *Ratych v. Bloomer*, [1990] S.C.R. 940 confirmed that in tort law, the plaintiff is entitled to be placed in the same position he or she would have been had the tort not been committed. The measure of damages should be the plaintiff's actual loss and implicit in this is that the plaintiff should not recover unless he can demonstrate a loss and then only to the extent of the loss.

[305] Per *Parlanis*, Ms. Barkley has not established any loss of benefit i.e., she would have been successful in achieving a much better recovery but for Mr. Sloan's negligence. Any additional *SABS* amounts that Ms. Barkley might have been recovered from Belair would have resulted in a corresponding reduction in what she would have received from the tort defendants for those claims either by way of settlement or at trial.

[306] Again, the intention of s.267.8 of the *Insurance Act* and *SABS* provides for some overlapping of coverage for loss of income and health care expenses but it allows tort defendants to deduct accident benefit amounts received by the plaintiffs from their corresponding "silo" tort damages to avoid double recovery.

[307] Ms. Barkley's counsel objected to Mr. Schneider giving his opinion regarding this issue as it was not necessary not being helpful to the trier of fact. Also, Mr. Schneider was not being impartial and purported to comment on the ultimate issue on a question of law involving double recovery. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23*; Alfano v. Persanti*, 2012 ONCA 297.

[308] The court in *Parlanis* at para. 90 confirmed that the applicable standard of care involves the assessment of the conduct of the lawyer providing advice to a client during the course of negotiation of the settlement of accident benefits

claims against his insurer where the amounts paid by the insurer will likely reduce the amounts potentially available to the client pursuing compensation from tortfeasors in civil actions arising out of the same accident.

[309] The court in *Rivait v. Montforton*, 2005 O.J. No. 4698 at paras. 63-67, aff'd at 2007 ONCA 829, considered the evidence of the expert lawyers that all accident benefits received or available to the plaintiff in an action against the lawyer alleging an improvident settlement of an accident benefits claim would operate as a deduction at that time against the claim for the plaintiff's loss of income or to reduce general damages.

[310] I have considered the intention and effect of s. 267.8 of the *Insurance Act* and these other court decisions as they relate to Ms. Barkley's claims against Mr. Sloan. I have considered Mr. Schneider's opinion only as noted in *Rivait* but nothing more.

[311] Although this action was commenced against Mr. Sloan in April 2016, it appears that it was held in abeyance until after the settlement of the tort action in February 2020. Mr. Sloan's statement of defence was then filed in October 2020.

[312] It is incongruent that Ms. Barkley should now be able to claim damages against Mr. Sloan because of his negligent advice for the value of those enhanced *SABS* in addition to her tort settlement she received when any hypothetical *SABS* she would have received from Belair would be deducted from, not in addition to, the tort settlement of $1.5 million. Ms. Barkley has not established that any deduction of the value of those *SABS* would not have been warranted to avoid double recovery.

[313] Ms. Barkley has accordingly failed to prove on a balance of probabilities that Mr. Sloan's negligence caused her to sustain any damages.

Barkley's Medical Condition from 2016 to Present

[314] Ms. Barkley claims that at some point from April to September 2016 until 2017, she would likely be found to have suffered a catastrophic impairment injury under Criteria (e) and Criterion (f) under the *SABS* as a result of the accident of November 12, 2012, thereby entitling her to access to significantly enhanced lifetime accident benefits.

[315] Accordingly, a review of the evidence regarding her medical condition during that time is required.

[316] Ms. Barkley continued to receive treatment from her medical specialists Drs. Shandling, Tumber and Bautz after the settlement of the *SABS* claims in 2014 as her CRPS symptoms continued. Ganglion nerve blocks in September 2014 provided temporary relief of her pain but her pain and mental health issues continued to decline.

[317] Her pain and swelling symptoms continued to become more severe in the summer of 2016 including down her left arm and hand, left foot, shoulder, neck and left hip requiring her at times to use a cane. She used medication to sleep. Because of her pain, she was making mistakes in her accounting work, only worked approximately 20 hours a week and stopped work altogether in September 2016 which increased her depression.

[318] She applied for Canada Pension Plan disability benefits ("CPPD") in September 2016 and although initially denied, she was eventually found eligible for those benefits in April 2018 retroactive to September 2016. The benefits commenced in January 2017 and continue to date.

[319] She continued to have significant pain and mental health issues after she stopped work. She had continued diagnoses of depression, anxiety and CRPS. She received lidocaine injections and trigger point injections without success in 2017, treatment through Dr. Tumber for her chronic pain as well as physiotherapy, medical marijuana and treatment with Dr. Bautz.

[320] In the spring of 2018 her evidence was she was not able to care for her family and she slept most of the day. She participated in minimal activities outside the home.

[321] She stopped seeing Dr. Tumber and Dr. Bautz in late 2018 or 2019.

[322] After the settlement in February 2020 of her tort claim of $1.5 milllion for damages plus costs, Ms. Barkley did not benefit from ketamine treatment in 2023 which was discontinued.

[323] Ms. Barkley stated that she presently takes antidepressant medication that has been helpful in managing her depression which has improved. She takes sleeping pills, THC medical cannabis through a medical cannabis clinic and supplements for pain management. She states she still presently has severe

pain but her ability to cope with the pain has improved. She complains of dizziness and pain in her neck, left shoulder, left hip and left lower leg and foot and right leg soreness as well as left arm hypersensitivity, coldness and occasional discolouration and tingling. Her evidence was that her left foot symptoms currently have the most functional impact of her life.

[324] She frequently takes naps and lays down and uses a heating pad often. At times when her pain in her legs and feet are significant, she uses a crutch or scooter when walking long distances.

[325] Ms. Barkley fortunately has had some improvement psychologically particularly with respect to her depression although she states she still has high levels of anxiety.

[326] She has not returned to work since 2016 stating her recall and focus are so bad that accounting is no longer a good fit for her. She has never worked in any other field outside of having done some volunteer work including bookkeeping for a local political riding association and providing part-time bookkeeping support for a candidate in the 2024 municipal election receiving a $3,000 honorarium. In 2022, she unsuccessfully ran for the part-time trustee position with the local school board. She has become involved in a group that advocates for legal reform and the rights of sexual abuse victims. She has recently been able to participate in kayaking on more than one occasion as confirmed by Mr. Barkley.

[327] Dr. Lesley Ralston, Ms. Barkley's friend, noticed Ms. Barkley's diminished physical functions and discomfort since 2015 but not mental restrictions and not any improvement since that time.

[328] Lisa Brown, another family friend since 2013, testified that she notices that Ms. Barkley appears to avoid physical activities including stairs, uses her cane and withdraws from conversations.

[329] The occupational therapist Ms. Grande completed an in-home assessment and provided a report of August 2016 for Ms. Barkley's lawyers in the tort action. She recommended then that Ms. Barkley be provided with housekeeping and outside yard maintenance assistance, occupational therapy, an exercise program and some assistive devices, supervisory and emotional support because of her pain, cognitive difficulties and fatigue.

[330] Dr. Kirsh, a psychiatrist, examined Ms. Barkley in September 2018 and provided a medical legal report for one of the defendants in the tort action. He diagnosed her with somatic symptom disorder, major depression and chronic pain. Dr. Kirsh did not believe her chronic pain syndrome had anything to do with the motor vehicle accident as Ms. Barkley told him that nothing physical had happened to her in the accident and she only spontaneously started to have neck pain two months after it. Dr. Kirsh however admitted that the accident potentially had a psychological impact on her. He did not believe she was malingering her pain which potentially she would have for her life or feigning her psychological condition. Dr. Kirsh's opinion was that Ms. Barkley was capable of beginning a return to work taking on only a small amount of work and then increasing her hours very slowly. He did not give an opinion as to whether he believed she would be successful in doing so.

[331] Dr. Selchen, a neurologist, in 2019 also examined Ms. Barkley for one of the tort defendants. He ruled out the possibility of malingering and concluded the most likely diagnosis was a highly atypical CRPS with a significant underlying emotional/psychological/psychiatric contribution in the category of a somatoform disorder.

The Likelihood of Alexa Barkley being found to Have Suffered a Catastrophic Impairment Injury after the Settlement of May 12, 2014

[332] Ms. Barkley's position is that at least by September 2016 when she stopped working she would have been able to be designated as catastrophically impaired.

[333] Accordingly, she alleges that absent Mr. Sloan's negligence and breach of contract, she ultimately would have been able to settle her accident benefits claim at an appropriate time once her condition was stable based on Belair's exposure to both lifetime IRBs and CAT level treatment benefits. Mr. Sloan's negligence and breach of contract caused her to sustain damages including loss of opportunity damages for the value of those lost enhanced benefits payable by Belair.

[334] Ms. Barkley relies on the opinion evidence of her expert chiropractor Dr. Adriano Persi details of which are noted herein.

[335] Mr. Sloan relies on the opinion evidence of his expert Dr. Gnam. Dr. Gnam not only strongly disagrees with the opinion evidence of Dr. Persi on both

catastrophic impairment criteria, he also opines that Dr. Persi, as a chiropractor and not a physician, is not qualified to provide an expert opinion in diagnosing mental disorders or regarding WPI ratings, mental WPI ratings, attributing functional impairments due to the effects of mental disorders or adjudicating the severity of mental impairments.

[336] Given the date of the accident of November 12, 2012, I must apply Subsection 3(2) of the *SABS* as it read at that time.

[337] Under Criteria (e), catastrophic impairment is an impairment or combination of impairments that in accordance with the *American Medical Association's Guides to the Evaluation of Permanent Impairment,4th ed.,1993*, (" *Guides")* results in 55% or more impairment of the whole person.

[338] Accordingly, Ms. Barkley would be catastrophically impaired if she sustained a physical impairment combined with a mental or behavioural impairment that resulted in a WPI that was 55% or more.

[339] Under Criteria (f), catastrophic impairment is an impairment that, in accordance with the *Guides* results in a Class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to a mental or behavioural disorder.

[340] Accordingly, Ms. Barkley would be catastrophically impaired under Criteria (f) if she sustained an impairment due to a mental or behavioural disorder that reached the threshold of Class 4 (marked impairment) being an impairment that significantly impedes useful functioning in at least one of the four spheres of useful function described further herein.

[341] At that time, the *Guides* also provided the framework for assessing physical and psychological impairments respectively and specified who is qualified to provide opinion evidence about permanent impairment and the process for assigning impairment ratings.

[342] Ms. Barkley bears the onus of proving on the balance of probabilities that as a result of the accident, she would likely have been found to be catastrophically impaired under the *SABS* during the time period of 2016 and 2017.

[343] The test to determine whether Ms. Barkley was catastrophically impaired is a legal test and not a medical one. *Liu v. 1226071 Ontario Inc*., 2009 ONCA 571.

[344] The Ontario Court of Appeal in *Kusnierz v. Economical Mutual Insurance Company*, 2011 ONCA 823 confirmed that the definition of "catastrophic impairment" was intended by the legislature to have an inclusive and not restrictive meaning.

[345] Dr. Cherise McKay, a neuropsychologist, and Dr. Michel Rathbone, a neurologist, assessed Ms. Barkley and provided reports for her counsel for the purpose of the tort action and gave evidence at this trial. Dr. Persi and Dr. Gnam referred to their reports. A summary of their main evidence for Ms. Barkley is as follows.

Dr. Cherise McKay

[346] Dr. Cherise McKay, a psychologist and neuropsychologist, was retained by Ms. Barkley's counsel to assess her in January 2015 for the purposes of the tort action. She was also qualified to give opinion evidence in clinical neuropsychology and in the determination of mental and behavioural catastrophic impairment ratings. However, she is not a physician which Mr. Sloan's counsel states significantly restricts and prevents her ability to provide that evidence in this case which I will consider further herein.

[347] Dr. McKay in 2015 diagnosed Ms. Barkley with major depressive disorder and Pain Disorder/Somatic Symptom Disorder caused by the accident which significantly interfered with her daily activities.

[348] She found that Ms. Barkley had not suffered a traumatic brain injury or concussion as a result of the accident. Ms. Barkley's initial heightened anxiety and PTSD had improved but her prognosis was guarded given her long-standing pain and psychological issues. Dr. McKay opined that Ms. Barkley could not work full-time but could work part-time and was at risk for future deterioration. Dr. McKay recommended psychological intervention and counselling.

[349] Although not initially requested to perform a CAT assessment at that time in 2015, Dr. McKay, in 2023 relying on that initial assessment, rated Ms. Barkley then in 2015 as only moderately impaired, not markedly impaired, in all four domains of function being: (i) activities of daily living, (ii) social

functioning, (iii) concentration, persistence and pace, and (iv) the deterioration in the work or workplace setting.

[350] Dr. McKay explained at trial that the California Method at that time was also an accepted method used by psychologists, psychiatrists and neuropsychologists to calculate mental or behavioural impairment by assigning a global assessment of function ("GAF score") and then using a table to convert that to a WPI. Although some clinicians use the GAF score method, she does not stating that the *Guides* instructions are to classify impairment within the confines of the *Guides*.

[351] In 2015, Dr. McKay did in fact assign a GAF score of 57 to 62 for Ms. Barkley's mental/behavioural impairment which she conceded was not entirely moderate but rather fell between "some mild symptoms" and "moderate symptoms". At trial, Dr. McKay agreed that this GAF score California Method, translates to only 12% to 20% WPI.

[352] In her June 1, 2023 report and at trial, Dr. McKay provided her opinion evidence as to a retrospective catastrophic impairment assessment of Ms. Barkley based on her 2015 assessment of Ms. Barkley and review of her 2015 report. She stated that the 2015 report was a complete and accurate reflection of Ms. Barkley's mental status at that time and she had no reason to doubt or revise any of those findings, opinions or conclusions she had made.

[353] Based on those 2015 findings, Dr. McKay at trial now assigned a WPI rating of 25% under Criteria (e) due to her mental and behavioural impairments. She found a 20% WPI for activities of daily living, 20% WPI for social functioning, 23% for concentration, percentage and pace and 25% WPI for adaptation in the workplace.

[354] However, by assigning a 25% WPI, Dr. McKay admitted that she chose the highest WPI percentage of the four separate domains of Ms. Barkley's function, not their average or median. This WPI amount of 25% is the equivalent of a GAF score of 54 to 55 and, according to Dr. Gnam, is inconsistent with her 2015 GAF score of 57 to 62 which produced a significantly lower WPI of 12% to 20%.

Dr. Michel Rathbone

[355] Dr. Michel Rathbone, a neurologist, was also retained by Ms. Barkley's counsel with respect to the tort action and who examined Ms. Barkley in April 2017.

[356] Dr. Rathbone confirmed that Ms. Barkley told him that she had no pain at all after immediately the accident. Nothing happened for two or three weeks and then she started having aches and pains, "a bit like the work related pains and back pain" and she was aware of spine, facial stiffness and some nausea. She did not seek medical attention until January 15, 2013, two months after the accident. Nevertheless, he diagnosed Ms. Barkley with chronic pain disorder and CRPS Type 1 that was caused by the accident despite his concerns with her delayed physical symptoms which were affecting her arm and leg on the left side.

[357] Dr. Rathbone also did not find that Ms. Barkley had suffered a traumatic brain injury or concussion as a result of the accident. Dr. Rathbone did not diagnose any neurologically based headaches, any impairment of the spinal nerves in the head and neck region or occipital neuralgia. He stated that Ms. Barkley did not report she suffered from headaches and explained that neck pain can sometimes result in head pain.

[358] Dr. Rathbone recommended the use of antidepressant and pain medications, psychotherapy, exercise and potentially stellar ganglion blocks.

[359] He stated that it would be difficult at that time to make Ms. Barkley better and he did not think she would be able to go back to work full-time as an accountant because of her significant pain affecting her leg and hand. He also stated she would not be able to return to other work including after retraining. He did not think she would improve in the future and that it would be unreasonable for her to complete her housekeeping activities given her leg and hand pain. Dr. Rathbone admitted that he was surprised that Ms. Barkley was kayaking in May 2023 suggesting her condition would have improved.

[360] Dr. Rathbone did not provide his opinion evidence regarding a WPI rating for Ms. Barkley's physical impairment.

Criteria (e) Catastrophic Impairment

[361] For the reasons noted below and based on the evidence at trial, I find that Ms. Barkley has not demonstrated on a balance of probabilities that from 2015 to 2017 she had a combination of physical and mental or behavioural

impairments as a result of the injuries sustained in the accident that resulted in Ms. Barkley's WPI of 55% or more.

[362] Dr. Persi is a duly qualified and licensed chiropractor who operated a Disability Designated Assessment Centre ("DAC") from 1994 to 2007 to conduct musculoskeletal disability assessments under the automobile insurance legislative regime then in effect. He has been certified by the American Board of Independent Medical Examiners in the AMA *Guides to the Evaluation of Permanent Impairment, 6th ed., 2016* and previous to that the 4th edition *Guides*. His training on the AMA Guides involved his taking the only Assessment training course that was provided and now taught by the defence expert Dr. Gnam. He has performed over 1,000 catastrophic impairment assessments since 2000. He has provided expert evidence regarding claims for catastrophic impairment before the Licence Appeal Tribunal ("LAT") and the previous Financial Services Commission of Ontario ("FSCO") on numerous of occasions.

[363] Mr. Sloan's counsel at the onset challenged the admissibility of Dr. Persi's opinion evidence regarding the mental and behavioural impairment claims of Ms. Barkley on the basis that he was not qualified to give that evidence. After submissions from counsel including on the interpretation of the *SABS*, I decided to hear his evidence and that of Dr. Gnam before deciding the issue of the admissibility of Dr. Persi's opinion evidence and if so, what weight, if any, would be attached to it.

[364] Dr. Persi did not physically examine or assess Ms. Barkley or prepare a report for submission to an insurance company regarding her claim or application for catastrophic impairment assessment. Ms. Barkley did not undergo a catastrophic impairment assessment at any time under or similar to one under s. 45 of the *SABS* to determine whether she would meet the test of catastrophic impairment from 2016 to 2017. She did not do so in order to determine whether she presently met that test unlike the facts in *Parlanis*.

