The RAG
News bulletin from ARAG UK
ISSUE 24 November 2019
ATE Test Case Special Edition

The slow hand of justice

The old maxim that 'the wheels of justice turn slowly' seems as true now, in the 21st century, as it ever was.

This summer's Court of Appeal decision, that finally brought some clarity to the use of block-rated ATE policies in clinical negligence claims, concerned two cases that both date back to 2016. However, the landmark judgment has actually settled some issues left unresolved by previous premium challenges dating almost as far back as the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act itself, in 2013.

We take a closer look at the implications of the latest judgment, over the page. The immediate impact on the many successful claims in which ATE premiums are still outstanding is welcome. However, it has come too late for at least one major ATE insurance provider, LAMP Insurance Company Limited, that went into administration earlier this year.

This brings to mind another legal maxim: Justice delayed is justice denied.

While the Court of Appeal delivered a thorough vindication of the role that ATE insurance plays in enabling victims of clinical negligence to access justice, the much needed market stability that this should bring may be short-lived.

It seems as though we have been waiting almost as long for the outcome of the consultation on fixed recoverable costs in clinical negligence cases, as we did for the premium challenges to be resolved. Lord Justice Jackson started working on his supplemental report almost 3 years ago, and still final proposals have yet to be announced, though they are rumoured to be just around the corner.

The wider turmoil in Westminster, and in the justice system in particular, cannot be helping. These days, Justice Ministers are rarely in office long enough to see the responses to consultations they have launched, let alone the implementation of any subsequent legislation.

The progress of the government's 'whiplash' reforms tells a similar story. There have been four Secretaries of State at the MoJ since that particular consultation was launched, also in 2016, and few would bet on the latest incumbent, Robert Buckland, still being in office when the planned implementation arrives, in April next year, no matter how well he may perform in the role.

All this is not to argue for greater haste in trying to manage such complex and important issues. What personal injury and clinical negligence litigation needs is fewer initiatives.

The ATE market has been undermined by the perpetual uncertainty caused by state intervention, whether in the form of government legislation or a quango's policy of challenging the legitimacy of claimants' means to access justice.

Besides, how can we ever hope to assess whether a reform has had the intended impact, when we are already implementing the next remedy before even observing the first in action.

In July, the Court of Appeal judges underlined the fact that access to justice must be the starting point for any debate about the validity of ATE premiums in clinical negligence cases. However, they also highlighted the equally important fact that the market for ATE insurance is fundamental to delivering that access.

Acknowledging its complexity and interdependence, the judges made it clear that arbitrary interventions in one type of case, without an expert understanding of how the whole ATE market works, could fatally undermine the system for all.

Let's hope the next initiative to emerge from government shows some understanding of this.

