

Insurance Litigation: Policy Coverage: *Fellowes, McNeil v. Kansa General International Insurance Co. Ltd.*

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In *Fellowes, McNeil v. Kansa General International Insurance Co. Ltd.*,¹ the Ontario Court of Appeal had an opportunity to be extraordinarily helpful to insurance defence counsel² across Canada. This case provided the Court of Appeal with a chance to set down clear legal principles regarding the proper role of liability insurance defence counsel when coverage problems arise.³ At a minimum, the case presented the Court of Appeal with a much needed excuse to offer some general guidance to liability insurance defence counsel about what steps to take and what steps to avoid taking when coverage issues are raised. Unfortunately, the Ontario Court of Appeal did not seize this opportunity and instead, following the decision of the lower court, provided a resolution in the *Fellowes, McNeil* case which is disturbing and precarious for insurance defence lawyers because of what the decision does say and, perhaps even more significantly, because of what the decision fails to say.

*The Facts*⁴

In 1993, Kansa General International Insurance Company Ltd. ("Kansa") terminated its business relationship with Fellowes, McNeil, an Ontario law firm which had served as Kansa's insurance defence counsel from 1979 to 1983. Fellowes, McNeil sued Kansa for \$168,000.00 in outstanding legal fees and Kansa in turn counterclaimed against Fellowes McNeil, arguing that the law firm had been negligent in the handling of four files: *Cabaret ATS. Downey*,

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¹ [2000] O.J. No. 122 (QL) [hereinafter referenced as *Fellowes, McNeil (CA)*], aff'g [1998] O.J. No. 4050 (Ont. Gen. Div.) (QL) [hereinafter referenced as *Fellowes, McNeil (Trial)*]. Leave to appeal this decision is currently being sought from the Supreme Court of Canada. The writer has submitted an affidavit in support of the leave application on the basis that the case raises matters of serious national concern.

² The terms "Insurance defence counsel", "liability insurance defence counsel", and "defence counsel" are used in this article to refer to the lawyer(s) hired by an insurance company to defend an insured pursuant to a liability insurance policy.

³ For a more complete discussion of the complex issues and ethical problems which can arise for liability insurance defence counsel who encounter coverage problems or potential coverage problems in the course of handling a litigation matter, see B. Billingsley, "Caught in the Middle: When Liability Insurance Defence Counsel Encounter Coverage Problems" (February 2000) 79 Can. Bar Rev. 221. This case comment can be viewed as an addendum to that article.

⁴ As summarized from *Fellowes, McNeil (CA)*, *supra* note 1; *Fellowes, McNeil (Trial)*, *supra* note 1; J. Melnitzer, 23:10 "The Unsophisticated Insurer" *Canadian Lawyer* (October 1999) 26; and M. Fitz-James, "The Kansa Claims: What the Judgment Said" 23:10 *Canadian Lawyer* (October 1999) 30.

Fruitman ATS. *Niagara*, *Uniroyal* ATS. *Sundor*, and *Little* ATS. *Confederation Life*.⁵ This comment addresses only the findings relating to *Little* ATS. *Confederation Life* (the “Little matter”).

The Little matter concerned a claim brought on 3 December 1985 by *Confederation Life Insurance Co.* (“*Confederation Life*”) against Little, a real estate solicitor with the law firm of *Shepherd McKenzie Plaxton Little & Jenkins* (“*Shepherd McKenzie*”). Generally, the claim alleged that Little had failed to properly protect *Confederation Life*’s interest in a mortgage deal. When this claim was filed, *Shepherd McKenzie*’s primary liability insurer was *American Home*.⁶ *Shepherd McKenzie* also had an excess liability policy issued by *Kansa* on a claims made basis to cover the period from 20 January 1984 to 1 January 1985.⁷ This excess policy was subsequently renewed to cover the period from 1 January 1985 to 1 January 1986. In a 30 December 1983 application for this excess coverage, *Shepherd McKenzie* indicated that it had no pending claims against it, knew of no proposed claims against it, and had no reason to anticipate any claims against it. In a 28 December 1984 application for renewal of the excess coverage, *Shepherd McKenzie* disclosed one existing claim for \$9,000.00 which was subsequently expressly excluded from coverage in the renewal policy. *Shepherd McKenzie* disclosed no other claims on the 28 December 1984 application and a declaration was signed on behalf of the firm stating that *Shepherd McKenzie* was not aware of any other potential claims. The problem with *Confederation Life* was not mentioned on either application.

