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Clinical Negligence Survey

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Welcome to the latest edition of our 'Clinical Thinking'. In this issue fixed recoverable costs is the focus of attention - for understandable reasons. There is also guidance on disbursement funding (as all may not be as it seems), there are developments in mediation plus 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 12.

Fixed Cost

FIXED COSTS - A FIX THAT DOESN'T FIX WHAT NEEDS FIXING - PART 2

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FIXED COSTS: A FOG, A FUDGE, A MINEFIELD - OR ALL THREE?

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DISBURSEMENT FUNDING: CHOOSE CAREFULLY

John Durbin with insights on this from the 2022 APIL Clinical Negligence conference - [Page 9](#)



Fixed costs - a fix that doesn't fix what needs fixing - Part 2

By Matthew Best, Senior Underwriting Manager

With the GB pound sinking to an all-time low against the US dollar during the government original budget proposals - what else could our leaders do to make things worse? Well, for the legal sector, guess what...

Sadly, but perhaps unsurprisingly the hot topics from our last newsletter remain. It's not a pretty picture for claimants as the principles of (access to) justice are being removed, slowly but surely.

There is still no word from the Government as to if, why and how fixed recoverable costs (FRC) are going to happen. The October deadline for implementation has been scrapped. We are now looking, at the very earliest, April 2023 for its introduction.

In a recent survey we conducted amongst claimant and defendant representatives, over 40% of you said that FRC can work. Interestingly, 25% of those are from a claimant background. When asked for the reasons for their answer, it simply came down to cost. If the figures are set reasonably, there is no reason it cannot work.

When asked whether the participant's law firm would still run FRC cases, around 50% said no, with 35% of those already stopping marketing those cases. That percentage, although foreseeable, really does show that the door to justice is being forced shut. Where will clients with legitimate cases go to get answers?

One article published recently suggested that law firms might be forced to deduct 50% from damages to survive the fixed costs extension. Whether that was aimed at personal injury matters or clinical negligence matters is, to me, irrelevant. The reasoning must be the same. Someone has to cover the solicitors' shortfall in respect of unrecovered profit costs and the irrecoverable success fee - don't they?

Deducting even more from claimant damages will be even more of a minefield than it is currently. It could lead to further disputes and arguments of the kind that have repeatedly appeared in the courts during recent months. Clients can also try to claim back deductions - on the basis they did not consent to such a large amount being taken by their advisers (Belsner). All we can do is sit tight and wait for whatever 'shady' system is implemented. But please remember that, here at Temple, we remain fully committed to keeping costs down.

To share your thoughts on this topic do please email me at matthew.best@temple-legal.co.uk or call 01483 577877. You may also want to read the previous article on "[Fixed costs - a fix that doesn't fix what needs fixing](#)"

'Our Survey Said'



Mediation in clinical negligence cases

Only 25% of participants said that a defendant engages with mediation. Temple actively encourages mediation by building incentives into our ATE insurance cover as standard. Interestingly, 40% of you knew that Temple covers mediation costs. Our cover and incentives have helped to build constructive case dialogues to keep the duration of cases down; and with that, costs - as long as there is engagement from the defendants.

There is a simple observation to make here - more defendants need to engage more with mediation.

We are looking to host a mediation webinar/seminar in 2023 in conjunction with a guest speaker. To register your interest or share your thoughts please email me at matthew.best@temple-legal.co.uk or call 01483 577877.

Non-fault systems - change is needed, but not this

This non-thought through idea really should be a non-starter. In the survey, nearly 45% of you said that the current system needed an overhaul. This is quite a worrying statistic at first sight; however, you gave the same reasoning - in terms of engagement and abiding by the ethos of early admissions and rehab with claimant/defendant collaboration; or under compensation.

Not one of you said a non-fault system was a good idea. Who'd have thought it?



Fixed Costs: a fog, a fudge, a minefield - or all three?

