

The complaint

Mr P is unhappy about the way AXA France IARD (AXA) handled a claim on his personal accident insurance policy, including its decision to pay only a proportion of his permanent total disability (PTD) claim, and to decline a claim for his loss of use of limbs.

What happened

The details of this complaint are well known to both parties, so I won't repeat them all again here.

However, by way of summary, Mr P previously had a complaint about the policy being mis-sold upheld by the company who sold the policy to him. The policy was cancelled, and that company refunded the premiums Mr P had paid for the policy together with net interest at 8% per year (totalling around £7,130). This rendered the policy null and void. AXA only discovered this in 2020.

By this stage, and after the policy had been cancelled, AXA had already offered Mr P 10% of the PTD benefit based on the contents of an independent medical report dated 2016.

Unhappy with that offer, Mr P brought a complaint to the Financial Ombudsman Service at the time. The Financial Ombudsman Service concluded that the offer was fair and reasonable based on the available medical evidence. However, the Financial Ombudsman Service also said that if Mr P was able to provide any further medical evidence to AXA, it should reassess the claims under the policy in light of this evidence.

Before AXA found out about the policy being cancelled and premiums refunded, Mr P did send further medical evidence to AXA to consider. However, AXA said it wouldn't consider any claims under the policy and withdrew its offer to settle 10% of the PTD claim.

Mr P brought a further complaint about this to the Financial Ombudsman Service. Our investigator issued a view recommending the claims be reconsidered on the basis that the premium refunds are paid back by Mr P. AXA accepted this view and agreed to reconsider the claims on that basis.

Since adopting that position, AXA has made several settlement offers to Mr P over the past two years so to this extent, the complaint has evolved from the one which was brought to the Financial Ombudsman Service in 2020. The first offer was made in January 2022 and the most recent offer was made in November 2023.

Our investigator concluded in January 2023 that AXA's decision to pay only 30% of the PTD benefit isn't fair and reasonable. As well as paying the hospitalisation benefit under the policy – which AXA agrees to – our investigator also recommended that AXA pay the PTD benefit in full and to contact Mr P's medical professionals for their medical opinion on the percentage loss of use of Mr P's legs under the policy, because of the accident. Upon receipt of that information, she recommended AXA reassess the loss of limb(s) claim.

AXA disagreed and raised further points in reply. These didn't change our investigator's

opinion so this complaint has been passed to me to consider everything afresh to decide.

I issued my provisional decision in March 2024 explaining why I was also intending to uphold this complaint. An extract of my provisional decision is set out below.

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The relevant policy terms and conditions

The policy says “you will be entitled to the following benefits if you have an accident after the start date and before the end date”:

- PTD (£140,000)
- Loss of use of two limbs (£140,000)
- Loss of use of one limb (£70,000)
- Hospitalisation (daily rate) (£175)
- Hospitalisation (lump sum benefit) (1,750)

The policy also says the benefits set out in the benefits table and premium will go up by 5% of their starting amounts for each complete year you are covered under the policy.

It’s now accepted by the parties that the start date of the policy was 1 February 1994.

Relevant policy definitions

Accident/accidental means a sudden and unforeseen event which happens by chance after the start date and results in bodily injury.

Bodily injury means injury to your body...resulting from outward violent means but excludes sickness or disease or any naturally occurring condition.

PTD means a total and permanent disability which medical evidence confirms will last for the rest of your life and which stops you doing any paid job which your experience or training reasonably qualifies you to do.

Disability is defined as a state of incapacity resulting from an accident.

Loss of use means total, permanent and irrecoverable loss of use or loss by physical separation.

Loss of use of limbs means total, permanent and irrecoverable loss of use or loss by physical separation at or above the wrist or ankle.

Hospitalisation means staying in a hospital on the advice of a doctor because of an accident.

Has AXA acted fairly and reasonably?

AXA has an obligation to handle insurance claims fairly and promptly and it mustn’t unreasonably decline a claim.

At the outset, I think it’s important to explain that AXA hasn’t disputed that Mr P’s injuries were caused by the accident in 2014. It’s also made an offer to pay a proportion of the PTD benefit. And it’s only declined the loss of use claim on the basis that the definition of “loss of

use” hasn’t been met.

I’m therefore satisfied that it’s fair and reasonable to assume that based on the medical evidence, AXA accepts that Mr P’s injuries were caused by the accident in 2014. So, I won’t consider this issue further as part of my decision.

I’m not a medical expert so when determining this complaint, I’ve very carefully considered the medical evidence and opinion I’ve been provided by the parties. Although I may only refer to certain parts of the medical evidence and opinion, I want to assure the parties that I have considered it all.