MD Tony Buss

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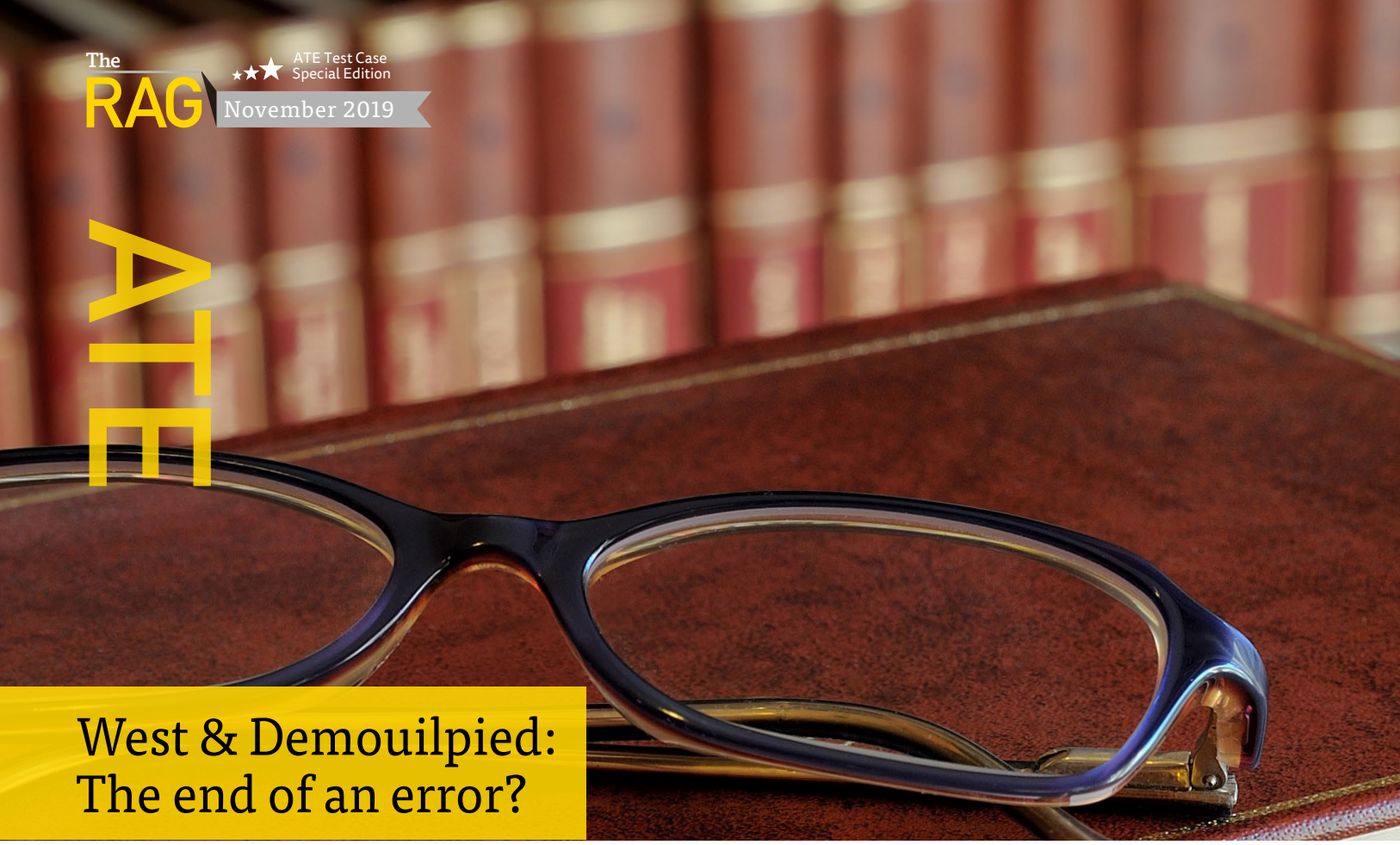


West & Demouilpied: The end of an error?

This summer's significant Court of Appeal judgment in the conjoined cases of *West v Stockport NHS Foundation Trust and Demouilpied v Stockport NHS Foundation Trust* marks the end of a long succession of challenges to after-the-event premiums in clinical negligence claims.

The judgment has resolved a number of key issues surrounding the recovery of block-rated ATE premiums in such cases. More than that, however, the decision marks a rare victory in the fight against diminishing access to justice.

The Master of the Rolls and Lord Justices Irwin and Coulson made it quite clear that preserving access to justice for the victims of medical malpractice sat at the heart of their deliberations, and went so far as to spell this out in the judgment:

"Access to justice must therefore be the starting point for any debate about the recoverability of ATE insurance premiums in any dispute about costs."

Most people simply could not afford to pursue a clinical negligence claim without the benefit of an ATE insurance policy, and the legislation to date clearly intended that their right to do so should be maintained.

The detail of the judgment focussed on the two key issues of the reasonableness and the proportionality of block-rated ATE premiums and provides considerable guidance on how any future challenges to such premiums should be assessed.

Following previous judgments, the Court of Appeal reiterated that judges do not have sufficient knowledge and understanding of the ATE insurance market to assess the reasonableness of a given premium without calling upon expert evidence.

On the proportionality of block-rated premiums, the court made it clear that they should be excluded from any wider assessment of the proportionality of costs because, like court fees, they are costs without which the litigation could not have been pursued.

The error has been one of understanding. ATE insurance is a complex and carefully considered mechanism in which the premiums are determined, not arbitrarily with consideration only for profit, but through expert calculation and assessment of the associated risks.

