

**SRP Meeting: The Place of the RPA and the Law.
Birmingham & Midlands Institute, 25 June 2003**

Abstract: This note discusses the importance of an understanding of the legal framework by the radiological protection professional; suggests topics for future meetings; discusses conflicts of interest that may arise in the work of an RPA; and offers definitions of some legal terms.

The meeting that was held last year on the place of the RPA in law raised a number of interesting questions. The organising committee believed that it was an issue of significant interest to the Radiological Protection community. We all receive significant technical training but legal training is variable. Given the way society is moving and the increase in litigation it is important the radiological protection professional understands some of the legal framework and how it impacts on their work. The purpose of this note is to build on the meeting itself and the issues raised by attendees and prompt some debate – in part the aim is to promote further discussion to increase understanding.

The event itself focused on Health and Safety at Work Act law and not environmental protection. This was a deliberate decision. Whilst there are some common areas the organisers believed that it would have led to an overlong day to achieve sufficient coverage. In our view it then had the potential to lose value. Having set the scene there is an opportunity to build and we had always wondered whether a regional meeting would be appropriate to take up the mantle and run a more focused session on the environmental aspects. Any volunteers?

There was some correct criticism of the fact that the event focused on English and Welsh law and did not acknowledge Scottish law. Criticism accepted, in our defence we wanted to get over some of the principles rather than implementation in each country. The basic tenants of Scottish, Welsh, Northern Ireland and English law in terms of SAFAIRP are the same. It is how things come to court and the legal precedents that affect the legal system in that country. Again is this a topic for a regional meeting. We also wanted to highlight some of the concepts in law that an RPA needs to understand

One of the key issues I believe the event brought out was the role of the RPA in giving advice. The RPA is an advisor but often wears another hat and has to implement the advice on behalf of the employer. This becomes a vexed issue as it does call into question the impartiality of the advice. The employer is responsible for safety and in reaching any judgement should take account of its advisors. It is the employer's responsibility if the advice is not taken.

The difficulty comes if the same person is then asked to implement something that has been advised against when they are employed directly. There are potential civil and contract issues where the RPA is brought in to provide the advice. An RPA may be retained on contract to do certain work on contract and provide advice.

The RPA has two functions.

Provide advice
fulfil the contract.

Overlaid across this there is the code of conduct and how does the RPA stand where something is identified that is safety related but not part of the contract. The code of conduct of any professional would indicate that this is drawn to the attention of the employer. A tangled web develops and one that will become more and more common place with modern business structures. At this stage I know of no case law in this area but it is a significant area for debate in the community.

As an example of how some of these issues come together the position in hospital trusts can be considered. In a hospital trust there are the complicating issues of clinical governance as well as corporate governance. The RPA is a key player in not only the communication and building of legislative requirements, but also in ensuring that managers are aware of their active roles in the administration of a sustained coherent overall management of radiation safety.

There are certainly complex interactions between the RPA and trust management towards assurance of compliance with legislation. For these to be transparent to regulators the documentation describing the relationships and mechanisms of appropriate and compliant practice must be rigorously audited and reviewed to be ultimately robust and to accurately reflect the variety of work at the coal face. This documentation spans the range from policy and strategy down to specific procedure documentation. The trust (employer) must be able to present accurate and understandable 'organisational charts' of its approach particularly to radiation safety management and in general to health and safety issues. These should include interactions within a Trust's divisional structure (complicated and ever changing) and the maintenance of a strong awareness of radiation safety issues within each radiation-using division.

Specifically, the RPA must be involved with the development of various forms of documentation which translate the Trust Policy into everyday practice. The RPA will inevitably have a major role in the establishment of regular safety audits and risk assessment programmes across all areas (ensuring involvement by a wide cross section of relevant staff). The development of a robust review and follow up of risk assessments and audit points will also require the RPA's involvement.