[365] Rather, Dr. Persi did a retrospective analysis of whether Ms. Barkley would likely have met the catastrophic impairment criteria under the *SABS* between 2015 and 2017 based on a review of some of her medical reports.

[366] In 2022, Dr. Persi reviewed and relied on the medical reports of Dr. Rathbone of April 25, 2017, the neuropsychological reports of Dr. McKay of March 16, 2015 and November 29, 2018, the occupational therapy report of Celina

Grande of August 29, 2016, the future care costs report of Terry Pearce of November 20, 2018 together with some physiotherapy, chiropractor records and occupational therapy records regarding Ms. Barkley from 2013 and early 2014. He subsequently reviewed the further report of Dr. McKay of June 1, 2023.

[367] He did not have or review any of the actual records or reports of Ms. Barkley's treating doctors being Dr. Shandling, Dr. Bautz and Dr.Tumber but just the summaries of them contained in Dr. Rathbone's and Celina Grande's reports.

[368] Dr. Persi's opinion evidence regarding Ms. Barkley's impairment under both Criteria (e) and (f) was accordingly based retroactively on the clinical assessments in those reports of Dr. Rathbone, Dr. McKay and Celine Grande.

[369] Both Dr. Persi and Dr. Gnam agree that the physical and psychological mental/behavioral impairment ratings under Criteria (e) are combined after reducing the total of their mathematical amounts using the Combined Values Table in the *Guides*.

[370] Both Dr. Persi and Dr. Gnam also agree that after that, the *Guides* then require a final WPI rating be rounded to the nearest value ending in a 0 or 5.

[371] Dr. Persi's opinion was that under Criteria (e), the combined WPI for Ms. Barkley from 2015 until 2017 for her physical as well as her mental and behavioural impairments was 58% rounded up to 60% which met the criteria for catastrophic impairment as it was in excess of 55%.

[372] Dr. Persi's calculation of that WPI amount was as follows:

cervical spine	5%
left upper extremity	28%
sleep disturbance	9%
headaches	5%
chronic pain	3%
effects of treatment/medication side effects	3%
mental/behavioural	29%

Total combined physical and mental/ behavioural WPI	58% rounded up to 60%

[373] Dr. Persi agreed that if the opinion of Ms. Barkley's neuropsychologist Dr. McKay was accepted that Ms. Barkley's WPI for mental and behavioural impairment was 25% not his rating of 29%, using the Combined Values Chart would result in a final WPI of 57% which would be rounded down to 55% WPI and which still satisfied the test for catastrophic impairment.

[374] Further review of Dr. Persi's evidence is provided below in comparison to that of Dr. Gnam with respect to the individual impairment ratings in dispute.

[375] Dr. Gnam is a fully licensed physician of the College of Physicians and Surgeons of Ontario with his specialty qualification in psychiatry since 1994. He initially took the same course as Dr. Persi did regarding his training in the AMA Guides and was a founding member, lecturer, examiner and grader of the examinations for the Catastrophic Impairment Certification Course offered jointly by the Canadian Society of Medical Evaluators and the Canadian Academy of Psychologists and Disability assessment which instructs various health professionals in the use of the *Guides* and subsequent ones in Ontario. He was one of two scientific and clinical consultants to the Expert Panel in Catastrophic Impairment of FSCO. He has provided over 2,000 CAT opinions and his expert opinion evidence in psychiatry and mental impairment ratings on numerous occasions in arbitrations conducted by FSCO, the LAT and at hearings in the Superior Court of Justice.

[376] Dr. Gnam was qualified to give opinion evidence in the area of psychiatry and mental disorders, income replacement benefits entitlement under the *SABS* as it relates to psychiatric and mental disorders and in the application and interpretation of the *Guides*.

[377] Dr. Gnam also did not examine or conduct a catastrophic impairment assessment of Ms. Barkley when he was asked to do a retrospective analysis of whether Ms. Barkley would likely have met catastrophic impairment criteria under the *SABS* up to March 2016.

[378] In addition to the reports of Dr. Rathbone and Dr.McKay, Celina Grande and Terry Pearce which Dr. Persi had reviewed, Dr. Gnam also had and reviewed the extensive pre-and post-accident medical treatment files of Ms. Barkley including from her family doctors, Dr. Bautz, Dr. Shandling and Dr. Tumber

and other medical practitioners, various hospital records, and the reports of the psychiatrist Dr. Brian Kirsch of October 2 and December 4, 2018 and February 13, 2020. He also had Dr. Persi's report for his catastrophic determination review of Ms. Barkley dated November 29, 2022.

[379] Dr. Gnam's initial calculation in his report of Ms. Barkley's WPI ratings from May 12, 2014 to May 12, 2016, referring to the chronology of Dr. Persi's chart above, was as follows:

cervical spine	5%
left upper extremity	28%
sleep disturbance	0%
headaches	0%
chronic pain	0%
effects of treatment/medication side effects	3%
mental/behavioural	22%
Total combined physical and mental/behavioural WPI	49% rounded to 50%

[380] Ms. Barkley's WPI impairment ratings for cervical spine of 5% and effects of treatment/medication side effects of 3% were not in dispute at the trial. Dr. Gnam, as a psychiatrist, could not comment on the WPI for Ms. Barkley's left upper extremity. Mr. Sloan's counsel submitted Dr. Persi's WPI assessment of 28% for that should not be accepted as reliable which I will consider further herein.

[381] Dr. Gnam's initial calculation, even accepting that 28% WPI rating for her left upper arm extremity, resulted in Ms. Barkley's combined WPI being less than 55%. Accordingly, he disagreed with Dr. Persi's opinion and concluded that Ms. Barkley would not have been found to be catastrophically impaired.

[382] I do not accept the opinion evidence of Dr. Persi and where it conflicts with that of Dr. Gnam, I prefer and accept the evidence of Dr. Gnam for the reasons noted below.

Level of Expertise

[383] First, Dr. Gnam's education, training and experience in the determination of catastrophic impairment, the *SABS* and the *Guides* is significantly superior to that of Dr. Persi. He regularly instructs, examines and grades health professionals regarding the application and interpretation of the *Guides*. He is also a physician, unlike Dr. Persi, and one of the foremost psychiatric experts in the interpretation and application of the *Guides*.

Mental or Behavioural Impairment/Disorder

[384] Second, I accept Dr. Gnam's evidence that Ms. Barkley's mental and behavioural WPI impairment was between 20% to 22% and reject Dr. Persi's evidence that it was 29% including because as a chiropractor, he is not qualified to give that opinion evidence.

[385] In arriving at that 29% WPI finding, Dr. Persi stated that he applied his "marked impairment" rating referred to below under Criteria (f) that he found significantly impeded Ms. Barkley's useful functioning spheres of concentration, persistence and pace and adaptation in a work or work like setting due to a mental or behavioural disorder.

[386] He then converted that Class 4 impairment into a WPI rating under Criteria (e). He stated he then used the tables in the *Guides* and the Rating by Analogy process to come up with a mental or behavioural impairment rating between 15% to 29% and used the highest figure of 29%.

[387] Dr. Gnam found that Ms. Barkley's level of impairment for all four spheres of function was interfering with some but not all useful functioning which put her at most in the moderate Class 3 range. He concluded that there were no marked impairment levels due to a mental or behavioural disorder that significantly impeded useful function and resulted in a Class 4 impairment in any of the four domains of functional ratings. Dr. Gnam then converted that impairment rating and initially assigned a 22% WPI for that which was within the range of 15% to 29% provided in Table 3 of Chapter 4 of the *Guides*.

[388] Dr. Gnam explained the two methods of assessing a WPI score. The first method uses the *Guides* directly. The second uses the Global Assessment of Functioning scale ("GAF") or California Method that was used extensively in psychiatry and psychology and yields a single number impairment that mathematically converts it to a WPI scale. Dr. Gnam's evidence was that in teaching the catastrophic impairment course, it has always been his position that the GAF was a more useful aid than the *Guides* with which two physicians seeing the same client will produce the same or very close impairment number.

[389] The Adjudicator in *G.T. v. The Guarantee Company of North America*, 2020 ONLAT 18-003334/AABS at paras. 18-21 noted at that time that the LAT has accepted Dr. Gnam's position that the California Method was an appropriate method for converting mental and behavioural impairments into WPI ratings and a suitable method for rating mental and behavioural impairment because it provided greater precision with respect to ratings as opposed to the broad ranges that were provided by Dr. Persi's method in that case.

[390] After a further review of Dr. McKay's 2015 report, Dr. Gnam realized that he had missed Dr. McKay's GAF scale of 57 to 62 noted therein which after converted was a direct estimate of Barkley's WPI of 11% to 20% WPI due to a mental or behavioural disorder at that time. Dr. Gnam said this was the best evidence of the appropriate WPI rating for Ms. Barkley's mental or behavioural disorder and was more accurate and appropriate than his 22% estimate.

[391] Dr. Gnam accordingly revised his mental or behavioural disorder WPI rating estimate slightly down to 20% using Dr. McKay's maximum converted number but which after rounding nevertheless still resulted in the approximately combined 50% overall WPI rating.

[392] Significantly, Dr. Gnam stated that Dr. Persi as a chiropractor and not a physician was not qualified and was prohibited by the *SABS* and the *Guides* from assigning impairment ratings, opining on whether when combined they reach the catastrophic threshold and from providing opinions on functional impairments attributable to mental or behavioural disorders that require the expertise of the specialist to do so.

[393] Dr. Gnam stated that the *SABS* and the *Guides* both require that the evaluations and production of the WPI estimates are the job of the physician except where

the only impairment was a brain impairment when a neuropsychologist could provide an opinion about the threshold for catastrophic impairment.

[394] Dr. Gnam was clear that the first two steps in Chapter 2 of the *Guides* required a proper medical evaluation by a physician, documenting findings, assessing the impairment, analysing the history and laboratory results and bringing all the information together.

[395] The third step is for the person checking compliance or fidelity of the physician's opinions (i.e. impairment estimates that have already been created) against the *Guides*. The role of the "knowledgeable person" in step three is not to do their own analysis or create their own impairment ratings; rather it is to double check that those ratings of the physicians are compliant with the ratings, guidance and method of the *Guides*.

[396] Dr. Gnam stated that his position was supported by Chapter 2 of the *Guides* which states as follows:

> The major objective of the Guides is to define the assessment and reporting of medical impairments so that physicians can collect, describe and analyse information about impairments in accordance with a single set of standards. Two physicians following the method of the Guides to evaluate the same patient should report similar results and reach similar conclusions…. Moreover, if the clinical findings, that is the impairment ratings are fully detailed, any knowledgeable observer can check the findings with the Guides criteria.

[397] Dr. Gnam also referred to Chapter 14 of the *Guides* which indicate that a physician and possibly even a psychiatrist must perform a mental/behavioural analysis of the claimant as follows:

> The heading "A Method of Evaluating Psychiatric Impairment" indicates reference to a physician.
>
> The reference to "medically determinable impairments and thinking" implies that a physician is conducting the assessment.
>
> The reference that reads: "The physician's observations made during the medical examination should be incorporated into the valuation together with other relevant observations" also implies that the assessment must be conducted by a physician.

[398] The *Guides* under 2.2 Rules for Evaluations also confirm that in general, it is a physician's responsibility to evaluate a patient's health status and determine the presence or absence of impairment and the physician should estimate the extent of the patient's primary impairment or impairing condition.

[399] Dr. Persi conceded that as a chiropractor he is not a physician. He had not spoken or consulted with any physician in preparing his reports and agreed that section 2.2 of the *Guides* state that in general the physician should estimate the extent of the patient's primary impairment or impairing condition. He agreed that in this case, there was no physician involved in evaluating the severity of Ms. Barkley's impairments or in providing impairment estimates under the *Guides*.

[400] He admitted that his chiropractor's expertise and opinions is limited to the assessment of the spine, musculoskeletal system, joints and disorders of the nervous system that result from disorders of the spine and joints and that he cannot diagnose, assess, treat or recommend treatment in relation to psychological or psychiatric disorders.

[401] He states however that given his experience and training in the *Guides* outside of his practice as a chiropractor, he believes he can provide an expert opinion as a knowledgeable person at step three of the three step process when he considers the functional impairments in order provide an impairment estimate.

[402] In fact, Dr.Persi stated that he would not necessarily defer to the mental and behavioural impairment ratings of the neuropsychologist Dr. McKay and the psychiatrist Dr. Gnam even though they were better qualified to assess impairments which are used to inform impairment ratings.

[403] I agree with Dr. Gnam's position and note that Dr. Persi, as a chiropractor and not a physician, not being qualified to provide an assessment of mental/behavioural impairments or assign WPI ratings without a physician having provided such ratings was recently confirmed in *Martin v. Certas Home and Auto Insurance Company*, 2025 ONSC 665.

[404] In *Martin*, the Divisional Court confirmed that Dr. Persi's evidence as a catastrophic impairment assessor was restricted within his own field of expertise when rendering a catastrophic impairment opinion. Lemay J agreed that s. 45 of the *SABS* entitled Dr. Persi to compile other assessors' impairment

ratings but was not entitled to provide new opinions on his own for his diagnoses that went beyond his own expertise.

[405] Section 45 states in part as follows:

> 45. (1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment.
>
> (2) The following rules apply with respect to an application under subsection (1):
>
> 1. An assessment or examination in connection with the determination of catastrophic impairment shall be conducted only by a physician but the physician may be assisted by such other regulated health professionals as he or she may reasonably require.
>
> 2. Despite paragraph 1, if the impairment is a traumatic brain impairment only, the assessment or examination may be conducted by the neuropsychologist who may be assisted by other such other regulated health professionals as he or she may reasonably require.
>
> 3. If a Guideline specifies conditions, restrictions or limits with respect to the determination of whether an impairment is a catastrophic impairment, the determination must be made in accordance with these conditions, restrictions and limits.

[406] Lemay J followed the earlier decision of *Snushall v. Fulsang*, 2003 CanLII 48418 (Ont.S.C.) which at paras. 39 and 40 confirmed Dr. Gnam's analysis of the three-step rating process set out in Chapter 2 of the *Guides*.

> [39] The Guides direct the clinician as the first step to gather thorough and complete historical information on the individual's medical condition(s), to carry out a medical evaluation and to compare the findings with the appropriate Guides tables to estimate the individual's impairment. The second step is to determine the nature and extent of the impairment. The third step is to compare the results of the analysis with the criteria specified in the Guides for the particular body part, system or function. The Guides state:

> This comparison is distinct from the preceding clinical evaluation and need not be performed by the physician who did that evaluation; rather, any knowledgeable person can compare the clinical findings with the Guides criteria and determine whether or not the impairment estimates reflect those criteria.
>
> [40] The Guides do not intend the "knowledgeable person" to necessarily be a person with medical knowledge. However, an impairment evaluation is a matter of medical knowledge and not judicial interpretation, as Dr. Becker suggested. It is therefore important that where the Guides provide ranges instead of fixed percentages, the assessing clinician brings his or her clinical judgment to bear on the question and arrives at a precise percentage. It is then the task of the "knowledgeable person" to determine, as the Guides state, "whether or not the impairment estimates reflect the Guides criteria" and to determine how the medical information fits with the other evidence.

[407] Lemay J confirmed in paras. 40-42, following *Snushall*, that Dr. Persi was entitled at the third step to engage in the compilation exercise of the clinical findings of other physicians but was not entitled to engage in the exercise of diagnosing a patient where that diagnosis goes beyond his own expertise. It is not an exercise in generating additional or new medical opinions.

[408] At para. 49, Lemay J stated:

> It would be a strange outcome indeed if a chiropractor or indeed someone who is not versed in medicine at all, could provide psychological diagnoses as part of a CAT evaluation merely because they were qualified to apply the AMA Guides.

[409] The Divisional Court in *Martin* found no error in the LAT giving Dr. Persi's evidence very little weight and confining Dr. Persi to his own area of expertise which was not psychiatry.

[410] The court at para. 45 also referred to the LAT decision in *Crecoukias v. Toronto Transit Commission*, 2022 ONLAT 19-014590/AABS , aff'd at 2022 ONLAT 19-014590/AABS wherein the adjudicator also assigned no weight to Dr. Persi's CAT psychological assessment because it was beyond his scope as a chiropractor to assign impairment ratings from a psychological perspective under the marked impairment function of Criteria (f).

[411] The Divisional Court recently in *Abboud v. Intact Insurance Company*, 2025 ONSC 3416 at para. 16 stated that it is clear law that the opinion of a psychologist who is not a physician is also not sufficient to meet the test in s. 45 of the Schedule. It held at para. 12 that the LAT correctly found [with reference to *SABS* s. 45] that to prove a claim for catastrophic impairment, the claim must be supported by an opinion from the physician. The court noted that this line of analysis is consistent with the LAT's prior jurisprudence and the language of s. 45 of the *SABS*: *Lanzon v. Economical Insurance Company*, 2023 ONLAT 20-005424/AABS; *Amoako v. Aviva Insurance Company of Canada*, 2021 ONLAT 20-000377/AABS at paras. 11, 12 and 21. See also *Abdi v. TD General Insurance Company*, 2021 ONLAT 19-008845/AABS at paras. 18-19; *Anwar v. Travellers Insurance*, 2023 ONLAT 21-000574/AABS at paras. 12-13.

[412] It appears that the LAT has been consistent in its decisions that only a physician can conduct an examination or assessment in order to determine a finding of catastrophic impairment. The LAT is a specialized body of arbitrators who routinely adjudicate claims for accident benefits. Their decisions provide persuasive authority regarding Ms. Barkley's obligations and requirements of proof before being entitled to a finding of catastrophic impairment under the *SABS*.

[413] This is significant as any application for catastrophic impairment that Ms. Barkley would have made after April 1, 2016 because of the change in the *SABS* could only be made to the LAT which had exclusive jurisdiction in the all *SABS* matters after that date.

[414] Dr. Persi, in his evidence, conceded that the *Guides*, as noted above, mandate that a physician estimate the extent of the patient's primary impairment or impairing condition and that he is not a physician. Dr. Persi also admitted that he did not consult with or assist any physicians while conducting a catastrophic impairment assessment or examination in preparing his reports assigning Ms. Barkley's catastrophic impairment ratings. His report was not directed by a physician unlike the facts in the decision relied on by Ms. Barkley of *Dyer v. Economical Insurance Company*, 2024 ONLAT 22-008237/AABS at para. 9.

