LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

File Number: 18-000268/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Naresh Persaud

Appellant

and

Coseco General Insurance Company

Respondent

AMENDED DECISION

ADJUDICATOR: **Kate Grieves**

APPEARANCES:

For the Applicant: Luis Quail, Counsel

Ryan Naimark, Counsel

For the Respondent: Gabriel Flatt, Counsel

HEARD: **In Person on October 2, 3, 4, and 12, 2018**

OVERVIEW

[1] The applicant was involved in a single-vehicle accident on October 24, 2017. More specifically, he was a passenger in a vehicle owned by his father, P.P., and operated by N.A. N.A. lost control of the vehicle, which left the roadway, flipped multiple times, and crashed at the side of the road. Police and EMS attended, and the occupants were extricated from the vehicle. The applicant lost consciousness and woke up in hospital. He sustained multiple, serious injuries as a result of the accident, including a fractured L2 vertebrae, collapsed lung, and separated shoulder. He underwent spinal decompression and fusion surgery before being discharged home.

[2] Following the accident, the applicant sought benefits from the respondent pursuant to Ontario Regulation 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule"*).

[3] A dispute arose with respect to whether the vehicle's owner consented to N.A. driving the vehicle and, if not, whether the applicant's claims were excluded under the *Schedule*. The applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") to resolve this dispute.

ISSUES

[4] The applicant claims income replacement benefits (IRBs) at the rate of $389.20 per week, as well as visitor expenses totalling $554.22 incurred by his family members while visiting him in hospital. The parties agree that, in the event the exclusion in s. 31(1)(c) of the *Schedule*, discussed below, doesn't apply, both benefits are payable.

[5] Therefore, the issues to be decided by the Tribunal are:

i. Whether the applicant knew or ought reasonably to have known that, at the time of the accident, the driver was operating the automobile without the owner's consent?

ii. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

iii. Is either party entitled to its costs of the proceeding?

RESULT

[6] I find that the exclusion does not apply. Therefore, the respondent shall pay the disputed benefits forthwith, with interest.

[7] The applicant is not entitled to an award pursuant to Regulation 664.

[8] Neither party is entitled to their costs.

ANALYSIS

[9] Section 31 of the *Schedule* sets out various exclusion clauses, circumstances in which certain accident benefits are not payable. Most of these exclusions apply only to the operator of a vehicle. They include circumstances such as when a driver operates a vehicle without insurance or a valid driver's license, or when a person engages in a criminal act at the time of the accident for which they are convicted of a criminal offence.

[10] The only exclusion which applies specifically to an occupant of a vehicle is s. 31(1)(c), which reads as follows:

> The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23…in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent.

[11] Therefore, I must decide the following:

i. Was the driver operating the automobile without the owner's consent? If yes, then,

ii. Did the applicant know or ought reasonably to have known that the vehicle was being operated without the owner's consent?

[12] The parties agree that it is the insurer's burden to prove that the exclusion applies. The applicant doesn't have to prove that there *was* consent; rather, the respondent must prove lack of consent. The insurer's task is to convince me -- on a balance of probabilities -- that the applicant ought reasonably to have known that N.A. did not have P.P.'s consent of to operate the vehicle that night.

[13] It may be intuitive to suggest that the owner would not have permitted a drunk, unlicensed driver to operate his vehicle. However, the hearing requires proof

and evidence of consent not intuition. Like the commission held in *Jacobs*, I cannot find that the applicant ought to have known that the driver did not have permission to drive the car simply because she had been drinking.[1] The issue here is not the illegality of operating a vehicle while unlicensed or impaired by alcohol.

[14] In conducting my analysis, I am mindful of the fact that the law is clear that exclusions must be interpreted narrowly and in such a way, where possible, to allow coverage, not deny it. Any benefit of the doubt is to be given to the insured.[2]

[15] Based on the evidence before me, I find that, although the owner's vehicle, P.P. did not explicitly consent to N.A. driving the vehicle, she drove with P.P.'s implied consent. At any rate, even if N.A. had been driving the vehicle without P.P.'s consent, the applicant did not know and ought not reasonably to have known that the vehicle was being driven without consent. Therefore, the exclusion does not apply and the applicant is entitled to the disputed benefits.

