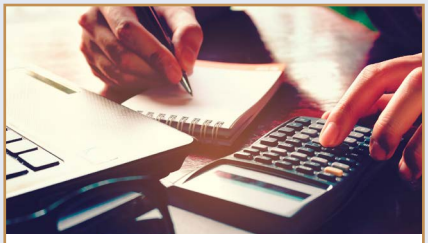
CLINICAL THINKING

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 issue we start with ‘the big one’ – an in-depth look at the CPR changes taking effect from next month. Elsewhere we’ve some highlights from a survey we conducted amongst our coverholders who shared their views on FRC; there’s also a look at 10 years of LASPO and what has happened from an ATE perspective. Just click on the image or gold colour heading below and you’ll go straight to that article. Enjoy reading our views; if you’d like to share yours, please get in touch with our team – contact details are on page 9.



QOC(s) ARE THEY THINKING?

6th April 2023 will see changes to CPR 44.14. We look at what might happen and what Temple is doing to help solicitors - Page 2

REALLY QUITE INTERESTING?

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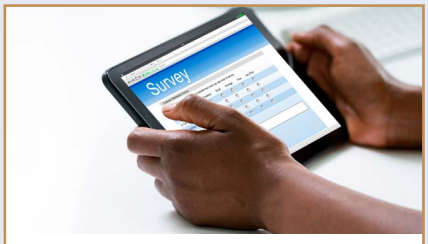
LOOKING BACKWARDS AND FORWARDS

News and views from Temple on The “Paul” case, a retirement, new beginnings and plenty more - Page 4



‘DID YOU TELL US WHAT YOU THINK?

A recent survey question on FRC attracted some interesting comments, and one good old-fashioned rant… - Page 6

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SEE YOU THERE? AVMA ANNUAL CONFERENCE 2023

Visit our stand to enter our prize draw for your chance to win a luxury M&S chocolate hamper - Page 9

QOC(s) are they thinking?

By Matthew Best, Director - ATE Partnerships, Head of Personal Injury & Clinical Negligence

As everybody may now know, 6th April 2023 will see significant changes to CPR 44.14. From this date defendants will also be able to enforce costs orders up to the aggregate amount in money terms of any settlement, including cases concluding by way of acceptance of Part 36 offers and Tomlin Orders.

The principal effect of these changes is that for personal injury proceedings issued after 6th April 2023 an adverse costs order made against a claimant will be enforceable against:

a. The award by way of judgment of damages and interest to the claimant,

Alternatively, against

b. An agreement to pay or settle damages, costs, and interest to the claimant,

And against,

c. The costs awarded to the claimant.

Effectively, the new rule will reverse the decisions in *Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654; [2018] 1 WLR 6137* (which precluded enforcement in cases where settlement had been agreed, rather than the court ordering an award of damages) and *Ho v Adelekun [2021] UKSC 43; [2021] 1 WLR 5132* (which precluded the offset of costs against costs).

I think it would be useful for us to look at a few scenarios to see what we are dealing with.

Damages and costs payable after acceptance of a Part 36 offer

Acceptance within "the relevant period":

If either a defendant accepts a claimant's Part 36 offer, or a claimant accepts a defendant's Part 36 offer within "the relevant period", then damages will be paid to the claimant and "the Claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror" (CPR 36.13(1)).

However, if, for whatever reason, there had been a prior costs order made against the claimant and in favour of the defendant (i.e. as part of a prior interlocutory application) then, by reason of the new wording of CPR 44.14(1) and the operation of CPR 44.14(3), the defendant is now able to enforce against the claimant's damages and/or costs to ensure recovery of the costs to which it is entitled.

Acceptance of an offer made less than 21 days before the start of trial

In these circumstances the liability for costs must be determined by the court unless the parties have agreed the costs. The court's discretion is not expressly fettered in any way. If the claimant agrees to or is ordered to pay any of the defendant's costs then the damages, costs, and interest to which the claimant is entitled are all available as a "pot" against which any costs order made in favour of the defendant may be enforced.

Damages and cost payable after a non-Part 36 settlement

Often, such as at a Joint Settlement Meeting (JSM), Round Table Meeting (RTM) or simply by exchange of correspondence or emails on a non-Part 36 basis, cases can be settled in terms that then lead either to a Tomlin Order or a Consent Order, or simply to a binding contract based on that correspondence or emails. Indeed, oral contracts count too, as do Calderbank offers.

All the above are different mechanisms for achieving "agreements to pay or settle a claim for damages, costs and interest" that now create the fruits of litigation by which a claimant maybe liable to meet a defendant's entitlement to be paid costs.

