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Docket: CA 163323

NOVA SCOTIA COURT OF APPEAL

[Cite as: Boutilier v. Merrill, 2000 NSCA 149]

Glube, C.J.N.S.; Hallett and Cromwell, JJ.A.

BETWEEN:

GORDON BLAISE BOUTILIER and DONNA TUTTY

Appellants

- and -

STEWART MERRILL and JAMES SCOTT TOMPKINS

Respondents

REASONS FOR JUDGMENT

Counsel:	Hugh R. McLeod for the appellants Lee Anne MacLeod-Archer for the respondents
Appeal Heard:	November 28, 2000
Judgment Delivered:	December 22, 2000

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Hallett, J.A. concurring.

CROMWELL, J.A.:

I. INTRODUCTION:

[2] This appeal arises out of a collision between a motorcycle and a car at the corner of Commercial and Corbett Streets in Dominion, Nova Scotia.

[3] The appellants, Boutilier and Tutty, were travelling on a motorcycle driven by Boutilier along Commercial Street. Boutilier was unlicensed and uninsured. The defendant Tompkins had stopped his car at the stop sign at the intersection of Corbett and Commercial Streets and was proceeding to turn left on to Commercial Street when the collision occurred. A bread truck (driven by the respondent Merrill) parked on the north side of Commercial Street, slightly east of the intersection, obscured the vision of both Boutilier and Tompkins.

[4] Boutilier and Tutty sued Tompkins and Merrill. The trial judge, MacAdam, J., apportioned liability 85% against Tompkins and Merrill and 15% against Boutilier. He assessed Boutilier's damages in the amount of $38,665.09 which were reduced by 15% to reflect the apportionment of liability. The judge also deducted from Boutilier's damages an amount equal to the no fault benefits that would have been available to Boutilier if he had been carrying a motor vehicle liability policy as required by s. 230(1) of the

Motor Vehicle Act, R.S.N.S. 1989, c. 293, as amended. Deductions were also made for 15% of the damages and no fault benefits relating to Tutty pursuant to a counterclaim in relation to those damages filed by the defendants against Boutilier.

[5] On appeal, Boutilier challenges the finding that he was 15% contributorily negligent and the deductions from the damages of Schedule "B" benefits that would have been available to him had he been insured. By way of notice of contention, the respondents challenge the trial judge's award of damages to Boutilier for loss of wages.

[6] The applicable standards of review were set out by the Chief Justice in **Fraser v. Hunter Estate** (2000), 184 N.S.R. (2d) 217 (N.S.C.A.) at § 8:

> [8] The parties agree that the standard of review on appeals involving findings of fact, apportionment of fault and an assessment of damages is as set out in **Morrow v. Barnhill (Ritchie) Contracting Ltd., Pynn and Teed** (1988), 86 N.S.R. (2d) 444; 218 A.P.R. 444 (C.A.) at p. 447:
>
> > [11] Findings of fact stand unless there was a palpable and overriding error on the part of the trial judge: **Stein Estate v. The Ship 'Kathy K**', [1976] 2 S.C.R. 802; 6 N.R. 359; 62 D.L.R. (3d) 1.

> [12] An apportionment of fault is only to be altered in very strong and exceptional circumstances: **Sparks v. Thompson** (1974), 1 N.R. 387; 6 N.S.R. (2d) 481 (S.C.C.).
>
> [13] An assessment of damages stands unless the trial judge has applied a wrong principle of law or has arrived at an amount so inordinately high or low as to be a wholly erroneous estimate: **Nance v. B.C. Electric Railway Company Ltd.**, [1951] A.C. 601.

II. FACTS IN RELATION TO LIABILITY:

[7] The trial judge found, and there was no dispute, that Boutilier was proceeding westerly on Commercial Street and came abreast of a bread truck parked, apparently illegally, in front of the Dominion Pharmasave located at the corner of Corbett and Commercial Streets. As Boutilier was approximately half way along the side of the bread truck box, the Tompkins vehicle proceeded from Corbett Street, in front of the bread truck, intending to make a left turn on to Commercial Street. As the front wheels of the Tompkins motor vehicle reached the two yellow centre lines, Boutilier's motor cycle struck the driver's side door. Boutilier and Tutty were thrown from the motor cycle and both were injured.

