

**LEGAL AID, SENTENCING AND
PUNISHMENT OF OFFENDERS BILL**



**A parliamentary briefing from the Association of Personal Injury Lawyers (APIL) for
members of the House of Lords**

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Introduction to APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit membership organisation, established more than 20 years ago to fight for the rights of people injured needlessly, through no fault of their own. APIL has over 4,700 members, who are mostly solicitors, with some barristers, academics and students.

Background to the Bill

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill was introduced to the House of Commons on 21 June and received its second reading on 29 June. Following 18 days in committee, the Bill returned to the floor of the House of Commons on 31 October for three days of report stage and third reading. During report stage, MPs spent only 20 minutes debating conditional fee agreements. Injured people deserve more time than this. The Bill will receive its second reading in the House of Lords on Monday 21 November.

Part one of the Bill includes the removal of the availability of legal aid for victims of clinical negligence who wish to make a claim. Part two of the Bill proposes to change the way civil litigation is funded in England and Wales, changing the nature of the 'no-win, no-fee' system. Clause 43 of the Bill caps the success fee which the successful claimant lawyer can receive, and no longer allows the success fee to be recoverable from the losing defendant, instead changing it so the success fee is taken from the claimant's damages. Clause 45 of the Bill prevents the recoverability of the after the event (ATE) insurance premium from the losing defendant.

Removing legal aid for victims of clinical negligence

Legal aid for clinical negligence cases costs £17 million out of a legal aid budget of £2.2 billion, constituting less than one per cent of the legal aid budget. The Government, in its campaign to cut costs, has proposed withdrawing legal aid for clinical negligence cases.

Removing legal aid for clinical negligence cases will remove access to justice for the most vulnerable people. These people may have suffered brain damage at birth or been left paralysed, and will have to have their cases funded by a restricted 'no-win, no-fee' agreement, the shortcomings of which are explained further in this briefing.

Even Lord Justice Jackson, whose report into civil litigation funding led to many of the changes proposed in this Bill, has spoken out against the decision to withdraw legal aid for clinical negligence cases, calling the decision 'most unfortunate', and saying the cutbacks in legal aid are contrary to the recommendations in his report.

Clause 43- non-recoverability of success fees

Most personal injury claims are funded by conditional fee agreements (CFAs), which allow for a success fee to be claimed by the claimant lawyer in a successful case. In CFAs, the claimant solicitor is paid nothing if he loses (which is unheard of in any other profession) and, to ensure claimant solicitors continue to take on difficult but meritorious cases, the success fee was introduced for successful cases and paid for by the losing defendant, or more usually the defendant's insurance company. This satisfies both the 'polluter should pay' principle as well as acting effectively as an insurance premium.

Clause 43 of the Bill will prevent the success fee from being recovered from the losing defendant, and the fee will instead be taken out of the damages awarded to the injured person for his pain, suffering and loss of amenity, as well as past losses. An injured person will therefore not receive the full compensation which has been deemed necessary.

The Government has proposed capping the success fee at 25 per cent, which will mean that more difficult cases will not be taken on, as solicitors will only be able to accept the cases that are most obviously going to be successful because they won't be able to take the financial risk of losing a case. Certain types of cases that are by their very nature extremely difficult to pursue, such as asbestos-related disease, and clinical negligence cases (which will no longer be eligible for legal aid under the terms of this Bill) could become impossible for solicitors to pursue, and these victims could be denied access to justice.

After researching our own members, APIL found that for a lawyer to take on an employers' liability case under these proposals, the case would have to promise a 65 per cent chance of success; a road traffic accident case would have to have 60 per cent chance of success, and both public liability and clinical negligence cases would need a 70 per cent chance of success for a solicitor to be able to afford to run them.

An alternative to Clause 43- fixing success fees

All categories of personal injury claim currently have fixed success fees, except clinical negligence and public liability claims. For road traffic accident claims, the success fee for cases which are settled outside of court is 12.5 per cent, while cases which go to trial have a success fee of 100 per cent.

