

The complaint

Miss B complains about how Marshmallow Insurance Limited handled her motor insurance claim.

What happened

The details of the claim are well known to both parties, so I'll only summarise them here.

In March 2022, Miss B was involved in a road traffic accident. She admitted having a drink before driving. Miss B says she was tested using a breathalyser at the roadside twice and the readings were 35ug and 41ug (the legal limit is 35ug). She was then asked to provide a blood sample for analysis, which she did. An extract from a police officer's witness statement confirms the following about the blood sample.

'This was later found to have been under the prescribed limit at the time of the collision, but only a crude back calculation could be completed due to the timings of her drinking, this back calculation being in favour of [Miss B].'

As a result of the car accident, Miss B was later convicted of driving without due care and attention for which she received a fine and penalty points.

In September 2023, Marshmallow wrote to Miss B to say she'd breached the policy terms as a result of driving while under the influence of alcohol. It was, therefore, not going to cover the claim and wanted Miss B to pay back the amount it'd paid for her claim as well as the costs it'd incurred on the third party's claims. In its final response letter, Marshmallow said, whilst Miss B wasn't charged for driving under the influence of alcohol, she had failed the breathalyser test. It was satisfied this, coupled with the report from the police, is strong enough evidence to suggest Miss B was under the influence of alcohol at the time of loss.

Miss B didn't agree and said the declined claim has had a significant impact on her and her wellbeing. Further, Marshmallow waited until 18 months after the accident to take this action which is too long and has reminded her of the traumatic event.

Miss B complained but Marshmallow didn't change its mind, so she brought her complaint to this Service for an independent review. To put things right, she asked Marshmallow to cover the claim, rather than seek to recover this from her, and said she had no interest in any compensation for the distress caused.

An Investigator reviewed matters and didn't agree Marshmallow had acted fairly and reasonably in declining the claim. To put things right, he recommended it reinstate Miss B's policy, removing any internal and external markers of the cancellation and consider the claim in line with the remaining policy terms and conditions. He also asked Marshmallow to pay £200 compensation for the trouble and upset caused.

Miss B accepted the recommendation. Marshmallow didn't. It made a number of points including the following:

- The policy is clear – if, at the time of the accident, there's *any* alcohol, the driver isn't covered. No alcohol is permitted.
- Miss B was under the influence at the time of the accident. The police officer's statement says Miss B was over at the scene. And Miss B's blood test was hours later which led to the alcohol being out of her system at this time.
- Miss B was completely in the wrong in this situation. To uphold her complaint sets a standard for drivers that this behaviour is acceptable on the roads.
- It could change the cancellation reason to driving without due care but it's still a cancellation and a breach of the policy conditions.

The Investigator communicated with Marshmallow to explain why these points didn't change his view. As Marshmallow didn't agree, the matter was passed to me for a decision.

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.

Having done so, I must explain to the parties I consider the Investigator reached a fair outcome in this matter and I agree with the reasons set out for their outcome. So, I will be upholding this complaint and asking Marshmallow to put things right. I'll explain why.

The starting point of any claim made under an insurance policy is the contract between the customer and the insurer - the policy document.

Miss B's policy excludes Marshmallow from liability in certain situations. This is set out in Section 5 and a relevant extract is below.

'Excluded uses and excluded drivers

Any liability, loss or damage arising while the insured vehicle is being:

...

driven by you..., should it be proved to our satisfaction that the driver was under the influence of alcohol or drugs at the time of such loss or damage occurring. A conviction under the relevant law (including a conviction for failing to supply a specimen of breath, blood or urine) shall be deemed to be conclusive evidence that the driver at the time of the loss or damage was under the influence of alcohol or drugs.'

Marshmallow relied on this to decline Miss B's claim. But I'm not satisfied the situation with Miss B reasonably falls within this term allowing Marshmallow to decline cover nor that it'd be fair and reasonable for it to do so in this matter.

It's acknowledged Miss B wasn't arrested or convicted of driving under the influence of alcohol. So, the focus here is on the first part of the exclusion – *'the driver was under the influence of alcohol or drugs at the time of such loss or damage occurring'*.

Marshmallow say this means no alcohol is permitted at all. I don't agree this is the reasonable interpretation of the clause. Firstly, if Marshmallow didn't want to cover any claims when alcohol has been consumed, this would be outside usual industry practice and considered an unusual term - and so would have needed to be specifically highlighted to Miss B in the sales process and policy documents. And I can't see this has been done. Further, Miss B's policy doesn't define *'under the influence of alcohol'* as distinct from being over the legal drink drive limit or explain how Marshmallow will determine this.

