DRN-5356400

The complaint

Mr S's complaint is about the rejection of a claim under the legal expenses section of his home insurance policy with U K Insurance Limited.

What happened

Mr S contacted UKI to make a claim for costs of pursuing a legal claim for clinical negligence in relation to treatment received in 2019.

UKI said the policy only covers claims relating to treatment that occurs during the period of insurance and the policy started in October 2021, so Mr S's claim is not covered. UKI also considered if there would be cover for a possible claim for breach of contract against the clinician in question but said there would be no cover for this either because the policy also excludes contract disputes about contracts entered into before the cover starts.

Mr S is very unhappy about this, as he says he only became aware that he had been given negligent medical treatment in January 2022. Mr S also complained that UKI had failed to make reasonable adjustments in the way it communicated with him, as he had requested with the support of medical evidence.

UKI says it has made various adjustments but Mr S has asked for a direct email address for his assigned case-handler which it cannot accommodate, as individual email addresses are not to be used for customer claims activity for data security reasons. UKI also says it cannot undertake to respond to every communication within 24 hours as requested by Mr S.

UKI also did not change its position on the claim, so Mr S referred the matter to us.

Mr S says it would be unfair and unreasonable for UKI to apply an exclusion clause which seeks to deny him cover even before he came to realise he had a viable legal claim. Mr S provided a written advice from his barrister in support of his claim and complaint. Mr S's barrister has said that our published guidance sets out that we'll consider the earliest date that a policyholder should have known that they needed to make a claim and if we think the earliest date of knowledge was after a policy started, we will ask an insurer to honour a claim. Mr S and his barrister also say that the Limitation Act 1980 is relevant and applying this would mean that the first date he was aware of the claim was January 2022, within the policy period. The barrister therefore said it would be unfair to refuse the claim.

One of our Investigators looked into the matter. She recommended the complaint be upheld, as she thought it was not reasonable to refuse the claim. The Investigator said she thought the policy term was very wide and on a strict interpretation would mean that cover for clinical negligence claims would only be provided in very rare cases where the negligence was discovered at a very early stage, which is unlikely to have been the intention of the cover. The Investigator therefore recommended that UKI disregard this exclusion and reconsider Mr S's claim in line with the remaining policy terms and conditions. She said UKI should also pay Mr S compensation of £100 for the distress and inconvenience he was caused.

The Investigator explained that we cannot make a decision about whether UKI has breached the Equality Act 2010 but could consider if it had acted fairly and reasonably in the way it handled Mr S's claim and communicated with him. The investigator considered UKI had made various adjustments and she did not think there had been any disadvantage to Mr S using the department email address, rather than an individual address.

UKI did not accept the Investigator's assessment. It says the policy terms are clear and transparent and the Limitation Act is not relevant to the policy coverage.

Mr S did not accept the Investigator's findings regarding the reasonable adjustments issue and asked that we order UKI to make the adjustments he has asked for. He says that he has been disadvantaged by having to use the department email address, as UKI has not responded to his communications to that address for six months. The Investigator told Mr S that as this had not been raised in the initial complaint, we cannot address any complaint about a lack of response until that has been raised with UKI.

As the Investigator was unable to resolve the complaint, it was passed to me.

I issued a provisional decision on this matter in January 2025. I disagreed with the Investigator's assessment and set out the reasons why I did not consider the complaint should be upheld. I have copied the main parts of my provisional decision below:

> "*Mr S's policy with UKI provides cover for various legal disputes, including clinical negligence and contract disputes. The sections most relevant to this complaint state as follows:*
>
> > "*Clinical negligence*
> >
> > *We will pay costs where negligent surgery, clinical or medical procedure or treatment leads to:*
> >
> > *- physical bodily injury, to you, or*
> > *- your death.*
> >
> > *We will only pay costs for claims relating to mental health if they result from negligent surgery, clinical or medical procedure or treatment that also causes physical bodily injury to you.*

We don't pay for claims arising from or relating to:

- negligent surgery, clinical or medical procedures, or treatment that occurred before cover started

- any alleged failure to correctly diagnose your condition."

The contract disputes section of cover also says that it excludes cover

"arising from or relating to: contracts you entered into before your cover started".

