CLINICAL THINKING

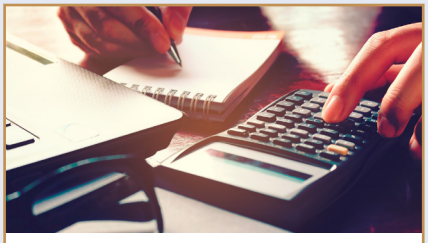
Solicitor updates and insights on clinical negligence and personal injury topics

temple legal protection

Welcome to the latest edition of our 'Clinical Thinking'. In this edition we have further coverage of fixed costs developments, a straightforward take on the five main disbursement funding options available, a case study about an ongoing pre-LASPO asbestos-related claim and lots more. 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 10.

FIXED COSTS - A FIX THAT DOESN'T FIX WHAT NEEDS FIXING

We say the root of the problem is the lack of patient safety across the whole of the NHS - Page 2



WHICH DISBURSEMENT FUNDING SOLUTION SUITS YOUR FIRM?

A straightforward take on the five main disbursement funding options available - Page 3

QEF queen elizabeth's foundation for disabled people

THE QUEEN ELIZABETH'S FOUNDATION FOR DISABLED PEOPLE

Temple has supported the QEF charity for several years, here they share their story - Page 4

ATE INSURANCE IN ACTION: A PRE-LASPO ASBESTOS-RELATED CLAIM

Disputed additional liabilities, that both the success fee and ATE were disproportionate - Page 5

P36 ACCEPTANCES AND THE ATE INSURANCE PREMIUM

In a "costs" argument, the Court continues to acknowledge the importance of ATE for clinical negligence claims - Page 8

OUT AND ABOUT - SEEING EYE-TO-EYE?

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CLINICAL THINKING

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Will they never learn? Fixed costs - a fix that doesn't fix what needs fixing

By Matthew Best, Senior Underwriting Manager

I understand that there is an argument for reform. However, I believe it is not the system and its associated costs that needs to change; the root of the problem is the lack of patient safety learning (learning from mistakes) across the whole of the NHS. It is plain to see that if this improved, the number of clinical negligence cases brought forward will inevitably drop.

Currently, the legal costs for claimants (injured patients) will always be higher than those of the defendant because the claimant has to discharge the burden of proof. However, the figures presented by NHS Resolution (NHSR) are skewed. This is not least because -

- The comparison does not include the cost of the work carried out by lawyers employed by individual NHS Trusts, or the cost of the work carried out by NHSR.
- Secondly, the claimants' costs figure includes Value Added Tax, whereas the figure for Defendants costs does not.
- In addition, the figure for claimant costs includes court fees. In many cases the fee for commencing court proceedings is a staggering £10,000. By contrast, the figures for defendants' costs do not include any court fees.

Delay and denial

The cost of clinical negligence claims is actually dropping. Indeed, they have reduced by over £100m from 2019/2020. As an insurer, we are able to see the reasons why costs increase. Ultimately this is because of certain behaviours by the NHSR; 'Delay, denial, delay' tactics are currently in operation. This reveals itself because 81% of claimant cases succeeded (in 2019/2020) where proceedings had been issued; a figure that is actually up from the previous years.

I am pleased to see that Maria Caulfield has admitted her mistake on this. She twice advised the Health and Social Care Select Committee that the current main driver of clinical negligence costs is rising legal costs.

Admitted? Yes. Corrected? No. Ms Caulfield is also wrong to put the emphasis upon increasing damages payments as the primary driver. A quick review of the last NHSR annual report shows damages payments actually went down overall, not up.

Here at Temple, we are fully on-board with keeping costs down. An example of our commitment to this is that we actively encourage mediation by building incentives into our insurance cover as standard. This has helped to build constructive case dialogue to keep the duration of cases down; and with that, costs - as long as there is engagement from the defendants.

Will Fixed Recoverable Costs solve the problem?

From a financial perspective it will push the problem elsewhere - more on that in a minute. But for claimants and their solicitors I believe that if the Fixed Recoverable Cost (FRC) proposals are implemented, then many specialist clinical negligence firms will be forced to exit this area of law. This will reduce access to justice - but increase the likelihood of events such as the recent Shrewsbury and Telford Hospital NHS Trust maternity scandal.

What will happen to after-the-event insurance (ATEI) premiums?