[415] I do not accept Ms. Barkley's position that s. 45 of the *SABS* has no application to this case because Ms. Barkley is not making an application to an insurer for a determination of catastrophic impairment and that even though Dr. Persi is

not a physician, he is entitled to provide and I should accept his expert opinion establishing that Ms. Barkley lost a chance to be found catastrophically impaired.

[416] Dr. Persi's report and opinion evidence essentially is that based on his retrospective analysis of Ms. Barkley's accident related impairments as they were at the time in 2016 and 2017, Ms. Barkley would more likely than not have been considered to have sustained a catastrophic impairment as defined by the *SABS* under both Criteria (e) and (f).

[417] In my view, that necessarily means that Ms. Barkley would have met the prerequisite and applicable tests, obligations and definitions under the *SABS* in order to establish her entitlement to and finding of catastrophic impairment under either or both Criteria (e) and (f).

[418] Moreover, Ms. Barkley must establish the required percentage likelihood of whether she would have been found to be catastrophically impaired in 2016 to 2017 in order to claim loss of chance or opportunity damages as a matter of law. *Folland,* above.

[419] Dr. Persi is not qualified to provide an opinion with respect to his own assessment of Ms. Barkley's marked impairment due to a mental or behavioural disorder or assign WPI ratings with respect to mental/behavioural impairment. His evidence does not meet the threshold requirement under *R. v. Mohan*, [1994] 2 SCR 9 as his proposed expert testimony is subject to an exclusionary rule under the *SABS*. I give little weight to his evidence in that regard.

[420] Dr. McKay provided her opinion at trial that at the time of her original assessment in March 2015, Ms. Barkley's WPI for mental and behavioural impairment was 25%. Dr. McKay is a neuropsychologist, not a physician. A neuropsychologist is entitled to conduct the assessment of catastrophic impairment only where the impairment is a traumatic brain impairment under s. 45(2)2 whereas in this case, all of medical evidence was clear that there was no brain injury sustained by Ms. Barkley.

[421] Accordingly, to the extent that Dr. Persi considered that finding of Dr. McKay's mental/behavioural impairment in his WPI rating of Ms. Barkley, I attach little weight to it.

[422] Although my decision is not restricted to merely choosing between impairment ratings offered by Dr. Persi and Dr. Gnam, I conclude that Dr. Gnam's original rating by analogy of Ms. Barkley's mental/behavioural WPI at 22% and subsequently using the California Method at 20% based on Dr. McKay's 2015 report is the appropriate finding and not the 29% used by Dr. Persi.

Headaches

[423] Third, I reject Dr. Persi's assessment of the 5% WPI for Ms. Barkley's headaches which he stated was obtained using the analogy to occipital neuralgia rating.

[424] Dr. Gnam confirmed that providing a headache rating through the *Guides* was very rare and that explicit passages in the *Guides* state that the vast majority of headaches are not ratable as most headaches are not considered permanent. Dr. Gnam rated Ms. Barkley's impairment for posttraumatic headaches at 0% WPI stating no neurologist confirmed chronic persistent headaches or supported a neurological disability or impairment warranting a separate headache rating. Dr. Gnam stated that Dr. Persi did not apply the *Guides* appropriately in addition to not having the expertise to do so with respect to headaches.

[425] Dr. Persi stated he relied on the reports of the neurologist Dr. Rathbone and occupational therapist Celina Grande which he stated confirmed Ms. Barkley's complaints of suffering from headaches.

[426] However, Dr. Rathbone stated he did not diagnose any neurologically based headaches, any impairment of the spinal nerves in the head and neck region or occipital neuralgia. Dr. Persi admitted at trial he was aware of this finding and would defer to Dr. Rathbone's expertise in not making those diagnoses.

[427] Dr. Rathbone did not diagnose that Ms. Barkley suffered from significant headaches caused by the accident but rather that her complaints were of her having intermittent and daily neck pain and stiffness associated with left facial pain and pain at the back of her head. Dr. Rathbone in his evidence stated that neck muscle contractions often cause head pain but Ms. Barkley did not report she suffered from headaches.

[428] Moreover, Celina Grande's report on which Dr. Persi said he relied in fact made no reference to Ms. Barkley complaining of suffering from headaches.

Rather, her report and evidence at trial was that Ms. Barkley was complaining of symptoms with her neck including degenerative changes, whiplash and tightness in the neck and upper back.

[429] In addition, the initial clinical records of Ms. Barkley's treating neurologist Dr. Shandling dated June 21, 2013 confirmed that Ms. Barkley denied having headaches. Dr. Persi admitted he would defer to Dr. Shandling who also did not diagnose neurologically based headaches or occipital neuralgia.

[430] Nevertheless, Dr. Persi appeared to have ignored those findings of these expert doctors and still applied a 5% headache rating in his report and evidence at trial.

[431] At trial, Ms. Barkley did not state that she developed headaches following the accident including from 2015 until 2017. Her only evidence was that she presently has pain that makes her dizzy and nauseous such that she lays in bed with her eyes closed. She described that her neck was a significant problem with extremely painful tension up into the back of her head. She complained of neck pain, not headaches.

[432] There was no evidence from any of Ms. Barkley's other treating medical practitioners being her psychologist Dr. Bautz, and her pain specialist Dr. Tumber that she ever complained to them of suffering from headaches, let alone constant and debilitating headaches, since the accident of November 2012 until 2017. Neither of them diagnosed that Ms. Barkley was suffering from headaches during that time period or prescribed medication for headaches.

[433] Dr. Tumber's clinical notes of July 3, 2015 confirmed that Ms. Barkley did not indicate she suffered from headaches. In fact, there was only his note of October 7, 2015 that suggested she developed an adverse effect of a significant headache only when having a stellate ganglion block in September 2014 for her left upper arm pain. As a result, she did not have any further blocks.

[434] Dr. McKay's evidence was that during her interview with Ms. Barkley in March 2015, also at her lawyer's request for the purposes of the tort action, Ms. Barkley stated that she had constant pain and muscle tension in her neck and shoulders at the time and her headaches started in the back of her head secondary to her neck tension.

[435] There is nothing in that brief reference in Dr. McKay's evidence to suggest that whatever cervicogenic headaches Ms. Barkley stated she had in 2015 were of any significance either in frequency, duration or intensity previously or at that time. At best, there may have been intermittent headaches and without any neurological features.

[436] In addition, when Ms. Barkley was examined in January 2019 by Dr. Selchen, a neurologist on behalf of the defendants in the tort action who gave the evidence at trial for Mr. Sloan, she did not complain that she had been at any time nor was then suffering from headaches since the accident of November 2012.

[437] None of the witnesses Mr. Barkley or Ms. Barkley's friends Lisa Brown or Lesley Ralston provided any evidence that Ms. Barkley ever complained to them of suffering from headaches since the accident of November 2012.

[438] I am not satisfied on the evidence at trial that Ms. Barkley suffered from significant headaches that were permanent, stable or unlikely to change with therapy from 2015 to 2017 or thereafter to date as a result of her injuries in the accident.

[439] I also agree with Dr. Gnam's assessment that Dr. Persi as a chiropractor is not qualified to give evidence regarding the causation of headaches, their nature and whether they should be rated and that Dr. Persi's WPI rating for headaches was not confirmed by a neurologist and not grounded in the opinion of a physician.

[440] Moreover, I accept Dr. Gnam's evidence that the *Guides* address headaches at s. 15.9. WPI ratings can only be assigned for permanent impairment, meaning a condition that is stable and unlikely to change in the future months despite medical or surgical therapy. The *Guides* state that the vast majority of patients with headaches will not have permanent impairments. Since the *Guides* are for the evaluation of permanent impairments, absent a physician's diagnosis of permanent headaches, Dr. Persi's rating of 5% WPI for headaches is not justified.

[441] The Adjudicator in *G.T.* at paras. 53 to 56 did not accept Dr. Persi's conclusion that G.T. suffered a 10% WPI as a result of headaches in that case as the adjudicator was not satisfied on the evidence that G.T.'s headaches were permanent, stable or unlikely to change with therapy and in and of themselves

interfered with G.T.'s ability to complete activities of daily living such that an impairment rating would be appropriate.

[442] That conclusion was rendered even though the evidence of headaches were significantly stronger than in this case. G.T. experienced headaches 4 to 5 times a week, the clinical notes and records documented consistent reports of headaches, she had been prescribed several medications to treat her headaches and continued to see her neurologist with complaints of constant headaches. The adjudicator held that the evidence nevertheless had not established that G.T.'s headaches should be assigned an impairment rating.

[443] The LAT in *Ahmadi* assigned a 0% rating for headaches based on the absence of headache complaints in the applicant's treatment records and the finding that the headaches were not based on any neurological injury or impairment.

[444] Lastly, I accept the evidence of Dr. Gnam that by Dr. Persi providing a separate and additional 5% impairment rating for headaches, has in effect double counted Ms. Barkley's WPI as Dr. Rathbone concluded that any head pain was due to her neck and accordingly has already been included in Dr. Persi's 5% WPI rating for her cervical spine impairment which he admitted was for her neck.

[445] There is no basis for the opinion of Dr. Persi providing an additional 5% WPI rating for Ms. Barkley's headaches. That rating for headaches is 0%.

Chronic Pain

[446] Fourth, I prefer and accept the evidence of Dr. Gnam that there is no basis in the *Guides* for Dr. Persi's separate and additional assessment of a 3% WPI rating for chronic pain.

[447] Both Dr. Persi and Dr. Gnam agreed that the *Guides* do not specifically provide any rating at all for pain on its own. They also both agreed that the *Guides* in Chapter 2 and Chapter 15 state that impairment ratings for the organ systems already include pain that may accompany the impairing conditions.

[448] Dr. Persi stated initially in his evidence that Dr. Rathbone had identified chronic pain in the periscapular area, mid back and thoracic spine. Dr. Persi assigned a WPI rating of 3% for chronic pain for those areas by analogy referring to Chapter 2 of the *Guides*. Dr. Persi admitted he had included pain when he rated Ms. Barkley's neck and left upper extremity impairments.

[449] However, Dr. Persi conceded in cross-examination that Dr. Rathbone did not specify which areas of Ms. Barkley's body were the cause of her reported pain and he did not examine her. Dr. Persi also admitted that in his initial report he stated that Ms. Barkley did not present with mid or low back complaints or limitations when Dr. Rathbone evaluated her.

[450] Dr. Persi also admitted that he had not included this evidence of chronic pain in Ms. Barkley's periscapular area, mid back and thoracic spine in his initial report but only provided that evidence in his examination in chief at trial. There was no medical evidence to support Dr. Persi's claim that the pain was not accounted for under the other impairment ratings.

[451] Dr. Gnam referred to the *Guides* which state that impairment estimates provided in the musculoskeletal chapter are intended to include pain that is associated with those physical impairments. Moreover, there was no method provided in Chapter 15 of the *Guides* to rate chronic pain which is already assumed in the impairment ratings in the *Guides* basic assumptions.

[452] Dr. Gnam confirmed that there was no need to rate pain separately by analogy as Dr. Persi attempted because Ms. Barkley's pain was already fully captured by the mental and behavioural disorders and the physical impairments rated under Chapter 14. Accordingly, Dr. Persi's separate pain rating constitutes impermissible double counting.

[453] Dr. McKay also confirmed that Chapter 14 of the *Guides* indicate that pain ratings should be included under Chapter 14. She accordingly had included the impact of Ms. Barkley's pain on her psychological condition in her Chapter 14 impairment ratings, not separately. Dr. Persi did not dispute that evidence.

[454] Dr. Gnam stated there was no support in the *Guides* for Dr. Persi's 3% rating for chronic pain and that his opinion was conjecture and not consistent with the *Guides*.

[455] Other decisions of the LAT have confirmed that interpretation of the *Guides* by Dr. Gnam. *Omidvari v. Intact Insurance Company*, 2024 ONLAT 23-006065/AABS at paras. 39-40.; *Ahmadi v. Intact Insurance*, 2024 ONLAT 23-006061 at paras. 52-56.

[456] I agree with and accept the evidence of Dr. Gnam over that of Dr. Persi and conclude that there should be no additional rating for chronic pain and which rating is 0%.

Sleep Disorder

[457] Fifth, I also do not accept Dr. Persi's evidence of an additional WPI rating of 9% because of Ms. Barkley having a sleep disorder due to her injuries and conclude that a 0% rating for that should be found.

[458] Dr. Persi relied on the report of Celina Grande the occupational therapist who suggested that Barkley was suffering from sleep disturbance. Dr. Persi used Tables 4-6 in Chapter 4 of the *Guides*, which is entitled "The Nervous System", and provided a 9% WPI for Ms. Barkley's sleep disturbance due to her fatigue and waking primarily relating to pain as opposed to relating to mental disorder.

[459] Dr. Gnam stated that a 0% WPI rating should be applied for the alleged sleep disorder as there was no evidence that Ms. Barkley had sustained a neurological injury or impairment such as a concussion or brain injury from the accident. The accident was relatively minor, all the diagnostic tests were normal, and there was no lack of consciousness at the scene.

[460] Dr. Persi admitted that sleep disorders are not impairments of the spine or musculoskeletal system. As noted in *Martin v. Certas*, as Dr. Persi is a chiropractor, I conclude he is not qualified to assess them.

[461] In addition, I accept Dr. Gnam's opinion that 4.e of Chapter 14 of the *Guides* addresses sleep disorders caused by impairments of the cerebrum or forebrain. Both Dr. Rathbone and Dr. McKay were clear that Ms. Barkley did not sustain a brain injury or concussion as a result of the accident.

[462] Accordingly, Dr. Persi's use of the *Guides* Table for rating sleep impairment that was meant to be attributable or caused by a brain impairment was inappropriate.

[463] Spiegel J in *Desbiens v. Mordini*, 2004 CanLII 41166 (Ont.S.C.) at para. 181 rejected the suggestion that a 9% WPI should should be assigned for Mr. Desbien's sleep disorder as he had not sustained a brain injury and there was insufficient evidence to suggest that as a result of disturbed sleep he had a consistent problem with reduced daytime alertness which interfered with any

of his daily activities. Accordingly, he did not meet the criteria under Table 6. Spiegel J also at para. 182 stated if pain interfered with Mr. Desbien's sleep, it had already been included in the impairments found in the muscoskeletal system and cannot be rated as a separate impairment.

[464] Dr. Gnam also stated that disturbed sleep is properly addressed as part of the WPI rating for "mental or behavioural impairment" falling under the activities of daily living category under the Psychiatric Impairment Rating Scale.

[465] Notably, Dr. McKay stated that Ms. Barkley's sleep disorder issues were related to her somatic symptom disorder and major depressive disorder diagnoses and accordingly had also included Ms. Barkley's sleep disorder issues in her mental/behaviour impairment rating. Dr. Persi in cross-examination admitted that.

[466] Dr. Gnam stated that to assign a separate and additional rating for sleep disorder under this category would result in double counting.

[467] The Divisional Court in *Syed v. Security National Insurance and License Appeal Tribunal*, 2024 ONSC 3391 at pars. 38-45 on somewhat similar facts to this case, accepted that position as reasonable upholding the LAT adjudicator's decision that no WPI should be assigned for sleep disorder under s. 4.e of the *Guides* in the absence of impairments of the cerebrum or forebrain.

[468] In addition, the LAT in *Raman v. Certas Home and Auto Insurance Company*, 2024 ONLAT 23-000115/AABS at paras. 45-46 accepted that when a sleep disorder arises from mental and behavioural factors, the WPI percentage rating should be evaluated according to the *Guides* chapters that deal with mental and behavioural impairments.

[469] In that case, the applicant attributed his sleep-disorder to depression, anxiety and accident-related nightmares. A WPI 20% rating for the applicant's mental and behavioural impairments had already been assigned. The adjudicator held that no separate and additional WPI rating for his sleep disorder was justified and would amount to double counting and accordingly that rating for sleep disorder impairment was determined to be 0%.

[470] Accordingly, I accept Dr. Gnam's evidence and a 0% WPI for sleep impairment is appropriate in this case.

Left Upper Extremity

[471] Sixth, Dr. Persi's finding of a 28% WPI for Ms. Barkley's left upper limb is based partly on his grading of the severity of the sensory changes as major causalgia under Chapter 3 Table 11 of the *Guides* which is defined as an extremely serious form of reflex sympathetic dystrophy, now CRPS, produced by an injury to a major mixed nerve.

[472] Dr. Persi admitted he relied on Dr. Rathbone's opinion as to the existence or nonexistence of neurological conditions. However, Dr. Rathbone concluded that the EMG and nerve conduction studies of Ms. Barkley were normal and that there were no problems with the nerves. Dr. Persi admitted this information could have changed his rating. Dr. Persi had not reviewed those normal tests results, is not a neurologist and was aware that no neurologist ever gave an opinion that the Ms. Barkley's impairments met the definition of major causalgia.

[473] As happened in *Martin v. Certas*, there is no qualified medical opinion to support Dr. Persi's rating for major causalgia and in fact, the evidence from Dr. Rathbone, Ms. Barkley's own neurologist, is to the opposite.

[474] Dr. Persi admitted that no neurologist ever provided any WPI ratings for Ms. Barkley's left upper extremity pain and he never asked any neurologist to review his own WPI ratings including Dr. Shandling and Dr. Rathbone.

[475] Although Dr. Gnam did not opine on this particular rating as it was not within his area of expertise and although I accept that Ms. Barkley did have significant issues and impairment with her left upper extremity, Dr. Persi's impairment rating of 28% for the left upper extremity to the extent it is based on Ms. Barkley suffering from major causalgia is not supported by the medical evidence and is not reliable.

Dr. Persi's Use of Highest Number of the Ranges

[476] Seventh, Dr. Persi consistently used the highest end of ranges provided in the *Guides* for all the impairments he rated. They include a 3% rating for chronic pain (the *Guides* state 1-3%,) 3% for effects of treatment (the *Guides* state 1-3%), 9% for sleep impairment (the *Guides* state 1-9%) and 29% for mental/behavioural impairments (the *Guides* state 15-29%).

