

Determination

Case number	775299
Financial firm	AAI Limited

1 Determination overview

1.1 Complaint

The complainant lodged a claim under his comprehensive vehicle insurance with the financial firm (insurer). This was due to damage to his vehicle after losing control at a roundabout and ending up in an embankment.

The insurer investigated the claim. The insurer assessed the vehicle as a total loss and denied liability. The insurer says the loss occurred as a result of the complainant's reckless act and failure to take reasonable precautions, which are excluded under the policy.

1.2 Issues and key findings

Is the insurer liable for the loss?

No. This is because the available information shows:

- the complainant failed to take reasonable precautions,
- this resulted in the loss claimed, and
- the policy clearly excludes losses in these circumstances.

1.3 Determination

This determination is in favour of the insurer.

The insurer correctly denied the claim and is not required to take further action.

2 Reasons for determination

2.1 Is the insurer liable for the loss?

Onus on complainant to establish a claimable loss

The policy provides cover for accidental loss or damage to the vehicle caused by an incident during the period of insurance. This is subject to exclusions, terms and conditions. An incident includes a collision or impact.

The complainant has the onus to establish any loss or damage arising from an event is covered by the terms and conditions of the policy. This is known as a valid (prima facie) claim.

Once established, the onus turns to the insurer to show:

- the loss is excluded, or
- it is otherwise entitled to deny the claim.

The complainant says on 1 January 2020, whilst he was driving in Bongaree, Queensland (QLD) at around 9:45 PM, he lost control of his vehicle and ended up in a ditch. He says police attended the scene of the accident and the vehicle was deemed a total loss.

Insurer says complainant failed to take reasonable precautions

The insurer relies on the exclusions within the policy relating to reckless acts and the failure to take reasonable precautions. The exclusions are set out in section 3.2 of this determination.

Failure to take reasonable precautions requires more than negligence

Failing to take reasonable precautions is a subjective test. It has a well settled meaning in the Courts.

To establish the application of the exclusion, the insurer must show the complainant:

- was aware of the risk of his actions (in a subjective sense); and
- deliberately, or recklessly, courted the risk.

It is not enough that there was a failure to act or inadequate action was taken. Neither does it apply to negligence or carelessness.

Parties disagree on liability for loss

There is no dispute the complainant lost control of the vehicle while driving and traversing a roundabout. The incident was investigated, and the police charged the complainant with dangerous operation of a vehicle.

The matter was heard at Caboolture Magistrates Court. The complainant was found guilty of the offence and his driving licence suspended for a period of six months.

Information on file suggests the complainant was travelling at approximately 150km/h to 180km/h in a 70-80km/h zone leading up to the accident.

Following the police report and court decision, the insurer denied the claim on several bases. This included the fact the complainant failed to take reasonable precautions to prevent loss or damage to his vehicle.

The complainant disagrees with the insurer's decision and says:

- he had three passengers in his vehicle at the time of travelling
- the three passengers were playing loud music
- the passengers' behaviour contributed to him losing control of the vehicle
- the witness statements are inconsistent because the passengers who gave them were intoxicated, so they should be disregarded.

The complainant maintains that the insurer has not assessed his claim correctly and fairly.

Evidence shows the complainant was travelling at high speeds

Having reviewed the exchanged evidence and circumstances surrounding the event, I note the following.

All of the witnesses in the vehicle gave statements to the police. Their evidence was relatively consistent. They say the complainant was driving at speeds of between 160-190 km/hr leading up to the collision. None of them observed the complainant using his brakes.

The complainant, when interviewed by the insurer, had no recollection of what happened about 50 metres from the accident scene. That is, he could provide no evidence of his likely speed or the circumstances leading to the loss of control. The only evidence he does recall is using the brakes at some point. In his interview with the police at the scene, he said he tried to use the brake but then used the handbrake to attempt to control the vehicle but was unsuccessful.

Five witnesses at a service station say they observed the complainant's vehicle driving at very high speeds shortly before the incident. They estimated the speed at a similar range to the passengers.

The road was sealed, marked and dry. The weather was clear. According to the insurer and the police, the roundabout was well lit. The insurer also notes the complainant would have been familiar with the route. The complainant provided no evidence to refute this.

