The RAG
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Further underwriter failures could impact claimants

AU Insurance Services, Elite Insurance Co, New Zealand's CBL Insurance Ltd and Alpha Insurance A/S all have something in common. They have recently ceased underwriting legal expenses business.

For a variety of reasons, many other underwriters have departed the LEI sector in recent years and it is an unfortunate truism that more will follow. Most recent is CBL Insurance which collapsed in February leading to the failure of Denmark's Alpha Insurance. Fortunately, the run-off from CBL will be orderly as the underwriter appears solvent and capable of meeting its obligations. There is no guarantee this will be the case in the future.

Very few law firms have in-depth knowledge of the insurance markets so it may be difficult to understand and calculate the risks involved. There are some basic questions that have to be answered, not just of the immediate provider but of their ultimate underwriter.

- **Who is the policy underwritten by?**
- **Where are they based?**
- **Who regulates them and what sort of scrutiny do they come under?**
- **Are they independently rated by a credible agency?**
- **How much experience do they have writing this class of business?**

Having received responses, how do you then assess the capabilities of the underwriters and their likely longevity? It is inevitably difficult to predict who might be next to leave the market but it is possible to minimise the risks of becoming associated with them. Checking the ratings agencies for that 'A' (Excellent) category is a sensible first step.

The frequency of failures in recent years has been accelerated by increased regulation, LASPOA and other legislative changes. LEI providers have also seen significant drops in revenue caused by contracting premiums post LASPOA.

Finally, it is worth noting that having feet in both ATE and BTE camps does not spread the risk: indeed, most underwriters are firmly entrenched in both sectors. Making the wrong choice of underwriter may not directly impact the claimant though it may well cause headaches and problems for the legal firm responsible for selecting the provider. Going back to the market to find a new provider, underwriter or product can be an unwelcome burden.

MD Tony Buss

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Working groups assess possible fixed costs regimes

There is clear polarisation of opinion over both the need for a fixed costs regime in clinical negligence cases and over their desirability. Responses to a Government consultation document showed that defendant insurers welcome reforms while claimants do not. The proposals are to implement fixed recoverable costs (FRC) for straightforward claims up to £25,000 in damages. After the consultation process closed, there was little evidence that the camps could be brought closer together, though there was at least agreement that a working group was needed to look at the whole issue. This has now started work with its report and recommendations scheduled for the end of September.

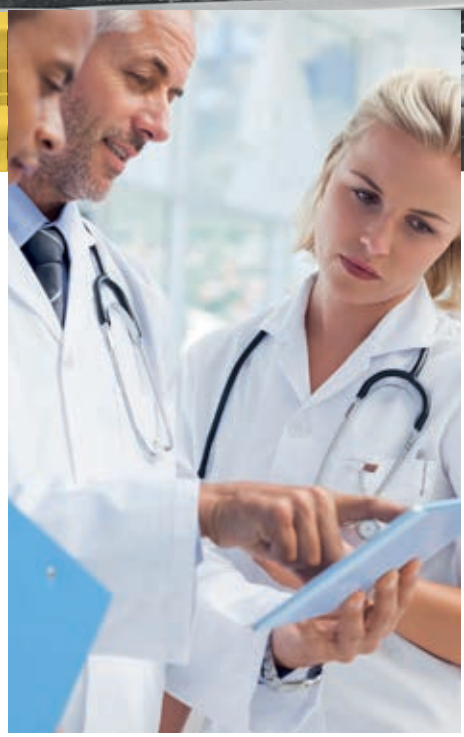
The big negatives are the likely impact on the seniority of claims handlers, already seen on the defendant insurers' side in response to rising costs, and the huge potential both for much more limited screening of claims prior to proceedings being issued and for more litigants in person clogging up the courts.