[477] Dr. Persi conceded that the *Guides* provide no guidance by strategy, protocol or methodology and do not specifically instruct assessors to choose the highest end of the range in every of situation. Dr. Persi stated that because the *Guides* use illustrative examples which always make reference to the highest number within a range, the assessor should give the benefit of the doubt to the client by always using the highest end of the range and that is why he chose the highest numbers. He then quoted from Ontario case law which he stated supports his position by holding that the *Guides* are to be interpreted in a broad manner that favours the insured such that when there is more than one interpretation, the one most favourable to the client is to be used.

[478] The cases Dr. Persi referred to may have referred to that last general statement but did not regarding his choice of always using the highest number in the applicable range for impairment ratings. In fact, the trial judge in the leading decision Dr. Persi referred to of *Desbiens v. Mordini* accepted Dr. Finlayson's opinion that Mr. Desbien's psychological impairment was quantified at 25% WPI which was within but not at the highest of the percentage range of moderate psychological impairment of 15% to 29%.

[479] The Superior Court in *Sunshall* at paras. 37-40 and the LAT in *17-004722 v. Wawanesa Mutual Insurance Company*, 2018 ONLAT20-006124/AABS at paras. 35-36 and in *Handy v. Aviva Insurance Company of Canada*, 2018 CanLII 78793 (ON LAT) at paras. 50-51 have all rejected that position and approach. Those decisions clearly conclude that if an assessor automatically gives a claimant the highest rating in the range, there is no need to have a range at all and doing so ignores the *Guides*' instructions that emphasize that the assessor should provide as precise a rating for an impairment as possible.

[480] It is also noteworthy that Ms. Barkley would have met the definition of catastrophic impairment according to Dr. Persi on the basis of Criteria (e) by only a very slight margin including because he had used the highest ratings in the range of these impairments.

[481] In doing so, Dr. Persi has failed to apply his clinical judgment as an impartial expert and unfortunately appears to have become an advocate for Ms. Barkley.

[482] As a result, even if I were to accept the 28% WPI impairment rating of Dr. Persi for Ms. Barkley's left upper extremity, the WPI ratings for Ms. Barkley based on Dr. Gnam's initial findings are as follows:

cervical	5%
upper extremity	28%
mental /behavioural	22%
burden of treatment	3%
Total Combined WPI	49% rounded up to 50%.

[483] As indicated above, Dr. Gnam confirmed that if his 20% mental/behavioural rating was used based on the GAF score from Dr. McKay's 2015 report, the total combined WPI rounded would be a little lower but still around the 50% WPI figure he used initially.

[484] Accordingly, Ms. Barkley has failed to establish on the evidence that she would have been found to be catastrophically impaired by having a combined impairment rating of at least 55% WPI at some time from 2015 to 2017 under Criteria (e) of the SABS.

Criteria (f) – Catastrophic Impairment

[485] Under this Criteria (f), Ms. Barkley must establish on a balance of probabilities that she suffered accident-related impairments that result in a Class 4 impairment (marked impairment) which significantly impeded useful functioning in one or more areas of function due to a mental or behavioural disorder.

[486] The four spheres of function set out in the *Guides* are activities of daily living, social functioning, concentration, persistence and pace and adaptation to work and work like settings.

[487] Similarly, with respect to Criteria (f) catastrophic impairment of marked impairment due to a mental or behavioural disorder, Dr. Persi is a chiropractor and not a psychiatrist, psychologist or physician. He is not qualified to provide opinion evidence regarding the assessment, diagnosis or treatment of mental or behavioural disorders.

[488] As indicated above, he nevertheless did so. He did not consult with any mental health professional regarding catastrophic impairment from a mental or behavioural disorder perspective, insisted that he was qualified to do so and

that his mental/behavioural impairment ratings were as valid as those of a neuropsychologist or a psychiatrist.

[489] Dr. Persi's opinion was that under Criteria (f), Ms. Barkley sustained impairments due to a mental or behavioural disorder consistent with only a moderate level of impairment in the two spheres of activities of daily living and social functioning as they interfered with only some of those areas of function.

[490] With respect to the third sphere of concentration, persistence and pace, Dr. Persi identified Ms. Barkley's impairments noted by Dr. McKay including her inability to maintain an adequate pace, limited persistence and low productivity resulting in greatly diminished work hours. Dr. Persi opined that those impairments were consistent with marked impairment in that sphere as they significantly impeded useful function.

[491] Regarding the fourth sphere of deterioration or decompensation in a work or work like setting, (also described as adaptation to work and work like settings), Dr. Persi noted that Dr. McKay and the occupational therapist Ms. Grande concluded that Ms. Barkley had greatly diminished number of hours even with naps, breaks and self pacing and that Dr. Rathbone noted she stopped working in September 2016. He opined that this was marked impairment in that sphere.

[492] However, Dr. McKay as a neuropsychologist in her June 2023 report and at trial confirmed that she found that there were no marked impairments in any of the four domains of function caused by mental or behavioural impairment but only that there were some moderate impairments as the impairment levels were compatible with some but not all useful function. As there were no Class 4 marked impairment in at least one of the four domains of function, Dr. McKay concluded that Ms. Barkley did not meet the test for catastrophic impairment based on a mental or behavioural disorder under Criteria (f).

[493] Dr. Gnam as a psychiatrist also did not find any Class 4 marked impairment that significantly impedes useful functioning in any of the four domains of function attributable to a mental or behavioural disorder.

[494] Dr. Gnam strongly disagreed with Dr. Persi that she had marked impairment that significantly impeded useful function on the third sphere of concentration,

persistence and pace that reached that level. He noted that Dr. McKay had similarly findings as he did.

[495] Moreover, Ms. Barkley continued to work part time which was inconsistent with a Class 4 marked rating for the fourth sphere of adaptation to work function.

[496] Furthermore, Dr. Gnam confirmed that the *Guides* would normally expect any person with two marked impairments to be unable to complete complex tasks without significant support which clearly did not fit the profile of Ms. Barkley.

[497] In addition, Dr. Persi himself had concluded in his findings under Criteria (e) that Ms. Barkley's mental WPI rating was 29% percent i.e., within the range of 15% to 29% WPI. This range Dr. Gnam noted covers moderate impairments only, not marked impairments, and contradicts Dr. Persi's assertion that Ms. Barkley had Class 4 marked mental or behavioural impairments.

[498] Accordingly, and for these reasons including his lack of qualifications, I give Dr. Persi's opinion little weight with respect to Ms. Barkley's mental or behavioural disorder impairment under Criteria (f).

[499] I accept the evidence of Dr. Gnam that the evidence does not establish that Ms. Barkley's impairment reached the level of marked impairment due to a mental or behavioural disorder in any of the four domains of function of activities of daily living, social functioning, concentration, persistence and pace or adaptations to work or work like settings in this case.

[500] Accordingly, Ms. Barkley has also not established that she would have been found to be catastrophically impaired from 2015 to 2017 under Criteria (f).

[501] Ms. Barkley's counsel made reference to Dr. Gnam limiting his WPI rating for Ms. Barkley's mental and behavioural impairment based on his instructions to a time period ending May 12, 2016. Dr. Gnam admitted that there was evidence of Ms. Barkley's condition worsening after that with her stopping work in September 2016 and that his opinion on her impairment could change in a later timeframe.

[502] However, although Dr. Gnam admitted it might have and that there was a possibility Ms. Barkley may have been found to have at least one marked

impairment under the Criteria (f) analysis, he provided no contrary or changed opinion at trial to that effect nor was he asked to do so.

[503] Ms. Barkley has failed to establish on a balance of probabilities as required under the *SABS* that she had a catastrophic impairment at any time after the settlement of May 12, 2014 including the period of 2015 to 2017.

[504] She has failed to discharge her burden of proving that but for Mr. Sloan's negligence or breach of contract, she would have been deemed catastrophically impaired and suffered damages based on that finding after the settlement.

Damages – Value of Accident Benefits Claim had the Improvident Settlement not Occurred

[505] If I am not correct on the issues of standard of care, breach of that standard, causation and no finding of catastrophic impairment, I have determined Ms. Barkley's damages based on the evidence at trial assuming that Ms. Barkley would have been entitled to claim IRBs payable and would have been found to be catastrophically impaired at least by September 2016 to 2017 when she stopped working altogether and entitled to claim the enhanced catastrophic impairment benefits under the Belair policy.

[506] In addition, Ms. Barkley claims that she suffered the loss of her opportunity to advance claims and receive benefits against Belair for IRBs and significantly enhanced medical/rehabilitation, attendant care and housekeeping benefits based on the catastrophic impairment limits.

[507] Ms. Barkley also claims she lost the opportunity to settle her accident benefits claim on the basis of Belair having significant exposure to those lifetime IRBs and significantly enhanced benefits.

[508] Ms. Barkley's position is that as a result of Mr. Sloan's negligence and breach of contract, she also suffered compensable damages for mental distress resulting from that negligent handling and improvident settlement of her accident benefits claim.

[509] Ms. Barkley claims that the total potential value of her accident benefits claim is $1,403,448 combined for IRBs, medical/rehabilitation, attendant care and housekeeping benefits. Ms. Barkley submits that given the uncertainty with respect to the precise value of that claim and the amount Belair would have

been willing to pay to settle such a claim on a full and final basis, a reasonable estimate of her lost opportunity damages is 70% of that amount or approximately $982,400.

[510] Mr. Sloan's position it is that even if Ms. Barkley has established that on a balance of probabilities but for Mr. Sloan's negligence she would not have suffered her loss, she has not proven she sustained any loss.

[511] Mr. Sloan's position is also that as this matter proceeded as a "trial within a trial", Ms. Barkley cannot show that the "trial within a trial" is impossible and she cannot claim loss of chance damages. In any event, Mr. Sloan states that Ms. Barkley has failed to prove any loss of chance damages.

[512] Ms. Barkley's position in submissions, as I understood it, is that the proceedings before me were not a "trial within a trial". As a claim for lost potential accident benefits is different than a future care cost claim in a tort action, it is difficult or impossible to assess those damages thereby entitling her to claim for loss of opportunity damages.

[513] Claims for solicitor's negligence and breach of contract can be advanced on a loss of chance basis.

[514] The Ontario Court of Appeal in *Jarbeau v. McLean*, 2017 ONCA 115 at para. 27 confirmed that where the plaintiff in the tort action arising out of the lawyer's's negligence can establish on the balance of probabilities that but for the negligence, he or she would have avoided the loss, he or she should be fully compensated for that loss.

[515] At para. 20, the court held that in some cases of solicitor's negligence, where it is practically impossible to determine what would have happened but for the solicitor's negligent conduct, the courts have allowed the plaintiff to advance a claim for loss of the chance to recover. Where a plaintiff can only establish that but for the solicitor's negligence, he or she lost a chance to avoid a loss, a claim for breach of contract may permit recovery for the value of that chance. *Jarbeau*, at para.28.

[516] The court in *Jarbeau* at para. 25 approved the following passage from an earlier decision of the British Columbia Court of Appeal:

> After conducting the "trial within a trial" to determine what damages, if any, a negligent solicitor is liable for missing a limitation period,

> three results are possible. First, the trial judge could find that had the case gone to trial the plaintiff would have been successful and in such case 100% of the lost damages would be awarded against the solicitor. Second, the trial judge could find that the plaintiff would not have been successful therefore only nominal damages may be awarded against the solicitor. Finally, where time has passed to such an extent that a trial within a trial would be impossible, then the court must to the best of its ability calculate the value of the opportunity lost to the plaintiff and award damages against the solicitor on that basis.

[517] Smith J in *Hopkins v. Murphy*, 2024 ONSC 3698 following *Jarbeau* and other authorities at para. 41 concluded that to determine liability and damages in a solicitor's negligence cases alleging an improvident settlement, the court must conduct a trial within a trial to determine liability and the amount of damages the plaintiff would have received following a trial. The court must then determine if the difference between the amount settled for and what the plaintiff would have received after a trial is within a reasonable range of possible choices that could have been made by a competent member of the profession. If it is impossible to conduct a trial within a trial, courts have allowed a plaintiff to advance a claim for loss of the chance to recover.

[518] The Court of Appeal in *Berry v. Pulley*, 2015 ONCA 449 at para. 70 confirmed that the procedure for a loss of chance claim is a two-stage process involving causation and quantum. The causation analysis to be conducted at the first stage is the "but for" test which is a negligence concept. The court confirmed that all four factors in *Folland v. Reardon* (2005) 74 O.R. (3d) 688 (C.A.) must be met at the first stage of the loss of chance analysis (causation).

[519] First, the plaintiff must establish on a balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. This is the application of the traditional burden of proof.

[520] Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. There is no bright line between a real chance and a speculative chance. An empirical review of the case law suggests that chances assessed at less than 15% are seldom viewed as real chances. This *de minimis* threshold has also been described as requiring the plaintiff to prove she had some reasonable probability of realizing an advantage of some real substantial monetary value.

[521] Brown J in *Waters v. Furlong et al*., 2023 ONSC 3908 at para. 120 stated that to establish a loss of chance damages, the plaintiff must prove on a balance of probabilities that the defendant's wrongful act caused him to lose a substantially real and significant chance to obtain a benefit. The action must be dismissed if Ms. Barkley fails at this first stage. *Trillium Motor World Limited v. Cassels Brock and Blackwell LLP,* 2017 ONCA544 at para. 278.

[522] Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself. The plaintiff is not expected to establish on a balance of probabilities that past hypothetical fact of what would have happened where that hypothetical fact turns on the actions of a third party.

[523] Fourth, the plaintiff must show that the loss of chance had some practical value. If the chance lost has no real value, no more than nominal damages are justified.

[524] At para. 72, the court in *Berry* held that if these four criteria are met, the court proceeds to the second step and will award damages equal to the probability of securing the loss benefit (or avoiding the loss) multiplied by the value of the loss benefit (or the loss sustained).

[525] Based on the evidence provided at trial and my reasons noted herein, Ms. Barkley has not met her burden of establishing that she had a chance to establish her entitlement to catastrophic impairment benefits from Belair that was a sufficiently real and significant chance. She had no chance that rose above mere speculation.

Damages – Income Replacement Benefits

[526] Scott Paulin, the plaintiff's expert forensic accountant, reviewed Ms. Barkley's personal financial records and those of the company Barkley and Barkley and provided his opinion with respect to the quantum entitlement of Ms. Barkley to IRBs within two years of the accident based on her substantial inability to perform the essential tasks of her employment.

[527] Dr. Rathbone and Dr. Gnam agreed and Mr. Sloan concedes that Ms. Barkley would have met that applicable test under s. 5(2)(1) of the *SABS*.

[528] Mr. Paulin found that there were no IRBs payable to Ms. Barkley from the date of the accident of November 2012 to the end of December 2013 due to her post-accident income. He calculated IRBs in the amount of $124.54 weekly payable for all of 2014 resulting in the amount of $6,493 up to the two-year post-accident date in November 2014.

[529] Mr. Paulin determined that there were no IRBs payable for all of 2015 up to September 16, 2016, Ms. Barkley's last day of work, because of Ms. Barkley's part-time post-accident income.

[530] After Ms. Barkley stopped work altogether in September 2016, she then collected CPPD as it was accepted that she had a physical or mental disability that was severe and prolonged.

[531] Under s. 6(2)(b) of the *SABS*, Belair was not required to pay IRBs after the first 104 weeks of disability unless as a result of the accident Ms. Barkley suffered a complete inability to engage in any employment or self-employment for which she was reasonably suited by education, training or experience.

[532] Ms. Barkley has the onus to prove her entitlement to these benefits on a balance of probabilities. In order to make that determination, the court must take into account all relevant factors including her need for retraining and whether the proposed employment was reasonably suitable in status and reward.

[533] Dr. Gnam testified he did not believe Ms. Barkley would meet that test because she was in fact working as of May 2016. However, Dr. Gnam agreed that he would reconsider his opinion if her condition progressed to the point where she was unable to work.

[534] I prefer and accept the evidence of Dr. Rathbone that after September 2016 when Ms. Barkley stopped work altogether, he did not believe there was anything she would be able to do given her physical condition and pain and did not think she would improve to permit a potential return to work in the future.

[535] Ms. Barkley's work as an accountant was entirely sedentary in nature which she could no longer do. Her attempts to do some part-time volunteer activities she found were very difficult and does not suggest she could meet the demands of a prospective employer including reasonable hours of alternative

employment. Ms. Barkley stated that she has not returned to paid employment because of her disability, her lack of energy, her need for a lot of flexibility and it being difficult for her to be reliable. Her attempt to be elected as a school trustee or assisting in a mayoral campaign would have resulted in only a very minimal part-time positions. She said that she was attracted to the political world now and was looking into whether there might be some opportunity there that had nothing to do with accounting.

[536] Given that evidence of Ms. Barkley, the medical evidence and absence of vocational evidence of other potentially suitable employment, I accept that Ms. Barkley would have met the requisite post 104 week disability test under the *SABS* from September 2016 when she stopped work altogether.

[537] Mr. Paulin calculated Ms. Barkley's past IRB claim to the date of the trial in the amount of $38,722 which was inclusive of the pre-104 IRBs of $6,493 and the balance for post-104 IRBs.

[538] He then calculated the future IRBs entitlement based on a present value amount of $93,996. He took into account there being no IRBs payable between 2029 to 2045 because of her receipt of CPPD that would eliminate her IRBs claim. He also considered her renewed entitlement to IRBs after Ms. Barkley turned 65 in 2045 when she no longer would be receiving her CPPD but her CPP pension instead.

[539] I accept Mr. Sloan's position that Mr. Paulin's post-104 IRBs calculations are not valid or correct because Mr. Paulin relied on incorrect law and made improper assumptions not grounded in the evidence.

[540] The facts are that in January 2014, Ms. Barkley and Mr. Barkley set up a company Barkley and Barkley Professional Corporation in which they were equal shareholders to operate Ms. Barkley's accounting practice and in which Scott also now worked on a full-time basis.