By John Ivory, costs lawyer and mediator

The advent of fixed costs has created a lot of uncertainty amongst legal practitioners, particularly for clinical negligence solicitors who are fearful of the impact on their cases and the industry as a whole. Costs lawyer John Ivory attended the recent Costs Law Reports Conference. He was kind enough to provide this update on fixed costs, including in clinical negligence claims and his views on how the changes may affect access to justice.

The Ministry of Justice has confirmed that Fixed Recoverable Costs ("FRC") will be extended to apply in most civil cases with a value up to £100,000 with the new regime originally set for implementation in October 2022, but it's now expected that the changes will be imposed from April 2023.

Professor Dominic Regan confirmed at the recent Costs Law Conference on 29 September 2022 that the reforms will not be retrospective, so they will only apply where the cause of action occurs after the date of implementation of the new rules. This is some small comfort to claimant solicitors.

There are grave concerns that vulnerable parties and witnesses may be adversely affected by the new FRC provisions, with a proposal that any claim for additional costs beyond the FRC allowance would have to be dealt with by way of a separate application - subject to a minimum threshold of 20% of extra costs and with no maximum cap.

Such a procedure based on prevailing "exceptional circumstances" does not provide for clear certainty that practitioners will be sufficiently remunerated when helping society's most vulnerable individuals. This therefore may dissuade some law firms from acting in certain cases.

A separate FRC regime is also proposed for clinical negligence claims valued at up to £25,000, no doubt with pressure from NHS Resolution to obtain help managing their exposure to legal fees arising from adverse claims. This mandatory scheme also has a due start date of April 2023. A review is proposed to take place within five years to consider whether the upper limit should be extended to take into account various factors, including inflation. With the current economic forecasts in mind, surely it's only a question of 'When' the upper limit is increased rather than 'If' it will go up.

The proposed sanctions for parties who do not comply with the new low-value clinical negligence FRC scheme are quite severe. They are particularly so for defendants who fail to respond to a letter of claim within six months in the standard-track as the case would then proceed based on the track applicable at the upper limit. Any delay by a defendant responding to a letter of claim beyond eight weeks on the light-track would lead to the case being subject to increased fixed costs pursuant to the standard-track.

Parties will also face percentage changes to their costs allowances based on conduct arguments. The whole regime appears to create a lot of uncertainty, when surely the motive of a protocol based on FRC is to impose a fair and straightforward set of rules which all parties can operate within in order to resolve claims swiftly and at economic expense?

The FRC regime will apply to all claims against the NHS and other private healthcare providers (excluding claims relating to inquests), although complex and sensitive claims may be excluded. Many practitioners are fearful there will be a lot of satellite litigation relating to whether the FRC regime should actually apply in certain cases. There could also be a possible minefield of potential solicitor and client disputes arising from settlements reached where the solicitors retain a proportion of the client's damages.

The devil will be in the detail once the new rules are published, but at least for now there is much trepidation and uncertainty amongst lawyers and the general public alike."

If you would like to discuss any of the issues raised in this article, please contact John via email to john.ivory@keithbintley.co.uk or call 020 3940 4954.

Fixed Recoverable Costs: Practitioner's view - It's not just about the money



By Peter Morgan, Senior Underwriter

With the implementation of Fixed Costs set to take place in April 2023 and no details available to allow law firms to prepare, concerns from claimant solicitors are understandable. Here we take a closer look at potential problems that could arise with expert insight from a leading practitioner.

With the FRC regime being excluded for complex and sensitive claims, knowing what will be excluded is likely to cause a number of problems for practitioners, especially within the first few years of the rules coming into effect. Joanne Westbrook from Attwaters Jameson & Hill expressed the following in respect of the proposed changes.

“While I welcome measures to improve health care services, I am concerned that these measures will have the opposite effect. In over 30 years as a claimant solicitor, I have witnessed how legal costs have justifiably been incurred when fighting for patients faced with denials of liability from health care providers.

