

WHEN A FALSE STATEMENT VITIATES A CLAIM:

Pinder v. Farmers' Mutual Insurance Company

Part I

Introduction

Although the reciprocal duty of “good faith” is the legal principle that defines the insurance relationship, its application in practical terms can be fraught with danger. Nothing illustrates such danger more than the impact of a false statement in a submitted claim. The insured could have his or her claim vitiated by reason of having made a false statement. On the other hand, if the insurer alleges that the insured made a false statement but then fails to prove it, the insurer can be liable to pay punitive damages.

The duty of good faith does not diminish the insureds' right to maximize his or her recovery under the policy. The insured pays the premiums, and is entitled to full benefits afforded by the policy. At times however, when seeking to maximize entitlement under the policy, some insureds might make false statements, either inadvertently, or in some cases, fraudulently.

As we discuss in this article, the line between statements that maximize benefits under the policy, and those that have the effect of vitiating the entire claim is not always clear. The question of whether the insured *intended* to deceive may be viewed by some insurers as the bright line for determining whether a false statement on the Proof of Loss is sufficient to vitiate the entire claim. However, as illustrated by the recent case of *Pinder v. Farmers Mutual*¹ where a Peterborough jury was tasked with deciding this thorny issue, the law says otherwise. In fact, the verdict in *Pinder*, and in particular, Justice Vallee's instructions to the jury dispelled the myth that there must be an *intent to deceive* in order for a false statement to vitiate a claim.

Pinder v. Farmers' Mutual

Pinder involved a coverage claim by a homeowner following a fire which destroyed her residence. Our firm represented the insurer. As is typical, the insured submitted a Proof of Loss appending to it a Schedule of Loss listing her claim for personal property alleged to have been destroyed in the fire. The insurer denied coverage on the basis, in part, that the Schedule of Loss contained several willfully false statements. The insurer relied on Statutory Condition 7 which states as follows:

*Fraud – any fraud or willfully false statement in a statutory declaration in relation to any of the above particulars vitiates the claim of the person making the declaration.*²

The insurer asserted that the insured had made willfully false statements relating to 68 of the items listed in the Schedule of Loss. These included statements falsely claiming that certain items (such as fur coats, electronics, TVs, and furniture) were involved in the fire (where the evidence was that they had not been damaged or were not even in the house at the time of the fire), as well as statements involving false descriptions of the items, their origin and their value. The insured denied making any willfully false statements, arguing that any inaccuracies in the Proof of Loss were the result of inadvertence and made without any intent to mislead.

The insured sued for indemnity under the policy, and added a claim of \$1,000,000 in punitive damages alleging that the insurer breached its duty of good faith

¹ *Pinder v. Farmers' Mutual Insurance Company (Lindsay)*, [2018] O.J. No. 2470 (SCJ).

² *Insurance Act*, R.S.O. 1990, c.I.8, s. 148(7).

by improperly denying the claim on the basis that the insured had been dishonest.

The case went to trial before a jury in Peterborough. The insured called numerous witnesses in an attempt to prove the truthfulness of the statements and the legitimacy of her claims. She testified that some of the inaccurate statements might have been made due to her lack of familiarity with the process, but none were made with the intent to deceive the insurer.

The case required Justice Vallee to instruct the jury on what was necessary to establish a “willfully false statement” as contemplated by Statutory Condition 7.

The law in this regard was set out by the Ontario Court of Appeal in its decision in *Gregory v. Jolley* wherein Sharp J.A., adopted the law as set out by the House of Lords in *Derry v. Peek*, 1889 14 A.C. 337 [1886-90] All E.R. 1, where it was held that a willfully false statement is one that is made:

- (1) knowingly;
- (2) without belief in its truth; or
- (3) **recklessly without caring whether it is true or not.**³

Importantly, in response to the insured’s defence that her claim could not be vitiated as she did not intend to mislead the insurer, the House of Lords in *Derry* stated as follows:

If fraud be proved, *the motive of the person guilty of it is immaterial*. It matters not that there was no intention to cheat or injure the person to whom the statement was made.⁴

The Court added:

to prevent a false statement from being fraudulent there must, I think, always be an *honest belief in its truth*.⁵

The law is therefore clear that where an insured makes a false statement, it will be held to have been a *willfully* false statement if made: knowingly; without belief in its

truth; or recklessly without caring whether it is true or not.

