

# disclosure

*Your quarterly source of personal injury news*



**SMITIUCH INJURY LAW**

## Fearless Advocacy 3.0 Coulson v. Sunrise North Senior Living Ltd.

As Canada's population ages, the care and treatment of our seniors has been the focus of much attention. The recent public inquiry into the horrific killings by Elizabeth Wettlaufer at a long-care home is one such example. The Wettlaufer case is a stark reminder of how vulnerable our seniors really are. Another such reminder is the tragic death of Evelyn Coulson at Sunrise Senior Living in Mississauga.

On June 15, 2009, at the age of 77, Evelyn was found dead in her room at Sunrise of Erin Mills. She had been strangled to death after falling out of her bed, resulting in her neck being trapped between the mattress and a Halo ring device. The halo ring had been improperly installed, leaving a large gap between the ring and the mattress.



What was supposed to be a short stay at Sunrise, to help Evelyn recover from a hip fracture and provide some respite care for her family (she had been diagnosed with Alzheimer's), turned into a nightmare for her family. To make matters worse, after Evelyn's death, her family were not told by Sunrise how she actually died. It was not until the coroner arrived and examined Evelyn that they finally were told about the horrific manner in which she died. As one could imagine, the shock of learning this caused the family great distress and emotional harm, in addition to the grief and sorrow that they were already experiencing.

On May 30, 2018, the Evelyn Coulson trial started in Brampton before a jury of six. Luke Hamer and Michael Smitiuch were the lawyers for the Coulson family. The trial received media attention and a good summary of the opening statements was written by Michele Mandel

in the Toronto Sun. After five weeks of trial, including jury deliberations, the jury awarded a total of almost \$640,000 for damages and held Sunrise 25% responsible for Evelyn's death, the installer of the halo ring 50% responsible and the manufacturer 25% responsible.

The jury verdict against Sunrise is believed to be only the third such successful verdict against a nursing home in Canadian history and for the first time, an award of punitive damages was made against a nursing home. Punitive damages are only awarded if the defendant's conduct was high handed, malicious or highly reprehensible.

The Coulson trial verdict was also unique because damages were awarded for the mental distress or nervous shock suffered by one of Evelyn's sons. The trial judge applied the principles from the recent decision *Saadati v Moorhead* where the Supreme Court of Canada held that "to establish mental injury, claimants must show that the disturbance is serious and prolonged and rises above the ordinary annoyances, anxieties and fears that come with living in civil society." The jury's award for nervous shock damages was significant because it shows a growing recognition that a mental injury can be just as life-altering as a physical one.

As it has been said, "the true measure of any society can be found in how it treats its most vulnerable members." Keeping these words in mind, it is hoped that the Coulson trial verdict will serve as a wake-up call to long term care homes that they must treat their residents with compassion, respect and ensure their well-being and safety. ✕

# 7 Distracted Driving Facts

1

Can include using smartphone, reading map or applying make-up

2

OPP reported 5,619 collisions due to distracted driving in 2018

3

Currently the number one cause of collisions in Ontario

## Schnarr v. Blue Mountain Resorts

We continue to fight for consumers in Ontario. On January 6, 2017, Smitiuch Injury Law successfully argued before Madam Justice Tzimas that a release of liability waiver from a ski resort (Blue Mountain) was not valid as it infringed on consumer rights, specifically the right to services of a reasonably acceptable quality.

Subsection 7(1) of the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched A ("CPA"), explicitly states, "*The substantive and procedural rights given under the Act apply despite any agreement or waiver to the contrary.*" The argument was successfully advanced that skiers at resorts such as Blue Mountain are consumers and therefore protected from overly broad, all-encompassing waivers.

This was a significant victory for plaintiffs who are opposing waivers based on consumer rights. However, approximately one year later, on February 7-8, 2018, Madam Justice Tzimas' decision was appealed to the Ontario Court of Appeal and unfortunately, the lower court's decision was overturned. The Court of Appeal concluded that consumer protection rights were subject to a release of liability waiver.

Smitiuch Injury Law maintains that the consumer protection laws in Ontario, pursuant to the CPA, clearly invalidates a liability waiver which seeks to remove a supplier's obligation to provide products and services of a "reasonably acceptable quality". We are part of the legal team seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. In May, a notice of application seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was filed. At this time, the decision of the Supreme Court is pending and we look forward to the outcome.

The outcome of the *Schnarr* decision is important to all plaintiffs and consumers in Ontario. The Supreme Court is being asked to weigh consumer protection rights against the right of occupiers to waive their legal obligations. This litigation has a potentially significant impact on ski resorts in Ontario and many other facilities across the province and country which offer dangerous and risky recreational activities. This was acknowledged by Madam Justice Tzimas and the Court of Appeal. ✕

## Profile of Shawn Snider *Student-at-Law*



Shawn Snider is a Student-at-Law with Smitiuch Injury Law for the 2018 - 2019 articling term.

He earned his law degree (J.D.) from Osgoode Hall Law School. Before studying law, he completed a Bachelor of Arts degree in Political Science from St. Francis Xavier University in Antigonish, Nova Scotia. Shawn played varsity hockey during his undergraduate studies and successfully balanced his work between academics and hockey. In March 2004, the X-Men won the CIS National Hockey Championship. Shawn was named an Academic All-Canadian in 2005.

