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 a disappointing verdict from the Supreme Court on the Paul judgment and also provide further insights. There's an update on Fixed Recoverable Costs, the results of our 2024 coverholder survey plus a great testimonial from one of our longest-standing customers. 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.

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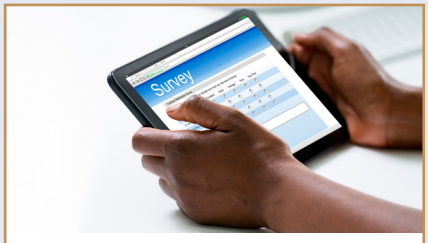

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Landmark Clinical Negligence Secondary Victim Appeal Ends in Disappointment for Claimants at the Supreme Court

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

In mid-January the Supreme Court handed down its long-awaited judgment on conjoined clinical negligence cases concerning psychiatric injuries suffered by secondary victims. Specifically, the case of Paul which concerned a failure to diagnose a life-threatening condition that resulted in Mr. Paul's death. The decision was unfavourable for the claimants in this matter, and thus for many other cases that were stayed pending this decision.

The appeal in each case related to a claim by an Appellant for psychiatric illness caused by seeing a traumatic event and death caused by a Respondent's negligence.

Following Paul, an application to dismiss the claim in Polmear was rejected but, again, permission was given to appeal. These cases were conjoined and heard before the Court of Appeal who found for the Appellants in Paul and Polmear, and for the Respondent in Purchase.

All three cases then came before the Supreme Court, also as a conjoined appeal. The primary issue to determine was simply whether an individual can, as a result of earlier clinical negligence, make a claim for psychiatric injury caused by witnessing the death or other horrifying event of a close relative.

In summary, with this judgment the Supreme Court has now determined that witnessing an "accident" (defined as "an unexpected and unintended event which caused injury (or a risk of injury) by violent external means to one or more primary victims") is a necessary condition for a secondary victim claim, but that witnessing a medical crisis (the suffering or death of a relative from illness) or its aftermath is not sufficient.

It has concluded that previously Novo was correctly decided whilst Walters was wrongly decided on the facts. Had the defendant raised the defence that the claimant had not witnessed an accident (or its aftermath), the claim should have failed.

At the time that the judgement was announced, I made the following observation, *"I agree with Phil Barnes and his legal team at Shoosmiths, who represented Mr Paul's family, that the Supreme Court's decision has effectively turned back the clock. The requirement for the secondary victim to witness an accident (an event external to the primary victim) will in practice mean that only in medical negligence cases will it be rare to make a secondary victim claim - such as negligent overdosing of a primary victim causing immediate adverse reaction and injury witnessed by the secondary victim. On a more positive note for claimants, in accident cases it will no longer be necessary to prove that the claimant's injury was caused by the mechanism of a "sudden shock to the nervous system" and was a sufficiently "horrifying event.""*

Phil Barnes himself offered the following view *"The Supreme Court has brought clarity to the application of the requirements in secondary victim claims arising from medical negligence cases by insisting that there must be an accident for there to be recovery for negligently caused psychiatric injury, but in so doing they have, in the words of Lord Burrows, taken an 'unwarranted backward step' and departed 'from the reasoning in almost all of the reported medical negligence cases in this area'… The court's approach is too restrictive and insensitive to those secondary victims who suffer psychiatric harm as a result of witnessing the death, injury or fear of injury to a loved one as a result of medical negligence."*

Continued on page 3 >>

>> Continued from page 2

On the future, I made the following observations, *"It is now time to deal with the consequences of this disappointing judgement. Temple will be on hand to deal with any claims made under the ATE policies. We are here to fight for justice and sometimes on that journey we hit bumps in the road; that is what an insurer is here for, to support our solicitor business partners and their clients - especially when things don't go as planned."*

Commenting on the current Supreme Court itself, Matthew further observed *"The Supreme Court currently has a very conservative outlook. This is apparent in many of its recent personal injury decisions - BXB, HXA, YXA and McCullough (going with the more doctor-friendly test). The consistent theme seems one of a retraction of duties and a consequent negative impact on the ability of claimants to pursue their case."*

He went on to say *"Our business partners, Shoosmiths and its legal team put forward such compelling arguments to the court. Their handling of this matter has been so impressive, and we are united in our view that this verdict is terribly unfortunate."*

Fixed recoverable costs conference 14th March 2024, Manchester

By John Durbin, Senior Business Development Manager

Temple were one of five sponsors at the Blume Fixed Recoverable Costs event held recently at the Hotel Brooklyn in Manchester.