I think these terms are sufficiently clear and unambiguous and I do not consider them to be inherently unreasonable. Insurers are generally entitled to decide what they want to provide cover for in return for the premium charged. I do not therefore agree that the exclusion can be considered unfair under the Consumer Rights Act 2015.

However, we expect insurers to apply policy terms fairly and reasonably. I have therefore considered whether UKI has acted fairly in relying on this term to reject Mr S's claim. Having done so, I think it has acted fairly. I will explain why.

Mr S says it is unfair because he did not know that he had experienced negligent treatment until after the policy …[started]. *Mr S could not therefore bring a claim until after the policy had*…[started]. *He has provided a barrister's opinion to support his complaint. His barrister says that:*

"A laymen such as … [Mr S] would understandably consider it very unfair that cover could be declined in respect of a claim of which they could not have been reasonably aware It would appear that the Financial Ombudsman Service (FOS) has recognised that obvious unfairness in that the FOS guidance includes the following in relation to legal expenses insurance (see https://www.financial-ombudsman.org.uk/businesses/complaints-deal/insurance/legal- expenses-insurance):

What's the earliest the policyholder should've known they needed to make a claim? If we believe that a consumer's earliest date of knowledge was after a policy started, we may ask the insurer to honour the claim.

9. The FOS therefore applies a date of knowledge test rather than a strict date of occurrence test when considering coverage. Clearly … [Mr S] could not bring a claim until he knew he had a claim or should reasonably have known that he had a claim."

However, the guidance quoted above is specifically about a situation where a complainant has continuous cover but at renewal has changed from one policy only covering claims that are made within the policy period to one only covering claims that occur within the policy period. In this scenario a policyholder might on the face of it be unable to claim under either policy, despite having continuous legal expenses cover. We recognise that this leaves a policyholder in an unfair position. In that scenario we may therefore consider the earliest time the policyholder would have known of a claim and we may ask an insurer to honour a claim that arises from events that happen outside of its policy period. No evidence has been provided that Mr S has been caught in the situation that this guidance applies to.

The guidance does not state that our approach generally is that we apply "a date of knowledge test" in all cases. Where the policy terms are sufficiently clear that it only covers claims arising from events that happen within the policy then, unless there is a scenario such as above, the insurer is entitled to rely on those terms.

The barrister and Mr S have also referred to the Limitation Act, which provides that a claimant's time limit for bringing a legal claim will run from when they become aware, or ought reasonably to have become aware, of the cause of action. They say it is unfair to refuse a claim that Mr S was not aware of until some time after the negligent event and his date of knowledge was within the policy period. Mr S says that the Limitation Act is the clear law applicable and that we are obliged to provide consumers "with their minimum rights under law". I do have regard to the relevant law as part of my consideration of all complaints. The Limitation Act does not directly apply to the interpretation of a clear policy term but I have considered whether it is fair to use Mr S's date of knowledge as the relevant date for the purposes of the policy.

The Investigator agreed with Mr S that it was his date of knowledge that was relevant, as she said it would be rare for a policyholder to be aware that any medical treatment had been negligent straight away and there is always a delay in realising there might be a cause of action. The Investigator therefore considered that cover would be unfairly limited if this term were strictly applied. I do not agree.

In some cases, it will be immediately obvious that medical treatment has been negligent and in other cases it may not be. I do not consider that it would be so "rare" that the application of the term would restrict the cover to such a degree that it would be unfair for UKI to rely on it. And, as stated, UKI is entitled to decide what it wants to provide cover for and in this case UKI has clearly set out in the policy that it does not want to cover claims for negligence that occurs before the policy start date.

So, even if I accepted that Mr S did not reasonably know he had a cause of claim against the treating professional until after the start of this policy, it does not mean that UKI should be required to disregard a clearly worded policy term about the cover. I do not think the term restricts cover so unfairly that UKI should not be permitted to rely on it.

I know that Mr S will be disappointed with this decision, having already received a recommendation from the Investigator that his complaint should be upheld. However, both parties are entitled to appeal to an ombudsman - the final stage in our process - and it is my role to review the matter afresh and make my own decision as to the appropriate outcome. It is only an Ombudsman's decision that is binding. Having received this complaint, I am required to determine it by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And having considered everything carefully, I have provisionally determined that this part of the complaint should not be upheld for the reasons set out above.

