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TREE CONSULTANCY

Extreme consulting; what it takes to be a successful tree expert witness

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Jeremy Barrell is one the UKs top tree expert witnesses, representing the successful parties in two recent high profile legal cases on tree management. In the High Court case of *Poll v Bartholomew* (2006), the Judge agreed with his view that the Defendant had not met the required duty of care in terms of tree inspections. More recently, in the case of *Atkins v Scott* (2008), he was part of the Defendant's team that explored the issue of inspector competence, resulting in a successful defence against the claim. In this paper, he expands on the issues in each case and how they are leading to a better understanding of the duties of care that the courts are expecting from tree owners in the UK. Perhaps, more importantly, for aspiring tree consultants who wish to progress their careers, he also reviews what internationally relevant lessons can be draw from these cases.

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THE DUTIESAND RESPONSIBILITIES OF AN EXPERT WITNESS

Acting as an expert witness is the pinnacle of professional practice in any discipline, and the tree world is no different. Sitting in a comfortable office writing a report is one thing, but standing up in a public court and defending it against the most agile of legal minds is in a different league. Exacting standards and very high expectations make it psychologically demanding, and the ever-present possibility of public humiliation for those who fail, mean it is definitely not for the faint-hearted. From the initial site visit, all the way through to the court appearance, the written material and personal conduct of expert witnesses are scrutinised in every detail; this is consultancy at the highest level, and it is extreme.

Exploring what standards of behaviour are expected of expert witnesses and how can they be met are sensible starting points for arborists with aspirations to go all the way to the top. In the UK, the evolution of codes of conduct and ethical behaviour has been driven by Judges setting out what they expect from experts in a number of landmark cases. Over time, these have been formalised into a wider set of Civil Procedure Rules (CPR), with Part 35 (Ministry of Justice, 2008) and its supplementary Practice Direction, specifically dealing with the conduct of expert witnesses. Further explanations are provided by the Civil Justice Council (CJC, 2005), which includes the following pointers for expert behaviour:

- An expert's overriding duty is to the court, and not to the paying client
- Experts should provide opinions which are independent, regardless of the pressures of litigation.
- Experts must not stray outside their area of expertise
- Expert reports must summarise the range of opinion, and not just focus on their client's perspective

Although this guidance is directly relevant to arborists, it has an extremely powerful provenance because it was created by lawyers and applies to experts of all disciplines.

In contrast, the lead body for tree consultancy in the USA, the American Society of Consulting Arborists (ASCA), has developed Standards of Professional Practice (ASCA, 1996) specifically for arborists. It usefully identifies and focuses on the virtues that tree consultants should strive to achieve, which include:

- **Competence** – working to a measured standard
- **Due care** – a level of performance necessary to fulfill specified requirements measured against a standard of care
- **Impartiality** – acting as a disinterested and unbiased third party
- **Independence** – free from influence, control or domination
- **Integrity** – candid, fair, honest and of sound moral principle
- **Objectivity** – free from personal influences, emotions or prejudices
- **Public trust** – honouring the public trust in professionals and serving the public interest

Although this is strongly orientated towards the US consulting environment, its principles accurately reflect the wider remit for expert practice covered by the UK guidance, and it is an extremely useful international reference. ASCA supplements this code with a widely acclaimed annual Academy, where expert ethics and behaviour are explored in detail and formally examined before graduation is confirmed.

FACTORS THAT AFFECT THE SUCCESS OF EXPERT WITNESSES

Of course, high-flying principles are all very well, but what really matters is how they are put into practice and what they mean in terms of an expert's daily work. How do everyday procedures need to be upgraded to meet these most demanding of standards, and are they practically attainable or just hopeless aspirations? My experience is that there is no simple recipe for making the grade; instead, success seems to be very much dependent on the accumulated impact of lots of small improvements across the spectrum of normal working practice. Most of these qualities can be learnt rather than relying on a rare aptitude to do the job, which is good news for the majority and not just the fortunate few who are naturally good at it.

