

The complaint

Miss C has complained about the way U K Insurance Limited (trading as Direct Line, who I will refer to as 'UKI') has handled a claim she made following a road traffic crash ('RTC') she was involved in.

What happened

On 1 June 2023, I issued a provisional decision explaining why I was intending to uphold this complaint. This is what I said in the provisional decision:

What happened

On the morning of 28 October 2021, Miss C was involved in an RTC on her way to work. When Miss C approached the lane entry of her work premises she signalled to turn right and reduced her speed in preparation of turning. Miss C said she'd slowed down to allow a tractor and trailer in front of her to move out of the way so she could check oncoming traffic before turning. She recalled checking her mirrors on a number of occasions to ensure it was safe to proceed. As she entered the lane, Miss C told us that the back of the drivers' side of her vehicle was hit by another car that was attempting overtake three cars, the tractor and trailer. The impact of the collision pushed her car off the road and into a hedge.

The police attended the scene and Miss C was taken to hospital for an assessment of her injuries. When Miss C contacted UKI to tell them about the incident she says she was told by two different individuals that it sounded likely that she would be attributed with no fault in the collision. However, a few days later, during the evening of 3 November 2021, Miss C received a text message from UKI to notify her that she was being attributed with thirty percent of the blame for the collision. UKI said this was based on the case of Joliffe v Hay, 1991 S.L.T 151 (1990) ('Joliffe v Hay'), in which the court concluded there was contributory negligence on the part of the vehicle in front. UKI confirmed that liability was accepted on a 'without prejudice' basis.

Miss C then instructed solicitors to act for her, who I'll refer to as T. They initially wrote to UKI on 17 December 2021. UKI issued their final response on 16 May 2022 not upholding Miss C's complaint, and confirming, among other things, that a police report wasn't obtained as UKI felt it wasn't necessary given the level of detail Miss C had provided about the accident. UKI also said there were no witnesses present at the time of the accident.

Unhappy with UKI's final response, T referred Miss C's complaint to this service on 29 April 2022.

Our investigator looked into what had happened and issued a view not upholding the complaint. He said that while this service can't comment on liability decisions, we do need to be satisfied that an insurer has taken into account all of the available evidence before making a decision on a claim. Our investigator concluded that UKI's

decision on liability had followed consideration of all the available evidence it had at the time, and therefore its decision to accept partial liability for the RTC was reasonable.

Miss C's representative, T, didn't accept our investigator's view. T requested an extension of time to provide additional information as they were awaiting a Police Service of Northern Ireland ('PSNI') report on the incident. They also provided a detailed response from Miss C, in which she was adamant that it was the dangerous driving of the other driver, that had caused the RTC.

Our investigator forwarded the supplemental information including the PSNI report and two witness statements provided by T, to UKI on 2 December 2022. He asked UKI to consider the information and confirm whether it would change their decision on the complaint. The evidence included a reference to Miss C being cautioned for driving without due care and attention. A short while later UKI advised that it had now accepted fifty percent of the liability for the accident.

T requested an ombudsman's decision on the complaint.

What I've provisionally 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.

T believes that UKI based its liability decision on inadequate evidence. On the day of the accident, UKI's claims' handler took details from Miss C regarding what had happened. That was the only conversation UKI had with Miss C, and on the basis of that initial conversation, during which T says Miss C was still in a state of shock from being involved in a serious car accident six hours prior, UKI accepted thirty percent liability for the accident.

T also argues that there are a number of fundamental differences between the RTC Miss C was involved with, and the circumstances of the case of Joliffe v Hay. I will address those differences later in this decision.

However, UKI maintains that Miss C must take some of the blame for the incident based on Joliffe v Hay, as it believes she hadn't checked it was safe to carry out her right turn when she did. UKI says both versions of events confirmed that and there was no independent evidence to support holding the third party fully at fault.

UKI referred to page 26 of their policy booklet, in support of their decision to accept partial liability, which says:

'Claims procedure – Our rights and your obligations

- a. You must not admit liability for or negotiate to settle any claim without our written permission*
- b. We are entitled to:*
 - Take over and carry out the negotiation, defence or settlement of any claim in your name or in the name of any other person covered by this policy'*

Having considered the paragraph detailed above, I agree that UKI's terms, like those

of most motor insurers, allow it to settle matters as it sees fit. However, we do expect insurers to use the discretion given by that term fairly and reasonably. What that means will be different in the circumstances of each case. An insurer should complete a reasonable investigation of the claim and determine that its prospects for success in defending its policyholder's liability for a claim aren't good. In those circumstances we'd be unlikely to say it had acted unfairly and unreasonably in accepting liability for the claim on a without prejudice basis. However, I'm currently of the view that UKI did not complete a reasonable investigation or assessment of Miss C's claim. I will explain why.