1. Factual Background

[16] The determination of the foregoing is driven by a factual analysis. The facts from the date of loss are largely not in dispute, with some key exceptions discussed below.

(i) Evidence of the Applicant

[17] The applicant was 22-years old on the date of the accident. He lived at home with his parents and his sister. The applicant's father, P.P., is the owner of the 2017 Honda Accord involved in the accident and insured by the respondent.

[18] The applicant testified that if a key was at home, he was free to drive it. The applicant testified that, before the accident, he and P.P. had discussed whether he was allowed to let other people drive the Honda. The applicant stated that P.P. gave him full discretion use the vehicle, provided he was home by 11:00 p.m. According to the applicant, P.P. was aware that the applicant had allowed his friends to drive the vehicle on other occasions. P.P. did not know exactly who had driven the vehicle before. The applicant believed that, as long as he used his discretion, P.P. allowed him to permit others to drive, such as when he was tired, or a friend was being the designated driver. Although it was never

[1] *Jacobs v Economical Mutual Insurance Co*., 1994 CarswellOnt 5575 (Ont. Insurance Comm.), OIC A-004394, June 16, 1994.
[2] *Monks v ING Insurance Co of Canada* 2008 ONCA 269.

discussed, the applicant testified that he did not think P.P. would have agreed to let an unlicensed driver operate his vehicle.

[19] On the date of loss, the applicant borrowed his father's car to go to work. The applicant called P.P. later in the day to say he was going out after work with a friend. P.P. agreed that he could take the car, and told the applicant to be home by 11:00. The applicant did not tell P.P. who he was going out with, and P.P. never asked.

[20] After work, the applicant purchased a bottle of whiskey and drove to pick up N.A., then 18-years old, at her parent's home. The applicant and N.A. previously dated on-and-off over a two-year period for a total of about 4-to-5 months. The applicant testified that he hadn't seen N.A. for about 6-to-8 months prior to the accident.

[21] During the 4 or 5 months that the applicant and N.A. dated, she never went to his house or met his parents. The applicant testified that he never had the impression that his parents didn't like N.A., and hadn't introduced her because the relationship was on and off. The applicant never told his parents who he was going out with on the date of the accident. He told his dad he was going out with a friend.

[22] The applicant and N.A. disagree about a telephone call that took place before the accident. The applicant testified that, on the date of the accident, his mother called while he was parked outside N.A.'s house, waiting for her. According to the applicant, his mother did not ask who he was with, and the applicant didn't tell her because she didn't ask. She only called to ask what time he would be home.

[23] The applicant testified that he picked N.A. up from her parents' house and drove to a hiking area near the beach. The applicant and N.A. first went to the beach area and drank a little whisky and went for a hike for approximately two hours. They drove to a second area near a lighthouse where they talked for an hour and drank the rest of the bottle. The applicant testified that he drank most of the bottle, that N.A. had "a few sips". They then wanted to get something to eat. The applicant got into the driver's seat, and N.A. was in the passenger seat. The applicant testified that N.A. could see that he was very intoxicated, so she asked if she could drive, and the applicant agreed. N.A. took over driving with the applicant in the front passenger seat. Within minutes of departing the area, the accident occurred.

[24] He testified that he was under the impression that N.A. had her driver's license. The applicant assumed that she had gotten her license, because the last time he saw her, approximately 6-to-8 months before, she said she was working on getting her license. He assumed she must have gotten it during that time, since when they were hiking, N.A. told him that she had recently started "doing a little driving".

[25] The applicant's testimony at an Examination Under Oath was consistent with his testimony at the hearing. He testified that he thought N.A. had a driver's license at the time of the accident because N.A. had advised him that she had been driving recently since he last saw her, several months prior.

(ii) N.A.'s Evidence

[26] N.A. also testified at the hearing. Her evidence concerning the events on the date of the accident was largely consistent with the applicant's. She confirmed that she and the applicant were dating on-and-off for about two years. N.A. testified that she was aware that the applicant had wide discretion to use the vehicle.

