barrell
TREE CONSULTANCY

The emerging duty of care in England relating to trees; a practitioner's perspective

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The emerging duty of care in England relating to trees; a practitioner's perspective

Jeremy Barrell is one the UKs top tree expert witnesses, representing the successful parties in two recent high profile legal cases on tree failures. At the High Court in the 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), Jeremy was part of the Defendant's team that explored the issue of inspector competence, resulting in a successful defence against the claim. In this Information Note, he expands on issues from these and other recent cases, that are leading to a better appreciation of the standard of the duty of care that the courts are expecting from tree owners in England.

The emerging duty of care in England relating to trees; a practitioner's perspective

TREES AND RISK

Balancing tree benefits and risk

Placing a pound value on trees is tricky because their physical attributes are constantly changing; starting from the smallest seedling, they grow progressively bigger and then die! Furthermore, the benefits they offer do not have obvious dimensions, which makes them tough to measure and even harder to reliably factor into the decision-making process. For these reasons, trees have traditionally been given a low priority in urban management, with other more pressing demands such as social services and infrastructure taking the bulk of the funds.

However, there is an increasing body of evidence revealing that trees may be much more valuable than we thought. Emerging research is showing that they can make a significant contribution to making our communities more resilient to the impacts of climate change. Trees have the potential to dramatically reduce urban temperature extremes and buffer surges in rainwater runoff, creating safer and more comfortable living conditions. They also absorb pollution, enhance ecological diversity and have a significant beneficial impact on human wellbeing; people that live near trees are healthier and happier. Indeed, investment in trees has the potential to deliver astonishing rates of return, with a recent Natural England analysis of the NHS *Walking the Way to Health Initiative* showing that for every £1 spent on access to greenspace, there was a more than £7 return in terms of averted health costs! This and other similar investigations are confirming what most of us already intuitively knew, i.e. that trees offer multiple benefits to our communities and we need more of them.

Despite these benefits, the presence of trees also increases the risk of harm through damage to structures from their growth and injuries to people if they fail. When harm arises, liability must be established and it is inevitable that probing questions about responsibility and management will be part of that process. Statistics tell us that the risk of death from tree failures is very low; on average about six people a year are killed by trees compared to about 10 people a day killed by traffic! Clearly, there is no need to panic, but it would be prudent for all land management professionals to be aware of tree responsibilities. The challenge for tree owners is to balance the benefits trees provide against the risks from their presence in a way that the courts will support in the event of harm arising from failures.

Duty of care relating to trees

In broad terms, a tree owner, and/or whoever has control over it (the duty holder), has a duty of care in both civil and criminal law to take reasonable management measures to avoid foreseeable injury or harm. Duty holders are expected to consider the risks posed by their trees and manage those risks in a reasonable and proportionate way. There is well-established case law upholding the principle that the standard of the duty of care varies according to the resources available to the duty holder, i.e. a large land owner such as an estate or a highway authority would be expected to apply a higher standard of management than smaller land owners such as residential householders. In short, the law expects duty holders to act in a practical and sensible way, according to the size of their properties.

However, in the event that a duty holder is found neglectful of their duty of care in terms of checking, i.e. they did not have their trees checked where a significant potential for harm existed, 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 check would have identified an unacceptable risk of 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 check then, irrespective of any negligence from not carrying out a check, the duty holder 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.

Negligence, liability and Acts of God

More specifically, negligence, liability and Acts of God are commonly used terms when discussing duty of care and how blame will be apportioned in the event of harm arising. Although they are the subject of detailed legal definitions, for the purposes of this discussion, their everyday meaning during normal use is more helpful. Negligence occurs when someone fails to do something that a reasonable person would have done. Liability is where the responsibility lies when something happens, i.e. who is to blame, with an implication that this is where compensation may be due for any harm that arises. An Act of God means an event that is beyond human control, i.e. there were no obvious indications that it was going to happen before the event. In this very general context, Figure 1 illustrates a decision-making framework for assessing if a duty holder is responsible for the consequences of a tree failure.