The vehicle suffered substantive damage and is a total loss. According to the police report, the vehicle struck the gutter of a roundabout, drove straight through it, took out a tree before exiting the roundabout and hitting the opposite side curb on the nature strip. The vehicle then struck a large metal stormwater grate, sheering it completely, before coming to a stop on an embankment about 5-10 metres off the road.

Photos taken by the insurer's investigator of the accident scene do not show the complainant's vehicle left skid marks.

The vehicle was tested mechanically by the police. No issues were noted.

Complainant failed to take reasonable precautions

After careful consideration of all the available information, I find the following.

All of the witnesses are consistent in describing the speed travelled. Several of the passengers said they observed these high speeds in the vehicle's speedometer. The complainant has provided no evidence to refute that.

The witness evidence is consistent with the witnesses at the service station. It is also relatively consistent with the vehicle's extended path of travel once it entered the roundabout.

I accept the witnesses' evidence as credible.

I therefore accept, on balance, the complainant was likely travelling between 150 to 180km/hr. The speed zone around the area was 80km/hr and reduced to 70km/hr leading to the roundabout.

There is no evidence the complainant was intoxicated or under the influence of drugs. No mechanical issue was identified in the vehicle. None of the passengers say they attempted to interfere with the complainant's control of the vehicle.

I therefore accept he was driving at these high speeds intentionally. I also accept he would have recognised the risk of being in an accident. There is widespread information and education about this risk. This ranges from television advertisements and driving tests. The risks of driving speeds much higher than the designated speed limit is also common knowledge. It is difficult to accept the complainant did not know of these risks.

I also accept the complainant, at least recklessly, courted this risk. He was driving at a speed significantly higher than the designated speed limit. There were no skid marks observed at the scene leading to the roundabout. Whilst the complainant says he applied the brake and handbrake, this appeared to have occurred after he lost control.

This shows he entered the roundabout at a very high speed. The evidenced shows little to no effort was taken to enter the roundabout at a safe and reasonable speed despite the road conditions being favourable and knowing the risks of driving at high speeds.

Given all this, I accept the complainant has failed to take reasonable precautions in the way he operated the vehicle.

I also accept the accident was caused by this failure. The complainant was familiar with the area. There is no evidence the road conditions contributed to the accident. The most likely cause of the accident was the complainant's failure to take reasonable precautions.

Insurer is entitled to deny the claim

It is fair in all the circumstances for the insurer to deny the claim because:

- the complainant does not dispute receiving the policy
- the policy clearly says the insurer does not cover damage caused by, arising from or involving a failure to take reasonable precautions
- the available information shows the accident was caused by the complainant's failure to take reasonable precautions.

3 Supporting information

3.1 The AFCA processes

AFCA's approach is based on fairness

AFCA has determined this complaint based on what is fair in all the circumstances, having regard to:

- the legal principles
- applicable industry codes or guidance
- good industry practice
- previous decisions of AFCA or its predecessor schemes (which are not binding).

The respective parties have completed a full exchange of the relevant information, and each party has had the opportunity to address any issues raised. We have reviewed and considered all of the information the parties have provided.

While the parties have raised a number of issues in their submissions, we have restricted this determination to the issues that are relevant to the outcome.

We assess complaints on available information and circumstances

AFCA is not a court of law. We do not have the power to take or test evidence on oath, or to require third parties to give evidence.

When we assess complaints, we consider:

- available documents
- the recollections of the parties
- all relevant circumstances.

We give more weight to documents created at the time the events occurred. If there are no relevant documents, we will decide what most likely occurred based on the available information.

If there are conflicting recollections and these are evenly weighted, we may find that a claim cannot be established.

3.2 Policy wording

Your responsibilities – page 4 and 5

You must:

- follow all the terms, conditions and responsibilities set out in your policy;
- provide honest and complete information for any claim, statement or document supplied to us.

Not meeting your responsibilities

If you do not meet your responsibilities, it may lead up to do either or both of the following:

- reduce or refuse to pay your claim;
- cancel your insurance policy.

If fraud is involved, we can treat your policy as if it never existed.

What we do not cover – general exclusions – page 23-24

You are not covered under any section of this policy for damage, loss, cost or legal liability that is caused by or arises from or involves:

Failure to take reasonable precautions

your failure to take reasonable precautions to prevent loss, damage or legal liability.

Reckless acts

Any intentional or reckless act by you, the driver of the car or by a person acting with your express or implied consent (such as street racing, burnout, donuts, driving into water, illegally using a mobile telephone, driving at excessive speed).