

# disclosure

Your quarterly source of personal injury news

SMITIUCH INJURY LAW

PROFESSIONAL CORPORATION

## There's Something Wrong with Aunt Diane

On Sunday, July 26, 2009, Diane Schuler was at the wheel of a minivan, carrying her two children and three nieces, ages two through eight, when she left the Hunter Lake Campground in upstate New York. On the route home, a drive Diane had made numerous times, something went tragically wrong. Four hours after leaving the campground, Diane's minivan was seen on the Taconic State Parkway travelling at a high rate of speed directly into oncoming traffic before it crashed head-on into an SUV, killing herself and seven others. This was one of the worst motor vehicle accidents in New York State history and the tragedy quickly became national news.

In 2011, HBO released a documentary that explored the events surrounding this horrific crash. The film included interviews with eyewitnesses, investigators and medical experts as well as surveillance footage surrounding the crash.

A thorough investigation was conducted into the circumstances of the accident. Her life was put under a microscope as the public and the grieving families searched for answers. In the aftermath, Diane was portrayed as a reckless drunk who suddenly lost control.

The results of Diane's autopsy were shocking. Diane's toxicology report indicated that she had a blood-alcohol content of 0.19%, twice the legal limit. A reading this high is equivalent to ten alcoholic drinks. She also had a high level of THC content in her blood, the active ingredient in marijuana. In sharp contrast, Diane had no known history of substance abuse or psychological problems and was generally known as a loving and stable wife and mother. Further, when she left the campground that morning, owner Ann Scott recalls thinking that nothing was amiss, saying, "[Diane] seemed sober to me."

The mystery which remains in the minds of Diane's husband, Daniel, and her sister-in-law, Jay, is how Diane could have done something like this given her history and personality.



The film delves into who Diane was prior to the accident through interviews with her friends and family. She is described as someone who wanted to be perfect, often referred to as "supermom" by friends and family. However, beneath the "perfect" veneer, Diane had a tendency to hide physical and psychological pain. Diane's mother abandoned her when she was nine years old, leaving her with her father and three brothers. Diane refused to speak about her mother. As one friend explains, "She never complained about it [her mother leaving]. She never talked about it...almost like she wasn't even there."

Daniel and Jay have been trying to clear Diane's name ever since her death. They simply cannot reconcile the toxicology results with the loving mother and aunt who would never knowingly endanger the children. The lone survivor, son Bryan, doesn't remember the accident. When asked about it, he replies, "Mommy's head hurt. She couldn't see."

The film educates us on the terrifying and harsh realities faced by victims of motor vehicle accidents as they struggle to cope with the loss of loved ones. Unanswered questions remain to this day.

*"There's Something Wrong with Aunt Diane" was produced and directed by Liz Garbus and released by HBO in 2011.*

# 7 Top Legal Songs



## Ontario Court of Appeal's Trilogy of Cases Continue to Protect Accident Victims

A recent decision by the Ontario Court of Appeal completes a trilogy of cases that supports a broader interpretation of the definition of “catastrophic” for individuals who are injured in a motor vehicle accident.

In Ontario, if an accident victim is deemed to be catastrophic, they are entitled to a maximum of \$1,000,000.00 in medical and rehabilitation benefits, \$1,000,000.00 in attendant care benefits, as well as housekeeping and home maintenance benefits, with no time limitations for any of these benefits. The following is a summary of the trilogy of cases:

### **Liu v. 1220671 Ontario Inc.**

On April 9, 1999, Ruofeng Liu was a pedestrian who was struck by a motor vehicle. His Glasgow Coma Scale (GCS) (a test administered by ambulance and medical staff to help determine if there is a brain injury) taken at the scene of the accident was 3/15. His GCS score improved while enroute to hospital to the point that, when he arrived at the hospital, it had increased to 14/15. Under accident benefits legislation, a person's injuries are determined to be catastrophic if their GCS is 9 or less.