<u>Reasonable adjustments</u>

Mr S also says that UKI has breached the Equality Act 2010 by failing to provide appropriate reasonable adjustments for him.

As the Investigator has already explained, if Mr S wants a decision that UKI has breached the Equality Act 2010, then he'd need to go to Court. However, I have taken the Equality Act 2010 into account when deciding this complaint – given that it's relevant law – but I've ultimately decided this complaint based on what's fair and reasonable.

UKI says it has made the adjustments it is reasonably able to do in order to accommodate Mr S. It says it has agreed not to call him after 2pm and to have a single case handler and given her extension number. However, it says Mr S also asked for the case-handler's direct email address and for an undertaking that he would always receive a response within 24 hours. UKI says it cannot reasonably accommodate this. It says that it is not possible to … email… individual claims-handlers, as individual email addresses are not for customer communications due to data security and because their emails are not accessible if they are absent. Instead UKI says customers are required to use a monitored shared claims inbox.

UKI also said it will endeavour to answer communications as soon as possible but its normal service level in which to deal with customer correspondence is five working days from receipt.

I do not think the arrangement in itself will inherently cause any delays in response or impact Mr S's use of the policy. I therefore agree with the Investigator that Mr S is not disadvantaged by this arrangement. It is my opinion that the arrangement to use a department email, which all case-handlers including Mr S's designated case-handler has access to, is reasonable. And I do not consider I can reasonably require UKI to undertake to respond more quickly than this to any communication.

Mr S has said he has suffered considerable prejudice and disadvantage from this arrangement, as UKI has not responded to any emails to that address in six months. It seems to me that this is not necessarily an inherent issue with using the department email. But as the Investigator has already explained to Mr S, we cannot consider anything that UKI has not had the chance to respond to and he did not include the issues with responses from UKI in the initial complaint. I am unable therefore to make any finding on this issue in this decision."

Responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or arguments they want considered.

Mr S is very unhappy with my provisional findings and does not accept them. He has made a number of further points in response and has also provided a supplementary opinion from his barrister. Mr S and his solicitor have also asked that I recuse myself from continuing to deal with his complaint. He says my provisional decision is at odds with our usual approach to cases such as his.

I have considered everything Mr S and his legal representatives have said and have summarised the main points below:

- I have failed to recognise that the "*date of knowledge*" approach applies outside of so called "*stool cases"* (*i.e*. where a claims made policy is followed by a claims occurring policy, thereby leaving the insured without coverage under either policy). Mr S's date of knowledge does plainly apply to clinical negligence cases such as this one and it was quite wrong, unfair and unreasonable for me to have suggested otherwise in my provisional decision.
- I have failed to recognise that the exclusion clause relating to "*contracts entered into before the policy came into force*" is allowed for contractual claims under our rules, but that all other exclusions in relation to non-contractual claims are not allowed, and that a "*date of knowledge*" approach is instead applied in such tortious and breach of statutory duty cases.
- I have therefore failed to apply our normal "*date of knowledge*" approach to the specific facts and circumstances of my tortious clinical negligence claim where it would be fair and reasonable to do so, given that Mr S did not learn of his psychiatric injuries until January 2022.
- It is absurd of me to have reached the view that it was "*up to the Insurer"* and "*fair and reasonable*" to exclude a claim even before the policyholder reasonably became aware of the fact he had a legal cause of action, which is contrary to our normal *"date of knowledge*" approach.

Mr S's barrister says I have misunderstood certain points made in his previous advice. I have considered everything he has said in his supplemental advice and have summarised his main points below:

- I stated that he had said the Limitation Act provides the date of knowledge as the relevant date to be taken into account in Mr S's claim. However, he made clear that his point was that, as we use terminology from the Limitation Act in some of our guidance and in our time limit rules (such as "*becoming aware*" or "*date of knowledge*"), one should look to the Limitation Act to see what was required for the insured to have the necessary knowledge about his claim.
- "*Date of knowledge*" as a necessary factor when determining limitation was introduced because of the obvious unfairness that would prevent a victim of a tortious wrongdoing from being able to bring a claim if they only became aware of the wrongdoing, or where the link between the injury and that wrongdoing was not evidenced, until a much later date.
- The notion of what is fair has influenced the Financial Ombudsman Service's approach to cases where the insured could not have reasonably known of an existing cause of action when a legal expenses insurance policy has been incepted.
- I appear to have had no regard to what other Ombudsmen have said is the "*normal approach*" in such cases.
- He has provided a schedule of past decisions, which he says demonstrate that my Ombudsmen colleagues considered the "*date of knowledge*" to be the normal approach, particularly in negligence cases as opposed to cases for breach of contract. In some, but by no means all, breach of contract cases, where the contract was entered into before the inception of the policy, the Ombudsman has rejected the claim if the wording of the policy is clear. This is consistent with the published guidance on our website.
- I acknowledged that there would be cases where it would not be immediately obvious that medical treatment had been negligent. There would be few cases where medical negligence would be immediately obvious.
- Ultimately my only reason for finding in favour of the insurer was that the insurer should not "*be required to disregard a clearly worded policy term about the cover*." This appears to contradict the "*normal approach*" taken in a

number of cases and seems to ignore that such a provision is likely to operate unfairly more in clinical negligence claims than in many other types of claim.
- I incorrectly suggested that the "*stool cases*" is the only time when the Financial Ombudsman applies the "*date of knowledge*" approach. This is plainly incorrect and is also directly contrary to the "*normal approach*" taken by a number of other Ombudsmen.
- I made my decision with reference to the terms of the policy and without considering whether on the facts of this case, notwithstanding the terms of the policy, the insurer should provide cover as the insured had no knowledge of the injury caused until after the policy had been incepted. In a negligence claim that would appear to accord with what other Ombudsmen have described as the "*normal approach*".

Request that I recuse myself

Mr S is very unhappy with my provisional decision and, as stated above, has submitted a complaint and his representatives have said I have erred in law and his trust and confidence in me has broken down, so it would be perverse and unreasonable for me to continue.

This request, and Mr S's broader complaint that this service has failed to make reasonable adjustments in response to his disabilities, has already been addressed by appropriate colleagues at the Financial Ombudsman Service.

Mr S has also provided medical evidence about the impact this matter and my provisional decision has had on him. I have read the evidence provided and I acknowledge this is a deeply distressing situation for Mr S and that he is suffering from various medical issues. I am sorry that this has had an impact on him but having said that, I am tasked with determining what I consider to be the fair and reasonable outcome. It is therefore right that the matter should proceed to the next stage in our process, which is that I consider all material evidence that has been submitted in response to my provisional decision and make this, my final decision on the outcome of this complaint.

Hearing request

Mr S's solicitor has also recently said Mr S had requested a telephone hearing of this complaint, which had been refused. The Investigator therefore asked Mr S about this and if he wanted to request a formal hearing in relation to his complaint. Mr S has responded and said he does not think a hearing is necessary, as there is no dispute about a point of fact but about whether or not the date of knowledge should apply in his case. Mr S says he thinks the evidence provided about this is clear and so a formal hearing is not required. Mr S has, however, said he would be willing to speak to me over the phone to clarify any questions I may have, and asks that I do this as a matter of professional courtesy.

Deciding ombudsmen don't routinely talk to either party to the complaint. We may decide it is necessary to do so, if there is information that is unclear or a dispute about the facts of the case that we consider can only be clarified by discussing it with the parties.

As Mr S has said, he has made his case clearly to the Investigator and I have been provided with all the correspondence and communications between him and UKI. The complaint turns on the interpretation of the policy wording and application of that wording to Mr S's claim. The evidence and positions of both parties about this is sufficiently clear in my opinion and so I don't consider it is necessary to discuss this case with the parties in order to fairly determine the matter.

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.

I have considered everything Mr S has submitted very carefully, including his submissions in relation to his complaint about me.

Published guidance

I am tasked with determining what I consider to be the fair and reasonable outcome in all the circumstances of this complaint. This requires me to consider fairness and reasonableness as it pertains to both parties, and not just to the complainant. I am not bound to follow views expressed by Investigators, or other Ombudsmen decisions, if I believe that a different outcome would be fair and reasonable. However, while we do not have a system of precedent, I do recognise the importance of consistent decision making and have therefore given careful regard to the decisions of this service to which reference is made by Mr S and his representatives.