[27] N.A. testified that she never met the applicant's parents, and had only a brief encounter with them at the party where she met the applicant. At the party, the applicant's cousins reportedly disapproved of N.A. and the way she was acting at the party. The applicant and N.A. often fought about it later, and the applicant would say that she was "not a good Indian girl". According to N.A., the applicant led her to believe that his parents didn't like her because he would lie to them about who he was with when he was with her.

[28] According to N.A., the applicant's mother called after she was in the car when he came to pick her up. N.A. testified that the applicant told his mother that he was hanging out with friends in Brampton. The applicant told N.A. that he didn't want his mother to know that he was with her because his parents didn't have a "good outlook" about her.

[29] According to N.A., when they were getting ready to leave the hiking area, she asked the applicant if he was fine to drive because he was slurring his words, and it was he who asked if she wanted to drive instead, and she agreed.

[30] N.A. testified that the applicant knew she didn't have a driver's license, because she explicitly told him on the date of the accident that she needed to get her G1, and that the applicant had offered to teach her to drive.

[31] N.A. provided a statement to a tort adjuster for Coseco on February 27, 2018., N.A. stated that she had discussed getting her license “in the past” with the applicant and applicant’s cousin, whom he had taught to drive. In this statement, N.A. makes no mention of discussing her driver’s license status with the applicant on the date of the accident.

[32] N.A. was confronted with this inconsistency at the hearing. There is no mention in the statement that she had discussed not having a license with the applicant, purportedly because she only answered the questions that were asked of her and she was very nervous at the time. Understandably, N.A. would have found that situation stressful – it was the first time she was questioned about the accident and was facing not only criminal charges but, as a result, the possibility of deportation.

[33] Following the accident, police laid criminal charges against N.A., including impaired driving causing bodily harm. The charges were reduced based on a plea deal, and she was convicted of the lesser charge of reckless driving causing harm. She was not over the legal limit and the impaired driving charges were dropped.

(iii) Evidence of the Owner

[34] P.P. testified at the hearing that the applicant was permitted to use the Honda whenever it was available. There were no restrictions on the applicant’s use of it other than what time he had to be home, which was usually 11:00 p.m. P.P. testified that the applicant could let anyone drive it, because he trusted the applicant to use his discretion. P.P. testified that he knew one of the applicant’s friends who had driven it. He knew that others had driven it, but did not know their names. P.P. testified that he told the applicant that if he, N.P., went out and was drinking, then someone else should drive the car.

[35] P.P. testified that he had never spoken to N.A. before or met her formally. He had seen her at the party where the applicant and N.A. initially met. P.P. had never discussed N.A with his son. P.P. testified that the applicant was an adult, and P.P. trusted him. P.P. emphasized that he told the applicant to use his judgment, but they did not discuss his son’s personal life or friends.

[36] P.P. testified that, on the date of the accident, the applicant called sometime in the afternoon and said he wanted to take the Honda and go out with friends. P.P. agreed and told him to be home by 11:00. He never asked who the applicant was going out with. The applicant never told P.P. that he was going to let N.A. drive the car. P.P. anticipated that the applicant would use the vehicle

responsibly. When asked whether P.P. had told the applicant his friends could drive the vehicle after they were drinking, P.P. testified "of course not" and "[o]nly that [N.P.] he could use his discretion". P.P. never told the applicant that unlicensed friends could drive -- it was never discussed. P.P. expected the applicant to use his judgment. P.P. testified that he had not expected that the applicant would let an intoxicated, unlicensed person drive his vehicle.

[37] Likewise, P.P. was asked whether he would let the applicant allow an intoxicated person to drive the vehicle. Again, P.P. responded that he was willing to let the applicant use his judgment to determine who could drive the vehicle.

2. Consent of the Owner

[38] It is the respondent's burden to prove that there was a lack of consent. Once proven, the insurer must go on to establish that the applicant knew or ought reasonably to have known that the driver was driving the car without the consent of the owner.