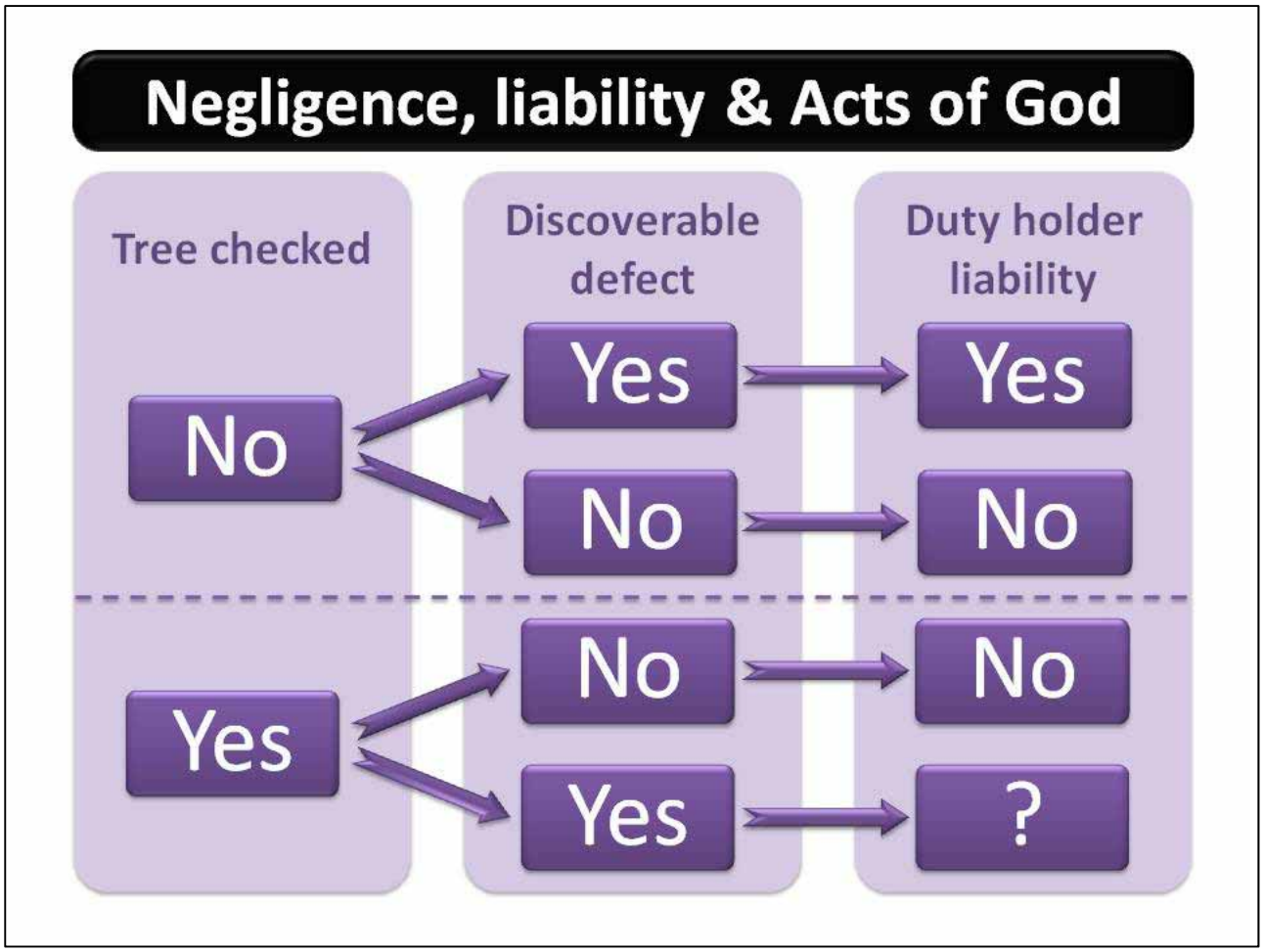

Figure 1: Where a sufficient potential for harm exists to warrant a tree check (see Figure 4), whether a check occurred and whether there was a visible defect are essential considerations in the decision-making framework when assessing liability

Each vertical panel in this conceptual diagram illustrates a stage in the decision-making process. The horizontal elements linked by arrows illustrate how liability is likely to flow, considering the variables of whether the tree was checked and whether there was a discoverable defect. Following the first horizontal thread, it is a common misconception

that if a tree is not checked and harm arises, then the duty holder is negligent and liability automatically applies. However, this is not necessarily the case for two reasons:

1. **No need to check:** As explained in Figure 4 below, if there is a very low level of access close to a tree, which means there is an insignificant potential for harm, it is likely that there will be no obligation to check the tree and so liability is unlikely to follow in such circumstances.
2. **No discoverable defect:** If a defect that resulted in failure was not discoverable during a visual check, then any harm could not have been reliably predicted, and again, liability is unlikely to follow.

If there was no check, there was a significant potential for harm and there was a discoverable defect, it is likely that the duty holder would be found negligent and liability would follow.

Following the lower horizontal thread in Figure 1, if a tree was checked, but there was no discoverable defect, then it is unlikely that the duty holder would be found liable for any harm. However, if there was a discoverable defect that was not identified during a visual check and harm arose, where liability lies is not so clear. If the duty holder was not advised of the defect by the inspector, i.e. the inspector missed it, then liability would probably be transferred back to the inspector for not doing the job properly. Of course, this would only follow if the duty holder employed another inspector. If the duty holder had taken on the role of the inspector, then the issue of their competence to carry out that task arises, which would be explored in court.