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But when will costs payable by a successful claimant be due?

An interlocutory application may result in an adverse costs order being made against a claimant. However, CPR 44.14(3) provides that "orders for costs against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed", thereby postponing the day upon which those costs must be paid.

If the damages and interest alone are insufficient to satisfy the defendant's entitlement to be paid costs, then regard must also be had for CPR 44.12. This states that where one party is both entitled to be paid costs and liable to pay costs, "the court may assess the costs which that party is liable to pay and either -

(a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance, or

(b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay".

In other words, assessment of the amount of costs due in each direction may have to be done first before a final order is made. But note, the wording of the rule is "may" not 'must'.

Finally, in some cases there may be significant sums due in each direction and it may not be possible to determine the true value of "the aggregate amount in money terms of any orders for, or agreements to pay or settle a claim for damages, costs and interest made in favour of the Claimant", until the claimant's costs have been assessed. Moreover, with interest on the claimant's costs accruing at the Judgments Act rate of 8% from the date upon which the entitlement to costs arose, ***the value of the interest may constitute a considerable element of the aggregate amount***.

It is clear that the rule changes will see greater risks for claimants themselves and their lawyers, and greater rewards for defendants and their legal representatives.

Are these changes really 'levelling the playing field' as 'intended'?

Personally, I don't think so; they appear to shift the power balance firmly in the favour of defendants. The real losers are the claimants, yet again. They will now likely have to shoulder (rightly or wrongly) the costs of the increased risk. There will be greater pressure on claimant lawyers. Which leads to the question around whether ATE insurance premiums are to increase. There is certainly an increased risk to insurers which cannot be denied. Another important point that becomes evident, is that the changes increase the need for ATE insurance.

The Temple Perspective - no increase in premium levels

Here at Temple Legal Protection, we strive to keep our premiums low. Claimants, their legal representatives and the insurers are on the same side. We will not be increasing our premiums; or changing our cover at this time. The data we hold does not cause immediate concern. Behaviours may change post 6th April 2023 and we will be keeping an eye on that; but, for now, we do not feel any drastic changes are needed.

Is your law firm looking to partner with a reliable and fair ATE insurer? One to protect your clients; and navigate through what is going to be a very testing time? If yes, then please do get in touch with me on 01483 514804 or via email to matthew.best@temple-legal.co.uk.

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

Costs/fixed costs

- 17 Jan - Get ready for a roller coaster ride in 2023 (Rachel Rothwell costs article)
- 10 Jan - Back to the future? Costs lawyers see Belsner solution in the past

Clinical Negligence

- 24 Jan - SCIL: Joint press release with AvMA & NHSR -- the impact of the Covid-19 Clinical Negligence Protocol
- 19 Jan - (video) Clinical Negligence Case Law Update
- 19 Dec - What is the Key to Effective Post-COVID Mediation?

Personal Injury

- 10 Feb - MPs launch inquiry into impact of whiplash reforms
- 14 Dec - Consultation Opened Into Pre-Action Protocol For Personal Injury Claims Amendments

Looking backwards and forwards - personal injury and clinical negligence developments

By David Pipkin, Non-Executive Director

Below we take a brief look back at 2022 to give you a sense of where we might be headed during the coming months. There's the "Paul" case, the retirement of Paul Bonner, new beginnings and plenty more.

In what was a very busy 2022, a considerable amount of time was spent visiting law firms and attending events throughout the year discussing topical issues impacting the future of clinical negligence litigation. On many occasions it became clear how disbursement funding was becoming ever more important for claimants in these tough economic times.

We gave our take on what we heard at various conferences and continued to comment on issues such as proposed regulatory and procedural changes. We also highlighted a number of significant case decisions, notably the secondary victims' case of "Paul" - one which Temple insured and has continued to insure for the forthcoming appeal hearing. There was also a multimillion-pound settlement for a case previously abandoned before being taken up by new solicitors and insured by Temple.

We published several newsletters during the year focusing on what we felt were important and practical issues that might affect the ATE insurance market. This included fixed costs for lower-value clinical negligence claims, other potential litigation reforms and the developing position for mediation, especially for clinical negligence cases.

Elsewhere, it was the end of an era when our Senior Underwriter Paul Bonner announced his retirement. Paul had been one of the pioneers of ATE insurance underwriting and with Temple for two decades! However, we were pleased to welcome several new members to our team including John Durbin as a senior Business Development Manager. John has a wealth of experience in the ATE market. You will hear more, much more from him and all the new members of the team over the coming months.