On 31 January 1985, *Confederation Life* advised Little that it would be commencing legal action against him and Little reported the claim to *Kansa*’s adjuster on 11 February 1985. At *Kansa*’s request, the adjuster’s file was forwarded to *McNeil* at the end of February 1987 with instructions “to defend.” The contents of the adjuster’s file indicated that both the adjuster and counsel retained by the primary insurer had conducted investigations regarding the date when Little first learned of the potential claim by *Kansa* and that neither the adjuster nor the primary insurer’s counsel had raised any concerns related to this information.

⁵ As a result of case management directions, the main action for the unpaid accounts was tried separately and *Fellowes, McNeil* was successful in obtaining a judgment for the outstanding fees. Also as a result of case management directions, the counterclaims proceeded as four separate, consecutive “mini-trials”. Ultimately, *ATS. Niagara* was dismissed by consent. The Ontario Court of Justice (General Division) dismissed *Kansa*’s claim regarding *Cabaret Tavern* ATS. *Downey*. While the lower court found in *Kansa*’s favour regarding *Uniroyal* ATS. *Sundor*, this finding was ultimately overturned by the Court of Appeal: see *Fellowes, McNeil (CA)*, *supra* note 1. As will be discussed in this paper, the lower court and the Court of Appeal found in *Kansa*’s favour with respect to *Little* ATS. *Confederation Life*.

⁶ *American Home*’s policy limits were \$500,000.00 per occurrence.

⁷ A “claims made” policy provides coverage for all claims brought during the policy period, regardless of when the actions giving rise to the claims occurred. *Kansa*’s policy limits in this case were \$8,250,000.00.

On 23 September 1986, represented by counsel retained by the primary insurer, Little attended at Examinations for Discovery. During the course of his examination, Little provided answers which arguably suggested that, prior to December 1983, Little knew or ought to have known that he was seriously exposed to a liability claim by Confederation Life. McNeil received the transcript from Little's examination in October 1987, and on 21 September 1990 McNeil advised Kansa that he had reviewed the transcript. On 1 April 1991, in accordance with Kansa's instructions, McNeil filed a Notice of Change of Solicitor, thus becoming solicitor of record and assuming the conduct of the defence for Mr. Little. The Little matter proceeded to trial in October and November 1992. On 4 December 1992, Justice Montgomery found that Little was negligent and awarded damages of \$2,669,615 plus interest and costs to Confederation Life.⁸ The judgment was paid by Kansa.

Kansa's claim against Fellowes, McNeil alleged that McNeil was negligent in handling the Little matter by failing to advise Kansa of the possibility of denying coverage to Little based on Little's non-disclosure of the potential claim by Confederation Life on the applications for excess insurance coverage.⁹

The Lower Court Decision

The trial decision in the *Fellowes, McNeil* case was rendered by Madame Justice Ellen Macdonald of the Ontario Court of Justice (General Division). Ultimately, the trial judge found that McNeil was negligent in failing to advise Kansa of the potential coverage defence and awarded damages in favour of Kansa in the amount of \$5,299,838.00 plus interest.¹⁰ In arriving at this disposition, Madame Justice Macdonald made several findings based on the evidence before her, including the following:

- that Little knew of the probable liability claim by Confederation Life prior to December 1983 when the first application for insurance with Kansa was completed and that Little's failure to disclose the Confederation Life claim on the insurance applications was a material misrepresentation;
- that, at the time Kansa retained McNeil on the Little matter, Kansa was unaware of Little's misrepresentation;
- that, had Kansa been made aware of Little's misrepresentation, Kansa would have elected to withhold coverage for Confederation Life's claim;

⁸ *Confederation Life Insurance Co. v. Shepherd, Mackenzie, Plaxton, Little & Jenkins*, [1992] O.J. No. 2595 (QL). Justice Montgomery's interest award was calculated on the basis of compound interest but this award was reduced to simple interest by the Ontario Court of Appeal: [1996] O. J. No. 177 (QL).

