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TREE CONSULTANCY

Tree risk management: the duty holder's perspective

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In this concluding article of a four-part series on professionalism, Jeremy Barrell (www.barrelltreecare.co.uk) explores the tree management expectations placed on duty holders by the courts. When a tree failure results in harm, the focus often falls on the standard of the duty of care, i.e. how much management is enough in all the circumstances, and whether it was met by the duty holder. Although the fine detail will always be an interpretation for the courts, duty holders can reduce their exposure to liability by adopting a systematic approach to tree risk management. The more reasonable, practicable, balanced, proportionate and sensible those measures are, the better the chances of successfully refuting allegations of negligence.

Tree risk management: the duty holders' perspective

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What is the standard of the duty of care?

Anyone advising tree owners on how to manage their trees will probably have noticed that the same old questions seem to crop up time and time again. How often should I have my trees inspected? Do my trees need inspecting at all? Can I inspect my own trees? What qualifications should an inspector have? Is a visual check OK or do I need to have expensive investigations carried out? Indeed, these are precisely the questions that the court will ask if a tree fails and harm arises, so the answers are very important. The conundrum for duty holders (those who are responsible if anything goes wrong), and for

arboriculturists as advisors, is that there are very few clear answers, more a complex mass of confusion and contradictions!

As a consultant, not having good answers was of great concern to me, especially as my legal report workload increased and my reputation depended on getting it right. But, trying to work out how tree management and the law fitted together was not easy, primarily because my expertise is with trees, not the law, and an understanding of both disciplines is helpful to make progress. However, as I wrote more legal reports and attended court more often, I slowly gained enough experience to start to piece together a decision-making framework to assist duty holders and their advisors to manage the risk from trees. The culmination of that work is a paper called *Balancing tree benefits against tree security; the duty holder's dilemma*, soon to be published in the *Arboricultural Journal*, and this article is an introduction to that detailed analysis.

As I became more familiar with the way harm from tree failures was viewed by the courts, it became increasingly obvious that duty of care was about much more than just trees. In fact, trees were just one small part of a much bigger legal and social context, and I needed to know about many more aspects if I was to stand a chance of working this one out. I was aware that arboriculture had developed a keen practical focus on the detail of tree structure and growth and biology. I also knew that, in parallel with those advances, sustained attention on the management front has seen the emergence of a number of sophisticated tree assessment methods. But, whilst such progress was certainly enlightening for the tree community, I noticed that it was not quite so important for the duty holders; they were not really that interested in the detail, they just wanted to know how much to do to meet their duty of care. It was obvious that a different approach was needed, one that looked beyond individual trees and set their management into the wider legal and social framework. It struck me that the duty holders were of fundamental importance because they were the ones that needed the answers, made the decisions and bore the responsibility; perhaps the focus should be on them rather than on the trees?

The concept of a duty of care landscape

With that in mind, I set out to identify and piece together all the issues that duty holders should consider in their decision-making process and Figure 1 is a conceptualisation of that landscape. In practical terms, the actual requirement of what to do to meet a duty of care is elusive detail, with no definitive answer until a case gets to court. It is an understandable aspiration for duty holders to seek the security of knowing they have done as much as can be reasonably expected, but there is no clear route from where they are now to a position of safety at the other side of the landscape. Instead, there are multiple interacting issues that have to be

understood and weighted, which in turn inform a range of management options, with no guarantee of protection if an accident occurs! The issues are complex and can be likened to obstacles in the landscape that have to be negotiated during the journey to secure a robustly defensible position if it all goes wrong. There are many different routes, ranging from doing nothing to removing all the trees, but where does the balance lie? The extremes are obvious, each with its set of risks and benefits, but a sustainable, proportionate, sensible and defensible path is much more difficult to map. Figure 1 illustrates this conceptual landscape, where the duty holder's task is to get from 'Go' to 'Home' without tripping up.

