

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



**Talking points against Clause 45**

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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.

## **Clause 45 - Recovery of insurance premiums by way of costs**

APIL does not believe that Clause 45 should stand part of the Bill. APIL believes that Clause 45 represents an assault on injured people and the damages awarded to them, which should remain fully intact. Clause 45 prevents the after the event (ATE) insurance premium from being recoverable from the losing defendant. It would more than likely have to be paid out the damages awarded to the injured person.

## **Talking points-**

- ATE insurance is a vital form of protection for the injured person who is bringing a claim against those who have caused him injury. This insurance protects the injured person from having to pay the costs of the other side, usually a multi-million pound insurance company, if he loses his case. The ATE insurance policy also pays for expenses, such as medical reports, in cases.
- The injured person could lose a proportion of his damages to pay for the premium, on top of already having to pay out up to 25 per cent of his damages for 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. In researching our own members, APIL has discovered the potential cost of an ATE insurance premium for different type of cases.
- An ATE insurance premium for a clinical negligence case - cases which by nature are complex, and therefore expensive - can cost up to £30,000. An ATE insurance premium for an employers' liability case, such as for industrial illness, can cost up to £12,000.
- By having to pay the often costly ATE insurance premium out of his damages, the injured person could potentially have his damages wiped out, even before he has to pay the success fee. It is important always to remember these are ordinary individuals who need protection, and are not profit-making businesses.

- ATE insurance is particularly important in asbestos and other industrial disease cases. ATE insurance policies are needed to fund the expenses of bringing the case, such as medical reports, as well as providing protection against having to pay defendants' costs. Industrial disease cases often have more than one defendant, making them complex and difficult. This means an unsuccessful case can be extremely costly if there are multiple defendants whose costs need to be paid. An individual would find it extremely difficult to cover these costs without a recoverable insurance premium.
- Very complicated pleural thickening and asbestosis cases which only attract modest damages will therefore face a far stricter vetting regime by solicitors, and some solicitors would be unable to take on these sorts of cases without recoverability of the ATE insurance premium. Solicitors don't want to pass these costs onto the claimant, and footing the bill themselves simply isn't sustainable. It is right and fair that the wrongdoer should pay.
- Being diagnosed with asbestosis provides a clear indication that the individual has been in contact with asbestos at some point in the past. These individuals are at a greater risk of developing a fatal disease, such as mesothelioma later on in life. The law, as it stands, requires someone to bring a case for asbestosis, for example, within three years of the date of knowledge of the disease. If that case isn't brought because the costs are prohibitive, and mesothelioma develops, the injured person may then be unable to bring a claim for the terminal disease. The injured person would therefore be denied compensation twice, both for the asbestosis and mesothelioma, the effects of which would also be felt by the injured person's family, both emotionally and financially.
- One such victim of industrial disease who would almost certainly have been denied access to justice by the changes to ATE insurance is Donald Glen.

### **Donald Glen's story**

Donald Glen, 71, worked as an industrial decorator, until he gave up work to look after his wife who subsequently died of cancer. Donald has asbestosis and is aware of the heightened risk of contracting a more serious disease.

This was a highly complex case with, initially, ten potential defendants. Not all of them could be traced and one was liable for an almost negligible proportion of the award so the solicitor pursued four defendants. Asbestosis is a 'divisible' disease, which means that the claimant only receives full compensation if every liable employer can be found, the insurance traced, and the case concluded successfully.

The case started in August 2008 and didn't settle until April 2011. The costs were very high, primarily because the defendants took a long time to respond. The problem, said Mr Glen's solicitor, Helena Jones of Quality Solicitors, Oliver & Co, is not so much breach of duty as proving the cause of the injury, and having to apply to the court to restore defunct companies back to the register.

"We wouldn't take this case on in the future. It involved a lot of work and we wouldn't want to do it without recoverable ATE insurance." said Helena. "We rely on ATE insurance policies to fund the expenses in these cases. If proving the exact cause of the injury is the issue, we would have to obtain detailed medical evidence and potentially expensive engineering evidence. An industrial disease case can also often have more than one defendant and, therefore, an unsuccessful case can be costly, so we also need ATE insurance to protect against defendant costs".