⁹ The claim also alleged that McNeil was negligent in failing to retain an appropriate expert for trial. This allegation was dismissed at trial and on appeal and is not relevant to this comment.

¹⁰ The damages represent the monies which Kansa had to pay to Confederation Life for the judgment obtained against Little, plus costs and interest.

- that, upon reviewing the transcripts of Little’s Examination for Discovery and, in any event, prior to being named Solicitor of Record in 1991, McNeil was aware, or ought to have been aware, of the coverage issue raised by Little’s misrepresentation;
- that McNeil owed a duty to Kansa to advise the insurer of any coverage concerns;
- that, in light of his knowledge of the coverage concerns raised by Little’s misrepresentation, McNeil breached his duty to Kansa to act as a reasonably competent insurance counsel by failing to advise Kansa of the potential coverage defence.

The trial judge’s finding that McNeil owed a duty to advise Kansa of coverage concerns appears to be based primarily on Madame Justice Macdonald’s understanding of the long-standing relationship between Kansa and Fellowes, McNeil, in which Fellowes, McNeil regularly served as Kansa’s insurance defence counsel. As a starting point, Madame Justice Macdonald noted that coverage is a critical issue in insurance litigation in general:

... I make the trite observations that coverage is of critical importance in the defence of insurers and insureds. This is especially so under a claims made policy. The utmost of good faith underlies every insurance contract with the result that misrepresentation and/or non disclosure are key questions in the representation of insureds and their insurers. I would add that this is one of the few points, on which the experts on coverage issues, agreed.¹¹

Madame Justice Macdonald then pointed out that, while both parties acknowledged that Kansa had not specifically asked or instructed McNeil to consider coverage questions, McNeil also admitted that Fellowes, McNeil had considered coverage issues for Kansa on other files without such a specific request or instruction.¹² Further, Madame Justice Macdonald stated that, while “knowledgeable and experienced”, Kansa was “not a sophisticated client” and that Kansa “relied on Fellowes, McNeil for advice on a wide range of issues as they arose over the course of the retainer.”¹³ Given this characterization of the relationship between Kansa and Fellowes, McNeil, Madame Justice Macdonald concluded that, “until Mr. McNeil took over the defence from Borden & Elliot in April, 1991, he [McNeil] had an ‘unfettered duty’ to protect Kansa’s interests including drawing any circumstances to the attention of Kansa which would indicate that Kansa’s policy would not respond to the claim in question.”¹⁴ Madame Justice Macdonald also expressly stated that McNeil was not relieved of this ‘unfettered duty’ by the fact that the coverage issue had apparently already been addressed by others.

¹¹ *Fellowes, McNeil (Trial)*, *supra* note 1 at para. 57.

¹² *Ibid.* at para. 59.

¹³ *Ibid.* at para. 10.

¹⁴ *Ibid.* at para. 59.

The Court of Appeal Decision

The Court of Appeal's review of Madame Justice Macdonald's decision is very methodical. Writing for the Court, Justice A. Weiler states that, in order for McNeil to be held liable to Kansa in the circumstances, Kansa had to establish two elements:

(1) that McNeil's conduct in failing to advise Kansa of a potential coverage denial fell below the standard of care that McNeil owed to Kansa;¹⁵

(1) that but for McNeil's negligence Kansa would not have suffered a financial loss (i.e. Kansa would not have been obligated to pay for Little's defence and for the judgment obtained against Little);¹⁶

According to the Court of Appeal, in order to determine whether Kansa established the first element, questions of law and fact must be considered. The question of law is: what standard is the lawyer's conduct to be measured by? The question of fact is: was the requisite standard met in the case at bar? On the question of fact, the Court of Appeal generally defers to the judgment of the lower court, finding that the trial judge did not make any palpable errors in finding that the evidence established that McNeil failed to fulfill the requisite standard of care. On the question of law, the Court of Appeal concludes that the trial judge applied the appropriate standard of care: namely, that of a reasonably competent lawyer expert in the area of insurance defence litigation.¹⁷ The Court finds that McNeil had a duty to advise Kansa of the potential coverage defence only if a reasonably prudent solicitor with the same expertise would have advised Kansa of the defence. According to the Court of Appeal, the scope of McNeil's retainer and the surrounding circumstances are factors to consider in determining what the response of an ordinarily competent and prudent solicitor would have been.¹⁸ The Court of Appeal also notes, however, that "[e]ven if the issue of coverage is not within the scope the solicitor's retainer, if important information comes into a lawyer's hands that the client does not have and that affects the client's risk in the litigation, the lawyer cannot ignore this information."¹⁹