RECENT COURT CASES

When a tree fails and causes harm, court deliberations often focus around the adequacy of the inspection regime, i.e. whether an inspection was necessary, the nature of the inspection, the frequency of inspection and the competence of the inspector. There are no simple answers to all these questions, but it is clear that a recipe-based approach does not work and the final decisions are made through the subjective interpretation of the evidence before a judge, in the context of relevant case law.

Duty holders have a responsibility to identify what practical tree management measures they should take to meet their duty of care in case a tree fails and harm arises. In that context, recent court cases provide an insight into how modern interpretations are likely to be applied and where the boundaries between reasonable and unreasonable management lie. Since 2006, there have been four judgments from the lower courts that provide some limited pointers on how these matters may be viewed:

- ***Poll v Bartholomew* (2006):** This High Court case covered the standard of duty of care and decided that, in this set of circumstances, a drive-by check was not a sufficient level of inspection and the Claimant succeeded (Figure 2). During the evidence, both tree experts jointly developed a broad definition for inspector competence, but this was agreed between them and not explored in depth during the case.
- ***Corker v Wilson* (2006):** This City of London Court case considered the failure of a branch that had a crack on its upper side and whether the householder owner could have been expected to see it. The householder inspected the tree from time to time and it was held that there were no obvious defects to be seen, which resulted in the Claimant failing (Figure 3).
- ***Atkins v Scott* (2008):** This County Court case focused on the inspection regime and the competence of inspectors. It confirmed that, although desirable, it is not essential to have a written record of inspection as long as a regime existed and that can be reliably established through testimony. It also clarified that competent inspectors do not necessarily need formal qualifications, although their ability to identify defects and know what to do about them would need to be explored through examination. Another central issue was whether a split in the failed branch would have been discoverable during

a competent inspection. A decision that it could not be seen resulted in the Defendant successfully refuting the claim (Figure 3).

- ***Selwyn-Smith v Gompels* (2009):** This County Court case is useful because it reviews the long-standing legal principle that the standard of duty of care varies according to the size of the land holding of the tree owner. It reaffirmed existing case law in that the lowest standard applies to residential householders and requires them to be aware of obvious defects, but this is unlikely to extend to them being familiar with detailed technical publications. It was held that there were no obvious reasons for the householder to suspect the tree was going to fail and the Claimant was unsuccessful (Figure 3).

It is notable that in three out of these four cases, with *Poll* being the exception, the Judges were critical of the experts for stepping beyond their remit and straying into an area that is strictly for the court. It is the duty of experts to help the court in specialist matters, but not to go so far as making judgments. Of course, experts must be able to set out the decision-making framework and interpret where a particular set of circumstances may fit in, but that is where they should stop. Judges are sending a clear message that they make the decisions and experts must fall short of saying precisely where the boundaries lie for the standard of duty of care. Deciding whether a duty of care has been met or not is the sole responsibility of the court and experts must resist any temptation to apportion blame.

Although these judgments carry significantly less weight than higher court rulings, they are of interest for duty holders because they begin to set out a broad framework for tree management and provide some clues as to what may be expected if a case goes to court.

