

Determination

Case number: 630084

10 September 2019

1 Determination overview

1.1 Complaint

The complainant holds a car insurance policy with the financial firm (insurer). The complainant's daughter, who is also a policy holder, was involved in a collision with another vehicle.

The complainant lodged a claim with the insurer. The insurer declined the claim on the basis it does not believe the accident occurred as the complainant alleged. The insurer considers the complainant's daughter deliberately caused damage to the insured vehicle and exhibited reckless disregard as to the consequences of her actions. Based on this the insurer argues the complainant did not establish a valid claim and policy exclusions defeat the claim.

The complainant disputes this outcome. He wants the insurer to accept the claim and either repair the vehicle or declare it a total loss.

1.2 Issues and key findings

Is the insurer entitled to refuse payment of the claim?

The policy provides cover for collision or impact damage, unless the damage was caused intentionally or with reckless disregard for the consequences.

I am satisfied given the available information that the damage was not caused intentionally or with reckless disregard for the consequences.

Given this:

- the complainant established a valid claim within the terms of the policy
- the insurer did not establish it is entitled to decline the claim based on policy conditions for intentional or reckless damage.

1.3 Determination

This determination is in favour of the complainant.

The insurer is required to meet the complainant's claim within the terms of the policy.

Should the insurer cash settle any part of the complainant's claim, the insurer is to pay interest, in accordance with the Insurance Contracts Act 1984 (the Act), from the date of denial of the complainant's claim until the date of payment.

2 Reasons for determination

2.1 Is the insurer entitled to refuse payment of the claim?

There has been a full exchange of material between the parties and each party has had the opportunity to address the issues arising from the information exchanged.

The complainant has been represented by his solicitor and it was his daughter (also a policy holder) who was involved in the collision. Any reference in this determination to the complainant includes reference to submissions made on behalf of the complainant and his daughter.

This determination follows consideration of all the available information and is based on what is fair in all 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.

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

The complainant held a comprehensive motor vehicle insurance policy providing coverage for a 2009 Suzuki Swift, for an agreed value of \$12,300. The policy provides cover in the event of the vehicle sustaining loss or damage from an insured event that occurs during the period of insurance.

The policy's insured events include collision or impact damage, unless the damage was caused intentionally or with reckless disregard for the consequences.

Circumstances of the loss

The complainant's daughter says that on Friday 14 September 2018, at approximately 10pm she was exiting the carpark of an aquatic centre and intending to turn right and travel north. In an interview conducted on behalf of the insurer, the complainant's daughter said she exited the carpark 'pretty fast' and failed to give way. The complainant's daughter says her vehicle made contact with the passenger side of the third-party vehicle, a 2011 Porsche Panamera.

The complainant's daughter could not confirm the Porsche's speed. In her initial reporting of the collision to the insurer she said her vision was obstructed by a food truck parked to her right, so she did not see the Porsche.

There is no dispute both vehicles suffered significant damage and both vehicles were declared a total loss.

The forensic evidence suggests third-party vehicle stationary when impacted

The insurer obtained an expert report from forensic investigator AI dated 15 January 2019. AI inspected the complainant's vehicle and the accident site in December 2018.

AI says the third-party vehicle was not available for examination, however, it did examine photographs of the vehicle in conjunction with vehicle blueprints.

AI was unable to retrieve crash data from the complainant's vehicle as it is not compatible with the relevant software.

AI is of the view that the damage is consistent with the complainant's vehicle hitting the third-party vehicle from the angle she reported. However, AI says the damage is consistent with the third-party vehicle being stationary at the time it was impacted, noting the speed limit where the accident occurred is 50km/h.

AI found:

- the damage could be consistent with the complainant's vehicle having collided with the nearside of the third-party vehicle as it travelled south
- the damage is not consistent with the third-party vehicle having been travelling south at or near to the speed limit of 50 km/h when the two vehicles collided
- the width of the contact damage on the nearside of the third-party vehicle is comparable to the contact damage width to the front of the complainant's vehicle
- the contact damage is more severe on the front nearside of the complainant's vehicle compared to the offside, consistent with the complainant's vehicle having been turning right.
- the contact damage is more severe on the front nearside door compared to the rear nearside door of the third-party vehicle, consistent with the complainant having been turning right
- a lack of significant longitudinal striations and tearing to the side of the third-party vehicle and the front of the complainant's vehicle, along with lack of lateral shifting to the front of the complainant's vehicle is consistent with the third-party vehicle being stationary at the time of impact
- both the complainant's vehicle and the third-party vehicle displayed evidence of vertical striations with only a small horizontal component consistent with the third-party vehicle having been stationary when it was impacted
- the source of the damage to the offside front door and the rear offside door and quarter panel of the third-party vehicle are from an unknown source.