The trial judge agreed with the defendant, who argued that since Mr. Liu's GCS scores rose above 9 within a reasonable period after the accident, his injuries should not be considered to be catastrophic.

The Court of Appeal rejected the trial judge's decision, stating that, “...the trial judge fell into error in equating the statutory test to a medical one.” The Court of Appeal went on to state that, “Provided there is a brain impairment, all that is required is one GCS score of 9 or less within a reasonable time following the accident. It is a legal definition to be met by a claimant and not a medical test.”

### **Kusnierz v. Economical Mutual Insurance Company**

In this decision, the Court of Appeal tackled another criteria for determination of a catastrophic impairment; that of a whole body impairment. Under the regulations, a person is deemed to be catastrophic if they suffer a 55% or more impairment of the whole person in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 4th edition*.

The trial judge concluded that a psychological impairment could not be combined with physical impairments when calculating the whole person impairment rating. The Court of Appeal disagreed, siding with an earlier judge's ruling, *Desbiens v. Mordini*, which noted that the drafters of the legislation clearly intended the definition of “catastrophic impairment” to be inclusive rather than restrictive.

### **Pastore v. Aviva Canada**

The Court of Appeal overturned a lower Court's decision regarding psychological impairments for determining catastrophic injuries. Under the regulations, a person is deemed to be catastrophic if they suffer a marked or extreme psychological impairment. There are four categories that are considered: (1) activities of daily living, (2) social functioning, (3) concentration, persistence and pace, and (4) deterioration or decompensation in work or work-like settings. The Court of Appeal ruled that one must meet the marked or extreme impairment in only one of these categories to be deemed catastrophic.

In all three of these cases the Ontario Court of Appeal has made it clear that an inclusive, not exclusive, criteria must be used when determining a catastrophic impairment so that the injured individual can access the accident benefits which are needed; often times for life.

## Profile of Michael Smitiuch Managing Principal



Michael Smitiuch is the founder and Principal of Smitiuch Injury Law. Mike grew up in Waterford, Ontario and obtained his law degree (LL.B.) from the University of Western Ontario in 1996. He was called to the Bar in Ontario in 1998. Mike also holds an Honours B.A. in Political Science from McMaster University.

Mike has lectured and written extensively for various legal conferences and publications, including the The Advocates'

Quarterly and the Ontario Trial Lawyers Association. He has also been consulted by the Toronto Star, National Post, The Hamilton Spectator and Canadian Lawyer magazine concerning insurance issues and litigation technology.

Mike sets a high standard of service for clients of the firm and prides himself on being attentive to their concerns and needs.

Mike is a member of the Law Society of Upper Canada, the Ontario Trial Lawyers Association and the American Association for Justice. While not practicing law, he enjoys golfing and coaching baseball and hockey.

Mike can be reached directly at [msmitiuch@smitiuchinjurylaw.com](mailto:msmitiuch@smitiuchinjurylaw.com), 416-621-1551, Ext. 201.

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**State Trooper**  
**Bruce Springsteen**  
**September 1982**

5

**Jailhouse Rock**  
**Elvis Presley**  
**September 1957**

6

**I Shot the Sherriff**  
**Eric Clapton**  
**July 1974**

7

**Jailbreak**  
**AC/DC**  
**September 1976**

## Third Annual Accident Benefits Seminar a Success

On September 20, 2012, Health Care professionals from across Southwestern and Central Ontario gathered at the Brantford Golf & Country Club for Smitiuch Injury Law's 3rd Annual Accident Benefits Seminar.

The keynote speakers were three members of Hamilton Health Sciences Centre's Crisis Management Team: Gary Blake, Rebecca Bond and Eugene Uchida. Their topic was, "Managing Behaviourally Challenging Clients in Community Settings."

Peter Cho, Associate Lawyer at Smitiuch Injury Law, provided an update on accident benefits case law, followed by Chris Jackson, Accident Benefits Manager at Smitiuch Injury Law, who presented an update on FSCO policies for auto insurers and Health Care professionals.