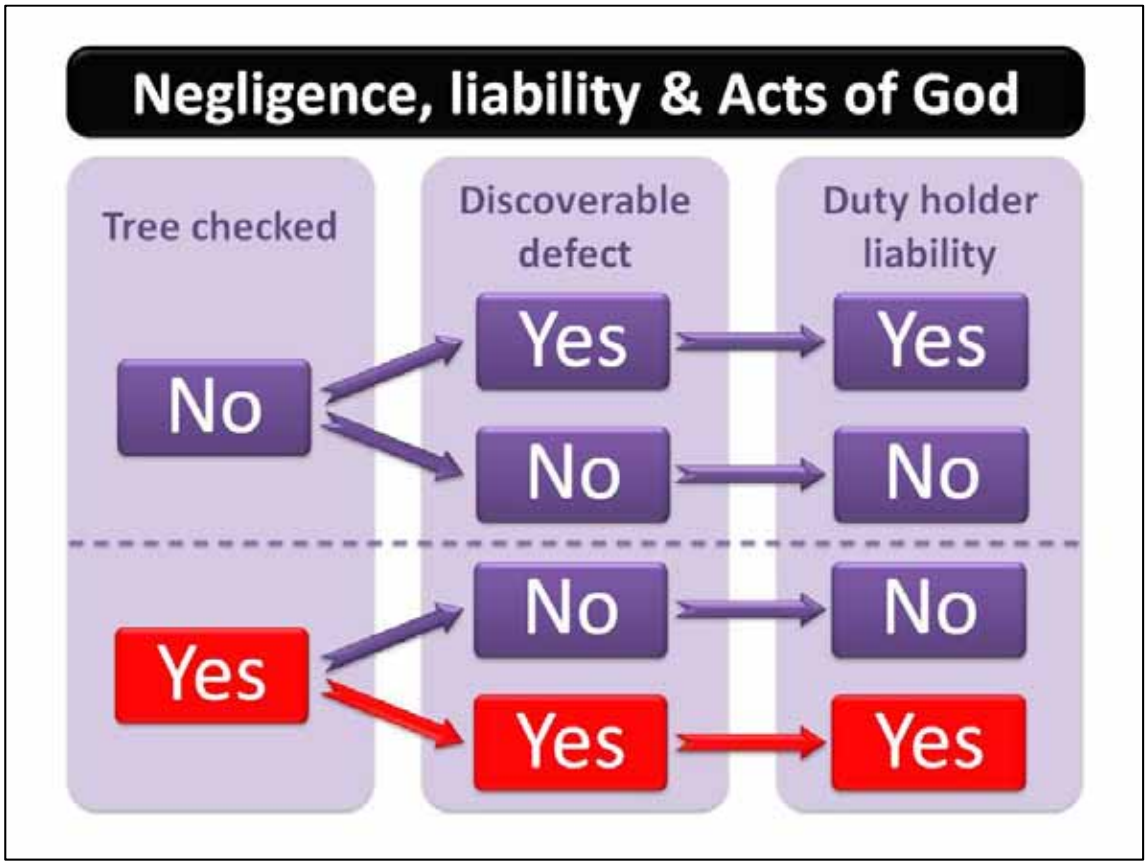

Figure 2: In *Poll*, the tree was checked, there was a discoverable defect that was not found and liability flowed to the duty holder (red path)