Many of our specialist clinical negligence practitioner members already operate their own staged success fee frameworks based on in-house models. These models offer defendants clear incentives to settle cases early, rewarding good behaviour and penalising bad, as well as saving defendants money and creating certainty.

We see no reason in principle why staged success fees could not be adopted into all areas

of personal injury litigation. Fixing success fees, whilst retaining recoverability, would save costs and reduce disputes about the level of success fee recoverable on conclusion of cases and, most importantly, retain full damages for injured people. In his report into civil litigation funding, Lord Justice Jackson himself recognised that if removal of recoverability is considered unacceptable, fixing success fees in all areas where conditional fee agreements are regularly used should be considered.

Clause 45- Non-recoverability of after the event (ATE) insurance premiums

An ATE insurance policy is taken out by the claimant to provide protection from having to pay the other side's costs if the case is unsuccessful. The premium is currently recoverable from the losing defendant, in the same way as the success fee.

Preventing the ATE insurance premium from being recoverable from the losing defendant represents a serious barrier to someone who needs to make a claim. If a claimant is seeking damages for a clinical negligence case, he will have to pay about £5,000 for a policy, which could be almost half a year's wage for someone earning the minimum wage. An ATE policy for a road traffic case could cost around £400 and a claimant in a public liability case would have to pay around £1,000.

Having up to 25 per cent of his damages awarded for pain, suffering, loss of amenity, and past losses taken off him to pay the success fee, and potentially paying up to £5,000 for an ATE insurance policy, an injured person will have his damages depleted, and will not receive the compensation which he may desperately need.

Who will suffer? - Case studies

Donald Glen, 71, worked as an industrial decorator and has asbestosis.

This was a highly complex case with, initially, ten potential defendants. Asbestosis is a 'divisible' disease, which means that the claimant only receives full compensation if every liable employer can be found, their insurance traced, and the case concluded successfully. Only four defendants could be traced in this case, and the capped success fee, under the proposed regime, would only have covered the work involved in investigating the other six cases, which ultimately couldn't be pursued in any event

“Without the safety nets provided by the current system, I would have to think very carefully about whether to take on such cases because the potential financial losses could be unsustainable for my firm” said Mr Glen’s solicitor, Helena Jones of Quality Solicitors, Oliver & Co. “The Government’s plan to make injured people pay for some of their legal costs when someone else has injured them in the first place is grossly unfair. Most of these people are elderly and infirm and it just wouldn’t sit right with me to take fees from a person in this position”

But the situation also poses a much more serious threat. Diseases such as asbestosis and pleural thickening mean there is an increased chance of the sufferer developing a much more serious disease in the long-term, such as the terminal cancer mesothelioma. Sufferers only have three years in which to bring a claim for compensation. If they don’t claim for their less serious diseases during this time frame, it can be difficult to pursue a claim for a potentially fatal condition in later life.

Benjamin Mousley, 22, was born with scoliosis (curvature of the spine) and a diaphragmatic hernia, which was repaired at birth. After a successful operation to help straighten his spine, he was given a blood transfusion appropriate for an adult rather than a child. He was nine when he was left paralysed below the upper part of his chest, with very limited movement in his arms and no movement in his hands.

“Ben’s case was incredibly complex and difficult, not least because liability had not been admitted by the hospital at any point following the blood transfusion,” said Warren Collins, Ben’s solicitor. “Under the terms of this new Bill, I could never have acted for him. The risks were simply too high to justify a limited success fee, so Ben and his family would have had to rely on the state for help, while the negligent party remained unaccountable for the negligence which caused his injuries.”

“Money isn’t everything,” said Ben’s mum, Toni. “But it’s bought my son the things he needs, like proper housing, a decent wheelchair and other special equipment which helps him to cope. It’s helped to give him confidence in what he can do. He’s able to go to college and it looks like he’s headed for a career in computers. He’s also now able to pay for a team of professional carers who look after him 24 hours a day, seven days a week.”

“Without this money, I would never have had a life of my own, and neither would my other children. This sort of thing doesn’t just affect one person – it affects the whole family. And the kind of life my son was facing would have been so intolerable for him, he has told me he would have killed himself.”