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Welcome to the latest edition of our 'Clinical Thinking'. Of note in this issue are developments in clinical negligence and personal injury claims resulting from the pandemic; this includes a claim case study of the type you may, or may not, see a lot more of. We've also got a solution to medical agency costs not recoverable in fixed costs regime, news of 'mandatory mediation' and have insights on higher value personal injury claims and the Civil Liability Act. 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 - contact details are on page 10.



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Covid-19 claims: what we are seeing?

By Matthew Best, Senior Underwriting Manager

Previously it was reported that we may see a 'tidal wave' of litigation surrounding the coronavirus pandemic. Whilst that may well be the case in the months or perhaps years to come, to date we have only started to see a few matters trickling in. In this update we bring you a consensus from numerous calls and conversations we have had.

In recent months, Temple has been actively collaborating with our partner law firms about this. We believe they should be involved in the process of how to tackle the claim issues the pandemic created. To that end, we believe the sharing of facts and knowledge is critical.

In addition, for many years now, Temple has offered an unrivalled range of delegated authority ATE insurance. We work with the best law firms in the country, whilst aiming to forge new relationships with others.

Why am I saying this?

Well, offering full delegation comes down to trust; a key factor when offering such wide-ranging delegation. Our view is that if we have offered an ATE scheme to a law firm, we trust them completely. The coronavirus pandemic, however, will undoubtedly see many cases being brought against the NHS.

The unprecedented nature of such litigation requires a unique bond and understanding between the law firm and the insurer. By having our partner law firms involved in processes, we believe we stand the best chance of securing access to justice.

Our conversations have led us to conclude that personal injury and clinical negligence litigators remain very cautious. Some report absolutely no interest in such cases; whilst many others wish to wait until the outcome of the spring 2022 inquiry. It is widely recognised that breach of duty and causation are as difficult as each other in this type of litigation. To draw an analogy, the landscape hasn't been painted yet and I, for one, will remain very careful as we seek to move forward on this together.

The sharing of information under the correct protocols is also key and I would like to share with you an example of a case we have been asked to consider covering; this is for a claimant looking to recover damages in connection with their contraction of coronavirus (Covid-19) as a result of their exposure to the virus, a biological agent, whilst working for the defendant as a paramedic.

At all material times the claimant was employed as a paramedic. It is alleged that the ambulance trust allowed employees to work as paramedics collecting and transporting contagious Covid-19 positive patients to hospital with insufficient PPE. This resulted in not taking any or adequate precautions against infection and a lack of any system of health surveillance. The claimant's exposure prior to infection was over a four-day shift pattern.

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The claimant asserts that they were only provided with a supply of thin paper masks whilst getting fit tested for FFP3 (a fitted mask used to protect against respiratory borne pathogens). To use these masks, relevant staff must be 'face fit tested' to ensure they achieve a suitable face fit and that it operates at the required efficiency.

The claimant also asserted they would attend work and go into the office; when there it was like a 'lucky dip' to see which PPE was available. The claimant was not able to use FFP3 masks for all attendances (owing to a short supply) with Covid-19 patients. As the FFP3 mask that the claimant had to carry on the ambulance in any event could only be worn once, it would be discarded in clinical waste afterwards.

At the very start of the pandemic, the claimant and their colleagues were instructed to take the ambulances back to station for decontamination by the 'Affers'. This procedure was stopped before the claimant fell sick - due to the amount of downtime of the ambulances. The claimant would be in the same uniform all day, eating lunch and drinking through the day, despite the uniform becoming contaminated on each patient attendance.

The claimant would then have to take it home to wash. The claimant asserted they were given a little red 'dissolvable' bag for the uniform, but the red bag could not go in a domestic washing machine as it would not dissolve. The claimant would have to extract the uniform and then dispose of the red bag. No facilities to wash the uniform were provided on station.

As to other forms of PPE, the claimant asserts they were only provided small plastic aprons that would blow around in the wind with contamination on, hitting them in the face. No face shields were provided. Additionally, the claimant was informed that they would have to take off all PPE to avoid cross contamination when attending hospital, leaving them totally exposed when in hospital with the patients.

