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November 2025

SMART GUIDE

CLAIMS

Top tips for limiting and recovering your outlay in INJURY CLAIMS

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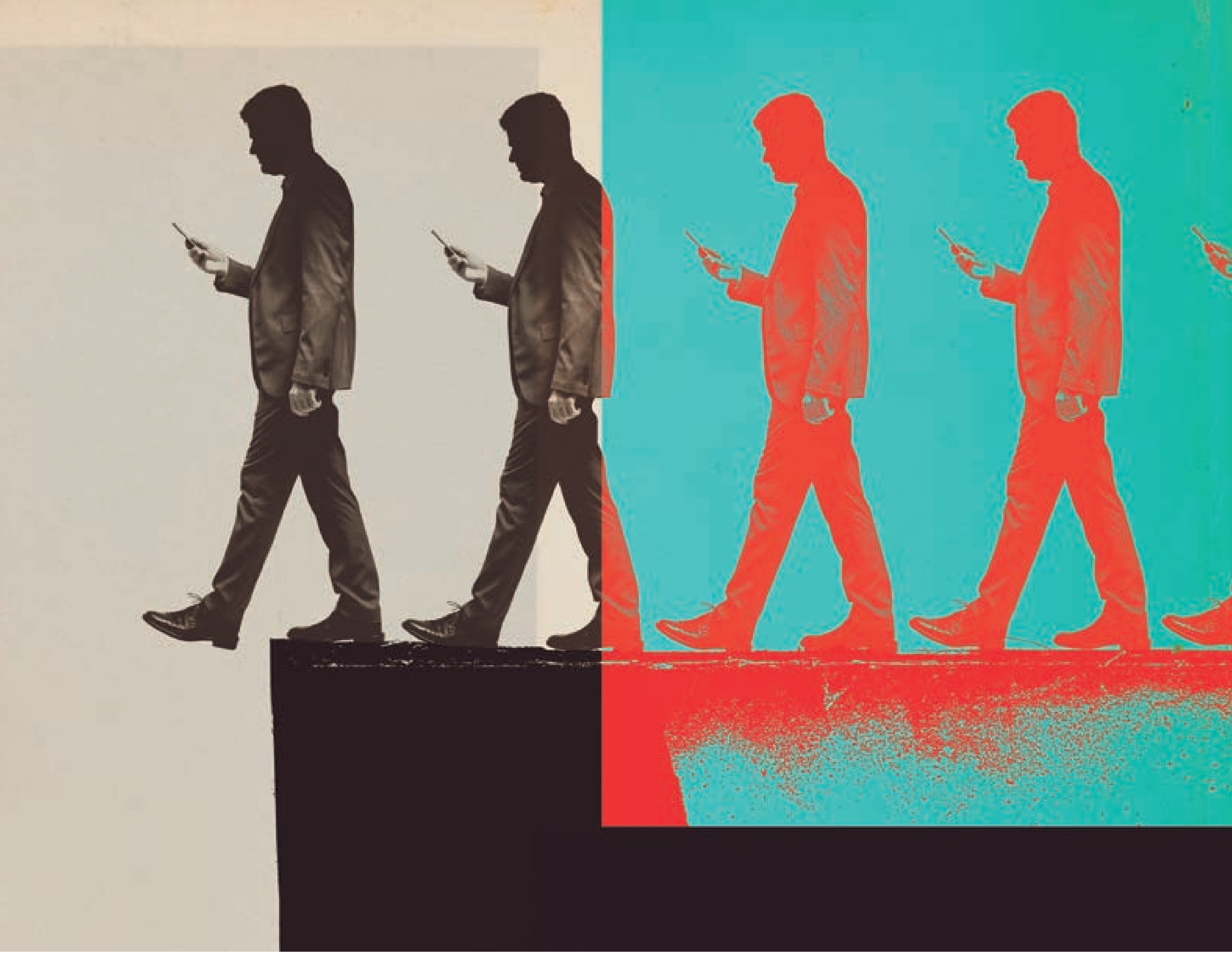
Given the pressure on resources in the public sector, and in public services generally, along with the rising cost of claims, assessing the potential for making a partial or full recovery from a third party is an essential element of good claims handling. However, there are key points to consider before deciding on a strategy for bringing a claim. In this Smart Guide we outline where opportunities for a recovery may arise and the key considerations.

Claims for contribution and indemnity often present a challenge, not least because of the need to adopt the role of a claimant. The causes of action are wide ranging and time limits need careful analysis, as these differ to injury claims. This is a broad and legally complex area, for example, claims for 'indemnities' may in fact be claims for damages for breach of contract under express or implied terms. However, for the purpose of this article, we have focused on scenarios where a public sector organisation is seeking to recover an outlay it has made (or will make) to a claimant following a successful claim for injury. We recognise this is just one aspect of a huge topic.