The consultation is silent on this. These proposals effectively undermine the operation of QOCS, which was introduced by the Government in the Legal Aid, Sentencing Punishment of Offenders Act 2012. Where is the logic in that? The proposals and the possible costs sanctions require claimants to maintain ATEI. And there has been no indication that any research has been carried out to ascertain whether ATEI providers will have to increase their premiums to reflect possible additional risk.

This article continues on our website.

Click here for lots more insight, including observations on correcting the source of the problem, non-fault systems, the need for prudent gatekeepers plus a look at the questions 'Where have we got to now?' and 'What next?'

What are we doing?

Temple is continuing to host discussions events with special guests/ speakers in which we can all have our say on developments. To register your interest or share your thoughts please email me at matthew.best@temple-legal.co.uk or call 01483 577877.

Which Disbursement Funding Solution Suits Your Firm?

A straightforward take on the five main disbursement funding options available in the marketplace

By Matthew Best - Senior Underwriting Manager

You may well have read a few months ago that two large litigation funders exited the market. This, understandably, may have resulted in unease if you are currently considering utilising litigation funding or disbursement funding. With that in mind, below is a straightforward take on the five main disbursement funding options available in the marketplace.

There are several options available, but some have more pitfalls than others. These I have sought to briefly explain below (including terminology such as 'tapered admin fees', 'CCA' or 'on-balance sheet lending') so that you are able to make a more informed decision.

From my perspective there are five choices currently in the market.

1. **On balance sheet lending** - this can be a burden, particularly when a successful case may take years to reach a conclusion. It is also worth pointing out this option slightly defeats the object of disbursement funding for your law firm.
2. **Using medical agencies** - these often only allow deferment at an additional cost for an agreed term. If the case has not been settled within the deferment period, you must still fund disbursements until the case's conclusion - a very costly exercise. In addition, medical agency fees are not recoverable as a disbursement in a fixed costs claim. Fixed costs are likely to be introduced on matters worth up to £25,000 – but in my view I doubt it will stop there.
3. **Consumer Credit Agreements (CCA's)** - full disclosure, this is the solution Temple Funding offers. CCA's are said to complicate discussions with clients. This honestly is a myth. We work with many leading UK law firms who find the procedure streamlined and straightforward; and we constantly review our processes to simplify it even further. The accrual of interest for a CCA arrangement may concern to some clients. However, it doesn't have to be, and I can quickly explain this to you.
4. **Increased ATE Premiums** - effectively, being offered disbursement funding in return for increased ATE premiums? You rarely get something for nothing, so it is important to question the provider who says their solution is free of interest. The reality is that ATE premiums are inflated in order to access this type of facility - often at a higher rate than current market interest rates. Inflated ATE premiums are simply 'disguising' interest and your clients could actually be worse off.
5. **Tapered Administration Fees** - other providers may charge these; they are payable by your law firm at the end of a case, but only upon a successful outcome. As with 1) above surely this also goes against the fundamental reason a law firm wants disbursement funding? And, like 4) above, this also is a way of 'disguising' interest.

With the last two options, do also consider what other services your firm is being tied into, such as pagination services or medical agencies, to name just two. These can bring additional reporting requirements which, ironically, can add complication and an extra admin burden.

Temple Legal Protection do not tie you in with any service providers. You are the experts in law, you know your experts. I am a firm believer that if Temple has offered you one of its facilities, trust has formed. Quite simply, we let you get on with running your cases.

Click here to find why, with Temple, disbursement funding is just so much easier. If you have any questions on this, or want to learn more about Temple disbursement funding, please do contact me on 01483 514804 or via email to matthew.best@temple-legal.co.uk.

QEF
queen elizabeth's foundation for disabled people

Queen Elizabeth's Foundation for Disabled People

Working with children and adults with physical and learning disabilities

Here at Temple we remain committed to our charitable endeavours and to support selected activities of our law firm customers. In this newsletter we asked The Queen Elizabeth's Foundation for Disabled People (whom we have supported for several years) to share their story.

The Queen Elizabeth's Foundation for Disabled People is a national disability charity based in Surrey. We have more than 85 years' experience of developing innovative services supporting almost 10,000 disabled people a year to increase their independence and achieve their goals in life.

We work with children and adults who have physical and learning disabilities or acquired brain injuries. Whether it's developing life skills to live as independently as possible, neuro rehabilitation to rebuild a life after a brain injury, or learning to drive a specially adapted car, we support each person to increase their independence.