Forensic evidence does not contradict complainant's reporting of the collision

AI's report says:

“the claim alleges that the Porsche was travelling from right to left across the path of the insured Suzuki, whilst travelling in a 50km/h speed zone.”

This is correct, however, I note the complainant's daughter could not confirm the Porsche's speed, as she did not see it until, or just before, she made contact with it.

While I accept the speed limit is 50km/h, this does not necessarily mean the Porsche was travelling at this speed.

The insurer did not interview the third-party driver, so I am unable to examine any information from the third-party in order to form a view as to what speed he was travelling and where he was travelling to. The accident happened as the complainant's daughter exited the carpark of the aquatic centre. It seems entirely possible the third-party had slowed down to enter the carpark, or to park on the side of the road nearby. I consider there are any number of possible reasons why the third-party could have been travelling below the speed limit – he may have been distracted, using his phone, or looking for a particular location to name just a few. I consider it possible that while the complainant did not see the third-party until the last second, the third-party may have seen the complainant exiting the car park and braked in an attempt to avoid the collision. Any of these reasons could have led the third-party vehicle to travel much slower than the 50km/h speed limit.

On page 49 of AI's report, AI sums up its conclusions. When referring to the aspects of the forensic evidence that align with the complainant's daughter's reporting of the collision it says the Suzuki "may" have collided with the nearside of the Porsche and the Suzuki "may" have been turning right. Yet when it comes to drawing a conclusion as to whether the Porsche was stationary or in motion at the time of impact, it says the Porsche "was" stationary. I note that AI never inspected the Porsche and based its findings on photos alone. While I accept the Porsche was not travelling at 50km/h when it was impacted, I am not persuaded AI had enough evidence to conclude the third-party vehicle was definitely stationary, as opposed to travelling slowly.

Complainant's credibility is sound

I accept those circumstances of the collision which the complainant's daughter was able to confirm (about the time and place of the collision and the location of the two vehicles in relation to each other) all correlate with the forensic evidence.

I viewed the photos provided by the complainant of both vehicles immediately after the collision and viewed Google Maps imagery of the area. Based on these I am satisfied the photos of both vehicles were taken at the site the collision is reported to have occurred.

I note the complainant's daughter was initially somewhat reluctant to be interviewed, and it could be said that she was nervous throughout. I do not consider nervousness unusual in the context of an investigator's interview, or accept she said anything during the interview which can be confirmed as untrue.

The complainant's daughter's reporting of the accident to the interviewer was somewhat vague, however, I consider that the versions of events she provided to the insurer and later to the interviewer, are broadly consistent.

The insurer reports the complainant himself came across as genuine during his interview.

Based on all the above I have no reason to question the complainant's or his daughter's credibility.

Possible financial motive exists but is not strong

The complainant's vehicle's agreed value is \$12,300. I accept this alone can be considered a possible financial motive. However, I note the complainant indicates he runs a successful taxi business and has a reliable income, which the insurer did not challenge. I received no evidence to suggest the complainant's financial situation is strained.

The insurer provided copies of the complainant's daughter's bank statements. These show a regular income from her employment as a property manager. While there appears to be limited savings in this account, during her interview she indicated that she has savings of approximately \$25,000 in another account, which the insurer did not challenge. I note the complainant's daughter lives at home with her parents and based on this it seems her expenses would be minimal.

While I accept a possible financial motive exists due to the agreed value itself, I do not consider this alone sufficiently establishes a motive for staging a collision.

Opportunity exists but is not strong

The collision is reported to have occurred at approximately 10pm on 14 September 2018, outside the aquatic centre. It is possible traffic at this time of night could be somewhat lighter than normal. However, I note it is a major road in this area and there is still a distinct possibility other traffic would be around at the time of the collision.

Further, I have checked the opening hours for the aquatic centre and note it closes at 10pm on Friday nights, the approximate time the collision is said to have occurred. Therefore, it is entirely possible other vehicles could have been exiting the carpark at this time and witnessed the collision.

Therefore, while I consider a possible opportunity exists, in my view staging a collision in this particular area seems relatively high-risk.

Other issues raised do not contradict complainant's reporting of the collision

The insurer raised several other issues it says undermine the credibility of the claim.

In particular, the insurer highlighted apparent pre-existing damage to the third-party vehicle and the reported sale of the wreckage after the accident. The insurer notes the third-party vehicle revealed some apparently unrelated accident damage to the opposite side of the vehicle. The available materials confirm the third party's legal representative later advised this damage was not caused by the collision but occurred

later in storage. I accept that this damage is not related to the reported collision. I am not persuaded the existence of unrelated damage to the third-party vehicle, itself shows the collision was staged.