With respect to the scope of the retainer, the Court of Appeal concludes that this issue is a factual question and that the trial judge's finding on this issue is therefore "entitled to great deference."²⁰ Looking at Madame Justice Macdonald's reasoning on this issue, the Court of Appeal finds that McNeil's own admissions properly lead to the conclusion that the question of coverage was within the scope of McNeil's retainer:

¹⁵ *Fellowes, McNeil (CA)*, *supra* note 1 at para. 4.

¹⁶ *Ibid.* at para. 6.

¹⁷ *Ibid.* at para. 5.

¹⁸ *Ibid.* at para. 50.

¹⁹ *Ibid.* at para. 50.

²⁰ *Ibid.* at para. 52.

One of the surrounding circumstances that the trial judge considered in coming to her conclusion was that McNeil had raised the issue of coverage on his own initiative when acting for Kansa in the past. More importantly, McNeil admitted on his examination for discovery that, at this stage of the litigation and at this time, McNeil was "... retained to protect Kansa's interests, as opposed to the insured's interests until [it] undertook the defence of the insured." Kansa's interests at this time included not just the question of liability but coverage as well. McNeil's acknowledgement put the question of coverage within the scope of his retainer.²¹

Accordingly, the Court of Appeal upholds the trial judge's finding that McNeil's retainer imposed a duty of care on McNeil to address any issues of coverage which arose.

Notwithstanding its finding that coverage questions were within the scope of McNeil's retainer, the Court of Appeal goes on to consider whether McNeil owed a duty to raise coverage problems with Kansa even if the issue of coverage was not within McNeil's retainer. That is, even if the issue of coverage was not within McNeil's retainer, "would an ordinarily competent and prudent solicitor have realized that Little's examination for discovery contained important information that Kansa did not have that affected Kansa's risk in the litigation?"²² On this point, the Court of Appeal notes that the trial judge was presented with conflicting expert evidence as to whether McNeil was required to consider coverage after reading the Examination for Discovery transcripts of Little. Once again electing to defer to the trial judge's assessment of the expert evidence, the Court of Appeal finds that "[t]here was ample expert evidence for the trial judge to conclude that, as a result of the information in the discovery, McNeil should have realized there was an issue of coverage raised by the discovery and the fact that he did not was negligence."²³

Thus upholding Madame Justice Macdonald's findings on liability, the Court of Appeal finally turns to consider the question of whether Kansa suffered any loss as a result of McNeil's apparent negligence. In particular, the Court of Appeal addresses three arguments raised by McNeil's defence:²⁴

- (1) that McNeil owed a simultaneous duty of care to Kansa and to the insured Little, such that McNeil could not properly advise Kansa of any coverage issues;
- (2) that the trial judge's finding that Kansa could have successfully denied coverage cannot be sustained because it is based on expert evidence;
- (3) that, by the time McNeil read Little's Examination for Discovery transcripts, Kansa was estopped from denying coverage to Little.

Ultimately, the Court rejects all of these arguments, however it is only the Court's analysis of the first defence which is relevant to this paper.

²¹ *Ibid.* at para. 53.

²² *Ibid.* at para. 54.

²³ *Ibid.* at para. 5

²⁴ *Ibid.* at para. 60.