We offer a wide range of expert services providing support and advice, specialist care, neuro rehabilitation and development of life skills that make a real difference to disabled people's lives.

Our Services:

- **QEF Care and Rehabilitation Centre:** The new centre provides expert, multidisciplinary neuro rehabilitation for people with acquired injury and stroke.
- **Independent Living Services:** based in Leatherhead, supporting adults with complex physical disabilities, and learning disabilities to live as independently as possible.
- **Mobility Services:** Provides a wide range of services focused on helping people of all ages become mobile and independent such as driving assessments for people with progressive disabilities or for people that have suffered an accident and need to learn to drive again.
- **MERU**: Improves the lives of disabled children by designing and manufacturing specialist assistive products, including MERU's Bugzi. Bugzi is a powered wheelchair for young children and thanks to fundraised income it can be loaned for free to disabled children.

There are many ways in which we can be supported:

- Run the TCS London Marathon 2022 (We still have places left for 2022, so please get in contact and spread the word)
- Do a Skydive with us
- Attend one of our amazing events
- Create a bespoke fundraising event
- Simply donate

If you want to get involved in any way, please email verity.millican@qef.org.uk or for our events email Events@qef.org.uk . Alternatively we can be called on 01372 841 151.

ATE insurance in action case study - a pre-LASPO asbestos-related claim

By David Stoker, Senior Underwriter

We have seen a lull in challenges to our ATE recoverable premiums, post LASPO, especially since the decision in West v Demouilpied, but now and again an interesting one occurs, including pre-LASPO challenges.

A recent challenge saw a law firm client with an asbestos-related illness who had signed up to a CFA/ATE pre April 2013. The final order for this case left the client with an opportunity to bring a further action if he went on to develop a worsening of his existing pleural effusions. He received appropriate damages for the illness suffered at the material time. Post April 2013 the client sadly developed asbestos-related lung cancer and passed away. The Estate brought the action on his behalf and the case went on to settle recently, although additional liabilities are currently disputed as below.

The Defendant's argument was that, in the points of dispute relating to additional liabilities, that both the success fee and ATE were disproportionate and denied the claimant was entitled to recover any additional liabilities from the paying parties.

The relevant law
CPR r44.17 states that QOCS does not apply where the Claimant has entered into a pre-commencement funding arrangement (I.e. prior to the commencement of the QOCS rules), whilst r48.2 states that -

"(1) A pre-commencement funding arrangement is -

a) in relation to proceedings other than insolvency-related proceedings, publication and privacy proceedings or a mesothelioma claim -

i) a funding arrangement as defined by rule 43.2(1)(k)(i) where -

(aa) the agreement was entered into before 1st April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or

(bb) the agreement was entered into before 1st April 2013 and advocacy or litigation services were provided to that person under the agreement in connection with that matter before 1st April 2013;

ii) a funding arrangement as defined by rule 43.2(1)(k)(ii) where the party seeking to recover the insurance premium took out the insurance policy in relation to the proceedings before 1st April 2013."

In this case these funding arrangements applied to the deceased and not to the Claimant - whether she is acting in her capacity as an Administratrix of his Estate, or otherwise.

The funding arrangement between the claimant and her solicitors must post date 1 April 2013. This is because by that point additional liabilities are no longer recoverable in disease claims, except those for a mesothelioma claim, which is not the subject of this case.

The claimant is required to prove an entitlement to the additional liabilities and to satisfy the court that the retainer did not terminate on the deceased's death.