In this particular matter, the HSE was obliged to issue two Notices of Contravention against the defendant Trust for non-compliance with its duty to keep paramedic staff safe from Covid-19 at work. It also appears that the ambulance trust had no plans in place for any such crisis.

Finally, I am keen to share knowledge on this hot topic in general in order to provide even greater value to our customers; so do get in touch if you want to canvass opinion or discuss any matters. Please call me on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations or to discuss your ATE insurance requirements.

Reducing costs: what took so long?



It has been good to hear that the cooperation in working practices for clinical negligence claims could last beyond the pandemic. The protocol agreed last summer between the Society of Clinical Injury Lawyers and NHS Resolution (NHSR) was aimed at facilitating the conduct of litigation during this time.

Temple has long been in favour of keeping the costs of litigation down and actively encourages mediation - as well as covering the costs of it under our ATE cover.

The protocol has helped the conduct of litigation during the pandemic. Changes, as we know, included more flexibility on limitation periods, greater use of email to serve and receive documents and online examinations of clients for medical expert reports.

The NHSR goal is to keep cases from escalating into unnecessary litigation and minimise legal costs. They say that the protocol has been successful in achieving these goals (Is the NHSR finally entering the 21st Century?).

It is said the NHSR hope to build on the increased co-operation they have seen during the pandemic to deliver better outcomes for everyone involved in these claims. I would say this works both ways; if matters were resolved earlier, rather than making admissions and settlement offers late on in the litigation, that will reduce litigation costs.

It didn't need a pandemic to work this out.

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Once on the [Temple Interest Rate Calculator web page](#) you simply enter the amount you wish to borrow and select the period of time using the slider. If you would like to set this up, please send an email to stephen.ryan@temple-legal.co.uk - we can also provide some suitable wording to introduce it to your clients and site visitors if required.



'Your generous delegated authority gives us freedom to run our cases without interference'



Jacqueline Hardaway, Head of Personal Injury & Litigation at Dawson Hart Solicitors recently got in touch with us to say:

"We have used Temple for our all our various ATE needs for over 15 years. We have always found their service to be efficient, friendly and, most importantly, supportive. The generous delegated authority gives us freedom to run our cases without interference. On the odd occasion when we have a problem part way through a matter, Temple are happy to discuss the options and seek solutions that work for everyone."

Please [click here](#) to read other feedback provided by our partner law firms.

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.



Medical agency costs not recoverable in fixed costs regime - a solution

By Peter Morgan, Senior Underwriter

When it comes to your client's personal injury claim, at some point you will need to obtain medical evidence - either through direct instruction with the expert themselves or via a medical agency. Whichever option you choose, each will come with their own pros and cons. Here we take a look at recent developments and offer a ready-made answer.

A number of agencies will provide a deferred payment scheme, where settlement of the invoice will be made upon receipt of the disbursement costs from the Defendant. Of course, with instructions through a medical agency, an uplift is included in the cost of instructing the necessary expert.

Unfortunately, the recent decision of Deputy District Judge Akers in *Powles v Hemmings* to rule that these additional medical agency costs are already included within the fixed costs regime, and therefore not recoverable from the Defendant. This leaves firms in a difficult position with the outstanding balance.

Temple Funding alleviates this risk by providing disbursement funding up front for any claim with a Temple ATE policy in place. This allows firms to avoid panel experts and instruct the most suitable expert directly without the additional agency fees or the risk of these not being met by the Defendant. However, the use of medical agencies will still work, but the uplift for the privilege of deferred payments would be extinguished.

Our disbursement funding is fully integrated into the Temple Online Policy System, along with our ATE policies making the process of applying for funding and making drawdowns quick and easy.

With one of the most competitive interest rates available, now is a good time to consider the benefits to both yourselves and your clients.

If you would like any additional information or would like to explore Temple Funding further, please contact our Senior Underwriter Peter Morgan via email (peter.morgan@temple-legal.co.uk) or via telephone (01483 514800) to start the journey towards your funding solution.



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When your client is provided with a Temple ATE Insurance policy - with no upfront premium - your client will also be eligible for disbursement funding.

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For a free, no-obligation discussion of your litigation requirements please call us on **01483 577877** or email ate@temple-legal.co.uk

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Mandatory Mediation: the end of the litigator?

