

## Patrick Brown

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McLeish Orlando  
151 Yonge Street  
Suite 1800  
Toronto, ON  
M5C 2W7

T: 416-366-3311  
E: [pbrown@mollp.com](mailto:pbrown@mollp.com)

Patrick Brown is a partner at McLeish Orlando. He has been practicing law for over 25 years and has dedicated his career to helping those who suffer serious and catastrophic personal injuries as well as those families who have lost a loved one due to the fault of another. His cases have involved children, spinal cord injury, traumatic brain injury, wrongful death, biking/cycling injury, boating, daycare and camp negligence, drowning, road disrepair, and motor vehicle collisions. In addition, Patrick has extensive experience advocating for those suffering from hospital negligence and medical malpractice. He has cases throughout Ontario and is a leader in the area of personal injury law.

# Back to School

Kellerman-Bernard v. Unica Insurance Company



Patrick Brown



## **Kellerman-Bernard v. Unica Insurance Company**

Kellerman-Bernard v Unica Insurance Inc., 2022 CanLII 6755 (ONLAT)

<https://canlii.ca/t/jm6gc>

Kellerman-Bernard v. Unica Insurance Company, 2023 ONSC 4423

<https://canlii.ca/t/jzg7f>

### **Introduction**

In [Kellerman-Bernard v Unica Insurance Inc., 2022 CanLII 6755 \(ONLAT\)](#), the LAT was faced with deciding whether an individual who was not directly involved in an accident can meet the criteria for Catastrophic impairment (CAT) as defined by O. Reg. 34.10: Statutory Accident Benefits Schedule – Effective September 1, 2010 (SABS).

### **Facts**

On January 26, 2016, the Applicant Naomi Kellerman-Bernard's child was involved in a motor vehicle collision. The Applicant was not present at the time and did not witness the accident. However, the Applicant claimed that she suffered psychological and mental injuries as a result of her child's accident. As a result, the Applicant sought benefits under the SABS and submitted a CAT application for CAT determination. The Respondent, Unica Insurance Inc., denied the application for CAT on the basis that the Applicant was not directly involved in the accident. Therefore, the issue before the LAT was whether the Applicant, who was not directly involved in the accident, could meet the criteria for CAT under the SABS.

### **The Parties Positions**

The Respondent submitted that the Applicant is an insured person under the policy and therefore entitled to claim accident benefits. However, the Respondent argued that the Applicant was not involved in the accident, thus her injuries were not "caused by an

accident” as defined in the SABS. Therefore, the Respondent argued that the Applicant is not entitled to apply for CAT determination as she does not meet the criteria for CAT.

The Applicant argued that there is no difference between injuries being “caused by an accident” or injuries being caused “as a result of an accident”. Further, the Applicant also argued that the SABS does not require an insured person to have been directly involved in an accident to apply for CAT designation.

### **The LAT’s Analysis**

The Adjudicator, Vice Chair Avril Farlam, agreed that the Applicant is an insured person under the SABS and that the dispute is whether the Applicant meets the criteria for CAT designation.

The Adjudicator noted that under Section 3(2) of the applicable SABS, CAT designation requires that a two part test be met:

“For the purposes of this Regulation, a catastrophic impairment caused by an accident is, followed by a list of six categories of physical, brain, mental and behavioural impairment”

First, an Applicant must establish that their injuries are “caused by an accident”. Second, the Applicant must establish that their injuries fit within at least one of the six categories of physical, brain, mental or behavioural impairments listed.

To determine whether the Applicant meets the two-part test for CAT designation, the Adjudicator found it necessary to interpret the meaning of Section 3(2) and the phrase “caused by an accident”. To interpret Section 3(2), the Adjudicator applied the modern approach to statutory interpretation, which involves looking at the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found.

The Adjudicator first looked at the language of the provision. The Adjudicator found that the phrase “caused by an accident” is clear and unambiguous. Next, the Adjudicator considered the context in which the phrase “caused by an accident” is used. In doing so, the Adjudicator considered the meaning of the word “accident” and noted that it is defined as an incident in which the “use or operation of an automobile directly causes an impairment”. Further, the Adjudicator noted that if it can be established that the use or operation of an automobile was the cause of the injuries, then the Applicant must establish that there were no intervening acts. With this in mind, the Adjudicator noted that the question at hand is whether it can be said that the use or operation of the automobile was a “direct cause” of Applicant’s the injuries.