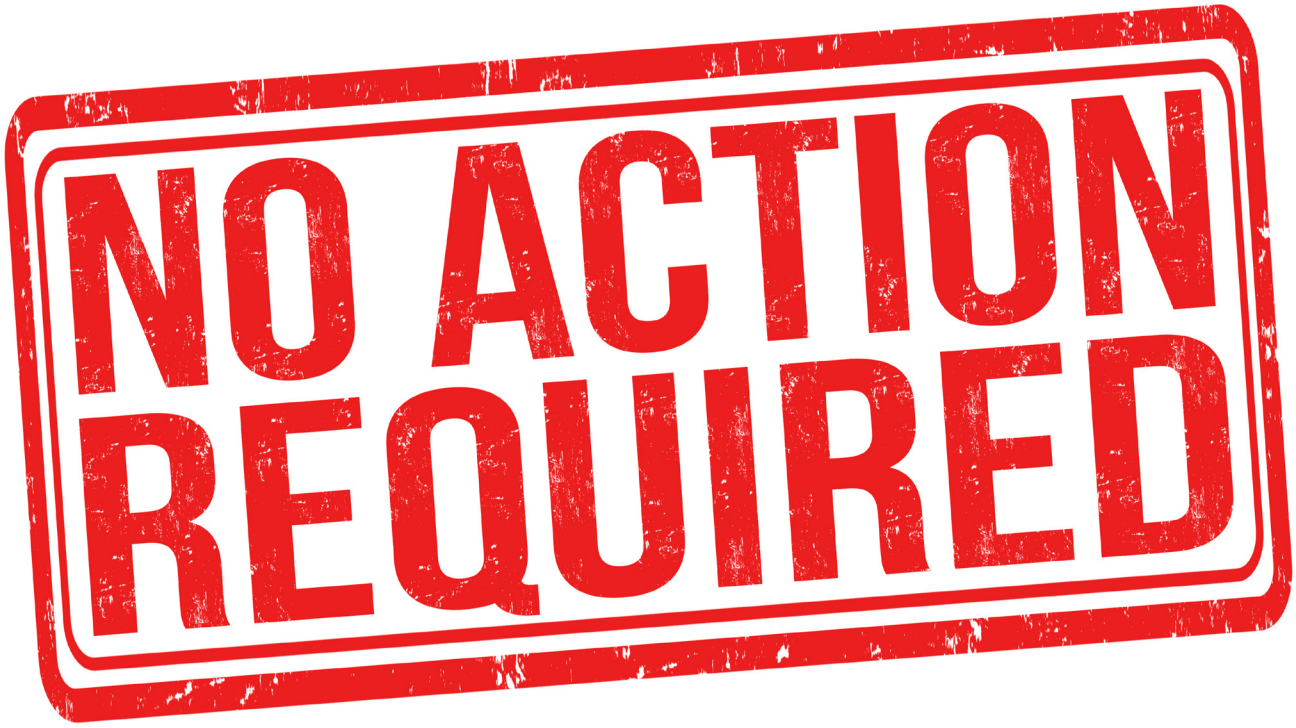
Reference is made to the reply to point 1 (see next paragraph) as the Claimant's solicitor asserted that QOCS does not apply in circumstances where the original Claimant dies and the estate or personal representative enters into another CFA post-LASPO 2012, from April 2013.

Point 1; The Defendants request disclosure of the Claimant's CFA. The original CFA between the Claimant's solicitors and the Deceased very likely contained a 'death clause' which automatically terminated the agreement upon his death. The Claimant is put to strict proof that a valid retainer was in force throughout the life of the claim and that there is an entitlement to costs.

The Claimant's solicitor referred to JUNE CATALANO v ESPLEY-TYAS DEVELOPMENT GROUP LTD [2017] EWCA Civ 1132 in which it was held that in any case in which litigation services had been provided under a conditional fee agreement made before 1 April 2013, success fees could continue to be recovered as costs and qualified one-way costs shifting would not apply - even if the CFA was terminated and a second CFA was made.

This article continues on our website.
Click here for lots more - the Claimant sought to enter into a new CFA, whether the employee/their Counsel were right to read the word "un-terminated" into CPR 48.2, the Temple perspective and what happens next?

If you would like Temple ATE insurance for personal injury cases, please call David Stoker on 01483 514808 or email david.stoker@temple-legal.co.uk to discuss your requirements.



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- Approval for non-medical disbursements over a certain value
- Authority to issue proceedings (or protective proceedings)
- Authority to reject a Part 36 offer
- Approval to continue when disbursements reach £10,000

Also, we do not tie you in with any other service provider.

Visit this page to find out more - https://bit.ly/ATEclinneg

For hassle free, transparent and trusted ATE insurance with disbursement funding, please contact Matthew Best on 01483 514804 or email matthew.best@temple-legal.co.uk

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WE HELP MORE

Really quite interesting? What's caught our eye recently

By Matthew Best - Senior Underwriting Manager

We all love a list, especially a useful list. Below are links to some topical article on clinical negligence and personal injury litigation that have caught my eye in the legal press over the last three months. For each one there is a pithy comment or two, starting with the hot topic.

