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## CASE SUMMARY: NO SUNNY SIDE FOR INSURER WHEN EGGS THROWN FROM MOVING AUTOMOBILE CAUSE INJURY TO PEDESTRIAN

Insurer's application to summarily dismiss an injured pedestrian's claim against her father's automobile insurer where the plaintiff was hit by eggs thrown out of a moving vehicle was dismissed as there was a genuine issue for trial.

**Insurance law – Automobile insurance – Exclusions – Unidentified motorist – Uninsured motorist – Chain of causation – Ownership – use or operation of motor vehicle – Statutory provisions – Practice – Summary judgments**

*Gilbraith v. Intact Insurance Co.*, [2019] O.J. No. 1523, 2019 ONSC 1875, Ontario Superior Court of Justice, March 22, 2019, A. Sosna J.

The plaintiff was injured while walking on a sidewalk when the front passenger in a motor vehicle threw an egg (or eggs) striking her in the eye resulting in her central vision to that eye to being permanently impaired. The plaintiff commenced a claim against her father's automobile insurer seeking indemnity for her damages in accordance with the OPCF 44R Family Protection Coverage Endorsement (the "Endorsement"), which indemnifies an eligible claimant in respect of bodily injury arising directly or indirectly from the use or operation of an automobile. The insurer brought an application for summary judgment to dismiss the plaintiff's claim on the basis that there was no genuine issue for trial as the injury did not arise directly or indirectly from the use or operation of an automobile, but by an egg being thrown by a passenger in the car.

The court dismissed the insurer's application, finding that there was a genuine issue for trial. The court found that the plaintiff had shown, as required by the Endorsement, that the tortfeasor was "at fault as a motorist" by meeting the test previously articulated by the Supreme Court of Canada to determine fault as a motorist, namely, the purpose test (i.e. the incident occurred in the course of the ordinary and well known activities of automobiles) and the modified causation test (i.e. there was an unbroken chain of causation linking the claimed loss or injuries to the use and operation of the motor vehicle, which was more than simply fortuitous or incidental).

The court found that transporting passengers and cargo – in this case egg(s) – is a well-known activity involving the use of an automobile. Further, the court found that throwing egg(s) from a vehicle travelling 50 – 60 km/h, resulting in injury, is not a distinct and intervening act completely independent from the use or operation of the motor vehicle and that the vehicle did not merely create an opportunity in time and space for damage to be inflicted. Rather, the court held that, absent speed and kinetic energy imparted into the egg by the vehicle, the plaintiff would not have suffered the corresponding injury. The court found that the driver was independently negligent in failing to stop his vehicle, or slow it down to the point of eliminating the effect of the vehicle upon the egg when he knew or ought to have known that the use of his motor vehicle would contribute to the impact of the egg about to be thrown in the direction where pedestrians may be present.

This case was digested by [Tricia M Milne](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Tricia M. Milne at [tmilne@harpergrey.com](mailto:tmilne@harpergrey.com).