The Adjudicator looked at what constitutes direct causation. The Adjudicator noted that direct causation requires a determination of the “dominant factor that physically caused the Applicant’s injuries”. The Adjudicator found that, at a minimum, some direct physical connection is required between the injuries and an automobile for the injuries to have resulted from an accident. Thus, if no direct physical connection exists, then the injuries cannot be said to have been caused by an accident. As a result, the Adjudicator found that, in this case, the Applicant’s injuries were not directly caused by an automobile because the Applicant did not directly witness the accident.

Finally, the Adjudicator considered the intent of the legislature. The Adjudicator found that the legislature purposely used the phrase “caused by an accident” as opposed to “as a result of an accident” to restrict access to the highest level of accident benefits available to insured persons who suffer a catastrophic level of injury directly caused by an automobile. Therefore, the Adjudicator explained that its finding that the Applicant’s injuries were not directly caused by the accident because they did not directly witness the accident is consistent with the intent of the legislature.

Ultimately, the LAT found that because the Applicant did not witness the accident and was not directly involved in the accident, she does not meet the criteria for CAT designation under Section 3(2) of the SABS.

### **Appeal before the Divisional Court**

Following an unsuccessful request for reconsideration at the LAT, Ms. Kellerman-Bernard sought judicial review and appealed to the Divisional Court. The decision of the LAT was unanimously overturned by Sachs, Coats and Leiper JJ. of the Divisional Court.

In the decision, Justice Sachs outlines the three errors made by the LAT in coming to the decision.

The LAT ignored the plain language of the SABS when it found that not all classes of insured persons could apply for a catastrophic designation. However, the SABS has no such restriction. If it did, it would have been accounted for as other sections in the schedule do when they do exclude certain classes.

The LAT failed to consider the words “caused by an accident” in their relevant context. It was never contested that Kellerman-Bernard suffered a psychological or emotional injury

because of the collision. Therefore, it should have been clear that the purpose of the phrase is not to deny the appellant the ability to apply for benefits.

The interpretation adopted by the LAT ignores the purpose of SABS as being a remedial consumer protection legislation. However, the LAT's interpretation in the case was restrictive. This goes directly against the Supreme Court of Canada in *Smith v. Co-Operator's General Insurance* where the bench confirmed that the purpose of the SABS is to be read, interpreted, and applied in a way that protects customers.

The Appeal was allowed for the reasons noted above. The reason that stands out is the final one, as the Ontario Divisional Court puts a special emphasis on fostering fairness for people with "the most health needs" and not increasing their suffering and economic hardship.

Kellerman-Bernard was found to be eligible to make a claim for catastrophic impairment for her psychological and emotional injuries and impairments that were a result of her son's bicycle collision. This is an important decision for family members and caregivers who may suffer tremendously despite not having suffered a physical impact from a motor vehicle.



**Citation: Kellerman-Bernard v. Unica Insurance Inc., 2022 ONLAT 20-002064/ABBS - PI**

**Tribunal File Number: 20-002064/ABBS**

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8., in relation to statutory accident benefits

Between:

**Naomi Kellerman-Bernard**

**Applicant**

and

**Unica Insurance Inc.**

**Respondent**

**PRELIMINARY ISSUE DECISION**

**Adjudicator: Avril A. Farlam, Vice-Chair**

**Appearances:**

For the Applicant: Wendy Sokoloff, Counsel

For the Respondent: Jamie R. Pollack, Counsel

**HEARD by way of written submissions**

## BACKGROUND

- [1] On January 26, 2016 the child of Naomi Kellerman-Bernard (“applicant”) was involved in an accident (the “accident”). The applicant sought benefits February 2, 2016 under the *Statutory Accident Benefits Schedule - Effective September 1, 2010*<sup>1</sup> (“*Schedule*”) including an application for catastrophic impairment (“CAT”), OCF-19 on October 24, 2018.
- [2] The applicant filed an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service on February 10, 2020 for dispute resolution in which she is seeking CAT and other benefits.
- [3] The Tribunal ordered that the preliminary issue below be heard prior to the substantive issues. The substantive issues are scheduled to be heard March 21 to 23, 2022.

## PRELIMINARY ISSUE

- [4] The issue before me is:
- i. Can an applicant not involved in an accident meet the criteria for CAT impairment as defined by the *Schedule*?