For those of you who are still interested, here are some of the issues, from writing reports to

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appearing in the courtroom, that I believe are likely to influence your potential to succeed as an expert witness:

- **Practical experience:** An essential and irrefutable cornerstone for providing solid tree management advice, and therefore the best possible foundation for an outstanding expert witness career, is practical experience. Those that do not have it will try to play it down, but I have little doubt that the cream of our future experts are out there today climbing around in trees.

- **Qualifications:** There are academics who would argue that qualifications come first in the wish-list of credentials for an expert witness, but without experience to place the theory into context, even the most impressive qualifications count for very little. Armchair arborists are often eloquent and articulate, and frequently turn up as entry-level experts. However, as they progress higher up the food chain, the bluff becomes increasingly hard to sustain, and it is only a matter of time before any weaknesses are exposed. The most potent combination is extensive practical experience with heavy-duty qualifications, but that is a rare recipe and takes time to compile.

- **Wisdom and age:** It is not a quirk of statistics or an unfortunate coincidence that the most accomplished expert witnesses are all over 40 years old. There is simply no substitute for years of experience; no books, no courses, no way, except to use painful mistakes to hone vital skills. Of course, there will always be the young upstarts trying to make their names, but with them comes a lament of stumbling and embarrassment before they get anywhere near the top. There is no short cut; to be wise, you have to do the time.

- **Organisation and accurate records:** To be well-organised takes time; it is always a delicate balance between doing so much in the background that there is scarcely time to do the job, and not quite doing enough to avoid being compromised when you need the detail. Keeping reliable and meticulous records is a hallmark of the best experts, and there is no easy formula. The test will be a simple one, and it will come when you are in court, with a host of witnesses. If you can answer where, when, why, how and what without delay, you will have passed the test. Immense credibility flows from being able to retrieve simple facts quickly and precisely. It is very hard to appreciate that, what seems to be so burdensome and unnecessary at the time when there is no pressure, can suddenly become so pivotal in the cauldron of the courtroom. The most successful experts are highly organised in every aspect; if you are not a natural, it can be learnt, but if you have no enthusiasm for it, then it may be best to avoid this career path.

- **Attention to detail:** A frequent passtime of cross-examining counsel is to explore the seemingly insignificant detail of an expert's opinion and expose any cracks, inconsistencies and weaknesses. Most big things, including expert opinions, are made up of lots of smaller parts, fitted together to produce the end result. A commonly effective strategy for inflicting damage to that overall opinion is to create doubt about, or even worse to prove false, one of the constituent parts. Detail is very important to lawyers and Judges, which, in turn means experts who ignore paying very careful attention to it, do so at their peril. Everything matters; spelling, typos, names, dates, times, measurements and records of conversations. Every detail that an expert gets caught out on is accumulating damage to credibility, and one step closer to the precipice of failure.

- **Confidence or arrogance?** There is a fine line between being confident, i.e. a deep understanding of your position, and arrogance, which is an extreme disregard of other perspectives. Experience breeds confidence, which is why having done what you are talking about is so important. Cross-examining counsel will attack opposing experts from all sides; it is debilitating and demoralising to be continually ground down, but that is the nature of being an expert witness. Confidence is born from a deep analysis and understanding of the issues, and spending time in advance to work on this detail often proves a wise investment when the day in court finally arrives.

- **Honesty and integrity:** One of the toughest challenges for an expert witness is to build up and maintain a positive perception of

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honesty. Courtrooms are inherently adversarial and, although an expert's duty is to be above the advocacy, it is an uphill struggle because they are perceived to be part of a team (defendant or claimant) that has precisely the opposite duty, i.e. to advocate one position or the other. The conflicts are very real and the only way to succeed is to be meticulously honest; never try to argue a lost point and always concede immediately if you are proved wrong. Easy to say and psychologically hard to do, but the odds are you will end up more damaged if you persist in trying to fight a lost cause.

- **Passion:** Enthusiastic people that care about their work are more of an exception than the rule, but it makes a big difference. Passion, in moderation, can have a very positive effect, and even the most cautious Judges are likely to be more receptive to an expert's opinion if they detect a caring attitude and a deep-held belief in the reasoning. If it is just a job and that is all it ever will be, then being an expert witness is probably not for you.

