DRN-3504329

The complaint

Mr P is unhappy with the way his claim on his legal expenses insurance claim was dealt with by Inter Partner Assistance SA ("IPA"). He says he wasn't given adequate support or advice on the claim and there were long delays.

Where I refer to IPA, this includes its agents and claims handlers acting on its behalf.

What happened

In 2010 Mr P had an operation which involved the use of an implant. He later became ill with a condition caused by poisoning from the implant. In November 2012 Mr P contacted a firm of solicitors to discuss a proposed clinical negligence claim.

In February 2013 Mr P contacted the legal helpline provided as part of the policy and then submitted a claim to IPA, who referred the claim to panel solicitors. Their initial view was that the claim didn't have reasonable prospects of success. But they said Mr P hadn't provided enough information to assess the claim fully. Mr P was asked to provide further information.

There were a number of phone calls around that time and correspondence over the following months where Mr P said he was going through his documents and would provide the information requested. In June 2013 he said he was still collecting evidence. But he was unhappy with IPA's response to his claim and complained. In response IPA said it couldn't comment on any advice Mr P had received from the helpline or the solicitors involved. It said the claim hadn't been dealt with because Mr P needed to provide the information requested - once it had the evidence from him it would assess the claim.

In March 2014 Mr P contacted IPA again. He said he had been gathering evidence and had instructed a direct access barrister. IPA advised him that it still needed evidence from him to assess the claim and couldn't cover any costs he had already incurred. In May IPA agreed to cover a clinical negligence claim, subject to confirmation that the claim had a reasonable chance of success, and to appoint the direct access barrister. The barrister advised that there were reasonable prospects of success for the claim against the surgeon, subject to obtaining expert medical evidence.

In June 2014 IPA sent terms of appointment to the barrister. He acknowledged the correspondence and said he would consider the matter further, as did Mr P. There was then no further contact between Mr P and IPA until February 2016. Mr P explained that he had been pursuing the clinical negligence claim but this was now on hold and he had started a product liability claim against the manufacturers of the implant. He said the panel firm and another firm of solicitors were dealing with a group litigation case against the manufacturer but they couldn't take his case on as were not taking on any more clients.

IPA referred the matter to another firm of solicitors who said they couldn't deal with that type of claim. Mr P's barrister then advised that his claim had reasonable prospects but needed expert medical evidence. IPA approached the panel solicitors again but they declined to take the case. In May 2016 IPA agreed to fund the costs of obtaining medical advice through the direct access barrister, and to look for a firm of solicitors to obtain the expert report

Mr P was unhappy with the way the claim was progressing and made another complaint. IPA issued a final response saying it had always been willing to consider the claim and, although the panel solicitors said the chance of success for the product liability claim was low, as Mr P's counsel said it did potentially have reasonable prospects, it would provide cover for a solicitor to obtain expert evidence for counsel to review.

Mr P's barrister said Mr P was hoping IPA would be able to find a solicitor to deal with obtaining the medical report but IPA said it couldn't do this as the panel firms who dealt with this type of work had declined to act. It suggested another firm of solicitors but they were not taking on more cases. IPA suggested Mr P contact one of the other firms dealing with the group action.

Mr P next contacted IPA in September 2018 to say he had been offered a payment to settle the product liability claim but had rejected that offer. In the meantime, the test case had been heard and the claimants had lost.

Mr P said he had been going through mediation with the hospital on his clinical negligence claim but the limitation period for that claim would expire in November 2018, so there was limited time to issue proceedings. He told IPA the original panel firm wouldn't take the case on. He asked for another panel solicitor to be appointed to deal with this claim. IPA decided to get counsel's advice.

Counsel's advice on the clinical negligence claim was that the prospects of success were better for one aspect of the claim, about a failure to inform Mr P of the outcome of blood tests in 2012. He commented that the product liability claim didn't seem to have good prospects. He said if the mediation process that Mr P was going through with the hospital wasn't successful, he should have funding to obtain expert evidence to explore pursuing the clinical negligence claim.

IPA appointed another firm of solicitors to obtain a medical report and draft particulars of claim for the clinical negligence claim and proceedings were issued, to protect Mr P's position. The solicitors said the prospects for that claim were 51%.

When the medical report was obtained, it wasn't supportive. Mr P stopped instructing the solicitors and continued the clinical negligence claim as a litigant in person after he disagreed with their advice. He later settled this claim and received a sum of money as part of the settlement. But he says he would have obtained a much better settlement if he'd still had solicitors representing him.