Contribution and indemnity claims arising from injury claims

In simple terms, a contribution or indemnity claim following or as part of an injury claim may be considered if a view is taken that a third party is also responsible or it has a contractual liability.

Generally, we refer to a 'contribution' if there is a potential to make a partial recovery, possibly where both parties share some responsibility. When referring to an 'indemnity' in this scenario, it is generally meant that a full 'recovery' is sought. Often a full recovery is the goal but alternatively a contribution will be sought.

> Undertake due diligence into the financial means of the third party. There is no benefit to litigating in the absence of the prospect of a recovery.

Highways

A scenario where public sector organisations may commonly consider a claim against a third party for a contribution or indemnity is in a highways setting. If, for example, a highway authority is presented with a claim by a member of the public for injury after tripping over a defect in the carriageway, the claim would likely be brought against the highway authority for breach of duty under the *Highways Act*.

In the above scenario, assuming there is no defence to the main action, and the defect was caused by the faulty workmanship of a contractor, the highway authority may settle the claim (or be found liable at trial), then seek to recover their outlay from the contractor.

NOTE - the highway authority would not have to wait until the conclusion of the claim to involve the contractor. Below we have outlined when an organisation may start to consider a claim against a third party.

NOTE - it is important to be aware that contractual liabilities may apply, whether or not the third party had a liability to the claimant in the main action. Such cases require careful analysis and a clear understanding of contract law.

Employee injury

Conversely, there may be a claim against a person or company where there is no contract. For example, an employee of a public sector organisation may be injured at the premises of a third party, the injury claim may be pursued against the organisation as the employer, but there may be a claim against the occupier of the premises the organisation can pursue.

The highways accident and the injured employee scenarios above are common examples but given the wide range of claims made against public sector organisations, the potential for contribution and indemnity claims is extremely broad.

A claim against another party for a contribution or indemnity

Such claims may be seen in these sectors, but this list is not exhaustive:

- Construction
- Highways maintenance
- Electric and plumbing
- Cleaning and sanitation
- Gardening, landscaping and tree maintenance
- Transport
- Education
- Care
- Housing.

NOTE - the starting point is to consider whether you have a claim is as soon as it is apparent another party has a potential liability. Don't leave it until the conclusion of the main claim, and/or until proceedings are issued. This should form party of the strategy for the claim at the outset.

Key actions

Consider the legal basis for the claim against the other party. Is it a claim in contract or tort?

Diary the time limit(s) for any claim. These differ according to the cause of action, so it's essential to ensure you check them at the outset. Add plenty of diary reminders too! If you are under pressure from limitation, find out whether the third party will agree to a standstill agreement. This will give you more time before you have to issue proceedings. Public sector organisations defending claims are often on the other side of these requests in main actions, so if you agree this, carefully consider the wording to ensure you are protected.

> Be aware that contractual liabilities may apply, whether or not the third party had a liability to the claimant in the main action.

Secure evidence. The focus is often on the main action, but make sure the potential claim is also considered, and decide what evidence is needed. Check the contract terms as early as possible, request disclosure and speak to witnesses. Consider if you need the support of the third party to defend the main claim. If so, factor that into your strategy.

The starting point to consider whether you have a claim is as soon as it is apparent another party has a potential liability.

When proceedings are served in the main action. Decide whether you need to bring the claim at that stage or whether you can and want to defer it until the conclusion. Each case must be assessed considering the cause of action, limitation periods and strength and value of the claim.

Undertake due diligence into the financial means of the third party. There is no benefit to litigating in the absence of the prospect of a recovery.

Assess the strength of the claimant's claim. Joining a third party into proceedings for personal injury creates a costs risk: if the main action is successfully defended, the third-party claim would fall away and that party could seek their costs. **NOTE** – the protections afforded by qualified one-way costs shifting don't apply in claims for recovery.

Settle a main claim first. If you decide to settle a claim, with the intention of bringing a claim for contribution or indemnity at a later date, you may wish to give the third party the opportunity to comment on the underlying claim. This can mitigate against arguments that the claim could have been defended or there has been an overpayment.

Check commercial relationships. Is there any commercial relationship with the third party that would be impacted? If so, think carefully about the approach to the claim and carefully manage each stage of the claim.

Defending contribution and/or indemnity claims

In defence of a contribution and/or indemnity claim following an injury claim, a third party may argue that:

- The settlement was not bona fide (rather, it was dishonest or there was collusion).
- The defendant was not liable to the claimant.
- If the claim is made under the *Civil Liability Contribution Act*[1], the third party may argue they are not liable to the injured person, either because there is no duty of care owed to the injured person and/or the third party was not negligent and/or such negligence was not causative of damage.
- Settlement was too high or certain heads of loss were irrecoverable in law.
- Limitation has expired.
- Where reliance is placed on a contract, the third party may take a different view on the applicability or meaning of contract terms.

References

[1] *Civil Liability (Contribution) Act 1978*, legislation.gov.uk

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