Case No: 8GU02043

IN THE GUILDFORD COUNTY COURT

The Law Courts
Mary Road
Guildford

Date: 20/10/2010

Before :

HIS HONOUR JUDGE REID QC

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Between :

JOANNE MICKLEWRIGHT **(on her own behalf and as Executrix of the estate of Christopher John Imison deceased)**	**Claimant**
- and -	
SURREY COUNTY COUNCIL	**Defendant**

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David Sanderson (instructed by **Irwin Mitchell**) for the Claimant
Angus Piper (instructed by **Veitch Penny**) for the Defendant

Hearing dates: 8th, 9th and 10th September 2010
Written submissions: 14th ,17th and 21st September 2010.

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JUDGMENT

Judge Reid QC:

1. The Claimant in this case is the executrix of the late Christopher John Imison ("the Deceased") who died on 19 August 2007 as the result of a tragic accident which occurred on 12 August 2007. He was struck by a branch falling from an oak tree which stands on the verge of Wick Road, Virginia Water. The claim is against the Defendant as highway authority.

2. The Claimant had been for many years the partner of the Deceased and is the mother of his three children. The Claimant makes her claim as executrix of the Deceased under the Law Reform (Miscellaneous Provisions) Act 1934 and under the Fatal Accidents Act 1976. She asserts that Defendant as the highway authority was in breach of its common law duty and its statutory duty under the Occupiers Liability Act 1957. Her claim is also pleaded in nuisance but the parties are agreed that if she does not succeed under either of her other heads of claim she cannot succeed in nuisance.

3. Subject to liability damages have been agreed in the sum of £500,000 inclusive of interest.

The Accident

4. The facts of the accident can be summarised very briefly. At about 4:30 PM on Sunday, 12 August 2007 the Claimant, the Deceased and their son David decided to go for a bicycle ride in Windsor Great Park. Their three bicycles were loaded on to the Deceased's Renault Espace car, one on the roof and two on the rack at the back. When they reached Wick Road, which runs along one of the boundaries of the park, the Deceased parked his car in a marked parking bay at the side of the road. Wick Road is an unclassified

road categorised by the Defendant as category D or as SPN3. "SPN" stands Surrey Priority Network.

5. The Deceased unloaded the bicycle from the roof of the car and was downloading the two bicycles from the rear when there was a cracking noise and the branch fell. It struck the Deceased causing him fatal injuries.

6. The Deceased was taken to the Royal London Hospital by air ambulance but had suffered such severe injuries that he died a week later when the ventilator which had enabled him to breathe was turned off.

7. The debris created by a falling branch was cleared from the road on the day of the accident. The fallen branch was sawn into sections. Part of the debris was removed and the remainder was piled on the verge, some of it in the ditch alongside the verge.

8. An inquest was held on 10 January 2008 which resulted in a verdict of "Accidental Death."

The Tree

9. By the joint statements of the experts called on behalf of the Claimant and of the Defendant it was agreed that the tree from which the branch fell is an oak tree between 200 and 300 years old. It is between 28 and 30m in height and its girth 1.65 m. The crown radial spread is uneven but is between 14 and 16m. It is described as being of normal vigour and of high amenity value. It stands in a sheltered lowland location surrounded by other trees, and is one of some two million trees along the 5,700Kms or thereabouts of Surrey's road network.

10. In the view of Mr Cocking in his report the tree was "over-mature". In his oral evidence he initially described it as "approaching over-maturity" but later reverted to calling it "over-mature." Mr Barrell regarded the tree simply as "mature". It is by common accord a tree with many years life left in it and in the absence of any compelling reasons advanced by Mr Cocking for classifying it as over-mature I prefer to accept Mr Barrell's view that it was simply a mature tree.

11. The branch that failed was a very large one that stretched right over Wick Road and overhung three parking bays. It failed about 7 to 8m above ground level and fractured between 2 and 3m from the point of its attachment to the main stem of the oak tree. The branch was estimated to have been approximately 15m in length with a diameter of approximately 0.4 m at the point of failure. Its weight was estimated to be approximately 900 kg

12. The day following the accident, 13 August, Mr Graham Banks, the senior asset planning manager (arboriculture) of the Defendant, attended the site at about 9.30AM. At this stage the Deceased was still alive and Mr Banks attended as a result of a call from Mr William Turmeau, a community highway officer employed by the Defendant, who requested a safety inspection of the tree as a result of the accident. Mr Banks sought to establish what the cause of the fall of the branch was. He took a number of photographs of the site and of the debris. He accepted in the course of his evidence that as a result of the clearing operations carried out before he came on the scene there was only some 5% of the debris which he would have expected still available for inspection. No effort had been made and

neither was any made at that stage to preserve either the branch itself or the debris from it.

13. When he received notice of the death of the Deceased Mr Banks returned again to the scene on 20 August and conducted further investigation. As a result of this he recommended certain work be done to the tree, in particular the shortening of two other branches by approximately 2/3 of their length. Mr Banks removed a section of the fallen bough which he brought back to his office. This section was made available to the expert witnesses and was produced in court at the hearing. This was the only sample taken or retained by the Defendant. The two branches which were shortened were taken back as a precaution. Nothing was found to be wrong with either of them. In Mr Banks' view the reduction of limb length was in retrospect unnecessary.

14. It was common ground that there was substantial fungal infection inside the branch which fell and that the fungal infection may have contributed to the failure but the experts agreed that it was unlikely to be the sole cause of failure.

The Law

15. The parties were substantially agreed as to the applicable law. Neither the common law nor statute requires an owner or occupier to make his land completely safe. His duty is to take such care as in all the circumstances of the case is reasonable. What is reasonable varies with the circumstances. It follows that the owner or occupier must make some assessment of the potential risk presented by any tree on his land. He must therefore inspect trees at appropriate intervals. In ascertaining how frequently the trees need

to be inspected the owner or occupier must have regard to the size of the risk involved and the difficulty of counteracting that risk. The question is "Was the owner or occupier's conduct reasonable?"