## RESULT

- [5] I find that the applicant does not meet the criteria for CAT as defined by the *Schedule*. The applicant’s claim for CAT is dismissed. The substantive issues remain scheduled to be heard March 21 to 23, 2022 by videoconference.

## FACTS NOT IN DISPUTE

- [6] The applicant’s child was involved in the accident.
- [7] The applicant did not witness the accident.
- [8] The applicant claims accident benefits because of psychological and mental injuries she allegedly suffers as a result of her child’s accident.

## POSITIONS OF THE PARTIES

- [9] The respondent does not dispute that the applicant is an insured person under the policy and is eligible to claim accident benefits but submits that the applicant is not

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<sup>1</sup> O.Reg. 34/10

entitled to apply for CAT because she was not involved in the accident, thus her injuries were not caused by an accident as defined in the *Schedule*. Therefore she does not meet the criteria for CAT in the *Schedule*.

- [10] The respondent submits that this is a novel issue and there is no precedent on point.
- [11] The applicant submits that she is an insured person under the *Schedule* who sustained psychological and mental injuries caused by the accident for which she is eligible to apply for CAT designation and CAT benefits. The applicant submits that there is no difference to her injuries being “caused by an accident” or “as a result of an accident” and that there is no requirement in the *Schedule* for an insured person to have been involved directly in an accident to apply for CAT impairment designation.

## LAW AND ANALYSIS

### ***Statutory Basis for Catastrophic Impairment***

- [12] There is no dispute between the parties that the applicant is an insured person under the *Schedule*. The submissions of both parties make it clear that the applicant has sought and received some accident benefits. Where the parties differ is whether the applicant can claim CAT designation which would entitle her to claim an increased level of benefits.
- [13] The fact that the parties have agreed that the applicant meets the definition of “insured person” under the *Schedule* is not determinative of the issue before me. The real issue is whether the applicant can claim CAT designation.
- [14] I find that applicant does not meet the criteria for CAT as defined by the *Schedule* because her alleged injuries were not “caused by an accident” as required by the *Schedule*.
- [15] Both parties agree that as the accident took place on January 26, 2016, the version of the *Schedule*<sup>2</sup> for the period August 26, 2015 to March 3, 2016 applies (the “*Schedule*”)<sup>3</sup>.
- [16] Section 3(2) of the *Schedule* defines catastrophic impairment as follows:

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<sup>2</sup> O.Reg. 34/10.

<sup>3</sup> The version of the *Schedule* referred to in this decision is the pre-June 1, 2016 *Schedule* unless otherwise noted.

“For the purposes of this Regulation, a catastrophic impairment caused by an accident is,” followed by a list of six categories of physical, brain, mental and behavioural impairment.<sup>4</sup>

- [17] Under s. 3(2) of the *Schedule*, CAT designation requires a two part test to be met. The threshold test is that the applicant must establish that his or her injuries are “caused by an accident”. If the threshold test is met, the applicant must then establish that his or her injuries fit within at least one of the listed categories of impairment.
- [18] The respondent submits that the phrase “caused by an accident” was purposely used in the *Schedule* to restrict entitlement to CAT to persons who directly suffer injuries caused by an accident because the legislature has chosen to treat access to enhanced CAT benefits more restrictively. The respondent also submits that the principles of statutory interpretation as outlined by the Courts, including the Supreme Court of Canada<sup>5</sup> should be applied here in the interpretation of s. 3(2). I agree.
- [19] In interpreting the meaning of the phrase “caused by an accident”, I apply the modern approach to statutory interpretation which involves a textual, contextual and purposive analysis. As explained by Executive Chair Lamoureux in *M.F.Z. v Aviva Insurance Canada*<sup>6</sup>, this approach involves consideration of three factors: the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found.

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<sup>4</sup> The key aspect of s. 3(2) in my decision is causation; however, for completeness, the six categories in s. 3(2) are:

- (a) paraplegia or quadriplegia;
- (b) the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg;
- (c) the total loss of vision in both eyes;
- (d) subject to subsection (4), brain impairment that results in, (i) a score of 9 or less on the Glasgow Coma Scale, as published in...according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or (ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in...according to a test administered more than six months after the accident by a person trained for that purpose;
- (e) subject to subsections (4), (5) and (6), an impairment or combination of impairments that, in accordance with the American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> edition, 1993, results in 55 per cent or more impairment of the whole person; or
- (f) subject to subsections (4), (5) and (6), an impairment that, in accordance with the American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.”

<sup>5</sup> *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (SCC).