The only defense available to an insured in the case of having made a false statement is that he or she had an *honest belief in the truth* of the statement at the time it was made and that such honest belief had been grounded in a *reasonable foundation*. The Trial Judge relied on *Sienema v. B.C.I.C* where the court held:

if I thought that the person making a false statement had *shut his eyes to the facts*, or *purposely abstained from inquiring into them*, I should hold that honest belief was absent and that he was just as fraudulent as if he had knowingly stated that which is false.⁶

It is therefore no answer for the insured to simply assert that the false statement on the Proof of Loss was made without the intent to deceive, or was the result of a mistake. There must have been an honest belief that the false statement was true for the insured to avoid the consequence of having his or her claim vitiated.

In *Pinder*, the insured argued that the Court of Appeal’s decision in *Pereira v. Hamilton Township* somehow changed the law and required the insurer to establish that the insured *intended* to mislead. In *Pereira*, Borins J.A, in obiter, appears to have incorrectly described a passage in *Gregory v. Jolley* as stating that fraud required the intention to mislead or deceive. Justice Borins’ brief comments read as follows:

As a general statement of law, fraud requires some form of intention to mislead or deceive: see *Gregory v. Jolley* [citation omitted]. This requirement applies to the proof of loss forms and Statutory Condition 7.⁷

In fact, Sharpe J.A. stated the very opposite in *Gregory v. Jolley*. *Gregory* adopted, as proper law, the statement of the House of Lords in *Derry v. Peek* that the motive of the person guilty of making the false statement is immaterial. In any event, Borins J.A.’s

³ *Gregory v. Jolly*, [2001] O.J. 2313, 54 O.R. (3d) 481, at p. 1, (CA).

⁴ *Gregory v. Jolly*, supra, at para 15, citing *Derry v. Peek*.

⁵ *Gregory v. Jolly*, supra, at para 15, citing *Derry v. Peek*.

⁶ *Sienema v. B.C.I.C.*, [2003] B.C.J. No. 2797, at para 19, (CA).

⁷ *Pereira v. Hamilton Township Farmers’ Mutual Fire Insurance Co.*, [2006] O.J. No. 1508, at para 98, (C.A.).

mischaracterization of *Gregory* was made in *obiter*, therefore considerably diminishing its precedent value.

After considerable argument on this issue in *Pinder*, Justice Vallee agreed with our position that a willfully false statement as contemplated by Statutory Condition 7 does not require the insurer to prove that the insured intended to deceive when making a false statement. She correctly followed the law as set out in *Gregory v. Jolley* (adopting *Derry v. Peek*) that a false statement will be considered *willfully* false where it is made: (1) knowingly; (2) without belief in its truth; or (3) recklessly without caring whether it is true or not, and that only an honest belief in the truth of the false statement will allow the insured to avoid the consequences of Statutory Condition 7. Vallee J. added that the honest belief in the truth of the statement must be grounded in a reasonable foundation, stating as follows:

a statement will not be a willfully false statement if the person who made the statement had an honest belief in its truth. The honest belief in its truth must be grounded in a reasonable foundation. A person making a statement cannot shut his or her eyes to the facts or purposefully refrain from inquiring into them.⁸

Thus, it is no answer for the insured to simply state “*I did not intend to deceive*” or “*I made a mistake*”. The mistake has to be grounded in a reasonable and genuine belief in its truth.

Importance of Jury Questions

In *Pinder*, a dispute arose about the form of the Jury Questions in relation to the insurer’s Statutory Condition 7 defence. As our client was alleging that the insured had made at least one false statement in relation to 68 items, we proposed that a schedule listing all those items be included with the Jury Questions, asking the Jury to determine as to whether a willfully false statement had been made regarding each item.

The plaintiff objected to this format as it would require the Jury to answer 68 separate questions in the negative in order for her to succeed. Knowing that just one

affirmative answer would have the effect of vitiating the entire claim, the plaintiff argued that it would be unfair for the questions to be framed in this format.

Justice Vallee agreed with us and held that since a willfully false statement in relation to *any* of the items represented a separate and full defence to the claim, it was appropriate for each item to be listed in the questions to Jury. She further instructed the Jury to answer every question without exception in order to ensure that each of our client’s defences was adjudicated upon.

Requiring the Jury to answer 68 questions on the Statutory Condition 7 defence alone took some time. Ultimately, the Jury returned a verdict finding that the insured had made willfully false statements in connection with 39 of the 68 items raised. Having made at least 39 willfully false statements, the insured was in breach of Statutory Condition 7, and her claim was vitiated in its entirety. The Jury also dismissed the claim for punitive damages against the insurer.

The insured then moved to set aside the verdict arguing that it was unsupported by the evidence and therefore perverse, and that in any event, she should be granted relief from forfeiture.