The claim for the PTD benefit

After Mr P brought his complaint to the Financial Ombudsman Service, AXA made an offer to Mr P to settle the PTD claim by paying 30% of the benefit amount (taking into account the 5% yearly increase in benefit).

An independent consultant general and vascular surgeon (‘the independent consultant’) was instructed to provide a report in this matter shortly after Mr P first made his claim. Their report dated September 2016 reflects, in their opinion, that Mr P hadn’t sustained a PTD as defined by the policy. This was based on Mr P’s function in the clinical examination, the clinical assessments of specialists during his care and his self-reported ability to drive and cycle.

If the PTD wasn’t total, the independent consultant was also asked to give a percentage value. It’s reflected that based on the clinical examination and review of case notes, the consultant placed a percentage value of 10%. But acknowledged that based on Mr P’s abnormal gait and subjective disability, the percentage value would be 70%.

The independent consultant provided a further report dated June 2023 at the request of AXA. It’s reflected that, in their opinion:

Based purely on the mechanical disability...Mr P’s disability should be found to be between 10% and 70% depending on the weight allocated to my objective assessment and Mr P’s subjective opinion.

AXA has sought to rely on the contents of the first report when first making the offer to pay 30% of the PTD benefit and thereafter maintaining its position that this offer was fair in light of the second report.

AXA has also said in emails to our investigator dated 23 June and 20 July 2022 that its own doctor settled on the figure of 30% after taking into account the available medical documents as well as the European guide for the evaluation of physical and psychological damage.

However, I’m not persuaded this fairly explains why 30% was used. Nor do I think the offer fairly takes into account the contents of Mr P’s consultant’s neurologist’s report dated November 2018 which concludes:

I do not think it likely that this claimant will be able to return to remunerative employment as a result of his neurological injuries, and that there is no meaningful prospect for further recovery from the effects of hypotensive brain injury and hypotensive or mechanical injury to his left lumbosacral plexus.

Mr P’s consultant neurologist says their opinion about Mr P’s ability to work again is based on the neurological injuries experienced by Mr P as well as the mechanical injury.

Whereas the independent consultant confirmed in their second report that they were basing their opinion solely on the mechanical disability. They haven't commented on whether Mr P met the PTD definition from a neurological perspective.

I've taken on board AXA's point that the consultant neurologist's report is dated four years after the accident and two years after the date of the independent consultant's first report. However, I still think it's relevant evidence to take into account in this case.

Further, there isn't another report which provides an opinion on Mr P's capacity to work from a neurological perspective. So, I'm persuaded by the consultant neurologist's conclusions in this respect.

The consultant neurologist's opinion was given having reviewed Mr P's medical records and the report reflects that they have been in medico-legal practice for 16 years. I have no reason to doubt what they say about that or that they weren't honestly providing their professional, medical opinion about the impact Mr P's injuries have had on him.

The independent consultant's second report also reflects that, in their opinion, Mr P could work in a similar position with the right flexible work arrangements. I've taken this into account. However, I don't think they provide a persuasive reason to explain why or explain which flexible working arrangements would assist Mr P.

Further, from what the independent consultant says in their two reports and when considering Mr P's ability to be able to work again in the future, they seem to place considerable weight on him being able to drive and walk a certain distance. However, I don't think it automatically follows that because Mr P is able to do those activities that he's able to do any paid job which his experience or training reasonably qualifies him to do.

Although aware of his job title, there's nothing to suggest from the two reports that the independent consultant had considered Mr P's job description or work experience, to know what was required of him or the types of jobs he was able to undertake.

Further, and I think important in this case, the independent consultant's second report also says: "based on my original assessment and the updated records...Mr P should be able to work but I cannot say Mr P would have been able to work any paid job which his experience or training reasonably qualified him to do". So, although the independent consultant's opinion is that Mr P should be able to work again, that's not what's required under the definition of PTD. What's relevant is whether he's able to work in any paid job which his experience or training reasonably qualifies him to do (my emphasis). And I don't think the independent consultant's reports are conclusive or persuasive on that point.

Based on the totality of the medical evidence and opinion, and on the balance of probabilities, I'm satisfied that Mr P has established that he meets the definition of PTD under the terms of the policy.

Loss of use benefit

The independent consultant's first report dated September 2016 also reflects that, in their medical opinion, Mr P hadn't experienced a total loss of use of a limb.

They were also asked: "if the total loss of use is not total, please provide a percentage value for each". Importantly, no answer is given. If the independent consultant was satisfied that there was no loss whatsoever, then I think they would've answered along the lines of 0%. The independent consultant doesn't give any further insight on this question in the second

report dated June 2023.