The monetary value of a claim is not necessarily an indicator of the seriousness or complexity of a case. A vast number of deserving patients have claims that are not worth over £25,000 but suffer terrible medical care. Elderly patients who have no lost income and no dependants may not be entitled to damages over £25,000 and yet the neglect they can experience is terrifying and will not be improved if the health care providers are not challenged and continue with their misconception that they have provided satisfactory care.

By restricting the costs that can be claimed, it quite simply prevents access to justice. Medical negligence lawyers want to do the best for their clients and get them the justice they deserve, but they operate within commercial restrictions and cannot incur costs that will never be recoverable. Consequently, many deserving claimants will find themselves without representation.”

The Temple perspective

With a separate FRC bracket being proposed for claims up to the value of £25,000 it is impossible to state when first taking on the case, how complex it will be and how much work is required in order to bring it to a successful conclusion.

Regardless of what is agreed in respect of the changes to FRC, Temple Legal Protection will continue to assist law firms and claimants in providing competitive ATE insurance and disbursement funding for clinical negligence.

If you would like further information on this topic or to share your views please contact Peter Morgan on **01483 514800** or email on peter.morgan@temple-legal.co.uk.

A ‘welcome back’ from APIL - face-to-face and virtually



By John Durbin, Senior Business Development Manager

On 20-22 September, Temple attended the APIL 2022 Clinical Negligence conference at the renowned Celtic Manor Resort. Across the 2 days there were rumoured to be 170 delegates who attended in person, with a further 60 attending virtually. In addition, there were 40 exhibitors, including Temple's main competitors, looking to engage with new and existing business partners alike.

From Temple's perspective, it was a chance to meet with new Senior Business Development Manager, John Durbin who, alongside Matthew Best, Lisa Fricker and Fraser Barnstaple, not only give away lots of freebies but, more importantly, engaged with delegates about ATE insurance and disbursement funding solutions as well as catching up with old friends in the clinical negligence world.

The view from delegates attended the seminars was that they preferred the approach of a having a single dedicated topic, neurology. This was supported by some interesting sessions put on by experts and specialists in this field.

We would like to thank everyone who visited our stand and took part in our small survey which helped us gather useful insights on subjects such as fixed recoverable costs and disbursement funding.

It was also very pleasing to see how many of you who completed the survey are aware that Temple provides cover for mediation fees. As a thank you for completing the survey we entered everyone into a prize draw to win a £50 Amazon voucher and a 2022 FIFA World Cup shirt of their choice. We're pleased to announce that Denise McKeown from Taylor Rose MW was selected at random to win the prize.

If you'd like to discuss our ATE insurance products or disbursement funding solutions in any more details, please call John Durbin on **07917 146290** or email john.durbin@temple-legal.co.uk



Clinical negligence case study - delayed diagnosis

Multi-million pound settlement for a case previously abandoned

By Paul Bonner, Senior Underwriter

This case relates to a delay in diagnosing and treating meningitis and sepsis that settled at a capital equivalent value of £16m.

We are pleased to report that one of our major partner law firms in London, Hodge Jones & Allen (HJA), has recently settled a multi-million pound case.

Case Details

This challenging case involved a young child and a delay in diagnosing and treating meningitis and sepsis. The negligence had already occurred some 7 years before we were asked to insure the matter. When presented to us in 2015, the case was in a distressed state, having been abandoned by other London solicitors after a negative expert's report and a cancelled Legal Aid Certificate.

However, HJA approached us with a positive input from a KC and we were encouraged to offer ATE cover. The critical issue in the case was the impact of delay of some 8 hours after attending at A&E and the commencement of strong antibiotic treatment.

Once the breach of duty was established, the case turned on the impact to the outcome caused by the delayed diagnosis and treatment - every hour of delay contributed to a very serious outcome, which involved a life-saving amputation of lower limbs and fingers.