Justice Vallee rejected the plaintiff’s argument that the verdict was perverse, finding that the insured could not “*shut her eyes to the facts*”, or “*purposely refrain from inquiring into them*”. She held that there was evidence upon which a Jury could find that the insured had made willfully false statements regarding the items listed. The verdict was therefore not disturbed.

Relief from Forfeiture

The insured then argued that she should be granted relief from forfeiture for her breach of Statutory Condition 7, relying on section 129 of the *Insurance Act* which reads as follows:

Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it

⁸ Reasons for Decision of Justice Vallee, dated May 8, 2018, at para 19.

inequitable that the insurance should be forfeited or avoided on that ground, *the court may relieve against the forfeiture* or avoidance on such terms as it considers just.⁹

As the section provides, the equitable remedy of relief from forfeiture is only available in cases of *imperfect* compliance with the statutory condition, as opposed to total non-compliance.

Relief from forfeiture is more readily granted in cases where the insured fails to promptly provide notice or fails to provide sufficient particulars. Unlike other statutory conditions which impose a positive obligation on the insured to act (and where there could arguably be “imperfect compliance”), Statutory Condition 7 does not impose a positive obligation. In fact, it merely provides a legal consequence in the case of a willfully false statement – namely, vitiating the insured’s claim. We argued that it was not possible to have “imperfect compliance” with a condition that does not require the insured to do anything, and therefore, there could be no relief from forfeiture from a breach of Statutory Condition 7.

The insured argued that as there was no specific finding of fraud, she should be granted relief from forfeiture. Justice Vallee disagreed, holding that making a willfully false statement is “something much more” than imperfect compliance with a condition of the policy and therefore, relief from forfeiture was not available.

As a result, the plaintiff’s entire action was dismissed, and our client received judgment for the recovery of the mortgage it had paid to the mortgagee under the Standard Mortgage Clause.

What Can The Insurers Take From This Case?

Pinder v. Farmers Mutual represents a rare instance where the insurer successfully defended an action relying on the protections afforded by Statutory Condition 7. It is the first case in over 20 years that

followed *Gregory v. Jolley* and *Derry v. Peek*, confirming, that to succeed in establishing a willfully false statement, the insurer need not prove that the insured intended to mislead or deceive. If a false statement is made: (1) knowingly, (2) without belief in its truth, or (3) recklessly without caring whether it is true or not, the statement will be held to be “willfully” false as contemplated by Statutory Condition 7.

Pinder thus dispels the myth that the insurer needs to establish that the insured had a subjective intent to mislead or that the insured could avoid the consequences of making a willfully false statement by merely asserting that they did not intend to deceive.

Rather, the test is objective: only *an honest belief in the truth* of the false statement, based on *reasonable* grounds, will prevent the claim from being vitiated. As stated by Justice Vallee, the insured cannot simply “shut his or her eyes to the facts” or “purposely refrain from inquiring into them”. If a statement contained in the Proof of Loss is false, it will vitiate the claim unless the insured has a reasonable and honest belief in its truth. It follows that where the insured does not take any steps to verify the accuracy of the information contained in her claim, the insured could be held to have submitted that claim recklessly, without caring whether it is true or not, and therefore in breach of Statutory Condition 7.

In terms of equitable relief, *Pinder* confirms that a willfully false statement in violation of Statutory Condition 7 is “something much more” than imperfect compliance, and therefore, the insured is not entitled to relief from forfeiture in case of a breach.

Finally, making willfully false statements may result in serious cost consequences for the insured. In *Pinder*, substantial indemnity costs were awarded against the plaintiffs following trial. We will explore this costs award together with Justice Vallee’s reasons for her costs decision in the upcoming Part II of this article.

⁹ *Insurance Act*, R.S.O. 1990 c. I.8 as amended, s. 129. Section 98 of the *Courts of Justice Act* further provides that “a court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just”.

ABOUT THE AUTHORS



Martin Forget was lead counsel for the insurer in *Pinder v. Farmers' Mutual Insurance Co (Lindsay)*. Martin is a founding principal of the law firm Forget Smith. His practice deals with all aspects of advocacy on behalf of insurers, including commercial and homeowners' property and liability claims, subrogation, coverage disputes, motor vehicle litigation, product liability claims and fraud cases. Martin has extensive trial and appellate experience, including as lead counsel on numerous reported cases, both jury and non-jury. He may be reached at mforget@forgetsmith.com.



Julia Falevich has extensive litigation experience with a wide range of subject matters including construction, commercial, nuclear and environmental matters. She currently maintains a practice with Forget Smith, specializing in advocacy on behalf of insurers. Julia may be reached at jfalevich@forgetsmith.com.

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