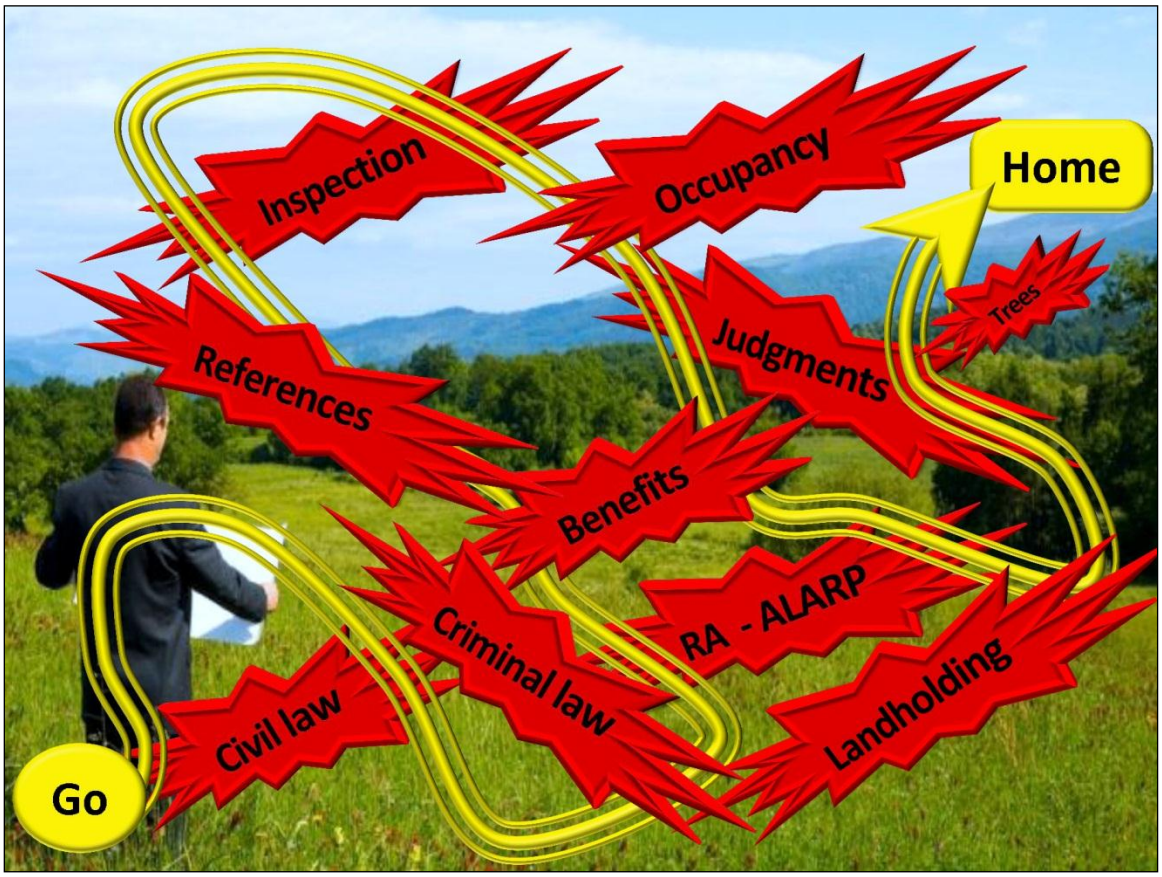

Figure 1: Conceptually, duty holders have to journey across a complex and fluid landscape of obstacles and conundrums in their quest to confidently refute allegations of negligence if harm arises from a tree failure.