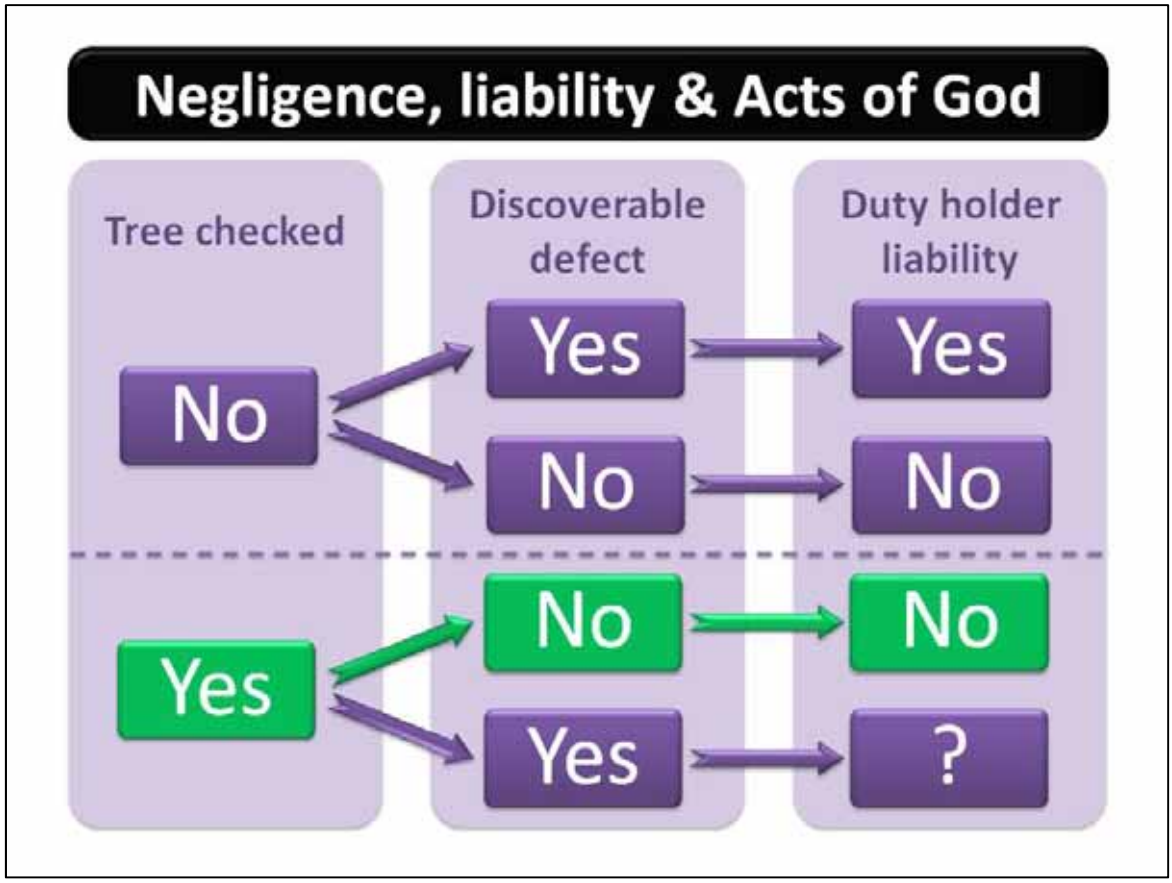

Figure 3: In *Corker*, *Atkins* and *Selwyn-Smith*, the tree was checked, there was no discoverable defect and there was no liability for the duty holders (green path)

THE STANDARD OF THE DUTY OF CARE

Assessing the potential for harm is the first step

In the face of these and previous judgments, it would be prudent for duty holders to attempt to reliably interpret what the standard of duty of care is for their particular circumstances. An obvious starting point is to establish if a tree needs inspecting at all, i.e. does the level of access/use (targets) near it warrant any proactive intervention? The risk of harm is affected by three factors: the size of the tree part that could fail, the likelihood of that part failing and the targets that could be harmed. Most influential of these is the number of targets because it is absolute. If there are few or no targets, i.e. the lower end of access/use range, then no matter how big a tree is or how likely it is to fail, there will be little or no potential for harm from this factor.

It follows that a sensible first consideration for prudent landowners is to identify zones based on their knowledge of access and levels of use of the property. In areas of no obvious access and low levels of use, the potential for harm from this factor would be so low that there may be no need to check the trees, irrespective of their size of likelihood of failure. However, where incidents end up in court, duty holders may be called upon to explain why they considered it reasonable and proportionate not to check.

Figure 4 illustrates the concept that as more people use the land around trees, the potential for harm increases. Obvious types/places of use include highways, parking, pedestrian and visiting or occupying buildings. It follows that if an area is not accessed or used, there is no potential for harm and no need to check any trees at that location. As the level of access/use increases, then so does the

potential for harm, along with an increasing requirement to proactively manage trees. All that is required to complete this analysis is knowledge of the land and its accessibility, with no tree expertise needed at this stage.

In line with the judicial position that decisions on whether a duty of care has been met are for the court, Figure 4 purposely shows no clearly defined boundaries between the varying degrees of potential for harm. Potential for harm is a continuum, with blurred thresholds between the different levels within the extremes. The division and description of these levels is a matter of judgment for each individual situation, with the Low, Medium and High separations illustrated in Figure 4 being informative rather than prescriptive. In the event that a case goes to court, the soundness of these assessments will ultimately be decided by a judge. This approach is proportionate because it does not automatically require the inspection of all trees and experts do not have to be employed to complete the zoning analysis. Irrespective of the size of their landholding, it is likely that all duty holders who go through this process would have made some significant progress towards meeting their duty of care.

The standard of duty of care for householders

Establishing the potential for harm in the form of a zoning exercise would not need any specialist input or require a disproportionate allocation of resources, and so it would seem a reasonable minimum requirement for all duty holders. If this process identifies trees that may present a significant potential for harm, then the standard of the duty of care for managing those trees will vary according to land holding. As *Selwyn-Smith v Gompels* sets out, the lowest standard to be met will be for the smallest landowner with the least resources, i.e. the residential householder. *Corker v Wilson* also explored the visibility of defects and what a householder would be expected to observe.

Although not spelled out word-for-word in these judgments, it is likely that householders would be expected to identify obvious defects such as dead branches, broken branches, external decay, large splits or cracks, fungal brackets, etc, and call in an expert if they did not know what to do. However, it is unlikely that they would be expected to obtain or familiarise themselves with technical publications.

In summary, if a significant potential for harm is identified, a quick visual check looking for obvious defects, is likely to be sufficient for most duty holders to meet their duty of care at this lower end of the land holding spectrum.