[8] The trial judge noted that, while Boutilier was proceeding within the speed limit, he knew that the bread truck and parked cars in the Pharmasave

parking lot obstructed his view of Corbett Street, including any vehicles proceeding along Corbett Street and attempting to enter Commercial Street. He also knew that there was a crosswalk across Commercial Street roughly at the front of the parked truck. The trial judge found Boutilier negligent because he drove too quickly even though he realized that both his view and the view of the driver of any vehicle on Corbett Street were obstructed. As the trial judge put it:

> The speed limit is the maximum speed and does not excuse a failure to slow down when conditions and circumstances require. The *Motor Vehicle Act*, as well as common sense, require such care, even where the speed limit has not been exceeded. Boutilier therefore bears some responsibility for this accident. I assess him as 15% contributorily negligent.

[9] Counsel for Boutilier challenges the trial judge's finding that Boutilier was 15% contributorily negligent. It is submitted that the trial judge misapprehended the evidence of speed and incorrectly found that Boutilier had failed to reduce his speed. More fundamentally, it is submitted that the trial judge erred in law in finding Boutilier contributorily negligent absent a finding that he could have avoided the accident had he not been driving too quickly.

[10] In my respectful view, the submission attacking the judge's findings in relation to Boutilier's speed has no merit. The speed limit was 30 miles per

hour at the scene of the accident. Boutilier's evidence was clear that he was doing close to the speed limit. While at one point in the evidence, there seems to have been some confusion between kilometres per hour and miles per hour, the trial judge did not commit any reviewable error in finding that Boutilier was travelling just under the speed limit having regard to Boutilier's evidence viewed as a whole.

[11] There is similarly no merit to the submission that the trial judge misapprehended the evidence about Boutilier slowing down. Boutilier's evidence was that he had taken his hand off the gas which would have dropped the speed by "maybe 2 miles an hour or something". Given this evidence of a very minor reduction in speed, it is not a reviewable error for the judge to have found that Boutilier failed to slow down as the circumstances required.

[12] The appellants' main argument with respect to liability is that in order for Boutilier to be found contributorily negligent, it was necessary for the defendants to show that Boutilier had sufficient opportunity to avoid the accident once he became aware of Tompkins failure to yield the right-of-way. This submission is based primarily on the decision of the Supreme Court of Canada in **Walker v. Brownlee**, [1952] 2 D.L.R. 450 (S.C.C.).

Reliance is placed particularly on the judgment of Cartwright, J. who said at p. 461:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.
> (emphasis added)

[13] The trial judge was referred to and cited **Walker** in his reasons for judgment and, in fact, sets out verbatim the passage of that case strongly relied on by the appellants.

[14] In the **Walker** case, Harmon was driving a taxi westward along Hugel Avenue in Midland, Ontario. Walker was driving north on Third Street towards the intersection with Hugel Avenue. A collision occurred and a passenger in Harmon's taxi was seriously injured. Hugel Avenue (on which Harmon had been driving his taxi) had been declared a through street by by-law, but there was no stop sign at the intersection with Third Street. Walker did not know that Hugel Avenue was a through street. Harmon knew that it was, but did not know that the stop sign was down. As Walker approached

the intersection, he reduced his speed but, seeing no traffic, went through the intersection. The circumstances were such that, had each driver kept a proper look-out, Walker would have seen Harmon coming and Harmon would have become aware of Walker's presence sooner.

[15] The trial judge found Harmon's negligence the sole cause of the collision. The Court of Appeal, by a majority, reversed that finding and held Walker was solely at fault for the accident. Walker's appeal to the Supreme Court of Canada was dismissed with Chief Justice Rinfret and Justices Taschereau and Kellock dissenting.

[16] The principal reasons on behalf of the majority were given by Estey, J. and by Cartwright, J. (with whom Locke, J. concurred). Brief reasons concurring in the result were delivered by Kervin, J. and by Rand, J. (with whom Fauteux, J. concurred).

