

Determination

Case number: 517683

18 December 2018

Determination overview

1.1 Complaint

The complainant held a motor vehicle insurance policy with the financial firm (insurer) and lodged a claim after an accident on 25 June 2017. He says he lost control of his vehicle after he was distracted by a light and collided into a light pole and tree.

The insurer denied the claim saying the complainant has provided false and misleading statements and that the claim is fraudulent. In the alternative the insurer says the collision occurred because of the complainant's driving and relies upon the exclusion related to intentional or reckless acts.

1.2 Issues and key findings

Has the complainant established a claim within the terms of the policy?

The complainant has established a claim within the terms of the policy. The policy covers accidental loss or damage caused by an incident including collision and impact. Incident is defined as an occurrence that you do not intend or expect. I am satisfied the complainant did not intend or expect the collision with the light pole/tree.

Has the insurer established the application of an exclusion?

I am not satisfied that the insurer has established the application of an exclusion within the terms of the policy. I am not satisfied the insurer has established the complainant deliberately provided false and misleading information or the accident occurred due to an intentional or reckless act.

1.3 Determination

This determination is in favour of the complainant.

The insurer is to settle the complainant's claim in accordance with the terms and conditions of the policy for \$102,800. No interest is payable on the cash settlement in view of the inconsistent statements provided by the complainant.

The insurer is to remove from its records and the records of any organisation with whom it has communicated any reference to fraud on behalf of the complainant.

Reasons for determination

There has been a full exchange of material between the parties and each party has had the opportunity of addressing the issues that arise from the information exchanged.

In addition, I interviewed with the complainant assisted by an interpreter and the insurer on 12 December 2018. Both parties were given a further opportunity of clarifying the issues in dispute.

This determination follows consideration of all the information and is based on what is fair in the circumstances, having regard to the relevant legal principles, terms of the policy, good industry practice including codes of practice and prior determinations where applicable.

2.1 Has the complainant established a claim under the policy?

The complainant has the onus to establish a claim within the terms of the policy

The policy insures the complainant's vehicle, a 2012 BMW M5F10 for an agreed value of \$106,000 subject to a flexible excess of \$3,200.

The policy covers accidental loss or damage caused by an incident during the period of insurance including a collision or impact. Whilst the policy does not define accidental damage, it defines an incident as a single occurrence that you did not intend or expect.

The onus is therefore on the complainant to establish that the collision on 25 June 2017 is unintended and unexpected.

Circumstances of the loss

The following facts regarding the accident are not in dispute:

- the complainant was driving the vehicle with two passengers on 25 June 2017
- at around 12.55pm, the vehicle was involved in a single vehicle accident on D Road in Millers Point
- the vehicle collided with a tree and a lamp
- the accident occurred in a 40km/h speed zone
- the vehicle was being driven at approximately 60km/h at the time of the collision
- a local resident (BH) heard the collision and came to see if the complainant was okay before calling the police.
- the police were called at 1.05am and arrived at the scene at 1.24am
- the police observed the vehicle wedged between a rock wall and a tree on the western (left) kerb. The lamp post had snapped in two and was obstructing the road

- CCTV footage confirms the collision occurred when the vehicle lost control
- there is no evidence to suggest that the vehicle was deliberately driven into the pole or that the collision was in any way intended or expected
- Forensic evidence suggests the collision occurred as the driver lost control of the vehicle due to excessive speed.

Complainant has established a claim within terms of the policy

I am satisfied in the circumstances the complainant has established a claim that falls within the terms of the policy.

Whilst the collision may have been caused by excessive speed, I accept the collision was unintended and unexpected.

2.2 Has the insurer established the application of an exclusion under the terms of the policy?

The onus is on the insurer to establish exclusion applies

The insurer has alleged that the complainant's claim is fraudulent and the complainant has provided false and misleading statements as to the circumstances of the collision. Alternatively, it says the collision was caused by a reckless act which is excluded from cover under the terms of the policy.

An allegation of fraud is a serious allegation that can have a significant impact on a person's ability to obtain insurance and in some circumstances finance. It is not an allegation that should be made lightly and where made, requires strong evidence to support the allegation. Normally an insurer would be required to provide evidence as to motive, opportunity, character and credibility as well as forensic information to support such an allegation.

