



## Ground-breaking Insurance Act Ruling Confirms Effect of Misrepresentation on Indemnity

*By David Pick, Partner; and Michael Thorne, Associate*

Ali Abbas was ejected through the windshield of an uninsured vehicle during a head-on collision on November 17, 2016. He spent approximately nine days in a coma and suffered a myriad of life threatening injuries, but made what many would consider to be a miraculous recovery.

Six months later, Mr. Abbas turned to Esurance Insurance Company for Section B – Total Disability Benefits. Initially he told the adjuster he was not employed at the time of the accident, but worked six of the twelve months preceding it. Shortly thereafter, however, he submitted a claim form indicating he was only employed for three of the twelve preceding months.

He later told the adjuster he must have completed the form incorrectly and that he actually worked nine of the twelve months preceding the accident. The adjuster pointed out that his Employer’s Certificate indicated he only worked three of the twelve preceding months, which Mr. Abbas claimed to be incorrect.

Unsure what to believe, the adjuster contacted Mr. Abbas’ former employer and obtained a Certificate indicating he only worked two of the twelve preceding months. When asked about this, he claimed his former employer used the wrong start date and sent her his hiring letter (which he later admitted to having forged). After a few more months had passed, he then insisted to having been employed by a barber at the time of the accident. The barber denied having ever employed Mr. Abbas and when confronted about this Mr. Abbas told Esurance he must have misremembered which barber he was working for; the adjuster was directed to talk to another barber who corroborated his story. Nonetheless, Section B benefits were denied.

Mr. Abbas sued the tortfeasor who was uninsured. He then turned to his SEF 44 Endorsement for underinsured motorist coverage. Esurance denied that claim on the basis that his claim for Section B benefits breached an implied policy term to act in good faith, that he committed a fraud and that he made willfully false statements contrary to section 554(1) of the *Insurance Act*.

At questioning Mr. Abbas admitted to making the false statements and forging the documents discussed above. He also admitted he was not in fact employed at the time of the accident. The barber who had corroborated his story turned out to be an uncle who had lied for him.

We proceeded to bring a summary judgment application. The Master dismissed the application on the basis that to deny a SEF 44 claim on the basis of fraud in the claim for Section B benefits would be “draconian” result for Mr. Abbas. We appealed.

The first issue was whether Mr. Abbas invalidated his insurance claim and forfeited his right to recover SEF 44 coverage pursuant to section 554(1):

**Misrepresentation, fraud or violation of condition**

**554(1)** If

...

(b) the insured contravenes a term of the contract or commits a fraud, or

(c) the insured willfully makes a false statement in respect of a claim under the contract,

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.



Mr. Abbas argued that section 554(1) only applied to the claim for Section B benefits. In other words, that the fraud/lie had to be materially connected to claim being applied for. Here, the lie was for a Section B claim so that meant only the Section B claim was affected and invalidated; his claim for SEF 44 coverage remained valid.

In response, we argued that the proper interpretation of the section resulted in the entire claim for any benefits under the policy being invalidated in the event there was fraud committed under any section of the policy. This is based on a clear reading of the phrasing: “a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.”

The second issue was whether the common law requirement that both parties to an insurance contract must deal with each other in good faith would invalidate the entire claim in the event the insured committed fraud or lied. Decisions such as *Andrusiw v Aetna Life Insurance Co. of Canada* and *Al-Asadi v Alberta Motor Assn. Insurance Co.* stand for the proposition that if an insured commits a fraud, their policy is invalidated and their right to recover any indemnity whatsoever is forfeited. Mr. Abbas sought to distinguish that line of cases on the basis that they did not deal with an underinsured endorsement.

In dismissing Mr. Abbas’ claim, [Justice Johnston concluded](#) a plain reading of section 554(1) “confirms that a violation of (b) or (c) results in the forfeiture of the right to recover indemnity under a policy of insurance.” Not only is such an interpretation “in harmony with the scheme of the *Insurance Act*, the object of the *Act*, and the intention of Parliament”, but it also preserves “the requirement of utmost good faith between insured and insurer and [provides] significant consequences for clearly improper and intentional conduct by the insured.” She dismissed the notion that such an interpretation is “draconian” by pointing out the *Act* contains other provisions that “provide balance.” Specifically, section 520, which “protects insureds from forfeiture of an indemnity due to mere inadvertence.”

With respect to the common law, Justice Johnston agreed that “courts should not lightly restrict the rights of insureds to indemnity under policies of insurance”, but emphasized the need for them to play their part in penalizing insureds who engage in reprehensible conduct. To that end, she concluded that although *Andrusiw* and *Al-Asadi* had distinguishable facts, the “overarching thesis” of the cases applied, namely, that “insurance fraud is serious and will result in the forfeiture of [all] coverage.”

The significance of this decision for insurers cannot be overstated. Not only is it the first to interpret section 554(1) of the *Insurance Act*, but it confirms that if an insured breaches a term of their policy, commits a fraud, or makes willfully false statements in respect of a claim, then their entire claim is invalid and their right to recover any indemnity whatsoever forfeited.



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## Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information related to this case or others related to SEF 44 coverage, please contact the following members of the Brownlee LLP Insurance Litigation Team:



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