

AGS LOSS PREVENTION GUIDANCE 2022

INTRODUCTION

This AGS Loss Prevention Guidance is a collection of papers providing members with guidance on particular issues that could affect legal liability and financial exposure. Guidance papers address issues such as those relating to liability, contract, insurance and health & safety.

Papers published prior to 2017 (collectively referred to as the Loss Prevention Tool Kit) were reviewed in 2017 by the Loss Prevention Working Group and a practising barrister to ensure that the legal basis on which the guidance was based, and the guidance itself, was current and relevant. Where this was not the case the paper was either updated or archived by the AGS. The contents of the Loss Prevention Guidance were similarly reviewed and updated again in 2022.

Guidance papers will be formally reviewed five yearly and issues arising since the previous review that affect the advice given and its legal basis will be addressed. This could be by the publication of an article in the Newsletter, by the preparation of a Loss Prevention Alert, and/or by the amendment or withdrawal of the relevant paper in the Guidance.

In addition to this formal review the Loss Prevention Working Group welcomes comment, advice or suggestions for additional guidance papers. These should be addressed to:

The Secretary Loss Prevention Working Group

AGS

Forum Court

Office 2FF,

Saphir House,

5 Jubilee Way,

Faversham,

Kent, ME13 8GD

or using the email ags@ags.org.uk

Contractual Helpline

For further help on contract and liability issues contact

Beale & Co

+44 (0) 20 7469 0400 (Please quote 'AGS Helpline')

Acknowledgements.

Much of the original Guidance presented here was prepared by or following review by Steven Francis. The recent legal review was carried out by Dominic Ruck-Keen. The AGS LPWG is extremely grateful for the advice from these two individuals and for the continuing support of Beale & Co. The Group also recognises the substantial efforts of many AGS members past and present in the preparation, review and publication of this series of Guidance papers. Credit to Kaya Dearnley, SOCOTEC for the front cover image.

TOPICS

Loss Prevention Guidance papers have been placed into groups of papers covering similar legal topics to help the reader find papers relevant to the problem being researched. These topics are as follows.

Contract – Contractual matters

Disputes – Issues associated with the resolution of disputes

Experts – Guidance for and issues associated with members acting as experts

H&S – Health and safety issues, and CDM

Insurance – Insurance issues

Liability – The fundamentals of liability

Non-contract – Non-contractual issues such as tort, statute and regulation

Reports – Matters associated with the production, control and delivery of reports and other deliverables

CONTENTS

AGS LPG No. (Topic)	Title	Summary description
001 (Liability)	Limiting and Excluding Professional Liability	The consultant generally owes their client in contract and tort a duty to use reasonable care, skill and diligence in the work they carry out. This paper describes means by which consultants may limit liability in both tort and contract.
002 (Liability)	The Doctrine of Vicarious Liability	The effect of vicarious liability is to render one party liable to another by the tort of a third party. This paper describes that liability in tort is not the same as that in contract and the distinction between employees and contractors.
003 (Liability)	The Criminal Liability of Firms for the Acts of their Directors and Employees	Companies and partnerships can act only through their staff - their directors/partners and employees. This paper sets out to what extent firms are responsible in criminal law for the acts of their staff.
004 (Liability)	The Liability of the Individual within the Contracting or Consulting Firm	Because of the rule of vicarious liability where an employee is negligent so causing loss, the party suffering loss will normally sue the employee's employer. This paper describes how the individual can also be sued and recommends sensible precautions for employees.
005 (Liability)	Liability for Independent Contractors	Generally, companies are not liable in tort for the acts of their independent contractors. However, some important exceptions to this rule are described in this paper.
006 (Liability)	Different Legal Structures/Forms for a Consulting or Contracting Undertaking	This paper describes the various legal forms a consulting or contracting organisation are likely to take and how this can affect the liability of its owners, managers and employees, as well as the organisation's liability in its own right.

007 (Liability)	Understanding “Fitness for Purpose” and “Skill and Care” Obligations	This paper describes the essential differences between Fitness for Purpose” and “Skill and Care” Obligations, the associated risks and implications for insuring against those risks.
008 (Liability)	The Law of Limitation	This paper describes how the law of limitation is designed to protect possible defendants from proceedings relating to old claims.
009 (Contract)	The Bare Agreement	Parties to a contract for professional services may agree what the professional is to do but with no other terms defined. This paper describes the issues around a contract based upon implied terms.
010 (Contract)	The Basics of Contract	A contract is a bundle of promises that the parties to the contract make to each other. This paper describes the Agreement, Consideration, legal relations and other basic provisions of a contract.
011 (Contract)	The Contracts (Rights of Third Parties) Act	This paper describes the provisions of the Act and how a third party may enforce a contractual term in a contract. Risks are described and recommendations to mitigate those risks presented.
012 (Contract)	Common Contract Breaches Committed by Consultants	Some of the common types of breach of contract committed by consultants are described. An overview is presented of the contractual obligations often set out in consultants' appointments and the ramifications of breach.
013 (Contract)	Consultants Undertaking Ground Investigation Contracting	This paper describes the issues faced by consultants in undertaking ground investigation contracting services within the scope of their services. The risks and strategies to mitigate those risks are set out.
014 (Non-contract)	Obligations in Tort	This paper describes how, in addition to contractual obligations the law of torts may also impose obligations to persons who are not parties to the agreement. The tort of negligence, usually the most important to the ground engineering specialist, is described.
015 (Non-contract)	Conflicts between a duty of Confidentiality owed to a Client and a Legal or Moral duty to assist the Authorities	Specialists owe a duty of confidentiality to their client. Conflicts of interest can arise where the regulatory authorities (for example, the Environment Agency) ask for information about or relating to the client's affairs. This paper describes some of the difficulties in this conflict and advises how they may be reconciled.
016 (Insurance)	Professional Indemnity Insurance Checklist	This paper presents a checklist of issues that a consultant undertaking professional services should consider when procuring professional indemnity insurance.
017 (Insurance)	Business Liability Insurance	This paper provides an introduction to various business insurances, other than professional indemnity insurance which are often taken out by smaller companies, consultants and contractors.
018 (H&S)	Controlling the Risks of Working Alone	This paper presents advice to member organisations employing people who will at times be working alone.

019 (Reports)	Disclaimers in Reports	Ground engineering specialists producing reports often insert disclaimers intended to limit the scope of liability. This paper discusses the legal effect of disclaimers and provides relevant advice.
020 (Disputes)	Alternative Dispute Resolutions	This paper describes Alternative Dispute Resolution and the traditional forms of dispute resolution, litigation and arbitration.
021 (Disputes)	Adjudication	This paper describes the nature of adjudication, adjudication pursuant to the HGCRA and the 10 pre-conditions to adjudication under the HGCRA.
022 (Experts)	Sources of Advice for Expert Witnesses	This paper provides a brief description of sources of advice for environmental and ground engineering specialists acting as Expert Witnesses
023 (Non-contract)	Freedom of Information Act	This paper provides information on the Freedom of Information Act, its implications and how it can affect AGS members and their clients.
024 (Contract)	Collateral warranties	Collateral warranties confer rights on third parties who are not party to the original main contract of appointment. This document provides guidance on the use of collateral warranties and compares their use with using the Contract (Rights of Third Parties) Act 1999 and letters of assignment / letters of reliance. Clauses which are recommended to be included in the collateral warranty or in a third party rights schedule are discussed.