This prestigious event had over 100 attendees who were there to listen to insights from four guest speakers - Professor Dominic Regan, Kevin Latham from Kings Chambers, Peter Rigby from Fletchers Solicitors and Sharon Allison, Chair of the Society of Clinical Injury Lawyers (SCIL).

The main fixed recoverable costs (FRC) takeaway was from Professor Dominic Regan, who confirmed that FRC will not start in April 2024. It is his view that unless the rules are drafted for debate by May 2024, it is unlikely to come in by October this year either. This opinion was subject to the possibility of a General Election later this year, an event that will see civil servants 'down tools' in preparation for that.

Kevin Latham spoke mainly on the impact of the intermediate track and how to progress cases quickly and efficiently. Peter Rigby focused his talk on the importance of using management information effectively and Sharon Allison highlighted the work SCIL have been doing to fight the FRC proposals.

Please call John Durbin on 07917 146290 or email john.durbin@temple-legal.co.uk to discuss your ATE insurance and disbursement funding requirements.

The Supreme Court's decision in Paul, Polmear, and Purchase - what are the implications?

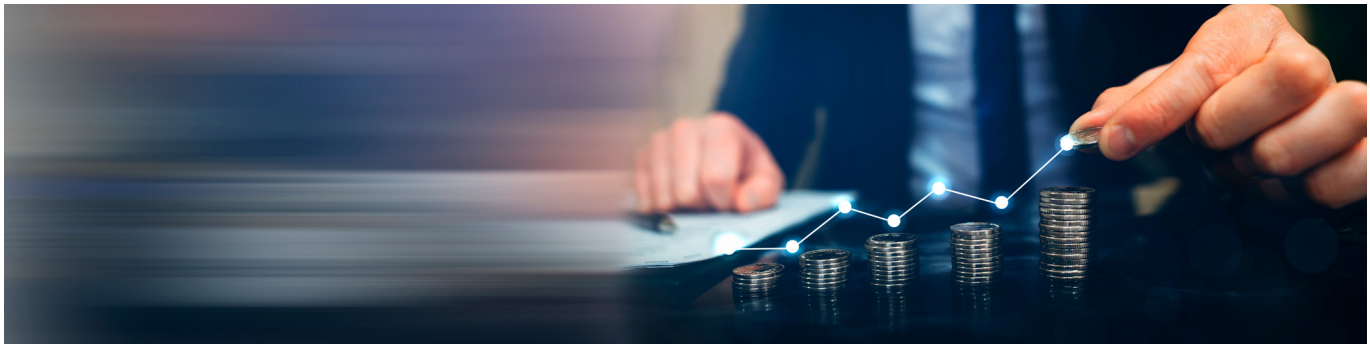
By Konrad Honour-Matulewicz, Technical Underwriting Manager

The Supreme Court concluded that *"…unless the exception defined by the Alcock line of authority is to become the general rule, a line must be drawn somewhere to keep the liability of negligent actors for such secondary harm within reasonable bounds."*

And: *"…a category of cases where secondary victims sustain illness as a result of witnessing a death or manifestation of injury which is not caused by an external, traumatic event in the nature of an accident but is the result of a pre-existing injury or disease is not considered as analogous"*

In simple terms, it means that the state of health of a patient's relatives is not relevant to treating doctors, even if they might potentially be psychologically affected by witnessing symptoms of a patient's condition which negligently had not been treated - with the only exception being cases meeting the criteria set out in Alcock. It is noted then that the Supreme Court has set out a policy of significantly restricting the possibility of secondary victims' claims being able to be pursued.

If you have any further questions or observations with regard to this decision, please feel free to email Konrad.honour@temple-legal.co.uk or call 01483 514815.



Fixed Recoverable Costs for lower value for clinical negligence claims – implementation delay update

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

As of 28/02/2024 there is still no update regarding the date of introduction of new fixed costs for clinical negligence claims with value up to £25,000.

Temple had already reported in December 2023 that the supplementary consultation on disbursements was taking place with a closing date of 22nd December 2023. As of today the results of the consultation have not been published and according to government website they are still being analysed.

Furthermore, the absence of the consultation results has prevented the Civil Procedure Rules Committee from discussing the implementation of the same and minutes from the December 2023 Committee meeting deferred to report on planned costs changes until February 2024. The minutes from the February 2024 meeting have not yet been published, but it seems unlikely that the costs extension for lower value clinical negligence claims could have been discussed in the absence of the consultation results, although there is no certainty in that regard.