The contention that McNeil owed a simultaneous duty of care to Kansa and to the insured Little is a classic “conflict of interest” argument. The essence of this defence is that, even if McNeil had or ought to have recognized the coverage problem raised by Little’s examination for discovery evidence, McNeil could not advise Kansa about this problem because to do so would have compromised McNeil’s obligation to protect Little’s interests in the liability action (one of Little’s interests obviously being to have insurance defence coverage for the action). The Court of Appeal rejects this argument on the basis that, at the time McNeil read Little’s transcripts, McNeil was not the counsel of record in the Little case and therefore did not have any obligation to protect Little’s interests. According to the Court of Appeal:

... it is essential to consider the state of the litigation. The primary insurer of Shepherd McKenzie, American Home, was representing the interests of the insured Little and had done so since it had been notified by Little of the claim against him in February 1985. Borden and Elliot were the law firm of record for Little. McNeil had been retained by Kansa in February 1987. Although McNeil had recommended to Kansa that it consider taking over the defence of Little, at the time McNeil read Little’s examination for discovery, September 1990, Kansa was not directing Little’s defence. That defence was only undertaken some seven months later in April 1991 when McNeil replaced Borden and Elliot.

As I have indicated, on his examination for discovery, McNeil admitted that Fellowes, McNeil, ‘... was retained to protect Kansa’s interests, as opposed to the insured’s interests up and until [it] undertook the defence of the insured.’ McNeil’s admission prevents him from asserting that he had a legal duty to Little at that time. McNeil’s admission supports the trial judge’s conclusion that, at the time McNeil read Little’s examination for discovery, he should have realized that it raised an issue of coverage and, given his unfettered duty, to the insurer, should have reported this to Kansa.²⁵

Thus, the Court of Appeal concludes that McNeil was not in a position of conflict and that “[a] reasonably competent insurance litigator in McNeil’s position would have been unconstrained in bringing to Kansa’s attention the coverage problem, and would have done so.”²⁶

Commentary

Both the trial decision and the Court of Appeal judgment correctly identify the issues of fact and law which need to be resolved in order to find liability against McNeil. The critical question of law focuses on the extent of a lawyer’s duty of care to his client: Namely, in this case did McNeil’s duty of care to Kansa require McNeil to advise Kansa of any potential coverage defences against Little? Assuming that McNeil did owe such a duty of care to Kansa, the relevant

²⁵ *Ibid.* at paras. 61 & 62.

²⁶ *Ibid.* at para. 63.

questions of fact are whether McNeil breached this duty of care and, if so, whether Kansa suffered any damage as a result of the breach. In order to have these factual questions resolved in Kansa's favour, Kansa had to prove the following underlying facts:

- that Little failed to disclose on the Kansa application form a probable liability claim by Confederation Life which Little was aware of when the application was completed;
- that Kansa was unaware of Little's non-disclosure at the time that Kansa retained McNeil;
- that, at the time Kansa retained McNeil on the Little matter, Kansa was unaware of Little's misrepresentation;
- that, had Kansa been made aware of Little's misrepresentation, Kansa would have elected to withhold coverage for Confederation Life's claim;
- that, upon reviewing the transcripts of Little's Examination for Discovery and, in any event, prior to being named Solicitor of Record in 1991, McNeil was aware, or ought to have been aware, of the coverage issue raised by Little's misrepresentation;
- and that McNeil did not inform Kansa of Little's misrepresentation or of the potential coverage issue raised by Little's misrepresentation.

As the Court of Appeal notes, it is difficult and not necessarily appropriate to second guess the trial court's assessment of these factual elements. The legal analysis offered by the Court of Appeal is problematic, however, in that the Court also defers almost entirely to the trial court's factual findings in order to resolve the fundamental question of law regarding the scope of McNeil's duty of care. The Court of Appeal uses the trial court's factual findings to avoid considering whether the duty of care owed by insurance defence counsel is inherently limited or affected by the tri-partite relationship which a liability insurance policy necessarily creates between the insurer, the insured and defence counsel.