By the end of last year, and continuing into this year, it became clear that Temple is now working with more top quality clinical negligence lawyers than ever before. We have also increased our volumes of work with personal injury and industrial disease lawyers; overall maintaining a diverse book of business - something reflected in Temples' appetite for clinical negligence risks of all types.

So, what about the year ahead from Temple?

- **Following a thorough review of our cover and processes** and having listening to our many law firm partners our new Optimum clinical negligence ATE insurance is ready to go. In a rapidly evolving marketplace for claimant clinical negligence law firms we hope this product 'ticks all the boxes' for you.
- **We look forward to continuing to deliver excellent service** to our customer law firms, as well as developing new business partnerships - whilst ensuring we remain one of the leading ATE insurance providers offering disbursement funding for personal injury and clinical negligence cases.
- **Our online systems will continue to be developed,** so they continue to deliver even quicker and easier access for coverholders, with minimal reporting obligations.

For the bigger picture, we do not have a crystal ball to predict when and which legal reforms might change the landscape but by working collaboratively with our partners we aim to be ready for whatever challenges lie ahead.

Why not talk to Temple about your ATE insurance and disbursement funding requirements? Call our Senior Business Development Manager, John Durbin on 07917 146290 or email john.durbin@temple-legal.co.uk to arrange an in-person or virtual meeting.

Can you be certain you are getting the right ATE deal?

We now offer bespoke clinical negligence ATE insurance and disbursement funding cover.

- Full Part 36 cover
- Access to our Temple Online Policy System (TOPS)
- £300k Limit of Indemnity
- Bespoke scheme solutions

To see our comparison chart and find the cover that's right for you, please visit - www.temple-legal.co.uk/cover-options

For hassle-free, transparent and trusted ATE insurance with disbursement funding, please contact John Durbin on 07917 146290 or email john.durbin@temple-legal.co.uk

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Legal expenses insurance you can trust

Contact us now on
01483 577877

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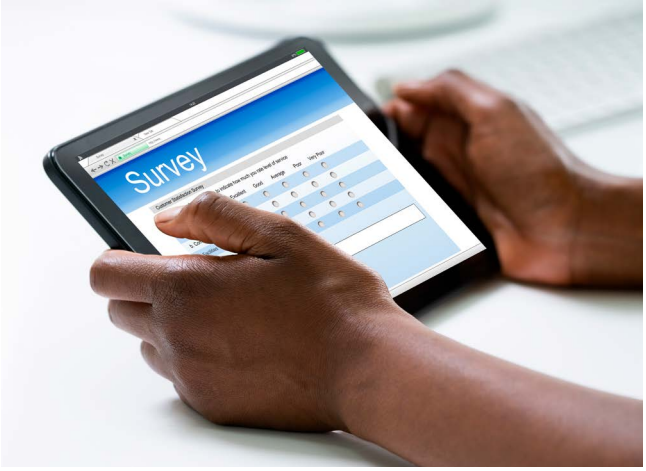

‘Did you tell us what you think?’

By John Durbin, Senior Business Development Manager

As 2022 drew to a close, we invited all of our personal injury and clinical negligence coverholders to give us feedback on how we had performed during the year, as well as their thoughts on the important developments the market could expect in 2023.

One of the questions that we asked was ‘With the recent news that fixed costs are going to be put back to October 2023 at the earliest, please provide us with a quick summary on your thoughts of these proposed changes.’

As predicted, the question divided opinion, as well as highlighted the uncertainty any potential fixed costs regime will cause. Below are redacted statements from some of our coverholders who kindly shared their thoughts:

