

complaint

Mr P is unhappy that Advantage Insurance Company Limited ('Advantage') settled his road traffic accident claim on a 50/50 joint liability.

background

Mr P was involved in a road traffic accident on 3 October 2015. He said while he was conducting a manoeuvre, he was hit by an oncoming motorcyclist. On 4 October, Mr P put in a 'no fault' claim to Advantage as he said the motorcyclist hit his car and he didn't think he was responsible for the accident.

The motorcyclist also claimed that he wasn't responsible. So Advantage appointed a third-party company to investigate the accident and establish liability.

From November 2015 to March 2016, Mr P and the accident investigators were in contact with the police and were both waiting for their report in order to conclude establishing liability.

In March 2016, Mr P updated Advantage to say that the police had been in touch to tell him they intended to charge him for driving without due care and attention. The police said this was based on witness evidence provided by the motorcyclist. The accident investigators contacted Advantage in April 2016 and said they were still waiting for the police report but a court hearing date had been set for Mr P on 6 July 2016. Mr P called Advantage in May 2016 to request the use of his legal expenses cover on the policy in order for him to be legally represented at court. Advantage told him incorrectly that he didn't have cover under the policy. But following further communication, it was confirmed that he did have the legal expenses cover and could be represented at court.

Although by July 2016, Mr P had been provided with legal representation under his policy, he'd already spent the time and effort to put his own case together. He was able to show the witness evidence provided by the motorcyclist wasn't independent so the charge against him was withdrawn by the police and the trial was subsequently dropped.

The police lost their file so they couldn't provide a full report to the accident investigators or Advantage. The report only included names of the drivers and the site of damage. Advantage reviewed the information it had and made a decision to settle Mr P's claim on a 50/50 joint liability basis. Mr P wasn't happy with this and asked Advantage to send him all information in relation to his claim.

Mr P made a complaint to Advantage in March 2017 and said he wanted Advantage to:

- set the record straight that it was a no fault claim and compensate him for the additional insurance costs paid;
- compensate him for any loss of recovery of the £250 excess; and
- compensate him for the time and money spent for having to do his own defence.

Advantage sent a final response to Mr P on 26 April 2017. It didn't uphold his complaint regarding settling the claim on a 50/50 liability. But it acknowledged that the overall service it provided could have been better and offered Mr P £165 compensation in recognition of this (comprising £75 for delays in acknowledging the complaint; £40 for correct policy details not being sent; and £50 for incorrect information regarding the policy and legal expenses cover).

Our investigator looked into Mr P's complaint and said she didn't think Advantage settled the claim unfairly on the 50/50 liability basis. She did think the level of service provided by Advantage could have been better and asked Advantage to increase its offer to £275 in total. Both parties responded to the investigator's assessment. Mr P said:

- Advantage settled his road traffic accident claim on a 50/50 basis despite all the evidence he sent. He believes this is wrong as he was not at fault;
- the 50/50 settlement means that he cannot claim back the £250 excess from the motorcyclist;
- Advantage declined his claim for cover of the legal expenses on his policy for his defence at court. As a result, he had to do his own investigation and defence which took over 486 hours plus costs. The Crown Prosecution Service withdrew their case on sight of the evidence as the police had not got an independent witness;
- Advantage has failed to investigate his claim and has demonstrated no interest in the facts of the case; and
- the level of service provided was poor. Examples of this were that it caused delays in responding to his complaint; it didn't provide all of the information when he made a subject access request; it provided incorrect information regarding legal expenses cover; and told Mr P that he couldn't use the cover he had on his policy.

Advantage didn't agree that any more compensation should be offered to Mr P other than the initial £165.

my findings

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

Firstly, I'd like to explain what this service can and can't do when looking at these types of complaints.

Our service doesn't decide who's at fault for an accident, as that's the role of the courts. But we do check to see if an insurer has looked into things fairly and made a reasonable claims decision. Like all such policies, the terms and conditions of the insurance contract give Advantage sole discretion to decide whether to settle or defend a claim; and we would only interfere if we thought Advantage had exercised this discretion in an arbitrary, irrational or unfair way. I don't regard that sort of term as inherently unreasonable — because insurers usually have greater experience of how a court is likely to determine legal liability; and they also have a legal duty under the Road Traffic Act 1988 to meet any third-party judgment against their insured, so it's not unreasonable for them to try to mitigate costs. Further, there are public policy considerations to take account of: civil litigation is not without cost to the taxpayer (because of the cost of running the courts) — so the courts shouldn't be clogged with unnecessary cases that insured parties could reasonably resolve directly.

Mr P has provided extensive information to us. I've reviewed this and, mainly, this refers to evidence he has put together, through his own time and research. He said this evidence proves that he was not at fault. So while I appreciate the time it's taken for him to put this information together, I must reiterate that it's not my function to assign legal liability for the accident. Based on what we can look at, the key points I need to decide on this case are:

- whether Advantage settled the claim fairly on a 50/50 joint liability basis; and

- whether Mr P received the right level of service from Advantage.

has the claim been settled fairly?