[541] Mr. Paulin's IRBs calculations from September 2016 onwards when Ms. Barkley stopped work altogether, did not include 50% of the post-accident income from Barkley and Barkley Professional Corporation in his post-accident income calculations for Ms. Barkley despite Ms. Barkley owning 50% of its shares. Mr. Paulin took the position that no corporate income should be attributed to Ms. Barkley as that income was now derived from her spouse's work.

[542] *O.Reg*. 34/10 was applicable to the November 2012 accident. It stated in s. 7(3)(a) and (b) as follows:

> (3) The insurer may deduct from the amount of an income replacement benefit payable to an insured person,
>
> (a)70% of any gross employment income received by the insured person as a result of being employed after the accident and during the period in which he or she is eligible to receive income replacement benefits; and
>
> (b) 70% of any income from self – employment earned by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit.

[543] Mr. Paulin chose not to follow the Regulation's use of the word "earned" in s. 3(b) where post-accident income from Ms. Barkley's professional corporation should reduce her IRBs payable from September 17, 2016 ongoing.

[544] Mr. Paulin acknowledged that when he prepared his report and gave his evidence, he was aware of the Divisional Court decision of *Surani v. Perth Insurance Company*, 2018 ONSC 7254 which held that in calculating a self-employed person's deduction from IRBs, it did not matter whether the insured person was engaged in the business or actual working. The focus is on the business, not the person, and the calculation of the income and loss of a self-employed person is to be determined in the same manner before and after the accident, that is, by considering the profits and losses of the business.

[545] The court in *Surani* in paras. 16, 18 and 22 addressed the argument that an insured person would be unfairly subject to the deduction despite not working with the explanation that the insured can claim the expense under s.7(2) of having to pay or hire someone to replace them as the focus is on the profit/loss of the business, not on the insured.

[546] Mr. Paulin stated he did not follow the direction of *Surani* as he was instructed by plaintiff's counsel not to do so and he relied on some case law, FSCO decisions and language from the previous *SABS* regime to suggest that because Ms. Barkley was not engaged in the business after September 2016,

her income from the company was not "earned" and thus not subject to the required deduction.

[547] Mr. Paulin also explained that he did not follow *Surani* as that case was rendered in 2018 and was not the law until two years after Ms. Barkley ceased work altogether in 2016. He referred to *Bapoo v. Co-operators General Insurance Company*, 1997 36 O.R. (3d) 616 (C.A.); *Jevco Insurance Company v. Robert Lacroix*, 2005 ONFSCDRS 37 and *Ljiljana Garic v. Markel Insurance Company of Canada*, 2009 ONFSCDRS177.

[548] I do not accept that position.

[549] The *SABS* were changed as of September 1, 2010 from the previous Regulation and s. 7(3) noted above was now in effect at the time of Ms. Barkley's accident.

[550] Moreover, Mr. Paulin had no issue correcting his calculations to remove GST from the catastrophic impairment limits during his testimony despite the fact that that issue of law was only settled in 2022 by the Court of Appeal in *Reid v. Dominion*, 2022 ONCA 564483.

[551] Lastly, Mr. Paulin agreed that the present applicable *SABS* legislation based on *Surani* requires that the 50% deduction be made whereas the previous *SABS* regime and decisions referred to above interpreted post-accident income as requiring a claimant to be "engaged in employment" or "received".

[552] I do not accept Ms. Barkley's position that *Surani* is distinguishable because Ms. Barkley stopped work altogether at Barkley & Barkley Professional Corporation in September 2016 whereas the applicant in *Surani* who no longer acted as a pharmacist still did some minor administrative role work. *Surani* clearly held that the requirement of active participation is not found in the words of s. 7(3)(b).

[553] Mr. Paulin agreed in cross-examination that had he followed the direction in *Surani* and applied a 50% deduction to his IRBs calculation based on a 50% shareholder ownership of the business by Ms. Barkley, the IRBs payable to Ms. Barkley from September 2016 onward would be $0 whether the claim is based on compensable damages or for loss of opportunity to advance that claim.

[554] Mr. Paulin should have done so.

[555] Accordingly, if Barkley were entitled to claim damages against Sloan, the total damages for her lost opportunity to claim IRBs are assessed based on the calculation of Ms. Barkley's pre and post-104 IRBs of $6,493 with no post-104 IRBs entitlement or loss sustained from September 2016 forward.

Damages – Medical/Rehabilitation Benefits

[556] Ms. Barkley's claims damages for the lost opportunity to claim for the value of the benefits for her past and future medication/rehabilitation expenses that she states would otherwise be payable under the Belair policy if she were catastrophically impaired up to the available lifetime limits of $1 million.

[557] Section 15 of the *SABS* states that medical benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident.

[558] Section 16 states that rehabilitation benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person in undertaking activities and measures that are reasonably and necessary for the purpose of reducing or eliminating the effects of any disability resulting from the impairment or to facilitate the person's reintegration into his or her family, the rest of society or the labour market.

[559] Ms. Barkley must prove on a balance of probabilities not only that these benefits claimed were reasonable and necessary, but also that they were "incurred" before she qualifies to receive any past benefit.

[560] Section 3(7)(e) of the *SABS* states that an expense is not "incurred" by an insured person unless:

> (i) the insured person has received the goods or services to whom the expense relates,
>
> (ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense,
>
> (iii) the person who provided the goods or services,
>
> > (A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the insured person.

[561] This is a more stringent onus of proof than a claim for future pecuniary losses in a tort action where the plaintiff need only prove a real and substantial risk that they will occur.

[562] Mr. Paulin's evidence was that the value of the past medical/rehabilitation benefits available under the policy for Ms. Barkley from November 2018 to the date of trial totalled $119,180 consisting of $59,583 for medications and devices and $59,599 for human services.

[563] Regarding the future medical/rehabilitation benefits, Mr. Paulin stated that he estimated that the annual goods and services for Ms. Barkley from the trial date to the point where the $1 million limits would be reached and applied the present value discount. His report indicated that he arrived at a number for the value of the potential future medical and rehabilitation costs including ongoing medications and devices and human services of $368,372.

[564] Accordingly, he calculated the present value for both past and future medical/ rehabilitation benefits for Ms. Barkley of $487,552.

[565] I place little value or weight on Mr. Paulin's calculation of the past and future medical/rehabilitation benefits because he relied on assumptions made in the report of Mr. Pearce of November 28,2018 which also should be provided little or no significant weight for the reasons noted below.

[566] Mr. Paulin was also asked to do calculations of the potential value of Ms. Barkley's accident benefits claim on the assumption that she were found to be catastrophically impaired and her accident benefits claim had not been settled in 2014.

[567] However, the assumptions relied upon by Mr. Paulin for his opinion were not sufficient or appropriate to justify his opinion on the value of Ms. Barkley's damages for his loss of opportunity damages for medical/rehabilitation benefits.

[568] Mr. Paulin had assumed that the past claims for medical/rehabilitation expenses made to the date of trial were reasonable and necessary and were incurred or would continue to be reasonable and necessary and incurred by Ms. Barkley to come up with those figures before the benefits would in fact

be payable under the the Belair policy. He admitted that he did not consider whether Ms. Barkley actually incurred them but assumed she had from the date of Mr. Pearce's report in 2018 to the date of trial.

[569] Ms. Barkley's evidence confirmed that she had not actually incurred to the date of trial most of the medical expenses except for those noted below or any of the rehabilitation services suggested by Mr. Pearce.

[570] Moreover, Ms. Barkley has not established that those medical/rehabilitation expenses she did incurr before trial were in excess of the $25,000 in settlement funds (specifically including $22,000 for medical/rehabilitation expenses) she received from Belair in May 2014. That included her sessions with Dr. Bautz from 2014 to 2018 totaling $7,875.

[571] Ms. Barkley also provided no evidence at trial from Belair that any of the past medical/rehabilitation expenses claimed to the date of trial would likely have been accepted by Belair as reasonable, necessary and incurred and therefore payable under the policy.

[572] Ms. Barkley in her evidence estimated that on a monthly basis she presently pays $125 for her prescription drugs, $100 for medical cannabis and $60 for over-the-counter supplements. However, at trial she provided no documentary proof for any of these amounts or previous amounts she incurred other than a 2015-2016 pharmacy print out relied on by Mr. Pearce and Mr. Paulin in their calculations suggesting she was then paying $2,525 annually. That figure is approximately $1,000 more annually than what Ms. Barkley says she incurs.

[573] However, Ms. Barkley admitted in cross-examination that since 2017 after becoming entitled to CPPD and to the date of trial, she has not been required to pay for any of her prescription medication expenses as they have been completely covered for her through the Ontario Trillium program which was confirmed from the Trillium history printout.

[574] It appears that Mr. Paulin also did not consider s. 47(2) of the *SABS* which provides that an individual injured in a motor vehicle accident must first seek coverage through any available collateral benefits provided before relying on the no-fault scheme contained in the *SABS*. Section 47(2) states;

> (2) Payment of a medical, rehabilitation or attendant care benefits or a benefit under Part IV is not required for that portion of an expense for

> which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law.

[575] Accordingly, there is no basis for Mr. Paulin's figure of $16,721 for the value of Ms. Barkley's past prescription medication benefits under the policy. Ms. Barkley has not established that those expenses would have been reasonable, necessary and incurred. Those claims were not sufficiently real and significant to rise above mere speculation and no loss of opportunity damages would be payable for them.

[576] Mr. Paulin suggested the annual costs of $3,650 ($10 a day) for a total past amount of $24,170 for Ms. Barkley's use of cannabis based on Mr. Pearce's report.

[577] However, Ms. Barkley herself stated in her evidence that she was only paying no more than $1,200 annually for cannabis but provided no documents or receipts to substantiate any of those past or present expenses. Ms. Barkley bears the burden to prove the value of her special damages with accuracy. No explanation was provided to the court as to why those documents or receipts for those expenses were not provided to the court which should have been available.

[578] Given her medical condition and her evidence, I nevertheless conclude that Ms. Barkley did incur some past out-of-pocket expenses for her cannabis use and nonprescription medications as reasonable and necessary to the date of trial which I determine are approximately $900 annually for a total of $5,500.

[579] Ms. Barkley provided no evidence that she incurred or wanted to incurr before trial a yoga/applicant membership or purchased a reclining chair, Obus form, assistive devices, transport chair, or CES machine referred to in Mr. Pearce's and Mr. Paulin's calculations of her past benefits. Those costs amounts totaled approximately $5,000 but were not proven to be reasonable and necessary and incurred expenses.

[580] Ms. Barkley had purchased a power scooter as noted by Mr. Pearce which she uses periodically along with her walker but did not provide any documents confirming her cost of those purchases. Ms. Barkley also provided no evidence that she has incurred any expenses for the scooter's maintenance to date. I accept that the power scooter cost of $4,500 and walker of $500 has been established but not the scooter maintenance costs of $2,637.

[581] With respect to the past rehabilitation expenses, Ms. Barkley's evidence was that since the tort settlement of February 2020 of $1.5 million (less $30,000 allocated to her children) plus costs, she used most of those funds to renovate her house to make it wheelchair accessible for her and construct a sunroom so she could use her cannabis medication separate from the house. No supporting documents for that expense were provided at trial.

[582] There was no medical evidence including from the occupational therapist Ms. Grande provided at trial that any such renovation costs were reasonable and necessary for her rehabilitation or accommodation because of her disability and injuries sustained in the accident. Ms. Barkley admitted she still had some significant investment funds remaining from that settlement.

[583] None of the past rehabilitation expenses referred to by Mr. Pearce and Mr. Paulin in his report and evidence have been incurred by Ms. Barkley to the date of trial. They include psychological services for Dr. Bautz ($12,600), inpatient chronic pain program ($16,500), massage therapy ($7,078), occupational therapy ($1,799), kinesiologist ($16,909), driver rehabilitation ($3,955) and osteopathic/chiropractic treatment ($750). Ms. Barkley had the financial means for those rehabilitation expenses but chose not to proceed with any of them.

[584] She has not established that she incurred any rehabilitation expenses that were reasonable and necessary. Those claims were not sufficiently real and significant to rise above mere speculation. Given that, the lost opportunity to claim the value of those past benefits has not been established and is not allowed.

[585] For completeness, I have nonetheless considered the potential validity of those expenses as future medical/rehabilitation benefits claims as noted below.

[586] Accordingly, if Barkley were entitled to damages, the total lost opportunity value of the potential past medical/rehabilitation benefits under the Belair policy is $10,500.

[587] Regarding the value of the future medical/rehabilitation benefits, Ms. Barkley's evidence at trial was that she is taking far less medication than before but again provided no details or documents confirming the previous quantity or costs. She states that she is now coping better with her pain and is presently taking blood pressure medication, anti-depression medication,

sleeping pills, medical marijuana related products together with a number of over-the-counter supplements recommended by her pain clinic. Her medical condition has improved to the extent that she can and does participate in some part-time volunteer activities and some physical activities including kayaking.

[588] Other than the claims of Ms. Barkley for her continued use of cannabis and nonprescription medications and some future power scooter ansd walker expenses, there is no basis in the evidence for Mr. Paulin's conclusion of the present value of approximately $271,000 over Ms. Barkley's lifetime as noted in his chart for all of those same claims for the medications and devices referred to above under the past expense claim.

[589] Ms. Barkley provided no evidence that she intends or anticipates in the future obtaining a yoga/aqua fit membership or believes that it would be helpful for her medical condition and rehabilitation, to obtain an obus form, reclining chair, assistive devices, transport chair, or CES machine. I find that those expenses are highly unlikely to be incurred by Ms. Barkley in the future and have not been proven then to be reasonable or necessary.

[590] I am not satisfied on the evidence of Ms. Barkley's need to replace her power scooter every five years or incur substantial maintenance costs each year in the future. Ms. Barkley only makes use of the scooter and walker periodically. A more reasonable amount to allow for the present value of both future potential expenses for the scooter and walker is $25,000.

[591] For the reasons noted above, I accept that ongoing costs of approximately $1,000 annually for Ms. Barkley's cannabis and nonprescription use expenses would be reasonable and necessary and likely to be incurred by Ms. Barkley resulting in the present value of those future benefits of approximately $30,000.

[592] There is no basis in the evidence that Mr. Paulin's conclusion that $73,339 for the present value of Ms. Barkley's future prescription medications is appropriate or warranted.

[593] I refer to the same evidence in my reasons above with respect to Ms. Barkley not incurring any prescription medication costs since 2017 to date because of the Trillium program. I conclude Ms. Barkley has not established that any future prescription medication expenses covered by the Trillium program

would be reasonable and necessary and incurred by her as a result of the accident.

[594] In considering Ms. Barkley's loss of opportunity damages submission, there was no evidence that, given her ongoing medical condition and receiving CPPD because of her inability to return to work, Ms. Barkley at any time in the future would run the risk of her future prescription medication costs not being covered by the Trillium program.

[595] There was no evidence that this particular government benefit is discretionary in nature. It appears to be a long-standing entrenched benefit for the benefit of disabled Ontario residents with little income such as Ms. Barkley.

[596] The Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 confirmed that the trial judge was entitled to make a finding of 5% of the future costs as damages based on the evidence of there being only a 5% chance that the cost of the group home for the parents disabled child when he turned 18 would not be paid for by the province even if the parents had the financial means to pay for it. The question was whether or not this arrangement would still existwhen the child turned 19. A 5% contingency award against the possibility the parents would incur no cost for his adult care at age 19 was appropriate and provided adequate security against the possibility of any legislative changes to the disabled child's entitlement to that government benefit.

[597] *Krangle* was a tort action that involved the reasonable and substantial possibility risk test of future care costs. Ms. Barkley's action against Mr. Sloan is for the payment of the value or loss of opportunity to claim reasonable and necessary expenses incurred in the future as a result of the accident.

[598] Accordingly, on the basis of *Krangle* and the evidence at trial, even if I assess the potential loss of opportunity damages for such future prescription medication expenses payable under the Belair policy at 5% which is less than the 15% figure suggested in *Folland*, that risk does not exceed mere speculation and no such allowance for damages for that lost opportunity to claim future prescription medication costs benefits should be made.

[599] With respect to the ongoing treatment, Ms. Barkley led no evidence at trial including updated medical evidence to indicate whether further treatment in the future at this time would be helpful to her which is determinative of

whether the benefit would be reasonable and necessary. *16-003010. v. Aviva*, 2017 CanLII 46346 (Ont. LAT).

[600] Mr. Paulin indicated the present value of Ms. Barkley's need for ongoing psychological services at $62,485. Mr. Pearce had included those costs on a monthly basis of $225 per hour or $2,700 annually which he thought would be an ongoing cost.

[601] However, Ms. Barkley stopped seeing Dr. Bautz in 2018 and has been treated by a psychotherapist Dr. Fowler since August 2020 and the psychiatrist Dr. Dawe since December 2020 with no personal cost at all to her as their fees are covered by OHIP.

[602] Ms. Barkley admitted that since the tort settlement in February 2020, all of her medical treatment including her pain clinic, a referral for ketamine treatment, and psychological and psychiatric treatment from these doctors have been fully funded by OHIP. There was no medical or other evidence at trial that Ms. Barkley might need to incur psychological counselling at her personal cost in the future.

[603] The LAT in *M.L. v. Zenith Insurance Company*, 2020 CanLII 34474 (Ont.L.A.T.) found that the proposed physiotherapy treatment plan was not reasonable and necessary because funding was available through the insured's private extended health coverage or OHIP.

[604] The same applies for Mr. Paulin's claim for the present value of $35,078 for Ms. Barkley's future massage therapy expenses based on an annual cost of approximately $1,200. Mr. Pearce stated Ms. Barkley had been receiving periodic massage in 2018 which he expected would continue as part of the maintenance program for her pain. He suggested $960 annually for massage therapy as Ms. Barkley stated in 2018 that she found it helpful but stopped for financial reasons.

[605] Ms. Barkley provided no evidence that she wanted to have or in fact had any massage therapy even after she received her substantial tort settlement in February 2020. I conclude that she did not.