Outcome/settlement

Judgment was entered in 2020 and the following two years have involved intensive use of various experts in assessing the level of damages, which has recently been agreed at the capital equivalent value of £16m; one of our largest settlements to date.

The Practitioner's view: comment from Emma Wray, HJA partner and instructed solicitor:

“Initially this seemed to be a case worthy of investigation, but on obtaining the records and noting the previous involvement of solicitors and the negative advice from Counsel we immediately advised Temple, having obtained a brief advice from leading Counsel. Temple, nonetheless, agreed to insure the claim, and we agreed to regularly update them with progress.

Cases involving a delay in diagnosis of infection such as this are notoriously difficult, but we started from the premise that the expert instructed by previous solicitors (who agreed there had been a missed opportunity to give antibiotics 3.5 hours earlier than they were administered) had strayed outside his expertise when commenting on causation. Evidence from a microbiology expert supported causation and was bolstered by further evidence from a pediatric intensive care expert.

At this stage, we were ready to serve draft Particulars of Claim to stand as a Letter of Claim, following which admissions were made. Proceedings were issued, judgment was entered and we then embarked on the lengthy and complex process of quantification.

This case stands as a good illustration of the need for individual risk assessment of cases to be shared between solicitor and insurer, and for insurers to trust the judgement of legal advisers. We are grateful to Temple for their support throughout.”

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 [delayed diagnosis / misdiagnosis cases](#)

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True delegated authority for clinical negligence ATE insurance

With Temple there is no need to get any of this -

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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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Disbursement funding update - five options, one real solution to the cost of costs?

By Matthew Best, Senior Underwriting Manager

We're all looking at ways to save money; law firms should be too. Interest rates are climbing and will continue to do so for some time yet. Therefore, it could well be timely to now consider what disbursement funding options are available for your clients to utilise.

1. **Would a medical agency relationship work best for you?**
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 still must fund the disbursements until conclusion of the case - a very costly exercise.

Do remember that medical agency fees are not recoverable as a disbursement in a fixed costs claim. Fixed costs are likely to be introduced but I doubt if the reforms will stop there - certainly something to think about. I have also been made aware that various agencies are stopping their deferred terms agreements; meaning payments will need to be made a lot sooner.

2. **Consumer Credit Agreements (CCAs)**
Could be the way forward? This is the solution Temple Funding offers. CCAs are said to add an additional layer of complication to the discussions with clients. This is a myth. We work with many leading UK law firms who find the process both streamlined and straightforward. This is because Temple Funding is constantly reviewing the processes involved in order to simplify it even further.

CCA's come with many benefits for a client. It allows them to access funds they may not have been able to access previously. They also allow the deferment of repayment over time - in this scenario, the end of the case, and only upon a successful outcome. What's more, interest rates are rising, but the rates for Temple disbursement funding are not.

3. **On balance sheet lending**
This is a bizarre concept when it comes to disbursement funding - if the whole point is to rid your balance sheet of any costs that can be passed on elsewhere. Surely if your ATE provider is offering your firm lending along these lines, then there is still a cost to pay? To me, this defeats the object. One provider offers this solution at an interest rate of 13%.

When it comes to adding layers of complication, I would class third party funder involvement as exactly that. You also have to ask yourself, is this model really sustainable?

4. **Increased ATE insurance premiums**
Here, effectively, you are being offered disbursement funding in return for increased ATE premiums. It is important to question if another provider says their solution is free of interest. More than likely, ATE premiums are inflated to access that particular facility, often at a higher rate than current interest rates in the market.

Inflated ATE premiums are simply 'disguising' interest and your client could actually be worse off. Additionally, with this type of arrangement, the amount of funds that are accessible are often not enough to fund the case to its conclusion.

5. **Tapered Administration Fees**
Other providers may charge tapered administration fees, payable by your law firm at the end of a case and only upon a successful outcome. Surely that also goes against the fundamental reason a law firm wants disbursement funding? This, to me is also 'disguising' interest. The point of disbursement funding is to get the balance of disbursements off your book of business; granted, this solution does that - but at whose cost?