The issues are complex and inter-related, with very few certainties. Indeed, there is no simple solution, which is probably why no one has yet managed to come up with answers to the questions posed in the introduction. I don't have those answers either, but I do have a strong practical background in arboriculture and

I deal with a lot of legal cases, which is the perspective I bring to the discussion. Here are a few pointers that I have found to be important in searching for that rather elusive safe route across the risk management landscape:

- **Trees:** First, and probably one of the least important issues, are trees. Although many of us would probably like it to be otherwise, the reality is that trees are just one very small part of this landscape and only knowing about them is simply not enough. There is a much wider legal context that dominates the way decisions are made. In the event of legal action, the ultimate arbitrator on whether the duty holder got it right will be the court, which means that understanding the legal process is of fundamental importance in working out what to do.
- **Civil law:** Most tree cases are brought in civil law as disputes between aggrieved parties unable to settle their differences and seeking a final answer from the courts. This decision-making process is very much focused around whether the harm was foreseeable, what a reasonable person would do, what is proportionate and what is practically possible, in all the circumstances. Understanding these principles and how they will be applied is a challenge, to say the least, for anyone without a legal background.
- **Criminal law:** A significant proportion of our trees are managed in a commercial context and so the detail of health and safety legislation is relevant. The Health and Safety Executive (HSE) publishes comprehensive guidance on the principles for managing risk generally, some of which is specifically aimed at trees. Although these publications tend to be short on detail, they do provide some reliable benchmarks for duty holders interested in developing a framework for managing the risk from trees.
- **Risk assessment and ALARP:** Keeping risks 'as low as reasonably practicable' (ALARP) is a mainstay of HSE guidance, but what 'reasonably practicable' means in a tree context is very much a matter of interpretation. Modern arboricultural thinking has developed an obvious inclination towards quantifying levels of risk, but can this be done without reliable tree failure data and, more to the point, is it actually necessary? My experience in court is that, while level of risk is a consideration, what is reasonable and practicable are potent legal principles that cannot be ignored. Whilst many arboriculturists remain fixated with the level of risk, it is likely that the courts will be more interested in the foreseeability of harm and how reasonable and practicable it would have been to remedy the problem. Quite simply, what a duty holder does about foreseeable harm may be much more important than the actual level of risk.

- **Resources:** There is some uncertainty over whether the resources available to a duty holder affect the standard of the duty of care likely to be expected by the courts. One recent lower court judgment in the case of *Selwyn-Smith v Gompels* (www.aie.org.uk) illustrates the difficulties with trying to draw reliable conclusions in these matters. In considering whether a tree owner had acted reasonably, the judge reviewed whether domestic householders should educate themselves through published literature before carrying out an inspection of their own trees. His view was this was a step too far, a position that attracts some sympathy because it would certainly be an extreme burden on all domestic householders who own trees to have to do this. In arriving at his conclusion, the judge referred to *Goldman v Hargrave (1967)* as a relevant precedent, identifying the principle that the standard of the duty of care varies according to the resources available to the duty holder. His take on this was that large land owners and managers such as country estates or highway authorities would be expected to apply a higher standard of management than smaller land owners such as domestic householders. At first glance to a layperson, this seems reasonable, but caution is required before accepting it as a reliable position. The difficulty is that it carries an implication that the standard of the duty of care could vary for the same tree, depending on the ownership, which has troublesome aspects. Advocates against this position would correctly argue that *Selwyn-Smith v Gompels* is a lower court case and, as such, carries no weight in establishing legal principles. Although, on the point of resources, the judge does reference the higher ranked appeal decision, there is a counter position that this principle should not be applied to trees; the appeal related to an emergency situation and managing trees is too remote from this for it to be relevant. Ultimately, this will be one for the courts to decide, but it does illustrate the difficulty for duty holders trying to work out what is a reasonable standard of management.
- **Tree benefits:** There is an ever-increasing body of research showing that the benefits from trees are much greater than previously thought and the idea that this should be factored into tree management decision-making is gaining momentum. Although it is an attractive proposition, there seems to be some considerable scepticism about how much weight tree benefits will be given if a case relying on this principle ever got to court, so this is a matter yet to be resolved.
- **Legal judgments:** Very few tree failure incidents every get to the lower courts (there have been seven judgments since 2004) and even fewer get to the higher courts where