Mr P remained unhappy with the way the claim had been handled and complained again. I PA issued a final response in February 2019. IPA referred to the actions it had taken in 2016 and said any delays between then and 2018 were due to waiting to hear from Mr P. It said prompt action had been taken in 2018, when counsel was instructed; part of the claim was said to have prospects, and solicitors were instructed to issue proceedings, before the limitation period expired. IPA acknowledged that Mr P was unhappy with the way the claim had been handled and some of the communication with him, but said it had taken reasonable steps, and decisions about cover were based on legal advice.

When Mr P brought his complaint to this service our investigator didn't think it should be upheld. Mr P disagreed with the investigator and requested an ombudsman's decision.

Before considering the merits of the complaint I initially addressed whether some aspects of the complaint were outside our jurisdiction. Mr P provided comments on that issue and IPA accepted that the whole complaint could be considered.

Mr P provided further, detailed comments on the complaint. I won't set these out in full but will summarise some of the key points he made, as follows:

- The policy documents say he will be given advice about his legal rights and access to legal advice but this never happened.
- Although IPA accepted he had a valid claim and the claim was kept open throughout, he was never given a framework for dealing with it, and he's never spoken to anyone who has given him any guidance or assistance with his claim - they should have explained his legal rights and what evidence he would need to provide, but never asked for the information needed to assess the claim. If IPA had engaged with him correctly, he would have had proper conversations and understood what information was needed.
- His case was delayed due to not having medical reports but the barrister he instructed was able to sort this out very quickly.
- The panel firm had a conflict of interest as they were dealing with other claims and knew his case would be disruptive, but this was never discussed - it should have been addressed.
- There were periods where nothing was happening, but he was very ill and unable to pursue things himself. When he was 'fobbed off' by IPA he felt paralysed and didn't know what to do. He ended up having to find his own barrister and spend his own money obtaining evidence. IPA never followed things up and just left him on his own.
- In 2018 they finally obtained counsel's advice but there was a very short timescale for doing this, which meant he wasn't able to provide all the evidence - he provided a bundle of documents and said it was important he spoke to the barrister to explain things properly but this wasn't allowed.
- They didn't tell him the barrister would comment on both the clinical negligence claim and the product liability claim.
- His product liability claim was different from the other claims being pursued in the group action and he could have pursued his case separately but they made no attempt to discuss this with him, understand his claim properly or deal with it.

I issued a provisional decision on the complaint in which I said I was intending to uphold the complaint in part and direct IPA to pay compensation of £500 to Mr P, for the following reasons:

In deciding what's fair and reasonable I need to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the time.

The relevant industry guidance says an insurer should deal with a claim promptly and fairly; provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; and not unreasonably reject a claim. As a general principle, firms should treat their customers fairly.

The policy provides cover for certain types of legal claims. The policy document explains that there's a legal helpline and the policyholder will be given confidential advice over the phone on personal legal matters - "We will tell you what your legal rights are, what course of action is available to you and whether these can be best implemented by you or whether you need to consult with a lawyer. There are no consultation fees and lines are open 24 hours a day, 365 days a year".

Where cover is provided for a claim, a lawyer will be appointed to represent the policyholder according to IPA's standard terms of appointment. In the first instance (and up to the point

where it becomes necessary to issue proceedings) this will usually be one of IPA's panel firms of solicitors, unless there is a conflict of interest.

Mr P wanted to bring a claim for clinical negligence in relation to treatment he received and a product liability claim against the manufacturer of an implant. His policy provided cover for such claims. But as with most insurance policies, cover was subject to the policy terms. Although IPA accepted that there was on the face of it a valid claim, the policy terms say cover will only be provided if there are reasonable prospects of success. So Mr P had to show that his claims had reasonable prospects of success - in other words, he was more likely than not to win. The terms say prospects of success will be assessed either by IPA or a lawyer appointed by IPA.

I have considered this complaint in the light of the policy terms and the other relevant matters set out above.

Mr P says he was never given any advice or guidance throughout the whole time his claims were being considered. IPA says it acted promptly whenever Mr P was in contact but there were long periods when he was not in touch and it couldn't progress the claims without receiving the information it needed from him. I've considered carefully the sequence of events. In my view, the crux of this case is whether IPA took the right steps to assess the claim from when Mr P first claimed in 2013 through to 2014, and then when he made contact again in 2016 and 2018. So although I have reviewed everything that took place I will focus on what happened at those points.