<sup>6</sup> *M.F.Z. v. Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT) para 39.

- [20] The phrase “caused by an accident” is clear and is not ambiguous, particularly when considered in the context in which the language is used. “Accident” is defined in the *Schedule* as an incident in which the “use or operation of an automobile directly causes an impairment...” In interpreting the term “accident” itself, the law is well settled that if it can be established that the use or operation of an automobile was the cause of the injuries, then the applicant must establish that there was “no intervening act(s) that resulted in the injuries that cannot be said to be part of the course of the ‘ordinary course of things.’”<sup>7</sup> The question is whether it can be said that the use or operation of the automobile was a “direct cause” of the injuries.<sup>8</sup>
- [21] Direct causation requires a determination of the “dominant factor that physically caused the applicant’s injuries”.<sup>9</sup> At a minimum, some direct physical connection is required between the insured person’s injuries and an automobile for the injuries to have resulted from an “accident”. Otherwise, the insured person’s alleged injuries cannot be said to have been caused by an “accident”. Here, the applicant’s alleged injuries were not directly caused by an automobile as she did not witness her child’s accident.
- [22] This purposive interpretation of the phrase “caused by an accident” is consistent with the fact that the legislature has seen fit to restrict access to the highest level of accident benefits available under the *Schedule* to those insured persons who suffer a catastrophic level of injury directly caused by an automobile. Here, because the applicant did not witness the accident and was not directly involved in the accident, she is unable to meet the threshold test for CAT designation required by s. 3(2). As a result, the applicant cannot meet the second part of the CAT test.
- [23] I find unpersuasive the applicant’s submissions that there is no difference to her injuries being “caused by an accident” or “as a result of an accident”, wording which she submits is used elsewhere in the *Schedule*, and that there is no requirement in the *Schedule* for an insured person to have been involved directly in an accident to apply for CAT impairment designation.
- [24] To the contrary, I am of the view that the legislature used the phrase “caused by an accident” purposely and in order to restrict CAT designation to those most seriously injured directly by the use or operation of an automobile, not their more indirectly affected family members. My interpretation is consistent with the

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<sup>7</sup> *Greenhalgh v. ING-Halifax Insurance Company*, 2004 CanLII 21045 (ONCA) at para 36; *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII) at para 14.

<sup>8</sup> *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII) at para 14.

<sup>9</sup> *Porter v. Aviva Insurance Company of Canada*, 2021 ONSC 3107 (Div. Ct.)

modern approach to statutory interpretation mandated by the Courts and Executive Chair Lamoureux and the cases cited by the applicant.

## ORDER

[25] For the reasons outlined above, I find that the applicant does not meet the criteria for CAT as defined by the *Schedule*. The applicant's claim for CAT is dismissed. The substantive issues remain scheduled to be heard March 21 to 23, 2022 by videoconference.

**Released:** February 3, 2022

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**Avril A. Farlam  
Vice-Chair**

**CITATION:** Kellerman-Bernard v. Unica Insurance Company, 2023 ONSC 4423  
**DIVISIONAL COURT FILE NO.:** 134/22  
**DATE:** 2023/08/02

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**  
**Sachs, Coats and Leiper JJ.**

**BETWEEN:** )  
 )  
NAOMI KELLERMAN-BERNARD ) *Stan Razenberg and H. Jack Parsekhian, for*  
 ) *the Appellant*  
Appellant )  
 )  
– and – )  
 )  
UNICA INSURANCE COMPANY ) *Jonathan Heeney, for the Respondent*  
 )  
Respondent )  
 )  
 ) **HEARD at Toronto by videoconference:**  
 ) June 27, 2021

**H. SACHS J.**

**Overview**

- [1] The Appellant sustained psychological and emotional injuries and impairments caused by a bicycle accident in which her son was significantly injured. While the Appellant was not herself involved in the accident, there is no issue that she is an “insured person” within the meaning of the *Statutory Accident Benefits Schedule* O. Reg. 34/10 (“SABS”).
- [2] The Appellant applied to the Respondent for a catastrophic impairment designation. Her claim was denied and the matter proceeded to the License Appeals Tribunal (“LAT” or “Tribunal”). On February 3, 2022 the LAT decided that the Appellant was not entitled to apply for a CAT designation as she did not belong to the class of insured persons that was entitled to seek such a designation. The Appellant requested that the LAT reconsider its original decision and on May 22, 2022, the LAT denied her request for reconsideration.