The standard of duty of care for larger land owners

At the other extreme, it is likely that large landowners with greater resources would be expected to know about, and operate according to, recognised published guidelines. Indeed, this was the case in both *Poll* and *Atkins*, where the Judges referenced the risk management for these larger properties to the HSE framework set out in their SIM, which offers the following guidance on inspection requirements at 10 (ii):

"*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.*"

Although this document is aimed at HSE enforcement officers for criminal prosecutions under the 1974 health & Safety at Work Act, it has been referenced in civil cases and it is likely that its content will continue to be considered relevant. In particular, it is heavily focused on a proportionate and staged approach, recognising that many trees may not need checking at all. Where there is a significant potential for harm, the first stage is a quick visual check, and a more detailed inspection is only necessary if triggered during the visual check. Figure 5 illustrates a four stage approach to tree management in relation to very general levels of inspector competence as follows:

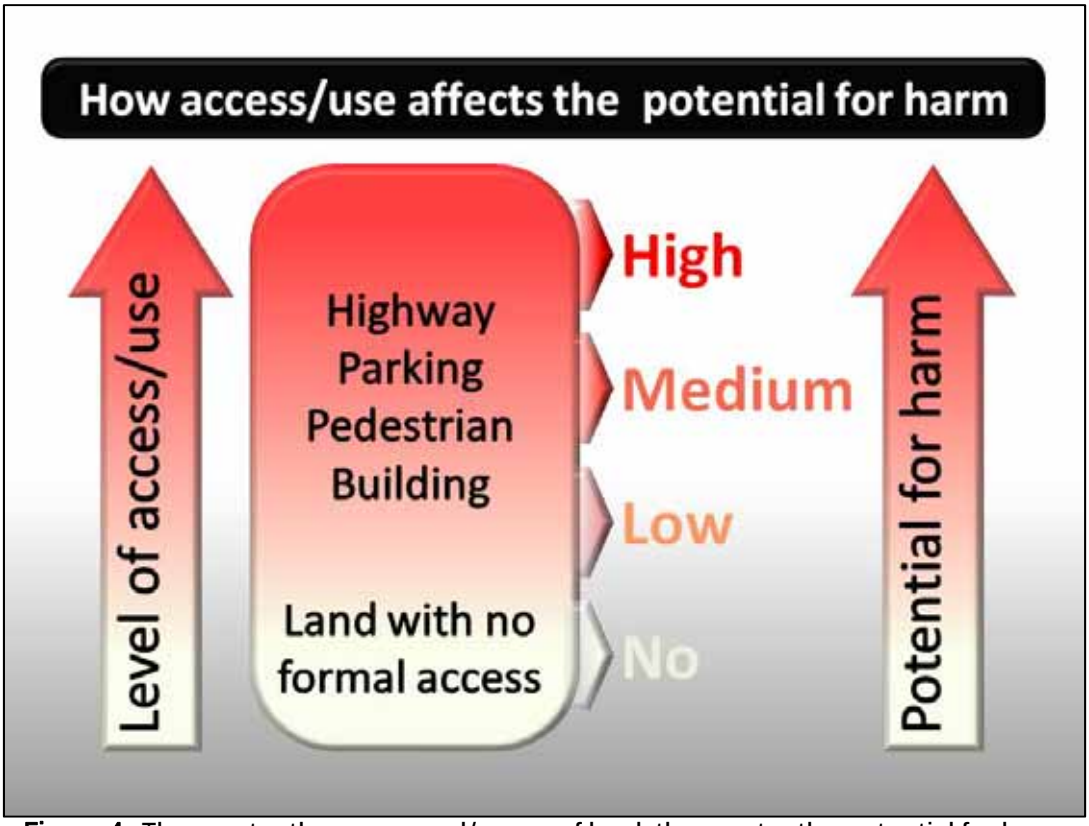

Figure 4: The greater the access and/or use of land, the greater the potential for harm

