

The complaint

Mr W and his relative, Mr W (who I'll refer to respectively as "Mr W1" and "Mr W2"), complain that Advantage Insurance Company Limited unfairly rejected a claim on their motor insurance policy.

What happened

Mr W1 had a motor insurance policy with Advantage. Mr W2 was a named driver on the policy. In June 2022 Advantage received a notification from the police that they had recovered Mr W1's car following a collision a couple of days earlier. Shortly afterwards, the insurers of the other vehicle involved in the collision contacted Advantage to say that the accident had been caused by Mr W1's car veering onto the wrong side of the road. They said that Mr W2, who was driving the car, had been arrested at the scene for drink driving.

Mr W1 made a claim on the policy in January 2023. Advantage spoke to Mr W2, who said he'd taken a breathalyser test at the scene of the accident which recorded that he was over the legal alcohol limit. He said he'd been cautioned for drink driving, but a blood test taken shortly afterwards had shown him to be under the limit.

Advantage told Mr W1 and Mr W2 that it wouldn't cover the claim. They objected to Advantage's decision, on the grounds that Mr W2 wasn't charged for drink driving, and the blood test showed him to be under the limit.

One of our investigators considered the complaint and thought it should be upheld. She didn't think Advantage had carried out a fair investigation before turning down the claim. She said roadside breathalyser results aren't always accurate, and Advantage hadn't carried out any investigation to check that the breathalyser reading was accurate and reliable in this case. So she said Advantage should request the police report, analyse the test results and reconsider the claim.

Advantage disagreed with the investigator's view, so the complaint was passed to me.

My provisional findings

After considering all the evidence, I issued a provisional decision on this complaint to Mr W1, Mr W2 and to Advantage on 18 August 2023. I said:

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

Advantage has pointed to the policy wording, which says:

"You're not covered if an accident happens while you or anyone entitled to drive under your current Certificate of Motor Insurance:

- Is found to be over the prescribed limit for alcohol or drugs in the country where the incident happens*

- *Is driving while unfit through alcohol, drugs or other substances, whether prescribed or not...*

Mr W2 has pointed out that the police didn't prosecute him for drink driving. But the terms and conditions of the policy don't state that he'd have needed to be prosecuted or found guilty of drink-driving in court for Advantage to decline the claim.

However, based on what I've seen, I'm not satisfied that Advantage carried out a fair investigation to determine whether Mr W2 was, in fact, over the prescribed limit for alcohol at the time of the accident before deciding to decline the claim.

It isn't in dispute that the reading from Mr W2's roadside breathalyser test was over the limit. But roadside breathalysers aren't 100% accurate. The legal alcohol limit in the UK is 35 micrograms of alcohol per 100 millilitres of breath. I haven't been given details of how much over the limit the breathalyser reading was. Nor have I seen anything to suggest that Advantage had a record of this.

As Advantage itself has commented, there are various factors that need to be considered, including the interval between the breathalyser test and the blood test. But I've seen no evidence that it had any record of the blood test results or of the respective timings of the two tests.

If Advantage had based its decision on evidence that Mr W1's breathalyser test was significantly over the limit and there was a long gap between the breathalyser test and the blood test, then I might have taken the view that it was fair to conclude that Mr W2 was over the limit, and to turn down the claim. But based on what I've seen, it seems to me that although Mr W2 told Advantage that he'd had a blood test, Advantage decided to decline the claim purely on the grounds that Mr W1 had failed the roadside breathalyser test.

I asked Advantage to explain why it hadn't obtained a copy of the police report. And I asked it for a copy of the breathalyser reading. It didn't respond. So I have no way of knowing how far over the limit the breathalyser reading was. I've seen a redacted copy of Mr W2's blood test results, but it doesn't show a time. It does, however, show Mr W2 to have been comfortably under the limit when the blood test was carried out. And blood tests are generally considered to be more accurate than roadside breathalyser readings.

Advantage has referred to Mr W2 having been "unfit" to drive at the time of the accident. But it hasn't provided any evidence to back this up. And given that I don't think it did enough to establish whether it was likely that Mr W2 was actually over the limit when the accident happened, I don't think it was fair of it to decline the claim.

It seems to me that the fair thing to do here is for Advantage to pay the claim. I also think it should pay Mr W1 £150 to compensate him for the distress and inconvenience of having his claim unfairly declined."

And I said that Advantage should put things right by doing as I've set out in the "Putting things right" section below.

Further submissions

Mr W2 has told us that he accepts my provisional decision. Mr W1 hasn't provided any further comments. But Advantage says it disagrees with my provisional decision.

Advantage says that Mr W2 himself accepted when he spoke to it that he was over the legal limit for alcohol when he took the roadside breathalyser test. And it says Mr W2's admission is the evidence that it's relying on.

