DUTY CALLS

This month, Tim Kelly of MotorClaimGuru Ltd, highlights the duties of an engineer when handling insurance claims, a customer's entitlement and how the Financial Conduct Authority (FCA) regulations are applied.

When I first became an engineer one of the best thing's I did was undertake training and complete the exams with the IAEA and I truly believe anyone involved in the industry as an engineer would benefit from doing the same. I thoroughly enjoyed it and have continued to further my knowledge in the industry as I believe it is also very important to continue with professional development.

It is important to have a thorough understanding of our industry so that engineers are seen as experts. There seems to be very little information about the very regulations by which all insurers, accident management companies and claims management companies (CMC) must abide. One reason this may be the case is because it is a very, very complex area - it may also be that they do not recognise the significance of it, why it is there, how it affects the consumer or how it relates to an engineer. The regulations referred to within this article are not my subjective take on things but are mandatory.

Consumers

We are all consumers, and most of us will have motor insurance policies, everything below relates to you as a consumer, and they are there for your protection.

The Financial and Service and Markets Act came into place in 2000 (FMSA 2000 Act) to protect consumers, and all aspects of the FMSA 2000 Act are mandatory. The FMSA 200 Act applies to all financial institutions and contains specific and general areas.

My role is to aid consumers in investigating how their claim has been handled to ensure they are being treated fairly and that they are receiving their contractual or legal entitlement under tort law.

So firstly, what is the consumer's entitlement? The principle of indemnity is re-imburse the financial loss sustained as a result of an incident; this is covered under a contract of insurance. It does not matter whether this been on a household claim, travel insurance or motor claim, it is nothing to do with repairing a vehicle, but in financial restitution (restitutio ad integrum).

'The principle adopted by the courts in many cases… is that of restitutio in integrum. If the plaintiff has suffered damage that is not too remote, he must, as far as money can do it, be restored to the position he would have been in had that particular damage not occurred.'

Court

If you note, a court never advises for a car to be repaired or how to be repaired only on the cost involved. It is possible that where the insurance company is acting as the agent on behalf of the consumer and is also the paymaster, the consumer may not receive their contractual or legal entitlement, it may well be a possible or real conflict of interest for the insurer or agency handling the claim.

Precedent was set in Coles v Hetherton when the Judge outlined the measure of a consumers' loss. Three issues were considered, namely:

1. What is the proper measure of loss for damage to a chattel?
2. Does it make a difference if the repair is organised by an insurer, as opposed to the claimant himself?
3. If an insurer indemnifies an insured in respect of repairs (which, as in this case, may include sundry incidental or administrative expenses) is the total amount recoverable, provided it is still reasonable?

RSA succeeded on all three points. On the first, and main, issue, the Court of Appeal found that the proper measure of loss was the diminution in the value of the damaged chattel. That loss occurred immediately at the time of the accident so could not be mitigated by having the chattel repaired at a lower cost. Provided the claimed cost of repair was not unreasonable therefore, it was recoverable. Further, it made no difference that the claimants were backed by insurers. The reasonable cost of repair was the cost the claimant could have obtained on the open retail market; it did not matter that his insurer might have been able to obtain a better rate through its industry connections. Equally, provided the final amount claimed was reasonable, it could be recovered even if it did include sundry additional expenses.

Protected

From the above, the consumer's loss whether under contract or through tort law is protected; the loss is the diminished value of the chattel that occurred and could not have been mitigated. Engineers should not be negotiating a consumer's loss to reduce cost on behalf of an insurer or your paymaster, as consumers are entitled to their full loss. It may well be that you need professional indemnity insurance, as the consumer may have the right to claim from the engineer for denying them their legal entitlement for the difference in that loss.

If advising in your professional capacity remember you are an engineer. The report may be needed in court and could be subject to CPR35 rules; I have seen many an engineer apply rates advised by their work provider as to rates being applied. The instance this is done, the engineer creating the report could be found in contempt, as his duty lies to the court not his paymaster and his report is no longer impartial.

In CPR35 it states, under section 4 4.2 that experts should be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly (CPR 1.1).

Experts are under an obligation to assist the court so as to enable them to deal with cases in accordance with the overriding objective.

Facts

The role of the engineer is to present the facts, not to mediate to reduce the consumer's loss by reducing rates and asking for discounts from repairers. The loss has already occurred and could not have been mitigated against by having it repaired for less (under Coles v Hetherton), therefore there is no duty to mediate. When acting for an insurer, whether employed by them or as an independent engineer, the Insurance: Conduct of Business Sourcebook (ICOBS) must be abided by.

Some people may think that ICOBS only applies to insurance intermediaries, but the FCA have confirmed when asked, that it does apply to all insurance companies, intermediaries, accident management companies and anyone appointed by these companies. The main purpose of ICOBS is to ensure customers are treated fairly when making an insurance claim.

Conflicts

The relevant area of ICOBS to ourselves as an engineer and to customers is ICOBS 8.3.3. This comes under conflicts of interest, http://fshandbook.info/FS/html/handbook/ICOBS/8/3. Principle 8 requires a firm to manage conflicts of interest fairly. SYSC 10 also requires an insurance intermediary to take all reasonable steps to identify conflicts of interest, and maintain and operate effective organisational and administrative arrangements to prevent conflicts of interest from constituting or giving rise to a material risk of damage to its clients.

If a firm acts for a customer in arranging a policy, it is likely to be the customer's agent (and that of any other policyholders). If the firm intends to be the insurance undertaking's agent in relation to claims, it needs to consider the risk of becoming unable to act without breaching its duty to either the insurance undertaking or the customer making the claim. It should also inform the customer of its intention.

A firm should in particular consider whether declining to act would be the most reasonable step where it is not possible to manage a conflict, for example where the firm knows both that its customer will accept a low settlement to obtain a quick payment, and that the insurance undertaking is willing to settle for a higher amount.

Apply

All the above could apply to an insurer or intermediary arranging an engineer, and if in doing so it leads to a material risk to a consumer, (an engineer negotiating in reducing settlement or an insurer contracting a repair at a reduced rate) could breach the regulations and cause detriment to the consumer. If in doing so, the consumer has the right to go to the Financial Ombudsman Service (FOS) and advise of these breaches and to seek full settlement and compensation.

When dealing with consumers' claims, these are some of the areas I review. When dealing with direct insurers section 3 of the above is applicable, and the insurer should be advising of any potential or real conflicts of interest in them acting as the customer's agent, as it may well breach its own contract of indemnity. Or in referring a consumer to an accident management company it owns breaching the regulations.

Reviewing section 4 when acting as an engineer, you are acting as an agent on behalf of the insurer or CMC it may well be that in offering a lower settlement on a total loss, a cash in lieu settlement, or in negotiating repairs you could well be breaching the regulations. Especially, if outlining your duty lies to the court. As an engineer, you are carrying out regulated activities and do need to comply.

I believe the role of the engineer needs to be re-established to affirm a vital role as the expert, recognised for the expertise and knowledge, and acting on behalf of consumers independently. This is where I see the future for engineers.

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