

Clinical negligence after Covid-19

Like almost everything else in our world the coronavirus pandemic has transformed the clinical negligence sector. While cases are still progressing, despite court closures and a hasty transition to remote hearings, work has understandably slowed and new instructions have inevitably declined.

The longer-term impacts are still uncertain. While many commentators have said that the prospect of large numbers of clinical negligence claims resulting directly from Covid-19 treatment is unlikely, the outlook for many other patients whose diagnosis or treatment for other conditions may have been missed or delayed is less clear.

In a guest article in this issue, Jerard Knott, a Senior Solicitor at ARAG-partner law firm Serious Law LLP, explores the wider personal injury claims landscape while taking a closer look at some specific aspects of the UK coronavirus outbreak that may result in valid negligence claims.

When any new claims do reach the courts, they will find a justice system operating in a radically different way to a few months ago. The adoption of remote hearings has been very rapid and, according to the Lord Chief Justice, largely successful.

Our own In-house Counsel, Hector Stamboulieh, adds his own thoughts to the words of Lord Burnett of Maldon, to consider whether this sudden shift will prove permanent once social distancing is no longer required.

While ARAG has always made a virtue of our ability to adapt swiftly to the frequent legislative shifts that the After-the-Event insurance market has had to endure in recent years, the current pandemic presents truly unprecedented challenges.

Whatever the future holds, ARAG's commitment to building solid partnerships with carefully vetted law firms will be crucial. ATE Senior Underwriter, Tom Hunt explains the careful process that his team goes through to ensure that such partnerships start on the best footing and are built to last.

In easier times, we sometimes said that the only certainty about the market for ATE insurance was "uncertainty". Now this is true for every aspect of our lives. It would be foolhardy to make any detailed predictions for the future of the clinical negligence sector after Covid-19, but this does not mean that we cannot start planning for all eventualities.

Whatever the future holds, it is sure to be challenging, but we are already preparing to meet those challenges head-on.



MD Tony Buss



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ATE



Tom Hunt
ATE Senior Underwriter

Creating a bespoke ATE scheme

One of the secrets to ARAG's success as an ATE provider is the care, attention and focus that we put into the underwriting of bespoke, flexible schemes for our solicitor partners. This contributes significantly to the creation of successful, long-lasting relationships, of which we are hugely proud.

Stage 1: Getting to know you

As underwriters, our first job when considering a new scheme is getting to know the firm in question. Obviously, we need to know what they want from an ATE solution, including cover requirements, limits of indemnity and the like, but we also have to understand what mechanisms they currently have in place and what plans they have for the future of the business.

At this stage, we also take a look at processes across the range of case types the firm works on, from initial risk assessments and methods for incurring disbursements to how cases are managed from acceptance to closure.

Stage 2: Gathering data

After the initial fact-find, we take a much deeper look at all the available data. Our most extensive source is obviously ARAG's

own, gathered over more than a decade of underwriting ATE cases. Equally valuable though, is data taken from the firm's own case management systems and from previous insurance providers they may have used.

If a funding arrangement is required, either through ARAG Advance or a third party, then a detailed understanding of how disbursements are incurred is vital. This is usually gathered through a simple extraction from the firm's disbursement ledger. We do the rest!

We often find that having a dedicated contact, typically in the firm's finance or IT team, is extremely helpful at this stage. Put simply, the more data we have to examine, the better and more tailored a proposal we can make.

Stage 3: Crunching the numbers

Once we have all the available data, it is time to make some sense of it. Careful analysis enables us to forecast an expected win ratio, claim frequencies and severities by each class of business. Where possible, we can often triangulate data to forecast a future development pattern of cases allowing for different scenarios, such as changes in process.

Ultimately, all the number crunching allows us to calculate a required average premium per class and consider any variations to take account of strong performance or any additional cover requirements. We can also forecast annual disbursement funding requirements, where a funding arrangement is required.

Stage 4: The proposal

The product of all this fact-finding and analysis is a detailed proposal that sets out the premium options offered by case type and our commitment to support the firm and their clients.

Typical options may be included such as different limits of indemnity, flexible damage bands and funding arrangements. The proposal will also include reporting requirements and the terms of business, which will be fine-tuned to match the firm's individual processes.

Stage 5: Embarking on the partnership

When options have been considered and the details of the contract ironed out, the real work begins. Setting up a bespoke scheme with a new firm means setting up key contacts in our claims, audit and underwriting teams, as well as training fee-earners and others in the firm to make use of our solicitor firm portal, gATEway.



How it all pays off

While all this may seem like a lot of work before we have even issued cover on the first case, it certainly pays dividends in the long run. The effort that ARAG and our solicitor partners put in before working together, engenders trust, mutual understanding and a far greater degree of autonomy than would otherwise be possible.

The detailed understanding of our partners' caseloads has given us the confidence to be flexible and innovative in our underwriting, but also to successfully defend our policies and business model against numerous defendant challenges and, last year, all the way to the court of appeal.



Our approach to ATE Partnerships

Some things work better together and in the current market it's important to have a partner you can rely on.

Chris Thorne, Partner & Head of Personal Injury & Medical Negligence at Clarke Willmott and Paul Morgan, ATE Account Manager at ARAG, talk about the partnership between the two firms and why it has been such a successful one.

Click below to watch our video:



ATE Partnerships - Clarke Willmott



Gerard Knott
Senior Solicitor,
Serious Law LLP

How has and how may Covid-19 affect Personal Injury and Clinical Negligence?

These are unprecedented times and thankfully no-one acting in Personal Injury or Clinical Negligence will be able to remember the last massive worldwide pandemic that hit either the UK or Western Europe. The closest we came perhaps was with Zika, MERS, SARS and Swine Flu. While preventative measures were introduced at the time, they did not disrupt society to the extent that Covid-19 has.

Covid-19 is a novel Coronavirus and was perhaps underestimated when it first appeared. It is closely associated with SARS (Severe Acute Respiratory Syndrome). The purpose of this discussion is not to point the finger of blame, rather to reflect on where Covid-19 has delivered us and where it could lead us in the future.

What does seem likely is that when everything settles down an Inquiry into what could have been done differently should a similar scope pandemic occur again, must be likely.

Personal Injury Claims

Lockdown has inevitably seen a reduction in the number of injuries being sustained on roads, at work and in public places. As businesses locked down, the risk of physical injury at work reduced.

The RIDDOR statistics for 2018/19 recorded 147 deaths in industry. It will be interesting to see what the RIDDOR statistics reveal for 2019/20 and 2020/21. These statistics have always excluded the NHS, something which will be returned to later. As road travel, save for essential journeys was frowned upon, road safety improved for all road users. Public place injury also reduced as people were advised against going out save for essential travel, shopping and a short local exercise regime. The purpose of this at the time was to take the weight off the NHS. Being married to a Radiographer and knowing many NHS employees, frontline account is that these steps quite probably prevented the NHS from reaching breaking point.

The steps taken have not however been without cost. At time of writing this piece statistics were available to 21 May 2020 and revealed:

- 36,042 people in the UK had been reported to have suffered a Covid-19 associated death
- 181 NHS workers and 131 care workers had suffered a Covid-19 associated death
- Transport for London reported 29 bus drivers had died with Covid-19
- A high proportion of the deaths have occurred in the BAME population

Personal Injury lawyers have always campaigned like the metaphorical Turkey looking forwards to Christmas, for Injury Prevention and Reduction. Naturally we are looking at this and thinking why have so many people died and why have people died in specified professions?

Defendants have already been preparing their position in the press, namely that nothing could have been done differently. My thoughts are claims arising directly from Covid-19 are likely to be quite limited in volume, but will probably be supported by Claimant lawyers arising from:

- Inadequate risk assessment of the risk to the BAME sector of workers
- Inadequate PPE, particularly for the families of the NHS heroes who have lost their lives

One additional emerging trend is that of excessive speed on roads. While the roads are quiet there are regular reports of people driving far above speed limits. A report of in the South East Police investigating dashcam footage of someone travelling in excess of 200mph on a motorway is dreadful. Local to me, a car travelled through the village I live in in excess of 100mph, through a 30mph static camera. Inevitably this has and will result in injuries on the roads, normally to a totally innocent third party.

Hector N
Stamboulieh
APIL Fellow Emeritus
In House Counsel at
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No going back on the use of remote working technology by the courts post Covid-19

I saw an interesting article in the Law Society Gazette, which I will summarise below, from the Lord Chief Justice Lord Burnett of Maldon, on how he believes courts will function post Covid-19.

He made clear that the courts system will never again operate as it did before the coronavirus pandemic struck. Judges and practitioners had found the use of remote hearings just as successful and often more convenient in many types of case. This has been facilitated by a 'quite remarkable' transformation which has kept the court system in England and Wales open where others in the world have been closed.

In a virtual appearance before the House of Lords recently, Lord Burnett acknowledged problems with litigants in person accessing technology, but said that 80% of civil and family hearings have been able to proceed in some form since lockdown began. He also revealed the Cloud Video Platform – used sparingly so far in some criminal cases and certain tribunals – will be rolled out to all civil and family courts in the coming weeks.

"Over the last two months we have had to move forward otherwise the system would have collapsed... I sense from practitioners but also from judges there will be increased demand for [remote technology]. There will be no going back to where we were. We had to deal with this.... It seems to me that we have, by necessity, taken three steps forward and done so using poor technology. We will probably take a step back [once the pandemic ends]." Lord Burnett said the rapid changes in how courts operate had highlighted the under-investment in the system for years prior to the lockdown. "I wish to make it absolutely clear that what has happened in the last couple of months demonstrates how vital it is that the investment continues."

On criminal justice, Lord Burnett acknowledged that if severe constraints on social interaction stay in place for "more than a handful of months", then imaginative thinking would be needed to address a resulting backlog of cases. But asked specifically about juries not sitting, he made clear this would have to be a last resort saying, "I would see it only as an option in extremis... I would hope parliament would take a deep breath before authorising judge-only trials..."

Comment: The way we all work at ARAG has changed significantly recently, as it has for solicitors, barristers and the courts. We have been forced to work much more with remote technology on a daily basis and most have discovered that with a few tweaks and improvements, here and there, it can make our lives easier in many cases. As Lord Burnett said, "...there will be no going back".

Clinical Claims

Opportunist reporting has emerged of how Covid-19 claims will cripple the NHS due to clinical negligence. This again seems unlikely. Firstly, a Covid-19 Indemnity Scheme is being developed by the Government. Secondly, Covid-19 treatments are going to be tested no differently to the current tests adopted in clinical negligence, namely was the treatment Bolam reasonable? There is not a likelihood of a swathe of new cases from Covid-19 treatment as this is a novel virus that is being managed to the best of the NHS's abilities.

Any suggestion (and it has been suggested by some medical defence unions) that a person who has been injured due to proven negligent treatment, should be excluded from redress at law is, however, inappropriate.

Perhaps one worrying aspect has been the necessary expediting of the supply of medical equipment that perhaps has not been subjected to the normal regulation and checks. As this is a time of need, perhaps this is where the Government Indemnity Scheme would come in, should a person be injured due to its use or failure.

Delay in intervention is one concern that medical lawyers do have. Most routine appointments and non-urgent surgery were postponed allowing the NHS to concentrate on Covid-19. This may be a problem in respect of faster growing cancers where a delay in intervention of 3-6 months could be terminal.

Better working practices

One thing that has emerged from the crisis is that Claimant Groups and Defendant Groups, led by APIL and FOIL respectively got together and determined a set of better working practices. So far as I am aware these have been well observed.

The Courts have also adopted technology in a manner that was probably not even envisaged by LJ Briggs in his report in 2016. The message coming out is that where firms, insurers, Chambers and Courts had emergency planning in place, they were able to adapt and remain very much open for business.

These are unprecedented times, but injury prevention should remain a priority and the safety of our key workers must be preserved.

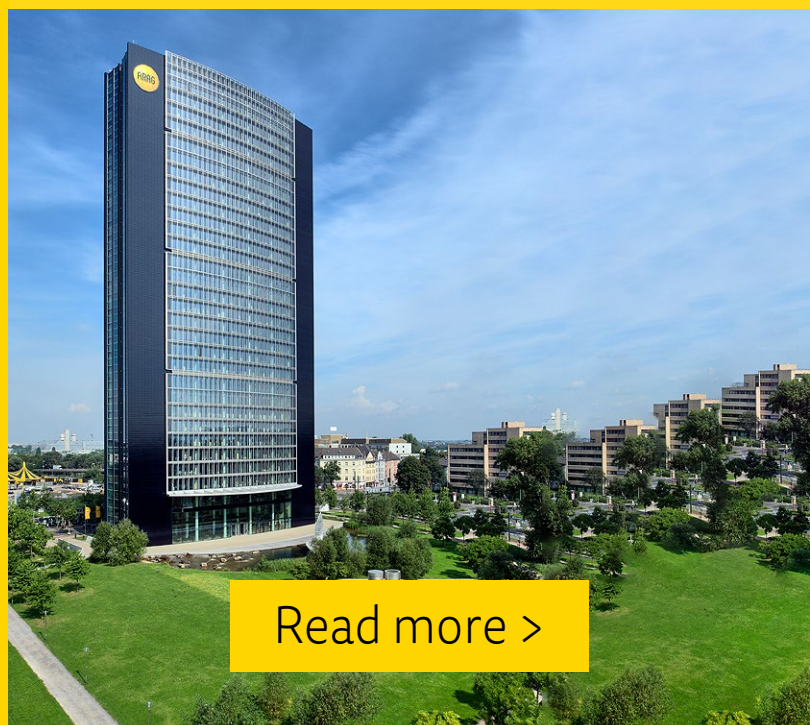
Extraordinary success for the ARAG Group in 2019

The ARAG Group achieved the most successful business year in its history in 2019 and remain confident in its ability to keep premiums at a stable level in 2020, despite the effects of the COVID-19 pandemic.

“ARAG will overcome these challenges thanks to its strong position. We will overcome them above all because our Group is backed by its very special ARAG spirit, which will not allow the successes of past years to be taken from us so quickly. Thus I look at the current year with confidence. Our position and our business model are solid, resilient and future-proof,”

notes Dr. Renko Dirksen, Member of the Board.

arag.co.uk



Read more >

ARAG RUN APRIL 2020 CHALLENGE!

The ARAG team are using their daily exercise allowance to run **2020km** during April

Please sponsor us to raise money for **Bristol Mind**

We did it!

Run April 2020 Challenge!

We are delighted to have hit our target of running 2,020kms during the month of April, in fact we achieved 2,104.67kms!

Congratulations to the whole team, over 20 ARAG colleagues (a few sweaty faces pictured!) took part to raise money for Bristol Mind and covered enough kms to reach Gibraltar! There have been a total of 293 separate runs with the average run of 718km.

A HUGE thank you to everyone who has donated so far, we've raised over £1,000 and you can still show your support via [this link](#).

In 2019 we donated £11,690 to a variety of [charities](#) and we will be doing the same this year & hoping to raise even more for charities in need of support more than ever during these difficult times.



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