[17] Estey, J. found that both drivers were negligent, Walker by failing to yield the right-of-way and Harmon by failing to make reasonable observations: at pp. 456 - 57. He found that Walker's failure to yield the right-of-way constituted negligence contributing to the injury but that Harmon's did not. He held that "[w]hen all the relevant factors are considered it cannot be said that the probabilities upon this record are such that Harmon, once he

observed, as he should have, Walker entering the intersection, could, in the exercise of due care, have then avoided the collision." (p. 458)

[18] Cartwright, J. agreed that Walker had been negligent and that this negligence contributed to the accident. He also agreed that no liability should be apportioned to Harmon stating at p. 461:

> In the case at bar I agree with what I understand to be the view of the majority of the Court of Appeal that it is not necessary in deciding this case to take into consideration the fact that Hugel Ave. was a through highway. Obviously the fact that it was known to Harmon to have been so designated cannot worsen his position. Leaving this fact aside, an examination of all the evidence brings me to the same conclusion as that reached by Roach J.A., that, even had Harmon been observing the appellant's car, when the time arrived at which he could reasonably have been expected to realize that the appellant was not yielding him the right-of-way it would have been too late for him to do anything effective to prevent the collision.
> (emphasis added)

[19] Walker's view of the intersection was apparently unobstructed. The issue in relation to Harmon, as expressed by Estey, J., related to Harmon's duty to use due care to avoid a collision once he saw that Walker, without stopping, was proceeding into the intersection: p. 457. In other words, the issue in **Walker** was whether Harmon had time to avoid the accident after the point at which he should have seen that Walker was not going to yield.

[20] The present case is, in my view, quite different. This is not a case in which Tompkins completely disregarded his statutory duty to yield the right-of-

way. He stopped at the intersection. His view of traffic on Commercial Street was obstructed by the bread truck. Having regard to the crosswalk and the obstructed view of the intersection which were known to Boutilier, the trial judge found that it was negligent for Boutilier not to reduce his speed to take account of these circumstances. The trial judge's findings of negligence is not that Boutilier failed to take reasonable care once he knew that Tompkins was not going to yield. The trial judge's finding is, instead, that Boutilier was negligent in failing to take reasonable care having regard to the readily foreseeable risk that traffic trying to enter Commercial Street (or for that matter pedestrians using the crosswalk), could not see oncoming traffic including Boutilier.

[21] Cartwright, J., in **Walker** at p. 460, cited with approval the following passage from **Woodward v. Harris**, [1951] O.W.N. 221 at p. 223:

> Authority is not required in support of the principle that a driver entering an intersection, even although he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his so doing will be a collision which he reasonably should have foreseen and avoided.
> (emphasis added)

[22] In my view, this passage supports the conclusion of the trial judge in this case. To the same effect, see **Parent and Belair v. Vachon**, [1958] S.C.R. 703 at 705 and **Gadoury v. Miron & Frères Ltée**, [1959] S.C.R. 53 at 56.

[23] As I read the trial judge's reasons, he found that Boutilier in the particular circumstances of this case, ought to have foreseen the risk of collision created by the obstruction of vision and failed to take reasonable care to avoid that foreseeable collision by reducing his speed. It is implicit in these findings that this negligence was a contributing cause of the accident. In my respectful view, these findings are supported by the evidence and based on correct legal principles.

[24] I would dismiss the appeal relating to the apportionment of liability.

III THE DAMAGES AWARD:

[25] There are two issues raised concerning the trial judge's award of damages. First, the appellants say that the trial judge erred by deducting from damages otherwise payable the amount of Schedule B benefits that would have been available had Boutilier been insured as required by s. 230(1) of the **Motor Vehicle Act**. The second issue is raised on the respondents' notice of

contention and is this. Did the trial judge err in awarding two years loss of wages to Boutilier? I will address these two issues in turn.

(a) Schedule B Issue:

[26] Boutilier did not carry insurance as he was obliged to do under the provisions of the **Motor Vehicle Act**. Had he done so, his insurance would have included provision for so-called no fault benefits pursuant to s. 140(1) and Schedule B to Part VI of the **Insurance Act**, R.S.N.S. 1989, c. 231, as amended.

[27] The trial judge held that the no fault benefits that would have been available to Boutilier had he been insured should be deducted from damages otherwise payable by the defendants. He stated at § 72:

> ... In our view, absent binding contrary authority, the defendant in respect to the losses advanced by the plaintiff, is entitled to rely on the plaintiff as having complied with the obligations mandated by law, here being the obligation as the driver of a motor vehicle on a highway to carry insurance coverage, that by statute, is required to contain weekly income replacement benefits commonly known as Section "B" benefits.