- **Demeanour:** Never forget that first impressions matter; the way you sound and look are the main clues that people (it is worth remembering that Judges are people as well) use to make judgments on capability and competence. The positive effects of a happy, cheerful disposition and a confident body posture delivers a significant advantage over the negative impacts of a listless, bored voice and a slouching manner.

- **Calmness:** Effective experts will remain calm at all times and never be provoked into emotional or uncontrolled outbursts. Cross-examining counsel will always try to engage an expert directly and stir up as much emotion as they can. One of the prime objectives for an expert is to provide balanced and well-reasoned opinions that are free from emotional bias. Any display of poor emotional control when under pressure could seriously undermine an expert's impartiality, and hand the initiative to the opposition. One of the best tips for doing this is never to engage with the questioner and always direct answers to the Judge.

- **Good manners and common courtesy:** Judges do not generally take kindly to bad manners or any type of discourtesy. Experts should always observe the common courtesies of never interrupting, talking over other speakers or showing disrespect for the opinions of others. If an expert is being bullied or these courtesies are lacking, then an appeal directly to the Judge will usually settle the matter (and often deal a psychological blow to the other side at the same time if the appeal is upheld). The perfect scenario for the other side is that an expert is goaded into responding to these pressures by being equally discourteous, and is then pulled up by the Judge.

- **Personal and written presentation:** Successful experts work very hard to align and engage people to their opinions by creating positive impressions. First impressions really matter; we all make decisions every day (and often very quickly) that are based on how people look or the written material they produce. Pleasant, personable, interesting, professional, tidy, concise and easy to understand are all positive impressions that facilitate alignment and engagement. Boring, untidy, bland, amateur and complicated are impressions that foster alienation and require a lot more effort to recover from.

- **Public speaking:** Thankfully, for the majority of us who are not natural public speakers, this is a skill that can be learnt and developed, with many simple tricks that can make a huge difference to the calibre of presentation and how stressful it is to deliver. It is an essential skill for all experts and it will have to be mastered by all those with high ambition. If it is an anxiety, then look for help from professionals, get plenty of practice and prepare thoroughly every time. Most of us will probably never be fully at ease, but the more you do, the easier it gets.

- **Body language:** It has been known for some time now that effective communication is highly influenced by body language, i.e. what you see and what you hear, much more so than the actual meaning of the words that are spoken (Borg, 2007). This subconscious language is redundant in the preparation of reports, but it is there to be used in court, where visual and verbal cues dominate the impact on proceedings. Whether we

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understand it or not, we are all highly influenced by the gestures, expressions, posture and tone of the people we meet, and experts are no different. The most effective expert witnesses will be aware of this power of persuasion and use it to their advantage by enhancing the positives and suppressing the negatives. Smiling, open gestures and dominant posture are all the hallmarks of the polished performers, and are an essential part of a successful package.

- **Internet discussion groups:** Internet discussion groups have failed to deliver their initial potential as an exciting new forum for debate because they lack the complete communication experience that is present in face-to-face discussions. Invariably they are dominated by a vocal minority and often more closely resemble a virtual running street fight than any reasoned exchange of opinions. A favourite line of enquiry, when lawyers identify an opposing witness, is to do an internet search on their name. The jackpot they are looking for is that one comment, recorded on a public forum, which compromises that expert. Heat of the moment written comments have a long shelf-life and, in the wrong hands, have career-ending potential. It is not a coincidence that the majority of the top experts are declining to engage with these forums; tempting as it may be, they are dangerous in the extreme and all participants contribute at their own peril.

- **Technical referencing:** It is tempting to subscribe to the idea that the more technical references an expert uses, the better the argument or the more robust is the opinion. In practice, it is very much the reverse; almost invariably, a closer analysis will reveal that the references have been used selectively, i.e. the bits that do not support the argument have been omitted, or are hardly relevant to the point being made. Inexperienced experts will frequently rely on references because they just do not have the confidence to run the argument based on their own first-hand knowledge. In contrast, the more seasoned operators will have the confidence to rely on what they have seen and know. Technical referencing is not a reliable measure of competence; in the very subjective world of trees, it is wise to use it sparingly and with caution.