- *“We think that there is a risk that this regime will make it more difficult to investigate claims adequately as complexity and value are not necessarily linked and are therefore concerned that this will impact on access to justice, however, until we see how things work in practice it is difficult to know for sure what issues will arise.”*
- *“It will be interesting to see the detail of the regime and whether certain claims, such as fatal claims, will have special provision. The introduction of fixed fees will impact the way we work in that more work will need to be delegated to junior staff and we are less likely to take on lower value claims.”*
- *“Difficult to see how clinical negligence cases can be run profitably on fixed costs and how Temple’s ATEI will work with cases which start as MT and fall into fixed costs?”*
- *“Fixed costs will in no way benefit the Claimant or the running of the claim and will result in more satellite litigation when costs are exceeded given the Defensive nature of insurers”*
- *“They could work if the level of fees were fair and reviewable…”*
- *“Slightly positive. Extended fixed fees might work better in some cases depending on level of fixed fees as they avoid risk cost and delay of costs budgeting & detailed assessment but economics only likely to work by taking an even greater % of client’s damages which we would not be happy about. Hopefully delaying introduction will mean they more carefully consider terms for fixed fees and ensure they are at a sensible and inflation-proofed level, which is index-linked. We shall see!”*
- *“In theory, FRC are almost a no-brainer, in that they would provide certainty and clarity for both sides of the litigation, as well as killing off all the unnecessary, frustrating and utterly wasteful (of time and costs) satellite litigation that surrounds costs generally, but, as always, with the present Government’s all-too-cosy relationship with the big Tory-donating insurers and their hatred of lawyers generally and continuing campaign to try to remove lawyers from any legal process they can think of, the level of fixed costs set, each time they extend the regime, is just so ridiculously, defendant-biased low as to render whole areas of work almost uneconomically viable - compare with the eye-watering levels/rates of company/commercial costs, which (surprise, surprise!) never seem to get touched - which leads to less provision of the full range of services for the public and more ‘snouts pushing in the same smaller and smaller troughs’, such as high-value clin neg, for example, where FRC are not in place (yet). Another very negative knock-on of this ‘snouts in troughs’ point, which affects insurers like Temple too, is that these are very highly skilled, specialist areas of law, requiring expert firms like ours, but punters can often end up with less skilled/specialist firms doing difficult, specialist work, with obvious negative results (including more claims on ATE policies).”*

Temple continues to keep a watching brief on the development of fixed costs. Internal discussions are already underway to ensure that, once we know the ‘devil in the detail’, we are in a position to create market-leading ATE products which continue to provide access to justice.

If you’d like to discuss the FRC regime in more detail or share your views, please email john.durbin@temple-legal.co.uk or call 01483 577877.

98%

of our customers are satisfied or extremely satisfied with our speed of response

10 Years of LASPO - what happened?

By John Durbin, Senior Business Development Manager

It seems amazing to think that we are 10 years on from The Jackson Reforms and LASPO - the Legal Aid, Sentencing and Punishment of Offenders Act, which came into force in April 2013. In advance of some significant amendments to the CPR, we take a look back at the key moments.

Back then, up to 2 months before LASPO was due to kick in, there was plenty of uncertainty; solicitors trying to get clients signed up to CFAs and secure ATE insurance before the deadline. This included cases where legal aid was still available but likely to run out past April 2013. This saw an influx of cases insured; in the first 3 months of 2013, Temple saw 19,640 policies incepted, which at the time was a 360% increase on the same period the previous year.

When LASPO started, many insurers (and law firms) felt 'cheap was best' when it came to ATE. The general consensus was, because clients would have to pay for their ATE premium, they would baulk at this concept and shop around for the best price. This initially created a 'race to the bottom' amongst insurers, which included a certain £1 ATE policy being introduced.

It was not long before this approach faltered; many insurers were unable to make a profit and had to cut their cloth accordingly. The result was an increase in premiums as well as some law firms deemed to be 'underperforming' and therefore, looking for a new insurer... In reality, many clients felt the pre-LASPO approach had been 'too good to be true' and there was actually little push back from clients when they were required to pay for their premium.

At Temple, we knew that sustainability of the premium and products would be key, and this was our preferred stance – not a 'land grab' approach taken by others. We applied a 'quality over quantity' criteria when selecting our business partners – this allowed us to price our premiums with foresight.

10 years on, we stand by our approach, which is supported by the 50+ coverholders who have continued to use Temple from April '13 to the present day. In addition, Temple was subsequently able to reduce certain premiums in June 2020. This not only ensured, but it proved we have the client's best interests in mind.

LASPO also brought about a new set of challenges from the defendants. With clinical negligence cases still being allowed a proportion of the premium to be recovered, it was not long before a precedent would need to be set. Temple was the first insurer to defend its recoverable premium at the Senior Courts Costs Office (SCCO) and achieved a positive recovery in the case of Nokes. Briefly, Master Leonard concluded in that matter that insurers must be able to offer a compliant product which is realistic and competitive. He advised that on the evidence, Temple had come up with a compliant, competitive product which the claimant has accepted.

This case, alongside judgment in the more recent West & Demouilpied Vs Stockport NHS Foundation Trust (2019), have supported ATE insurers in the way recoverable premiums are calculated and made the overall costs recovery process easier.

As we approached 2017, a large proportion of pre-LASPO cases (where 100% success fees were allowed) had settled and, with post-LASPO CFA's now allowing a maximum 25% success fee, law firms profit margins were being squeezed and they began to seek solutions to offset client disbursements. Given that ATE insurance covers client disbursements, joining the two together looked like the obvious way forward.