[39] In deciding the consent issue, I had concerns about the underlying interests of various witnesses and how this would affect the reliability of their evidence. The relationship between the applicant and N.A. is acrimonious, given that he is now suing her and, in the absence of coverage from an insurer, she has to pay for the resulting legal expenses herself. For his part, the applicant's interest in the outcome is obvious: if the Tribunal finds there is consent, he is entitled to benefits. For her part, even though she was called to testify by the respondent, if the Tribunal were to find in the applicant's favour, it would reduce N.A.'s exposure to the applicant's lawsuit. It seems that none of the witnesses who testified were entirely disinterested.

[40] The case law with respect to consent in the context of accident benefits is limited. Most of the cases cited in support of the applicant's position are cases considering the *Highway Traffic Act*'s definition of consent. However, those cases are about *possession* of the vehicle, which is considerably more flexible than consent to *operate*.[3] For example, if the person to whom the vehicle was lent continues to be in "possession" of the car, the court seems to disregard whether other conditions imposed by the owner were violated – such as allowing others to drive.

[3] *Thompson v Bourchier* [1933] OR 525; and *Berge v Langlois* (1984) 6 DLR (4th) 766 (Ont CA).

[41] The majority of the cases the respondent cites are from British Columbia. While the *Godsman*[4] decision appears to be helpful at first glance (after all, it deals with liability of an owner who loans a vehicle to someone who, in turn, loans it to a third party), Ontario courts have made it clear that this case, "along with all other cases emanating from British Columbia, must be viewed with considerable caution in view of the fact that under the applicable British Columbia Legislation the onus is on the driver to demonstrate consent rather than on the owner to negative it".[5]

[42] In *Godsman*, the trial judge considered whether the test for consent was objective or subjective, ultimately deciding it was subjective. He considered the informality and ease with which the owner allowed others to use his vehicles, the nature of the relationship between the owner and the original borrower, the trust the owner had in the borrower's judgement, and applied what he referred to as the "expectation and willingness" test: the owner of a vehicle should be held to impliedly consent where the person who borrows the vehicle with express consent of the owner, and the circumstances clearly show that the owner knew that it was acquired with the expectation and willingness on his part that it would be driven by another person at the will of the person to whom he gave possession.

[43] On appeal, the decision was set aside because the trial judge did not address the question of to whom and under what circumstances the owner's expectation and willingness extended: specifically, whether it could be said that there was consent for the motorcycle to be loaned under the circumstances that it was loaned to Mr. Peck. The Court of Appeal held that the owner would not have expected the borrower to lend the vehicle to the third party who did not have the proper license when one considers' his testimony that he trusted the borrower's judgment.

Express Consent

[44] P.P. never told the applicant that his friends could drive if they had been drinking. He testified that he was willing to let the applicant use his judgment to determine who could drive. He never told the applicant that unlicensed friends could drive – the conversation never took place. PP testified that before the accident, he never would have expected that the applicant would let an intoxicated, unlicensed person drive his vehicle.

[4] *Godsman v Peck* [1997] BCJ No 377.
[5] *Crangle v Kelsey* 2003 CanLII 13678 (ON SC).

[45] There is clearly a lack of express consent on the part of N.A. to drive P.P.'s vehicle -- he had never met N.A. and never discussed her driving the car with the applicant. Similar to *R.P. and Intact*, the owner said that he would not have consented.[6]

[46] I find as a fact that P.P. would not have expressly consented to letting N.A. drive had he known that she was unlicensed and had been drinking that night. In fact, P.P. testified at the hearing that he would not have consented. However, this was with the benefit of hindsight. At the time of the accident, P.P. permitted the applicant to allow others to drive. There were no restrictions in place. P.P.'s only instructions to the applicant were to use his discretion when letting others drive, and usually to be home by 11:00.

Implied Consent

[47] There is a line of cases involving the test for determining implied consent as set out by the Supreme Court of Canada.[7] I find these tests to be the appropriate analysis of implied consent, as opposed to the reasoning in *Godsman,* given that Ontario courts have cautioned against its application to Ontario cases.

[48] That test is whether the operator believed that he or she had implied consent and whether that belief was justified in looking at all of the circumstances. Does the evidence support the conclusion that, "at the time the motor vehicle was loaned to the original driver, the owner granted possession of it under circumstances that clearly show that it was acquired with both the willingness and expectation on the owner's part that it would be driven by a third party"?[8]

[49] I find that in this case, the owner's consent was implicit because the applicant was given broad permission to allow others to drive, without any restrictions imposed by the owner.