Finally, it has been reported that there is now not enough time to implement changes with effect on 06/04/2024 as there is now not enough time for the Statutory Instrument to come into force as that would require a 40-day annulment period.

Therefore, the general consensus among practitioners seems to be that the new introduction date will likely be October 2024, however - in the absence of any further documents, minutes or reports - it is only a 'best possible' guess at the moment.

At the time of writing, the Civil Procedure Rules Committee published minutes of their 2nd February 2024 meeting and, as expected, there is only a very short comment from Senior Master Cook confirming that the progress was ongoing, and the issue has been provisionally programmed in for a further report during March 2024 meeting.

How we can help

At Temple, we are always happy to use our extensive experience to help our coverholders and partners with difficult costs queries, including those related to fixed costs. Furthermore, we will be hosting a webinar for our coverholders and business partners to give a final run-through of the impending regime changes.

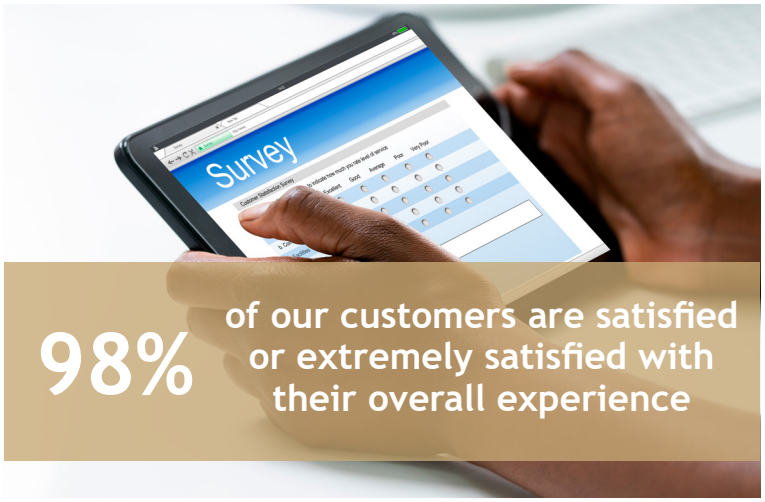
Please call Matthew Best on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations on this topic or to discuss your ATE insurance requirements.

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
- Wrongful birth cases. Read more



Did you tell us what you think?

By John Durbin, Senior Business Development Manager

At Temple we are constantly striving to improve on our market-leading products and services. With this in mind, at the beginning of 2024 we invited all of our personal injury and clinical negligence coverholders to take part in a short survey. The findings are below.

The intention of the survey was not only to find out what we do well but, more importantly, where we can improve. This is a key part of our ongoing commitment to finding out where we can make a real and genuine difference to our customers.

The overarching message is that 98% of our coverholders remain satisfied or extremely satisfied with their overall experience of using Temple. When we delved deeper into the results, we were delighted to find we had achieved a higher number of 'extremely satisfied' coverholders across ALL questions when compared with the same question set in 2023. For a business that prides itself on customer satisfaction, this is extremely pleasing.

We were also given areas where we can improve, and remedies are already being put in place to ensure this happens as soon as possible. The main observations made were refinements to our online policy system such as improved 'search' bars to assist with overall functionality.

When asked for any additional comments, the inevitable topic of Fixed Recoverable Costs (FRC) was raised. Temple continues to keep a watching brief on its much-delayed implementation, and we will work with all of our coverholders to ensure that our products align with any changes, but primarily continue to meet the needs of the new regime when it (eventually) comes in

Finally, the survey also asked questions around what communication channels you would like to see from Temple. Without an obvious outlier, we're pleased to say you will continue to see regular communications from Temple across all our social media channels, website updates and 'Clinical Thinking' articles - such as this!

Is there a topic you would like to hear more about from Temple? If yes, please send an email to john.durbin@temple-legal.co.uk or call 07917146290.

Temple Legal Protection – 25 Years at the Leading Edge of Legal Expenses Insurance

January 20th saw the 25th anniversary of Temple Legal Protection, one of the founders and leading lights in the legal expenses insurance sector. 2024 will see the company reflect on its involvement in many significant legal and insurance developments and hosting a celebratory year of events and activities.

Temple opened for business in 1999. In the early years it insured some momentous cases including 'Callery v Gray' in 2002; a landmark judgment that helped establish the ATE industry. Since then, Temple innovations have included delegated authority insurance schemes, 'staged' as well as 'deferred and contingent' premiums, 'LASPO friendly' ATE cover in 2013 and CCA backed disbursement funding in 2017.

For commercial disputes, media law has been a speciality – Temple supported the journalist who uncovered the MPs expenses scandal in 2009.
In 2011 they backed the first of many (and many still ongoing) phone hacking privacy proceedings as well as the Martin Lewis v Facebook case in 2019.
And not forgetting the first employment disputes insurance cover sold by employment lawyers.

Commenting on 25 years of insurance innovation, Temple MD Laurence Pipkin said "Since 1999 we have built our reputation for doing things a little differently from our competitors. This is because we value the long game in our business partnerships – not just a short-term win.

2024 will be a time to reflect on those values that were so important to our founder Chris Wait, who passed away late in 2022, as well as looking forward to the next 25 years with great enthusiasm."

A 90-second video can be seen here. This video provides a snapshot of some significant moments that will no doubt jog the memory of those solicitors who have been in the industry since that time.

What our clients say

"My firm and I have worked with Temple for 20 years now. At the time we began our journey with Temple, we were a new firm and Temple were also fairly new to the market. Over that 20 years we have built an excellent relationship of trust and support. It is thanks to Temple and their collaborative, trusting and open approach to the work we do - and their willingness to take calculated risks with us - that we have managed to achieve the very best for our clients in some very tricky and challenging cases. Temple have always been ahead of the curve, they are true leaders in their field and, in our view, simply the best."

Mehmooda Duke MBE - Moosa-Duke Solicitors

Watch our latest video

Click on the video above to discover the key benefits of Temple's clinical negligence ATE Insurance and the areas we cover.

Interest rate

Disbursement funding

without an accruing interest rate for clinical negligence cases

Clear and transparent disbursement funding at 0% with just a fixed facility fee only payable upon the successful conclusion of your client's legal action.

Affordable, easy to use and fully integrated with our clinical negligence cover.

Use the link below to find out more.
www.bit.ly/0percentinterest

To discuss your ATE and funding requirements please call John Durbin on 07917 146290 or email john.durbin@temple-legal.co.uk

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Your trusted insurance partner

Contact us now on
01483 577877

www.temple-legal.co.uk

Scan the below QR code to find out more about our disbursement funding

Montgomery – Watered Down?

For practitioners in Scotland, England and Wales

By David Stoker, Senior Underwriter

On 12 July 2023, the Supreme Court confirmed in the Scottish case below that the assessment of whether a possible treatment option is a reasonable one is a matter of clinical judgment. In considering Montgomery, there is a duty of care to inform patients only of all reasonable treatments. This should provide some clarity for practitioners in England and Wales as well.

The patient/Pursuer was Neil McCulloch, who died on 7 April 2012 shortly after admission to Forth Valley Royal Hospital (FVRH), having suffered a cardiac arrest at home. The cause of death was pericarditis and pericardial effusion (inflammation of the sac surrounding the heart and a build-up of fluid inside the sac).

He was treated as an inpatient on two separate occasions, with a working diagnosis of pericarditis. He was under the care of a medical team, with assistance from a cardiologist, Dr Labinjoh.

Dr Labinjoh did not discuss treatment with NSAIDs (non-steroidal anti-inflammatory drugs). NSAIDs are medicines such as Ibuprofen widely used to relieve pain, reduce inflammation and bring down a high temperature. This was a standard treatment for pericarditis, but Dr Labinjoh considered Mr McCulloch was not suffering from this condition before being discharged.

It was argued that this alternative treatment with NSAIDS should have been discussed with the patient, but it wasn't and that therefore the hospital was negligent.

In the lower courts the Pursuers argued that NSAIDs were a reasonable alternative treatment which ought to have been discussed with the patient, in line with the previous authoritative decision on consent, Montgomery v Lanarkshire Health Board [2015] UKSC 11.

The Defenders argued that the decision on what were reasonable alternative treatments and what should be discussed with the patient came down to the skill and judgment of the doctor, and that their duty of care should be governed by the "professional practice test" of negligence in Hunter v Hanley 1955 SC 200.

The decisions in the Outer and Inner House went in favour of the Defenders. The Pursuers appealed to the Supreme Court. For the family it was argued that the doctor is under a duty to take reasonable care to disclose all reasonable alternative treatments; this ought to consider a range of factors including but not limited to:

- Alternative treatments that a reasonable person in the patient's position would be likely to attach significance to in the context of making his or her decision.
- Alternative treatments that the particular patient would be likely to attach significance to in the context of making such decision.
- Alternative treatments that the doctor appreciates, or should appreciate, a responsible body of medical opinion would consider reasonable, even though the doctor reasonably elects to recommend a different course of action.