[28] The trial judge added that this was "akin to a failure to mitigate, albeit the failure preceded, rather than followed, the event giving rise to the claim". He held at § 74:

> ... To the extent Boutilier claims for reimbursement, both in respect to loss of income and for expenditures made "*within the provisions of Schedule "B"*, they are disallowed as against the defendants. Similarly, to the extent Tutty would have been entitled to claim reimbursement for expenditures made that would have been compensable under a motor vehicle insurance policy insuring Boutilier's motor cycle, they are allowed to Tutty, but recoverable by the defendants as against Boutilier. (emphasis in the original)

[29] In the result, special damages of both Tutty and Boutilier totalling $10,075.42 as well as weekly indemnity benefits that would have been available to Boutilier in the amount of $11,504.48, were deducted from the damages otherwise payable by the defendants.

[30] In my respectful opinion, there is no basis in law for this reduction of Boutilier's damages and the order of the trial judge in this regard must be set aside.

[31] There is a statutory provision in the **Insurance Act** which, in certain circumstances, releases a defendant from the payment of damages to the extent of Schedule "B" benefits which are paid or available to a claimant. Section 146(2) of the **Insurance Act** provides:

> **Entitlement constitutes release of claim**
>
> 146. (2) Where a claimant is entitled to the benefit of insurance within the scope of Section 140 [that is Schedule "B" benefits], this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant

> of any claim against the person liable to the claimant or the insurer of the person liable to the claimant. R.S., c. 231, s. 146.
>
> (emphasis added)

[32] It is common ground that this provision does not apply to Boutilier. It is not suggested, nor in my opinion could it be, that Boutilier, as an uninsured person, was "entitled to the benefit of insurance" or that Schedule "B" benefits were "available" to him within the meaning of s. 146(2). What the respondents ask us to do, and what the trial judge did, is to create a common law rule that would extend the effect of s. 146(2) to claims advanced by uninsured drivers.

[33] In my view, we should not create such a rule for three reasons. First, to do so would be inconsistent with the basic principle of damages for negligence that foreseeable losses caused to a plaintiff by a defendant's negligence should be compensated. Second, the proposed rule would also be inconsistent with the common law's approach to losses covered by private insurance. Third, the proposed rule would intrude into the complete and self-contained code of legislative provisions relating to no-fault benefits. I will consider each of these reasons in turn.

[34] The basic principle of damages in negligence is that the plaintiff should be compensated by the defendant for foreseeable losses caused by the

defendant's breach of duty. This was expressed by both McLachlin, J. and Cory, J. in their reasons in **Cunningham v. Wheeler**, [1994] 1 S.C.R. 359 at 368 (McLachlin, J. dissenting in part but not on this issue) and 396 (Cory, J.):

> The fundamental principle is that the plaintiff in an action for negligence is entitled to a sum of damages which will return the plaintiff to the position the plaintiff would have been in had the accident not occurred, in so far as money is capable of doing this. This goal was expressed in the early cases by the maxim *restitutio in integrum*. The plaintiff is entitled to full compensation and is not to be denied recovery of losses which he has sustained: *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 (H.L.), at p. 39, *per* Lord Blackburn. It has been affirmed repeatedly by Canadian courts and once again in more recent times by the House of Lords: ". . . the basic rule is that it is the net consequential loss and expense which the court must measure": *Hodgson v. Trapp*, [1988] 3 W.L.R. 1281, at p. 1286. At the same time, the compensation must be fair to both the plaintiff and the defendant. In short, the ideal of the law in negligence cases is fully restorative but non-punitive damages. The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more. The watchword is restoration; what is required to restore the plaintiff to his or her pre-accident position. ... (McLachlin, J. at p. 368)
>
> . . .
>
> At the outset, it may be well to state once again the principle of recovery in an action for tort. Simply, it is to compensate the injured party as completely as possible for the loss suffered as a result of the negligent action or inaction of the defendant. ..... (Cory, J. at p. 396)

[35] The rule which the defendants ask us to adopt would be completely contrary to this fundamental principle of compensation. The defendants would be

relieved from paying and the plaintiff Boutilier would not receive compensation for losses caused to him by the defendants' negligence.

[36] It is suggested that the proposed rule is a just "punishment" for the failure to observe the statutory requirement to carry insurance. I do not find this a convincing argument. There is a sanction in the **Motor Vehicle Act** for failure to have the insurance coverage required by the **Act** and, in fact, Boutilier was charged, convicted and fined for that failure. Moreover, there are other strong incentives to carry insurance. The failure to carry insurance deprives the injured party of access to the rapid payments of benefits without regard to fault with the result that in this case, Boutilier was left to his remedies in tort law which led to a court order for compensation nearly four years after the accident.