The initial claim

When Mr P first sought to claim in February 2013. IPA referred the claim to panel solicitors to assess the prospects of success. The solicitors said they did not think the claim had reasonable prospects, but that was based on very limited information. IPA advised Mr P that if he provided more evidence it would arrange for a further assessment. I think that was reasonable - I wouldn't expect an insurer to provide cover where the legal advice is that the claim isn't likely to succeed.

As a general principle, in the first instance it's for a policyholder to show they have a valid claim. Although IPA referred the claim for a prospects assessment, the key point is that if Mr P didn't show he had a valid claim, it was reasonable for IPA to ask for more information. I've considered whether IPA made it clear to Mr P what information was needed. IPA asked Mr P to provide documents including a copy of his complaint to the hospital and their response; correspondence: a copy of any expert report obtained; copies of any court papers if proceedings had been issued; and any other information relevant to his claim. I think it was reasonable at that point for IPA to request this. It knew little about Mr P's circumstances and wouldn't have known exactly what information he had but this set out for him the sort of evidence he would need to provide. He would have understood he needed to provide copies of correspondence he'd had with the hospital and any documents that supported his claim.

In the phone calls and correspondence with IPA, it doesn't seem that Mr P was confused or didn't know what was wanted. In June 2013 he said he was still collating the information requested. Again, it doesn't seem that he was unsure about what needed.

Mr P was unhappy when he found the panel solicitors were the same solicitors he had consulted in 2012, before making his claim. He considered this should have been disclosed to him and thought they had a conflict of interest. The solicitors had said they couldn't act for him due to a conflict of interest; IPA said that was a matter for the solicitors and it had no control over that. IPA said once Mr P had all the information to support his claim and had

completed the complaints procedure with the hospital it would assess his claim. I think that was reasonable.

Mr P contacted IPA again in March 2014 asking about proceeding with his claim. He said he was still collecting evidence and had instructed a direct access barrister to help. IPA then heard from solicitors instructed by Mr P, who said they shared the barrister's view that the case had good prospects of success - at least at 60% - and asked that cover be provided for them to act for Mr P. This wasn't, however, a reasoned legal opinion reviewing all the evidence and setting out detailed reasons why the claim was likely to succeed. I wouldn't expect IPA to provide cover in reliance on a letter such as that.

IPA wrote to Mr P advising that it would only consider whether his claim would be accepted once the policy terms and conditions were satisfied; it couldn't confirm cover as it only had limited information. It asked for full details of his claim so it could arrange a legal assessment, or alternatively a reasoned advice from Mr P's barrister - though the cost of that advice would not be covered under the policy. IPA said it couldn't advise Mr P whether to provide the information at that time or provide this later if it became necessary to issue proceedings.

This may not have seemed entirely helpful to Mr P as he didn't get a definitive answer about whether this claim would be covered. But it did set out what he needed to show and alternative ways of doing this - either by providing all the documents he had so IPA could arrange a legal assessment, or providing an advice from the barrister he had consulted.

In May 2014, Mr P provided a bundle of documents and a letter from his barrister setting out the possible legal action and advising the prospects of success were over 51%. As there was now legal advice that the claim had reasonable prospects, together with documentary evidence, I would expect IPA to provide cover. IPA agreed to do so, and in June it sent terms of appointment to Mr P's barrister.

It wouldn't normally be necessary for a policyholder to get their own legal advice before cover Is granted. If IPA had Insisted that Mr P did that, I don't think that would have been reasonable. But If Mr P had provided all the documents to IPA It could had obtained a legal assessment. I appreciate Mr P may feel had had to seek legal advice himself but I don't think that's the case. What IPA had asked for was either documentary evidence to enable It to seek a legal opinion, or an advice from his barrister - it hadn't Insisted he get the legal advice. And It had given him an explanation of how the policy worked and how his claim would need to be considered.

Mr P told IPA he was speaking to the barrister, they had decided to take time to carefully consider the terms or appointment, and would get back to IPA In due course. So on that basis, there was nothing further for IPA to do - it was waiting to hear from Mr P or his barrister. I've thought about whether IPA could have provided more guidance to Mr P, or whether he was forced to get legal advice due to IPA failing to deal with his claim correctly. I'm satisfied IPA explained to Mr P the sort of information he needed to provide. As I've said, in the first Instance it's for a policyholder to show they have a valid claim. I think Mr P had enough from IPA to understand that he needed to gather all the documents and correspondence related to his claim and submit that. While I can appreciate why he may have wanted to seek legal advice himself I don't think he was forced to do so by any failings by IPA. Mr P must have provided evidence to his barrister to enable him to advise; he could have provided that information to IPA.

So up to this point, I think IPA had acted fairly and In line with the policy terms and the relevant expectations for dealing with an insurance claim.