By Terry Renouf, Renouf Mediation

After many judicial speeches on the topic the summer saw three significant publications. Firstly, the Civil Justice Council reported, at the request of the Master of the Rolls, supporting mandatory Dispute Resolution [1]. Secondly the Ministry of Justice published its own Guide to Civil Mediation [2]; thirdly and finally the Ministry requested evidence on Dispute Resolution [3].

That call for evidence is sponsored not only by the Master of the Rolls and the two Presidents of the Tribunals Divisions but also the Lord Chancellor and his ministerial colleague in the House of Lords - providing support from the Executive branch of Government.

Do not doubt that this is important and will lead to change. The question is not whether there will be a change but how much. The report's introduction explains that the aim is to bring into the mainstream "non-adversarial dispute resolution mechanisms, so that resolving disagreements, proactively and constructively becomes the norm."

Does this mean the end of the litigator? Are the brave, brash front-line soldiers of the law going to transform to accommodative Dispute Resolution (DR) professionals? Rest easy! Although the world is certainly changing and the judicial focus reflects the client need for resolution, the call for evidence asks how the courts should best implement that change. There will therefore be an opportunity to provide input into the future of dispute resolution.

The Call for Evidence raises 32 questions but cost effectiveness and its close cousin proportionality lie at the heart of many of the issues. The costs of mediation will be relevant and will be judged against sums in dispute (and presumably, where costs budgets are available, the financial savings that might result from settlement.)

Other questions include what types of "DR" are most appropriate to resolve a particular case (and when): no doubt an issue that will take up more time at Case Management Conferences. Pre-Action Protocols will no doubt also need to be reviewed and broadened. Another legitimate question is which cases are not appropriate for DR? The judicial view seems to be that this could be a vanishingly small number - but "test cases" that set precedents will be one class.

Are there others? How should they be defined? Will we see a formal Notice to Mediate as there is in British Columbia? And "unless

orders" where DR has been ordered? Should mediators be regulated? Will Courts expect civil mediators to be Civil Mediation Council Registered? Will your clients?

At this stage there are many questions and imponderables, but parties even now will need their settlement strategies from outset. Be ready, know your options, know your mediator(s) and have your answers ready for the Cost-Benefit analysis. The Evidence paper states:

"We want to support people to get the most effective resolution without devoting more resources than necessary - financial, intellectual and emotional - to resolve their dispute. Creating more proportionate and constructive routes to resolution avoids the need for these resources to be expended, saving the user's time, as well as reducing their levels of stress at an already difficult time."

As a client satisfaction guide it is hard to fault this goal. If the Courts are designing such a process, then it can be no bad objective for legal advisers to be ready to offer the same service to their clients.

The MoJ Call for Evidence closes on 30 September. Do respond if you want to influence the policy changes that will follow - and consider your settlement strategies when your clients ask how you will be resolving their dispute without devoting more financial, intellectual and emotional resources than necessary.

If you would like to discuss mediation in relation to a clinical negligence case, please call Matthew Best on 01483 514804 or by email to Matthew.Best@temple-legal.co.uk

[1] [Civil Justice Council - Mandatory \(alternative\) dispute resolution](#)

[2] [Ministry of Justice - A guide to civil mediation](#)

[3] [Ministry of Justice - Dispute Resolution: Call for Evidence](#)



Personal injury claims and the impact of the Civil Liability Act: part 'clear', part 'clear as mud'?

By Matthew Best, Senior Underwriting Manager

The Civil Liability Bill that went through parliament during 2018 was aimed at two distinct aspects of personal injury claims - lawyers responsible for lower value RTA claims and the discount rate. It is the former that I concentrate on in this article and seek to provide some clarity on.

It seems obvious to me the wording of the Act is convoluted, detailed and designed to keep most whiplash claims within the new regime in order to cut costs. Matters captured under Part 1 of the Act are whiplash type claims. Sec 1(2) of the Act defines whiplash as "an injury of soft tissue in the neck, back or shoulder" that is:

- A sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder; or
- An injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

You may say what is convoluted about that? The short answer is, not much. However, there is a broad exclusion which may take some mixed claims out of the Act. Under the new legislation an injury is not defined as a whiplash injury if:

- it is an injury of soft tissue which is ***part of or connected to another injury***, and;
- the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling outside [Section 1(2)], set out above.