[37] I turn to the second reason why, in my opinion, the rule proposed by the defendants should not be adopted.

[38] The common law rule is that proceeds of private insurance payable to the victim of a tort do not reduce the damages otherwise payable by the defendant. As Justice Cory put it for the majority of the Supreme Court of Canada in **Cunningham v. Wheeler**, **supra,** at p. 396:

> For over 119 years, the courts of England and Canada have held that payments received for loss of wages pursuant to a private policy of insurance should not be deducted from the lost wages claim of a plaintiff. ...

[39] He stated further at p. 400:

> I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. ...
>
> Recovery in tort law is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

[40] It must be borne in mind that these comments were made in the context of discussing insured plaintiffs who, pursuant to the principle affirmed by the majority of the Supreme Court of Canada, would, in effect, receive double recovery, one from insurance and the other from the tortfeasor.

[41] What we are being asked to do by the respondents in this case is to say that failure to have insurance should lead, not simply to the avoidance of double

recovery but the denial of recovery to the plaintiff and reduction in damages otherwise payable by the wrongdoer. It would seem to me to be anomalous on one hand to ignore the fact of insurance even though it leads to double recovery while on the other, to deny compensation altogether when there is no insurance coverage. In my view, we should not adopt a rule that leads to such anomalous results and is so fundamentally at odds with well-established common law principles.

[42] I turn to the third and final reason for rejecting the rule advanced by the defendants. No fault benefits are a creature of statute established by a comprehensive legislative code. Although, in some circumstances, deduction of such benefits from damages otherwise payable by the defendant is specifically provided for in that code, there is no legislative provision for deduction which applies to this case. In my view, it would be inappropriate to create such a deduction by judicial decision in these circumstances.

[43] In the course of his reasons in **Cunningham, supra,** Cory, J. specifically adverted to provisions such as s. 146(2) of the **Insurance Act** which, in effect, provide that Schedule "B" benefits paid or available should be deducted. He stated at p. 401:

> There is a good reason why the courts should be slow to change a carefully considered long-standing policy that no deductions should be made for insurance monies paid for lost wages. If any action is to be taken, it should be by legislatures. It is significant that in general no such action has been taken.

> Although in Ontario the non-deductibility principle was abandoned in relation to motor vehicle accidents when a no-fault motor vehicle insurance regime was enacted, the general rule in other tort litigation of non-deductibility has not been altered: .... It is significant that this was done in the context of creating a new system for compensating victims of motor vehicle accidents, largely outside traditional tort law. ...

[44] Viewed against the common law background, the provision in s. 146(2) of the **Insurance Act** must be viewed as a statutory exception. Justice Cory referred to it as such in the passage which I have quoted above. That provision must also be seen, as Justice Cory pointed out, as part of a statutory scheme of benefits. It seems to me that where the Legislature has, by specific language, and as part of a comprehensive benefits scheme, altered a common law rule, there is no basis for judicial extension of that statutory provision in situations which it does not and did not intend to address.

[45] It also seems to me that the position advanced by the defendants is contrary to the purposes of Schedule “B” benefits. The purposes of this limited no fault benefits scheme is to provide a measure of compensation without

regard to fault as quickly as possible and to prevent double recovery in tort litigation with respect to benefits paid or payable. The defendants would have us adopt a rule which would deny recovery for insurance amounts to which Boutilier was not entitled and relieve the wrongdoers of liability to him to that extent. To my way of thinking, this is not only fundamentally at odds with the common law principle that the defendant should not benefit from the plaintiff's private insurance even where the application of this rule leads to double recovery, it also deprives injured parties of compensation to which they are otherwise entitled and benefits the tortfeasors responsible for those injuries.

[46] For these reasons, it would be inappropriate to adopt the rule advanced by the defendants. I can see no reason in principle or authority which would justify the deduction that was made from damages otherwise payable in this case. I would set aside that aspect of the trial judge's order.

[47] I would add that the British Columbia authorities relied on by the respondents do not assist their position. For example, in **Petersen v. Bannon** (1993), 37 B.C.A.C. 26; leave to appeal dismissed [1994] S.C.C.A. No. 39, the relevant question was whether the provisions of the British Columbia legislation had the effect of giving the defendant credit for no

fault benefits to which the plaintiff would have been entitled had he not made wilfully false statements to the insurer in connection with his claim. The issue before the court was one of statutory interpretation, with the main question being whether the claimant "would have been entitled" to the benefits within the meaning of the statute.