However, I'm satisfied from the other medical evidence that Mr P did experience difficulties using his left leg, in particular, since the accident and over a significant period of time. There's reference to an unsteady and "abnormal" gait, using two crutches, being unable to weight bear on the leg and being in pain.

Further the consultant neurologist's report dated November 2018 reflects: "I do not believe that there are any further interventions which are likely to improve neurological function of the Claimant's left lower limb". And Mr P's consultant vascular surgeon also says in a report dated November 2018 that Mr P has significant impaired limb function (referring to his leg). Another, more recent letter, from Mr P's consultant vascular surgeon dated April 2023 also reflects that Mr P was now experiencing weakness and unsteadiness in his right leg.

As stated at the outset, I'm not a medical expert. However, I do think it would be fair and reasonable for the parties to agree a suitable independent medical expert to review Mr P's medical records and reports to date, meet with him and then provide a report on the percentage loss of use of Mr P's legs (which, I'm satisfied, would be 'limbs' under the policy terms).

And because much of the medical evidence mentions the issues with Mr P's left leg, I think it would also be fair and reasonable for AXA to ask the instructed independent medical expert whether it's likely the issues with the right leg were the result of a bodily injury caused by the accident.

Hospitalisation benefit

The policy terms say the daily rate benefit:

- is for each complete 24 hour period in hospital; and
- excludes the first 3 days in hospital of each accident; and
- is subject to a maximum 120 days in hospital for each accident.

And that a single lump sum payment will be made after "you have spent 10 continuous days in hospital. Only one lump sum payment will be paid for the same accident".

After Mr P brought a complaint to the Financial Ombudsman Service, AXA made a settlement offer to pay the daily hospital benefit (taking into account the 5% yearly increase in benefit) for 12 days. That's based on Mr P being in hospital for 15 days as a result of the accident together with the hospital lump sum payment.

I think that's fair and reasonable and in line with the policy terms as the first three days in hospital are excluded from the daily hospital benefit.

Maximum benefit

I'm satisfied Mr P has the benefit of "individual cover" as the schedule of insurance only lists him as the insured party.

For this type of cover, the policy terms say that the maximum benefits payable for all claims is the PTD benefit and the maximum hospitalisation benefit.

I'm intending to find that this means the total benefit payable under the policy is the aggregate benefit of these two benefits, which according to the table of benefits would

amount to £162,750. This figure would be subject to the 5% benefit increase each year since the policy started.

So, on that basis, I think it would still be possible for the policy to pay out a proportion of the benefit for loss of use as the aggregate maximum benefit hasn't been paid for PTD and hospitalisation benefit.

If it transpires that any loss of limb(s) claim should be paid by AXA in light of the further independent medical report I'm directing the parties to obtain, any payment would be subject to the maximum benefit.

Interest

When providing its calculations, AXA has offered to pay simple interest at a rate of 8% per year on the hospitalisation and proportion of the PTD benefits. AXA has said it will calculate interest from 3 October 2017 to the date of settlement.

I'm satisfied that's for a longer period than I think it's reasonably required to pay interest for in respect of the PTD claim.

I say that because although the accident happened in 2014, AXA did initially offer to pay 10% of the PTD benefit earlier in 2017. AXA says in its final response letter dated October 2020 that the Financial Ombudsman determined in late 2017 that this was a fair and reasonable offer at the time based on the medical evidence available. Our records don't go back that far but in the absence of anything to the contrary, I accept what AXA says about that.

AXA says Mr P didn't provide any additional medical evidence for the claim to be reassessed until 2020. I haven't seen the evidence to support that date, but Mr P didn't obtain his further medical reports until the end of 2018 so even if AXA had been provided with those reports shortly after, that's still over a year after the date on which it's offered to calculate interest from.

So, I don't think AXA has acted unfairly by using the start date of 3 October 2017 to calculate the interest payment for the PTD claim.

Distress and inconvenience

As AXA has agreed to pay simple interest on the PTD benefit for longer than it reasonably has to, I think the additional sum Mr P will receive in interest over and above the interest payment he would've otherwise received is more than the compensation amount I would be minded to direct AXA to pay for any distress and inconvenience it caused him as a result of any errors in handling the claim.

So, in the circumstances of this complaint I don't intend to direct AXA to pay separate and additional compensation to reflect the impact of any of AXA's errors in this case.

Putting things right

I intend to direct AXA to pay:

- A. the full PTD benefit taking into account the 5% increase in benefit each policy year.
- B. the lump sum hospitalisation benefit taking into account the 5% increase in benefit each policy year.