What happened In 2016

There was then no contact from Mr P until February 2016. He said the clinical negligence claim was on hold and he was now pursuing a possible product liability claim against the manufacturer of the implant.

IPA referred the matter to another firm of solicitors who said they couldn't deal with that type of claim. In April 2016 IPA approached the panel solicitors again but they declined to take the case. The solicitors referred to their previous assessment and said they had concerns about the prospects of success; lots of investigation was needed and they didn't have the capacity to deal with this. The solicitors said the barristers working with them on the group litigation were very experienced and didn't think the prospects of Mr P's claim were good. They were also concerned that taking on his case could affect the chances of settling other (more favourable) cases, so there was a potential conflict of interest.

IPA advised that the panel solicitors that specialised In this type of work were unwilling to consider the claim and so suggested to Mr P that he approach another firm as they were acting for other claimants in the group action.

In May 2016 IPA agreed to fund the costs of obtaining medical advice, through the direct access barrister. It asked Mr P's barrister to draft a letter of instruction to the expert and said it would ask one of its panel firms of solicitors to arrange for the report to be obtained.

IPA said as the two panel firms had rejected the claim on prospects IPA considered it was entitled to decline further assistance but, since Mr P's counsel said he did, on face of it, have reasonable prospects, it would provide cover for the costs of a solicitor obtaining expert evidence for counsel to review.

I would normally expect an insurer to seek legal advice on whether a case has prospects of success. And It's generally reasonable to rely on that advice provided it's a reasoned opinion from someone suitably qualified, unless It's obviously wrong. In this case, one of the panel firms had said there was a conflict of Interest and its view seems to have been based, not on a review of all the information the available, but on its pre-existing view of Mr P's circumstances. The other firm had made a cursory assessment of the product liability claim without fully reviewing all of Mr P's circumstances. That firm had advised back In 2014 that it only accepted certain types of product liability claims and didn't have the expertise to deal with the type of claim Mr P was proposing.

In these circumstances I'm not satisfied IP A had properly reasoned opinions from suitably qualified lawyers. And at least one of the firms had a conflict of interest. In those circumstances it wasn't reasonable to rely on the views given by the two panel firms. So I don't think it was right for IP A to say it could have rejected the claim.

The question then is what steps IPA should have taken. It was prepared to fund obtaining an expert report for Mr P's barrister to review. That seems reasonable - but it didn't go ahead. By now, Mr P had told IPA he wasn't able to deal with the matter himself and asked IPA to provide details to the barrister of a solicitors firm that could arrange the assessment. IPA suggested Mr P contact one of the other firms dealing with the group litigation but in view of Mr P's circumstances I don't think it was fair to leave matters like that, with no further contact with Mr P.

IPA says it took no further action because it didn't hear from Mr P again until 2018. If an insurer is waiting to hear from the policyholder I wouldn't necessarily expect it to chase them for information: it's the policyholder's claim and ultimately it's for them to decide if they wish to proceed. But it was clear to IPA that Mr P wasn't well and was struggling to deal with a

complex situation. Bearing in mind its duties to deal with the claim promptly and fairly and to provide reasonable guidance to help Mr P make his claim, I think it could have done more to ensure matters proceeded at this point and engaged with Mr P to explore other options.

Having said that, there was a limit to what IPA could do. There wasn't a panel firm able and willing to take the case on. Generally, a panel firm will be appointed and the policyholder may only choose their own lawyers once proceedings are necessary, or where there's a conflict of interest. Since there was a conflict of interest - and no available panel firm - Mr P should have been able to choose his own solicitors. However that obviously means it's for him to find someone to represent him. Although IPA could have been more proactive in terms of speaking to Mr P and discussing alternatives, ultimately it was for him to find another solicitor. So even though IPA could have engaged with Mr P at that point rather than sitting back and waiting to hear from him, ultimately I don't think the lack of progress after 2016 was IPA'S responsibility. It did, however, cause Mr P some distress at a time that was already very difficult.

What happened in 2018

Mr P contacted IPA again in September 2018 to say he had been offered a sum of money to settle the product liability claim but had rejected that offer. He now wanted to pursue the clinical negligence claim. As the limitation period for that claim would expire in November, there was very little time to issue proceedings. Mr P asked for another panel solicitor to be appointed to deal with this claim.

IPA agreed to get counsel's advice. When counsel advised that there were reasonable prospects for one aspect of the proposed claim and Mr P should have funding to obtain expert evidence to explore pursuing it, IPA acted on this - it appointed another firm of solicitors to obtain a medical report and draft particulars of claim for the clinical negligence claim. Cover wasn't provided for the product liability claim but that was in line with the legal advice. Proceedings were issued before the limitation period expired, to protect Mr P's position. The solicitors said the prospects of success for the clinical negligence claim were 51%.

Mr P's particular concerns around what happened at this point focus on the information given to the barrister. Due to the short timescale he wasn't able to provide all the evidence - he provided a bundle of documents but he wanted to speak to the barrister. He felt this was important as it would have enabled him to explain things properly but this wasn't allowed. He also says IPA didn't tell him the barrister would comment on both the clinical negligence claim and the product liability claim. His product liability claim was different from the other claims being pursued in the group action and he says he could have pursued his case separately but they made no attempt to discuss this with him, understand his claim properly or deal with it.

It wouldn't be standard practice for a policyholder to speak directly to a barrister who's instructed to advise on the prospects of success. That's because they are not acting for or advising the policyholder - they are giving advice to the insurer to help the insurer make its decision on whether to provide cover.

I appreciate Mr P considers the barrister didn't have all the information relating to the case, and he could have filled in the gaps had he been allowed to speak to him. But the barrister provided a lengthy advice which was detailed and set out various possible claims with analysis of the evidence and his views on the strength of each. This was a very experienced barrister. He had three bundles of documents. If he didn't have information he needed he would have explained this. I don't think I can say the fact Mr P wasn't able to speak to the barrister meant the advice couldn't be relied on.

Mr P says he wasn't aware the barrister would comment on the product liability claim, and he points out that his circumstances were not the same as those of the people involved in the group litigation (which was unsuccessful). But the barrister noted that Mr P's circumstances were different. So he was aware of this and nevertheless commented that it was unlikely Mr P would find any lawyer willing to take his case on.

Although Mr P discontinued his product liability claim, saying this was due to IPA's refusal to provide a legal assessment in relation to this claim, it was reasonable for IPA to proceed on the basis of the barrister's advice.

There were issues with the way the proceedings continued. I've considered what Mr P says about this but responsibility for managing the litigation lay with the solicitors, not IPA. His comments concern how they went about pursuing the case and obtaining expert evidence. IPA wasn't responsible for that. And it's not for me to comment on the solicitors' actions or how the court case was pursued. So while I appreciate Mr P has concerns about how his case was managed and the way he had to negotiate the settlement, I can't comment on any of that.

For these reasons, I don t think IPA was at fault in relation to how it dealt with matters in 2018.

Other issues

Mr P says arguably the most important issue is the lack of any direct access to advice provided to him throughout the claim from 2013 to 2018. He refers to the policy wording "We will tell you what your legal rights are, what course of action is available to you and whether these can be best implemented by you or whether you need to consult with a lawyer" and says IPA never provided him with any useful or qualified legal advice and guidance. Instead, he says he was repeatedly told to go and find his own solicitor until IPA panicked in November 2018 and all of a sudden paid for a QC to advise.

His other main concern is that IPA would or should have known from the outset that there were already serious conflicts of interest as IPA's claims handlers, together with their panel solicitors (who ran the legal helpline) and other insurers had already arranged cover for the other product liability claims. He says they breached their duty of care when they continually chose not to reveal these conflicts of interest to him; he was misled and denied any help or legal advice, because they were guarding against the possible loss of millions of pounds across many other cases spread between their own and other insurers in the group. Mr P considers he was effectively forced to act as a litigant in person. He also says many of the other solicitors and barristers told him they could not be seen to act for him on either of his claims due to their involvement in the group action.

I appreciate the policy refers to giving information to the policyholder about their legal rights. But that doesn't necessarily mean Mr P was entitled to detailed legal advice on each of his cases throughout. The policy wording he mentions is referring to the legal helpline; that provides initial advice on possible courses of action. As it says, that includes whether the policyholder can pursue matters themselves or will need a lawyer. If legal representation is required, they then need to proceed with a claim on the policy. And if cover is provided, solicitors will then be appointed. IPA doesn't provide legal advice or expertise itself. In order to have full access to legal support and representation, Mr P needed to show he had a valid claim under the policy terms, and that his case had reasonable prospects of success.

With regard to the conflict of interest, IPA could have explained sooner that there was a conflict, though this is generally a matter for solicitors to address; it's for the solicitor to

decide whether they can take a case on or are prevented by a conflict, since that is a matter for them under their professional obligations. And as I've explained, where there is a conflict of interest the way to address that is for a policyholder to choose their own solicitors rather than expect the insurer to do that for them. I know Mr P had difficulty finding solicitors to act for him but ultimately it's for the solicitors to decide whether to take a case on and IPA has no control over that.

Summary

I think the way IPA dealt with the claim in 2013 to 2014, and again in 2018, was in line with the policy terms and was fair, for the reasons set out above. It could have done more to assist Mr P in 2016 given his circumstances, but ultimately there was a limit to what it could do. So I don't consider IPA was responsible for the fact Mr P didn't have representation until 2018. And it wasn't responsible for how the solicitors handled his case once they were appointed. For these reasons my judgment is that IPA wasn't responsible for how Mr P's cases were pursued or that he received a lower settlement than he might otherwise. Although there were periods where no action was taken, IPA was waiting to hear from Mr P. I know there were times when he couldn't pursue matters due to other factors, such as his health. But looking at all the circumstances I don't consider IPA failed to deal with the claim promptly at those times when it was in contact with Mr P.

I do consider the lack of support in 2016 would have been upsetting for Mr P. He wasn't well and was struggling to deal with the situation. The lack of support made an already difficult situation even worse. In the circumstances a compensation payment would be fair to acknowledge the impact of this on Mr P and the figure I have in mind is £500.I realise Mr P considers he has suffered substantial losses as a result of not being able to pursue the claims in the way he wished. In particular he says he would have obtained a much better settlement than the one he agreed to if he'd still had solicitors representing him. This compensation doesn't address that and he will find that very disappointing. But for the reasons set out my view is that IPA is not responsible for any losses he claims.

my provisional decision

For the reasons given above I intend to uphold the complaint in part and direct Inter Partner Assistance SA to pay compensation of £500 to Mr P for the distress and inconvenience caused to him by what it got wrong.

Replies to the first provisional decision

IPA did not provide further comments for me to consider. Mr P however provided further submissions of his own, together with comments from a barrister. These further points included the following:

- From the beginning he had two potential claims. Anyone assessing these should have been qualified to assess issues including what may constitute lack of care, whether he had given consent and how to establish whether the damage might justify a legal claim, so they could form an opinion on the treatment and possible claim.
- If either claim seemed to have merit he should have been guided to identify, provide and facilitate access to the relevant evidence. And IPA should have provided him with competent legal advice and guidance. This didn't happen in his case - no-one from IPA or any of the solicitors assessed his case in this way.
- As the courts wouldn't award damages twice for the same injury, he should have been advised and guided to assess the merits of the two claims and any limitation deadlines for issuing claims.

- Instead, what happened was they offered to refer the claim to the panel solicitors then abruptly said the panel firm refused to deal with him. He asked for an alternative and trained claims handler but was ignored.
- All IPA did was keep insisting he provide them with all his records while ignoring his request for legally knowledgeable help.
- By late 2013/early 2014 IPA had effectively repudiated the contract by their negligent actions and nothing that happened later was an adequate remedy for this.
- It's correct to find that IPA wasn't entitled to reject the product liability claim on the basis of the legal advice it had in 2016, but I should give further consideration to whether it was fair and reasonable for IPA to leave him to find a solicitor at that point, or should have appointed a solicitor for him then.
- The failure to appoint a solicitor in 2016 wasn't remedied by what happened in 2018.
- Although IPA instructed a QC, they were only appointed to advise on policy cover; this wasn't the appointment of an appointed representative for him.
- It would be unfair to rely on the QC's advice about the product liability claim because
  - he didn't reach a conclusion on prospects of success for the product liability claim; and
  - his comments were generalised and not specific to Mr P's case.
- The QC's comments did not give IPA good reason not to take steps to get solicitors to obtain expert evidence on the product liability claim and/or a legal assessment on prospects based on the full facts and documents.
- The reasons IPA gave for not providing cover were contradictory - initially it said it was relying on the QC's advice that the claim didn't have reasonable prospects; then said the policy doesn't cover product liability claims; then again said the decision was based on the QC's advice on prospects.

After considering the further comments I issued a second provisional decision in which I explained that my conclusions remained broadly the same. But I thought there had been some poor communication with Mr P after he contacted IPA again in 2018, for which some compensation should also be paid. I set out my further conclusions as follows:

The initial claim

Mr P says IPA should have assessed his two potential legal claim properly at the outset, I wouldn't however expect IPA to assess his legal claims - that's a matter for solicitors. IPA's role as an insurer is to deal with the insurance claim on the policy. So it would carry out an initial assessment of whether there is on the face of it a valid claim - for example, considering whether it falls under one of the heads of cover in the policy, or whether any exclusions might apply. But any assessment of the legal merits would be a matter for the panel solicitors.