[606] Mr. Pearce conceded that if funding was available, it would be reasonable and necessary for Ms. Barkley to follow through and continue with massage therapy, occupational therapy, kinesiology sessions, and osteopathic/chiropractic treatment if she believed it was going to be

beneficial. Ms. Barkley confirmed she has not done so since February 2020 and provided no evidence that she intends to have any of these treatments in the future or believed any of them would be beneficial to her medical condition.

[607] Based on all the evidence, I conclude that it is also highly unlikely that Ms. Barkley in the future would undergo and incur any of these rehabilitation expenses. Ms. Barkley has not established that she lost the opportunity to make those claims on the basis that they would be reasonable and necessary and potentially incurred. Her chance lost to claim these benefits would not be sufficiently real and significant to rise above mere speculation.

[608] As indicated above, I have considered potentially under Ms. Barkley's future claims for those *SABS* benefits the other Past Human Services claims that I did not allow as past claims.

[609] For the same reasons, Ms. Barkley has also established that she has lost the opportunity to claim future benefits for ongoing occupational therapy, kinesiology sessions and osteopathic/chiropractic treatment.

[610] I also do not accept the evidence of Mr. Pearce that his recommended $16,500 inpatient chronic pain program when he prepared his 2018 report for the tort action would be a reasonable, necessary and incurred medical/rehabilitation expense. Mr. Pearce said the purpose of that chronic pain program was to help Ms. Barkley cope with her pain.

[611] However, no medical doctor had recommended or prescribed it for her at any time, Ms. Barkley has not incurred it since and she is still being treated through another pain clinic at no personal cost to her. Ms. Barkley also confirmed that she is now better at coping with her pain and gave no indication that she thought that that particular chronic pain program might be helpful and wanted to pursue it either before or after trial.

[612] I also do not accept Mr. Pearce's suggestion that Ms. Barkley's participation in a driver rehabilitation program would be a reasonable, necessary and incurred expense at a cost of $3,000 or $4,000.

[613] Although Mr. Pearce stated it was usual to have an individual who was working with a psychologist link up with a driver rehabilitation specialist to apply strategies for reducing anxiety while driving a car, Dr. Bautz at no time recommended that for Ms. Barkley and Ms. Barkley did not tell Mr. Pearce

that she was not driving. Ms. Barkley, in her evidence, admitted she continues to drive motor vehicles and did not indicate that she thought she needed or would find a driver's rehabilitation program helpful. Dr. Bautz had only stated in her May 2013 report, five years before Mr. Pearce's 2018 report, that when driving Ms. Barkley was hyper alert and finds herself looking for vehicles with trailer hitches for no reason that she can understand which does not provide support for Mr. Pearce's opinion of a need for a driver rehabilitation program.

[614] Although in tort claims for damages Ms. Barkley would be free to spend her settlement funds received as she wishes without being required to use them for her past and future medical/rehabilitation costs before being entitled to claim for them, she provided no evidence that she followed and incurred or intended to follow and incur the medical/rehabilitation expenses recommendations of Ms.Grande or Mr.Pearce in the future other than her use of cannabis and nonprescription drugs and her scooter and walker costs.

[615] Ms. Barkley admitted that she he did not incurr the remaining medical rehabilitation expense recommendations to date even after she received the substantial tort settlement of $1.5 million plus costs in February 2020. I conclude on all the evidence that it would be unlikely that Ms. Barkley would incur those medical/rehabilitation expenses or accept the service of them in the future.

[616] Accordingly, Ms. Barkley has not established that the majority of the medical/rehabilitation recommendations of Mr. Pearce or Ms. Grande were reasonable and necessary and incurred in the past or would potentially be in the future. Ms. Barkley's claim lost regarding those benefits are not sufficiently real and significant to rise above mere speculation.

[617] If Ms. Barkley were entitled to damages, the value of Ms. Barkley's medical/rehabilitation damages including loss of opportunity damages would be as follows:

Past Loss	$5000	scooter and walker
	$5500	cannabis and nonprescription drugs
	$10,500	Total

Future Loss	$25,000	scooter and walker
	$30,000	cannabis and nonprescription drugs
	$55,000	Total

Attendant Care Benefits

[618] Ms. Barkley's position is that she is entitled to damages based on the present value of her entitlement to claim the ACBs payable under the Belair policy for her lifetime up to the $1 million limits based on her being found to be catastrophically impaired in 2016 to 2017.

[619] She alternatively claims loss of opportunity damages with respect to that benefit.

[620] At the time of the accident in November 2012, s. 19(1) of the *SABS* provided that ACBs shall pay for all reasonable and necessary expenses that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant. The maximum amount payable was $6,000 per month and $1 million total but only if the insured person sustained a catastrophic impairment as a result of the accident. The maximum payable for ACBs for a non-catastrophic impaired claimant was limited to $36,000 within two years of the accident.

[621] Again, under s. 3(7)(e), an expense for ACBs is not incurred by an insured person unless

> (i) the insured person has received the goods or services to which the expense relates,
>
> (ii) has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and
>
> (iii) the person who provided the goods or services did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged but for the accident, or sustained an economic loss as a result of providing the goods or services to the insured person.

[622] Just before the settlement was reached in May 2014, *O.Reg.* 347/13 came into force on February 1, 2014 which limited the claimant's ACBs in respect of nonprofessional attendant care providers such as friends and family members,

to the actual economic loss sustained by that attendant care provider during the period and as a direct result of providing the attendant care.

[623] The Ontario Court of Appeal in *Morrissey v. Wawanesa Insurance Company*, 2024 ONCA 602, 500 D.L.R. (4th) 143 at paras. 80-81 considered and did not disagree with the FSCO appeal decision of *Motor Vehicle Accident Claims Fund v. Barnes* [2017] O.F.S.C.D. No. 99 [FSCO APP] which confirmed that the 2014 amendment applied to Mr. Morrissey's ACBs claims for benefits arising from a January 2012 accident after the amendment was made.

[624] The court noted that on June 1, 2016 by *O.Reg.* 251/15, s. 19(3) was further amended to add the qualification that the ACBs which the insurer must pay in respect of the person providing attendant care for remuneration are limited to the quantum of actual incurred attendant care expenses.

[625] The evidence of Mr. Paulin was that he assumed from the 2016 report of Ms. Grande that Ms. Barkley required 21 hours per week of attendant care which from the date of that report to the date of trial totalled $125,582 for the three different levels of care by applying the rates provided by the *SABS*.

[626] In calculating future attendant care benefits, Mr. Paulin extrapolated those same costs in the future until they reached the statutory limit of $1 million for catastrophic impairment ACBs. He then discounted those costs for the present value and mortality rates for a total future claim of $441,445.

[627] I place little weight on this evidence of Mr. Paulin because he relied on assumptions which were not established by the evidence.

[628] Mr. Paulin did not consider the evidence of Mr. Pearce who, in 2018, two years after Ms. Grande's 2016 report, spoke to Ms. Barkley and did not include anything for Ms. Barkley's attendant care needs because it was not necessary at that time due to her level of functioning. Mr. Pearce did not agree with Ms. Grande's suggestion that Ms. Barkley needed 14 to 28 hours per week of attendant care based on what Ms. Barkley told him then.

[629] Ms. Barkley admitted at trial that she has never incurred any attendant care expenses from the date of the accident until the trial and did not incurr any out-of-pocket expenses by bringing in a personal support worker or anything like that. Her spouse Mr. Barkley was helping with some housekeeping, washing her hair and getting her dressed on bad days. There was no suggestion or evidence that Mr. Barkley incurred any economic loss because of that.

[630] Ms. Barkley admitted that she understood she had to provide receipts in order to prove the amount claimed and unlock the ACBs and that Belair had to approve the benefit payable.

[631] I do not accept Ms. Barkley's evidence that she has not been incurring attendant care expenses because she was not eligible for ACBs once her case settled in May 2014 and did not hire anyone to provide attendant care because she could not afford it.

[632] Ms. Barkley admitted that at one point she did not want people in her house after the accident. She admitted she did not want strangers in the house to do her personal care of helping her get dressed and for bathing.

[633] When she was reminded in cross-examination that in February 2020 she received her substantial tort settlement and even since then never had any attendant care services from anyone, she responded that she was actually functioning better now than she was.

[634] Ms. Barkley has failed to prove on a balance of probabilities that any attendant care service provider including nonprofessional attendant care providers from her family actually provided any significant attendant care services for any period from 2014 to date.

[635] Moreover, Ms. Barkley did not pay any attendant care expense for a professional attendant care and no family member including her spouse provided attendant care resulting in their sustaining an economic loss.

[636] Ms. Barkley has not established that any past attendant care services have been "incurred" and her claim for this loss was not sufficiently real and significant to rise above mere speculation. Accordingly, there are no amounts payable for ACBs as damages or for lost opportunity damages for the period of 2016 to the date of trial.

[637] Chapnik J in *Pilotte* denied the plaintiff's claim for future ACBs in the amount of $380,000 based on present value of the $500,000 limits payable under the *SABS* policy in existence at that time.

[638] Her reasons included at para. 601 that attendant care provided to Pilotte by her sister, mother, father and husband were not compensable under s. 7 of the *SABS* in effect at that time for ACBs.

[639] In addition, the occupational therapist, as in this case, provided her report in the tort action and not in the negligence action against the lawyer for a claim for ACBs.

[640] Chapnik J similarly found at para. 620 that Pilotte's repeated assertions that she would have continued with more treatment if she had the funds to do so rang hollow.

[641] Chapnik J also concluded that the insurer would not have accepted Pilotte's attendant care costs to be reasonable and necessary as claimed in those circumstances.

[642] In this case, since the date of the accident, Ms. Barkley has never had anyone provide attendant care services for her either professionally or from family members even though she was paid some ACBs from Belair in 2013 and 2014 before the *SABS* settlement. Even after she received the *SABS* settlement funds in May 2014 and the substantial tort settlement funds of $1.5 million in February 2020, she has not received or incurred any attendant care services from professionals or family members to the date of trial.

[643] It is noteworthy that Chapnik J dismissed the claim for the value of future ACBs altogether under s. 7 of *Regulation* 672/90 of the *SABS* which at that time required the insurer to pay reasonable costs of a professional caregiver or amount of gross income reasonably lost by a person as a result of the accident in caring for the insured person.

[644] The Regulation in effect at that time did not include the added requirement under the present Regulation that applies for Ms. Barkley's accident that the attendant care expense now had to be "incurred" as defined above.

[645] Ms. Barkley has never incurred any attendant care expenses to date that were reasonable and necessary. There was no evidence from her that she presently needs or wants attendant care or anticipates she will reasonably require and incur same in the foreseeable future. I conclude, similar to her most of her medical/rehabilitation expense claim, that it is unlikely that she will ever incurr them in the future.

[646] Based on the evidence at trial, Ms. Barkley's chance of her being entitled to future ACBs is minimal, not sufficiently real and speculative at best and no more than 5% to 10%. She is not entitled to compensation for that loss of opportunity.

[647] Accordingly, if Ms. Barkley were entitled to damages, her claim for the loss of opportunity damages for past and future ACBs is also denied.

Housekeeping and Home Maintenance Benefits

[648] Section 23 of the *SABS* states the following:

> The insurer shall pay up to $100 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustained a catastrophic impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.

[649] The housekeeping/home maintenance section contemplates that the housekeeping benefit be paid either directly to the housekeeping service provider or to the insured person to reimburse the service provider for the incurred expenses. Again, the expenses must be "incurred" as a result of the accident. There is no total limit of the housekeeping and home maintenance expenses.

[650] Ms. Barkley admitted that in order to claim housekeeping benefits, she had to submit proof of the amount claimed to Belair for their approval.

[651] Ms. Barkley stated that a big part of her out-of-pocket expense claims in the tort case work was for her housekeeping costs which she is also claiming in this proceeding against Mr. Sloan. I understood from her evidence that she had documents supporting her housekeeping expenses that she provided in her tort claim. However, no documents establishing any housekeeping expenses incurred by her at any time were produced at this trial.

[652] Ms. Barkley admitted she had a housekeeper even before the accident. She could not say whether the hours she worked before or after were the same. That housekeeper was paid biweekly both before and after the accident but was changing the bed and doing some laundry after the accident. Ms. Barkley then admitted that on her examination for discovery in the tort action in February 2016 she had stated that her housekeeper after the accident was coming at the same frequency as before the accident. I accept that the frequency and hours of the Barkleys' housekeeper before and accident were the same although there may have been some different duties after.

[653] However, Ms. Barkley also admitted that since receiving the tort settlement of $1.5 million plus costs in February 2020, she no longer has had a housekeeper or paid for one to date. Her spouse Mr. Barkley and children helped to take care of the housekeeping tasks before his separation from Ms. Barkley in 2023. Since that time, has resided in their home's basement and has assisted with the outdoor work and their teenage children now help at times with her housekeeping which Ms. Barkley also spreads out for herself. Ms. Barkley provided no evidence that she incurred or paid or anticipates she will incur or pay any expense to her spouse or children for doing so. Her house is wheelchair accessible and laundry room is located on the main floor which is very helpful in her being able to keep up with the housework.

[654] Mr. Pearce, based on his discussions with Ms. Barkley in November 2018 for the purpose of the tort action, quantified the amount of housekeeping that Ms. Barkley required at $150 per week (six hours at $25 per hour) which was greatly reduced from the occupational therapist Ms. Grande's recommendation of 13 hours per week.

[655] Moreover, the assumption Mr. Pearce made then was that Ms. Barkley was having difficulty doing some housekeeping after the accident, needed a housekeeper and that her spouse was doing a lot of things that she had normally done. Although he understands that Ms. Barkley did have a housecleaner before the accident and continued after it, Mr. Pearce did not ask Ms. Barkley whether the house cleaning before the accident continued at the same frequency after nor did she tell him that it did.

[656] Ms. Grande was also not aware when she assessed Ms. Barkley in 2016, eight years ago, that Ms. Barkley had the use of a housekeeper even before the accident with the same frequency although perhaps with different duties.

[657] There was no medical evidence or evidence of an occupational therapist at trial confirming any continuing need of housekeeping/homemaking services or a potential of those being incurred by Ms. Barkley at this time or in the future.

[658] Mr. Pearce also agreed that if someone had the financial resources and discretionary income and it made no difference to them in terms of financial stability, he would see them as hiring someone to do the housekeeping needed.

[659] Ms. Barkley obviously had the substantial financial resources and discretionary income since February 2020 but stopped having a housekeeper since then. She has not incurred any housekeeping/home maintenance services expenses and has not provided any evidence that she will potentially incurr any such expenses in the future. This is confirmation that they are not and would not be reasonable, necessary and incurred additional expenses.

[660] Ms. Barkley's evidence was that her medical condition has improved over the years. She no longer takes the same quantity of medication or receives treatment as she did before. Again, as indicated above, Ms. Barkley has not established that she would have been found to be catastrophically impaired in 2016 or 2017 in order to claim housekeeping and home maintenance expenses under section 23 or that she is entitled to damages for that lost opportunity to claim those benefits.

[661] Mr. Paulin relying on Mr. Pearce's report calculated the value of the past housekeeping benefits under the policy based on Ms. Barkley's spending $100 per week on housekeeping which was the maximum benefit available under the *SABS*.

[662] Mr. Paulin then used the timeframe between November 2018, the date of Mr. Pearce's report, to the date of trial and came up with the amount of $30,472 for the value of her past loss of housekeeping benefits.

[663] Based on the evidence noted above, I do not accept that evidence of Mr. Paulin as Ms. Barkley has not established on a balance of probabilities that as a result of the accident that she incurred any reasonable and necessary additional expenses for past housekeeping/home maintenance services because of the accident that she normally performed before the accident but could not because of her substantial inability to perform them.

[664] Accordingly, the value of Ms. Barkley's past loss housekeeping/homemaking services claims as damages including loss of opportunity damages is $0.

[665] In calculating Ms. Barkley's future housekeeping/homemaking services claim at $100 per week for her lifetime, Mr. Paulin discounted the amount to the present value of $117,285.

[666] I also do not accept that evidence for the same reasons noted above.

[667] Since 2020, Ms. Barkley has incurred no expense at all for any housekeeping/home maintenance services even though she has had significant funds to do so. Ms. Barkley did not state in her evidence that she now needs, wants or anticipates she might at some point need or want to incurr such expenses. At present, she performs her own housekeeping in her house where she lives with at times the assistance from her children. Her spouse, who resides in the same house, takes care of the necessary outside home maintenance work.

[668] I accordingly conclude and assess the possibility of Ms. Barkley incurring reasonable and necessary housekeeping/homemaking services expenses in the future as a result of the accident as being highly unlikely,not sufficiently real and speculative and no more than 5% to 10%.

[669] Accordingly, if Ms. Barkley were entitled to damages, I would assess her damages including the loss of opportunity to claim past and future housekeeping/homemaking expenses under the Belair policy at $0.

Mental Stress Damages

[670] Ms. Barkley claims that because of Mr. Sloan's negligence, breach of duty of care and breach of contract related to the alleged improvident settlement, she has suffered damages for mental distress.

[671] The Supreme Court of Canada in *Mustapha v. Culligan of Canada Limited*, 2008 SCC 27, [2008] 2 S.C.R. 114 at para. 9 confirmed the law does not recognize upset, disgust, anxiety, agitation or other mental states that fall sort of injury and that such an award for mental distress is only available for the plaintiff who sustained a serious and prolonged psychological disturbance that rose above the ordinary annoyances, anxieties and fears of people living in society routinely, if somewhat reluctantly, accept.

[672] In this case, the only evidence from Ms. Barkley at trial was that she was unhappy about the fact that Mr. Sloan did a bad job which had a big impact on her psychologically.

[673] She complained on May 22, 2014 to her psychologist Dr. Bautz about being very unhappy at the settlement and her need to now pay for her own treatment costs.

[674] On June 26, 2014, Ms. Barkley told Dr. Bautz that Belair had refused to pay for the two sessions that were incurred presettlement, she was very stressed and had lost trust in her lawyer who she said would take no responsibility for the unpaid treatment invoices and needed to find another lawyer. She repeated those complaints in a session on July 9, 2014. Dr. Bautz recommended the names of two lawyers to her.