With the last two options, please also consider what other services your law firm is being tied into. It could be pagination services or medical agencies. There may also be the imposition of additional reporting requirements. There may also be the imposition of additional reporting requirements, which ironically, adds an additional extra layer of complication/administration.

[Click here](#) to find why, with Temple, disbursement funding is just so much easier.



John Durbin Joins Temple Legal Protection as a Senior Business Development Manager

By Matthew Best, Senior Underwriting Manager

Many appointment announcements are full of 'corporate speak' so we've taken a different approach and gone 'straight to video' to introduce John Durbin, Temple's new Senior Business Development Manager for our clinical negligence and personal injury team. If first impressions count, he got extra style marks for wearing a dark blue suit with a gold tie - very Temple.

Having John on the front line is a key part of our plans - [click here](#) to watch the video and find out why.

John is highly experienced in the legal expenses insurance market and joining Temple at an important moment for us all, given the challenges facing the sector. In the video I put him in the spotlight so you can find out what made him want to join Temple and how he feels he can make a difference for us and our partner law firms.

I also find out John's views on some hot industry topics I've written quite a lot about - the government's proposed clinical negligence reforms, fixed costs for lower value claims etc. In addition John shared a few non work-related snippets including a seriously strenuous charitable activity, the football team he supports... and one he manages.

From my experience I've known John for many years and always admired his ability to engage with clients when it comes to ATE insurance and disbursement funding related products. If you'd like to talk to John about how Temple can help your law firm, please call him on 07917 146290 or email john.durbin@temple-legal.co.uk



Disbursement funding - choose carefully, details make the difference

John Durbin, our Senior Business Development Manager has just returned from the APIL Clinical Negligence conference.

It was no surprise to me to see four of Temple's main competitors also exhibiting across the two days. As always, conversations with both existing business partners and more interestingly, new potential partners were focused on disbursement funding and the nuances of the products available in the market.

What has become clear over the past couple of years is the need for a sustainable funding solution and the desire for it to be linked with an ATE insurance policy. We can all see the benefit of an ATE-backed disbursement funding solution; it keeps the transactions clear and the involvement of a third-party funder to a minimum. What though is less clear is the conditions certain ATE providers introduce in order for the funding to be utilised.

The market is wise enough to know that there is no such thing as 'free money'. However, this is often how some ATE providers package their ATE and funding solutions. In reality, the cost of 'funding' is often consolidated within an inflated insurance premium, which in turn is being passed to either the client, defendant or both.

This approach can be acceptable, providing both clients and defendants alike are aware of the increased premium and the benefit being derived from the enhanced policy. Furthermore, we are seeing more ATE providers insist on the use of selected medical agencies in conjunction to the drawdown of funds and in doing so, potentially restricting solicitor's freedom to run their case as they see fit.

If you'd like to know more about Temple ATE insurance with disbursement funding, please contact John on 07917 146290 or email john.durbin@temple-legal.co.uk

Caught on a camera - for a good reason



'What is Disbursement Funding?'

If you're new to disbursement funding, why not start at the beginning? In this video we do just that, in 30 seconds!



'Disbursement Funding FAQ's'

One video answering your questions on how easy it is to set up Temple disbursement funding, consumer credit agreements, drawdowns, charges (only two) and regulation (Temple is, not all funders are though). 4 minutes of time well spent.



Your words, not ours

More kind words from our law firm business partners.

From personal injury solicitors

- "What a star you are! I have had to settle this matter, on costs lawyer's advice, but thanks so much for your support." *Paul Fretwell - George Ide LLP*
- "I would like to take the opportunity on behalf of myself and my client to thank you/Temple for supporting this case. The level of award is likely to make a real difference to [the client's] quality of life given the extent of her ongoing difficulties referable to her spinal cord injury." *Ian Carrier - Royds Withy King*

[Click here](#) to read more about the service we offer personal injury law firms.