As I said in my first provisional decision, in the first place it's for the policyholder to show they have a valid claim. So Mr P would be expected to provide enough information to show what his claim was about and provide any relevant information to allow it to be assessed. IPA explained this to Mr P and advised him of the sort of information it would need.

In his initial claim Mr P said "Obviously I have a lot of background correspondence and records but before I start copying and sending them I would like to discuss my overall case with one of your solicitors by phone". In my view it was reasonable - and in line with normal practice - to ask Mr P to provide what information he had so that it could be referred to the panel solicitors. If they needed to discuss anything with him that could have happened then. I wouldn't expect a policyholder to be able to discuss their case with solicitors before cover is in place.

In March 2013, IPA asked Mr P when he would get the paperwork together and he said he was still doing it. Later, in June, he told IPA he was putting the claim together with another solicitor and would be in contact when it was done.

I've reviewed the sequence of events but it remains my view that it was reasonable for IPA to wait for Mr P to provide the information he had relating to his claim and then arrange for it to be assessed. Mr P must have collated evidence and provided that to his barrister to enable him to advise; he could have provided that information to IPA and if he had done so, it would have been passed to panel solicitors to assess.

What happened in 2016

It remains my view that I PA wasn't entitled to reject Mr P's claim on the basis of the panel firms' advice at that time. And I agree he was entitled to a solicitor, as counsel advised he did have prospects of success.

Mr P's barrister says that where Mr P was unable, or did not wish, to make an nomination, the policy seems to require IPA to choose the appointed representative and this means IPA should have appointed a solicitor for him.

I appreciate the policy refers to IPA appointing an 'appointed representative'. But I don't think that means IPA had to search for and find a solicitor who would act for Mr P. Where any solicitor acts under the policy, the insurer will agree terms of appointment with them - to that extent, they are appointed by the insurer to be the policyholder's appointed representative. But I don't think it would be fair to say that meant IPA had to find a solicitor.

Normal industry practice is that insurers will usually appoint panel firms in the first instance but where a policyholder is choosing their own solicitor, it's for them to find someone willing to act. Once the policyholder has found someone, the insurer will agree terms of appointment. IPA could have been more proactive in terms of speaking to Mr P and discussing alternatives. But it did suggest other firms to Mr P. And ultimately it was for him to find another solicitor that he wanted to act for him.

I appreciate that at times Mr P's health made it difficult for him. However, he was able between 2016 and 2018 to collate evidence, instruct a barrister and pursue legal action himself. So even if at that point in 2016 it was difficult for him to find a solicitor I don't think that would have been the case throughout.

The lack of engagement did, however, cause Mr P some distress at a time that was already very difficult. So it's still my view that IPA should pay compensation for the distress this caused.

What happened in 2018

When Mr P contacted IPA again in 2018 it was reasonable to want to review the prospects of success. It's a requirement that a claim has reasonable prospects throughout and insurers are entitled to keep this under review. And IPA hadn't heard from him since 2016. So it was reasonable to want to have all the up to date evidence from him and review the claim before confirming whether cover would be provided. It wasn't simply a case of being able to appoint solicitors - that would only happen if Mr P was entitled to cover for the claim.

Mr P's barrister says the issue here is whether IPA remedied its failure in 2016 to identify and appoint an appointed representative for the product liability claim, or legally assess the claim on the full facts and documents. While I don't agree there was a failure to appoint a

solicitor for Mr P in 2016, nevertheless I agree it's relevant to consider whether IPA did enough when looking at the claim again in 2018.

The barrister says it didn't, because the focus of the instructions to counsel was on the clinical negligence claim and there wasn't a proper assessment of the product liability claim. I've considered whether the assessment was sufficient or was lacking in any way.

The insurer's role is to assess the insurance claim, not the merits of the underlying legal dispute. It's generally reasonable for an insurer to rely on a properly written and reasoned legal opinion on whether a claim has prospects of success. And I wouldn't question or comment on the legal advice unless it's obviously wrong (to the extent that a lay person would be able to spot the error).

Mr P's barrister says the advice wasn't adequate because it only mentioned the product liability claim briefly; the QC didn't have all the facts or documents relating to that claim and so wasn't able to consider it properly.

While the focus was on the clinical negligence claim, the QC was aware of the product liability claim and considered this too. The instructions asked him to advise on "whether he considers his case falls within the remit of clinical negligence ...or whether the claim should have been pursued as a product liability claim."