Like the trial court, the Court of Appeal correctly finds that the test to apply in determining whether a duty of care was owed by McNeil to Kansa is whether a reasonably competent lawyer of similar expertise and in like circumstances would have advised Kansa of a potential coverage defence. In applying this test to the case at bar, however, the Court of Appeal relies almost entirely upon the trial court's factual findings. For instance, while noting that the scope of McNeil's retainer with Kansa is an important circumstance to consider in applying the "reasonable lawyer" test, the Court of Appeal then defers to the trial court's conclusion that McNeil's retainer required McNeil to consider coverage. This conclusion is based on the fact that McNeil had historically provided Kansa with coverage opinions on litigation defence files without being specifically requested to do so and on McNeil's acknowledgement that, at the time, he was retained to protect Kansa's interests as opposed to Little's interests. In further deference to the findings of the trial court, the Court of

Appeal then concludes that, even if coverage was not within the scope of McNeil's retainer, coverage is an issue that McNeil ought to have considered to be in the interests of Kansa.

The "factual deference" approach which the Court of Appeal brings to its application of the reasonable lawyer test in this case gives rise to three fundamental problems. The primary problem is that this approach allows the Court of Appeal to summarily dismiss the policy argument that McNeil could not have provided coverage information to Kansa without breaching his duty to Little. Rather than dealing with the fundamental question of whether insurance defence counsel should ever provide coverage advice to an insurer given the interdependent relationship between an insurer, an insured and defence counsel under a liability policy, the Court of Appeal avoids this critical question.

With respect, the state of the litigation and McNeil's opinion as to who his client was at the time that he read Little's transcript cannot properly be relied upon as a basis for dismissing or ignoring the critical policy question regarding the obligation of insurance defence counsel to advise, or to refrain from advising, an insurance company on coverage matters. Relying on these facts blurs, rather than resolves, an important and outstanding question of law. Moreover, the state of the litigation and McNeil's belief regarding to whom he owed a duty of care are not reliable indicators of the scope of an insurance defence counsel's duty of care. The idea that a conflict of interest problem cannot arise until insurance defence counsel is made counsel of record or takes an official role in the litigation defence is simplistic and fails to appreciate the nature of the tripartite relationship between defence counsel, the insurance company and the insured. An insured can and frequently does rely upon insurance defence counsel to protect the insured's interest in a liability claim long before defence counsel files a defence or otherwise becomes solicitor of record. The insured communicates with defence counsel because the insured is obligated to do so in order to maintain insurance coverage and because the insured believes that defence counsel is ultimately going to be protecting his interests. Thus, actual reliance by the insured, or the entitlement of the insured to rely, upon the insurance defence counsel is what raises the conflict of interest problem for defence counsel faced with coverage information. While the state of the litigation may be a factor for the Court to rely on in determining what the proper response of defence counsel should be to the conflict of interest which arises when coverage issues are raised in a liability file, the state of the litigation should not be a factor in determining whether a conflict of interest exists at all.

Of course, the Court of Appeal's primary obligation in this case was to deal with the facts before it and not necessarily to address broader policy issues or ethical concerns. Nevertheless, the facts of the case are more appropriately viewed as raising the policy issues rather than as an excuse for avoiding these questions. One is left to wonder what might have happened if McNeil had advised Kansa of the coverage defence and if Kansa relied on that advice to deny coverage to Little or to obtain a non-waiver agreement from Little. Based on existing Canadian case law, in such a circumstance Little may have been

successful in convincing a court that Kansa should pay for his independent counsel.²⁷ In an application by Little for Kansa to pay for independent counsel, a Court would be looking at the reliance of Little upon McNeil and Kansa and not at McNeil's belief as to whom he owed a duty of care.