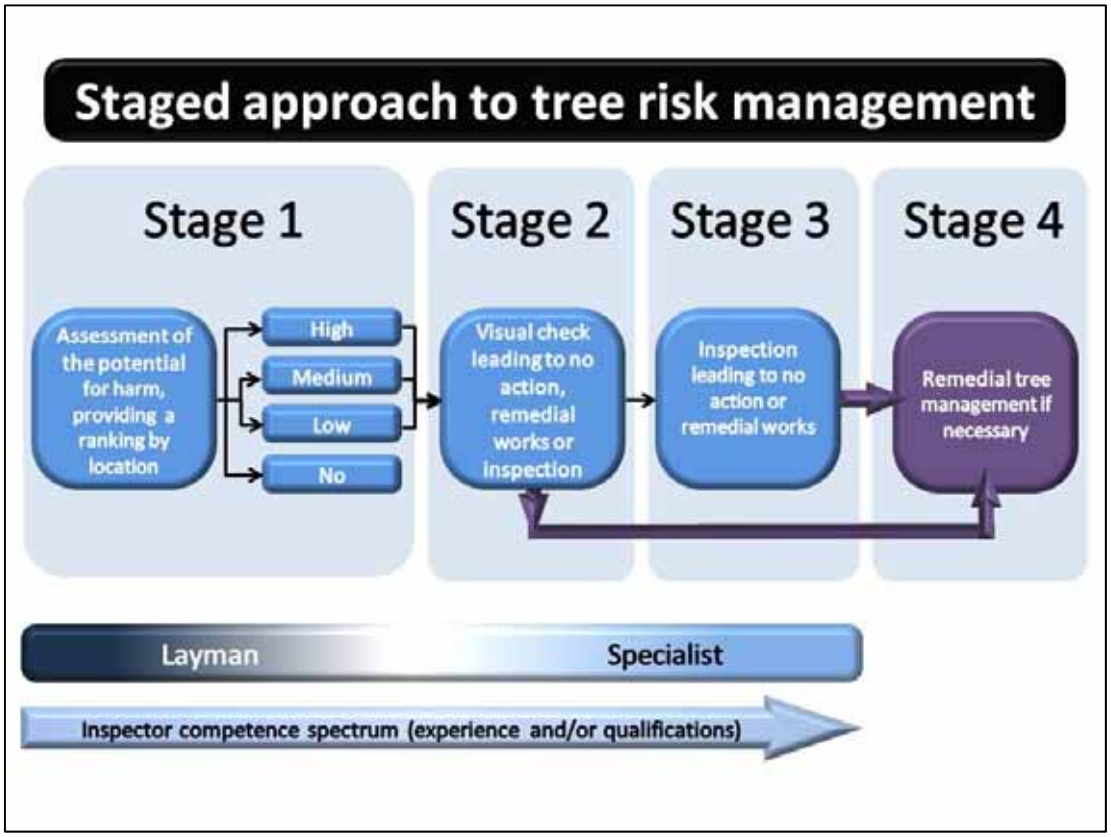

Figure 5: The responsible management of risk from trees can be divided into four stages

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- **Stage 1:** The assessment of the potential for harm based on the level of access and use can be done by a layman with no tree expertise. It is likely that all duty holders would be expected to undertake this process to meet their basic duty of care. If there is no realistic potential for harm, then there is no need to check the trees.

- **Stage 2:** If there is significant potential for harm, then the trees will need to be visually checked, with the priority dictated by the subjective ranking from Stage 1. Although not absolutely clear, it is likely that the courts would accept that a householder could carry out this visual check without any specialist training. However, as the land holding size increases, it is likely that the higher standard set out in the HSE SIM would be applied, i.e. they would need to have "*...a working knowledge of trees and their defects,…*". If the quick visual check did not identify any significant defects, then no further action would be necessary. If defects were identified, then remedial works could be specified at that point or a further, more detailed inspection, carried out.

- **Stage 3:** The level of a more detailed inspection would be dictated by the findings of the visual check, but it is likely that this would require specialist knowledge and the inspector would be formally trained for the task.

- **Stage 4:** Carrying out management works within a specified timescale.

Frequency of checking trees

A regular question explored in the analysis and development of tree management regimes is how frequently trees should be checked. From the approach set out in Figure 5, if there is no significant potential for harm, i.e. the trees are remote from access/use, then there is no automatic need to check them at all. However, as the potential for harm increases, i.e. more people get closer to the trees more often, then the need to check emerges, although there is no clearly defined threshold on precisely what level of access/use triggers that duty. Indeed, this is clearly a matter for the courts, assessed on a case by case basis, because of the wide range of individual circumstances that can arise. However, it is possible to attempt to narrow the range by reviewing some of the more respected published guidance on the matter.

Although it may have limited application to smaller land holdings, a useful starting point can be gleaned from a review of the national guidance that applies to highway authorities relating to checking highway trees. In 9.13.4 of the Department for Transport *Well-maintained Highways – Code of Practice for Highway Maintenance Management* (2005), it advises that:

"*9.13.4 Most trees should ideally have an arboricultural inspection every five years but this period may be reduced on the advice of an arboriculturalist. Default intervals is for arboricultural inspections at least every five years.*"

This clearly sets out that trees with a significant potential for harm, i.e. trees within falling distance of public roads, should be checked at least every five years, and possibly more often in some circumstances.

The Forestry Commission Practice Guide *Hazards from Trees: A General Guide* by Dr David Lonsdale (2000) has similar limitations for application to smaller land holdings because it focuses on woodlands. However, it certainly applies to larger land holdings and adds the following clarification on the types of circumstances that may require a more frequent checking regime:

"*Hazards from large old trees sometimes develop quite rapidly, for which reason an inspection frequency of one year or more is generally advisable where such trees occur on high-usage sites.*"

This advice alerts duty holders that large old trees at high-usage locations may require a higher standard of checking than the maximum

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five year frequency advised as a starting point for highway situations. Although it would be inappropriate to apply this to every case, there are clearly instances where inspection frequencies of a year or even less may be necessary to discharge the duty of care. This higher standard of inspection frequency is most likely to apply to large, mature trees that have identified defects and are located in areas of high usage and/or occupation.

