

The complaint

Mr H's complaint is about a claim he made on his Aviva Insurance Limited legal expenses insurance policy.

Mr H feels that Aviva treated him unfairly.

In this decision all references to Aviva include their claims handlers.

What happened

Mr H made a claim on his Aviva legal expenses insurance policy for cover to bring a claim against a hotel he stayed at abroad at which he suffered a fall.

Aviva instructed one of their panel firms to review Mr H's claim, but that panel firm said they weren't able to consider the claim because they only dealt with package holiday claims and Mr H's claim didn't fall into this category. As a result, Aviva instructed a second panel firm to consider Mr H's claim.

The Solicitor at the second panel firm said that on the basis of the evidence she'd considered, she couldn't say Mr H's claim had reasonable prospects of success. She said that supportive expert evidence would be necessary in order to establish this. In the absence of Mr H supplying this, the Solicitor said she couldn't say Aviva should fund his claim. Following this Aviva took the view they weren't able to fund Mr H's claim unless he supplied a supportive legal opinion of his own.

Unhappy, Mr H complained to the Financial Ombudsman Service. He said:

- He was told by Aviva's legal helpline he could report the fall he had when he returned back to the UK, but the second panel firm said that not seeking immediate medical attention has weakened his claim.
- When he had a second fall in a different country following the first incident, he was told by the same legal helpline he should immediately obtain a legal examination.
- He should've been entitled to instruct his own choice of Solicitor to consider the merits of his claim. He's since received advice from two recently retired personal injury lawyers who have said he has a valid claim.
- He would have paid for expert evidence if it wasn't for Aviva saying that he would need to obtain a legal opinion as well, which they could then refer to a third lawyer to determine his case didn't have reasonable prospects of success, which is unfair and will unnecessarily use up his indemnity limit intended to cover his claim.
- He wants Aviva to allow him to choose his own lawyer, reimburse all of his medical costs and cover the costs of any future treatment to his injury.

Our investigator considered Mr H's complaint and initially concluded that it should be upheld in part. She said that Aviva should fund the cost of an expert report for Mr H because he'd done enough to establish he had a valid claim. Aviva didn't agree and provided further submissions including evidence from the second panel firm in support of this. In response the investigator accepted their position and changed her view of Mr H's complaint. The investigator then said that Mr H hadn't done enough to establish a valid claim in the circumstances, so Aviva didn't need to fund the cost of any further expert evidence at this stage. She also concluded that Mr H wasn't entitled to choose his own Solicitor and it was reasonable for Aviva to rely on the opinion of the second panel firm when turning down cover.

Mr H doesn't agree so the matter has been passed to me to determine.

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 won't be upholding Mr H's complaint. I'll explain why below. Before doing so, it's important for me to explain that although I haven't addressed each and every one of the submissions the parties have made in this complaint, I have considered them all. That's not intended to be disrespectful, but rather represents the informal nature of the Financial Ombudsman Service.

The starting point is the policy terms. It's a requirement of virtually all legal expenses insurance policies that any intended claim has a reasonable prospect of succeeding. Mr H's policy is no exception. That means his claim needed to have over 51% prospects of succeeding in order for Aviva to cover it.

We don't think this is unfair. Litigation can be expensive. A privately paying customer wouldn't want to bear the cost if advised it is unlikely to succeed. We wouldn't expect a legal expenses insurer to fund claims in these circumstances either.

Where an insurer has declined funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, and as the investigator explained, we look at whether the insurer has acted fairly. So long as they have got advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless we think it was obviously wrong or based on factual mistakes. Aviva did this.

I'm satisfied that the Solicitor was experienced in the area of law Mr H was asking for help with and Aviva have provided me with evidence that her advice was based on the legal framework in the country Mr H wanted to bring his claim in. In addition, I've seen nothing that suggests the Solicitor's advice was based on factual mistakes. I appreciate Mr H might not necessarily agree with that advice, but that's not something I can consider here. If, as Aviva said, Mr H was able to provide an alternative reasoned opinion from a comparable Solicitor (and not something summarising any advice that he might have been given from retired professionals), then I would expect Aviva to consider that. Equally, if he provided Aviva with any new evidence or information that has now come to light that might change the outcome of the second panel firm's assessment, I would expect Aviva to refer that back to them.

This includes the provision of an expert report. Much of the advice from the Solicitor centres around the lack of expert evidence on several issues. It's true that the Solicitor advised that the provision of expert medical evidence immediately at the time of the incident would have been helpful to Mr H's claim but that doesn't appear to be determinative.