Police statements inconsistent with complainant's collision description

The police took statements from BH and the complainant at the accident scene.

The passengers declined to give statements at the scene due to language difficulties. They were asked to attend a police station later to provide a statement with the assistance of an interpreter.

BH told the police that he was sleeping in his lounge room when he was 'awoken by a loud screeching noise which went on for between five and ten seconds' and was followed by a loud bang.

He says he went outside and, after confirming that the complainant was okay, called the police. He says the complainant told him he was driving at around 60-70km/h when his 'wheel must have locked up' and he slid into a pole.

With respect to BH's comments, the complainant told the police that the 'front wheel was popped' but said he was not sure whether that was 'from the gutter or tree'. When asked if there was a loud screeching noise before the collision, the complainant said there was 'nothing'.

The complainant told the police that:

- he was driving between 50-60km/h when an oncoming black vehicle moved into his lane, its headlights beaming in his eyes
- the other vehicle was approximately 20 metres away when he first noticed it
- the front driver's side of the other car may have collided with the right rear side of his vehicle
- he veered out of the way to avoid the other vehicle, lost control then hit a tree and a lamp post on the right rear side before coming to a complete stop
- the driver of the other vehicle left the accident scene without stopping or providing his details.

One of the passengers (MM) provided a translated statement at the police station four days after the accident. MM said that another driver had entered the complainant's lane and the 'car slid'. His account of the accident is consistent with the account which the complainant provided to the police.

CCTV footage does not show a second vehicle

The police obtained CCTV footage of the events leading up to the accident. There are two CCTV videos. One of those videos was recorded from a camera facing south (Camera 1) and the other was recorded from a camera facing north (Camera 2).

The footage from Camera 1 commences at time stamp 57:27 and ends at time stamp 57:54. At 57:46, the vehicle can be seen negotiating a right-hand curve onto Dalgety Road. At 57:54, the footage darkens following the vehicle's impact with the lamp post (which damaged the post and extinguished the lamp). The vehicle remains within its lane throughout the recording.

The footage from Camera 2 commences at time stamp 57:48. At 57:52 the vehicle can be seen impacting the tree, and then the lamp post. At 57:53 the street lamp is extinguished. At 57:55, the lamp post falls onto the road.

The CCTV footage shows no other vehicles passing into or through the accident area from 57.46 to 57.55. The footage does not show exactly when the complainant lost control. The vehicle appears to be under control in the first video and flashes into view out of control in the second video.

Complainant charged by the police

The complainant was charged by the police with negligent driving with contributing factors being speed. According to the police officer the CCTV footage clearly depicted a single motor vehicle accident.

There is no information to indicate the collision resulted from avoiding another vehicle travelling in the other direction. The complainant simply lost control of his vehicle, mounted the kerb and collided heavily with the light pole and tree.

The complainant was not under the influence of drugs or alcohol at the time of the collision. There is no suggestion that the complainant misled the police as to the speed he was travelling. He has consistently stated he was travelling at approximately 50-60km/h in a 40km/h zone.

Complainant's statements inconsistent

The complainant was interviewed twice by the insurer's investigator.

During the first interview the complainant said that he had just turned at a roundabout and was driving at about 50-60km/h when he saw another vehicle travelling in the opposite direction in the middle of the road. He said that he took evasive action to avoid the other car, then lost control of his vehicle before hitting the tree and the lamp post.

During the second interview he said he was driving at around 50km/h and going through a left corner when a light shone in his face causing him to lose control of the vehicle. He said he thought the light was coming from another vehicle. He did not mention any impact with the other vehicle.

The complainant said that he had been distracted by a light shining in his face but said he did not know where the light was coming from.

The complainant was not assisted by an interpreter during the interviews. He says he made his statement on the belief that the incident occurred as he and his witness had previously stated.

The complainant said he believed the vehicle may have turned left from W Street. He does not believe this vehicle was necessarily picked up in the CCTV footage. All he can say however, is that as he came around the corner he saw a bright light which caused him to lose control.

Forensic report supports the collision occurred as the vehicle lost control

The insurer has provided a report from a forensic accident investigator (FA) dated 24 November 2017.

FA conducted an examination of the collision site, a damage profile analysis upon the vehicle and reviewed the CCTV footage to determine whether the collision occurred in the way the complainant says it did.

