

The complaint

Mr N complains about a declined claim on his motor insurance policy with Calpe Insurance Company Limited.

What happened

The background to this complaint is well known to both Mr N and Calpe Insurance. In my decision, I'll focus mainly on giving the reasons for reaching the outcome that I have.

Mr N had a collision with a parked car. He says he was distracted by an argument in his car with his passenger and he collided with the parked car. He made a claim on his motor insurance policy which was ultimately declined – but Calpe did settle the finance agreement on Mr N's car, pending their full investigation of the claim. They later declined the claim (for driving whilst unfit – due to being under the influence of alcohol) and then requested their outlay from Mr N.

Mr N complained to Calpe, but as he remained unhappy he referred it to our Service for an independent review. Our Investigator considered the complaint and recommended it be upheld. That is, Calpe needed to settle the claim in line with the remaining policy terms.

As Calpe didn't accept the recommendations, the complaint was referred to me for a decision. I recently sent both parties a copy of my provisional, intended findings where I set out that I wasn't intending to uphold this complaint. As the deadline for responses has now passed, I've considered the complaint for a final 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.

Although a number of issues have been raised, this decision only addresses those issues I consider to be materially relevant to this complaint. This isn't meant as a discourtesy to either party – it simply reflects the informal nature of our Service.

Why did Calpe decline this claim?

Calpe declined this claim, relying on the following exclusion:

*'This Policy does not provide cover for any loss, damage, accident or injury, other than the Underwriters are required to provide in accordance with the Road Traffic Act, occurring whilst Your Car is being driven by You or any person permitted to drive under this Policy **should it be proved to the Underwriters satisfaction** [bold added for emphasis by Ombudsman] that the driver was under the influence of drink or drugs.*

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 of the condition of the driver at the time and date of the occurrence

giving rise to the conviction. [Bold added for emphasis by Ombudsman]

If the Underwriters are required to pay a claim under the Road Traffic Law as a result of Drink/ Drugs driving the Underwriters reserve their right to recover from You and/or the person who incurred the liability any amount paid out which the Underwriters would not have been liable to pay had the law not existed. A conviction for Drink/Drugs offence will result in the immediate cancellation of Your Policy.'

I will return to the policy terms later in my decision. Calpe say that Mr N was under the influence of alcohol at the time of the collision and only provided a sample a few hours afterwards. They argued that, had he provided a sample shortly after the collision, it'd likely have produced a higher reading. Although I've noted Mr N's comments about there being no evidence to show he was over the legal drink driving limit at the time of the collision - my role here is to decide if, on balance, Calpe have fairly and reasonably considered the claim before reaching the position they've taken here.

Mr N failed to provide a sample (breath) at the roadside. He's provided a number of explanations as to why this was the case – including:

- *“it was coming up as inconclusive”* (notification of loss call with the business),
- *“the breathalyser machine was unable to take a reading at the scene”* (complaint form),
- He *“wasn't doing it properly”* (indemnity call with business),
- *“The roadside test possibly did not get a reading as I was shaken up by what was happening, as well as never having done one before, or the device that was used was faulty”* (email to our Service 14 February 2023) and, most recently;
- that a mental health condition impacted his physical ability to give a sample (in response to my provisional decision).

He was arrested for failing to provide a sample, but did later provide a sample at the police station at around 5.45am – which was under the legal drink driving limit of 35 micrograms (MG) of alcohol per 100 millilitres (ML) of breath. Mr N has said the delay in getting to the police station was because his passenger needed to be cut out from the car.

I've weighed up what Mr N has said about failing to provide a sample at the roadside alongside the position Calpe have taken. On balance, based on the evidence provided by both parties, I'm satisfied that the position taken by Calpe is fair and reasonable.

Calpe's ultimate rationale for declining the claim was that Mr N was likely under the influence of alcohol at the time of the collision and only provided a sample a few hours afterwards. They argued that, had he provided a sample shortly after the collision, it'd likely have produced a higher reading. I agree that, in the absence of a medical condition or other physical reason, the relative alcohol reading will generally decrease as time passes and alcohol is broken down by the body.

It's not in dispute that Mr N had been drinking alcohol prior to the accident at around 3am. I say this because he told the police at the time of the accident (police report) and he also told our Service. What is in dispute is whether he was unfit to drive as a result – given the relevant test wasn't successfully completed until 5.45am.

I've then considered the circumstances that led to Mr N being unable to provide a sample

(listed earlier in the decision) at the roadside and why he was arrested - as the delayed result forms the basis of Calpe's position in declining this claim. The police report listed 'impaired by alcohol' as a possible contributory factor. Although a range of factors can lead to loss of concentration, it's generally accepted that consuming alcohol can impact concentration and slows reaction times.

It's important to point out that although Mr N has (broadly) told our Service that he was unable to provide a sample either because he was 1- shaken up, 2- 'wasn't doing it properly' or 3- the device was faulty, the police report is clear that Mr N "Refused to provide" the sample. I've also noted the charge was given as "Fail [sic] to co-operate with a preliminary test..."

Under the relevant law (The Road Traffic Act 1988), it is stated:

'(6) A person commits an offence if without reasonable excuse he fails to co-operate with a preliminary test in pursuance of a requirement imposed under this section.'

The following government website expands on what is expected to happen when asked for a breath test <https://www.gov.uk/stopped-by-police-while-driving-your-rights/breath-tests>:

'If you refuse to take a breath test, or fail to supply a sample of breath and do not have a 'reasonable excuse', you can be arrested. A reasonable excuse could be a genuine physical or mental condition stopping you from giving a sample.'

I'd have reasonably assumed if the breathalyser was faulty this would've been raised with the police at that time or before now. I find it unlikely that Mr N would've been charged with failing to co-operate with the breath test (considering the police report references his refusal) if his version of events was accurate.

Mr N has recently referenced a mental health condition that may have contributed to him failing to provide a sample at that time. As explained, the claim wasn't declined because of Mr N failing to provide a roadside sample – it was declined because Calpe concluded that had the sample been given at that time it would've likely shown him to be over the drink driving limit at the time of the collision.

Have Calpe fairly and reasonably considered the claim inline with the policy terms?

I'll now return to the policy terms, referenced earlier in my decision. In response to our Investigator's opinion, Calpe said:

"a conviction for drink driving is not requirement [sic] for the Underwriter to be satisfied that a person was under the influence and merely the conviction for drink driving is conclusive, no arguments. We have pointed out the circumstances of this case which satisfies the Underwriters belief the person was under the influence at the time of the collision."

My reading of the relevant terms here is that the test for Calpe is them being satisfied that Mr N was under the influence of alcohol at the time of the accident. I agree that a conviction could be interpreted as conclusive evidence, but that Mr N wasn't convicted for either drink driving or failing to initially provide a sample doesn't mean that Calpe can't rely on this exclusion in the specific circumstances of this complaint - or that they've unfairly applied the policy terms when considering this claim.

Responses to my provisional decision

Calpe responded to accept my intended findings. Mr N responded to say that he didn't accept the decision and told us about a previously undisclosed mental health condition he lives with. He also provided a letter from a medical professional to support that he lives with the condition. Mr N says his condition would have likely affected him at the roadside and contributed to him being unable to provide a sample at that point.

Mr N says his reason for not disclosing it to either Calpe or Our Service until now was because of '*the stigma attached around it and how people treat and perceive you...*'. But I'm satisfied that Mr N has had ample opportunity to disclose this information - either in confidence to the police at the time of his arrest or to Calpe when making his claim. This information doesn't change the outcome I've reached. I say this because Calpe's decision to decline the claim was not based on the *reason* for the failure to provide the roadside sample - but what the reading likely would've shown had it taken place at that point instead of a few hours later.

Summary

When considering this complaint, I've reached my findings based on what is *more likely than not* to have happened – the balance of probabilities. This is different to the 'beyond reasonable doubt' test that a Court may apply.

In the specific circumstances of this complaint, I find that Calpe have fairly and reasonably considered the evidence here before reaching their position and I don't seek to interfere with it. At the core of this dispute, I find that Mr N's failure to provide a sample at the road side meant that a higher reading (than what was recorded almost three hours later) wasn't recorded and the position taken by Calpe is reasonable.

Whilst it was positive of Calpe to settle the finance agreement pending the outcome of their claim investigation, as I find that they fairly considered the claim in line with the policy terms, Mr N now needs to speak to Calpe about agreeing a way forward with regards to the finance agreement that was settled.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 18 September 2023.

Daniel O'Shea
Ombudsman