In this case, UKI only spoke to Miss C once, within six hours of the accident, and carried out no other investigation. UKI immediately (and in my view incorrectly, as I will shortly explain) concluded that the circumstances Miss C had described were exactly the same scenario as that of the Joliffe v Hay case. It didn't place any weight on Miss C's adamant view that she wasn't responsible for the accident, and when it was later presented with more evidence, it quickly dismissed the evidence. UKI also didn't obtain a legal opinion, which, in this particular case, I consider would have been a reasonable step to take. Given the consequences for Miss C of their decision to accept liability, I think UKI should have carried out a more detailed investigation before doing so.

I will give my reasons for why I'm intending to uphold this complaint below, under the following two headings: The application of Joliffe v Hay; and The available evidence. I will then address the question of whether UKI should pay Miss C compensation for the way it's handled her claim. But before I do so, I would like to explain the basis on which I make my decision. Where the evidence is inconclusive, inconsistent or contradictory, as it is here, I make my decision based on the balance of probabilities, that is, what I think more likely than not happened. That is the standard of proof I will be applying in this decision.

The application of Joliffe v Hay

In my view there are four factors which distinguish Miss C's case from that of Joliffe v Hay, relied on by UKI.

First, in Miss C's case, the position of the overtaking vehicle was not directly behind Miss C's vehicle. In Joliffe v Hay, the vehicle which crashed into the turning vehicle was immediately behind it, and the court found that the driver of the front vehicle had failed to keep a proper look out, as he'd only checked his mirror once before concluding the vehicle behind would not move out. The court believed that showed a lack of reasonable care. However, in Miss C's case, she had checked the vehicle in front and the two vehicles immediately behind her before starting her manoeuvre. She was hit by a vehicle that was third in-line behind her, and which appears, on balance, to have been travelling at a significant speed.

Second, having taken account of all of the available evidence, I'm currently persuaded that Miss C likely did check her mirrors a number of times before she started her manoeuvre. She confirmed on the call with the claims' handler that she'd checked the traffic before starting her turn, and in her witness statement included in the police report she said that she was constantly checking her mirrors, as she is aware people perform overtakes on that road (which she had been travelling on six days a week for the past four years).

Third, I'm persuaded that the speed of the other vehicle was likely significantly faster than the driver admitted to. She conceded that she was attempting to pass four

vehicles (one of which was a tractor and trailer), but said she was able to apply her brakes. However, the other evidence provided, including the observation of the absence of skid marks at the scene and the fact that Miss C's car was propelled 38 feet past the entrance to the lane that she was turning into, down a ditch and into a hedge, both call into question the credibility of the other driver's recollections.

I think that the fourth factor which distinguishes Miss C's case from *Joliffe v Hay* is how much of the manoeuvre had been completed before the car was hit. In *Joliffe v Hay*, the front driver had only started his manoeuvre when the RTC happened. In that case, the second driver was well over to the offside of the road at the point of the accident, and it was concluded that the second car's movement into that position should have been noted by the first driver. However, in Miss C's case she had almost completed her manoeuvre when the back of the driver's side of the vehicle was hit.

Taking all of this into account, I don't think it's fair to say that Miss C had failed to keep a proper look out as was concluded in *Joliffe v Hay*. I also don't agree with UKI's assertion that the circumstances of Miss C's accident were exactly the same scenario, and I don't think UKI have acted reasonably in seeking to apply that case to Miss C's accident without further investigation. Given the differences in the two sets of circumstances, I think UKI should have obtained a legal opinion before making its decision on liability, which it decided not to do.