- **Courtroom awareness:** It is almost a reflex action to look at, and answer to, the person who asks a question, but not so in court. The expert's duty is to the court and the Judge represents where the focused expert should concentrate. Cross-examining counsel's job is to engage, distract, disorientate and destabilise that focus through a whole range of tactics. Effective experts will never engage with cross-examining counsel, will always answer directly to the Judge, will always pause while a Judge is writing and always take the lead from the Judge, rather than the multitude of distractions that can be thrown by the other side.

- **Supporting your team:** Although bound by the professional constraints of independence, impartiality, etc, an expert is still part of a team, which would normally include a barrister, an instructing solicitor and possibly experts from other disciplines. An overriding duty to the court does not preclude them from supporting the team effort, and the most effective experts will do this, where there is no conflict. A great way to help your barrister is to take detailed notes of all the examination and testimony, including accurate quotes of key statements, where possible. Although most cases are recorded on tape, that detail is not available for barristers to prepare their summing up at the end of the case, and they do not have the capacity to write down every detail as they examine each witness. Taking long and accurate notes is tough to do, especially if the case runs for days, but it can pay big, big dividends to have an accurate record of who said what and when.

- **Judges and experts:** One of the mainstays of any successful expert is an impeccable reputation, with no blots on their record. However, Judges will not hold back on criticising experts, if they have not complied with appropriate standards of behaviour, and this can have a devastating impact on an expert's career. Written judgments remain in the public domain and so do any criticisms of experts recorded in them. It is very difficult to sustain a good reputation with serious written criticisms that can be accessed by

opposing lawyers and brought to the attention of Judges in future cases. There will always be pressure on experts from clients who desperately need to win and lawyers whose fees may be dependent on the outcome of the case. Experts who succumb and compromise independence or objectivity, by allowing interference from lawyers in the preparation of any written submissions, run a real risk of being found out in court, with potentially career-ending consequences.

- **Innovative explanations:** A primary expert role is to assist the court in understanding, often complicated technical issues, and there are very few rigid boundaries on how this is done. Traditionally, expert evidence has been text orientated, but photographs, animations, models and even videos can often be of great benefit, especially if they enhance the comprehension of concepts or sequences of events that are difficult to visualise. This can even extend to reconstructions on site. I once took a chainsaw into the High Court to demonstrate how frightening it would have been for a road protestor who fell from a tree during a confrontation. It was tricky to get through security, but it made the point very well, although we lost the case! Creative and innovative explanations of complex issues can be the difference between winning and losing, and can elevate an expert's reputation from average to exceptional.

- **Public scrutiny of work:** In consultancy at any level, it is a fundamental truth that anything put down in writing could turn up and be referenced in future proceedings. That is a very powerful reason to be meticulously careful with anything that is written, from formal documents in hard copy to informal, even personal, emails. One careless word taken in the wrong context, as they usually are, can have far-reaching consequences for both careers and reputations. An extreme example of such an event is the *Poll* case, where despite objections from both experts, a third party forced the publication of all the papers in the case, including the court transcripts. Every word that each expert wrote and said at the trial are available for public review (www.aie.org.uk), which is an extreme test of expert competence. Even by the time the case was over, both experts had no idea that this would happen, but when it does, it is beyond your control and you have to live by every single word that was spoken, as well as written. The potential for full public disclosure is ever-present for any document at any time in an expert's career, and should never be forgotten.

- **Consistency of opinion:** Whenever providing advice, there is always likely to be subtle pressures on experts to be as helpful as possible to their clients, it's human nature. Clients can be very persuasive; they have a vested interest in promoting their own position, which is often manifested as an exaggeration of the positives and turning a blind eye to the negatives of their situation. Inexperienced experts that succumb to these pressures, and say what the client wants to hear rather than deliver bad news, are likely to pay a high price if the case ever gets to court. The jackpot for cross-examining counsel is an expert that changes position, from one view in the written report (given in the comfort of friendly company) to a different view in the face of hostile verbal examination in front of a Judge. Such changes are common and usually fatal to the case. There are always two sides to every story, each one often as compelling as the other when heard in isolation. Consistency of opinion, irrespective of the forum where it is expressed, i.e. the core quality of independence, is essential for long-term survival as an expert witness.