- C. the daily rate hospitalisation benefit (based on 12 days) taking into account the 5% increase in benefit each policy year.
- D. simple interest at a rate of 8% per year on the sums in A, B and C above calculated from 3 October 2017 to the date of settlement (which is the interest period offered by AXA). If AXA considers it's required by HM Revenue & Customs to take off income tax from any interest paid, it should tell Mr P how much it's taken off. It should also give him a certificate showing this if he asks for one. That way Mr P can reclaim the tax from HM Revenue & Customs, if appropriate.

AXA should also deduct from the amount owed to Mr P the amount he was refunded by the company who sold the policy to him for premium paid for the policy (including net interest) and, on behalf of Mr P, pay that sum back to the seller of the policy (who'd refunded him the premium initially).

I also intend to direct AXA to provide details of suitable independent medical experts to Mr P for him to agree the identity of one. That expert should then be jointly instructed to review Mr P's medical history and reports to date and to meet with Mr P to report on whether he has lost the use of his left and/or right leg and if not, whether he has lost a percentage use of his left and/or right leg because of the accident in 2014.

AXA should cover the cost of this report and the cost of requesting all updated medical records for Mr P.

Our powers to award compensation

When making financial awards, there are different maximum limits based on the date of the act or omission by a financial business, and the date the complaint is referred to the Financial Ombudsman Service.

AXA has calculated the full PTD benefit to be £280,000 (with the yearly 5% benefit increase) based on the policy date of 1994 and the date of the accident in 2014.

It's also calculated the total hospital benefit to be £8,400 (with the yearly 5% benefit increase).

Based on the date of the complaint I've been asked to determine being referred to the Financial Ombudsman Service and the date of the act complained of, I'm currently satisfied that the amount I've provisionally directed AXA to pay Mr P (at points A, B and C above) is less than the maximum award set out in the table at DISP 3.7.4 of the Financial Conduct Handbook (which is the handbook which contains the rules that governs the Financial Ombudsman Service). This can be read online.

So that I can be sure this is the case, when replying to this provisional decision, AXA should provide a detailed breakdown to the Financial Ombudsman Service setting out the calculations under A, B, C, and D – and the deduction for the refunded premium and net interest on that amount.

I'm satisfied the interest amount I've provisionally directed AXA to pay (at point D) above – although substantial - is excluded from the calculation of the maximum award. DISP 3.7.5 (1) says any interest awarded on the amount payable under a monetary award is excluded from the maximum award.

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I invited both parties to respond to my provisional decision.

Mr P replied. In summary, he said:

- It would be helpful for AXA to provide the interest calculations and confirm whether it intended to deduct income tax from the interest to be paid (and if so, how much).
- If he was required to obtain more medical reports in support of his loss of use of limb(s) claim, this could take a significant amount of time to conclude. Mr P says there is a lot of medical evidence already in support of this claim and AXA should be able to pay this claim without further evidence.
- Interest should be paid from the end of December 2015 – that's a year after the accident - not 3 October 2017. And the offer made by AXA in 2017 to pay 10% of the PTD claim was unfair and it hadn't obtained neurological and vascular reports to assess the full extent of his injuries and the impact they had on him. Mr P says it wasn't for him to get additional medical evidence.
- The Ombudsman should direct AXA to pay compensation for distress and inconvenience. He has been left extremely vulnerable and traumatised after the accident and what should've been a straightforward claim was not settled in a timely and professional way. He has had a dreadful customer experience with AXA and the delays in having his claim settled has caused significant and emotional hardship.

AXA also replied. In summary, it said:

- It agreed to pay Mr P 100% benefit for the PTD claim plus the hospitalisation benefit for 12 days' stay in hospital and the hospitalization benefit lump sum. By doing this, AXA is reaching the maximum benefit to be paid under the policy terms.
- On this basis, it doesn't agree that any benefit for loss of use of a limb(s) should be paid. This benefit should only been considered and examined if AXA didn't agree to pay 100% of the PTD claim.

I considered the further information I received from both parties.

In relation to the loss of use of limb(s) claim, I explained to Mr P that I was now minded to find that the policy terms should be fairly interpreted as the maximum benefit being 100% PTD benefit plus any hospitalisation benefit that's to be paid. And as AXA had now agreed to pay this in line with my provisional decision, I was minded to find that AXA wasn't required to consider any further claim for loss of use of limbs(s) as the maximum benefit payable under the policy terms had been reached.

