

Tree Risk Management

Nick Bolton explains landowners' responsibilities concerning potential risks posed by the trees on their property.

In January 2012 Andrew Cavanagh's life was changed irrevocably. Following an overnight storm, a lime tree growing on the side of a public road fell over and hit the bus he was driving causing him severe injuries. In late 2018 the Court of Appeal upheld a prosecution against the land owner (Witley Parish Council) for failing in its duty of care to inspect trees growing on its land with sufficient frequency. This judgement follows a series of findings by the courts that provide a very clear outline of what is expected of a landowner in relation to the management of trees and tree related risk. This article summarises what is expected of landowners from a legal and insurance perspective, and will outline some strategies that can be applied to provide cost-effective tree risk management solutions.

Trees and the law

In this section we will specifically describe our understanding of how the law expects landowners to manage their trees. This is a relatively narrow focus against the broader topic of trees and the law, but is pertinent to the purview of this article.

The law consists of two elements – statute as defined by Parliament, and case law as interpreted by the Courts. The two principle statutory instruments for the management of tree-related risk are the Occupiers Liability Acts (1957 & 1984) and the Health and Safety at Work etc Act (1974). While there are various other acts of Parliament relating to tree risk management, there is not sufficient scope within this article to discuss these. The Occupiers Liability Act states that, amongst other things, landowners have a duty of care to take **reasonable** precautions to ensure the safety of any third party (invited or not) on their land. Reasonable has been highlighted as this is a key word that will recur throughout this article. One element to consider here is that the responsibility for compliance with this Act lies with the occupier. There may be situations where the occupier and the landowner are distinct and separate entities – the

difference may simply be explained as the entity who has control over the land. The Health and Safety at Work etc Act places obligations upon employers to ensure that all reasonably practical steps are taken to ensure that people are not exposed to risks to their health and safety. There is one additional key element to this Act – the responsibility lies in both directions. People have a responsibility to themselves and others not to knowingly place themselves in



Mitigation options for tree management can include excluding people from access to an area. (Photo: Lockhart Garratt)

harm's way. One common misconception of tree risk management is that the onus lies exclusively with the landowner. This is not necessarily correct. If a landowner has taken reasonable and practical steps to provide a safe environment and has provided sufficient information to third parties so as to allow them to make a rational decision, responsibility for their safety lies with the third party.

This then leads to the question – what do the courts expect? There are a number of key cases that have been considered over the past 10-15 years, and following is a review of some of the more pertinent ones.

Poll vs Bartholomew (2006) – This case concluded that a landowner must ensure that the person who undertakes tree inspections must have the necessary level of competence and experience, so as to be able to reach an informed opinion of what they are assessing.

Bowen vs The National Trust (2007) – The court concluded that landowners must have in place a reasonable system for assessing and managing tree related risk.

Mickewright vs Surrey County Council (2010) – This case started to rebalance some misunderstandings about managing tree risk and considered that it was not practical for a landowner to ensure that his/her land was completely safe. In this case, while the council had a system in place for inspecting its trees, the inspection had failed to identify a branch that subsequently failed. The court concluded that, given the available information at the time of inspection, the defect would not have been identified and it was not reasonable to expect every defect to be found. This conclusion is important when considering the Cavanagh case introduced at the beginning.

Stagecoach vs Hind (2014) – While previous cases had started to define the expectation of competence in the inspector and the requirement for a system for determining inspections, this case sets the expectation in regard to the need to ensure that inspections are undertaken with a degree of regularity. While the frequency is not defined, this case highlights the importance of ensuring that inspections are a regular occurrence. The court made it clear that landowners are required to act in a reasonable and prudent manner. This requires regular inspections of a tree, but this

may be done informally, with expert advice being sought when an issue is identified. This is an important consideration when reflecting how insurers may regard the management of tree related risk (see below).

Cavanagh vs Witley Parish Council (2018) – A summary of the background has been given at the beginning, but the findings of this case are important. When a landowner has an inspection regime, and employs a competent person to carry out the inspections, it is not sufficient to take a 'one size fits all' approach to managing trees. By this, it is

considered that the courts will now expect landowners to take a more bespoke approach to managing individual trees. A blanket approach that states all trees in a given location (referred to hereafter as zoning) will be inspected on a set frequency will not be acceptable if there are individual specimens in that location that will

require a different approach and frequency. Landowners must know their trees and where they are growing in order to reduce the risk of damage or injury to a third party.

This most recent case might be considered a retrospective step in the advancements that have been made towards practical approaches to tree risk management. However, it is more nuanced than that as, at a simple level, it asks landowners to take a different approach to larger, older trees growing in vulnerable locations than it takes to younger, smaller trees in the same place

What will insurance companies expect?