It is the phrase in ***bold italics*** above that has no statutory or judicial guidance on what is meant by it. The then Justice Minister, Rory Stewart, speaking on 23 October 2018 offered some guidance on this, but nothing substantial.

We must also not forget that it is not only the nature of the injury that is relevant, but also the time factor. Within Section 6, the bar on pre-med offers is only applicable to whiplash claims falling under Section 3 (where the tariff for damages is implemented). This refers to claims where the duration of any whiplash injuries suffered "does not exceed, or is not likely to exceed, two years". Consequently, if a whiplash injury has already lasted more than two years or would be likely to, it seems that a pre-med offer could indeed still be made.

But what about medical evidence?

Where a whiplash injury does fall under the Act, a regulated person is not able to make an offer or payment in settlement of the whiplash claim, or arrange or advise settlement, without first seeing "*appropriate evidence*". Likewise, a regulated person cannot arrange or recommend acceptance of a settlement unless there is medical evidence.

This is the next 'unclear' piece of the Act. It does not indicate what will amount to "appropriate medical evidence" - detail on this will be set out in secondary legislation.

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One thing that is perhaps clear are the limits of the Act. To begin with, the Act only applies to causes of action taking place after 31 May 2021. In addition, it only applies to

- Claims brought by someone who was injured whilst using a motor vehicle, excluding a motorcycle.
- Vulnerable road users using a wheelchair, bicycle or other pedal cycle, horse riders and pedestrians are outside the Act.
- E-bike riders are not included within the express wording of the Act. Under the Electrically Assisted Pedal Cycles (Amendment) Regulations 2015, e-bikes are excluded from motor vehicle registration and are arguably not mechanically propelled, so would appear to be outside the Act.
- For mobility scooter users, the situation is less clear. Lower value claims brought by mobility scooter users are expressly within the OIC. We believe it consistent for these claims to be treated the same as other vulnerable road users' claims.

So here we have a part 'clear' and part 'as clear as mud' Act. How has it affected your business? Here at Temple, we are still receiving many enquiries on ATE cover for matters that now come under the new regime. If this is something you require, I would be delighted to explore a simple solution with you.

I am interested to gauge the thoughts and experiences of all practitioners affected by this Act.

Please call me on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations or to discuss your ATE insurance requirements.



'Ho', 'Howe' and costs shifting

By George Beevor, Claims Manager

The Ho v Adekun hearing at the Supreme Court was heard on 29th-30th June. In recent years defendants in personal injury and clinical negligence matters have relied on the case of Howe v Motor Insurer Bureau [2017] EWCA Civ 932, to recover greater costs after successfully defending a Part 36 Offer.

In 'Howe' the Court of Appeal found that any costs due to the defendant may be offset against any costs due to the claimant in addition to the damages. Claimants have argued that the case refers to specifically to statutory compensation from the MIB and not damages.

Ho comes down two issues:

- **Whether the defendant should be entitled to its costs** before the original Deputy District Judge. This was the first hearing at which the defendant was successful but no order for costs was made - placing emphasis on the fact that the defendant had signed the consent order providing for an assessment of costs and was therefore to some extent culpable.
- **Whether the defendant should be entitled to off-set its costs** of the successful costs' hearings (including the appeals) against the claimant's costs of the underlying claim. The defendant submitted that, as the claimant was entitled to QOCs protection, it should not only be entitled to its costs against the claimant's damages but also against the claimant's costs. This was because the law confirmed they were entitled to do so (Howe v MIB No.2) and that this was just and fair in the circumstances.

The Supreme Court have now heard the case of *Siu Lai Ho V Seyi Adekun* [2020] EWCA Civ 517 in which it is hoped that *Howe v MIB* finding will be overturned. Temple believes that the intention of the Jackson reforms was only ever to allow limited cost shifting relating to damages and not pre-offer costs.

We await the judgement.

Please call Matthew Best on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations on this topic or to discuss your ATE insurance requirements.

A 'welcome back' from APIL - face-to-face and virtually



Temple Legal Protection is delighted to be exhibiting at the APIL Annual Clinical Negligence Conference 2021 taking place at Celtic Manor, Newport on 22nd and 23rd September. This will be APIL's first hybrid conference - with delegates having the option to attend in person or virtually via the APIL virtual platform.

