

Guidance to ICE directors, employees and committee chairmen on Contempt of Court issues

This document refers to the ICE policy regarding the implications of legal action against managers and engineers.

The Legal Action Working Group ("LAWG") has developed guidance to assist ICE directors, employees and committee chairmen to avoid the risk of Contempt of Court following high profile accidents involving civil engineering matters. Background information, and some practical guidelines, for ICE meetings are given below.

These guidelines are general in nature and if there are any specific issues these should be discussed with ICE's Director of Communications and Marketing.

1 Background

- 1.1 Concern has been raised that any discussion surrounding an accident including the causes, may be "sub-judice" and ICE directors, employees and committee chairmen involved in internal discussions and arranging meetings for ICE members may therefore be committing an offence.
- 1.2 The expression sub-judice simply means that a matter is "before the court". The term describes only a state of affairs and is of little analytical value when considering the extent to which matters, that are (or may be) the subject of proceedings, can be discussed out of Court. The appropriate area of law to consider is Contempt of Court. This is discussed in Section 3.

2 Objectives

- 2.1 It is important that ICE is clear on why it and its members should be able to discuss the issues surrounding major accidents. There are clearly a number of possible reasons. The primary one is to ensure that members, with a professional interest, understand why a failure has occurred so that lessons are learned and continual improvements can be made to worker and public safety.
- 2.2 This objective should be achievable. The test for the offence of Contempt is high and therefore if discussions, meetings and briefings are approached sensibly and in a measured way Contempt is unlikely to be an issue. Guidelines are set out in Section 4.

3 The Law

- 3.1 Contempt of Court is essentially a common law criminal offence, modified in the areas likely to be relevant to ICE, by the Contempt of Court Act 1981. If found guilty, an individual can be liable to a fine and, in serious cases, a prison sentence.
- 3.2 The Contempt of Court Act 1981 creates a strict liability offence for all forms of communication (including speeches, letters, emails) addressed to the public or a

section of the public which creates a "substantial risk" that the course of justice will be seriously impeded or prejudiced. Strict liability means that if the offence has been committed the prosecuting authority does not need to show that the person making the publication intended to prejudice the outcome of a criminal investigation or a Court Case.

- 3.3 The common law offence of Contempt of Court requires the prosecutor to show that the individual intended to commit the offence. However, the situations in which ICE directors, employees and committee chairmen could put themselves at risk of Contempt are unlikely to be any wider than the scope of the Contempt of Court Act. Therefore, for the purposes of establishing these guidelines it is assumed that the intention of the perpetrator is not relevant.
- 3.4 The key question therefore is whether the intended meeting, event or briefing is likely to cause a "substantial risk" that the course of justice will be seriously impeded or prejudiced. What is relevant is whether, as a result of the communication, any influence will be brought to bear that is likely to divert proceedings from the course they were otherwise likely to take. In addition to the content of the communication, factors such as how widely the communication was distributed and the proximity to the trial will be relevant.
- 3.5 For example an internal discussion say between ICE Directors regarding the causes of an accident where strict confidentiality is maintained, is unlikely to constitute a Contempt of Court even if that discussion concludes that an individual was negligent leading to the accident. This is because there is no communication to the public or a section of the public and therefore no substantial risk of prejudice.
- 3.6 However, meetings and briefings of the membership introduce the possibility that the content will have a wider circulation. If the content is potentially prejudicial (e.g. the speaker concludes that Engineer X must be negligent because he/or she should have realised that the component would fail) then there is a risk in a more open format that this view would be published to the public, particularly if the meeting is reported by a journalist or communicated by an attendee to them. In this case it would be sensible to take steps to ensure that the discussion does not consider the culpability of organisations or individuals to avoid any risk of prejudice in the event that the discussion is published widely.
- 3.7 Interestingly when considering if an offence has been committed it is not relevant whether the investigation or the Court Case were in fact affected by the Contempt.
- 3.8 There is an important and useful exemption in the Contempt of Court Act: where communication is made as part of a discussion in good faith of matters of general public interest and if the risk of prejudice is an incidental consequence of expounding on the main theme of the discussion. Following major accidents ICE is likely to be able to rely on this exemption on the basis that it is in the public interest that the causes of accidents are understood and discussed amongst those people who can use the information to good effect. However the main purpose of the discussion must not be to attribute blame.