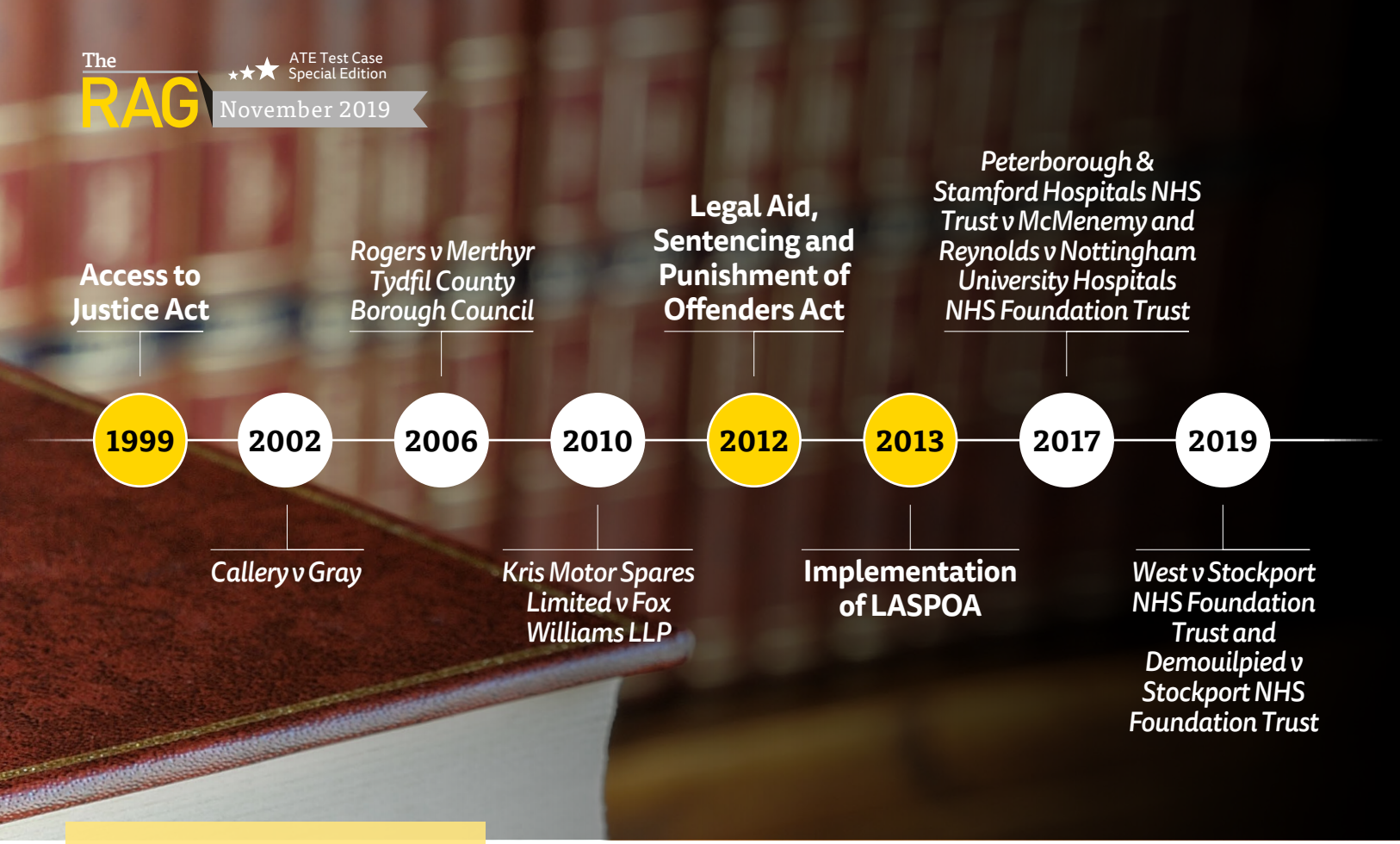
A block-rated premium for the ATE policy used in a given clinical negligence claim is set according to the risks of a whole basket of cases in which both the costs and the quantum are inevitably very diverse.

As a consequence, the argument that such premiums should be in any way proportional to the costs in a case is flawed.

Whether the Court of Appeal has now stemmed the flow of challenges to after-the-event premiums in numerous clinical negligence cases, remains to be seen. For now, the importance and validity of ATE insurance in providing access to justice for the victims of clinical negligence has been underscored.