[50] One of the few accident benefits cases which consider this exclusion clause is *Branch v Dominion*.[9] Mr. Branch was a passenger in a tractor trailer owned by Mr. Spindler and being driven by Mr. Martini. Mr. Branch and Mr. Martini worked for Mr. Spindler. Neither Mr. Martini nor Mr. Branch had the license required to operate the tractor trailer. They mistakenly believed they could operate the vehicle with their ordinary "G" license. Arbitrator Palmer emphasized that it was not a question of illegality of operation of the motor

[6] FSCO A10-003275, April 5, 2012.
[7] *Palsky v. Humphrey* [1964] SCR 580 (SCC); *Hartley v Saunders* 33 DLR (2d) (BCCA).
[8] *Palsky,* supra.
[9] *Branch v Dominion* 1995 CarswellOnt 4934 (Ont. Insurance Comm.), OIC A-010681, May 10, 1995.

vehicle but whether or not the owner consented to the employees' operation of the vehicle. Mr. Spindler was aware that they had been driving the vehicle in the industrial park, but Arbitrator Palmer found that he had not considered the possibility that his employees would take the vehicle onto the highway. The Arbitrator found that by giving the employees the keys to operate the vehicle, without specific instructions or restrictions, and by being present during the operation of the tractor by two of the employees, the driver had the owner's implied consent to operate the vehicle. Therefore, the commission held that it was reasonable for the passenger to assume that the driver was operating the tractor with the owner's consent.

[51] Consent may be implied from a course of conduct or circumstances known to the owner, illustrated in the Supreme Court's decision *Deakins v Aarsen.*[10] The Court held that an owner who had lent her car to her son to use whenever he wanted it had not discharged her onus under the *Highway Traffic Act* to prove that, when the son had lent the car to his girlfriend, he had done so without the owner's consent.

[52] The respondent relies on a BC Court of Appeal case, *Green v Pelley*, which considered whether Pelley had the express or implied consent of the owner. He was operating a truck owned by Mr. McIvor, who had given possession of the vehicle to his daughter, who in turn allowed Mr. Pelley to drive while she was in the truck. The court discussed the law of express and implied consent. This case can be distinguished because, unlike the present circumstances, the court held that there was no evidence that the owner ever allowed his daughter to lend the car to others, and no evidence that he was aware of others having previously driven the vehicle.

[53] In *Duggan v Travers*, Osler J. stated with respect to implied consent: "a very important consideration in circumstances such as these is the reasonable expectation of the owner when he or she gives someone else possession and permission to drive".[11]

[54] Arbitrator Wilson considered a similar exclusion with respect to consent to operation in *R.P. v Intact.* He held that consent can be either explicit or implicit and implied, and that "a pattern of consensual use for example, might suggest that the use on the night of the accident was also consensual".[12]

[10] [1971] SCR 609.
[11] [1989] OJ No 1855.
[12] *RP v Intact* 2012 CarswellOnt 5133, FSCO A10-003275 April 5, 2012.

[55] In *Ferguson v. Royal Insurance*, the arbitrator, having found that the plaintiff had given a third-party carte blanche the right to use his car, held that it was not open to the plaintiff to withdraw that consent because he did not fully appreciate what he was doing.[13]

[56] *Price v Liberty Mutual* is one of the few accident benefits cases which consider this exclusion clause, however it is not particularly helpful because the facts are significantly different. Ownership of the vehicle was disputed, and Arbitrator Allen concluded that the driver's father was the owner. The owner's son was driving at the time of the accident, without consent, and the question was whether the passenger knew that the son was driving without consent. After considering the evidence, Arbitrator Allen concluded that Liberty Mutual had failed to establish that Mr. Price knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent. Therefore, he was entitled to pursue his claim for IRBs.[14]

[57] A user in possession of the vehicle who is not the legal owner, may not, in the presence of a specific prohibition to do so, grant another the legal permission to drive the car in such a way as to bind the legal owner.[15] In the subject case, however, there was no prohibition to permit others to drive, but rather there was express permission to allow others to drive.