they carry significant weight as precedents. This means it is often necessary to look outside arboriculture for examples of influential legal authorities, and cases relating to the reliability of statistical and probabilistic methods are one such authority. Most recently, in *R v T [2010] EWCA 2493*, the Court of Appeal indicated that 'mathematical formulae', such as likelihood ratios, should not be used by forensic scientists to analyse data where firm statistical evidence did not exist. Indeed, this case was reported in Issue 62 of *Your Witness*, the *Newsletter of the UK Register of Expert Witnesses* (www.jspubs.co.uk), where the author concluded: 'The Court of Appeal has got it right in this case. Justice is not served by dressing up expert's guesses as pseudo-science.' Again, whether this can be reasonably applied to quantitative approaches to tree risk assessment is a matter for the lawyers to work out. However, my experience is that probabilistic methods of assessing the level of risk are very much guesswork because there is a scarcity of reliable data on tree failure rates and impact harm according to branch length. Indeed, in the light of this judgment, there could be some doubt about whether expert evidence based on probabilistic methods will be accepted by the courts. If that does turn out to be the case, it could be a significant factor affecting the detail of meeting a duty of care.

- **References:** Although the courts are not bound to accept any technical information or expert interpretation, it is very likely that relevant references will be produced in evidence, since they can provide a valuable insight into the benchmarks against which duty holders may be assessed. One of the most influential is likely to be the HSE Sector Information Minute (SIM) *Management of the risk from falling trees*, published in 2007. It is a document aimed at HSE enforcement officers for criminal prosecutions under the 1974 Health & Safety at Work Act, but there is evidence that it will also be referenced in civil cases. Although it is likely that its content will be considered relevant, the weight it will be given is obviously a matter of discretion for the courts.
- **Occupancy:** The HSE SIM places a heavy emphasis on a balanced and proportionate approach to tree management because it is clearly impractical to inspect vast numbers of trees on a regular basis. It advocates a zoning approach and introduces some considerable weight to the idea that many trees may not need inspecting at all. Effectively, as the occupancy near trees increases, then so does the potential for harm, along with an increasing requirement to manage proactively. Interestingly, all that is required to complete this preliminary assessment is knowledge of the land and its accessibility, with no tree expertise needed at this stage. However, the level of occupation that

triggers the need for more intensive management is not so obvious, with no precise guidance on where the threshold lies.

- **Inspection:** If a tree is in a location of high occupancy, then the next stage in a responsible management regime is to visit and look at it. The purpose of that examination is to assess if there is a sufficient risk of harm to warrant more specific management intervention. The nature of an inspection can range from a quick visual check at one extreme, to a more detailed and time-consuming investigation at the other. Whether a quick visual check is sufficient and how much detail is necessary are important considerations for duty holders. The inspection regime, i.e. frequency, inspector credentials and the nature of inspection, are obviously important practical issues. Again, the HSE SIM gives some useful pointers, referencing levels of use and separating out a quick visual check from a more detailed inspection. It also introduces the idea that the starting point in terms of inspector credentials is a working knowledge of trees rather than specialist training.

A framework for proactive tree risk management

The above bullet points only touch upon some of the issues that the forthcoming *Arboricultural Journal* paper will discuss in more detail, but they do set out the beginnings of a process to help duty holders work out what to do. Figure 2 assimilates all that information into a decision-making framework to assist duty holders and their advisors in this task, and can be summarised as follows:

Stage 1: The assessment of the hazard potential for the location based on the level of occupancy can be done by a layman with knowledge of the land but no tree expertise. It is likely that, as a minimum, all duty holders would be expected to undertake this process to meet their duty of care. If there is no significant hazard potential, then there is no need to visit and check the trees.

Stage 2: If there is a significant hazard potential, then the trees will need to be visited and visually checked. If the quick visual check did not identify any significant defects, then no further action would be necessary in that management cycle. If defects were identified, then remedial works (which could include tree works or changes to restrict access around the tree) 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 that the inspector should be formally trained for the task.