Click below to watch our video:

Success in the Court of Appeal



Legislation and litigation - 20 years in the history of access to justice

While after-the-event insurance was already in its infancy by 1999, the past twenty years have seen it shaped by successive parliaments and courts. The West & Demouilpied judgment refers to many of the key laws and cases that have created the modern ATE market:

1999 Access to Justice Act - At the same time as capping the budget for legal aid in civil cases, the Act sanctioned the use of conditional fee agreements in most types of civil claim.

2002 Callery v Gray - Established that an ATE policy could be taken out at the outset of a case.

Cited in *Demouilpied*: "(judges) ...do not have the expertise to judge the reasonableness of a premium except in very broad-brush terms..."

2006 Rogers v Merthyr Tydfil County Borough Council - Endorsed the use of staged premiums and ruled out the simple comparison of premiums in the ATE market as a test of reasonableness.

Cited in *Demouilpied*: "...this very market is integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world."

2010 Kris Motor Spares Limited v Fox Williams LLP - Confirmed the recoverability of after-the-event premiums, even when the policy is taken out at a late stage in proceedings.

Cited in *Demouilpied*: "It is for the paying party to raise a substantive issue as to the reasonableness of the premium which will generally only be capable of being resolved by way of expert evidence."

2012 Legal Aid, Sentencing and Punishment of Offenders Act - Cut legal aid for most civil litigation and stopped the recoverability of ATE premiums and success fees, introducing Qualified One-way Costs Shifting (QOCS) though not for clinical negligence cases in respect of premiums relating to experts reports on liability and causation.

2017 Peterborough & Stamford Hospitals NHS Trust v McMenemy and Reynolds v Nottingham University Hospitals NHS Foundation Trust - Sanctioned recovery of ATE premiums in clinical negligence cases, even when case settles before expert reports are commissioned.

Cited in *Demouilpied*: "Questions of reasonableness are settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and not by reference to the facts in any specific case."

2019 West v Stockport NHS Foundation Trust and Demouilpied v Stockport NHS Foundation Trust - Determined rules around reasonableness and proportionality of block-rated ATE insurance premiums.

ATE

Profit in adversity

2018 was yet another profitable year for ARAG but, more than that, our success has vindicated both our strategy and also ARAG's long-term commitment to supporting access to justice.

Last year was the ninth in a row that ARAG has managed to turn a profit in the UK, in what have been consistently turbulent times in our markets. Legal expenses insurance providers, whether offering products Before or After-The-Event, have seen enough legislative and legal challenges to last a lifetime.

Even posting a modest profit for the year represented a remarkable result, given the significant sums that ARAG was owed by defendant insurers, pending the outcome of the West & Demouilpied appeals (see page 1). Our success in this latest landmark case means that many outstanding premiums will now be paid by the defendant, as the law intended.

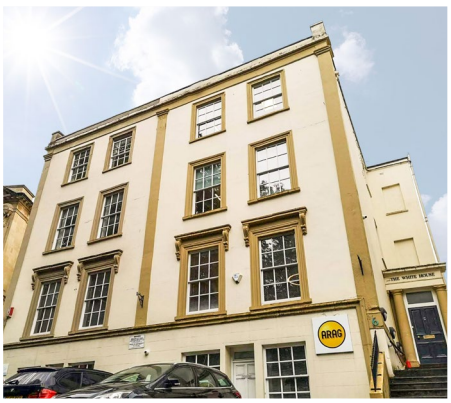
However, more important by far is the fact that ARAG's strategy and our block-rated ATE premiums have been considered by the Court of Appeal, and were found to be not just legal but reasonable and proportionate too. This provides considerable certainty for the future.

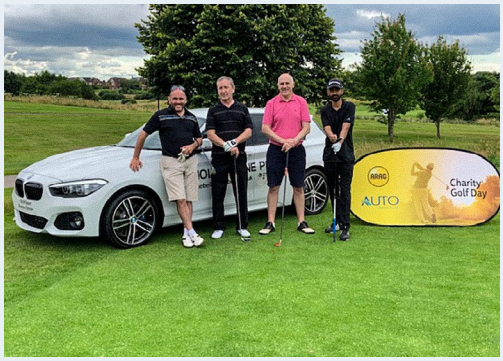
ARAG is fortunate to have both the financial strength and the diversity of income to stand behind our products, all the way to the Court of Appeal if necessary.

We have always sought measured and stable financial growth, and our expansion has been equally measured. However, last year we started to run out of space in our Bristol headquarters. Fortunately, we were in a position to purchase a neighbouring building, which we have refurbished, refitted and started to occupy.

There is a lot to be said for steady growth that delivers consistent returns and financial stability.

At ARAG, we're now ready to start the next decade of it.





Golf Day with Auto Claims Assist

Back in June we held a fantastic Golf Day with Auto Claims Assist at championship course Wychwood Park. Taking place on the day of The Open from Portrush our golfers certainly tried to show their skills throughout the day with competitions for the longest drive, nearest the pin and beat the Pro. Unfortunately, the brand-new BMW remains unclaimed, let's hope for a hole in one next year!

Thank you to all who attended, it was a great day and we are delighted to have raised over £1,000 for the Child Brain Injury Trust.

EMPLOYEE SPOTLIGHT

James Morgan, ATE Underwriting Manager

Q How did you begin your career in legal expenses insurance field?

A *I went to university in Bristol and had been looking for a way to return after working at AIG in Brighton. A friend suggested a great company which was looking for an assistant underwriter which happened to be ARAG.*

Q What are your main responsibilities at ARAG?

A *I am responsible for performance and profitability of our After the Event business. I ensure that the solicitors we work with share our same appetite for risk, so we can provide the best possible cover and price for their clients. I directly and indirectly manage ten underwriters and support staff so am responsible for their performance and development as well as our internal underwriting procedures.*

Q What do you find most challenging and the most rewarding?

A *ATE is a highly competitive market, keeping up with the pace of change and ensuring our offerings remain flexible to meet the needs of an evolving solicitor marketplace has been a challenge. It's rewarding getting to know the business of our solicitor partners and seeing a solution we have developed being well received by the firm.*

Q What is the professional accomplishment you are most proud of?

A *This is a tricky one, I am proud of my own professional development within ARAG, having joined as an assistant underwriter with no experience of LEI, to now be nearing completion of the ACII. I'm also proud of how our ATE business has developed, having managed the effects of LASPOA and other legislation. And to have a growing involvement in the future direction of the company.*

Q What is your favourite part about working at ARAG?

A *It has to be the people. I have had the pleasure of working with some great people who feel passionately about access to justice. ARAG is a very open place with the most senior of managers being accessible and happy to discuss any aspect of the business.*

Q If you could change one thing about the ATE insurance industry, what would it be?

A *ATE insurance is not very well known amongst the general public. This makes it hard for solicitors to explain to their clients how important it is for them to pursue their case. It would be great to raise the profile of ATE insurance and how it provides access to justice for many in light of continued cuts to legal aid.*

Q Finally, how do you switch off from the world of ATE insurance at the end of the day?

A *I love a meal out so relish any opportunity to visit old favourites in Bristol or many of the new establishments opening in a great city for foodies. I'm also a bit of an amateur barista and enjoy spending time trying to pull the perfect shot of espresso from my vintage Gaggia*

Get in touch: **James.Morgan@arag.co.uk**

Not just for big firms

Finding the right ATE policy can be tricky even for larger law firms that specialise in personal injury and clinical negligence work. For firms with smaller caseloads, the choice can be severely limited and often leaves solicitors dependent on less secure, offshore or unregulated products. With this in mind, ARAG has created a new solution specifically for smaller firms.

In 2018 ARAG collaborated with two specialist partners, ATE insurance and litigation funding broker Guardian Legal Services and litigation funding provider Affiniti Finance. Together we developed a comprehensive ATE legal expenses insurance and disbursement funding solution for smaller firms.

The scheme was specifically designed for those solicitor firms that only handle a modest volume of clinical negligence and other personal injury work each year. It offers a complete package, combining ATE cover (including cover for adverse costs and own disbursements) and competitive disbursement funding.

The solution enables all of a smaller firm's clients to benefit from a single, specialist scheme, thus avoiding the need to apply on a case-by-case basis.

The ATE policy includes Part 36 cover and the single-stage premiums are deferred and only payable on a successful conclusion of the case. The unique package is available to the clients of SRA regulated firms in England and Wales.

If you would like to know more about ARAG's ATE insurance and disbursement funding solution for smaller firms, then contact Mike Knight, UK Sales Manager on **07795 636 391** or email **mike.knight@arag.co.uk**

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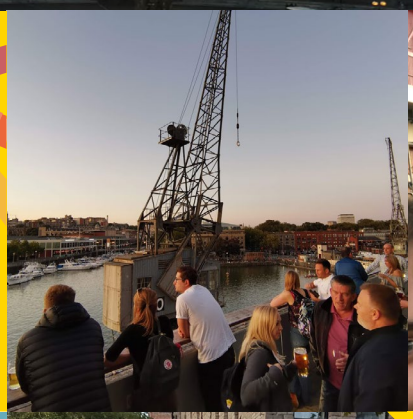
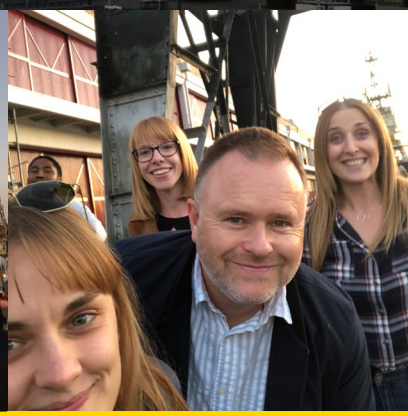
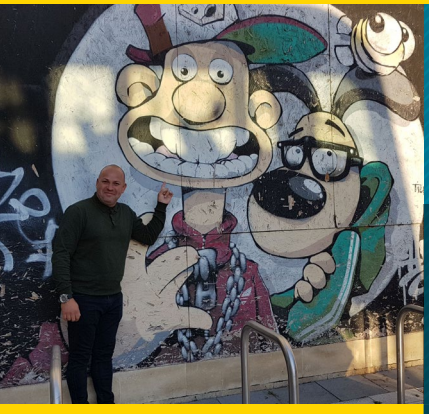
A sunny September staff social

For our third staff social of the year we managed to entice the sunshine out for a final taste of summer. We enjoyed a treasure hunt from our offices down to the Bristol Harbourside with mixed departmental teams tasked with taking pictures, answering questions and collecting items along the different routes around the streets of Bristol. The rewards for our treasure hunters were food, drinks and a fabulous view from the balcony of the M Shed.







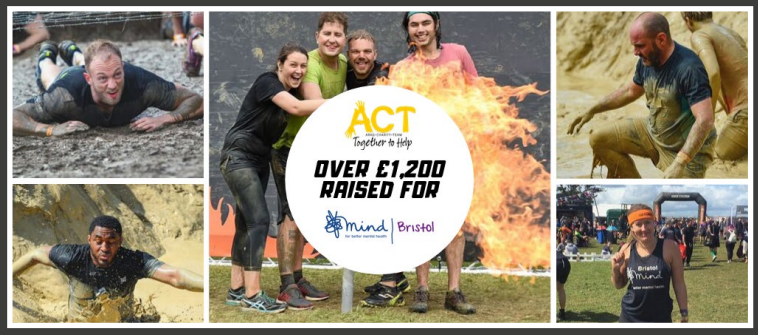
"Lovely views of Bristol harbour"

"Enjoyed socialising in the fresh air!"

"Fantastic view, location and the weather helped!"

"Good fun to work in teams of people we may not have worked with before"

"A very enjoyable chance to get to know more colleagues in a relaxed and fun environment"



Getting tough for charity

In August we fielded a team of 10 ARAG staff who gave their all and competed in the Classic Tough Mudder. The course comprised of 10 miles of running with 25 obstacles along the way, that featured electric shocks, ice cold water and lots and lots of mud. They were split across the Marketing, Sales and Underwriting teams, running to raise money for ARAG's charity of the year – Bristol Mind.

The least favourite obstacles amongst the team were the electrocution ones, with one team member having this to say, "Really didn't like the electric shock one! I thought it was just going to be a mild tingly shock so was really *shocked* that it was so strong – felt like I'd been tasered!"

The team manged to raise over £1,200 for Bristol Mind in one of our most successful charity campaigns of 2019. Several of the team even said they'd like to do it again next year if the option came up, though that was before the aches and pains started over the next few days.

ARAG

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