The insurer also noted the wreckage of the third-party vehicle was sold to a business (VR) for \$13,000. The insurer queried this and initially held concerns this business did not exist. I note however, the available materials indicate the insurer's investigator later attended the premises of this business. In any case, I do not consider this reason enough to conclude the collision wasn't a genuine accident.

Further, while the insurer's investigator attended VR's premises, he reported a support person (who was present at the complainant and the complainant's daughter's interview) was also at the premises. The complainant says this individual works at a nearby business and was visiting a client. While I consider this an unusual coincidence, if indeed it did occur, in my view the insurer did not provide a compelling explanation of why it considers this relevant to the claim.

Finally, the insurer says the:

- complainant's daughter initially indicated her vehicle was towed from the collision scene on the night
- subsequent investigations revealed towing occurred the following Monday.

I am unable to see where the complainant told the insurer the vehicle had been towed immediately after the collision. I note a copy of the initial online claim lodgement provided by the insurer shows the complainant answered "no" to the question about the vehicle being towed and indicated that it was still in the carpark where the collision occurred. The insurer questioned the complainant's daughter's reporting her request for towing that night was declined because the car was on private property. However, I am unable to see how this is relevant to the validity of the claim.

Overall, complainant's account of claim circumstances is supported

I accept the evidence supports the collision occurred as reported by the complainant's daughter. She never said the third-party vehicle was traveling at 50km/h. I am satisfied this was an assumption by the insurer. As established above, there could have been any number of reasons as to why it was traveling significantly slower than this.

I am satisfied that all other aspects of the complainant's daughter's reporting of the collision correlate with the forensic evidence. These include the time of the collision, location of the collision and location of the two vehicles in relation to each other, with the complainant's vehicle turning to the right as it impacted the nearside of the third-party vehicle.

The insurer has not established any link between complainant and the third party, or why either party would have staged the collision. I am satisfied the complainant has established a valid claim within the policy.

The insurer is not entitled to refuse payment of the claim

The insurer declined the claim on the basis that it does not consider the collision occurred in the manner alleged by the complainant. The insurer also considers that exclusions with regard to damage caused deliberately and intentionally and reckless disregard of the consequences apply to the claim.

As established above, I accept the available information supports, on balance, the collision occurred as claimed. Therefore, I do not consider the policy condition for causing damage intentionally or deliberately limits the claim.

Further, I do not consider the complainant's daughter driving out of the carpark and failing to see the third-party vehicle constitutes reckless disregard for the consequences. The complainant indicated she did not see the third-party vehicle until the last moment as there was a food truck parked to her right as she exited the car park. I accept the complainant could have exercised more care and she may have been distracted. In my view, reckless disregard would imply a much higher degree of carelessness, such as courting a known risk. I am not persuaded the available information supports that occurred in this instance. Therefore, I do not consider this exclusion applies.

Given all the above, the complainant established a valid claim under the policy wording, as the insurer did not establish, on balance, an entitlement to decline the claim based on the policy conditions it raised.

Accordingly, the insurer is required to accept the claim in line with its policy terms and conditions.

If the insurer cash settles any aspect of the complainant's claim, the insurer is to pay interest in accordance with the Act from the date of denial of the claim, until the date of settlement.

3 Supporting information

3.1 Policy wording

Product disclosure statement (PDS) page 22:

Collision or impact damage

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What is covered

You are covered for damage caused to **your vehicle** (including damage to **your** windscreen, window and sunroof glass) by an incident involving a collision or impact, unless it was committed with the intention of causing damage or with reckless disregard of the consequences by:

- **you**; or
- a person with **your** consent.

You are also covered for any amount **you** legally have to pay another person for loss or damage to someone else's property. Please refer to the Insured Event 'Legal liability' on page 25.

...

Excess

If **we** agree to pay a claim as a result of this Insured Event, the amount **we** pay will be reduced by the applicable excess/es, as described on pages 60 to 64 and stated on **your Certificate of Insurance**.

PDS page 25

Legal liability

...

What is covered

You are covered for any amount **you** legally have to pay another person for loss of or damage to someone else's property caused by:

- **your vehicle** as a result of an event which is partly of fully **your** fault;

...

This cover includes reasonable legal costs and expenses for settling or defending the claim made against **you** or any other person seeking cover under this section if **you** or they have received prior written approval from **us**. **You** or any other person seeking cover under this section must notify **us** of any potential claim within 6 months of the event.