Timing

- 3.9 Considerations of Contempt of Court issues are relevant from the time that it appears likely that criminal proceedings are virtually certain to be commenced to the point at which a verdict is given or because the prosecuting authority have dropped the case. It is therefore probably sensible to assume that all accidents involving death, serious injury or potential for serious loss of life are likely to result in criminal proceedings and therefore the precautions set out below should be applied.
- 3.10 The relative proximity of the communication to a trial is a factor when considering the likelihood of risk of prejudice. It will probably be therefore sensible to avoid arranging events where there is a wide membership involvement, and reduced control on content, in the period shortly before the trial date.

What can be discussed and with whom?

- 3.11 If the audience is limited and tightly controlled there is no reason why any aspect of the accident cannot be discussed, as there is no substantial risk that that the discussion will divert proceedings from the course they were otherwise likely to take¹.
- 3.12 Where the audience is broader the likelihood that the content will be prejudicial will still be relatively low unless it is both prejudicial in content and the meeting is reported widely. However as reporting of most ICE meetings is likely to be difficult to control, it is sensible to take some practical steps to reduce (what is already a relatively low risk) further. These are set out in Section 4.
- 3.13 It is not envisaged that consideration of causes of accidents (e.g. why did the structural element fail, was there a breakdown in the safe method of working?) should be prevented. Quite the opposite: these are important matters, which are in the public interest. The key thing is to ensure that the main purpose of the discussion is the wider safety issues – any consideration of culpability (and it is best to deliberately exclude this) must be incidental to discussion.
- 3.14 Where an ICE director or committee chairman is invited to comment directly to the media then clearly the risk of Contempt of Court is much more significant. Before engaging in any conversation with the media on a topic of this nature, guidance should be sought from the Director of Communications and Marketing to establish what if anything can be said and who it can be attributed to.
- 3.15 Questions have been raised as to what extent the issues surrounding Contempt of Court prevent ICE from providing support to members who are under investigation and/or charged. Clearly there may be issues of aiding and abetting if a Director, ICE employees member or a Committee Chairman ill-advisedly became involved in concealing or misrepresenting member's actions following an incident. Clearly that should not happen and would appear highly unlikely in any event. These issues are not discussed further here. In terms of Contempt of Court however, and whilst ICE can make general statements about the duties of its members in any given situation, it should avoid appearing to conclude publicly that these duties have or have not been discharged.

¹ If a document is created with conclusions and views on the accident and it is relevant to the case, then the prosecuting authorities may be entitled to seek disclosure of that document. This is not a Contempt of Court issue but one of evidence.

4 Conclusions

- 4.1 If ICE Directors, employees and Committee Chairmen take care to ensure that any discussions following a major accident are either not widely communicated or are unlikely to significantly influence the outcome of trial, then there is no reason why ICE cannot continue to discuss issues surrounding major accidents. The list below is a summary of the key do's and do not's that should be kept in mind.
- 4.2 These guidelines are general in nature and if there are any specific issues these should be discussed with the ICE's Director of Communications and Marketing.

DO

- i) Do consider carefully the position before asking any witnesses of fact, who may be asked to give evidence in an investigation, to speak at meetings or briefings. It is probably inadvisable but to allow a proper discussion of the causes and to achieve the objective of sharing knowledge it may be unavoidable. If it is felt necessary to seek advice, the Director General should be consulted, who will obtain legal advice if this is appropriate
- ii) Ensure that meetings and briefings, which may conclude that the actions or omissions of an individual were negligent, are kept confidential and not communicated. However, be aware that any documents produced and conclusions made are not protected from disclosure to the police or the HSE if they are relevant to their investigations.
- iii) Consider the timing of meeting. In the event that the content could influence the outcome of a trial, discussions reported months before a trial are less likely to be prejudicial than discussions the day before the trial starts. .

DO NOT

- i) Discuss the behaviour of particular organisations or individuals giving an opinion on what acts or omissions by them may have contributed to a particular incident.
- ii) Comment to the media on whether preventative steps were or were not taken.
- iii) Ask individuals who are giving evidence as expert witnesses (either for the prosecution or defence) to take part in meetings or briefings.