Clinical Negligence

10th May - 'Fixed costs extension earmarked for April 2023'
I am not sure who the rules intended to benefit. Often the defendant will be insured and can afford to throw money at cases using the premium collected from, in many cases, the claimant. This is somewhat ironic I think given that if claimant lawyers are having their costs fixed, then surely defendant insurers should be limited in what they can spend on defending a case? The cynic in me says that defendant insurers use the savings from fixed recoverable costs to pay its legal teams more to defend the case; and when that doesn't work, use the savings to increase sponsorship of the Government and pay lobbyists to drive change another way…

The only factor that seems to matter on recovery is the level of damages. It seems to be forgotten that often a £20k claim can be infinitely more complicated than a £90k claim. Fixed recoverable costs are likely to be increased to £100k in these case types; but how about, if at the end of the protocol period where there is no admission of liability, it falls back to standard costs? Would this give some incentive for defendants to engage with the matter?

25th April - 'Minister apologises for misleading parliament on negligence costs'
Getting straight to the point here, it is abundantly clear to me that costs were decreasing, if not, at least plateauing. The figures produced were skewed.

14th April - 'No-fault clin neg compensation 'would harm patients''
The HSCC were debating this in January, but it seems we have moved on from that to 'Let's just cut costs'. Surely the former impacts the latter and is therefore far more important?

24th March - 'Death of NHS front line worker following exposure to Covid-19 at Newham University Hospital'
As we enter further into what is hopefully the end of the pandemic, it is quite clear the policies of individual Trusts are being reviewed. It is also clear from this article that all may not be as it seems.

22nd Feb - 'Clin neg costs reforms "could lead to exodus" of small law firms'
Yet another article supporting our thoughts exactly. If these Fixed Recoverable Cost proposals are implemented, many specialist clinical negligence firms will be forced to exit this area of law.

Personal Injury

12th April - ''Whiplash portal 'needs saving' with claim numbers still low'
System issues aside, it is obvious from the data that injured claimants want compensation for the injuries they have sustained, proper legal representation and access to a fit and proper system to resolve disputes.

18th March - 'Vos: claims costs could be obsolete within 20 years' low'
Much has been said in the not-so-distant past about humans being replaced by robots. The leader of the civil bench makes some concerning comments here.

24th February - 'Court of Appeal to start again in test case on deductions from PI damages'
With the much-anticipated hearing in CAM Legal v Belsner now scrapped; the Court of Appeal is to start again in this test case on deductions from PI damages.

P36 acceptances and the ATE premium; an argument over "costs"

By Peter Morgan, Senior Underwriter

Many arguments have been advanced since LASPO attacking the recoverability of After the Event ("ATE") insurance premiums, but the recent decision in Dance v East Kent University Hospitals NHS Foundation Trust & Ors [2022] EWHC B9 (Costs) has found that the ATE premium of £5,266.01 was payable in full, thus ensuring that Claimants continue to be provided with access to justice without having to overcome a further otiose technical challenge.

The challenge put forward by the paying party contained two submissions, the first of which followed the Court of Appeal's decision in Cartwright v Venduct Engineering Limited [2018] EWCA Civ 1654 where a Part 36 offer or a Tomlin Order did not amount to an order for costs. However, this was not the main area of attack.

The second, stronger submission, was based on the interpretation of costs and Regulation 3 of The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 ("the No 2 Regulations"). It was argued that the receiving party would only be able recover the ATE premium if they have an order to that effect in their favour. Without this order, there is no entitlement to the recoverable ATE premium.

Whilst Costs Master Leonard considered the arguments put forward by Mr Friston for the defendant, these were not accepted, as these would unnecessarily require all P36 offers to expressly include provision for the recoverable ATE premium within a costs order.

Master Leonard said "Whilst I admire the ingenuity of Mr Friston's submissions, I do not find them persuasive. My reasons are, in summary, first that I do not accept that the No 2 Regulations create an exception to the normal rule that "costs" as defined at CPR 44.1(1) are (subject to assessment) recoverable under any order for costs without specific provision for any particular element of those costs: and second, that recoverable ATE premiums do fall within the definition of "costs" at CPR 44.1(1)."

The Master concluded that the submissions made by the paying party were not sufficient to alter the current CPR rules in place regarding recoverability. Any issues arising in respect of premium challenges can be addressed at assessment - without an additional step to make further provision solely for the purposes of the ATE premium.