- **Conduct in conflicts:** Serious conflicts with opponents arise from time to time in professional practice, and it is often difficult to judge an appropriate response. Of overriding importance is the professional requirement to minimise the introduction of emotional bias into heated exchanges. Easy to say, but very difficult to carry out when you or your ideas are under attack, sometimes from all sides and in a sustained way. A few pointers that can be reputation-savers in the heat of the moment include; avoid referring to an antagonist directly by name (why give them the credibility of being engaged); never be drawn into public slanging matches; always focus on your strengths, rather than being drawn to attack an opponent's weaknesses; there is never an excuse for disrespect or bad manners; and always

criticise ideas, never the person. Responding to unprofessional behaviour with more of the same is the mark of an amateur. As a last resort, all professional bodies have complaints procedures, and they should be used to resolve serious grievances.

DUTY OF CARE AND TREES

General principles

In broad terms, the duty of care that a tree owner/landlord is expected to exercise in the management of their trees is to have them inspected regularly by a competent person. When a case gets to court, the commonest arguments are then over what is a reasonable inspection regime, which usually involves detailed analysis of how it should be done, how often it should be done and who is competent to do it. There are no simple answers to all these questions; a recipe-based approach does not work and the final decisions are made from the subjective interpretation of all the evidence by the Judge.

In the event that an owner/landlord is found neglectful of their duty of care in terms of inspection, i.e. they did not have their trees inspected, it does not automatically follow that they will be liable for any harm that arises. Liability will only flow from that negligence if it can be established that a competent inspection would have identified the potential for harm and resulted in remedial works that would have prevented that harm occurring. If a defect that resulted in failure would not have been found in a competent inspection then, irrespective of any negligence from not carrying out an inspection, the owner is unlikely to be held liable for the consequences of the failure. This is a common scenario and often results in court examinations focusing on the competence of inspectors and whether causes of harm would have been discovered before the event.

Poll v Bartholomew

On the 11 July 2001, Mr Poll was riding his motorcycle along a road in Somerset when a tree fell from land owned by Viscount Asquith of Morley and caused him to have an accident, in which he suffered serious injuries. It was not clear if Mr Poll had driven into the tree because he did not see it as he came round a sharp bend in the road, or whether it had fallen on him. However, it was reported that at least one other driver in a vehicle had not seen the tree in the road and driven into it.

The tree in questions was an ash (*Fraxinus excelsior*) about 15m in height, with a main stump of about 1m diameter and four smaller stems 20–30cm in diameter forming the main crown. It was located in a hedgerow about 4m from the road with an open field on the other side of the hedge and an open entrance to the field within 30m. Its main trunk had been coppiced in the past during normal hedgerow management, which resulted in multiple stems from the original stump. One of these stems had a severe included bark defect and a fungal infection, which was not positively identified, but considered likely to be *Perenniporia fraxinea* by the specialist who examined it. There was also a fungal bracket about 15–20cm at the base of the trunk on the road side. The tree had been inspected from the road during a driveby inspection by a forestry contractor before the accident, but was not subjected to a closer inspection.

Dr O'Callaghan was instructed by the Defendants and prepared his main report in January 2003, and a further Addendum Report in June 2005. Subsequently, I was instructed by the Claimant in early 2004 to review that report and prepare my own report that was published in July 2005. Dr O'Callaghan and I prepared a joint statement, in September 2005. We then prepared a second joint statement in December 2005, in response to questions asked by the lawyers. The case was heard in the High Court in London in March 2006, in front of His Honour Judge MacDuff. The written judgment was dated 11 May 2006, with the decision in favour of the Claimant, Mr Poll. All of these documents, and a copy of the court transcripts for both days, are available for download from www.aie.org.uk.