Finally, an expert panel consisting of Heather Driver, Senior Manager of the Auto Insurance Policy Unit at the Financial Services Commission of Ontario (FSCO), Philippa Samworth, a highly esteemed insurance defence lawyer from Dutton Brock LLP, and Nick Gurevich of the Alliance of Community Medical and Rehabilitation Providers, answered participant's questions regarding accident benefits legislation and procedures.

"The number of participants continues to increase each year" says Michael Smitiuch, Principal at Smitiuch Injury Law. "We are pleased we can offer an interesting and educational seminar to the Health Care community".

Smitiuch Injury Law would like to thank all presenters and participants for another successful seminar.

Next year's seminar is scheduled for September 25, 2013, at the Brantford Golf & Country Club.



## Preparing for the Slippery Winter Season

Do not let last year's mild "snowless" winter diminish your preparedness for this winter. According to AccuWeather.com, "we may be actually seeing above-normal snow for places such as Toronto, Ottawa and Montreal during the heart of the winter." After an easy start to the winter, AccuWeather.com predicts a stormy end to the season. Therefore it is important that you are prepared for the slippery winter driving season.

The Ontario Provincial Police and the Canadian Automobile Association offer the following advice to prepare you for winter driving:

- Install four winter tires. Rubber in all season tires starts to lose elasticity and harden at approximately 7 °C, significantly reducing the tire's ability to grip the road. Winter tires harden at approximately -40 °C. Deeper grooves in winter tires provide significantly more traction than all season tires, making them capable of stopping your car as much as 40% faster than all season tires.
- Have an ice scraper and snow brush in your vehicle to keep windows, signals and lights clear.
- Keep your windshield washer reservoir topped up.
- Make sure your windshield wipers are in good condition.
- Keep your fuel tank at least half full (prevents running out and condensation in gas tank).
- Keep a fully stocked emergency kit in your vehicle. Some suggested contents includes: warm gloves, toque and boots, warm blanket, small shovel, snacks, waterproof matches and a flashlight.
- Slow down; drive to road and weather conditions. During the winter, even more so than other times of the year, it is important to focus on defensive driving to protect yourself and family.
- Leave extra space between vehicles (stopping distances double on snowy roads and longer on ice).
- Monitor road and weather conditions and alter your travel plans if necessary.



Being prepared may go a long way in the middle of a winter storm.

## Smitiuch Injury Law Event Calendar

### **October 12, 2012 – Hamilton Health Sciences Centre - Lunch and Learn**

This lunch and learn was presented by Smitiuch Injury Law. The topic was “Everything you wanted to ask a Personal Injury Lawyer but were afraid to”.

Hamilton Health Sciences Centre, Hamilton, ON

### **February 9, 2013 – Kids Can Fly – 6th 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.

Rossini Lodge, Brantford, ON

### **September 25, 2013 – 4th Annual Accident Benefits Seminar - Practical Issues for Health Care Professionals**

This seminar, presented by Smitiuch Injury Law, is intended for Health Care professionals who wish to hear about the latest Accident Benefits issues and how they pertain to their practice since the SABS limits changed substantially in September 2010. Please contact our office to register.

Brantford Golf & Country Club, Brantford, ON



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

416.621.1551 or [msmitiuch@smitiuchinjurylaw.com](mailto:msmitiuch@smitiuchinjurylaw.com)



*“Helping those who need it the most.”*

**Toronto:** 21 Four Seasons Place, Suite 600 / Toronto, Ontario M9B 6J8 / **T** 416.621.1551 **F** 416.621.1558 1.866.621.1551

**Brantford:** 330 West Street, Unit 6 / Brantford, Ontario N3R 7V5 / **T** 519.754.1558 **F** 519.754.1580

[www.smitiuchinjurylaw.com](http://www.smitiuchinjurylaw.com)