I accept the forensic report findings that there was no other vehicle involved in the accident and that the collision occurred when complainant lost control of the vehicle. I note the estimated speed was 63kp/h which is 23kp/h over the relevant speed limit.

The complainant has consistently stated he was travelling at 50-60kp/h so there is no significant difference between the forensic findings and the complainant's statements other than the existence of an unknown second vehicle.

Insurer has not established the complainant intentionally misled the insurer for the purpose of deceiving it into payment of the claim

I accept that there were inconsistencies between the complainant's statements, the forensic information and the CCTV footage. The inconsistencies relate to whether a second vehicle had caused the complainant to lose control of the vehicle.

The complainant's statements were largely provided without the assistance of an interpreter. According to the complainant, he had an honest belief that at the time there was a second vehicle involved. This view was supported by the complainant's friend and witness who also provided a similar statement to the police.

It is possible a person having been involved in a significant collision may not accurately recall the events that have led to the collision. I accept that a person may in some circumstances form an unrealistic view as to the circumstances that have led to a collision. I am not satisfied that this necessarily establishes that a person has deliberately provided false and misleading information, nor am I satisfied in the current complaint that this information has in any way prejudiced the insurer's ability to properly investigate the claim.

As indicated earlier there is no suggestion that the complainant was affected by alcohol or drugs, or that the complainant deliberately staged the collision.

Although the complainant does not admit this, it is possible the statements were designed to deceive the police and avoid any subsequent charges. Considering the complainant's extensive driving history which shows numerous speeding offences and numerous licence suspensions this is a possibility.

If this is the case it would go to the credibility of information provided by the complainant. However, it would not prove on the balance of probabilities that the complainant provided false and misleading statements to deceive the insurer into making payment of the claim. I am not satisfied the insurer has established that the claim is fraudulent.

Insurer has not established that the accident was intentional or due to reckless conduct by the complainant

The insurer says, in the alternative, that the complainant's acts were intentional and reckless.

There is no information available to show the complainant deliberately drove the vehicle into the pole to cause the damage. The CCTV footage shows the complainant losing control. The forensic information supports the view the complainant lost control as he was travelling at an excessive speed through the area. The complainant admits to losing control.

Insofar as the insurer alleges that the complainant's conduct was reckless, the insurer needs to establish that the complainant having recognised the risk of being involved in a collision, deliberately or recklessly courted that risk. The test is not an objective test but is a wholly subjective test.

The complainant admits that he was travelling at an excessive speed for the area. He says he had been directed to this area due to roadworks. He was not familiar with the area and did not appreciate it was a 40kmph zone. No information has been provided to dispute this.

Whilst the complainant's driving history suggests that the complainant was careless and had little regard for speed restrictions, there is no indication that the complainant, as driver, had been involved in accidents of a similar nature.

I accept that the complainant's driving may have been careless if not negligent. This does not however equate to recklessness. This is not sufficient to show the complainant having recognised the risk, deliberately or recklessly without regard to the consequences courted the risk.

The insurer is to meet the complainant's claim

As the complainant has established a claim within the terms of the policy and the insurer has not established the application of a relevant exclusion, then the insurer is to meet the complainant's claim in accordance with the terms and conditions of the policy.

The vehicle has been rendered a total loss. The policy insures the vehicle for \$106,000 less an excess of \$3,200. The insurer is therefore entitled to cash settle the claim in accordance with the terms and conditions of the policy for \$102,800.

I do not propose awarding interest on the cash settlement in view of the initial statements made by the complainant with respect to the circumstances of the cover.

Supporting information

3.1 The determination is made under FOS Terms of Reference

The Australian Financial Complaints Authority (AFCA) has commenced managing disputes previously lodged with Financial Ombudsman Service (FOS).

This determination is made under FOS Terms of Reference but has adopted the following terminology for consistency with AFCA. In this determination the AFCA terms have the same meaning as the FOS terms defined in paragraph 20.1 and Schedule 1, 2 & 3 of the FOS Terms of Reference.

FOS definitions	AFCA term
applicant	complainant
financial services provider	financial firm
dispute	complaint
claim	claim

3.2 Relevant law

Insurance Contracts Act 1984 – Section 56

Fraudulent claims

- (1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.

Briginshaw v Briginshaw [1938] HCA 34 (1938) 60 CLR 336

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences.