CLINICAL THINKING

Solicitor updates and insights on clinical negligence and personal injury topics

temple legal protection

Welcome to the latest edition of our 'Clinical Thinking'

Welcome to the latest edition of our "Clinical Thinking". This issue includes timely updates on disbursement funding interest recoverability, virtual mediation and the COVID-19 clinical negligence protocol - plus other topical clinical negligence and personal injury matters. Just click on the image or gold colour heading below and you'll go straight to that article. Enjoy reading our views; if you'd like to share yours please get in touch with our team – contact details are on page 9.

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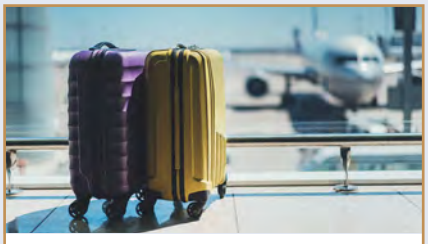

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Disbursement funding interest recoverability - as clear as mud?

By Matthew Best, Senior Underwriting Manager

A previous article I wrote in June 2019 'Is disbursement funding interest recoverable' attracted, forgive the pun, a lot of interest - but the subject itself has remained a very grey area with clarity in short supply. The SCCO has, unhelpfully, recently ruled that a claimant is not entitled to recover interest on a loan taken out to fund a medical report prior to a part 8 order.

In the judgment of Nosworthy v Royal Bournemouth & Christchurch Hospitals NHS Foundation Trust [2020] EWHC B19 (Costs) Master Brown said that costs recovery "is not intended to be a complete indemnity" – Parliament would have allowed for the recovery of such costs had it wanted to, "but I do not read the scheme for provisional assessments under CPR 47.15 (or indeed generally in respect of the assessment of costs) as providing any such mechanism".

In this case, costs could not be agreed and so part 8 proceedings were commenced in respect of the costs only (sought for £25,328, including both pre- and post-judgment interest) and settled for £20,000. At the hearing, the claimant sought interest for the period prior to the part 8 order, specifically £235 in interest for the cost of the medical report (the loan was provided at a 15% rate).

Master Brown said that, contrary to the claimant's contention, he did not understand an order for interest on costs before judgment to be considered normal, or that the general rule was that pre-judgment interest on costs should be awarded.

There was perhaps a crumb of comfort from his comments in relation to large commercial claims or multi-party actions, where "it is much more likely to be proportionate for the court to undertake the sort of enquiry into interest which is anticipated by this claim…"

Continuing on this theme, Master Brown also said - "the making of an order of the sort which is requested by the claimant would introduce an unnecessary level of sophistication into the process for assessing costs… The complications which would arise would, to my mind, be substantial even in a modest case; and they would exist even assuming that the rates and the principle of payment were agreed.

Further, paying parties might legitimately question whether they should be paying any interest if the receiving party had, for instance, the means, by way of insurance or otherwise, to pay up front for disbursements without taking out a loan. The potential for yet further legitimate disagreement would be substantial in the context of ordinary litigation (which may involve litigants in person)."

Cutting to the chase

In very basic terms, the Costs Judge thought it too complicated to decide whether or not to award interest and if so, how much, in respect of disbursement funding and other pre-judgment costs - save where the amount involved was likely to be significant.

Master Brown accepted there was a discretion to award interest on costs before the date of the judgment but that it wasn't a sensible exercise of that discretion to allow such interest in modest cases for disbursement funding. He did observe that, as interest is awarded on costs as a whole from the date of judgment, claimants could look to that interest to repay the interest owed on disbursement funding without having to draw on their damages.

In light of the decision in Nosworthy, it certainly appears that the fight to recover interest goes on; the pendulum is certainly swinging in favour of the opponent - interest is not currently going to be recoverable from the opponent – certainly prejudgment.

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The Temple perspective

Returning to the original case of *Jones* in my first article, the Court of Appeal did not have to consider if the interest due under a funding agreement was recoverable in principle because that point had been conceded by counsel in the court below.

So, in this case the Costs Judge did not feel bound to follow *Jones*. We think he was right. *Jones* was only concerned with the rate of interest because that was the only issue before the Court.

Unfortunately, we cannot expect to see interest due under a disbursement funding CCA being awarded in future detailed assessments.

Ultimately, the advice to our customers has to be clear. We still await a decision on the recoverability of interest.

Whilst we believe it ought to be recoverable, it is only fair and proper that the client knows they are ultimately responsible for the payment of such.

We would be very interested to hear your views on this. Do you agree, disagree - or is there something we are missing to consider?

Temple offers straightforward, affordable disbursement funding that enables your client to make a claim without having to pay expenses along the way. It provides your law firm with a solution to the significant cash flow burden that comes with clinical negligence litigation.

It is available at no extra cost to your law firm and there are no set-up fees for the client. The interest rate is competitive – at just 10% per annum.

If you would like to discuss this, or feel that your clients and your law firm would benefit from this, please contact me on **01483 514804** or via email to **matthew.best@temple-legal.co.uk**

Clinical negligence ATE insurance premium challenge – technicalities and the reality

By David Stoker, Senior Underwriter

We received a recent clinical negligence ATE insurance premium challenge from a well-known defendant law firm where the paying party is seeking to argue that a Tomlin Order is not a relevant "order for costs" and therefore the premium is not payable. We suggest that this is purely a technical point which should be given short shrift.

In the instance, case proceedings were discontinued against the first defendant and then later settled against the second. The argument received was as follows:

In Cartwright v Venduct Engineering Limited [2018] EWCA Civ 1654 the court confirmed that a Part 36 offer or a Tomlin Order did not amount to an 'order for costs'. The second defendant notes that this matter likewise concluded by way of a Tomlin Order.

The second defendant refers to s46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") which states:

Recovery of insurance premiums by way of costs

(1)In the Courts and Legal Services Act 1990, after section 58B insert—

"58C Recovery of insurance premiums by way of costs

(1) ***A costs order** made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).*

(2) *The Lord Chancellor may by regulations provide that **a costs order may include provision requiring the payment of such an amount***

The second defendant further refers to the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No.2) Regulations 2013 which state:

3.—*(1) **A costs order** made in favour of a party to clinical negligence proceedings who has taken out a costs insurance policy **may include provision requiring the payment of an amount in respect of all or part of the premium of that policy if—***

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(a) the financial value of the claim for damages in respect of clinical negligence is more than £1,000; and

(b) the costs insurance policy insures against the risk of incurring a liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence (or against that risk and other risks).

*(2) The amount of the premium **that may be required to be paid under the costs order** shall not exceed that part of the premium which relates to the risk of incurring liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence in connection with the proceedings.*

Further and, in any event, the Second Defendant notes that LASPO makes clear it permits recovery of ATE premiums in clinical negligence claims by a discretionary inclusion in the costs order; in other words, the order **must** contain a specific provision for payment of the ATE premium. The Regulations echo that framework.

The second defendant further refers to the editorial note to the White Book (2019 edn), which confirms the same framework at p.1595 (in the 2019 volume), which says *"If no such provision is included in the order, the cost of the premium will not be recoverable"*. The order contains no such specific provision for payment of the ATE premium.

The second defendant therefore contends that there is no order for costs which includes provision requiring the payment of the premium, and accordingly, the ATE premium is not recoverable from the Defendant.

The Temple perspective

Our view is that the post-LASPO regime and the advent of recoverable insurance premiums in clinical negligence cases was not set up to create such pitfalls when the defendant has always been aware of the potential liability for an additional liability for ATE cover.

If you encounter such an argument with a Temple premium, we would ask you to refer the matter to us so that we can prepare the desired response for you.

Please be aware that this type of argument may now become more common. Therefore you should strive to include reference to a recoverable ATE insurance premium in the final orders (not in a schedule to a Tomlin order).

If you have any questions please do not hesitate to contact David Stoker on **01483 514808** or email on **david.stoker@temple-legal.co.uk**

Collaborative protocols, Covid-19 and clinical negligence litigation

A recent Law Gazette article was published entitled 'Covid-19 protocol encourages 'positive behaviours' in clinical negligence litigation' . Having read this article, we asked our Underwriting Manager, Matthew Best for his thoughts on this and Temple Legal Protection's stance on such litigation.

As I commented in my recent podcast, the idea of suing any of the NHS Trusts for the levels of compensation previously awarded may no longer be a realistic option. The NHS was created to protect our population; suing it occurs not because people want to, they do so because their lives have changed through negligence.

I absolutely agree with the various organisations representing the different aspects of clinical negligence claims. We must go forward together and behave positively towards each other. The COVID-19 clinical negligence protocol has been agreed, so let's follow it.

Now is the time for more mediation

If claimants and defendants are collaborating, then why not engage in mediation more? With the NHS already owing in excess of £4.3bn in legal fees, significantly reducing lengthy and costly trials would help greatly. Here at Temple we recognise the importance of mediation and have even included mediation incentives into our ATE insurance products.

From an insurer's perspective, it is only correct for me to say that we do not know how this will pan out. We have done our own risk assessments on various COVID-19-related scenarios that might end up at a law firm's door. As you can imagine, there are lots of questions and many scenarios that need to be addressed – and we're getting on with that now.

Preparing for what might happen - watch this space!

Temple Legal Protection is collaborating with interested parties to identify and get under the skin of the key issues before a potential avalanche of potential claims is received. If you would like to know more or discuss potential developments please either call Matthew Best on **01483 577804** or email **matthew.best@temple-legal.co.uk**

Clinical negligence and personal injury claims – mediation in the virtual world

By Paul Balen Mediator Director, Trust Mediation Ltd

Six months in from lockdown, the fall-out for clinical negligence and personal injury practitioners is clear - the lines of communication have been stretched and the courts are log-jammed. Concluding claims as quickly as possible has become a key priority to aid the cash-flow of both claimant and defendant firms.

Wise practitioners therefore have been looking hard at Alternative Dispute Resolution (ADR) which now, like never before, has come into its own. Not only has the pandemic accelerated the uptake of dispute resolution but judges are, without question, penalising parties who either do not embrace ADR or simply pay lip service to it.

Already this year, judges have penalised a defendant for making no offers at a JSM and disallowed a successful defendant costs for failing to engage in mediation[2] .

They have also penalised an unsuccessful defendant with indemnity costs because it had refused to consider ADR on the grounds that "no purpose would be served" because it had a "strong defence";[3] and penalised a defendant with indemnity costs for failing to file a statement explaining refusal to engage in ADR[4] .

All these cases concerned pre-lockdown events. It is not difficult to imagine judges' responses to similar situations since then.

Post lockdown it is also easy to see virtual mediations continuing to follow their success in replicating the face-to-face version. Whichever is used, mediation should seriously be considered as a means of resolution - just as soon as you are in a position to advise the client on appropriate settlement parameters. Waiting for there to be a trial bundle is simply not necessary.

Whilst there will always be a place for direct negotiations and joint settlement meetings, the introduction of a neutral mediator, particularly one steeped in the subject matter, can often accelerate resolution and help the parties achieve that quicker and at far less cost than awaiting a judicial decision.

Mediations are now regularly heard much earlier in the process than JSMs. Indeed, around 40% of mediations are now pre-issue. With the majority of our mediations now being held before a CCMC, feedback strongly suggests claimants (and it must be remembered that, for all the lawyers' investment in the case, first and foremost it is the claimant's case) far and away prefer their involvement in a relaxed collaborative negotiation – and as early in the process as is viable.

[1] EAXB v University Hospitals of Leicester NHS Trust 6th January 2020
[2] Wales v CBRE [2020] EWHC 1050
[3] DSN v Blackpool Football Club [2020] EWHC 670
[4] BXB v Watch Tower etc [2020] EWHC 656

Mediation checklist

The lawyer's role in preparing for mediation should include:

- Think resolution
- Help the client to analyse the strengths and weaknesses of case
- Work out and advise on settlement brackets
- Ascertain 'What would help the opponent provide resolution?'

An experienced mediator can help the parties by:

- Facilitating the exchange of information
- Uncovering and preventing misunderstanding
- Keeping the parties engaged
- Handling emotions and avoiding hostility
- Assisting with the case analysis and risk assessment
- Being aware of potential conflicts
- Helping manage expectation
- Breaking deadlocks
- Facilitating thoughtful rather than reactive offers
- Dissipating anger, frustration, and hostility
- Planning and, if appropriate, choreographing plenary sessions – online if helpful
- Organising and running the virtual platform
- Providing a pre-mediation guided tour and venue for a pre-mediation conference

Experience since the lockdown has shown that, after some understandable fear of technology, practitioners (and indeed claimants) have increasingly embraced the virtual world and, along with it, a much more relaxed and collaborative approach than in the 'real world'.

Claimants are always relieved not to have to go to court whilst, once compensation is achieved, costs can be negotiated then and there or failing that a substantial interim payment obtained something guaranteed to put a smile back on the face of the finance partner!

Trust Mediation runs free training sessions and pre-mediation trial runs on a virtual platform. Do please contact us for more information via email to paul.balen@trustmediation.org.uk or call 07767 673200.

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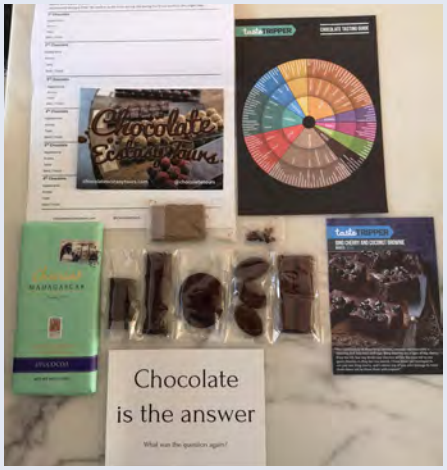

A matter of taste - and a potentially 'sticky' situation

Temple Legal Protection hosted a chocolate tasting 'virtual' event on 17th September for number of our ATE insurance scheme Coverholders, with Jennifer Earle from internationally recognised 'Chocolate Ecstasy' our expert guide.

Everyone certainly enjoyed the chocolate provided, Jennifer was extremely knowledgeable and provided the guests with an educational journey into the world of chocolate tasting. It was great to interact with our partner law firm colleagues; a fun time was had by all and we look forward to hosting more virtual events in the coming months.

Virtual Wine Tasting

Temple Legal Protection hosted a Wine Tasting Virtual Event on 24th September for number of our key contacts, with Chris Scott from ThirtyFifty as our expert guide.

Chris was an extremely knowledgeable and engaging host, with lots of fun things such as quiz questions and a scavenger hunt along the way.

It was great to interact with our guests and a fun time was had by all, with some lovely feedback provided by our guests following the event. We will certainly be organising another Wine Tasting event later in the year.

Travel Sickness Claims – A Turn for the Better

By Paul Bonner, Senior Underwriter

Since the Court of Appeal's Decision in Wood v TUI in 2017, it has been harder for the claimant to succeed in demonstrating causation in relation to their gastric symptoms.

The defendant tour operators have had considerable success in challenging both the factual evidence in relation to whether the claimants dined away from their all-inclusive resort, and the reliability of the expert evidence in showing causation.

Now the High Court has overturned the first instance decision in favour of the defendant, where the defence had not led any expert evidence, but the court had accepted that the claimant's expert had not gone far enough in establishing a causative link between the claimant's gastric illness and the holiday resort.

On appeal to the High Court in Griffiths v TUI (2020), the Judge found that although the claimant's expert's report had some shortcomings it was uncontroverted, in that there was no expert's report from the defendant; therefore it was wrong of the lower court to find against the claimant's expert.

The court cannot ignore a report which complies with CPR Part 35 unless there are exceptional circumstances. If there is no expert challenge from the defence, the claimant's expert is believed.

What will happen now?

In short, the defendant tour operator must commit to obtaining its own expert evidence on causation to counter the claimant's expert. It can no longer simply seek to criticise the claimant's expert's report.

What will TUI do next?

It can take the case to the Court of Appeal, or it will have to contemplate instructing expensive experts on each case it is defending. In this position TUI, and others, may seek to settle lower value cases.

For now at least, claimants have something to make them feel better.

If you have a question about a travel-related personal injury claim please email david.stoker@temple-legal.co.uk or call David on 01483 514808.

Varying a costs budget from 1st October – a 'heads up' webinar.

Temple's latest webinar was presented by John Ivory at Keith Bintley Ltd and hosted by our Senior Underwriter Peter Morgan. It runs through the changes to be expected when varying a costs budget from 1st October.

Expert insight in the webinar includes updates to the Practice Directions, when to submit variations to a costs budget and a short Q&A session with John at the end. The webinar was presented live to a number of personal injury and clinical negligence solicitors.

A link to the webinar can be found here.

Following the success of this event, further webinars are planned to take place over the coming months on a variety of topical subjects. Details of these will be provided in due course.

If you have any questions on how Temple's ATE insurance can benefit you and your clients or are interested in attending future webinars hosted by Temple, please send an email to peter.morgan@temple-legal.co.uk or call Peter on **01483 514800.**

Your words, not ours...

Iona Smith at Gaby Hardwicke Solicitors had these kind words to say about the service we provide:

"Temple are always there when you need them. They are very efficient and help to resolve problems in a pragmatic and helpful manner. We have always been delighted with the personal service we receive from them"

Click here for more testimonials from our partner clinical negligence law firms.

Are you listening to our news? Well, you can now!

Our latest podcast is from Matthew Best, our Senior Underwriting Manager on the 'New Deal' for Clinical Negligence ATE insurance explaining **why** we have launched it, not just **what** new features are now offered.

Genuinely lower premiums will catch your eye, as will our focus on mediation-related cover benefits. The latter is not a panacea for the problem of rising costs, but together they can go a long way to keeping costs in check and assist in making a fixed cost regime a less bitter pill to swallow.

Click here to listen.

ATE Insurance and Disbursement Funding Product Guides

Get all the facts about our ATE insurance and funding facilities, click here to download your copy of the Clinical Negligence Product Guide and click here for the Personal Injury Product Guide.

New - Case-type specific web pages

Pregnancy and birth injury - cases are the latest addition to our website with in-depth ATE insurance information on these cases for clinical negligence litigators.

Click here to find out more.

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Matthew Best

Senior Underwriting Manager

Matt's day-to-day role involves managing a large number of ATE insurance schemes for law firm's clinical negligence and personal injury claims. In addition he uses his experience to ensure that their Temple disbursement funding facilities are set up and run smoothly. He is often seen at APIL, AvMA and SCIL conferences sharing his expertise.

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Lisa Fricker

Solicitor Services Manager

Lisa has over 15 year's experience in the legal insurance industry, and is used to working closely with solicitors to develop and maintain good working relationships. In her role Lisa manages our internal and external review process and is focused on ensuring that the quality of service provided by Temple remains at the highest standard.

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David Stoker

Senior Underwriter

David's experience allows him to undertake a key role within Temple's ATE insurance personal injury and clinical negligence teams. He also participates in the assessments of delegated schemes that Temple provide to help our customers make the most of the products and services we offer.

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Peter Morgan

Senior Underwriter

Peter is an Underwriter within the Personal Injury and clinical negligence team and is responsible for assessing risks along with the day to day management of delegated authority schemes. He is also available to help with any underwriting questions to ensure customers are getting the best of their ATE and funding products.

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Alex Stracey

Senior Underwriter

Alex has over 14 years experience within the LEI market, both ATE and BTE, and she is used to working closely with solicitors to ensure the best outcomes for their clients. Her experience allows her to match customer requirements with Temple's products and services. Alex is happy to assist with any queries that arise on a day to day basis.

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Philip Pipkin

Underwriting Support Manager

Philip's integral role at Temple is to ensure that personal injury and clinical negligence underwriting tasks are dealt with quickly and professionally. He mainly deals with initial ATE insurance enquiries and general underwriting issues but also assists in the maintenance and introduction of delegated schemes to Temple's customers.

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David Pipkin takes on new Non-Executive Director role

We are sure you are all familiar with David to some degree from his 14 years as Director of Temple's Underwriting Division. He is likely to have met you at your offices or at one of the conferences he regularly attends. David, who has also spent 40 years as a Legal Executive, has been instrumental to our growth and success. His expertise, knowledge and friendly nature has helped us to support you and your clients.

In June, David decided to move into a Non-Executive Director role at Temple. Although he will not be involved day-to-day in business operations, his new role will still see him actively involved with long-term strategy at board level, and he will also still attend seminars and conferences when able to do so.

David is looking forward to continuing to mentor and support our team so that we continue to offer you the very best service and assistance. He is also looking forward to meeting you again and enjoying your company at events - Hopefully next year!