

## **The complaint**

Miss B's representative complains on her behalf that Admiral Insurance (Gibraltar) Limited (Admiral) unfairly declined to settle her claim on her motor insurance policy.

References to Miss B, or her representative, will include the other.

## **What happened**

Miss B was involved in an accident whilst driving her car.

When the accident happened the police attended, and Miss B was breathalysed at the roadside. The roadside breath test results showed 41 micrograms of alcohol per 100 millilitres (41mg/100ml).

Miss B was taken to the police station where two further tests were completed which were found to be 31mg/100ml and 29mg/100ml. Because these readings were under the legal limit no further action was taken by the police and she was released without charge.

Miss B made a claim on her motor insurance policy and Admiral declined to settle it. It said it felt on the balance of probabilities that Miss B was over the legal limit of alcohol at the time of the accident and therefore cover was excluded under the terms of her policy.

Miss B's representative said Admiral had failed to establish that Miss B was over the legal limit for alcohol at the time of the accident. They thought it had unfairly declined to settle her claim, so they brought the complaint to our service.

Our Investigator recommended the complaint be upheld. They said Admiral had unfairly declined the claim. They said the roadside test is an indicator of someone being over the limit for alcohol, but it is not an accurate measure. They did not think the roadside test results could be relied upon and said Admiral should consider Miss B's claim further without applying the drink and drugs exclusion.

Because Admiral is unhappy with our Investigator's view the complaint has been brought to me for a decision to be made.

## ***What I provisionally said***

*Admiral used clause 11 in Miss B's motor insurance policy to decline her claim.*

*In the terms and conditions of Miss B's policy it says;*

*"11. Drink and drugs clause*

*If an accident happens while any insured person is driving and:*

- is found to be over the legal limit for alcohol or drugs*
- is driving while unfit through drink or drugs, whether prescribed or otherwise*
- fails to provide a sample of breath, blood or urine when required to do so, without lawful reason.*

*No cover under the policy will be given and instead, liability will be restricted to meeting the obligations as required by Road Traffic Law and we will cancel your policy.”*

*Admiral said it declined to settle Miss B’s claim in this case because it felt on the balance of probabilities, she was over the legal limit of alcohol at the time of the accident. It said based on evidence from the police:*

- *The collision between Miss B’s car and the third-party happened at 17.55pm.*
- *The roadside breath test recorded an alcohol reading of 41mg/100ml This was completed at 18.51pm which is almost one hour after the accident.*
- *The two tests undertaken at the police station recorded alcohol readings of 31mg/100ml and 29mg/100ml. These were completed between 19.54pm and 20.14pm which is approximately two hours after the accident.*

*Admiral said it had considered the roadside sample reading, the readings at the police station and the elapsed time between the accident and the alcohol readings. It estimated that at the time of the incident Miss B’s alcohol level was likely to be approximately 48mg/100ml which is over the legal limit of 35mg/100ml. It said this is because two hours later the evidential breath sample shows her to still be at around 88% of the limit.*

*It said on balance of probabilities, the roadside sample was an accurate reflection of Miss B’s alcohol level at the time, because it was consistent with the results from the sample taken at the police station and in line with known typical alcohol elimination rates over time.*

*Admiral said it was reasonable for it to conclude Miss B was driving over the legal limit at the time of the accident based on this information.*

*I understand that Miss B’s representative has said the police accepted the alcohol breath readings taken at the police station and did not take any further action. He said it was not reasonable for Admiral to base its decision solely on the roadside breath test given the potential for inaccuracy.*

*I am satisfied that Admiral’s burden of proof is the balance of probabilities, which is less than the courts. So it can rely on the drink and drugs clause in the terms and conditions of the policy without a formal finding from the court if it can show that on balance that one of the three bullet points in this clause happened.*

*Based on the evidence, and Admiral’s calculations, it feels like on balance, Miss B was over the legal limit for alcohol at the time of the incident. And I am satisfied that’s a fair and reasonable conclusion based on the evidence provided to me.*

*Therefore, I do not intend to uphold Miss B’s complaint and do not require Admiral to do anything further in this case.*

### **Responses to my provisional decision**

Miss B’s representative responded and said;

1. On what basis has our service accepted the information provided by Admiral to be accurate.
2. The timings of the breath tests had not been provided to him in any official capacity so how did Admiral get hold of them.
3. How did Admiral satisfy itself the roadside test breathalyser was properly calibrated, and the test properly conducted.

4. Admiral had not provided any evidence to substantiate its claim that Miss B was over the limit on the balance of probabilities.

On what basis did it estimate the level of alcohol at the time of the accident, as it did not have any medical data of Miss B or details on what she had eaten or what alcohol she had drunk and when?

Miss B was not driving at the time of the roadside test and had not been driving for one hour. It was reasonable to assume she was below the legal limit at the time of the incident as it could be that her alcohol level was actually going up during the period she waited for police to arrive and that it peaked at the time of the roadside test.

5. The burden of proof is upon Admiral.
6. My decision conflicted with previous findings of the Financial Ombudsman Service and it should be consistent with established precedent.

Admiral did not respond.

### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

#### ***In response to Miss B's representative's comments***

1. This complaint is not about an issue with accuracy of evidence used to decline Miss B's claim. Our service accepts the evidence provided by all parties involved as accurate unless shown otherwise. I've not been provided with anything persuasive to show that what Admiral have said is inaccurate.
2. Admiral obtained information about the breath tests directly from the police.
3. I have no reason to doubt that the roadside breathalyser was not accurate. And as detailed in my provisional findings Admiral did not rely solely on the roadside results to decline Miss B's claim.

4. I have based my findings using the evidence presented to me since Miss B's representative brought the complaint to our service in April 2023.

The roadside breathalyser results were considered by Admiral alongside the results from the tests at the police station and the elapsed time between the accident and the different alcohol readings.

I accept the calculations of elimination of alcohol over time used were that of a typical case, so I can appreciate this point. However I was not provided with any evidence that persuaded me it would not have been reasonable to accept a generic calculation in the circumstances of this case. Further time was given to Miss B's representative to submit this evidence, but it was not provided.

I agree the time of the roadside breathalyser test in which Miss B was found to be over the legal limit for alcohol was one hour after the incident occurred. Miss B told Admiral that she had drunk a large glass of wine prior to the incident but there was no information provided as to the time it was consumed.

Based on that I'm satisfied Admiral's assertion that on balance Miss B was over the legal limit for alcohol at the time of the accident was a reasonable one.

5. I do agree that it is Admiral's burden of proof to show it's fair to apply the clause it's relying on. But its burden of proof is the balance of probabilities – which is less than the burden of beyond reasonable doubt required by the courts.

Because the burden of proof for the insurer is the balance of probabilities, I don't think the absence of a prosecution means Admiral can't rely on its term. In this case based on the evidence provided and for the reasons given I am satisfied that Admiral fairly declined Miss B's claim because it thinks she was over the legal limit of alcohol at the time of the accident, even though the police chose not to prosecute her.

6. I do understand Miss B's representative's frustration, but each case has its own consideration. This complaint has been considered on its own merits, based on the evidence provided and I'm satisfied Admiral's decision is a reasonable one based on the evidence I have been sent.

Based on the evidence I've reviewed; I maintain my provisional decision and I don't uphold Miss B's complaint.

### **My final decision**

For the reasons I have given I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 11 April 2024.

Sally-Ann Harding  
**Ombudsman**