Despite the fact that many claimant solicitors cannot see any commonality between claims, insisting that each case must be viewed as unique, the momentum for extending FRC into the clinical negligence arena is being driven by a strong appetite for an improved process that makes the NHS in particular more accountable for the costs it incurs. Underlying this is the desirability of the healthcare professionals learning from their mistakes, improving their practices as a result and ultimately making fewer mistakes.

So, we now have the Civil Justice Council (CJC) working group chaired by Andrew Parker (DAC Beachcroft) with David Marshall (Law Society and Anthony Gold) as Vice Chair. The terms of reference boil down to the following areas:

- an improved process for claims under £25,000
- a structure for FRC to attach to the new process
- figures for FRC and for the cost of expert reports
- investigate how the structure would affect patient safety and how outcomes might improve healthcare standards
- consider how expert reports should be commissioned and funded, possibly using single joint experts in some claims.

Justice Minister Lord Keen has emphasised that the Government supports the principle of extending FRC wherever possible. He indicated as recently as the APIL annual conference in April that the Ministry of Justice would listen to good arguments, citing their successful lobby over travel



claims so that only holiday sickness claims would be subject to FRC. This was tempered with a warning that the MoJ would return to the issue 'if it proved necessary'. Other voices are looking to be heard. What we learned from the Society of Clinical Injury Lawyers (SCIL) conference this year was that its members are highly regarded by defendants but many CMCs are not. A form of accreditation of SCIL members might be desirable but difficult to put into practice.

However, within this scenario, it is clear which direction FRC is going.

'Clinical negligence cases are often undertaken on behalf of some of the most vulnerable people in society.'

Renewed clarity on clinical negligence premiums

Clients can be insured for any potential costs their clinical negligence claim may incur from the earliest moment they enter into a conditional fee arrangement. They can insure from the outset whatever the risks may be and irrespective of whether those costs, such as experts' reports, are incurred.

This was clear, firstly from the pre-LASPOA principle established in Callery v Gray some 15 years ago, then from the way the new legislation was framed, and now in the unanimous Appeal Court test cases involving two NHS Trusts, McMenemy and Reynolds. In both cases, a block-rated ARAG policy had been initiated but the claims settled before proceedings had been issued and without medical reports having been sought.

In his deliberations, Lord Justice Lewison decried the fact that in one of the cases the district judge held it was unreasonable to have insured against the cost of expert reports on the question of liability but not the cost of reports on causation. "The case law has also emphasised that costs judges do not have the expertise to second-guess the insurance market", he said, "still less to deconstruct a policy that is offered as a package into its constituent parts".

Giving his view that the new proportionality test does not require a case-by-case approach, Lewison added: "It is clear from the Government's formal response to Sir Rupert Jackson's recommendations that 'for reason of public policy' the Government decided to exclude ATE insurance premiums relating to the cost of expert reports in clinical negligence cases from the general abolition of their recovery.

"The concern was that claimants might not be able to afford the 'upfront' costs such as reports, and thus that access to justice might be unduly restricted".

This is crucial in clinical negligence cases as they can be expensive to resolve and are often undertaken on behalf of some of the most vulnerable people in society. Whilst seeking to reduce the financial burden to taxpayers, it was never the Government's intention to prevent a reasonable action in law from having access to a legal remedy.

Whilst McMenemy and Reynolds clear up any misunderstandings over recoverability, questions still remain over reasonableness, proportionality and quantum. These will be aired at further test cases in the Autumn.

Decisions, decisions, decisions...

Compensation culture myth exploded

After several years of plateauing at a little over 750,000 motor personal injury claims per year, 2017 saw a sharp fall to the lowest level ever recorded. The number of motor claims registered with the DWP's Compensation Recovery Unit fell to 650,019 in 2017/18 from 780,324 a year earlier. Whether the drop is attributed to better safety or more limited access to the legal system, it tends to explode the perpetuated myth of a 'compensation culture'.

Despite this, the drive to create a simpler process for pursuing injury claims continues. However, with current proposals destined to produce more litigants in person, a look at decisions in the professional negligence case of Barton v Wright Hassall LLP holds some important lessons.

