



Briefing Note on *Witley Parish Council -v- Cavanagh*  
(England and Wales Court of Appeal Civ 2232)

This Briefing Note is published by Jeremy Barrell to provide tree-oriented commentary on the civil proceedings in the case of *Cavanagh -v- Witley Parish Council & Shepherd*, and the subsequent High Court Appeal of *Witley Parish Council -v- Cavanagh*.

## Summary

On 3<sup>rd</sup> January 2012, Mr Cavanagh (The Claimant) was driving a public bus along the A283 Petworth Road in Witley, Surrey, when a mature lime tree fell across the road hitting the vehicle and causing him severe injuries. The responsibility for the tree rested with Witley Parish Council (The First Defendant) who operated a three-yearly inspection regime leading up to the incident. The Second Defendant was a tree and forestry contractor, Mr Shepherd, who inspected the tree about three years before the failure. The experts agreed that the tree failed due to severe and extensive decay in the root system, with high winds being a contributory factor. At the time of failure, the tree had a significant fungal bracket of the genus *Ganoderma* at its base, but on the side furthest from the road.

The case was heard in the High Court in December 2016 and the judgment handed down in February 2017 [2017] EWHC 278 (QB) in favour of the Claimant <sup>1</sup>. The judge found that a three-year inspection regime was inadequate and that a reasonable inspection frequency should have been every two years. The tree experts were Dr Dealga O'Callaghan (The Claimant), Jeremy Barrell (The First Defendant), and Simon Holmes (The Second Defendant).

Permission to appeal was sought by the First Defendant, Witley Parish Council, and that appeal was heard on 3<sup>rd</sup> October 2018, with a written Approved Judgment dated 11<sup>th</sup> October 2018 [2018] EWCA Civ 2232 <sup>2</sup>.

## Commentary on tree issues

As an expert witness in this case, I have had access to all the documents, seen the tree remains, heard all the evidence in court, and read both the first instance judgment and the appeal judgment. In addition to the published legal commentary on the case that is in the public domain to be read, I have formed the following tree-oriented views based on my first-hand experience in this case:

### **The National Tree Safety Group (NTSG) guidance**

The NTSG guidance, *Common sense risk management of trees*<sup>3</sup>, was published towards the middle of December 2011, and the incident happened on 3<sup>rd</sup> January 2012. This only allowed two to three weeks, which included the Christmas and New Year breaks, for the duty holder to access the document, digest its content, and act on its guidance. For this reason, I did not reference the document in my report and so it was not accessible to the judge, although it was technically current at the time of the incident. Had this document been available, *Scenario 4: Local authority – rural*, would have been an important reference, where it states: "*Competent arboricultural staff survey high use areas every three years.*" In future cases, the NTSG document will be a credible reference, and that guidance is likely to be given significant weight when considering the matter of inspection frequency.

### **The relevance of the Forestry Commission (FC) Practice Guide *Hazards from trees*<sup>4</sup>**

In the first instance judgment, the judge placed significant weight on the FC Guide and summarised its relevance as follows:

*"67. The document from which I receive most assistance is the FC Guide. I distil the following principles: Where a tree (or group of trees) is within an area (one may say a high-risk area but the language is unimportant) where people or high value property are within their falling distance, inspection is necessary. If it can be reasonably foreseen that there is a risk of serious injury/damage, a duty arises to minimise that risk; this is particularly the case alongside a public road, more so if it is busy and more so if the relevant tree(s) is / are large or old. It is known that trees (particularly older trees) can become diseased and unstable within a relatively short time frame."*

This weight was reiterated in paragraph 35 of the appeal judgment, with specific emphasis placed on this extract:

*"A third zone, representing a need for inspection to be carried out more frequently as well as after severe storms, may be appropriate for the strip along the public road. The need for such a zone applies especially if the road is busy and if the trees are large or old enough to represent a significant potential hazard. The same category of zoning for inspection may also be satisfactory for the amenity and car-parking area, where people and property are close to trees for much or all of the time. However, this area will probably need to be placed in a somewhat higher category, to take account of the need for inspections to be done with especial rigour. Also, the usage of this zone may be more conducive to trees becoming hazardous, for example due to vehicle impacts and soil compaction."*