[58] I find that the owner's consent was implicit because the applicant was given broad permission to allow others to drive, without any restrictions imposed by P.P. The owner expressed a willingness and expectation that when his son took the car, that others would operate it on occasion. The applicant had allowed other friends to drive in the past, which P.P. was aware of, and P.P. took no issue with it. He only knew the name of one of the applicant's friends who had driven the vehicle, but was aware that others had also driven it. It was reasonable to expect that the applicant would continue to allow his friends to drive the vehicle in future, per P.P.'s instructions that if the applicant was tired or had been drinking, that someone else should drive.

3. What did the applicant know or ought to have known?

[59] Even if I am mistaken with respect to my finding that N.A. had implied consent of the owner, the respondent has not discharged its onus of establishing that the exclusion applies. I would still find the applicant reasonably believed that

[13] [1989] OJ No 160.
[14] *Price v Liberty Mutual* 1998 CarswellOnt 6335 (Ont. Insurance Comm.), OIC A98-000053, November 27, 1998.
[15] *Collins v Wright* [1988] OJ no. 389, approved by C. of A. in [1989] OJ No 2416 (Ont CA).

N.A. had consent to drive the car that night based on P.P.'s trust that he, N.P., use his discretion.

[60] In *Jacobs,* Arbitrator Palmer discussed this exclusion (17(3)(b) in that version of the *Schedule*) and noted:

> …the words "reasonably ought to have known" become the focus. The use of the word "reasonably" implies an objective standard. The words "ought…to have known" are distinguished from the word "knew", which presumes a purely subjective finding.
>
> In other words, is the test what an ordinary, rational, sensible and sober person in Peter Jacobs' shoes at the time of the accident "ought reasonably to have known" or is the test what Peter Jacobs, the grossly intoxicated passenger, "ought reasonably to have known"?

Arbitrator Palmer concluded:

> …The use of the word "reasonably" in the phrase "ought reasonably to have known" of section 17(3)(b) of the *Schedule* means that an individualized inquiry is called for, but only to the extent of the exercise of reason by an ordinary, rational person in the situation of the Applicant. The evidence must convince the arbitrator, at least on a balance of probabilities, that an ordinary person in Peter Jacobs' situation that night should have known that [the driver] was driving the Grand Am…without consent of [the owner].

[61] I find this decision persuasive in its approach to the appropriate test for this exclusion. I must consider whether it is more probable than not that an ordinary person in the applicant's situation on the date of the accident believed that N.A. was operating the vehicle with the consent of the owner?

[62] The parties spent a lot of time disputing whether the applicant knew that N.A. was unlicensed on the date of the accident, a fact which is impossible to prove. It is well established that any benefit of the doubt is to be given to the insured, not insurer.[16] I accept that the applicant believed that N.A. had her driver's license. His testimony at the Examination Under Oath and at the hearing was consistent that he believed she had her license. The log notes indicate that during a statement taken just a few days after the MVA, the applicant advised that he believed that N.A. had a driver's license. N.A.'s statement to the insurer

[16] *Monks v ING Insurance Co of Canada* 2008 ONCA 269.

is inconsistent with the evidence she gave at the hearing. The statement indicates that she had discussed not having her license with the applicant “in the past”, while at the hearing she says that they discussed on the day of the accident that she still needed to get her license. Therefore, I find the applicant’s version more credible. I find that, on the day of the accident, the applicant believed that N.A. had her driver’s license.

[63] The parties also disputed whether P.P. approved of the applicant’s relationship with N.A. – the implication being that the applicant knew his father didn’t like or approve of N.A., and therefore would not have consented to her driving his car. However, the evidence is consistent that P.P. and the applicant did not discuss his relationships, and that P.P. trusted the applicant to use his discretion to let friends drive. Accordingly, I do not believe it could reasonably be said the applicant ought to have been aware that his father did not consent to N.A. operating the Honda.

[64] I also find that the applicant reasonably believed he had the authority to grant permission to N.A. to drive. Even N.A.’s evidence supports that she also believed that the applicant had the authority to grant her permission to drive. She testified that she was aware of no restrictions on the vehicle and knew that the applicant had wide discretion to use it.

[65] As instructed by P.P., the applicant used his discretion – albeit poorly perhaps – to allow his friend to drive the vehicle. I find that a person in the applicant’s shoes – being mindful of his level of intoxication, the fact that the applicant was allowed to let his friends drive, and had done so in the past, and given his (mistaken) belief that N.A. had her driver’s license – would reasonably believe that N.A. was operating the vehicle with consent.

[66] With the benefit of hindsight and a full appreciation of the facts, it is easy to understand why P.P. testified that he would not have consented to N.A. driving the vehicle -- she was unlicensed and had been drinking. However, it would be unreasonable for the applicant to have known at the time of the accident that his father would not have consented this particular friend in these circumstances to drive the vehicle. Giving the applicant the benefit of the doubt, he believed N.A. had a driver’s license. They had both been drinking, but the parties agree he was much more intoxicated. This is supported by the fact that the DUI charges were later dropped against N.A. because she blew under the legal limit. The applicant was given unfettered permission by his father to let others drive – the only restriction being to use his discretion. Given the applicant’s history of permitting friends to drive at his father’s instruction, it

would not be unreasonable for a young man in the applicant's circumstances to believe that N.A. was operating the vehicle with consent.

[67] Even if the applicant had misapprehended his authority, his belief that by allowing N.A. to drive he was doing so with consent of the owner was a reasonable one. The applicant's pattern of being allowed to let other people drive fails to support the respondent's assertion that the applicant should have known that his friend did not have consent to drive.

[68] As a result, I find that the respondent has not met its burden of proving that, at the time of the accident, the applicant knew or ought reasonably to have known that the owner did not consent to N.A. operating the vehicle.

INTEREST

[69] I find that the applicant is entitled to interest in accordance with the *Schedule*, with respect to the incurred visitor's expenses, and income replacement benefits to date.

AWARD PURSUANT TO REGULATION 664

[70] Section 10 of Ontario Regulation 664, R.R.O. 1990 states that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal may award a lump sum of up to 50% of the amount to which the person was entitled to at the time of the award with interest. It is commonly referred to as a "special award" as the term was used in a prior version of the regulation.

[71] The applicant asks me to make an award in this case. If I am to make an award for the failure to pay the benefits, I must find that the respondent not only withheld or delayed that payment, but did so unreasonably.

[72] The case law has established that an award should be granted only where there was unreasonable behaviour by an insurer in withholding or delaying payments, which can be seen as excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

[73] The purpose of a special award is to punish an insurer for misconduct and to deter it and others from future similar actions.[17] An insurer is not to be held to a standard of perfection, but rather, it should be held to a standard of reasonableness. This may not have been a perfect investigation, but having

[17] *Persofsky v Liberty Mutual Insurance Company* [2003] OFSCID No 11 (Director Draper).

considered all of the submissions I find that the error is not grave enough to support a special award.

COSTS

[74] The Tribunal's authority to award costs in a hearing is set out in Rule 19 of the *Common Rules of Practice and Procedure* (the "*Rules*"). Rule 19.1 permits me to award costs where a party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith. The request may be made in writing or orally at a hearing at any time before the decision is released. The impugned behaviour must occur during the proceeding.

[75] Pursuant to Rule 19.5, in deciding whether to order costs, and to determine the amount, the Tribunal must consider all relevant factors including: the seriousness of the misconduct; whether the conduct was in breach of a direction or order issued by the Tribunal; whether the party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient and effective process; prejudice to other parties; and the potential impact a costs award would have on individuals accessing the Tribunal's system.

[76] I decline to award costs to either party. Considering all the relevant factors and the parties' submissions, I find that neither party's conduct in the proceeding was frivolous, vexatious, or in bad faith.

ORDER

[77] Having considered the evidence and the submissions of the parties, for the reasons set out above, I order:

1) The exclusion pursuant to s. 31 (1) (c) does not apply. The applicant is not disqualified from receiving the income replacement benefits or the visitor's expenses. The respondent shall pay the disputed benefits forthwith, with interest.

2) The applicant is not entitled to an award pursuant to Regulation 664.

3) Neither party is entitled to their costs.

Released: August 9, 2019

Kate Grieves
Adjudicator