The second main problem which arises from the Court of Appeal's factual deference approach to the legal question is that, while deferring to the trial court's finding that McNeil's retainer or his role as counsel imposed a duty of care on McNeil to advise Kansa on coverage matters, the Court does not clarify exactly what facts — and in what degree — result in the imposition of this duty of care. Does the sole fact that McNeil previously provided unrequested coverage advice mean that the insurance company is forever entitled to consider coverage matters to be an unspoken part of its retainer with McNeil? How many times did McNeil have to provide unrequested coverage advice on a litigation file before coverage became an implied part of the retainer? The trial judgment emphasized the fact that the insurance company was “not sophisticated” and therefore was justified in relying on McNeil to raise any coverage issues. Does the sophistication level of the insurance company impact upon the implied terms of the retainer? If so, what elements or factors are relevant in determining the insurer's level of sophistication? Further, the Court of Appeal relies upon McNeil's admission that, at the time he read Little's transcripts, McNeil's understanding was that he was retained to protect Kansa's interests alone. Would the Court's finding, then, be different if McNeil had believed he was retained to protect the interests of both Kansa and the insured? In other words, is the test of McNeil's obligations subjective or objective? If the test is, as the Court of Appeal states, that of the “reasonably competent lawyer”, then McNeil's subjective belief of his obligations is irrelevant and really begs the very question which is before the Court. The Court of Appeal also points out that, at the time McNeil was retained, Kansa was Little's excess insurer only and had not assumed Little's defence. Does this mean that counsel for an excess insurer who has not assumed the insured's defence always owes an unencumbered duty to the insurance company? Alternatively does this mean that all insurance defence counsel (whether retained by the excess or primary insurer) owe a duty of care solely to the insurance company until that counsel becomes solicitor of record for the insured in the litigation action? Further, is it the combination of all the circumstances (the previous coverage advice, the sophistication level of the insured, McNeil's belief that he was acting in Kansa's interests only, and the fact that Kansa was Little's excess insurer and had not yet assumed conduct of the defence) that resulted in the imposition of a duty of care on McNeil to consider coverage, or would one of these circumstances alone be sufficient to create the duty of care? In failing to elaborate on exactly how each of these elements impact upon the finding of a duty of care, the Court of Appeal's

²⁷ See B. Billingsley, *supra* note 3, for a detailed discussion of the appointment of independent counsel at the insurer's expense where coverage issues compromise the ability of insurance defence counsel to represent the insured's interests.

decision fails to offer any certainty in the law and instead begs for future cases to be argued as distinguishable on their facts.

The final problem resulting from the Court of Appeal's approach is that, even if one accepts the Court of Appeal's finding that McNeil was obliged to advise Kansa of a potential coverage defence, the Court of Appeal fails to indicate how that duty should be fulfilled. Given the facts of this case, was McNeil obliged to simply advise Kansa of the information contained in Little's Examination for Discovery transcript? Was McNeil obliged to advise Kansa to obtain a coverage opinion based on the information contained in Little's transcript? Was McNeil obliged to give Kansa a coverage opinion based on Little's sworn testimony? Again, the Court of Appeal missed this opportunity to provide useful guidance to insurance defence counsel as to the precise nature of their obligations when coverage issues arise. In saying simply that in this case insurance defence counsel had a duty to advise the insurance company of a coverage issue, the Court of Appeal has done little, if anything, to clarify the overall obligations of insurance defence counsel faced with a coverage problem.

Conclusion

Canadian law provides for a semi-objective test in determining the extent of any lawyer's duty of care; specifically, what would be the response of a reasonably competent lawyer of *like* expertise in *like* circumstances. Unfortunately, in *Fellowes, McNeil*, the Court of Appeal applies this test by relying on the particular factual circumstances of the case and without regard to the broader policy question of what obligations insurance defence counsel owes to an insurer and an insured by virtue of the tripartite relationship necessarily created by a liability insurance contract. As a result, this case offers no reliable guidance to insurance defence counsel about their objective obligations when a coverage issue arises. The "like" circumstances which the Court of Appeal should have focussed on is the identification of a coverage issue by counsel hired by an insurance company to respond to an action believed to be covered under a liability insurance policy. Unfortunately, rather than stepping back from the details of the case at bar and seeing this larger "like" circumstance, the Court of Appeal considered the "like" circumstances to be the detailed factual findings made by the trial court.

It has been suggested that, because of the lack of Canadian case law regarding the obligations of insurance defence counsel faced with a coverage problem and the fact-driven decisions which do exist on this issue, insurance defence counsel, insurers and insureds are unsure of their obligations to each other and are forced to engage in an elaborate dance to protect their own interests and avoid harming the interests of one another whenever coverage issues arise in a litigation matter.²⁸ In the *Fellowes, McNeil* case, the Ontario Court of

²⁸ *Ibid.* at 251.

Appeal had the opportunity to end this dance by clarifying the objective obligations owed by insurance defence counsel when insurance coverage is called into question. The Ontario Court of Appeal did not respond adequately to this opportunity and, consequently, the band plays on.