[48] The British Columbia statutory provision, in effect, provides that benefits to which the claimant "is or would have been entitled" are deducted from damages otherwise payable by the defendant. There is no comparable language in the Nova Scotia Statute. Finch, J.A., delivering the reasons of the Court, emphasized that the question was one of legislative intent: what do benefits to which the claimant "would have been entitled" include? The Court decided that benefits which would have been available to the claimant but for his false statements are benefits to which he "would have been entitled" within the meaning of the statute. There was no discussion of common law principles and no suggestion that this result would have been justified on any basis other than the particular statutory provision considered by the Court.

[49] As noted, the relevant provision in Nova Scotia is considerably narrower. Section 146(2) gives the benefit to the defendant of "payments made or

available to the claimant under insurance provided for in s. 140". In connection with the Nova Scotia provision, this Court has followed the Ontario Court of Appeal in holding that benefits which are not available cannot be deducted: see **MacKay v. Rovers** (1987), 79 N.S.R. (2d) 237 (S.C.A.D.) and **Stante v. Boudreau** (1981), 112 D.L.R. (3d) 172 (Ont. C.A.). These cases held that it is not necessary for the plaintiff to establish a disentitlement under a no fault claim in order to include the amount of that claim against the tortfeasor. It is sufficient if the plaintiff provides some evidence of a refusal by the insurer to pay to justify a claim against the tortfeasor. Having regard to these decisions, it is clear, in my respectful view, that the British Columbia cases turn on the considerably broader exclusion of recovery contained in the British Columbia legislation as interpreted by the British Columbia Court of Appeal in **Petersen** and the cases following it.

[50] As mentioned, I conclude that the deduction of amounts that would have been available under Schedule “B” had Boutilier been insured was in error and should be set aside.

(b) The award for wage loss:

[51] The respondents submit on their notice of contention that the trial judge misinterpreted or erroneously stated the evidence with respect to Boutilier's loss of wage claim and that, but for this misapprehension, the loss of wage claim would have been restricted to four months rather than the two years which the trial judge awarded.

[52] In order to consider this submission, it is necessary to review the relevant portions of the trial judge's reasons in detail. Before doing so, I note that not every factual error by a trial judge will result in appellate intervention. As Lamer, C.J.C. said in **Delgamuuk v. British Columbia**, [1997] 3 S.C.R. 1010 at § 88:

> ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue" ... .

[53] The trial judge found that, by the time of trial, (February and March of 2000), Boutilier did not continue to suffer either significant pain or limitation of his daily activities. The trial judge referred to evidence given by Tompkins' father of seeing Boutilier performing karaoke and dancing in August of 1996. He referred to Boutilier's study at CompuCollege although he said that this occurred in August of 1998 when, in fact, it appears that the

CompuCollege course took place in the fall of 1996. The judge also referred to the medical reports and noted that Boutilier testified that he has endeavoured to return to carpentry on a number of occasions while acknowledging that he neglected to report these attempts and the failures to the doctors and physiotherapists. The trial judge also referred to extensive physical therapy undertaken by Boutilier in the years following the accident and concluded at § 61:

> ... I am satisfied Boutilier was injured in the accident, and that his activities, both work and daily living-related, were curtailed because of pain from some of these injuries. However, on the evidence he has been for some time able to cope and the suggestion of other than a minimal permanent disability from the accident, is not warranted.

[54] The judge awarded non-pecuniary damages in the amount of $15,000.00 and this part of the award is not challenged.

[55] With respect to the loss of wage claim, the trial judge found that Boutilier's reported pre-accident income averaged at least $7,190.00 per year and noted that a claim was advanced for four years at this amount. The trial judge then stated at § 64:

> ... Whether his injuries prevented him from returning to work in his previous trade as a carpenter, or in some other capacity, and whether it was necessary for him to

> first undertake, albeit unsuccessfully, a course in hospitality management, and later a course, this time successfully in locksmithing, is debatable. Having in mind the videos of Boutilier walking, working as a carpenter and driving his truck, were taken in 1998 and the attendance of Dr. Gross was also in 1998, I am satisfied to award him loss of wages for two years, from which, of course, should be deducted any earnings he made during this period.

