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Injuries caused by falling branches who's to blame?

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Negligence against a landowner who was sued when a heavy branch from one of his oaks fell into the path of a car, severely injuring the driver was successfully defended by Lea Brocklebank, a partner at Bond Pearce.

The judgment, which was handed down on Thursday 16 August 2008;

- Clarifies the nature of a landlord's duty to inspect for damaged trees
- Confirms that it is possible to discharge this duty, even where a system of inspection is unrecorded and ad hoc
- Illustrates the importance of ensuring an expert's objectivity and independence

The Judge emphasised that whilst a systematic and recorded inspection regime would make it easier for land owners to resist claims arising from tree failures, an informal system of regular visual inspections carried out by workmen who were skilled and expert in their chosen trade albeit without formal, paper qualifications would be sufficient.

THE CASE

Albert Atkins v Sir James Scott [2008] 5 August, Aldershot & Farnham County Court

(HHJ Iain Hughes QC)

The facts: On 30 September C was injured when driving along the A32 in Hampshire when his car was struck by a branch that had fallen from a 200 year old oak tree growing on D's adjoining estate. C sued D in common law negligence contending that D had failed to undertake a proper inspection of the tree, one that would have revealed a deformity: which in turn would have identified the danger that the branch presented and prevented the accident. **The decision:** The claim was dismissed. HHJ Hughes QC found on the facts:

- (i) D's did have a sufficient system of inspection even though it was informal;
- (ii) Although there had been a crack in the bark on the branch that failed for at least a year, it would not have been observable by competent inspection;
- (iii) On the facts, C had been injured by an unfortunate accident for which no one was to blame.

Summary of legal principles:

HHJ Hughes clarified the law concerning the nature and extent of a landlord's duty to inspect:

- The standard of care is that of the reasonable and prudent landowner. This is higher than an ordinary urban or rural casual observer of trees but less onerous than a scientifically qualified arboriculturist, per Lord Normand in *Caminer v Northern and London Investment Trust Ltd [1951] AC*;
- A claimant must prove that proper inspection would have led to something being done that would have prevented the accident, per Lord Reid *ibid*;
- The court will look to the practical guidance issued by relevant bodies, such as the Forestry Commission or the Health and Safety Executive, when determining what is established good practice. The latter states that a quick check by a person with a working knowledge of trees, once a year, is sufficient to discharge the duty of care.
- The nature and extent of the practical steps that a landowner is required to undertake will vary with the particular circumstances of each case;
- Climbing inspections and the routine use of binoculars when inspecting each tree were not reasonably required;
- An annual inspection by a competent person was an important component of any suitable system of inspection;
- In determining whether any individual inspector was competent to undertake this task adequately, regard should be had to any reported authorities and to expert and other evidence in the individual cases in preference to any formulaic system of qualifications or classifications in particular such as whether a person should be regarded as a level 1 or 2 inspector.

The judge observed *obiter* that a drive-by inspection from the A32 would not have been sufficient to discharge the duty of care.

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Factual findings: D's informal system of tree inspection was sufficient to discharge his duty of care. D employed two very experienced woodmen who would inspect the trees during the process of clearing fallen deadwood at least one a year prior to silage mowing. Their longstanding knowledge of the trees within the estate and their practical understanding was sufficient to equip them to spot diseased limbs or other defects that might constitute a danger. The inspections took place when the trees were in leaf, as this is the best time to spot defects. These and other staff were all instructed to be alert and to report to D any arboreal defects. D also consulted a forestry expert with a degree in Estate Management, who was on hand to advise on any particular problems that might arise. D's policy was to err on the side of caution once a defect was spotted, whether this involved taking down the tree or bough or merely reducing foliage, so as to remove any risk that a defect might pose. The material tree had been inspected within 12 months of the accident.

The defect subsequently discovered on the bow which fell into the road would not have been observable to any reasonable inspection. This was because the crack was high enough up the tree and located along uppermost part of the bough so that it would have been neither probable nor reasonably possible for a competent inspection to notice it or discern it from the natural fissured bark of the oak tree. Although the Forestry Commission suggested an annual inspection in the autumn, D's inspections in the spring and summer were sufficient. The transcript of the judgment rewards careful reading on these issues.

Evidential issues

C's case depended on his establishing that D had failed to implement a system of inspection which would have revealed the defect and prevented the accident. Both parties appointed arboriculture experts to advise on these issues. However the judge was clearly unimpressed by C's expert, finding him at fault in nine separately listed areas, leading him to prefer D's expert testimony wherever it conflicted.

The judge's appraisal of the comparative merits of the two experts' testimony is also worthy of attention.

This illustrates how important it is for expert witnesses to retain their objectivity and independence when exercising their function. They should always be mindful of the fact that their overriding duty under CPR Part 35.5 is to help the court on matters within their expertise. They should never allow themselves to be perceived to be the unwitting partisan of their instructing solicitors or their client.

Similarly, instructing solicitors should be wary of acting in an overly intrusive fashion that might be viewed as attempting to interfere with the experts' duty to the court. In particular, solicitors should not interfere in the compilation of a joint statement.

The judge identified a number of tell-tale signs that suggest that C's expert evidence was tendentious, in that it appeared to have been developed to advance an objective standard whatever level of inspection regime would have led to the discovery of the defect in question.

The judge also took into account the actions of C's instructing solicitors, such as where she prevented the experts from discussing the issues at a joint experts meeting and in the degree to which she had influenced her expert in the production of his report.

A full copy of the transcript is available on request.

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