- [3] This is an appeal as of right from both the LAT decisions. The appeal concerns a question of law alone. The question is one of statutory interpretation. As such, the applicable standard of review is correctness.
- [4] For the reasons that follow I would allow the appeal. In summary, the interpretation adopted by the LAT ignores the plain and ordinary meaning of the legislation in question, focuses on one phrase in that legislation without considering the phrase in its full context and defeats rather than promotes the accepted purpose of the *SABS*.

### **THE RELEVANT STATUTORY FRAMEWORK**

- [5] This appeal involves the interplay between three provisions in the *SABS*- s. 3 (1), which defines who is an “insured person”; s. 45(1), which provides that an “insured person” is entitled to apply for a catastrophic impairment designation and s. 3(2) which sets out the criteria necessary to qualify for such a designation. The full text of these provisions is set out below.

#### ***Section 3(1)***

- [6] The relevant portions of section 3(1) provide as follows:

“insured person” means, in respect of a particular motor vehicle liability policy,

- (a) The named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of a named insured or of his or her spouse.
- (i) If the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or
- (ii) If the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant

- [7] Section 3(1) sets out two classes of people who are named in the policy who qualify as “insured persons” – named insureds who are actually involved in the accident and named insureds who are not actually involved in the accident, but who suffer psychological or mental injury as a result of the fact that their family member was involved in the

accident. The Appellant falls within the second class of “insured persons”. She is named in the policy. She was not directly involved in the accident, but she suffered psychological or mental injury as a result of the fact that her son was directly involved in the accident.

- [8] In *Ayr Farmers Mutual Insurance Company v. Wright*, 2016 ONCA 789 at para. 25, the Court of Appeal states:

It is well established that the definition of insured person in the [SABS] governs the entitlement to SABS.

- [9] As previously noted, it is not contested that the Appellant is an “insured person”

***Section 45(1)***

- [10] Section 45(1) confers upon an insured person the right to seek a catastrophic impairment designation. It reads:

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.

- [11] Pursuant to this section the Appellant, an insured person, applied to the Respondent for a determination as to whether her impairment was a catastrophic impairment. The Respondent denied her application on the basis that she did not fall within the class of insured persons that was entitled to apply for a CAT designation. The LAT agreed with the Respondent. It did so on the basis of its interpretation of s. 3(2) of the *SABS*.

***Section 3(2)***

- [12] Section 3(2) of the *SABS* provides:

(2) For the purposes of this Regulation, a catastrophic impairment caused by an accident is:

- (a) paraplegia or quadriplegia;
- (b) the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg;
- (c) the total loss of vision in both eyes;
- (d) Subject to subsection (4), brain impairment that results in,
  - (i) a score of 9 or less on the Glasgow Coma Scale...

(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale....

(e) Subject to subsections (4),(5) and (6) an impairment or combination of impairments that, in accordance with the American Medical Association’s Guide to the Evaluation of Permanent Impairment...results in 55 per cent or more impairment of the whole person, or

(f) Subject to subsections (4), (5) and (6), an impairment that , in accordance with the American Medical Association’s Guides to the Evaluation of Permanent Impairment...results in a [marked impairment, extreme impairment] due to mental or behavioural disorder.

[13] The LAT in its decisions focused on the phrase “caused by an accident” in s. 3(2) and found that the Appellant was not entitled to apply for a CAT designation because she was not directly involved in the accident and thus her impairment was not caused by an accident. Thus, the LAT found that the class of insured persons to which the Appellant belongs, namely people who are not themselves involved in the accident but who suffer psychological or mental injuries as a result of an accident that resulted in injury to their family member, are not entitled to seek a CAT designation.

### **The Errors of Law Committed by the LAT**

#### ***The LAT ignored the plain language of the SABS***

[14] In *Skunk v. Ketash*, 2018 ONCA 450, the Court of Appeal states as follows:

[8] The principles of statutory interpretation require the court first to look to the plain meaning of the statute. If the words have a plain meaning and give rise to no ambiguity, then the court should give effect to those words.

[15] The LAT found that not all classes of insured persons could apply for a CAT designation. This is contrary to the express language of s. 45(1), which states that “an insured person” may apply for a CAT designation. It puts no restriction on who can apply for such a designation.