Advantage says that the policy term that it is applying is that Mr W2 was driving while unfit through alcohol at the time of the incident. It says that whether or not he was over the limit, Mr W2 had alcohol in his system "*which is an attributing factor to the incident*", so it believes it was correct to decline the cover.

Advantage says Mr W2 would have received charge sheets from the police "*at the time of his arrest*" and documents confirming the results of his tests.

But Mr W2 says he wasn't given a charge sheet, as he wasn't arrested. He says that after the blood test, he was released without charge. He says the only information the police have given him was the result of the blood test, which he's already provided. He says he's provided us with all the information he's had throughout the case, and can't provide information he's never been given.

Advantage has commented that it finds it hard to believe the police wouldn't have given Mr W2 any documentation. And it's suggested that Mr W2 may have been given documents which he's not provided because they prove Advantage's point.

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 thought about the further points that Advantage has made, but having done so, my view remains unchanged.

Crucially, I don't accept Advantage's contention that Mr W2 accepts that he was over the limit when he took the breathalyser test. Mr W2's accepts that the breathalyser reading was over the limit. But his argument throughout has been that this can't be relied on to show that he was, *in fact*, over the limit, as roadside breathalysers aren't fully reliable. And he's said throughout that the fact that a blood test shortly after the incident showed him to be significantly under the limit suggests that the breathalyser reading was unreliable.

Following receipt of my provisional decision, Advantage provided us with a recording of the phone call in which Mr W2 told it about what happened. I've listened to the recording, but it only goes to reinforce my view that the complaint should be upheld.

During the call, Mr W2 told Advantage that the roadside breathalyser result was "slightly" over the limit. Advantage's call handler responded "*Because you have confirmed that you were over the limit, it doesn't matter that you were only slightly over. Because you were over there is no cover for the claim.*" And she said that Advantage "*wouldn't spend any more money trying to get a police report to confirm this information. We won't get in contact with the police because we are not going to cover it*". The call handler told Mr W2 that it didn't matter that Advantage didn't have the blood test results "*because you've confirmed you were over the limit and that's all we need.*" Mr W2 said that the blood test had been carried out about half an hour after the breathalyser, to which the call handler responded "*Anything else from the police is not going to change that decision*".

It's apparent that once Mr W2 had told Advantage that the roadside breathalyser reading was slightly over the limit, it decided that it decline his claim and seek to recover the costs of the third party's claim from him, and nothing would change its mind.

The policy didn't explain what it meant by "unfit through alcohol", as distinct from being over the legal alcohol limit. Nor did it explain how this would be determined. I don't accept that it was reasonable of Advantage to conclude that Mr W2 was unfit to drive through alcohol simply because there was alcohol in his system at the time of the accident. Nor am I satisfied that it was fair of it to conclude, with no effective investigation, and without sight of a police report or any test results, that the alcohol in Mr W2's system contributed to the accident.

I'm not convinced that there's any good reason to think that Mr W2 has withheld information, as Advantage has suggested. I've listened to recordings of phone calls Mr W2 had with both Advantage and the investigator, and I find what he says persuasive. He told the investigator that he'd tried to get more details from the police, but that the police had said that it was the insurer's job to ask for that information, but that insurers were sometimes reluctant to do that because it cost money. That seems to be borne out by what Advantage's call handler said to Mr W2 in the call I've referred to above.

In the end, the police sent Mr W2 a heavily redacted copy of his blood test results. But I'd normally expect the police to be able to share more information with the insurance company than with the insured. And I think if Advantage had requested the information that it should have done from the police, it would likely have indicated how far above the limit the breathalyser reading was, and how much time elapsed between the breathalyser test and the blood test. Given that it knew Mr W2's blood test showed him to be comfortably under the legal alcohol limit, I don't consider that it was fair of Advantage to decline the claim without that information.

Putting things right

To put things right, Advantage should:

- Settle Mr W1's claim in accordance with the remaining terms and conditions of the policy;
- Add interest to the money paid in settlement at a rate of 8% simple per year*, calculated from one month after the date on which the claim was made until the date the settlement is paid; and
- Pay Mr W1 £150 to reflect the distress and inconvenience he's experienced.

*If HM Revenue and Customs requires Advantage to deduct tax from this interest, Advantage should give Mr W1 a certificate showing how much tax it's deducted if he asks for one.

For the avoidance of doubt, Advantage should not pursue Mr W1 or Mr W2 for recovery of any payment it made in connection with the third-party claim.

My final decision

My final decision is that I uphold this complaint. I require Advantage Insurance Company Limited to put things right by doing as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W1 and Mr W2 to accept or reject my decision before 8 November 2023.

Juliet Collins

Ombudsman