Leonard added "For that reason and for the other reasons I have given, the wording of the No 2 Regulations does not support the conclusion that they add to the CPR by introducing an additional requirement to the effect that a recoverable ATE premium must be expressly provided for in a costs order."

"It follows that a recoverable ATE premium will, subject to the normal principles on the assessment of costs, be recoverable under any order for costs (whether deemed or actual) without any need for the order, CPR Part 36, or any other part of the CPR to make further provision."

It was concluded that the case of McMenemy v Peterborough and Stamford Hospitals NHS Trust [2017] EWCA Civ 1941 has already determined the definition of "costs" under the CPR which must, in clinical negligence matters, extend to include recoverable ATE premiums.

The Temple Perspective

It is reassuring to see the Court continuing to acknowledge the importance of ATE insurance within the field of clinical negligence litigation and the vital role it plays in providing cover for the risks of incurring fees for the Claimant's own breach and causation expert evidence.

With the rising costs of obtaining appropriate expert evidence, now would be a good time to consider utilising Temple for your ATE insurance needs. If you would like further information please contact our Senior Underwriter, Peter Morgan on 01483 514 800 or at peter.morgan@temple-legal.co.uk.

The 2022 SCIL conference: a welcome and energetic return

By Lisa Fricker, Solicitor Services Manager

Temple Legal Protection were delighted to be exhibiting at the SCIL Conference which was held in Birmingham on 19th May 2022. This was the first SCIL event held since the pandemic and was a welcome return to see old friends as well as making new ones.

A refreshing opening talk by keynote speaker Dr Phil Hammond set the tone for the conference. His talk was met positively by delegates and exhibitors; ensuring that an energetic atmosphere carried on through the whole event.

Delegates were also engaged in conversation with Sir Bob Neill MP, Chair of the Justice Select Committee. Sir Bob did appear to understand the position of SCIL in terms of fixed recoverable costs and the threat of complete reform. He left the conference with lots to ponder; as did we all. You may well want to read Sir Bob's recent article in the Law Gazette with his 'doubts about fixed costs in clin neg claims'.

Thank you to everyone who came over to our stand for a catch up and for those that entered our prize draw to win 'The Hundred' cricket final tickets, along with a team shirt of their choice. The winner of the tickets was Chloe Partridge of Lime Solicitors, who we hope enjoys her day.

If you 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.

The APIL Advanced Brain and Spinal Cord Injury Conference 2022.

By Andy Lyalle, Senior Business Development Manager

Following our sponsorship and exhibition stand at the APIL Clinical Negligence conference in September 2021 we were pleased to return to The Celtic Manor Resort from 18th-20th May.

We spent three days catching up with existing clients and contacts and having the pleasure of meeting new delegates. We were also able to swap thoughts with our fellow exhibitors.

The conference saw an impressive selection of talks from a diverse panel of experts which included updates on liability, pre-existing conditions and future care. It was noticeable how much good feedback there was from the delegates about these sessions.

In addition, there were two packed evenings of entertainment for attendees to network and let their hair down, including new additions such as street food stands rather than a traditional dinner. There was also a silent disco, a DJ and a casino. Peter Morgan made his vouchers go much farther than Andy Lyalle.

There was a lot to take away from the conference for those looking to increase their knowledge in a complex area of law as well as important topical issues discussed. Exhibitors were also addressed directly in the exhibition hall on the need for APIL, its members and service providers such as Temple to engage with each other. This is with the aim of trying to create a unified, positive approach to proposals that may not be in the interests of an injured party.

We would like to thank those that attended our stand to have a chat and enter our competition for a pair of Google Ear Buds. We are pleased to announce the winner as Matthew Evans of CFG Law.

If you would like to find out more about ATE insurance and disbursement funding for your firm and clinical negligence clients please call Peter Morgan on 01483 514800 or email peter.morgan@temple-legal.co.uk.

CLINICAL THINKING

Solicitor updates and insights on clinical negligence and personal injury topics

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Your words, not ours...

We were flattered to receive these kind words from Janine Collier at Tees Law.

*"**We have worked with Temple for several years** because they meet each and every requirement we and our clients have.*

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***An added benefit is that Temple's disbursement funding** helps meet the significant third-party costs that are incurred whilst running a busy medical negligence practice.*
***Service levels are excellent**.*
It has been a partnership in every sense of the word and long may it continue."

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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This will definitely be of interest to you

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