[16] This is to be contrasted with another provision of *SABS* – the section dealing with entitlement to optional benefits. Section 28(2) of the *SABS* states:

(2) The optional benefits referred to in subsection (1) are applicable only to,

(a) the named insured;

(b) the spouse of the named insured;

( c) the dependants of the named insured and of the named insured's spouse, and

(c) the persons specified in the policy as drivers of the insured automobile.

[17] Thus, in section 28(2), the legislature has specified through a list who is which class of entitled to apply for optional benefits. This demonstrates that when the legislature wishes to restrict benefits to only certain people it does so through explicit language. Section 45(1) contains no such list. Anyone who is an “insured person” is entitled to apply for a catastrophic impairment designation.

[18] The decision of the LAT also ignores the plain meaning of s. 3(2). Section 3(2) contains no language that speaks to the insured person's entitlement to apply for a catastrophic impairment designation. Rather, it sets out the functional and medical criteria to be used in assessing whether the impairment at issue can be considered “catastrophic.”

[19] In effect, the LAT interpreted s. 3(2) so as to restrict the application of s. 45(1). There is nothing in the express language of s. 3(2) that supports such an interpretation.

***The LAT failed to consider the words “caused by an accident” in their entire relevant context***

[20] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court reiterated that the proper approach to statutory interpretation requires reading the language chosen by the legislature in its entire relevant context (para. 117).

[21] The LAT failed to do this. Instead, it took the phrase “caused by an accident” in s. 3(2) out of context and then asked itself whether the Appellant's impairment was caused by an accident within the meaning of caselaw that has no application to the case at bar. The case law that the LAT examined deals with entitlement to benefits by people who were not clearly “insured persons” within the meaning of the legislation. The Appellant is an insured person and, as such, according to the express language of s. 45(1), her entitlement to apply for a catastrophic impairment designation is clear.

[22] If the phrase had been considered in context, it would have been clear that its purpose is not restrict entitlement to apply for benefits under s. 45(1), but to clarify that the only impairments to be considered in assessing whether the impairments at issue are “catastrophic” are the impairments that were caused by the accident (as opposed to other causes.) There is no issue that the Appellant suffered a psychological or emotional injury as a result of the accident. The only issue is whether that injury qualifies as a “catastrophic impairment.”

***The interpretation adopted by the LAT ignores the purpose of the SABS***

- [23] In *Vavilov*, supra at para. 117, the Supreme Court reiterates that the words of a statute are to be read “ in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”
- [24] The courts have repeatedly recognized that the *SABS* are remedial and constitute consumer protection legislation and ought to be read, interpreted and applied in such a way. This was confirmed by the Supreme Court of Canada in *Smith v. Co-Operator’s General Insurance Co.* [2002] 2 S.C.R. 129 at para. 11.
- [25] In *Tomec v. Economical*, 2019 ONCA 882 the Ontario Court of Appeal confirmed that “[the] legislature’s definition of ‘catastrophic impairment’ is intended to foster fairness for victims of motor vehicle collisions by ensuring that accident victims with the most health needs have access to expanded medical and rehabilitation benefits. That definition is meant to be remedial and inclusive, not restrictive” and that the goal of the *SABS* “is to reduce the economic dislocation and hardship of motor vehicle accident victims and as such, assumes an importance which is both pressing and substantial” (see para. 42).
- [26] Instead of being remedial and inclusive, the interpretation adopted by the LAT is restrictive. Instead of fostering fairness for people with the most health needs, it increases their suffering and economic hardship.

**Conclusion**

- [27] For these reasons, the appeal is allowed, the decision and reconsideration decision of the LAT are set aside, and the Appellant is found to be eligible to make a claim for a catastrophic impairment designation. Since the result is inevitable, it would only cause delay and create injustice to send this matter back to the LAT for further reconsideration.
- [28] Pursuant to the agreement of the parties, the Appellant is entitled to her costs fixed in the amount of \$5000, all inclusive.

\_\_\_\_\_  
**Sachs J.**

I agree

\_\_\_\_\_  
**Coats J.**

I agree

\_\_\_\_\_  
**Leiper J.**

**Released:** August 2, 2023

**CITATION:** Kellerman-Bernard v. Unica Insurance Company, 2023 ONSC 4423  
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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
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**Sachs, Coats and Leiper JJ.**

**BETWEEN:**

NAOMI KELLERMAN-BERNARD

Appellant

– and –

UNICA INSURANCE COMPANY

Respondent

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**REASONS FOR JUDGMENT**

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**SACHS J.**

**Released:** August 2, 2023