I provided Mr P with a further opportunity to respond to this point. Although Mr P didn't provide any further information in response to this further provisional finding, he did raise additional points including:

- AXA should pay for the costs of his consultant completing the relevant section of the claim form (which he says it had initially agreed to do) in the sum of £250. And the costs of a return taxi journey (in the sum of around £300) to see the consultant who'd completed a further medical report in October 2018. He obtained this report in response to the independent consultant's report.
- AXA should be responsible for any income tax payable on the interest due on years he was without the benefit up to the tax year 2020/2021 as he won't be able to claim tax back before that tax year.

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.

Although I have only summarised the points both parties have provided when replying to my provisional decision, I have considered everything they've said.

- For the reasons set out in my provisional decision (an extract of which is set out above and forms part of this final decision) I uphold Mr P's complaint, subject to one important change.
- I'm now satisfied that once AXA pays 100% of the PTD benefit and hospitalisation benefits, the maximum benefit under the policy terms would've been met and so, AXA doesn't need to reassess or pay any benefit in respect of the loss of use of limb(s) under the policy terms. Mr P didn't provide anything in response to my provisional decision to convince me that this isn't a fair and reasonable interpretation of the 'maximum benefit' section of the policy terms.
- I know Mr P says interest should be paid on the benefits which AXA has now agreed to pay from a year after the date of his claim to the date of settlement. However, I still don't think this would be fair and reasonable.
- AXA has offered to pay simple interest at a rate of 8% per year on the hospitalisation and PTD benefits. AXA has said it will calculate interest from 3 October 2017 to the date of settlement. I'm satisfied that's for a longer period than I think it's reasonably required to pay interest for in respect of the PTD claim.
- As I said in my provisional decision (and Mr P's further points on this issue hasn't changed my mind), the accident happened in 2014 and AXA did initially offer to pay 10% of the PTD benefit in 2017. AXA says in its final response letter dated October 2020 that the Financial Ombudsman determined in late 2017 that this was a fair and reasonable offer at the time based on the medical evidence available and I accept what AXA says about that. So, I don't think AXA has acted unfairly by using 3 October 2017 as the start date to calculate the interest payment for the PTD claim. Even if Mr P was able to provide further medical evidence before he did, I'm not satisfied he would've done so until the end of 2017 (and AXA would've needed time to reasonably reassess the claim).
- As AXA has agreed to pay simple interest on the PTD benefit for longer than I think it reasonably had to, I think the additional sum Mr P will receive in interest over and above the interest payment he would've otherwise received is more than the compensation amount I would be minded to direct AXA to pay for any distress and inconvenience it caused him as a result of any errors in handling the claim (which I accept would be significant). So, in the circumstances of this particular complaint I'm not going to direct AXA to pay separate and additional compensation to reflect the impact of any of AXA's errors.
- AXA has now confirmed that it will also reimburse Mr P for the £250 he paid his consultant to complete the initial claim form. And upon receipt of documentary evidence from Mr P of the return taxi fare he says he incurred to see his consultant to produce a report (in the sum of £300), it will reimburse Mr P these costs. I'm satisfied that it's fair and reasonable for AXA to ask Mr P for documentary evidence of the taxi fare paid by him before it makes payment so that this expense can be verified.
- AXA has also confirmed that it will not be making any deductions for income tax when making the interest payments to Mr P; it's for him to declare this to HMRC and make any necessary tax payments. I'm satisfied that's fair and reasonable. If Mr P is

required to pay income tax on the interest payments, then that's not something I can comment on.

Putting things right

I direct AXA to pay:

- A. the full PTD benefit taking into account the 5% increase in benefit each policy year.
- B. the lump sum hospitalisation benefit taking into account the 5% increase in benefit each policy year.
- C. the daily rate hospitalisation benefit (based on 12 days) taking into account the 5% increase in benefit each policy year.
- D. simple interest at a rate of 8% per year on the sums in A, B and C above calculated from 3 October 2017 (which is the interest start date offered by AXA) to the date the benefit payments are made.

AXA should deduct from the amount owed to Mr P the amount he was refunded by the company who sold the policy to him for premium paid for the policy (including net interest) and, on behalf of Mr P, pay that sum back to the seller of the policy (who'd refunded him the premium initially).

So that there's no uncertainty, AXA should also provide Mr P with a detailed breakdown of the interest payments to be paid to him on the PTD and hospitalisation benefits, including the daily rate of interest, the number of days interest has been paid for and a yearly breakdown of the amount of interest that has accrued since 3 October 2017.

I also direct AXA to provide Mr P with a written apology, on headed paper, for the way it's handled his claim and the subsequent delays in accepting the claim in full.

My final decision

I uphold Mr P's complaint to the extent set out above and direct AXA France IARD to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 22 July 2024.

David Curtis-Johnson
Ombudsman