[675] Ms. Barkley consulted and retained her new counsel. After that, there was no evidence from Ms. Barkley or Dr. Bautz that Ms. Barkley ever complained about being upset at Mr. Sloan because of his negligence or that Ms. Barkley's being upset was serious and prolonged or required any specific medical or psychological treatment. Dr. Bautz's notes on August 28, 2014 indicate that Ms. Barkley told Dr. Bautz that her new counsel was very helpful and she had learned about things that helped to decrease her stress around her future.

[676] Damages can be awarded for mental distress in solicitor's negligence cases. *Dhillon v. Jaffer*, 2014 BCCA 215, 375 D.L.R. (4th) 288 at para. 55 held that the *Mustapha* threshold would seldom be met in cases of solicitor's negligence.

[677] The current case is clearly distinguishable from *Boudreau v. Benaiah*, (2000) 46 O.R. (3rd) 737 wherein the court awarded $15,000 to the plaintiff for mental distress. The defendant criminal defence lawyer was found negligent for failing to explore the evidentiary basis for the defence, neglected to communicate and keep appointments with the plaintiff, pressured him to plead guilty and failed to document an agreement with the Crown Attorney to drop charges against the plaintiff's mother and father. The plaintiff's relationship with his family were affected and he lost his familial times leading to serious depression due to the defendant's negligence.

[678] I accept that Ms. Barkley initially suffered some emotional upset as a result of Mr. Sloan's negligent representation of her. However, her evidence does not establish that she suffered a serious and prolonged psychological disturbance that would meet the threshold test for compensable injury as established in *Mustapha*. See *Thind v.Smith-Gander*, 2022 BCSC 1167 at para. 158*; Katzman v. Zucker*, 2003 CanLII 15806 (Ont.S.C.), aff'd 2005 CanLII 32560 (Ont.C.A.)

[679] Ms. Barkley's claims for damages for mental distress is not allowed.

Mitigation of Damages

[680] Mr. Sloan argues that Ms. Barkley failed to mitigate her damages. He bears the burden of proving that Ms. Barkley has failed to take all reasonable efforts to mitigate any losses she incurs from his alleged wrongdoing and that mitigation was possible. *Southcott Estates Inc. v. Toronto Catholic School Board*, 2012 SCC 51, [2012] 2 S.C.R. 657 at paras. 23 and 24, citing *Asamera Oil Corp. v. Seol Oil & General Corp*., [1979] 1 S.C.R. 633.

[681] *Asamera* confirmed that a plaintiff need not take all possible steps to reduce his or her loss.

[682] The Supreme Court in *Southcott* at para. 24 stated that losses that could reasonably have been avoided are in effect caused by the plaintiff's inaction rather than the defendant's wrongdoing. Accordingly, the plaintiff will not be able to recover those losses which he could have reasonably avoided by taking reasonable steps to do so.

[683] Unreasonable failure to mitigate loss reduces damages to the extent that mitigation would have avoided the loss. If a mitigation opportunity would only partially avoid the plaintiff's loss, then only a partial reduction in damages can be justified. *Southcott* at para. 75.

[684] If the plaintiff in carrying out her efforts to mitigate acted reasonably in adopting remedial measures to do so, they would be entitled to recover against the defendant the reasonable costs incurred of those measures. *Toronto Industrial Leaseholds Limited v. Posesorski*, (1994) 21 O.R. (3d) 1 (C.A.)

[685] Mr. Sloan's position is that Ms. Barkley failed to mitigate her damages by not exercising any of her options for setting aside the settlement including requesting that of Belair, initiated mediation, or commencing proceedings to do so on her repayment of the settlement funds. He further argues that these efforts would likely have been successful given there being no meeting of the minds regarding Belair's obligation to also pay for Dr. Bautz's two approved but unbilled treatment plans. Finally, these efforts would have avoided her losses being claimed against Mr. Sloan altogether as she would have been entitled to pursue any claim for IRBs and significantly enhanced benefits under the Belair policy if she became catastrophically impaired in the future.

[686] Mr. Sloan states that Ms. Barkley's failure to mitigate her loss was unreasonable which eliminates her claims for *SABS* damages against him altogether. *Southcott* at paras. 24 and 75.

[687] Ms. Barkley's position is that Mr. Sloan has not established that she failed to mitigate her damages as the improvident settlement would not likely have been set aside because of Mr. Sloan's negligence because it was a unilateral mistake on the part of Ms. Barkley and Mr. Sloan of which Belair was not aware.

[688] I disagree with Ms. Barkley's position and accept that of Mr. Sloan for the following reasons.

[689] The clear and uncontradicted evidence at trial was that at all times throughout the entire negotiations from April 2014 and on May 12, 2014 Belair knew from Mr. Sloan's discussions that any offers to settle on a full and final lump sum basis would also require Belair to pay for the approved but unbilled treatment plans that were outstanding. Both Ms. Barkley and Mr. Barkley confirmed that those were their instructions to Mr. Sloan and understanding of the $25,000 settlement reached.

[690] Ms. Barkley failed to call any evidence under oath from Belair to rebut that evidence of Mr. Sloan which I accept or provide some explanation in context. I place no weight on the unsworn hearsay notes of Belair's adjuster of May 28 and June 13, 2014 as those records were not admissible for the truth of their contents and no Belair adjuster testified at trial.

[691] The confirmation memo to Belair of the settlement terms from Mr. Sloan's law clerk Ms. Middleton of May 12, 2014 could have been made clearer. Nevertheless, in my view, the memo did make it clear that Belair was to check into the outstanding treatment plans through the HCAI portal. The reason for Belair's doing so was to ensure that Belair pay for those treatment plans as well. Ms. Barkley or her lawyer would have no access to that site and there would be no need for Belair to check into that site for those invoices if Ms. Barkley was expected to pay them from the $25,000 settlement amount.

[692] The last sentence of the Middleton email also made it clear that Ms. Barkley was only responsible for any future treatment plans she may incur again confirming Ms. Barkley's and Mr. Sloan's position that Belair was also to pay for the two approved but unbilled treatment plans.

[693] Given these circumstances, the context in which Ms. Middleton's email of May 12, 2014 was drafted and in the absence of any contrary evidence at trial from Belair, the reasonable inference and conclusion is that Belair at all times knew or ought to have known that Ms. Barkley and Mr. Sloan were settling on a $25,000 lump sum payment on the basis that Belair would also be paying for the two approved but unbilled treatment plans outstanding.

[694] Mr. Sloan acknowledged that the Middleton email to Belair could have been better worded and that he erred in believing that the wording of the settlement disclosure documents subsequently provided by Belair required it to pay for those treatment plan invoices in addition to the $25,000 lump sum payment.

[695] When Mr. Sloan learned Belair was denying responsibility for payment of those two treatment plan invoices, he immediately contacted Belair again reiterating Ms. Barkley's position throughout the negotiations that Belair was also responsible for payment of those two invoices. This also provides some confirmation that Belair was aware or ought to have been aware of that.

[696] Lastly, it is significant that Belair then without any further discussion with Mr. Sloan paid the one Dr. Bautz invoice of $218.28. There was no evidence of negotiations or that Ms. Barkley or Mr. Sloan advised Belair at any time that Ms. Barkley accepted its payment of that invoice as a compromise of settlement of the dispute and I conclude neither did. Furthermore, no evidence was provided from Belair by Ms. Barkley as to why they paid this invoice.

[697] Belair's payment of that invoice, in the absence of any evidence of negotiations or as a compromise, is further evidence by reasonable inference that Belair knew or ought to have known of Ms. Barkley's and Mr. Sloan's position throughout the settlement negotiations and settlement reached that the $25,000 settlement amount also required Belair to pay for both of those invoices for the completed but unbilled treatment plans. Otherwise, why would Belair have paid it?

[698] Accordingly, on the clear and uncontradicted evidence, this is not a case of unilateral mistake on the part of Ms. Barkley and Mr. Sloan when the settlement documents were signed on May 15, 2014.

[699] Even if it was, the same clear and uncontradicted evidence and in particular the absence of any sworn evidence from Belair to the contrary, confirm that Belair knew or ought to have known that Ms. Barkley's and Mr. Sloan's terms

of settlement throughout the negotiations including on May 12, 2014 were that Belair was also to pay for the approved but unbilled treatment plans in addition to the $25,000 settlement. Those terms were confirmed in Ms. Middleton's email of May 12, 2014. The settlement documents prepared by Belair, by mistake or otherwise, did not reflect those terms.

[700] Accordingly, the decisions relied upon by Ms. Barkley of *Landry v. Standard Life Insurance Company*, [2005] O.J. No. 3667 (S.C.) and *Davis v. Cooper*, 2010 ONSC 4230, aff'd 2011 ONCA 323 which enforced settlements resulting from solicitor's negligence and failure to explain the contents of the release to the plaintiff are clearly distinguishable.

[701] The LAT in *X.Z.S. v. Primmum Insurance Company*, 2019 ONLAT 18-003084/AABS found that the settlement agreement did not capture the parties' intention with respect to settlement of the ACBs and that it was a mutual mistake and no meeting of minds in order for the settlement agreement to be considered valid.

[702] The Ontario Court of Appeal in *Deschenes v. Lalonde*, 2020 ONCA 304, 447 D.L.R. (4th) 132 at paras. 27-28 confirmed that there is a strong presumption in favour of the finality of settlements which prevails unless there is fraud, misrepresentation, duress, undue influence, unconscionability or mutual or unilateral mistake.

[703] Even assuming Ms. Barkley's position that this was a case of unilateral mistake on her part or Mr. Sloan or both, as noted in *Deschenes*, it was clearly a material term of the settlement to Ms. Barkley and Belair knew or ought to have known of that. Under these circumstances and given that Belair was insisting on a full and final release by Ms. Barkley of any potential claims for future *SABS* and in particular a release of her potential claim for substantially enhanced benefits if she became catastrophically impaired in the future, the evidence establishes that it would be unconscionable for Belair to rely on the terms of the settlement documents it prepared if this were a unilateral mistake.

[704] When Ms. Barkley became aware shortly after the settlement that Belair's position was that they were not required to pay for those two approved but unbilled treatment plans totaling approximately $1,000, she admitted initially in cross-examination that Mr. Sloan advised her that she had the option to set aside the settlement because of the mistake.

[705] I do not accept Ms. Barkley's subsequent evidence in cross-examination that Mr. Sloan did not speak to her about her option to set aside the settlement because of there being no meeting of the minds. Ms. Barkley in her email to Dr. Bautz on June 16, 2014 made specific reference to there being a risk that she may have to repay the settlement if they i.e. Belair, do not agree to pay the outstanding balance of Dr. Bautz's account. This information had likely come to her verbally from Mr. Sloan.

[706] Mr. Sloan also by email on June 23, 2014 advised her that they could try to sue for recovery of these two treatment plan amounts or that she could return the settlement funds and seek to rescind the settlement on the basis of there being no meeting of the minds.

[707] Because the wording of the settlement documents could have been better, Mr. Sloan recommended to the Barkleys that she obtain independent legal advice on that and agreed that he would pay the other invoice of $741.40 and then add it as a disbursement in the file on the tort claim.

[708] Both Ms. Barkley's and Mr. Sloan's evidence was that Ms. Barkley was not prepared to take the steps to rescind the settlement as she would be required under the *SABS* to return the settlement funds of $25,000 as a condition of doing so. She had already applied the settlement funds to her line of credit and the disputed amount involved of approximately $1,000 in her view was not worth it.

[709] Ms. Barkley then promptly in mid July 2014 consulted new counsel who, based on Ms. Barkley's evidence, was fully aware that Ms. Barkley was unhappy with the settlement and with Mr. Sloan's services and significantly, of the mistake issue regarding the approved but unbilled treatment plans that Belair declined to pay. Ms. Barkley had told Mr. Sloan of her deteriorating medical condition. New counsel received Mr. Sloan's complete file on August 8, 2014 one day after it was requested which included the above-mentioned medical records confirming the deterioration in Ms. Barkley's condition.

[710] Ms. Barkley then decided to terminate Mr. Sloan's retainer and new counsel continued to act for her.

[711] Ms. Barkley's new counsel subsequently issued the statement of claim in this action in April 2016 claiming negligence regarding the alleged improvident settlement against Mr. Sloan and damages for not being able to claim

substantial benefits under the Belair policy due to her becoming catastrophically impaired as well as IRBs.

[712] The reasonable inference to be drawn from all this evidence including the wording in the statement of claim issued by new counsel is that Ms. Barkley was likely aware in July and August 2014 after consulting new counsel of her potential entitlement to claim substantial catastrophic impairment benefits under the policy in the future if her condition deteriorated and if the settlement was set aside.

[713] At that point, Ms. Barkley was also likely aware that the settlement reached with Belair may have been improvident and perhaps significantly so if she met that test of catastrophic impairment in the future. She was likely aware that she could try to negotiate with Belair and if unsuccessful, to apply to set aside the settlement after mediation on the basis of there being no settlement agreement reached regarding Belair's payment of those two treatment plans which would also require her to repay the settlement funds to Belair.

[714] No evidence at trial was provided by Ms. Barkley or her new counsel as to what specific legal advice was given to Ms. Barkley at that time regarding the potential of her setting aside the settlement to preserve her claim for catastrophic impairment benefits in the future, the likelihood of her being successful and why Ms. Barkley did not pursue that through new counsel especially if a claim in negligence was being considered against Mr. Sloan.

[715] There was no evidence that Ms. Barkley's new counsel advised her that her efforts to set aside the settlement were unnecessary in their claim for damages against Mr. Sloan and were unlikely to succeed.

[716] What is clear is that despite now having the benefit of legal advice from experienced new counsel, Ms. Barkley apparently decided then when she was not catastrophically impaired not to even attempt to contact Belair to rescind the settlement on her repayment of the $25,000 settlement funds.

[717] She also did not do so in 2016 when her condition continued to deteriorate and she stopped work altogether that September or to date. By reasonable inference, new counsel did not proceed with any attempt to contact Belair to set aside the settlement from August 2014 to date presumably on instructions from Ms. Barkley.

[718] There was no evidence led by Ms. Barkley or Mr. Barkley that they could not have repaid the settlement funds to Belair in order to set aside the settlement. Ms. Barkley used the $18,000 net settlement funds she received to pay off her line of credit at her bank. She and Mr. Barkley provided no evidence that they could not have borrowed against that same line of credit to repay the settlement funds to Belair in order to set aside the settlement agreement.

[719] Mr. Sloan had recommended that Ms. Barkley consider moving to set aside the settlement and there was no evidence from him that he would not have returned the $7,000 in legal fees so that the full $25,000 could be repaid to Belair.

[720] Moreover, there was no evidence presented by Ms. Barkley at trial through any witness from Belair that Belair would not likely have consented to the setting aside of the settlement if requested by Ms. Barkley upon her return of the settlement funds in 2014 or after that.

[721] In addition, there was no evidence from Belair that even if it initially refused to do so, it would have contested any application by Ms. Barkley to set aside the settlement on the basis of Ms. Barkley's position that there was no settlement reached.

[722] No evidence was provided from Mr. Wilson, Ms. Barkley's expert, regarding the likelihood or not of a *SABS* insurer in these circumstances including Belair, if asked, consenting in 2014 or thereafter to the setting aside of the settlement on Ms. Barkley's return of the settlement funds. Furthermore, there was no evidence from Mr. Wilson on the likelihood or not of a *SABS* insurer including Belair contesting any application by Ms. Barkley to set aside the settlement under the circumstances.

[723] As noted above in *Basandra,* the *SABS* insurer consented to Basandra's request to rescind the *SABS* settlement made five years earlier even after becoming aware of Basandra's now advancing a claim of becoming catastrophically impaired after the settlement.

[724] There was no evidence at the trial that suggested Ms. Barkley at that time in 2014 would have met the test of being catastrophically impaired. Ms. Barkley conceded that she would not have met that test then even though she was still working reduced work hours. In June 2014, she told Mr. Sloan that she had in

fact increased her hours of work to approximately 50% to 75% of her preaccident capacity.

[725] Accordingly, Belair may not have had any significant concerns in 2014 of Ms. Barkley becoming catastrophically impaired in the future so as to oppose Ms. Barkley's request to rescind the settlement or being prejudiced in any way if the settlement was set aside at that time.

[726] Moreover, this is not a case where Ms. Barkley, in mitigating her damages, would have to undertake complex and costly speculative litigation against Belair. It would involve an initial request of Belair to set aside the settlement on the basis of Ms. Barkley returning the settlement funds and if denied, commencing mediation and subsequent court or tribunal proceedings, none of which would be costly to Ms. Barkley or complex.

[727] Ms. Barkley had retained Mr. Sloan on a contingency fee basis with respect to her tort and accident claims. Ms. Barkley similarly likely retained new counsel for her tort claim on a contingency fee basis and by reasonable inference, she may also have done so regarding her negligence claims against Mr. Sloan for the improvident settlement.

[728] In any event, Ms. Barkley's costs in taking reasonable remedial measures to try and set aside the settlement would likely have been claimable as additional damages incurred in mitigation against Mr. Sloan if she was unsuccessful in setting aside the settlement.

[729] Accordingly, there was likely no significant financial risk to Ms. Barkley if she had proceeded with her attempt to rescind the settlement against Belair.

[730] Had Belair, if asked, declined Ms. Barkley's request to set aside the settlement, in my view based on all the evidence, Ms. Barkley's chances of doing so successfully after mediation and application to the court or LAT on her return of the $25,000 settlement funds were certainly far more probable than not. In my view, they would in all likelihood have succeeded for the following reasons.

[731] First, this is not a case in which the plaintiff suggests that the settlement agreement should be rescinded because new information that came to light following the settlement that indicates that the plaintiff entered an improvident settlement. The fact that Ms. Barkley's medical condition had deteriorated significantly by 2016 so that she was no longer capable of work

would not be grounds to rescind the settlement because of her change of heart or because of the benefit of hindsight regarding the improvident settlement that was reached. *Deschenes*.