From my site visit and the evidence I had seen, my assessment was that the size of the stem that fell, the severity of the defect and the closeness of the adjacent road, with regular and fast moving traffic, would have triggered immediate remedial work if it had been inspected before the accident. My opinion was the included bark defect would certainly have been visible and the fungal infection, through the relatively large bracket, was

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likely to have been detected in a detailed inspection. The defect and fungal infection would not have been directly visible from a roadside inspection because of heavy undergrowth. However, one very common characteristic of trees with included bark defects between stems is that they have multiple stems rather than one single stem. Multiple stems are normally visible from a distant visual inspection and should trigger a more detailed inspection, which would then identify any defects. In this case, the multiple stems of this tree, which were easily visible from the roadside, did not trigger a more detailed inspection. If they had done, that inspection would have identified the defect and the decay, prompting immediate remedial work. My view was that it would be common knowledge to any competent tree inspector that trees with multiple stems in hedgerows with a history of cutting are more prone to having included bark defects than single stemmed trees. These can be easily seen from a distance and should then be more closely inspected. Being aware of the issues relating to multiple stems is good practice for anyone carrying out tree hazard inspections and an essential element of any competent inspection regime. The multiple stems of the subject tree and its location in a hedgerow means it would have been obvious and predictable that it was defective, and so the failure was reasonably foreseeable. Furthermore, it would have been easy to inspect with an open field and unobstructed entrance within 30m of the tree.

The Claimant's case was that both the landowner/landlord and the highway authority have a duty of care to identify hazard trees and take reasonable actions to reduce risks to acceptable levels, which they failed to meet for this tree. The Defendants argued that the duty of care had been met through the driveby inspection, and that, in any event, the fungal defect would not have been found during a competent inspection. The forestry contractor who carried out the inspection provided a written statement, but was not called to give evidence and so he was not examined on any of the issues. Based on the evidence and testimony before him, HHJ MacDuff found in favour of the Claimant because a competent inspection was not made.

Atkins v Scott

Mr Atkins was driving along the A32 towards Alton on 30 September 2004 when a large branch fell from an oak tree on land at Rotherfield Park Estate and hit his car. Mr Atkins suffered serious injury and made a civil claim against the owner of the tree, Sir James Scott Bt. I was instructed to act on behalf of the Defendant, Sir James Scott Bt, and produced my main report in February 2005. Subsequently, another expert was instructed to act for the Claimant and produced his report later that year. I produced two further supplemental reports and we both prepared a joint statement of common ground. The case was heard before HHJ Hughes in a County Court hearing in August 2008. The written judgment was handed down on 16 August 2008, with the decision in favour of the Defendant. A copy of the written judgment can be downloaded from www.aie.org.uk.

The case focused on the suitability of two estate workers to carry out competent inspections and whether a split in the failed branch would have been visible during a competent inspection. Both workers had been woodsmen on the estate for many years and had extensive practical experience, but had no significant paper qualifications. Furthermore, there was no written inspection record for the tree that failed. The Claimant's advisors had identified a crack on the upper side of the failed branch that was up to 5mm in width, about 80cm in length and about 8m above the ground when it was on the tree. Much of the discussion in court revolved around whether the split would have been visible during a competent inspection, and therefore triggered remedial works that would have prevented the accident.

This case clarifies that the nature of a landlord's duty to inspect for tree defects will vary with the particular circumstances of each case. In this instance, climbing inspections and the routine use of binoculars when inspecting each tree were not reasonably required, and an annual inspection by a competent person was an important component of any suitable system of inspection. It also confirms that it is possible to discharge this duty, even where a system of inspection is unrecorded and *ad hoc*. However, HHJ Hughes observed *obiter* that a driveby inspection from the A32 would not have been sufficient to discharge the duty of care for this particular tree. He emphasised that whilst a

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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. 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 approach to qualifications and experience.

This case also illustrates the importance of ensuring an expert's objectivity and independence. HHJ Hughes found the Claimant's expert at fault in nine separately listed areas, leading him to prefer the Defendant'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. They should always be mindful 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 overly intrusive fashion that might be viewed as attempting to interfere with the expert's duty to the court. In particular, solicitors should not interfere in the compilation of a joint statement. HHJ Hughes identified a number of telltale signs that suggest that this had happened, in that the Claimant's expert evidence appeared to have been developed to advance an inspection regime that would have led to the discovery of the split, as an objective standard. The Judge also took into account the actions of the Claimant's instructing solicitor, 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.