It's for Marshmallow to demonstrate why Miss B was more likely '*under the influence*' of alcohol. I'm satisfied this reflects the wording of the Road Traffic Act 1988 and, in the absence of a definition, can fairly be interpreted as being over the drink drive limit. The limit is in place as it's generally accepted past this is when alcohol affects an individual's ability to drive safely. So, I don't agree Miss B's claim can be excluded because *any* level of alcohol isn't allowed under her policy.

I acknowledge Marshmallow says the results of the blood test are uncertain as the Police officers statement refers to a '*crude*' back calculation. And, as the statement corroborates Miss B failed a roadside breathalyser test, it has strong enough evidence to argue it has been proven she was driving under the influence at the time of the incident. Therefore, it doesn't matter what the Police's decision was. But I don't see things the same way.

I think it's reasonable to rely on the Police's judgement and decision in this matter. Miss B was breathalysed by officers at the scene – she says one result was over but close to the drink drive limit and the other wasn't over the limit. Miss B then consented to a blood test. This showed she wasn't over the limit at the time of the accident after a back calculation had been carried out. So, the time it took for the blood test to be done isn't relevant. The statement from the Police Officer doesn't given evidence about Miss B being '*under the influence*' or her behaviour in relation to alcohol – it simply confirms details about the accident and that one reading given was 41ug. Importantly, it does state the blood test back calculation confirmed she was under the limit at the time of the accident. No detail is given by the Officer as to the calculation, how it was carried out or why he refers to it as being a '*crude*' calculation. Nor has any evidence been provided by Marshmallow to show this shouldn't be relied on and the breathalyser result of 41ug is the most persuasive evidence in this matter.

The Police didn't arrest or charge Miss B with any alcohol-related offence. I think it's reasonable to conclude that, if the Police took no action, they were satisfied she wasn't driving whilst unfit when under the influence of alcohol.

As far I'm aware, Marshmallow reached its conclusion based on the same information the Police used to determine she wasn't unfit to drive along with a statement from Miss B which doesn't substantially alter the evidence which came before it. In the circumstances, I don't think it's fair and reasonable for Marshmallow to reach a different conclusion to the Police. Whilst I acknowledge this Service requires a different standard of proof - on the balance of probabilities – I'm not satisfied Marshmallow has met this standard with the evidence it's provided.

In summary, Marshmallow hasn't persuaded me the blood test back calculation wasn't accurate. Nor why a breathalyser result has more weight than the blood test. I say this particularly in light of the Police's decision to obtain a blood test and then not to charge or prosecute Miss B based on the same evidence.

I note Marshmallow's comment Miss B's behaviour was wrong and this decision will set a dangerous precedent. But this decision is based on the policy terms in Miss B's particular claim and whether these have been fairly and reasonably applied in Miss B's situation. It's not a moral or ethical decision about the ability of a person to have an amount of alcohol – which the blood test shows was below the legal limit - and then drive. The standard of a driver is one for the courts to decide.

I'm aware Marshmallow says it can take the same action due to Miss B being convicted of driving without due care and attention. But I don't see things the same way. It hasn't pointed to any policy terms allowing it to do so. And that's not the reason Marshmallow rejected her claim, or why it asked her to return the claim monies and pay its third-party costs. It did so

because it said Miss B was '*driving while under the influence of alcohol*'. For the reasons set out above, I don't think Marshmallow has shown this, so I don't think it's reasonable for it to rely on this term.

In light of the above, I'm satisfied Marshmallow hasn't acted fairly and reasonably in applying the terms of Miss B's policy to retrospectively reject her claim. It now needs to put things right.

Putting things right

Marshmallow Insurance Limited should take the following steps to put things right:

1. Reinstate Miss B's policy and settle the claim in line with remaining policy terms (if this hasn't already been done). To be clear, this means it cannot require Miss B to pay back the amount it has already paid for her claim nor the costs it has incurred on the third party's claims.
2. Remove any record of the policy cancellation internally and externally.
3. Pay Miss B compensation of £200 for the distress and inconvenience caused.

My final decision

My final decision is I uphold this complaint against Marshmallow Insurance Limited. To put things right, it needs to follow the steps outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 1 May 2024.

Rebecca Ellis
Ombudsman