After completing his undergraduate degree and prior to enrolling in law school, Shawn played professional hockey for nine years in the U.S., Sweden and Germany. Shawn particularly enjoyed this experience as it permitted him to indulge in two of his passions, hockey and travel, while allowing him to experience new language and culture.

At law school, Shawn participated in the Osgoode Mediation Intensive Clinic that provided mediation services to the York campus and surrounding communities. He also helped organize an alternative dispute resolution awareness week and led numerous workshops on mediation and

other forms of dispute resolution. Shawn developed these strategies that he brings to his day-to-day work at Smitiuch Injury Law.

During this time, he was also the Head Coach of the Minor Midget Mississauga Reps AAA Hockey team, from which thirteen players were drafted in the 2018 Ontario Hockey League (OHL) draft. Shawn continues to support this team and works in hockey development in the Greater Toronto Area throughout the winter months.

In his spare time, Shawn spends time with family and friends, plays golf and travels as much as possible. ✕

In 2016, 310 people died in distracted driving collisions in Canada

Highest number of fatalities, are in 35-44 age group, fewest 55-64

In 2016, 32,213 people were injured in distracted driving collisions in Canada

On January 1, 2019, penalties increase to \$3,000 fine, six demerits, 30-day suspension

## Supporting FORE The Kids Charity Golf Tournament

For the past five years, Smitiuch Injury Law has been pleased to sponsor the FORE the Kids Charity Golf Tournament.

The charity golf tournament was started 17 years ago by a group of airline employees and friends who decided to organize a golf tournament in the aid of a charity, as a way to give back to their community.

This year, FORE the Kids and Smitiuch Injury Law supported Cardiac Kids, in support of the SickKids Foundation. Funds raised for Cardiac Kids are used to support the children and staff of the cardiology ward at The Hospital for Sick Children. Cardiac Kids is a volunteer group established in 2000 to raise much-needed funds for children who are suffering from congenital heart disease. One in 100 Canadian children are born with a congenital heart defect and more than half need surgery to survive.

This year's tournament was held on June 9, 2018, at the Granite Ridge Golf Club in Milton. The special guest was Toronto Maple Leafs' legend, Eddie Shack, who entertained attendees with colourful and humorous stories of his time in the NHL.

Over the years numerous other charities have been the recipient of the group's efforts.

For several years the OHL Kitchener Rangers' Clarky's Kids was one of them. This charity was founded in 2008 in part by former Kitchener Rangers' forward and current NHL Vegas Golden Knights player, David Clarkson. It provides special event opportunities and financial assistance to local families of children ranging in age from infant to 16-years-old dealing

with cancer. The program has raised well over \$600,000.00 to date.

Smitiuch Injury Law is proud to be associated with such worthy causes. ✕



## Prevalence of Video Evidence in Personal Injury Cases

Since we have entered the digital age, video evidence has become prevalent in personal injury cases. It can be used by both plaintiffs and defendants for each party to try to advance their case.

Video evidence can cover many types of footage including: surveillance videos from the scene of the incident, cell phone videos, accident reconstruction videos, and surveillance of a plaintiff.

Insurance companies occasionally take video surveillance of plaintiffs during the proceedings. Typically, they hire a private investigator to conduct the surveillance through traditional video recordings, however, recently, they have also been known to conduct surveillance with drones. When conducting surveillance, they must follow the law. For example, plaintiffs have a reasonable expectation of privacy in their own home, so insurers cannot look through a window to obtain surveillance footage. However, insurers can take surveillance of the plaintiff in a public setting such as at the grocery store, running errands or picking their child up from school.

When taking the surveillance, the insurer hopes to catch the plaintiff doing something that they stated they were unable to do, such as lifting their child at the park even though they stated they were unable to lift anything due to a back injury.

What should you do if surveillance is being taken of you? While it may be unsettling to know that you are under surveillance, we encourage our clients to live their life as they would if there were no surveillance. ✕



## Smitiuch Injury Law Event Calendar

### **October 19, 2018 - Ontario Trial Lawyers Association Fall Conference**

Peter Cho, Associate Smitiuch Injury Law, will be presenting - "Practical Strategies: Presenting Your Chronic Pain Case to a Jury"  
Metro Toronto Convention Centre, North Building, Toronto, ON

### **November 22, 2018 - Hamilton Brain Injury Association - 12<sup>th</sup> Annual Fundraising Dinner**

The annual dinner raises funds in support of the association's mission to ensure the quality of life for survivors of brain injury, and their families through education, support and advocacy. Smitiuch Injury Law is pleased to be a participant and sponsor of this event.

Liuna Station, Hamilton, ON

### **February 2, 2019 - Kids Can Fly - 12<sup>th</sup> Annual Storybook Breakfast**

Children and their parents enjoy breakfast with well-known Disney and cartoon characters. Proceeds from this event are used to support early child development and parenting. Smitiuch Injury Law is pleased to be a participant and donor of this event.  
New Covenant Christian Fellowship Church, Brantford, ON

### **February 6, 2019 - Ontario Bar Association - Elder Law Seminar**

Michael Smitiuch, Principal Lawyer, will be speaking on nursing home liability and the recent Coulson trial.  
20 Toronto Street, Toronto, ON



For further information or to discuss how we can help you  
please contact Michael Smitiuch at:  
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