The introduction to his opinion says at paragraph 2:
"For the reasons set out below, I consider that:

(i) The potential claim falls more comfortably within the remit of clinical negligence than a product liability claim in view of the outcome of the[...] Group Litigation judgment "

Mr P's barrister says it would be unreasonable for IPA to rely on the QC's advice when considering the product liability claim because:

- *although the QC commented on the product liability claim in his advice, that was in the absence of being fully and clearly instructed to do and in the absence of full facts and full documentation;*

- *the main focus of his advice was the clinical negligence claim.*

As I've explained, it's reasonable for IPA to rely on a properly written and reasoned opinion. So the question is whether - in relation to the product liability claim - this was a properly written and reasoned opinion. Mr P's barrister says not, because the QC wasn't fully instructed on that issue and didn't have all the relevant information.

I agree the main focus was on the clinical negligence claim, but the QC also covered the product liability claim. And he set out why he didn't think that claim should be pursued. Bearing in mind this was a QC, if he considered he didn't have enough information to comment on the product liability he could have said so. And had he done that, it wouldn't then have been reasonable for IPA to rely on this advice. However, while the focus of his advice was on the clinical negligence claim, the QC made a number of references to both claims and, as I've said, advised that he thought the claim should proceed within the remit of clinical negligence, not product liability.

I need to consider - from IPA's view - whether this was an opinion it could reasonably rely on. The QC was satisfied he had enough information to comment on both claims and advised which claim he felt should be pursued. If Mr P had provided another legal opinion at the time challenging the advice, then IPA would have had to review it. But in the absence of any such challenge I don't think there's enough reason for IPA not to take that advice at

value and act on it. Nor is there anything so obviously wrong in the advice that IPA should not have followed it.

For these reasons I'm satisfied it was reasonable for IPA to rely on the QC's advice.

Following that advice, solicitors were instructed to deal with the clinical negligence claim. There were issues with the way the proceedings continued. I explained in my first provisional decision that it's not for me to comment on the solicitors' actions or how the litigation was managed.

However, having considered the further points raised, I do accept there were issues with the insurance claim at that time too. In January 2019 IPA's claims handlers requested underwriting confirmation for the product liability claim. The underwriter's reply was that while they agreed that claim wasn't covered as it didn't have reasonable prospects, they didn't think there was no cover at all (as the claims handler was suggesting). But the underwriting advice was that it wasn't necessary to consider this in the absence of reasonable prospects of success and where the clinical negligence case was the better claim to consider. IPA advised Mr P of this. But looking at the sequence of events and the communication with Mr P, I don't think it was clear to him whether the product liability claim would be covered and if not, what the reason for that was, since the reasons given to him changed.

Taking into account the already stressful time Mr P was experiencing, this delay and lack of clarity in explaining to him the position on this claim would have caused him additional distress. I think a payment of compensation to recognise this would be fair and the amount I propose is £200.

Summary

My view remains that:

- *IPA was not at fault in the way it handled the initial claim between 2013 and 2014;*
- *IPA wasn't obliged to find and instruct a solicitor for Mr P in 2016 but its handling of the claim at that time did cause him some unnecessary distress for which a payment of £500 would be reasonable;*
- *it was reasonable for IPA to rely on the QC's advice in 2018 and to deal with the claim on that basis, but the confusion between then and January 2019 around what was being covered also caused some unnecessary distress for which a payment of £200 would be reasonable.*

Replies to the second provisional decision

IPA has advised that in order to bring matters to a conclusion it accepts the findings in the second provisional decision.

Mr P said he didn't accept the second provisional decision and was seeking further information. Although he has since advised that he differs in his view of what's happened, he hasn't provided any further substantive comments or evidence.

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 reviewed my provisional decisions and in the absence of any further substantive comments, I see no reason to change my conclusions. So it remains my view that:

- IPA was not at fault in the way it handled the initial claim between 2013 and 2014;

- IPA wasn't obliged to find and instruct a solicitor for Mr P in 2016 but its handling of the claim at that time did cause him some unnecessary distress for which a payment of £500 would be reasonable;

- it was reasonable for IPA to rely on the QC's advice in 2018 and to deal with the claim on that basis, but the confusion between then and January 2019 around what was being covered also caused some unnecessary distress for which a payment of £200 would be reasonable.

Putting things right

In order to put things right for Mr P, IPA should pay him compensation of £700 for the distress and inconvenience caused to him.

My final decision

My final decision is that I uphold the complaint and direct Inter Partner Assistance SA to pay compensation to Mr P as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 8 July 2022.

Peter Whiteley
Ombudsman