I am also aware that we publish our final decisions and provide some external guidance on matters where we have developed a well-established approach. This is in order to provide some assistance to consumers and businesses to enable them to understand how we may go about considering a complaint. However, ultimately each complaint is dealt with on its own merits.

Mr S is adamant that we have an established approach to claims brought in tort where the date of the claimant's knowledge of the claim post-dates the start of the policy and that this approach is consistently applied by my Ombudsman colleagues but not by me.

Mr S's representatives have referred in particular to sections of a published note on our website titled, *'Legal Expenses Insurance'*. I want to assure Mr S that I have given this note very careful regard and am satisfied that the approach I have taken is in line with the approach we outline in that guidance.

I note in particular that there is a section of the note titled: *'Pre-existing Events'*, under which the following is said:

> *"Legal expenses insurance is meant to cover uncertain risks, not inevitable or existing events.*
>
> *Most 'before the event' policies will only cover the cost of legal proceedings when the event or dispute giving rise to the legal action occurred, or came to light, after the policy began.*
>
> *However, this is not always straightforward in the cases we deal with. When dealing with cases like this we need to:*
>
> - *Identify the event that gave rise to the legal action*
> - *Consider the event that gave rise to the legal action*
> - *Consider whether the policyholder was aware of the event when they took out the policy*
>
> *We'll consider the facts of each particular case when making decisions."*

And as set out in my provisional decision, we also have published guidance about a situation where a complainant has continuous cover but at renewal has changed from one policy only covering claims that are made within the policy period, to one only covering claims that occur within the policy period. Mr S has called these the "*stool*" cases. In this scenario a policyholder might, on the face of it, be unable to claim under either policy (or '*fall between two stools*'), despite having continuous legal expenses cover. Because we recognise that this leaves a policyholder in an unfair position, we may consider the earliest time the policyholder would have known of a claim, and we may ask an insurer to honour a claim that arises from events that happen outside of its policy period.

Mr S's barrister has clarified that he considers this guidance demonstrates our general approach to issues around '*date of knowledge'*.

Mr S is correct that we do sometimes apply the '*date of knowledge'* approach to cases other than in the 'stool cases'. This is recognised in the excerpt from the note on pre-existing events that I have referenced above. (I will address that more below.) However, I do not agree that this guidance can be extrapolated, in the way Mr S insists it should be, to mean that complaints about the rejection by an insurer of any claim that would be brought in tort, should be treated this way.

Our published note on legal expenses insurance also provides guidance on issues about contract disputes as follows: *"some policies only cover disputes about contracts made during the period of insurance, or only if the consumer had unbroken similar cover since the contact was made, We'd generally say it's fair for you* [the insurer] *to rely on that, even if the dispute only came to light during the term of the current policy, as long as the wording is clear".*

I consider this to be more relevant to my consideration of Mr S's complaint than any other guidance we have published, as it explains our usual approach to a situation where there is a clear and unambiguous exclusion of the type of dispute the policyholder wants to bring. I will explain all this further below.

Previous Financial Ombudsman Service decisions

As I say, Mr S's barrister is correct that we do sometimes apply a date of knowledge approach to cases other than the *"stool"* cases. Mr S and his representatives have provided references to a sample of previous decisions going back to the start of our publishing in 2013, which they say demonstrate that my provisional decision is not in line with our approach on this issue, which in their view, is that the date of knowledge approach is used in connection with any claim in tort and that a claim can only be excluded for arising outside the policy period if it is a contract claim.

I have considered all the decisions he has provided and everything Mr S and his representatives have said about them. However, having done so, I do not think these change the outcome of his complaint. I will explain why.

Most of the previous decisions Mr S has highlighted involve complaints about the rejection of an insurance claim on the basis that the events that gave rise to the claim pre-dated the start of the insurance policy. Apart from specific 'after-the-event' legal expenses policies, all other legal expenses policies (and other types of insurance policies) will generally exclude cover for pre-existing events or issues. This is a common feature of insurance, as it is generally intended to cover unforeseen and unexpected events.

The decisions Mr S has highlighted almost all involved policies that had varying, albeit similar in effect, terms about the date of occurrence of the events that relate to, or give rise to, the claim.