For the Health Board it was argued that the assessment of reasonable alternative treatments is an exercise of professional skill and judgement and is to be judged by the standard Hunter v Hanley test. Therefore, if a doctor is aware of a treatment but opts not to discuss it with the patient, so long as a body of reasonable medical professionals would also have decided not to discuss it, the doctor is under no duty to do so.

"It is important to stress that it is not being suggested that the doctor can simply inform the patient about the treatment option or options that the doctor himself or herself prefers. Rather the doctor's duty of care, in line with Montgomery, is to inform the patient of all reasonable treatment options applying the professional practice test."

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The Supreme Court held, therefore, that Dr Labinjoh, in exercising her professional expertise, skill and judgment, had decided that NSAIDs were not a reasonable treatment option - and she was supported in this opinion by a reasonable body of medical practitioners. She was not therefore, negligent in failing to discuss this treatment option with Mr McCulloch. If however she had considered them to be a reasonable treatment, but preferred another course of treatment, then, failing to discuss NSAIDs with him would have been negligent.

The Temple Perspective
This decision should bring some clarity to medical professionals and legal practitioners on the duty to advise on treatment options and the risks associated with them. This is not a dilution of Montgomery but an acknowledgement of the facts in that Dr Labinjoh's clinical advice was supported by a reasonable body of medical practitioners in not advising NSAIDS as an option in relation to Mr McCulloch's treatment.

Scottish clinical negligence lawyers who would like to know more about why they should choose Temple or discuss any aspect of ATE insurance or outlay funding, please email david.stoker@temple-legal.co.uk or call 01483 514808.

Really quite interesting? What's caught our eye

By Morag Lewis, Underwriter

1) Managing the risks around do not resuscitate orders

See - https://www.wtwco.com/en-gb/insights/2023/12/health-and-social-care-sector-managing-the-risks-around-do-not-resuscitate-orders

This article reports on the requirement for in-depth discussions with individuals and their care providers when considering putting a DNR in place. It also highlights the use of DNRs and how, with the appropriate use and recording of such, these can offer reassurance for people and their loved ones – before and during difficult times.

2) The expert witness market: changing times

See - https://kennedyslaw.com/en/thought-leadership/article/2023/the-expert-witness-market-changing-times

This is an interesting articular that discusses, among other issues, whether there will be an increased use of single joint experts for reasons of efficiency and capacity. It also raises the question of whether experts should be independently accredited.

Clinical negligence risk assessment guide for Scotland

Why not read our dedicated Scottish guide to risk assessment for clinical negligence cases? It could save you a great deal of time and costs. Below is an extract from the start of it and below a link to the full guide.

We're here to help, not to second-guess you. You may well be equally experienced, but having seen a great many clinical negligence cases, there are three key insights to begin with, namely –

- Many cases are discontinued far too late – this causes a higher claims exposure, benefiting nobody.
- We see many more cases stalling due to inadequate case timetable management. Too much time is spent identifying appropriate experts, followed by long delays in obtaining the experts reports – without ever having a 'Plan B' in place.
- Too much time and money is also spent trying to turn an unsupportive expert around. If the answer is not 'yes', then the case is probably a 'no go'.

Click here to read the full guide.

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2024 AvMA Annual Conference

21st-22nd March

On 20th March Senior Business Development Manager, John Durbin and Head of Solicitor Services and Quality Assurance, Lisa Fricker travelled up to Leeds for AVMA's 34th Annual Clinical Negligence Conference.

The conference was extremely well attended with over 500 attendees across the two days. The feedback from the sessions during the breaks was positive with many commenting on the interesting and in-depth seminars and speakers.

As always, the welcome drinks and mid conference dinner gave Temple many opportunities to catch up with existing business partners and forge new relationships.

Lyndsey Banthorpe from Penningtons Manches Cooper was the lucky winner of the luxury hamper at the Temple stand prize draw and the above picture shows Lyndsey receiving the hamper from John Durbin.

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.

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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.

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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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Konrad Honour-Matulewicz | Technical Underwriting Manager

Konrad has a degree in Law from the University of Gdansk. He is a qualified advocate and qualified solicitor for England and Wales who has worked for numerous law firms and insurers in the UK for over a decade. Konrad's insurance background and proven track record as a litigator allows him to provide Temple's customers with the highest level of service and support.

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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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