[56] The judge went on to award $2,500.00 for diminution of earning capacity, an amount consistent with his earlier conclusion that "the suggestion of other than a minimum permanent disability from the accident is not warranted".

[57] It is common ground that the trial judge was in error when he concluded that the videotape surveillance evidence of Boutilier working as a carpenter and driving his truck were taken in 1998. They were, in fact, taken in 1996. As noted, it is also clear that the trial judge was in error in finding that the CompuCollege study occurred in 1998 rather than in the autumn of 1996. The submission on behalf of the respondents is that had the trial judge realized that the video surveillance evidence and educational initiatives occurred in 1996 rather than 1998, he would have awarded only four months of lost wages rather than two years.

[58] As I read the trial judge's reasons in their entirety, three aspects of the evidence constitute the primary basis for his conclusion that two years was the appropriate period.

[59] First, there was the fact that Boutilier underwent extensive physiotherapy and that there was no evidence that this was not required. According to the report of Glace Bay Physiotherapy, which is in the record, he was treated at the physiotherapy clinic from May 28, 1996 to June 2, 1997 and again from August 19, 1998 to September 15, 1998.

[60] Second, the trial judge seemed to accept that while Boutilier had attempted carpentry work during this period, he was unable to continue to work and the attempts failed.

[61] Third, the trial judge appears to have accepted the evidence of the defence doctor, Dr. Gross, who saw Boutilier in June of 1998, shortly after the second anniversary of the accident. Dr. Gross was of the opinion that, at the time of his examination, Boutilier could be judged fit for return to his usual duties and that there was no physical impediment to him returning to his previous work as a carpenter.

[62] In other words, the trial judge's selection of the two year period seems to be based on the physiotherapy and medication that were ongoing during that two year period, the failed attempts to return to work and on his acceptance that by June of 1998, Boutilier was, as judged by Dr. Gross, fit to return to work as a carpenter.

[63] The remaining question is whether the trial judge's misapprehension as to the date of the videos was central to this conclusion. Examining his reasons as a whole and having reviewed the surveillance evidence in the record, I do not think that it was. The surveillance evidence, as summarized in the record, is not particularly compelling. It adds little, if anything, to the picture of Boutilier's activities during the relevant period which the trial judge clearly had and expressed in his reasons. The trial judge was aware of and accepted the evidence relating to Boutilier's dancing in August of 1996 and of his attempts, which he accepted as failed attempts, to return to work during the two year period which he allowed for loss of wages. As against that, the judge had the evidence of physiotherapy and medication ongoing during this period and the fact that even Dr. Gross's defence medical report did not suggest this course of treatment was unnecessary. I interpret the judge's remark that whether Boutilier's injuries prevented him from returning to work as a carpenter or made it necessary for him to take retraining was debatable, to be consistent with his finding that at least by early June of 1998 there was no physical impediment to him returning to his previous work as a carpenter.

[64] While the errors in the trial judge's reasons are, of course, regrettable, I am satisfied having reviewed the reasons in their entirety in the light of the record before him that he did not err in awarding two years loss of wages at the rate of $7,190.00 per annum.

[65] I would, accordingly, not give effect to the arguments advanced on the notice of contention.

IV. DISPOSITION:

[66] The appeal with respect to the apportionment of liability is dismissed. The appeal respecting the deduction of benefits that would have been available under Schedule "B" had Boutilier been insured is allowed and the deduction of $21,579.90 from the damages otherwise payable is set aside. The respondents are also liable to pay pre-judgment interest on that amount pursuant to the trial judge's order that interest at the rate of 6% would be payable on other claims at the agreed rate of 6% from the date of loss or payment.

[67] In light of this conclusion, the award of costs to Boutilier at trial may require adjustment due to his significantly greater recovery on appeal. However, as

it appears there were offers of settlement which were considered by the trial judge in fixing the costs recoverable, and these offers are not before us, it would not be appropriate to set an amount for trial costs without having the submissions of the parties. I would, therefore, direct that the parties confer with a view to reaching agreement on an appropriate amount for trial costs in light of the results of the appeal and, absent such agreement, to make written submissions to the Court within thirty days of today's date as to the appropriate revision, if any, of trial costs in light of this decision.

[68] Costs of the appeal will be awarded to Boutilier only fixed at 40% of the costs recoverable by Boutilier at trial plus disbursements on appeal.

[69] Signing of the order for judgment should be withheld pending resolution of the costs issue.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Hallett, J.A.