NOT RECKLESS
but reasonable

A recurring theme in motor vehicle insurance claims is rejections, based on driver recklessness. Often, it is in relation to the high speed at which the insured vehicle travelled that the insurer would seek to avoid liability.

Notwithstanding various discussions, published articles, workshops and seminars by the Ombudsman, insurers still get the application of this concept of recklessness wrong.

It is the writer's observation that it is frequently incorrectly understood that this is one of the easier or easiest grounds on which to decline claims. What seems to muddy the waters is the fact that investigators employed by insurers usually have a policing background and are reasonably familiar with the traffic offence of reckless and negligent driving. By its very nature, due to the fact that it includes negligence, it is quite an easy charge to prove.

Why reckless driving is harder to prove

Negligence is any conduct that fails to meet the standard of reasonableness, hence the ease of proving such a charge, accusation or allegation.

What is often overlooked, however, is that insurance policies ordinarily provide coverage for negligent driving. In addition, it is overlooked that negligent driving and reckless driving are actually two completely different concepts in law.

As indicated earlier, to prove negligence one needs to prove deviation from the bounds of reasonableness. Recklessness, on the other hand, is much more difficult to prove, especially because one is required to prove that the driver accused of driving recklessly subjectively and knowingly courted danger.

To prove recklessness, one has to prove extreme deviation from reasonable conduct such that it can be concluded that the person alleged to have been reckless must have appreciated what they were doing, the likely consequences of it, and reconciled themselves with the consequences of their conduct, hence the concept of knowingly courting danger.

Alternatively, one must prove that the consequences must have been obvious but deliberately ignored.

It is impossible to prove what was going on in someone else's head, and one would have to rely on the available circumstantial evidence to establish what must have been going on in that person's mind.

As soon as one can prove that the conduct was not unreasonable in the context of the prevailing circumstances, the insurer would not succeed with the allegation of recklessness - particularly when considering fairness and equity.

Can fear justify reckless driving?

In one of the latest cases dealt with by the Ombudsman, it was common cause that the complainant suffered a loss in a motor collision which occurred whilst they travelled at 114 km/h in a 60km/h zone. The insurer declined the claim citing recklessness on the part of the insured driver.

However, the latter explained that the reason they drove in the manner they did was neither unreasonable nor reckless. Rather, it was out of necessity and self-preservation.

The insured driver felt under attack and took what they considered reasonable measures to safeguard themselves and their vehicle. The ensuing collision was thus not the result of recklessness but the result of reasonable actions to self-preserve. The complainant thus argued that their conduct was necessary in the context of the reasonable apprehension, following the behaviour of occupants of a third-party vehicle.

Necessity and reasonable apprehension were, therefore, raised in defence of the driver's manner of driving; and against the claim rejection.

The insurer neither contested nor disproved the complainant's version.

A claim reconsidered

Accordingly, the Ombudsman pointed out to the insurer that it had not proved its entitlement to decline the claim on the ground of recklessness. The insured driver's conduct seemed reasonable under the circumstances, and could not, therefore, be considered reckless.

It was recommended that the insurer reconsider its approach and stance, and perhaps settle the claim. The insurer acceded to the recommendation and settled the claim.

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