Mr H's case seems to be that the cause of his fall was the construction of the object he slipped on- though he also refers to the fact that this might have been because the object and the surrounding area wasn't properly cleaned. The Solicitor said that in order for Mr H to successfully advance this argument, he'd need to provide expert evidence to support that the construction of the object was the cause of his fall. That said, she also highlighted discrepancies that might not support him irrespective of the expert evidence. For example, the fact that Mr H wasn't sure of the exact cause of his fall at the time of the incident (such that he was seeking CCTV from the hotel to confirm this) and because the medical professional that treated him referenced the cause of the falling being a fall from a step rather than as a result of the object he later identified as the cause of the problem. I realise Mr H says he wasn't concerned to correct the professional in question because the purpose of his visit to them wasn't to identify the cause of the incident but rather to treat his injury, but I don't think that means the advice given by the panel Solicitor was wrong. Taken together I think Aviva were entitled to rely on the opinion they received. Mr H should note that given the nature of the advice, the provision of expert evidence may or may not support his claim has reasonable prospects of success, so it's a matter for him to decide whether he wishes to pursue this or whether to seek another legal opinion at his own expense.

For the avoidance of doubt, I don't think that Mr H has done enough in this case to demonstrate he has a valid claim, such that I would consider that Aviva should fund the cost of expert evidence as part of the normal evidence gathering process. That's essentially for the same reasons set out by the panel Solicitor which identifies several problems with his case, which I've referred to above.

I turn now to the advice Mr H says he was provided by Aviva's helpline in the first instance. The investigator said Aviva hadn't had the opportunity to address this issue specifically, but I can see the matter was raised in Mr H's complaint to the Financial Ombudsman Service. And I can see that although Aviva had sought copies of the call recordings from their helpline, they haven't to date provided these. Based on the advice of the panel firm, I don't think that any advice Mr H might have been given about reporting his claim when he returned to the UK is likely to have been the sole reason why his claim was determined as being unlikely to succeed. And reporting the claim on Mr H's return to the UK isn't the same advice as not seeking medical attention at the time if this was required. Either way, I don't think this matters. For the reasons I've set out, there are a variety of different reasons given by the panel Solicitor to support why Mr H's claim doesn't have reasonable prospects of success and most of those reasons aren't because Mr H didn't seek medical attention at the time of the incident. Mr H should note that I can't comment on the advice he might have been given by the same legal helpline in respect of his second fall he suffered in a different country. For the reasons I've mentioned, I don't think this would make any difference to the outcome of this complaint anyway.

Mr H is unhappy that Aviva have said that even if he obtains expert evidence and a supportive legal opinion from a comparable legal professional, Aviva will seek a further legal opinion of their own. I don't think that's unreasonable unless Mr H obtains the opinion of a barrister. I say so because Aviva would be funding the cost of any potential litigation on his behalf, so they are entitled to satisfy themselves that the advice and evidence received is sufficiently supportive to meet the policy terms and therefore reduce the risk of their incurring costs that are unlikely to be recoverable. A prudent litigant would no doubt want the same thing, so I can't say it's wrong for them to seek the opinion of a barrister on a further Solicitor's opinion Mr H might provide them with. Mr H feels this will detract from his policy limit. I can't comment on this because this isn't something that's happened, and I've not seen anything to suggest that Aviva will deduct these theoretical costs from Mr H's indemnity limit. If this does become an issue that Mr H is unhappy with, he can make a separate complaint about that.

Mr H has said he should have been entitled to choose his own Solicitor to advise on the merits of his claim. The policy says:

“Choice of lawyer:

- if court proceedings are issued within the UK or there is a conflict of interest, you can choose your own lawyer*
- for proceedings outside the UK, we’ll choose the lawyer*
- we’ll appoint the lawyer subject to acceptance of our standard terms of appointment which are available on request “*

It’s common for legal expenses insurance policies to contain such a term and it’s consistent with the relevant laws applicable to freedom of choice. Regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 says:

“where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person)”

The phrase “any inquiry or proceedings” means when it becomes necessary to issue court proceedings, or proceedings in another formal place of inquiry, such as a tribunal.

Mr H’s claim has never been litigated. That means proceedings have never been issued. And in the absence of anything to suggest that there was a conflict of interest in appointing the panel firm, I can’t see that he had freedom to choose his own solicitor at any point during his claim with Aviva. And given Mr H hasn’t established that he has a claim that meets the policy requirement on the question of prospects of success, I don’t think it’s unfair for Aviva to have appointed their panel firm to assess this rather than a Solicitor of his own choosing.

I haven’t considered the remedies Mr H has requested in order for Aviva to put things right because in this case, I don’t think Aviva did anything wrong. But even if I had I wouldn’t have been directing them to reimburse all of his medical costs and the costs of any future treatment to his injury because that wouldn’t have amounted to putting him back in any position he might have been in had cover been granted for his claim in the first instance. I realise the former request is based on Mr H’s submission that the helpline told him to report his claim to Aviva on his return to the UK, but that didn’t prevent him from seeking medical assistance whilst abroad if he thought he needed it. And that was something he needed to make a decision about himself on the question of his health. The fact that he didn’t isn’t something I can hold Aviva responsible for.

My final decision

For the reasons set out above, I don't uphold Mr H's complaint against Aviva Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 19 March 2024.

Lale Hussein-Venn
Ombudsman