For radiation safety practices to develop and evolve so that they are optimised for the purpose, the Trust must ensure that the RPA is in a management position and have uncompromised communication with senior management (Chief Executive or such level capable of providing resources to effect a change in practice).

The above example also sets out issues concerning control and supervision in organisations that can apply equally to proposed new management structures in the nuclear industry. Changes are occurring in terms of how services are delivered including make or buy decisions. These factors will impact upon the radiation protection professional in terms of how advice is given and to whom. This is a very good reason for the radiological protection professional to fully understand the legal framework within which they operate.

Hopefully this has given some food for thought and prompted some more debate. To help on some of the legal concept concerning reasonable practicability the steering group have produced a note for information which is attached. This is not a definitive legal interpretation and should be taken as information on case law and interpretation of terms.

BRIEF NOTE ON “REASONABLY PRACTICABLE” FROM SRP LEGISLATION AND STANDARDS SUB GROUP

The definition of reasonably practicable as currently applied in radiation protection legislation was built on the decision in *Coltness Iron Co. Ltd v Sharp*¹, where Lord Atkin, almost in passing, gave the elements which make it up.

“...I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of section 55 (of the Coal Mines Act 1911). The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate, that I think the Defence is proved.”

Thus, the time, trouble and expense all form part of the consideration of reasonably practicable, as is the requirement for these elements to be “disproportionate” to the risk involved.

“Practicable” has a legal meaning also, and this is established as being possible, and can be accomplished with known means or resources. Indeed, one way that the nuclear industry has ratcheted standards up for itself is that many operators have done things because they can (i.e., are practicable) rather than addressing what they should do (i.e., reasonably practicable). In the development of case law, practicable continued to hold its old sense as possible, but since *Edwards v NCB*², reasonably practicable had a distinct meaning in law.

Edwards v NCB concerned the failure to prop and support an underground roadway as was required in the Coal Mines Act 1911, and a fatality that resulted from the unsupported roadway collapsing. The judges agreed on the outcome of the case, and also criticised the defence severely. The criticism was on the grounds that they had failed to bring evidence to show that propping and supporting the remainder of the roadway had disproportionate costs in the time, trouble and expense in relation to the degree of risk involved.

Radiation Protection Advisers should note that when relying on reasonably practicable, an analysis must be done before any accident or incident occurs, and this analysis must meet the requirement of the courts (rather than satisfying any technical requirements from ICRP or NRPB) and must be written. Professional judgement implemented through discussion does NOT meet the requirement of reasonably practicable.

One result of this is to give a hierarchy of duties, dependant on the words used in any legislation, of

absolute -	a strict legal duty as laid down in the legislation,
practicable -	everything possible must be done with known
means and resources to achieve this duty,	
reasonably practicable -	everything possible must be done to achieve this
duty, taking into account the time, trouble and expense of the work in	
comparison to the risk involved.	

It should be noted that the burden of proof for Regulations made under the Health and Safety at Work etc. Act rests on the defendant where practicable and reasonably practicable are concerned (see Section 40). It is for the defence to prove that their actions were either

¹*Coltness Iron Co. Ltd v Sharp* [1937] 3 All ER 593

²*Edwards v NCB* [1949] 1 All ER 743

practicable or reasonably practicable, and any such defence will rest on documentation prepared before any incident occurs. This documentation can only be effective if it addresses the elements covered in the accepted legal meanings of those terms.

The difference between practicable and reasonably practicable must be clearly understood as the legislation dealing with radiation imposes not only absolute duties but also many that are either practicable or reasonably practicable. The implications of these different levels of duty will have a considerable impact when considering the interaction and relative weights of the legislation involved.

In order to give legally competent advice to the employer, every Radiation Protection Adviser must be able to understand the hierarchy of duties outlined above and how the courts require those duties to be addressed. Mere technical competence is not enough, and it could be argued that technical competence is secondary to understanding the legal requirements and advising the employer accordingly.