Evidence from the witness statements

The road traffic crash (RTC) happened 28 October 2021. Miss C spoke with UKI's claims' handler later that day after she'd been discharged from hospital. Around 11 minutes into the call, Miss C was reassured that the accident would need to be further investigated before liability could be established. Around 17 minutes into the call the claims' handler said that if Miss C could provide the witnesses' details, that would be great as UKI would want to speak with them. Miss C explained that the PSNI officer would provide the police reference to her on the Friday or Monday. The claims' handler asked Miss C to pass that information on. However, as I will next explain, UKI carried out no investigation of the RTC, despite Miss C insisting that she was not at fault, and despite a number of sources of evidence becoming available to inform a proper investigation.

There is some disagreement in the information on the complaint as to who should have obtained a copy of the police report on the RTC. However, the PSNI report shows that Miss C's statement was taken on 21 November 2021, with the police witness statement being taken on 7 March 2022. So, it's unlikely the report would have been available before then. Therefore, any discussion of who should have obtained a copy of that information, Miss C or UKI (or both) is irrelevant as UKI told us they'd decided liability on the day the RTC occurred.

Approximately a year after the RTC happened, T provided this service with witness statements from Miss C's employer and her father. A number of points mentioned in these two witness statements were corroborated by other evidence, as I will explain.

In his witness statement, Miss C's employer, Mr T, said that after hearing a loud bang, like a bomb going off, he immediately ran outside and headed down the lane to the entrance. He said he'd spoken to one of the drivers and had taken her details, and those of the driver of a car on the opposite side of the road, which he provided to the police. The police said they'd been unsuccessful in contacting the witnesses. UKI doesn't appear to have made any attempt to do so and I think it should have done.

Mr T also recorded a conversation he'd had with the driver in the car immediately behind Miss C's car, who confirmed that she had slowed down and indicated to turn right, corroborating Miss C's version of events. He also recalls the officer commenting on the severity of the impact and the likely speed the other car had been travelling at, given the severity of the damage to Miss C's car. Both Mr T and Miss C's father also recalled that she was in a state of shock and a lot of pain, which further calls into question UKI's decision to solely base its decision on the call it had with Miss C, later on the day of the accident.

When UKI was provided with the witness statements and PSNI report, it simply said it had passed that information on to the third-party insurer but said, what won't help is Miss C being cautioned for driving without due care and attention. Again, UKI made no effort to investigate the evidence regarding the giving of the caution.

T says that Miss C was cautioned three months after the RTC but explained the PSNI officer had informed Miss C that she'd only been cautioned as the other driver had raised a complaint against her. Otherwise, T says Miss C wouldn't have been cautioned as the officer regarded her as the victim. The Public Prosecution Service wrote to Miss C shortly afterwards to confirm they would not be taking any action against her. It's not for me to comment on the action of the PSNI officer, or his reason for giving the caution – that would be a matter for Miss C to take up with the appropriate body. However, taking account of all the available evidence, and bearing in mind any suggestion of a caution being given was first raised four months after the RTC, I don't find the giving of the caution on its own to be indicative of any contributory liability on Miss C's part, in this case.

When UKI provided its business file to our service it said: 'We've assessed the likelihood of defending a non-fault claim and in light of the customer's version of events we are satisfied the claim would result in a shared liability'. UKI's case notes on the complaint state that they made the liability decision on day one, based on the information they had to hand. They didn't obtain a collision report from PSNI as they had no reference number for the accident and didn't feel it would have assisted their enquiries as UKI believed it was fully aware of the circumstances. UKI also maintained there were no witnesses to the accident.

However, as I've explained, there was other evidence available for UKI to consider, in coming to its decision on liability. Although, very little evidence was readily available at the time the decision was made, that is, on the day of the accident. Given Miss C's insistence that it was the driver a few cars behind her who had carried out a dangerous and reckless manoeuvre that had caused the RTC, I think it would have been reasonable for UKI to allow some time (in excess of a day) for evidence to be provided prior to making its decision on liability.

Overall, I don't think UKI completed a fair and reasonable investigation or assessment of the claim. It didn't seek a legal opinion which I think would have been helpful in this particular case given the circumstances. And, it made no attempt to contact any witnesses or obtain a copy of the police report on the investigation, which again, I think would have been helpful.

Given the time that's passed since the RTC occurred, it's not possible to know what would have happened if UKI had carried out a better investigation. However, it's possible that UKI might have been able to successfully defend the claim. For these reasons, I think the fair and reasonable outcome for Miss C, given the particular circumstances of her complaint, is for UKI to record the claim as non-fault. That means that UKI should: record the claim as 'bonus allowed'; refund Miss C's excess;

and restore any NCD. Due to the time she's been without the money, UKI should add interest to anything it refunds Miss C at a rate of 8% simple per year from the date she paid the money, to the date it makes payment.