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This prompted an evolution of ATE products where a disbursement funding solution was included, either direct from the insurer or a third-party funder. We suddenly began to see a switch away from the cheapest premiums being the primary focus of the ATE product; but also the simplicity (and price) of any disbursement funding solution offered.

Temple had recognised this need in 2016 and are proud to say we were the first ATE insurer to offer a disbursement funding solution to the market. As the market evolved, so have our products; in doing so, we have created a market-leading offering which can be tailored to individual law firms.

So what next?

Almost ironically, 10 years on and April 2023 should see substantial change and a contradiction to The Jackson Reforms and LASPO. This will see Qualified One-Way Costs Shifting, one of the major changes introduced in April '13, likely to receive a revamp thanks to amendments to the CPR.

This, together with the much-discussed Fixed Recoverable Costs (FRC) - now predicted to come into force in October 2023 - will once again cause uncertainty in the market and force ATE insurers to review and potentially have to develop new products.

However, and to end on a positive note, Temple has reviewed its current products in line with the CPR changes and can confirm there is no reason for us to amend our policies. We can also confirm that work is going on behind the scenes looking at the impact FRC will have and what possible new products we can create.

In summary, whilst an insurable risk remains, Temple will continue to lead the way in the ATE market.

We want to hear from you. The future for claimant clinical negligence holds challenges such as fixed costs and challenges to Qualified One Way Costs Shifting. To share your thoughts please email matthew.best@temple-legal.co.uk or call 01483 577877.

Charities update 2023

She's Shining Fundraising Lunch hosted by the Child Brain Injury Trust

By Lisa Fricker, Solicitor Services Manager

Temple remains committed to our charitable endeavours. Our aim throughout the year is to organise fundraising events with each charity, as well as participating in events organised directly by the charities to raise much needed funds for exceptionally good causes.

This month we have an update from one of the charities we support - the Child Brain Injury Trust (CBIT). Danielle Gibson, Head of Fundraising and Marketing from CBIT sent these kind words -

"Thank you so much for braving some adverse weather conditions to join us in Greater Manchester on Friday. Your support means a great deal to the charity, and we were so delighted to welcome you all to the spectacular Halle St Peter's in Manchester as we shared the stories of some truly inspirational women.

We've totalled all the fundraising you've helped us with for this event. Whether you have sponsored, purchased tickets or participated in our 'heads and tails' or Hermes purse draw on Friday whilst at the event, I am delighted to announce that, thanks to you, we were able to raise an amazing £19,865.

We're over the moon with this fundraising total - thank you so much for contributing to this amazing amount that helps us to support the families whom you heard from on Friday.

I'm also delighted to announce that we are making a donation to Dame Stephanie Shirley's charity, Autistica, and a local Manchester women's charity, out of the funds we have been able to raise. We are proud that we were able to deliver an event aligned with International Women's Day, and I am so happy to hear the wonderful feedback you've given us."

If you'd like to see photos of the afternoon, visit https://childbraininjurytrust.org.uk/shes-shining-fundraising-lunch-2023/. You can also find out more about CBIT at https://childbraininjurytrust.org.uk.

If you would like to know more on the charitable work Temple undertakes or get involved with fundraising for these great charities, then please don't hesitate to contact Lisa on 01483 514872 or via email to lisa.fricker@temple-legal.co.uk.

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See you there?

AvMA 2023 Annual Clinical Negligence Conference

On the 22nd March, John Durbin and Andy Lyalle will be heading to Bournemouth to attend the 33rd AvMA Annual Clinical Negligence Conference being held on 23-24 March.

As usual, Temple will be exhibiting at the conference and you will find both John and Andy on our stand ready and willing to discuss the current ATE market, as well as introduce you to our revamped product offering. Please ensure you visit our stand and do not forget to enter our prize draw for your chance to win a luxury M&S chocolate hamper, just in time for Easter!

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 | Director of ATE Partnerships

Matt joined Temple in July 2011 and was swiftly promoted to Senior Underwriting Manager, taking on overall responsibility for Temple's personal injury and clinical negligence underwriting department. Over the years Matt has become well known in the industry, cultivated fantastic relationships with our business partners and, in 2022, he joined Temple's board of directors as Director of ATE Partnerships.

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.

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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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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.

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Morag Lewis | Underwriter

Morag's experience allows her to undertake an important role in Temple's ATE insurance personal injury and clinical negligence teams. She has started studying for the CILEX qualification and will then move on to take her insurance exams to develop herself further into the company, in order to provide Temple's customers with the excellent service they expect.

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