The FC guidance was published in 2000 and, in the absence of the NTSG document in the case papers, it was the most current reference available to the judges in both hearings. Indeed, in the context of this advice, the interpretation by the judges that large trees at high-usage locations need to be inspected with *"especial rigour"* cannot be challenged. However, the failure of the explanations in the FC document to articulate that *"especial rigour"* could also include a more detailed inspection as an alternative to more frequent inspections, did not assist the judges in their interpretation. Additionally, although much of its content is still relevant, there are some hazards that are missing from its Appendix 1, which experience is proving to be material considerations in modern tree risk management, e.g. dead trees and branches, large occluded wounds, severe imbalance, asymmetrical root distribution, the cumulative impact of multiple defects, etc. These deficiencies provide a clear indication that the FC document needs reviewing before it will be suitable for assisting a realistic and balanced interpretation in future cases.

Arboricultural thinking, experience, and terminology have moved on since this FC document was published in 2000, and will continue to do so with the current review of the NTSG document. The original NTSG document is 12 years newer than the FC guidance, and that FC reference is no longer current, which is why it is likely that the NTSG document will carry more weight in future cases.

### **Clarifications on the meanings of *"high-risk position"* and *"high-occupancy position"***

In paragraph 27 of the original judgment, the judge describes the position of the tree as high risk: *"When the literature comes to be considered, this tree should not be treated as a high-risk tree; but it was in a high-risk position"*. Throughout that paragraph the judge discussed and accepted my explanation that the tree could not be high risk until the defect was found, but I failed to successfully articulate that the same reasoning applied to the position, i.e. the position cannot be high risk because of high occupancy alone, it must have an associated high likelihood of failure to make it high risk.

This reasoning is based on the widely accepted definitions of risk<sup>4</sup>, which is often simplistically articulated as *Risk = Likelihood x Consequences*. In conceptual terms, at the extremes of the ranges of options, both likelihood and consequences can be considered as high and low. The matrix in Figure 1 shows the combinations, with the highest risk (red) arising from high likelihood and high consequences, and the lowest risk (green) arising from low likelihood and low consequences.

**Figure 1:** Matrix conceptualising the outcomes of likelihood and consequences combinations

	High likelihood	Low likelihood
High consequences	High risk	<High risk, but >Low risk
Low consequences	<High risk, but >Low risk	Low risk

All the other combinations (orange) deliver a level of risk somewhere between both those extremes, but most importantly, not at the highest or lowest extremes. No combination other than high likelihood and high consequences can deliver high risk. In short, high occupancy (lots of targets) cannot reasonably be interpreted as high risk unless there is a high likelihood of failure.

At present, the technical tree risk management literature is inconsistent and vague on the differences between high-risk and high-occupancy positions and, as the first instance hearing confirmed, the experts can also be confused. There is clearly a need for a credible clarification to be published, which will allow a technically correct interpretation relating to trees to evolve for reference in future cases.

### Practical implications for duty holders

At the time of the Cavanagh incident (2012), tree risk management was in a state of uncertainty because of confused and dated technical tree guidance. Arboricultural thinking and experience is rapidly progressing, and it is likely that future cases will be viewed in the light of more modern and better-informed technical publications. As our understanding of those technical issues improves, e.g. the rigour of an inspection regime can be improved by more detailed inspections as an alternative to an increased inspection frequency, then some of the issues raised in the Cavanagh judgments may be extinguished by future cases.

However, in practical terms, until those cases are heard in the context of a more modern interpretation of appropriate tree risk management, duty holders would be wise to make provision to check trees like the Witley lime at least every two years.

- 1 High Court: *Andrew Cavanagh -v- Witley Parish Council & Kevin Shepherd* <https://www.barrelltreecare.co.uk/resources/useful-documents/2016-civil-judgment-cavanagh-v-witley-parish-council-and-shepherd/>
- 2 Court of Appeal: *Witley Parish Council -v- Andrew Cavanagh* <http://www.bailii.org/ew/cases/EWCA/Civ/2018/2232.html>
- 3 Forestry Commission Practice Guide *Hazards from Trees: A General Guide* (2000) <https://www.forestry.gov.uk/website/publications.nsf/DocsByUnique/F4B437F845E831D280257EBB0046FB53>
- 4 ISO 31000 (2018) *Risk management – Guidelines* <https://www.iso.org/iso-31000-risk-management.html>



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