At a very simple level, insurance companies expect landowners to act within the law, and to act in a reasonable and responsible manner. The Stagecoach case has made it clear that when a landowner identifies a hazard, action must be taken to either reduce or remove it, or put in place measures that mean third parties are able to avoid it. A failure to take such steps might be considered reckless and be grounds for an insurance company to refuse a claim. By contrast, the Stagecoach case also makes it clear that, in the absence of evidence to the contrary, a landowner is not expected to undertake works to mitigate a hazard that has not been identified. In cases where a hazard might have been identifiable had the tree been inspected, but no such inspection took place, the landowner might be negligible,

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but public liability insurance exists to cover such acts of negligence. The Bowen case expects landowners to have in place a system to assess the risk presented by trees, and therefore it is not acceptable to take no action at all. This could be considered reckless. With this in mind, landowners should put in place a reasonable, cost effective and practical system to ensure that trees growing on their land that could affect third parties are inspected. By adopting and implementing such a system, a landowner should be able to demonstrate to their insurer that they have taken the required steps to meet societal expectations.

Managing tree-related risk

While legal cases and insurance expectations set a benchmark of what needs to be done, there is little by way of guidance as to how to meet these goals. However, there are four guidance documents that provide help and assistance to landowners, as well as those involved in the inspection of trees and assessment of risk.

Forestry Commission Practice Guidance (2000)

– Hazards from Trees

This document has been given notable significance following the Cavanagh case, as it was one of the guidance documents that the court relied upon in determining that the inspection regime adopted by Witley Parish Council was not sufficient. Although this document is almost 20 years old, it is still the official guidance note provided by the Forestry Commission and it still has relevance in the management of trees today. The introduction to this guidance note sums up its approach to hazards associated with trees in a very succinct manner:

“This Practice Guide indicates the responsibilities of owners and managers for assessing the risk of hazards from trees, and considers what inspection procedures might be appropriate” (p.1)



Tree failure is a natural process and it is not necessary to inspect every tree. The location of the tree is a determining factor in the inspection regime. (Photo: Lockhart Garratt)

The guidance note goes on to explain that the need for any particular tree to be subject to an inspection is dependent upon the usage of the area around that tree. This is a common theme across all the guidance and legal expectation, and is the basis on which **zoning plans** should be created.

The importance of the document as an informative reference to the courts is clear, as it provides detailed guidance to both the level of inspection required and the frequency and timing of inspections. The suggestions made through this guidance document are closely linked to the findings in many of the court cases detailed above. This is an important document for landowners and managers to understand and is freely available to download from the Forestry Commission website (Lonsdale, 2000).



Knowledge of tree stock and the usage of different areas is critical for landowners when preparing their tree management system. (Photo: Lockhart Garratt)

Well-managed Highway Infrastructure
– A Code of Practice (2016)

Commissioned by the Department for Transport, this guidance note has been adopted by a wide group of parties interested in the management and maintenance of the UK Highways network. It is of relevance to the issue of tree risk management, as the UK road network presents one of the highest potential risk areas in terms of trees, and yet tree lined roads form a critical part of our landscape as well as green infrastructure, providing a rich variety of habitat for numerous species of plants and animals. There is a delicate balance to be struck between managing trees for the safety of road users and maintaining the wider societal and environmental benefits that trees have to offer. A previous version of this document, published in 2005, is one that the courts have been known to consider when determining how tree risk is managed.

The management of roadside trees is therefore critically important and is an area that can be confusing, not least of which in determining who is responsible for which trees. This article will not attempt to answer that question, but landowners and managers can be reassured that a key recommendation within the guidance note states that:

“A balanced and structured system can only help reduce the potential for claims of negligence.”

“Materials, products and treatments for highway infrastructure maintenance should be appraised for environmental impact and for wider issues of sustainability. Highway verges, trees and landscaped areas should be managed with regard to their nature conservation value and biodiversity principles as well as whole-life costing, highway safety and serviceability.” (Recommendation 35 – Environmental Impact, Nature Conservation and Biodiversity, p. xiii)

Achieving a reasonable balance between retaining trees for their importance as landscape and biodiversity features, and human safety is a determining factor in how highways managers look after these trees and should be a guiding principle for land managers more widely. This document is freely available to download from the UK Roads Liaison website (Department of Transport, 2016).