[732] Second, the Ontario Court of Appeal in *Milios v. Zagas*, (1998) 3 O.R. (3d) 218, a case involving mistake and apparently a unilateral mistake, confirmed the discretion of the motion judge not to enforce the terms of the settlement on the defendant's motion brought under Rule 49.09 after considering the following relevant factors disclosed by the evidence:

a) Counsel in that case was mistaken with respect to his instructions to settle;

b) Because no order giving effect to the settlement had been taken out, the parties pre-settlement positions remained intact,

c) Apart from losing the benefit of the impugned settlement, the defendant would not be prejudiced if the settlement was not enforced

d) The plaintiff would be significantly prejudiced if judgment was granted in relation to the prejudice the defendant would suffer if the settlement was not enforced,

e) No third parties would be affected if the settlement was not enforced.

[733] I am aware that this case, unlike *Milios*, is not one under Rule 49.09. However, similarly, the pertinent facts are as follows:

a) The settlement documents did not reflect the terms of the settlement of Ms. Barkley and Mr. Sloan of which Belair knew or ought to have known.

b) The parties pre-settlement positions on repayment by Ms. Barkley of the $25,000 settlement amount remained intact.

c) Apart from losing the benefit of the impugned settlement, Belair would not have been prejudiced if the settlement was set aside.

d) Ms. Barkley's prejudice suffered by not being entitled to preserve her claim for significantly enhanced benefits if she was found to be catastrophically impaired in the future was significantly greater than the prejudice Belair would suffer if the settlement was not enforced.

e) No third parties were or would be affected if the settlement was not enforced.

[734] As noted above,there was also no evidence that Belair would not have consented to any request by Ms. Barkley to set aside the settlement on her repayment of the settlement funds or would have contested any application to the Court or LAT by Ms. Barkley to do so.

[735] In addition, Ms. Barkley could have initiated mediation and court proceedings or tribunal proceedings to set aside the settlement until April 1, 2016 and thereafter because of the *SABS* change only to the LAT which I understood was conceded by Ms. Barkley's counsel.

[736] Nordheimer J, as he then was, in *Geto Investments Limited et al v. Squires*, [1999] O.J. No. 5037 confirmed at para. 20 that the plaintiff can be found to have failed to act reasonably in mitigation of damages if the loss claimed from the negligent party could have been avoided altogether by taking of some other proceeding.

[737] *Southcott* subsequently confirmed the same principle at paras. 24 and 75.

[738] Nordheimer J followed other Canadian authorities as well as that of *Walker v. Medlicott & Son*, [1999] 1 All E.R. 685 which held that the beneficiary's claim for negligence against the lawyer who drafted the will failed as his obligation to mitigate his damages required the beneficiary to first issue proceedings for rectification of the will even if it would have been hotly contested.

[739] Nordheimer J also at para. 15 dealt with the onus of proof on the issue of mitigation of damages. He found that rather than requiring the defendant to prove that payment would have been forthcoming from the third-party had an action been taken, the onus should lie on the plaintiff to prove that it could not have recovered the amount had it taken that step.

[740] The British Columbia Court of Appeal in *Ueland v. Lynch*, 2019 BCCA 431, 31 B.C.L.R. (6th) 33 dismissed the plaintiff's negligence claim against his lawyer acting in a personal injury action which resulted in an order that that action be dismissed. The plaintiff had instructed the lawyer to take no further steps but was aware that he needed to set aside the dismissal order immediately and had told the lawyer he intended to retain other counsel to do so.

[741] The court upheld the trial judge's decision that the defendant had met the onus of proving that the plaintiff had not acted reasonably to mitigate his damages by not moving to set aside the dismissal order. The court found that if the plaintiff had promptly made that application, it would have been successful. The plaintiff's damages were reduced by 100% because of his failure to mitigate rather than only 50% as found by the trial judge.

[742] That case was followed in *Thind* which held that the plaintiff failed to mitigate his damages in negligence against his lawyer which resulted in an order dismissing his divorce action. The court found that the defendant had met her onus to prove the plaintiff acted unreasonably in failing to take steps to mitigate her loss to set aside the divorce order in a timely way as her entire loss would have been avoided. A 100% reduction in her claim for damages against the lawyer was therefore in order.

[743] In this case, Ms. Barkley received proper legal advice from Mr. Sloan that based on there not being a meeting of minds with respect to the terms of the settlement, she should consider proceeding with the application to rescind the settlement agreement upon her repayment of the $25,000 settlement amount which would preserve her continuing claims for accident benefits in the future.

[744] Ms. Barkley's evidence was that she did not do so after receiving advice from Mr. Sloan because of her sense of relief in not having to deal with Belair, it did not make sense to undo the settlement and in her view, the $1000 in dispute was not worth it. She still declined to do so when she likely knew in July and August 2014 after consultation with her new counsel if the settlement was set aside of her potential claim for substantially enhanced benefits if her condition deteriorated in the future and she became catastrophically impaired as noted in the subsequently drafted statement of claim against Mr. Sloan.

[745] As noted above, Ms. Barkley provided no evidence at trial as to why she did not attempt to promptly set aside the alleged improvident settlement after receiving advice from her new counsel in July and August 2014. In any event, as noted above, her new counsel presumably operating on her instructions did not do so.

[746] Even if Ms. Barkley had thought she had a strong case for damages against Mr. Sloan for professional negligence because of her entering an improvident

settlement, that would not have dispensed with her obligation to mitigate her damages by moving to set aside the alleged improvident settlement. *Geto Investments Limited*, at para.19.

[747] I do not accept Ms. Barkley's submission that she had no realistic prospect of setting aside the settlement. I also do not accept her position that by failing to attempt to do so, there should be only a modest reduction of only 15% reflected as a negative contingency affecting the amount of her damages.

[748] Mr. Sloan has met the onus of proof that the plaintiff Ms. Barkley failed to make reasonable efforts to mitigate her damages and that mitigation was possible. The evidence also establishes that not only was mitigation possible, those steps to set aside the settlement promptly would in all likelihood have been successful and would have avoided the loss altogether which Ms. Barkley now seeks to visit on Mr. Sloan.

[749] As similarly noted above on the issue of causation, it was Ms. Barkley's inaction that resulted in her losses she now claims against Mr. Sloan that could reasonably have been avoided altogether.

[750] Accordingly, Ms. Barkley's action is dismissed.

Rule Against Double Recovery

[751] Mr. Sloan also takes the position that Ms. Barkley is not entitled to any claim for her pecuniary *SABS* damages in this action because she has already received compensation for those damages in the tort settlement reached in February 2020. That settlement paid Ms. Barkley, her spouse and children the sum of $1.5 million in damages on a global lump sum basis plus costs of $304,150 for a total of $1,804,150.

[752] Including the $25,000 settlement, Ms. Barkley received $30,487.12 in medical/rehabilitation benefits and $3,588.36 in attendant care benefits from Belair which the tort defendants were entitled to deduct from the medical/rehabilitation and attendant care expenses damages respectively claimed in that action.

[753] Mr. Sloan states that to allow Ms. Barkley any claim for loss of opportunity *SABS* damages in this action against him comprising her alleged entitlement to income replacement benefits, attendant care, medical/rehabilitation and housekeeping benefits without allowing the appropriate reduction for the net

tort damages recovered by Ms. Barkley would amount to double recovery which, save a few narrow exceptions, is not permitted.

[754] Ms. Barkley states that Mr. Sloan is not entitled to any such credit or reduction from the tort settlement against her damages claimed in this action.

[755] Ms. Barkley submits she did not recover the full extent of her losses in the tort action and that the $1.5 million in damages received represents a lump sum payment arrived at after a lawsuit was commenced and negotiated as a compromise. *Tsiapraillis v. Canada*, 2005 SCC 8, [2005] 1 S.C.R. 113 *Vanderkop v. Personal Insurance Company of Canada*, 2009 ONCA 511 at paras. 81 and 82. The defendants' offers made in the tort action at the mediation in February 2020 were all on a global basis for the Barkleys' damages with no breakdown of those damages whatsoever.

[756] Their position is that Mr. Sloan cannot prove that any part of the $1.5 million of that settlement can be attributed to any of the heads of damages claimed in this action against him. Hence, Ms. Barkley states that none of the $1.5 million in tort damages can be considered in the calculation of or deducted from any of the heads of damages claimed against Mr. Sloan in this action. There has been no double recovery.

[757] The Barkleys allocated $30,000 of the $1.5 million net they received for the *Family Law Act* claims for their three children leaving Ms. Barkley with $1,470,000. Of that amount, Ms. Barkley's counsel concedes that approximately $200,000 would be appropriately allocated for Ms. Barkley's general damages for pain and suffering.

[758] Ms. Barkley, in addition to her claims for pain and suffering damages and *Family Law Act* claims for her family members, advanced the same claims for past and future medical/rehabilitation, attendant care and housekeeping/home services expenses in the tort action through the same evidence of the occupational therapist Ms. Grande and future care costs specialist Mr. Pearce that she is now making in this action against Mr. Sloan albeit subject to maximum amounts payable under the *SABS* herein. The value of the lost IRBs are also claimed in this action.

[759] Ms. Barkley provided no evidence at this trial that there were any additional claims for such damages that were not already claimed in the tort action and that were considered as part of the $1.5 million damages settlement reached.

[760] Ms. Barkley and her lawyers throughout this litigation declined to disclose the documents from her lawyer's tort file of any breakdown of the settlement amount that was reached stating there was no breakdown of the global sum of $1.5 million in damages. Ms. Barkley's counsel declined to produce her mediation brief outlining how she calculated her potential damages in the tort action broken down into separate headings for general damages and past and future damages for loss of income, medical/rehabilitation, ACBs and housekeeping expenses. That information and documentation were required to be disclosed before the trial on rather similar facts in *Burwash v. Levy,* 2021 ONSC 7196.

[761] There is an issue on double recovery regarding whether the tort settlement Ms. Barkley received for the purpose of this action represents an indemnity payment from third parties intended to compensate her in whole or in part for her pecuniary losses. *Cunningham v. Wheeler*, *Cooper v. Miller; Shanks v. McNee*, [1994] 1 S.C.R. 359 at para. 371; *IBM Canada Limited v. Waterman*, 2013 SCC 70 at para. 81.

[762] There is also an issue as to whether in these circumstances to avoid double recovery, the onus of proof ought to be on Mr. Sloan to prove what portion of the global tort settlement proceeds received by Ms. Barkley is related to the specific claims for damages against him by her so that his liability should be reduced by some of the global tort settlement. See *Hilson v. 1336365 Alberta Ltd.*, 2019 ONCA 1000, 148 O.R. (3d) 609.

[763] Or, should the onus of proof in these circumstances be on Ms. Barkley to prove that any part of the global tort settlement was attributable to a head of damages other than Ms. Barkley's lost income replacement, medical/rehabilitation, attendant care and housekeeping expenses she now also claims against Mr. Sloan? See *Pereira v. The Business Depot Limited*, 2011 BCCA 361, 20 B.C.L.R. (5th) 295; *Young v. Saskatchewan and Mutual Life Assurance Company of Canada*, 1992 Canlii 799 (Sask.K.B.); *Nova Scotia Public Service Long-term Disability Plan Trust Fund v. McNally*, 1999 NSCA 129, 179 N.S.R. (2d) 314.

[764] It is not necessary or appropriate on the evidence to determine whether or not Ms. Barkley should also be prevented from pursuing her claim against Mr. Sloan on double recovery principles because of her tort settlement received for the following reasons.

[765] I have already concluded that Ms. Barkley could not claim both the enhanced accident benefits from Belair (if she did not settle or if she set aside the settlement) and also claim those same expenses and income losses from the tortfeasor in her February 2020 settlement of $1.5 million plus costs.

[766] The tort defendants would have been entitled by statute to a deduction for those additional *SABS* received or to be received in the future by Ms. Barkley on a "silo" basis from the damages they were required to pay her so as to avoid double recovery.

[767] Because of that, I concluded that Ms. Barkley on the issue of causation has not established that but for Mr. Sloan's negligence she lost a benefit i.e., that she would have been successful in achieving a much better recovery with no corresponding reduction in what she would have received from the tort defendants either by way of settlement or at trial. I concluded that Ms. Barkley should not be entitled to claim against Mr. Sloan an additional amount of damages for the value of those additional accident benefits she might have received.

[768] In my view, that is the more appropriate way of resolving the issues of Ms. Barkley's double recovery rather than considering whether Mr. Sloan is entitled to a credit against all of the damages claimed by Ms. Barkley against him for some or all of of the $1.5 million in tort damages received by her.

[769] Accordingly, it is not necessary or appropriate on this evidence to consider separately whether Ms. Barkley cannot also recover damages against Mr. Sloan because she may already have been paid for those same items of damages in the tort settlement and I decline to do so.

Set off for Sloan's Legal Fees Against Barkley's Damages

[770] Mr. Sloan claims a set off against Ms. Barkley's damages claimed against him under s. 111 of the *Court's of Justice Act* and common law for his legal account for his work on Ms. Barkley's tort and *SABS* files.

[771] The account was rendered on July 28, 2014 in the total amount of $12,245.58 comprising of $11,307 for fees including GST plus disbursements of $885 including GST. Mr. Sloan stated that that account was for outstanding fees and disbursements he had in the file as of the conclusion of the retainer in investigating and pursuing both the accident benefits claims and at fault party tort case.

[772] Mr. Sloan's accident and tort files were then turned over to Ms. Barkley's new counsel who undertook to protect Mr. Sloan's account for services rendered from the proceeds of settlement and judgment. Despite that undertaking, Mr. Sloan's account remains unpaid.

[773] Ms. Barkley does not dispute having received Mr. Sloan's account for the work he did on her files and in fact agreed in her evidence that individuals should be compensated for their work.

[774] Section 111 of the *Courts of Justice Act* provides the statutory framework for legal set off of a debt owed by the plaintiff to the defendant in action for a debt owed by the defendant to the plaintiff.

[775] Legal set off is not available under s. 111 where the plaintiff's claim against the defendant is an action for unliquidated damages as in this case.

[776] In *Holt v. Telford*, [1987] 2 S.C.R. 193 at para. 33, the Supreme Court confirmed the following principles governing the defence of equitable set-off:

a) a defendant must show some equitable ground for being protected against the plaintiff's claim ;

b) that equitable ground must go to the very root of the plaintiff's claim;

c) the claims must be so clearly connected that it would be manifestly unjust to allow the plaintiff to enforce payment without consideration of the cross-claim;

d) the claims need not arise from the same contract;

e) the claims need not be liquidated claims.

[777] While there may be some value for the legal services provided by Mr. Sloan to Ms. Barkley with respect to the work he performed on Ms. Barkley's tort claim, I am not prepared to find that Ms. Barkley received $7,000 of value that she paid for Mr. Sloan's legal services in May 2014 regarding her accident benefits claim given his several breaches of the standard of care required of him as noted in my reasons. See *Westmount-Keele Limited v. Nicholas C. Tibolla Professional Corporation*, 2025 ONCA 401 at paras. 13 and 14.

[778] In addition, Mr. Sloan's being paid that $7,000 in legal fees from the $25,000 *SABS* settlement does not seem to have been accounted for in that account of

July 28, 2014. That account appears to exclude only references to the original meeting date of March 14, 2013 with the Barkleys, the mediation date of May 12, 2014 and Mr. Sloan's attendance with the Barkleys on May 15, 2014.

[779] Except for a few brief references to Mr. Sloan's correspondence with the engineer and the third-party insurance adjuster which pertained to the tort file, the entire account of July 28, 2014 appears to relate to Mr. Sloan's office handling of the accident benefits file for Ms. Barkley which would have included his obtaining all of the various medical records of Ms. Barkley's attending health practitioners. Mr. Sloan also in that account included his time and fees for his services in June and July 2014 dealing with Dr. Bautz's two approved but unbilled treatment plan invoices.

[780] No explanation was provided by Mr. Sloan as to why he believes the work his office did in handling the accident benefits file from the outset was not included in the $7,000 in legal fees that he was paid from the *SABS* settlement, why no credit of that $7,000 was provided in that account or why he should be paid for his time spent in dealing with the Dr. Bautz treatment plan issues given his admitted error regarding the wording of the settlement disclosure notice.

[781] Although the court has inherent jurisdiction to assess Mr. Sloan's legal fees, Mr. Sloan has the onus of demonstrating that his fees are reasonable given the time expended by the lawyer, the legal complexity the matter, the degree of responsibility assumed by the lawyer and the monetary value of the matters in issue, the importance of the matters to the client, the degree of skill and competence demonstrated by the lawyer, the results achieved, the client's ability to pay and the expectation of the client regarding the amount of the fee. *Cohen v. Kealey & Blaney*, [1985] O.J. No. 160 (CA).

[782] I have considered that lack of explanatory evidence in assessing Mr. Sloan's account of July 28, 2014 and the fact that Mr. Sloan's office received $7,000 from the *SABS* settlement for which Ms. Barkley did not receive significant value and which should be offset against Mr. Sloan's remaining account. Accordingly, the reasonable outstanding fees of Mr. Sloan from that account of July 28, 2014 are assessed in the amount of $3,000 inclusive of HST and disbursements.

[783] Mr. Sloan would be entitled to an equitable set-off of $3,000 against any damages if awarded against him by Ms. Barkley. As no such damages are

payable given the dismissal of the action, Mr. Sloan is not entitled to judgment against Ms. Barkley for that amount under s. 111 (3) of the *Courts of Justice Act* as that section only pertains to legal set off of claims involving mutual debts.

Conclusion

[784] For these reasons, Ms. Barkley's action against Mr. Sloan is dismissed.

[785] The parties are strongly encouraged to resolve the issue of costs.

[786] If they are unable to do so, Mr. Sloan shall file written submissions of no more than five pages in length together with counsel's bill of costs and any relevant offers to settle within 30 days from the date of this decision.

[787] Ms. Barkley can similarly provide responding submissions within 15 days thereafter.

[788] If no written submissions are received within those timeframes, the parties will be deemed to have resolved the issue of costs.

Nightingale J

Date: October 27, 2025

CITATION: Barkley v. Sloan et al, 2025 ONSC 6057
COURT FILE NO.: CV-16-57260
DATE: 2025/10/27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALEXA BARKLEY

Plaintiff

– and –

PATRICK SLOAN and FERGUSON BARRISTERS LLP

Defendants

REASONS FOR JUDGMENT

R. J. Nightingale, J.

Released: October 27, 2025