

disclosure

Your quarterly source of personal injury news



SMITIUCH INJURY LAW

“Negligence in Restaurants – Can You Sue?”

Recently there was a story in the news about a man who was served a meal in a restaurant containing food he was allergic to. The twist is, he was served the food even though he had forewarned the waiter about his allergy when ordering.

Can he successfully sue the waiter or restaurant?

Any action or omission that is the subject of a civil claim, where one person sues another, will fall on a scale from accidental to intentional, with negligence being near the middle of the scale.

An accident is generally defined as an event that could not have been easily expected or prevented. Negligence is an event where a person; (a) fails to provide the proper care that the law requires; (b) acts in a way they could expect harm would occur; or (c) could have easily prevented the harm. Basically think of negligence as extreme carelessness.

The situation involving the waiter would likely be a case of negligence. To establish that a defendant was negligent, the most common approach is to prove the following three things.

First, a duty of care must be recognized by law. Lawyers will look at past cases to see whether waiters are expected to act in a way that ensures that the customers stay safe. If there is no such case, the lawyers will have to establish a new duty of care. It would have to be shown that waiters should be expected to make sure customers don't come to any harm.

Second, it is necessary to show that the waiters acted or failed to act in the required way. The kinds of things that could be

expected at a restaurant include, for example, requiring that the waiter ask about allergies or for the restaurant to have a plan to ensure no contact with dangerous food.

Third, damage or harm must have occurred and it must have been because of the waiter's actions. A severe allergic reaction, causing harm to your health would qualify as such.

However, a waiter can raise certain defences. First, for example, imagine that a person with a seafood allergy goes to a seafood restaurant and comes in contact with lobster.



Here, the defence of “voluntary assumption of risk” could be raised because the person should probably have known that there is an extremely high chance of accidental contact with seafood.

Another defence is that the harmed person contributed to the injury. For example, a customer with a strawberry allergy is mistakenly brought a salad with strawberries. If a reasonable person could easily

identify the strawberries in the salad, the customer would also be expected to do so and not eat it. By eating the strawberry salad, the customer is acting carelessly and contributing to the injury.

Whether you can successfully sue the waiter or restaurant will depend on a variety of factors. It seems clear that the waiter and restaurant owed the customer a duty of care. If you should find yourself the victim of a severe allergic reaction after notifying the server or the restaurant of your allergy, it is best to consult with a personal injury lawyer to see if your circumstances would give rise to legal action.

Greatest Fictional Lawyers

1

Atticus Finch
(Gregory Peck)
To Kill a Mockingbird

2

Lt. Daniel Kaffee
(Tom Cruise)
A Few Good Men

3

**Vincent
"Vinny" Gambini**
(Joe Pesci)
My Cousin Vinny

Fearless Advocacy - The Dabor Trial

The lawyers, paralegals and staff at Smitiuch Injury Law continue to fearlessly advocate for their clients at both trials and arbitrations. It is the philosophy of the firm to take cases to trial where the other side fails to make a fair and reasonable settlement offer. We have conducted numerous trials and arbitrations in recent years and do not shy away from challenging liability or damages cases. The case of Dabor et al. v. Southbram Holdings Limited et al. (CV-11-417735) is one such example.

On June 3, 2016, a Toronto jury returned a verdict in favour of our clients after three weeks of trial. This action arose from the Plaintiff's fall from a metal stud located above a drop-down ceiling to the floor ten feet below. The Plaintiff suffered a comminuted calcaneus (broken heel) and continues to suffer with significant pain.

This was a unique case in that the Plaintiff was an independent contractor performing regular work at a warehouse owned and occupied by the Defendants' corporations. Neither of the parties had workers' compensation coverage. It was alleged by the Defendants that the Plaintiff was the author of his own misfortune and as an experienced contractor he should have performed the work more carefully. In addition, they argued that the Plaintiff did not raise any safety concerns with the work he

was being asked to perform and that he had in fact completed the same task safely one week before his fall.

Even before this case made it to trial, the Defendants had brought a summary judgment motion to try and put a stop to the lawsuit. Peter Cho of Smitiuch Injury Law successfully fought off this motion and the case continued on.

During the trial, we called numerous witnesses, including an orthopaedic surgeon, family physician, specialist pain doctor and a forensic accountant. In the end, the jury found the Defendants 38% responsible for failing to give clear instructions to the Plaintiff, failing to have a safe pathway above the ceiling and failing to provide the necessary equipment for the job. The jury assessed damages at \$515,000.00 plus interest and the Plaintiffs beat the Defendants' formal offer to settle.

This verdict was significant because it serves as a warning to owners and occupiers of properties that they must ensure they have the right person to do the job and that their premises must be safe for the work intended to be performed.

Michael Smitiuch and Peter Cho were trial counsel for the Plaintiffs.

Profile Of Aaron Meng *Student-at-Law*



Smitiuch Injury Law is pleased to introduce Aaron Meng, a Student-at-Law who has been with the firm since July 2016.

Aaron spent much of his childhood in the Toronto area, and is excited to provide legal assistance in the communities where he grew up.

He received his law degree (J.D.) in 2016 from Western University's Faculty of Law where he developed skills to become a strong litigator and successful advocate with the goal of applying his knowledge of the law to assist those in need.

At law school, Aaron significantly contributed to Pro Bono projects, where

he assisted underprivileged clients with small claims and family law matters. He volunteered at the community legal clinic in London providing legal services to low-income residents. He was also actively engaged with the East Asian Student Association as an executive member.

Prior to studying law, Aaron earned a Master of Arts degree in Political Science with a focus on Public Policy & Administration and Comparative Politics from McMaster University and an Honours Bachelor of Arts degree in Political Science from the University of Waterloo.

Having previously worked as a Claims Adjuster at one of the largest insurance companies in Canada and spending a summer working at an insurance defence firm, Aaron brings with him a

strong understanding of the insurance industry which allows him to skillfully and efficiently engage with the legal issues in personal injury matters.

In his spare time, he enjoys exploring the food scene, travelling and running marathons. He is fully fluent in both Mandarin and Cantonese.

Recently, Aaron successfully passed both his Barrister and Solicitor Licensing Examinations. He is excited to learn from the best at Smitiuch Injury Law and become a contributing member of the team!

Aaron can be reached directly at aaron@sil.lawyer or 416-621-1551, ext. 237.

Perry Mason
(Raymond Burr)
Perry Mason

Smitiuch Injury Law Event Calendar

September 19, 2016 - The Law Society of Upper Canada - Plaintiff's Personal Injury Law Practice Basics 2016

Michael Smitiuch, Principal Lawyer, will be co-chairing this seminar with William Teggart.

This seminar guides you through the stages of a personal injury file, including the initial meeting with the client and assessing the file, starting the action and bringing a motion, and conducting effective examinations for discovery.

The Law Society of Upper Canada - Donald Lamont Learning Centre, Toronto, ON

September 22, 2016 - Will Davidson LLP Products Liability Litigation Seminar

Michael Smitiuch, Principal Lawyer, will be presenting – “Dangerous products in the home”.

20 Toronto Street, Toronto, ON

October 27, 2016 - Ontario Trial Lawyers Association Fall Conference - The Diversified Personal Injury Lawyer: Conquering New Legal Frontiers

Chris Jackson, Accident Benefits Manager, will be presenting - “Here Kitty, Kitty... Finding the CAT in the New SABS”.

Metro Toronto Convention Centre, North Building, Toronto, ON

February 4, 2017 - Kids Can Fly - 10th 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



For further information or to discuss how we can help you

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SMITIUCH INJURY LAW

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