From clinical negligence solicitors

- "Temple's service levels are excellent and all the staff are very helpful and pleasant to deal with... On the rare occasions when we do need to call on a policy Temple are fair and pay out which gives us the peace of mind that our clients are well protected." *Michael Jefferies - Jefferies LLP*
- "With the delegated authority scheme from Temple, we are able to give our clients great service and an excellent insurance product, providing them with peace of mind and reassurance." *Linda Schermer - Partner, Oliver & Co*

[Click here](#) to read more about the service we offer clinical negligence law firms.

We could not have proceeded with the matter... without Temple's support

James King from GoodLaw Solicitors recently got in touch with us to say:

'I would just like to send a short note of thanks to Temple for supporting this claim throughout. It was a case in which prior authority from Temple was required on the grounds of prospects of success. It probably goes without saying that we could not have proceeded with the matter and obtained such a great result for the client without Temple's support and faith in the case.'

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

Which types of clinical negligence do Temple Legal Protection cover?



We can provide ATE cover for all types of clinical negligence claims, 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](#)



Really quite interesting? What's caught our eye on the internet and in the legal press recently

Clinical Negligence

- 18 Aug - [Fundamental dishonesty: claimant in clinical negligence claim found in contempt of court](#)
- 18 Aug - [Clinical negligence leader sees results from "fast and fair" approach](#)
- 5 Aug - [Costs in lower-value clin neg cases "far exceed damages"](#)
- 3 Aug - [QOCS, multi-party actions and Sanderson orders: the applicability of Cartwright in practice](#)

Personal Injury

- 29 Sept - [Lawyers' dismay as whiplash tariff review confirmed for 2024](#)
- 14 Sept - [Court denies claimant chance to recover deductions made by PI firm](#)
- 18 Aug - [Claimants call for review of stagnant fixed costs](#)

Scottish articles

- 22 Sept - [Mediation proposals can help reduce court backlogs](#)
- 15 Aug - [Scottish court: Injured woman cannot recover English solicitors' costs](#)

ADR Mediation/Arbitration

- 29 Sept - [The arguments for compulsory mediation](#)
- 29 July - [Mediation Could Become Compulsory](#)

CLINICAL THINKING

Solicitor updates and insights on clinical negligence and personal injury topics

temple
legal protection

New case-type specific web page



Military injury claims is the latest addition to our case-type specific web pages.

[Click here](#) to find out more.

This will definitely be of interest to you



Quickly and easily take control of your disbursements with our new Temple Funding Interest Rate Calculator.

[Click here](#) to try it out and give your clients a headstart with some of the most competitive rates in the market.

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.

01483 514804 | matthew.best@temple-legal.co.uk



John Durbin | Senior Business Development Manager

John joined Temple in June 2022 and brought with him over 19 years' experience in the legal expenses industry, with 17 of these specifically relating to ATE insurance. His primary focus is developing Temple's clinical negligence and personal injury ATE offerings and disbursement funding. John is well known in the industry for making business partners feel at ease when they meet.

07917146290 | john.durbin@temple-legal.co.uk



Lisa Fricker | Head of Solicitor Services & Quality Assurance

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.

01483 514872 | lisa.fricker@temple-legal.co.uk



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.

01483 514808 | david.stoker@temple-legal.co.uk



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.

01483 514800 | peter.morgan@temple-legal.co.uk



Fraser Barnstaple | Underwriter

Fraser joined Temple in May 2022 following the completion of his LLM Laws degree at University College London. The study of litigation funding and dispute resolution during his masters led to his working for Temple while now continuing his studies part-time. He strives to provide the best customer support with a speedy, efficient and accurate underwriting service.

01483 514414 | fraser.barnstaple@temple-legal.co.uk



Temple Legal Protection

One Bell Court, Leapale Lane, Guildford, Surrey GU1 4LY
Tel. 01483 577877 | www.temple-legal.co.uk

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