The emerging wisdom on inspector competence

It is human nature to seek formulaic solutions to important problems because that approach delivers consistent and reliable answers, with little need for subjective interpretation. This works well in disciplines such as accountancy and engineering, where the inputs are mainly objective, but it cannot be so reliably applied to trees. The organic nature of trees makes them inherently variable, which in turn is compounded by an almost unlimited range of environmental influences. In the face of such variability, a recipe-based approach throws up so many exceptions to the rule that it becomes a meaningless exercise. Despite the best efforts of decision-makers, who often seek the comfort of a reliable formula to cover their backs, tree management will never quite fit into this mould. Really bad news for the theoreticians, who crave neat and tidy solutions; great news for arborists, whose subjective judgments become central in the whole process.

In the *Poll* case, Dr O'Callaghan and I were acutely aware of how inappropriate a formulaic approach to assessing inspector competence was, despite the obvious attractions of a simple recipe that delivered an indisputable answer. Our view was that it was not feasible or realistic to devise such a method because there was no objective measure of inspector credentials that would precisely define a threshold of competence. Instead, we were mindful that, in practice, almost any combination of experience and qualifications had the potential to deliver competence, but none were a guarantee. Faced with such a complex credential-based solution, we opted for a different approach, which focused on what a competent inspector must deliver. We decided that the distillation of an inspector's task was to identify tree hazards and assess the levels of risk, which would inform appropriate management recommendations to minimise the risk of harm. The essence of our reasoning was set out in the description of a level 2 inspector from the *Poll* case:

> "Level 2: A 'Competent Person' as recommended in Circular 52/75 will have sufficient training, expertise and/or qualifications to identify tree hazards, assess the levels of risk and make appropriate management recommendations."

The focus was off credentials and on the ability to do the job. *Poll* reinforces the principle that this is a matter to be explored on a person-by-person basis, through examination in court, and the decision on competence should be a subjective judgment.

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Turning to technical references, in 2000, some limited help on the matter of inspector competence was provided by Lonsdale (Lonsdale, 2000) in the Forestry Commission Practice Guide *Hazards from Trees: A General Guide*:

> "It is possible to recognise signs of possible weakness without detailed training but owners are expected to seek expert advice if they themselves are not able to recognise all these signs."

More recently, in 2007, on behalf of the UK government, the Health & Safety Executive provided broad guidance on inspection requirements at 10 (ii) of their Sector Information Minute (Health & Safety Executive, 2007) called *Management of the risk from falling trees*:

> "For trees in a frequently visited zone, a system for periodic, proactive checks is appropriate. This should involve a quick visual check for obvious signs that a tree is likely to be unstable and be carried out by a person with a working knowledge of trees and their defects, but who need not be an arboricultural specialist."

Both sources seem to be broadly moving towards the view that competent inspectors do not have to have detailed training or be specialists, but they do need to have a working knowledge of trees and must know when to seek further help. Importantly, the emphasis is certainly away from a credential-based recipe approach, and is more focused on the ability of the inspector to identify defects or signs of weakness.

In 2008, this reasoning was successfully presented in the *Atkins* case, where the Judge accepted that the estate workers, although lacking in formal qualifications, had sufficient experience to deliver competence, i.e. they were able to 'identify tree hazards, assess the levels of risk and make appropriate management recommendations', as defined in *Poll*. Furthermore, they proved that they could do this through their testimony on the stand under the most intense and detailed examination, which is the defining test of whether the threshold has been exceeded. The courts seem to be accepting that inspector competence is a subjective judgment and, in that context, it is unlikely that there will ever be a satisfactory objective test.

In summary, my experiences in these two cases indicate that a consensus is emerging on the characteristics of a competent inspector. A simple credential-based recipe approach is unlikely to guarantee competence. Instead, the capacity of an individual to identify and understand the importance of tree weaknesses is more likely to be the primary determinant. The ultimate test of competence will be a thorough examination in court, a formidable prospect and something that all aspiring tree inspectors should be mindful of.

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