In fact, Mr S's policy also has one of these general pre-existing event exclusion clauses. It says:

> *"We don't cover claims arising from or relating to don't cover claims arising from or relating to … incidents that begin before cover started".*

It also says that cover will be provided *"as long as… the incident happens within the territorial limits and the date of incident is during the period cover was in force".*

The decisions Mr S has highlighted almost all involved policies that had general pre-existing event exclusion clauses like this one.

In cases where a claim has been rejected by application of one of these general pre-existing event exclusion clauses, we consider the individual circumstances of the case and *may* determine that it would be fair and reasonable to consider the claimant's knowledge of the events that might give rise to the claim. This practice is alluded to in the published guidance I have referred to above.

In some of the selection of my decisions highlighted, I determined on the particular facts that the complainant had sufficient knowledge of events, that would later give rise to the claim under the policy, before the start of the policy cover and so determined that it was fair for the insurer to decline their claims as they pre-existed the start of the cover.

Mr S has also provided a selection of decisions issued by some of my Ombudsmen colleagues in which they determined that the policyholder did not know about events that would later give rise to a claim before their policies started and upheld the complaints against the insurer.

However, Mr S's case is different. His claim has not been rejected by applying a general pre-existing event exclusion (although UKI might say his claim does also fall within that exclusion). Unlike any of the published decisions Mr S has referred to, his policy also contains an additional specific exclusion that is directed at claims for negligent medical treatment. It is specifically intended to exclude claims "*arising from or relating to: - negligent surgery, clinical or medical procedure or treatment that occurred before cover started".*

None of the previous decisions provided by Mr S and his representatives deal with a complaint about a claim rejected by application of a similar specific exclusion intended to address medical negligence claims, in the manner that the exclusion does in this case.

As stated above, it seems to me that the fact Mr S's policy has this additional specific exclusion means that it is more in line with situations where a claim for a contract dispute has been specifically excluded on the basis of a term excluding cover for disputes about contracts that were entered into outside the period of insurance.

Mr S says this is incorrect and the date of the claimant's knowledge is, and should be, clearly applied in all tort claims but not contract claims. Again, we have no such established approach.

<u>Should the policy term be disregarded in Mr S's case?</u>

Mr S's policy specifically excludes claims for disputes arising from or relating to medical treatment that pre-dates the policy. Insurers are entitled to decide the events for which they want to provide cover and those which they don't. UKI has determined that it does not want to cover latent claims like Mr S's in connection with negligent medical treatment, and I do not think that in itself is inherently unreasonable. We expect insurers to apply any such terms

and restrictions fairly and reasonably but I do not consider it is reasonable to expect insurers to accept all such claims regardless of when they may have arisen.

In making this decision, I want to assure Mr S that I have given very careful thought to the points he makes. I agree that fairness requires me to take account of the fact that although the event giving rise to his claim took place before the commencement of his cover, he may not have been aware until after the cover commenced that he had a claim. Having regard to that possibility is, as Mr S and his representatives point out, in line with our usual approach in pre-existing events cases (as our published guidance indicates) and I have given it very careful consideration. But that guidance also indicates that although we will consider whether the policyholder was aware of the event when they took out the policy, ultimately we need to "*consider the facts of each particular case when making decisions".* In Mr S's case, UKI had written its policy so that it contained a clear and specific exclusion pertaining to claims for negligent medical treatment and in turn the clear intention was that the cover would not extend to such claims where the treatment took place before the cover started. In all the circumstances of the case, it is in my view fair and reasonable for UKI to apply that exclusion when refusing Mr S's claim.

Having considered everything very carefully, including everything Mr S and his representatives have said in response to my provisional decision, I remain of the opinion that, because the treatment that Mr S's claim for negligence arises from was provided before the policy commenced, it is not unfair or unreasonable for UKI to rely on this exclusion. The policy term is sufficiently clear and unambiguous and is not inherently unfair. While I am sympathetic to Mr S's situation, I do not think there is any reason that the exclusion should not fairly apply to his claim.

Reasonable adjustments

Neither party has made any comments regarding the reasonable adjustments that Mr S says UKI failed to put in place, so I do not see any reason to change my findings about that.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 4 June 2025.

Harriet McCarthy
Ombudsman