Distress and inconvenience

I've next considered whether any compensation should be paid by UKI for the impact its actions have had on Miss C. The way UKI's handled Miss C's claim has clearly caused her additional distress at an already upsetting and stressful time for her. Making a decision that it knew would lead to significant financial impact, and emotional distress, on the basis of very little evidence clearly increased Miss C's distress. On the first notice of claim call, UKI said it sounded like Miss C hadn't done anything wrong and assured her that an investigation would be carried out and witnesses would be contacted. But neither happened. Instead, UKI sent Miss C a text message, out of hours in the evening, four working days after the crash to confirm that it had accepted thirty percent liability for the RTC. This undoubtedly caused Miss C further distress, which was highlighted by the emotion expressed by Miss C during the call she had with UKI the following morning.

Overall, the way UKI have handled Miss C's claim shows it failed to take account of the significant impact the accident had on Miss C, and its actions caused her additional distress. In addition, UKI said Miss C's personal effects could be collected from her car, but then proceeded to sell the car with her possessions remaining inside. Her father eventually tracked her possessions down, but again, this action increased the upset Miss C was suffering at this time. Taking everything into account, I'm intending to award Miss C £500 for the distress and inconvenience she's been caused by the way UKI has handled her claim.

I said I intended to uphold Miss C's complaint and require U K Insurance Limited to change the records on databases, including CUE to 'bonus allowed', restore Miss C's NCD, reimburse her excess, together with 8% interest, and pay Miss C £500 compensation for the distress and inconvenience caused by its handling of her claim.

UKI responded to say it accepted the provisional decision. However, UKI did take issue with any suggestion that either witness could be regarded as independent and it maintained that Miss C's employer didn't see the accident.

Miss C's representatives, T, confirmed acceptance of the provisional decision, on her behalf. However, they requested that I consider increasing the compensation award to cover her legal costs, which Miss C says she was required to incur as a result of the approach UKI had taken to handling her claim.

As both parties have responded to the provisional decision, I consider it appropriate to now issue my final decision on this complaint.

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.

I've also considered the comments made by the parties in response to the provisional decision.

I would like to clarify, for UKI, that I don't consider the witness statements to be independent as they were given by Miss C's father and employer. However, the point I was trying to make

in the provisional decision was that in the absence of any other evidence, their statements provided some information about what had likely happened, which I took into account. I also agree that Miss C's employer didn't see the accident take place, but I note that he was there shortly afterwards so I consider he was able to provide some useful information about the situation at that time.

I've considered Miss C's request for increased compensation to cover the legal fees she's incurred in relation to the claim. However, I'm satisfied that Miss C didn't need to instruct solicitors to deal with the claim, and I'm not persuaded that doing so made any difference to the outcome. In the final response letter, under the heading: '*Next steps*' UKI said:

'You also have the right to appeal our decision through the Financial Ombudsman Service. Making an appeal is free but you must do it within 6 months of this letter'.

I'm therefore satisfied that Miss C would have been aware that we offer a free service to consumers who are in dispute with financial institutions. Consequently, I'm satisfied that in all the circumstances of this complaint, UKI should not be required to reimburse Miss C for her solicitor's fees.

For the reasons given in this decision, and the provisional decision, I uphold this complaint and require U K Insurance Limited to take the actions, and pay the awards detailed below.

Putting things right

My final decision is that I uphold Miss C's complaint and I require U K Insurance Limited to:

- Change the records on databases, including CUE (the Claims and Underwriting Exchange) to 'bonus allowed' to reflect how it's treating the claim;
- Restore Miss C's NCD;
- Reimburse the balance of the excess paid by Miss C in relation to the RTC;
- Add interest to the sum above, at the simple yearly rate of 8%, from the date of payment to the date of settlement. (If UKI thinks it's required by HM Revenue and Customs to withhold income tax from the interest, it should tell Miss C how much it has taken off and provide a tax deduction certificate if required); and
- Pay Miss C £500 compensation for distress and inconvenience she's been caused by the way it's handled her claim.

My final decision

My final decision is that I uphold this complaint and require U K Insurance Limited to take the actions and pay the awards detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 19 July 2023.

Carolyn Harwood
Ombudsman