These references provide a broad insight into the issues it would be prudent for duty holders to review when trying to pinpoint an appropriate checking frequency for their specific set of circumstances. However, before this can be assessed with confidence, there are two obvious scenarios that require different approaches, depending on the whether there has been recent formal management or not:

- **No previous checks:** In the scenario where there has been no obvious recent risk management and the duty holder is setting up a new tree checking regime, it is unlikely that there will be any detailed knowledge of the condition of the tree stock. This raises the possibility that large trees with the potential for imminent failure could be present, which could impart a significant level of risk, even if the occupancy/use was at the lower end of the range. In such circumstances, because such trees could fail well within that five year period, duty holders could find themselves vulnerable to criticism if they unreasonably delayed checks until the end a five year checking cycle. For this reason, where there is no prior knowledge of tree condition, there would be a strong argument that it is unreasonable to adopt the five year frequency as a default. Duty holders who adopt a programme of checking all their trees as soon as they can rather than relying on the five year default would be better placed to refute criticism in the event of an incident. There is no simple answer to how soon is soon enough, but it is likely that the courts will place significant weight on the scale of the task and the resources available when deciding if the standard of duty of care has been met.
- **Established and ongoing management regime:** The scenario where all the trees have been checked is different because trees with the potential for imminent failure should have already been identified. In this situation, unless specific advice has been provided during the previous inspection that a more frequent inspection interval was necessary, then it would seem reasonable to adopt the five year default. However, this approach is dependent on the tree inspector specifically advising on future inspection frequency at the time of inspection. Obvious factors that are likely to affect this advice include, *inter alia*, the size of the tree, the adjacent site-usage, the health of the tree and any structural weaknesses that could predispose the tree to a significant risk of failure in less than five years.

In summary, in terms of inspection frequency, it is likely that duty holders who have had their trees checked every five years, and at shorter intervals where there is an obvious elevated risk of harm, will have made significant progress towards meeting their duty of care.

Inspector competence

The issue of inspector competence was considered in detail by the experts in *Poll*, but the matter was agreed between them and not tested to any great extent during the hearing. However, the Judgment is useful because it considered the credentials necessary for an inspector to be deemed competent. Both experts were sensitive to how inappropriate a formulaic approach to assessing inspector competence was, despite the obvious attractions of a simple recipe that could deliver an indisputable answer. Their 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, they were mindful that, in practice, almost any combination of experience and qualifications had the potential to deliver competence, but none were a guarantee.

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Faced with such a complex credential-based solution, they opted for a different approach, which focused on what a competent inspector must deliver. They agreed that the distillation of an inspector's task was to identify tree hazards and assess the levels of risk of harm, which would inform appropriate management recommendations to minimise that risk. The essence of this reasoning was set out in the definition of a level 2 inspector as having: "*… sufficient training, expertise and/or qualifications to identify tree hazards, assess the levels of risk and make appropriate management recommendations.*" This approach shifted the focus away from credentials and towards 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.

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 a rigorous test in deciding whether a duty of care has been met.

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

THE EMERGING DUTY OF CARE

In summary, unless trees are so remote that there is no realistic potential for harm, it is likely that the courts will expect duty holders to proactively manage their trees. In the first instance, all that is required is a quick visual check and more detailed inspection would only be necessary if this check revealed matters of concern. This check should be carried out at least every five years, and possibly more frequently if there is an obvious elevated risk of harm. It is likely that householders could carry out this visual check without any specific training, but the standard would be higher for larger land holders. In these circumstances, it is likely that the tree inspector should at least have a working knowledge of trees and be able to identify and react appropriately to any significant defects. However, there is no standard recipe for where the boundaries between these varying standards lie and ultimately, it will be a matter for the courts to decide.

In the event of harm, all duty holders should be prepared to justify and defend their decisions during examination in court, a formidable prospect and something that all aspiring tree inspectors should be mindful of.

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National Tree Safety Group initiative

In recognition of the difficulties surrounding the management of trees and risk, the Treework Environmental Practice began a wide ranging exploration of the subject with its '*The Future of Tree Risk Management*' seminar held in London in September 2006 (www.treeworks.co.uk). Through the interest that generated and a series of further seminars, a broad partnership of organisations came together to develop a widely consulted approach to tree safety management and to provide guidance that is proportionate to the actual risks from trees, called the National Tree Safety Group. It has a website at www.NTSG.co.uk and is currently in the process of consulting on a draft publication called the '*Guidance Document on Trees and Public Safety*', with aspirations to provide nationally recognised guidance advocating a balanced and proportionate approach to managing tree risk.

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