Even experienced litigants in person can get it wrong

Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise themselves with the rules which apply to any step they are about to make.

In 2005, Mr Barton brought a professional negligence claim against legal firm Bowen Johnsons, which acted for him in 1999. The respondent firm Wright Hassall LLP initially acted for him in that negligence claim but withdrew after a dispute over fees. Mr Barton unsuccessfully resisted that application and was ordered to pay the costs, and his appeal against that costs order was also dismissed with further costs against him. In the meantime, acting in person, he settled with Bowen Johnsons.

In a further action against Wright Hassall, the now experienced litigant Mr Barton sought damages for not having achieved a higher settlement figure and, again, the costs. The key feature of the Supreme Court judgment this year was that Mr Barton was in the wrong by serving his Claim Form and Response Pack at the last minute by e-mail, at a time when e-mail service was not accepted and, therefore, too late to rectify his actions.

This case highlights that even relatively experienced or knowledgeable litigants in person can easily make a simple mistake which could lead to them running up thousands of pounds in legal fees. With proposed changes to legislation due to create an increasing number of litigants in person, many more people could find themselves in this very difficult position.

'The drive to create a simpler process for pursuing injury claims continues.'

Lawyers get paid

Once a solicitor firm has accepted a CFA and entered the RTA portal, it is entitled to its fixed fees even if the defendant insurer pays direct to the motorists they represent.

In six cases involving Gavin Edmondson Solicitors and Haven Insurance, enhanced payments and the promise of quicker settlement were used to entice claimants to cancel their CFAs. The Supreme Court held that insurers could not go direct to claimants to avoid legal costs once the protocol had been initiated. It noted that Haven had used this practice on 'many other' cases, not before the court. This is a good result for lawyers that have CFAs in place with clients as their fees can now be seen to be guaranteed, even if a defendant insurer steps in to make a direct offer.

Peers concerned over Civil Liabilities Bill

After an airing in the Chamber of the House of Lords, the Civil Liabilities Bill is set for its line-by-line examination at Committee Stage before going back to the Commons with amendments. Timescales are currently hazy though whiplash reforms are due for implementation from next April. Peers expressed concerns that falling numbers of claims would have an adverse effect on safety standards and that the voice of claimants is being ignored in favour of that of vested interests including defendant insurers.

The objectives stated by Government are well enough known, but the detail of the likely fixed legal and reporting costs, fixed tariffs on compensation based on duration of pain and suffering, plus the increase to the Small Claims Limit for motor injury claims are still unconfirmed.

Almost all whiplash claims are likely to fall within the expected caps and tariffs. And whilst the changes will also make a proper medical assessment mandatory – effectively outlawing the practice of defendant insurers buying-off smaller claims – the inevitable problems resulting from 'litigants in person' have yet to be seen or assessed. Compulsory medical reports and outlawing of pre-assessment offers are to be welcomed, but the other changes are expected to drastically reduce the opportunity for legitimate claimants without insurance to be helped back into recovery and compensated for their suffering.

The Bill has so far been less contentious on proposed technical changes to the discount rates applied to the Ogden Tables. Its progress in parliament depends mostly on the detail added by the Lord Chancellor. However, the sharp questioning in the Lords suggests that it may not have an untroubled ride, whatever the eventual outcome.

There remains scepticism and unease over the Government's underlying assumptions about spurious claims. And instead of the insurance industry taking action against those claimants it regards as having false or inflated claims, it is pressurising government to legislate for them. Sanctions may be needed to compel those same motor insurers to pass on actual savings by way of lower premiums even though many of them have pledged to do so.

Yet the effect of the Bill is not restricted to RTAs, and any injuries below the Small Claims threshold may encourage newly energised CMCs to take on cases for a fee. Although they may be better regulated as the FCA begins to oversee them, things could become messy.

Industrial disease development creates issues

Lisa Abrahams, ATE Account Manager, recently attended the 12KBW Annual Asbestos Seminar in London, aware of the continuing development in treatment, especially with immunotherapy for mesothelioma. Whilst this is potentially very positive for some claimants, it can also cause issues with settling cases with the new unknown life expectancy and cost of treatment, which isn't currently paid for by the NHS.

It is now more important than ever to have a dependable and supportive ATE insurance provider behind you. Support, flexibility and longevity are increasingly important requirements in a changing environment. We have extensive expertise in Industrial Disease and an innovative approach to underwriting individual cases.

ARAG is a large international insurer operating in 17 countries with a premium income of €1.6 billion. Our product is from an A+ rated insurer, Brit Syndicate at Lloyd's. Our core business is Legal Expenses insurance and we have very knowledgeable and specialised claims and underwriting teams to ensure the product we offer matches your customer's needs.

For more information please do get in touch with Lisa.

Contact details:

Lisa Abrahams, *ATE Account Manager*
Email: lisa.abrahams@arag.co.uk
Mail: 9 Whiteladies Road, Clifton, Bristol, BS8 1NN
Mobile: 07920 136 921

OUR ACHIEVEMENTS

'd-ARAG-on racers' paddle for charity!

On Sunday our team of 'd-ARAG-on racers' took part in the Bristol Dragon Boat Festival and paddled it out against other Bristol businesses to raise money for two fantastic charities - Caring in Bristol and FOCUS!

It was a brilliant day down at the ARAG gazebo on the harbourside with the sun shining, burgers (thanks to our BBQ chef Andy Talbot!) and beers flowing with friends and family cheering on the team. The racing was great fun and although we didn't win, the team put in a great effort and we will be back to try again next year! Our huge thanks go to all those who took part and supported us on the day, as well as helping us to reach our fundraising target.

https://uk.virginmoneygiving.com/Team/dARAGonracers

ARAG NEWS

We hope to see you at an event soon…

June is a busy month for our ATE team with two of our most important conferences, APIL Brain & Spinal Injury and the AvMA Clinical Negligence conference, which provide an invaluable opportunity for us to connect with new prospects and re-connect with our current partners.

For more than a decade, ARAG has led the way in delivering innovative after-the-event insurance solutions to law firms throughout the country. Many will talk of 'access to justice', but ARAG is still driven by its founding principle, more than 80 years old, that "...every person should be able to assert their legal rights, not just those who can afford it."

The design of our Recourse range of after-the-event solutions has always focused on simplicity. Products that a solicitor can easily explain and a client can readily understand; products free from complex underwriting mechanisms and onerous conditions; products, put simply, that work.

Our team always enjoy attending events like those put on by AvMA and APIL as they offer a perfect mix of business and networking, but they are also extremely busy. So, if you would like to discuss your ATE insurance requirements but didn't have the opportunity, then please speak to **Mike Knight**, ***UK Sales Manager***.

Contact details:
Mike Knight,
UK Sales Manager
Email:
mike.knight@arag.co.uk
Mail:
9 Whiteladies Road, Clifton, Bristol, BS8 1NN
Mobile:
07795 636391

Events AGENDA

21st-22nd June 2018
APIL Advanced Brain & Spinal Injury Conference, Hinckley

29th-30th June 2018
AvMA Clinical Negligence Conference, Brighton

4th October 2018
APIL Clinical Negligence Conference, Newport

11th October 2018
Yorkshire Legal Awards, Leeds

General enquiries:
generalenquiries@arag.co.uk

Press office:
pressoffice@arag.co.uk

@ARAG_UK

arag legal services uk

9am-5pm, Monday-Friday

After-the-Event (New business):	0117 917 1692
After-the-Event (Underwriting):	0117 917 1564
Before-the-Event (New business):	0117 917 1685
Before-the-Event (Underwriting):	0117 917 1693
General Enquiries:	0117 917 1680

ARAG plc
9 Whiteladies Road
Clifton
Bristol BS8 1NN