The terms and conditions of policy state:

“Your insurer shall be entitled to conduct the defence or settlement of any claim and to instruct the solicitors of their choice to act for you in any proceedings. In circumstances where it is considered appropriate your insurer will be entitled to admit liability, for the costs covered under this policy, on behalf of you or any person claiming indemnity under the policy. Such admissions may be made prior to or after the commencement of proceedings in relation to any event likely to give rise to a claim under the policy.”

So, Advantage is contractually entitled to settle the claim and decide liability on Mr P's behalf in return for providing him with an indemnity. If Mr P disagreed with Advantage's proposals on liability, it was open to him to withdraw his claim and take upon himself the risk of suing the third party (or defending a like claim against him). But so long as he wanted the peace of mind of insurance cover, he was bound to follow Advantage's advice on liability and whether or not to compromise.

I have seen nothing to suggest that Advantage reached its decision in an arbitrary or unfair way. On the contrary, it relied on the available evidence and independent expert opinion. Advantage believed there was a reasonable chance that Mr P could have been held liable. This is not surprising, as it will have known — from similar cases (both from law reports and its own experience) — that courts do often find in favour of motorcyclists because they are less visible and more vulnerable than cars, especially when the latter are carrying out certain manoeuvres such as U-turns. So it decided that the most appropriate and commercial way to settle the claim was on a 50/50 joint liability basis. That doesn't seem unfair to me in the circumstances of this case. After all, it appointed accident investigators and, although Mr P has questioned what they did in investigating the accident, ultimately there was no independent, persuasive evidence to decide liability either way. Whilst the trial was eventually aborted, I cannot ignore the fact that Advantage was faced with a potential criminal trial against its client — and given the higher criminal standard of proof (beyond reasonable doubt rather than just balance of probabilities), this would have affirmed its concerns that a civil case against the third party was unlikely to succeed.

I appreciate that Mr P has provided substantial evidence of his own and can't understand why all of this hasn't been taken account of. But it's well-established in law that a person can't be an independent expert witness in his own cause. His own evidence was never going to be as persuasive or weighty as that of a truly independent witness or an expert in accident investigations. I have to look at the difficult decisions Advantage needed to make at the time, not what we know subsequently happened with the benefit of hindsight. And I am satisfied that its decision to compromise was within the spectrum of reasonable potential outcomes for such a case.

Advantage also supported its point of view with authorities. For example, it cited two legal cases which would apply in circumstances such as these and which showed competing claims being split on a 50/50 liability. Mr P has said that he can't see these are relevant. But it's standard practice to rely on legal precedents to assess whether a proposed action or defence has reasonable prospects of success. Judges are obliged to determine cases in line with the decisions of higher courts — and they try to be consistent with their fellow judges and/or predecessors so far as reasonably possible.

In all the circumstances, I am satisfied that Advantage made reasonable attempts to find out who was at fault while naturally taking account of the legal fact that a turning car-driver has a clear duty of care to look out for other vehicles, especially motorcycles. Without credible independent witnesses, it was difficult to lay blame on one party over the other. So in terms of settling the claim on a 50/50 joint liability, I don't think Advantage acted unfairly or unreasonably. It follows that I don't think Mr P is entitled to recover his uninsured losses from Advantage or the third party, e.g. the £250 policy excess.

level of service

There's no dispute as to Advantage's failings with regards to the service it provided in terms of administering the claim (as opposed to the ultimate claims decision). It has offered £165 compensation for distress or inconvenience but doesn't agree that it should offer the additional £110 which our investigator recommended. So, I've considered everything Mr P has told us and what he felt he had to do as a result of having received incorrect information and poor service.

Advantage wasn't responsible for his being potentially charged with a criminal offence. And it's important to draw the distinction between the discretionary funding of a motorist's civil claim or defence and funding the cost of defending criminal proceedings. Because of Advantage's omissions with regard to information about the latter, I can see this led to Mr P having to put his own defence together. Had he received correct information regarding his legal expenses cover, he would have had professional legal representation much earlier. Mr P also experienced delays and had to prompt further after his subject access request. Overall, this is enough to persuade me that it's fair and reasonable for Advantage to pay him a further £110 compensation for the distress and inconvenience he unnecessarily suffered over and above that which inevitably and unavoidably flowed from the accident and prosecution.

my final decision

For the reasons explained above, I'm only upholding Mr P's complaint against Advantage Insurance Company Limited in relation to its maladministration of the claim, not the overarching claims decision. It should pay Mr P a total of £275 compensation for distress and inconvenience (less any part of that sum which it may already have paid).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 6 July 2018.

Nimisha Radia
ombudsman