All delegates and exhibitors will have full access via the conference app and after a difficult 18 months, it is great to be hitting some kind of normality. We are very much looking forward to seeing some friendly faces and to have that in person contact once again, which is something that has been greatly missed.

This year's theme is 'sensory injuries - including vision, nerve damage, pain and hearing loss' and we forward to meeting with some of the country's leading medical experts and lawyers in this specialist area of work.

On our stand will be Lisa Fricker and Andy Lyalle ready to answer any questions you may have regarding ATE insurance and of course the benefits of using Temple's clinical negligence ATE insurance and disbursement funding products. They will also be available to discuss possible future challenges and share their views on the ATE insurance market in general - so do please come and have a chat.

If you're not going to be at the conference but would like to find out more about ATE insurance and disbursement funding for your firm and clinical negligence clients, please call Lisa Fricker on 01483 514872 or email lisa.fricker@temple-legal.co.uk

Clinical negligence case study - birth injury. What a difference a day makes...



By George Beevor, Claims Manager

Well, in Mrs M's case, it made a whole world of difference to her case for clinical negligence. After a caesarean section Mrs M was left with a serious wound infection. At first the urgency of the situation went unnoticed and, by the time it was, a necrotising fasciitis had broken through the peritoneal wall and spread to the gut wall and rectum.

Fortunately, Mrs M was represented by a top-quality clinical negligence firm, and they arranged ATE insurance cover on her behalf with Temple Legal Protection.

Experts on both sides agreed that she had been left with significant injury and that there had been negligence in her treatment. What they could not agree on was when this negligence occurred. The difference was 24 hours but, in terms of causation and what could therefore have been done to treat the infection, this made all the difference.

The defendant made an early offer on this basis, but Mrs M's experts needed time to look at the evidence. This was because there was a good case for saying a diagnosis could have been made the day before and, if it had been, the prognosis would have been so much better.

Under the Part 36 rules the clock was ticking. If the ATE cover from Temple had not been available, Mrs M would have had to take the offer or risk losing its value entirely through the QOCS rules. As it was her solicitor carried out a full investigation and the experts eventually agreed that the defendant was most likely correct in their position. The offer was accepted out of time with the post-offer costs threatening to swallow up the entirety of Mrs M's much needed damages.

Without the ATE insurance cover, the client's solicitor could not have obtained the evidence and risked losing all her damages. Happily, Temple was able to provide cover and when the bill from the defendants was received for their costs after the expiry of the offer, we were able to deal with that, enabling Mrs M to keep her damages.

Please call Matthew Best on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations on this topic or to discuss your ATE insurance requirements. [Click here](#) to find out more about ATE insurance for pregnancy and birth injury cases.

CLINICAL THINKING

Solicitor updates and insights on clinical negligence and personal injury topics

temple
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Which types of clinical negligence do Temple Legal Protection cover?



We can provide ATE cover for all types of clinical negligence claim, including surgical negligence, pregnancy and birth injury claims, prescription and medication errors, cosmetic surgery negligence, dental negligence and opticians' negligence.

Click on the links below for in-depth ATE insurance information for clinical negligence litigators.

- **Pregnancy and Birth Injury Cases.** [Read more](#)
- **Cauda Equina Syndrome (CES) cases.** [Read more](#)
- **Delayed diagnosis / misdiagnosis cases.** [Read more](#)
- **Surgical Negligence cases.** [Read more](#)
- **Prescription and medication.** [Read more](#)
- **Optician's Negligence claims.** [Read more](#)
- **Dental negligence cases.** [Read more](#)
- **Cosmetic Surgery Claims.** [Read more](#)
- **Nursing Care and Care Home Claims.** [Read more](#)

Contacts:

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 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 from their Temple ATE and funding products.

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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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Howzat! The Hundred is a hit

Temple was recently in attendance at The Hundred cricket match between Manchester Originals and London Spirit as well as the match between London Spirit and the Northern Superchargers. We were delighted to be able to take guests to the event to experience this new format, the atmosphere was electric, and a good time had by all. Cricket's newest venture was extremely enjoyable to watch, and we are looking forward to attending matches again next year.

