

LEGAL
OMBUDSMAN

Guidance

**Complaints alleging
negligence**

Summary

There are often instances where issues raised within complaints by a client could be treated as either a cause of action in negligence, or a complaint to the Legal Ombudsman scheme about the level of service provided.

This guidance will set out our approach to such complaints.

It may be helpful to read this guide alongside others we have published, including:

- [Our approach to putting things right](#)
- [Our approach to determining complaints](#)

Our Scheme

A common question we receive is whether we can determine complaints which allege professional negligence. The answer to this question is 'yes', as is inferred under section 137(5) of the Legal Services Act 2007 which states that '*the power of the ombudsman [to direct a remedy] is not confined to cases where the complainant may have a cause of action against the respondent for negligence*'.

However, we would emphasise that complaints under our scheme are intended to be dealt with "*quickly and with minimal formality*" (Section 113(1) Legal Services Act 2007).

We can dismiss a complaint where we feel it would be better dealt with by a court (Scheme Rule 5.7(g)), but this is a discretionary power and one we only exercise when appropriate.

Our approach

Our job is not to decide whether there has been negligence, as that is a decision only a court can make. Instead we will determine the complaint and direct any remedy by reference to what is, in the opinion of the ombudsman making the determination, "*fair and reasonable in all the circumstances of the case*" (section 137(1) Legal Services Act 2007), taking into account what decision a court might make, codes of conduct and what was good practice at the time of the act/omission (Scheme Rule 5.37).

If a complainant accepts an ombudsman's final decision, it becomes binding. Both parties are then barred from starting or continuing legal proceedings in relation to the same issues. So, if an ombudsman makes a decision on a complaint where negligence is alleged and it is accepted by the complainant, this bars the bringing of any subsequent claim in negligence. This reflects the fact that our process is designed to be final and conclusive for both parties.

In some cases, legal proceedings may already be underway between the complainant and service provider when the complaint is referred to us. Depending on the stage of these proceedings, we may:

- ask for them to be stayed so we can investigate;
- look to dismiss the complaint if the court is going to consider the same issues; or
- suspend our investigation until the court proceedings are finalised.

In these circumstances, the investigator assigned to your case will advise you what action we propose to take.

First-tier complaints

Consumers often use words like negligence or misconduct to let their service provider know they are dissatisfied. However, they often don't understand what these words mean or the possible consequences of making such allegations.

In these situations we would expect service providers to be pragmatic, considering what has caused the complaint and the customer's intentions before deciding how to deal with it. The fact the customer has said the service provider was negligent in their complaint letter doesn't mean they intend to pursue a negligence action. They are more likely to come to our office.

We know that service providers are required to tell their insurers if negligence is alleged by a customer, and the insurer may then tell the service provider not to deal with the complaint until they have decided what they want to do. We understand that this puts service providers in a difficult position, and makes them feel that they cannot engage with the customer in relation to their complaint or admit if their service was not reasonable. Service providers often ask us what they should do in these situations.

Even if a service provider cannot deal with the complaint under their internal process because they are following advice from their insurers, there are a number of steps they can take to ensure the customer's complaint has been acknowledged and that they know the approach that is being taken. This may include:

- Clarifying with the customer whether they intend to make a professional negligence claim, and if so whether they intend to issue a pre-action protocol letter or consider bringing the complaint to LeO.
- When a complaint has been referred to an insurer, acknowledging the complaint, explaining to the customer how it is being dealt with and why they have decided to take this approach. The customer should also be given timescales for a response (or told if a timescale cannot be given), and informed of their right to refer the complaint to this office after eight weeks have passed. The eight-week time limit applies even if a complaint involves allegations of negligence and the insurers have yet to issue a response.

Service providers should be aware that if the complaint is later accepted by us, the service provider will not be given another opportunity to deal with it internally.

The involvement of insurers does not negate the service provider's responsibility to cooperate with any investigation by this office. Where insurers are involved it is worthwhile contacting us so we can agree a way forward.

Mr G wrote to his solicitor to complain that they had acted negligently by not keeping him informed of the progress of his personal injury claim and by not responding to his emails or letters.

As Mr G had alleged negligence, the firm told him to redraft his letter so that it complied with the pre-action protocol and could be referred to their insurers. Although Mr G told the firm he did not intend to pursue a negligence claim, they still insisted he take these steps.

After Mr G referred his complaint to us, the firm asked for an opportunity to deal with it under their internal complaints process. Their request was refused as they had already had this opportunity and had decided not to deal with the complaint. That was their choice and it was unreasonable for the firm to ask for another chance.

Following an investigation, we found that the firm had progressed Mr G's case and they had kept him reasonably informed. However, we concluded that the firm did not deal with Mr G's complaint properly. It should have been clear from the contents of the letter that Mr G's complaint related to service rather than negligence.

It was apparent that the firm did not really consider what Mr G was complaining about, and referred the matter to their insurer simply because he had used the word "*negligence*" in his letter. The Ombudsman also found that it was unnecessary for the firm to ask Mr G to redraft his letter in accordance with the pre-action protocol. They were directed to pay Mr G compensation of £150 for the distress caused to him in the way they handled the matter.

Further information

If you have any questions about the guidance provided in this document please contact us using the details below.

Email: support@legalombudsman.org.uk

Tel: 0300 555 0333