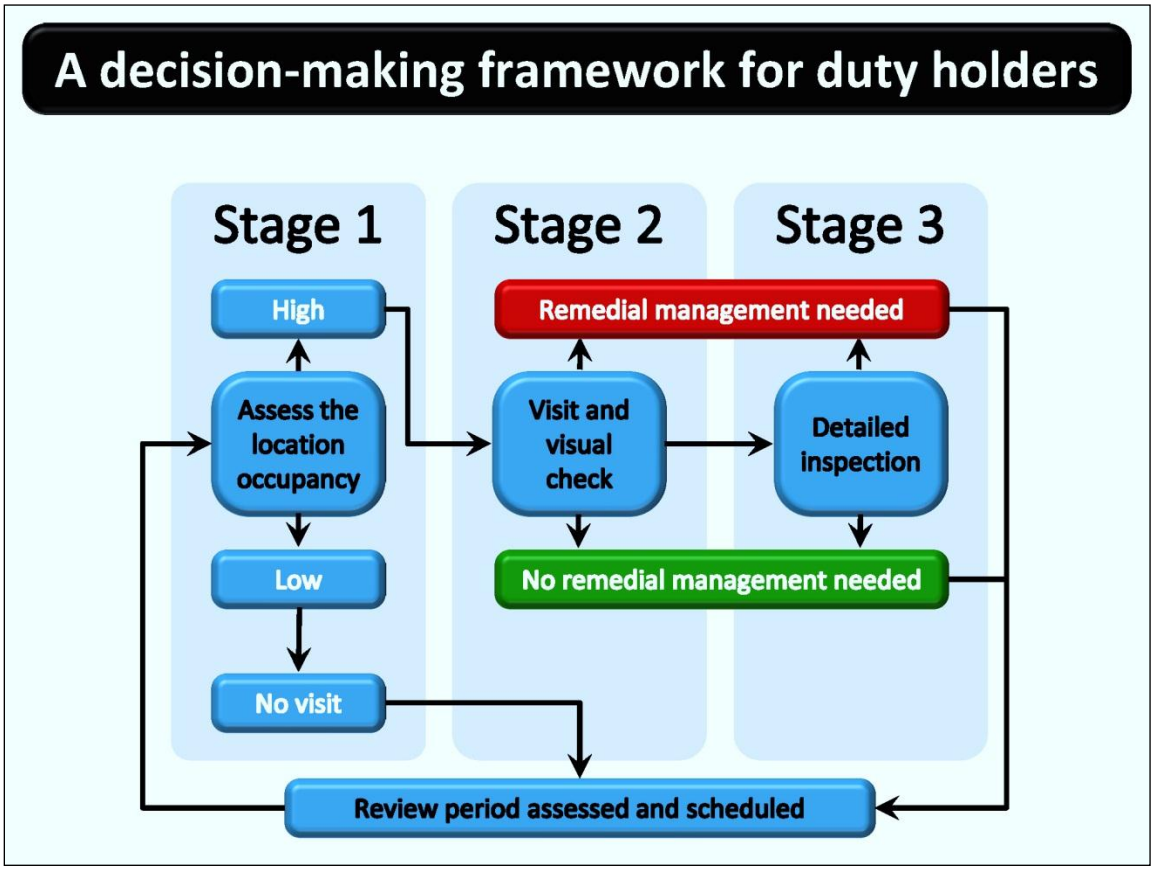

Figure 2: A decision-making framework for duty holders.

If management works are required, they should be undertaken within a reasonable timescale to discharge the current responsibilities. Indeed, it is likely that failure to carry out the recommended works soon after notification would leave the duty holder exposed in the event of any legal proceedings. Furthermore, the duty of care is ongoing and is not indefinitely discharged through one round of management activity. As time passes, the situation will need to be revisited, i.e. all effective management regimes must have a reinspection provision to complete the cycle.

In summary, the difficulty for duty holders and advisors alike is that the only way to be sure that enough has been done is through a decision from the courts. In the absence of such certainty, duty holders who have adopted a structured approach and are able to demonstrate that what was done was reasonable, practicable, balanced, proportionate and sensible are likely to have gone some considerable way to meeting their duty of care.