National Tree Safety Group

– *Common Sense Risk Management of Trees (2011)*

This guidance document is a slight anomaly in the collection as it is one that has not (in its entirety) been tested or relied upon in court. However, it is a document that has been drawn together by a wide variety of parties across all sectors who have an interest in trees, and seeks to provide a balanced and proportionate guidance to

landowners as to how to manage tree related risk. It is widely accepted by the arboricultural industry and wider stakeholders as a key document in the management of tree and hazards. The issue of balance and proportionality is the theme that runs through the

document and is summed up in the introduction:

“The NTSG believes that one fundamental concept should underlie the management of risks from trees. It is that the evaluation of what is reasonable should be based upon a balance between benefit and risk. This evaluation can be undertaken only in a local context, since trees provide many different types of benefit in a range of different circumstances.” (p.11)

This document does not seek to tell landowners how to inspect their trees, nor does it provide detail on the frequency of inspections, but it seeks to encourage landowners and managers to ensure they have a detailed understanding of their tree stock, so that appropriate and informed management decisions can be made. As with the previous guidance notes, this is freely available to



Age and species are important when considering trees, and the benefits they accrue to the wider society can outweigh the risk posed. Veteran trees are an example of when great care is required over management approaches. (Photo: Lockhart Garratt)

download from the NTSG website (National Tree Safety Group, 2011).

HSE SIM 01/2007/05 – Management of risk from falling trees

The stated target audience of this guidance note are FOD (Field Operations Directorate) Inspectors and Local Authority Enforcement Officers. While the previous three guidance documents may be considered to be the carrot, this document might be viewed as the stick as it provides guidance to those who might be investigating an incident that involves a failed tree. In the introduction there is a specific caveat that this document is not intended as a

guidance document for duty holders. One of the more important considerations of this document is the highlighted need for there to be a system in place.

The overall approach taken in this document remains one of a proportionate and balanced assessment of the risk given a range of factors. Crucially this document recognises that the risk of a person being hit or killed by a tree or falling part of a tree is extremely low, and it reinforces the fact that landowners must do “*all that is reasonably practicable to ensure that people are not exposed to risk to their health and safety*”. It explains that landowners should have in place a system for managing their trees, a conclusion that was reinforced by the Bowen vs National Trust case in 2007.

As with all of the above documents, this is freely available to download from the HSE website (Health and Safety Executive, 2013).

Cost-effective management of trees

It is clear from the combination of court judgements, statutory requirements and best practice guidance that landowners need to take several steps to demonstrate a responsible, balanced and proportionate approach to managing the risks associated with trees:

1. Know your tree stock
2. Inspect trees that are located in key areas
3. Know when to get professional advice
4. Take action to mitigate identified risks

These four points can be summarised into a single approach– a **tree risk management system**.

A tree risk management system is made up of four elements:

- A tree risk management policy (TRMP) that defines the approach that a landowner will adopt in the management of their trees.
- A zoning plan to inform the landowner of the different rates of occupancy by third parties across their, or neighbouring land.
- The undertaking of surveys to identify hazardous trees and assess the risk presented by the hazard. This includes mitigation options to eliminate or reduce the risk to an acceptable level.
- Formally reviewing or auditing of the overall system on a periodic basis to ensure that the adopted system is being used proactively and continues to be fit for purpose.

While there is a cost to be incurred in the development of a tree risk management policy, the adoption of this approach typically results in a long-term cost saving as landowners start to develop proactive and proportionate tree management. Often this management will empower the landowner to undertake a considerable part of the survey work in-house, allowing budgets to be dutifully focussed.

Professional assistance can be deployed to review specific issues rather than a more blanket approach of employing a professional to inspect every tree within the landowner's estate. Landowners are in an unenviable position with regards to the management of trees. An increased blame culture has led to a perceived rise in claims being made for negligence, while simultaneously, an enhanced public awareness of the importance of trees and the current threats they face means that there is a greater level of resistance towards tree removals.

A defensible approach for landowners to adopt to meet such challenges is to put in place a robust management system that ensures an inspection regime and any ensuing works are proportionate to the level of risk presented. A balanced and structured system can only help reduce the potential for claims of negligence.

Trees are such a key feature of our landscape and integral to the biodiversity that exists across that landscape, they must be well managed and maintained so they can be retained providing sustainable green infrastructure long into the future with reduced risk to people and the environments in which they live, work and relax.

References

- Department of Transport (2016) *Well-managed Highway Infrastructure A Code of Practice* <http://www.ukroadsliasongroup.org/en/utilities/document-summary.cfm?docid=4F93BA10-D3B0-4222-827A8C48401B26AC>
- Health and Safety Executive (2013) *Management of the risk from falling trees or branches* (SIM 01/2007/05). London: HSE. http://www.hse.gov.uk/foi/internalops/sims/ag_food/010705.htm
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- National Tree Safety Group (2011) *Common sense risk management of trees*. Edinburgh: Forestry Commission. <http://ntsgroup.org.uk/guidance-publications/>

Further reading from the QJF archive

These articles can be accessed online by logging into the members' area of the RFS website, then following links to the *Quarterly Journal of Forestry*.

- Finch, R. (1997) Caring for Veteran Trees - The Practicalities. *QJF*, **91**(3):231-236.
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