16. Although a separate claim was made in nuisance it was accepted that this claim could not succeed (see **Noble v Harris** [1926] 2 KB 332) and the Claimant had to rely on breach of a common law duty of care or of a statutory duty under the Occupiers Liability Act.

17. The owner or occupier must distinguish between routine maintenance and the necessary reasonable specialist inspections.

18. It does not follow that because an owner or occupier fails to his duty to make the necessary inspections of his trees that he will automatically be liable if someone is injured by one of them. It may be the tree was suffering from a defect that would not be revealed by inspection. Thus in **Caminer v Northern & London IT** [1951] AC 88 at 103 Lord Normand observed that the defendants did not comply with their duty but "it is no less plain that, if they had, it would have made no difference. The tree was just such a tree as [the expert witness] says the owner might consider safe." It is necessary for the claimant to show that if the owner or occupier had complied with his duty on the balance of probability the defect or danger in the tree would have been noticed. It is important when considering whether the owner or occupier has complied with his duty to avoid using the benefit of hindsight.

19. The Claimant made an additional submission that the Defendant had a unique opportunity (and responsibility) to collect relevant evidence, yet allowed the bulk of the debris from the fallen branch to be removed

immediately without any attempt to preserve of examine it, made no attempt to examine the foliage, collected only one sample of wood from the scene. This failure to conduct an immediate and thorough investigation into the cause of the branch's failure made, it was said, the case analogous to **Keefe v Isle of Man Steam Packet Co** [2010] EWCA Civ 683 in which Longmore LJ at para 19 in the context of a Defendant's failure to make or keep proper records said that:"...the Court should judge the Claimant's evidence benevolently and the Defendant's evidence critically."

20. In my judgment that is a correct approach. The Claimant has been put at a substantial disadvantage in advancing her claim by the manner in which the Defendant dealt with the remnants of the branch once it had fallen. In those circumstances I take the view that the proper way to approach the evidence is that suggested by Longmore LJ. This does not however reverse the burden of proof or relieve the Claimant of the need to prove her claim on the balance of probabilities.

The Parties' Contentions

21. The Claimant says that the Defendant did not have a proper system for inspection in place, that it did not carry out a proper series of inspections. She says that if it had done so, "a quick visual check, carried out by a person with a working knowledge of trees as defined by the HSE", being the extent of examination required agreed by the experts to be appropriate in the first instance, the defect which led to the falling of the branch would have become apparent and the branch would have been removed.

22. The Defendant asserts that it had, and carried out, a proper system of inspection of its trees notwithstanding that the tree in question had not in fact been subject to a detailed expert inspection. It submitted that if "a quick visual check, carried out by a person with a working knowledge of trees as defined by the HSE" had been carried out, no need would have been found for a further more detailed inspection by a qualified arboriculturalist. The Defendant further submitted that even if the tree had been subject to an inspection by a qualified arboriculturalist, the defect in the oak tree was not one which would have been seen and the branch would not have been removed.

The Defendant's Inspection Regime

23. In December 1975 the Department of the Environment issued a circular, No. 52/75, relating to the inspection of highway trees. The circular contains the following paragraph:

> "2. Trees growing within the highway are a most important amenity feature, but they can also present very real danger to persons using the highway. For this reason trees should receive adequate attention to preserve healthy growth, and they should also be examined regularly for any signs of injury or decay which could lead to their becoming a hazard.
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> 3. During the course of his work the road inspector should make a note of any obviously dead, dying or dangerous trees whether within the highway itself or within falling distance of the highway. If he finds that has been any accident or damage to a tree, that it is unstable in any way, large branches have been broken, or, if in leaf, there is any sign of wilting or die-back, then the facts should be reported to the County Engineer, who will arrange for further examination by a competent person and for any follow-up action found to be necessary.
>
> 4. In addition the County Engineer should arrange the examination of the trees by a competent person at regular intervals, preferably when they are in full leaf, in order to make

> sure that they are safe and are likely to present no danger to road users before the next inspection takes place. If further action is considered necessary, this should take place urgently. The period between these inspections and the degree of examination will depend on the age and history of the trees, surgery, disease, accidents, etc. It would be helpful to the examining officer if a record could be kept of any previous damage or work done etc on wayside trees, and brought up to date at subsequent inspections ...."

24. The circular went on to deal with particular points which should be noted.

25. There is no evidence that the Defendant took any notice of the circular until 2004 when it took steps to appoint Mr Banks to his post. Until that time the Defendant appears to have relied on arrangements with individual Borough and District Councils to inspect and keep records of roadside trees and it does not appear that the entire county was covered by the arrangements made with the individual councils. Furthermore it seems that the individual local councils had different priorities when dealing with trees. They were concerned primarily with street trees, i.e. trees within built up areas, and appear to have been concerned more with the trees from the point of view of amenity and planning rather than from the point of view of safety.

26. It was to remedy this deficiency that Mr Banks was appointed. He set up the system which is currently in place. He was presented with an enormous task. There are some two million trees along the length of Surrey highways and the Surrey road network is approximately 5700km in length.

27. He introduced a system of cyclical tree inspection. His inspectors began by inspecting trees on or alongside classification A and B roads. As Mr Banks said in cross-examination, his priority was to take a strategic approach to identify where the risks were and so he started with SPN1 roads. The task of

inspecting trees on C and strategic D roads commenced in September 2008 and the inspection is expected to take approximately 2 years. Since the death of the Deceased the specialist inspection of highway trees has been carried out on a three yearly inspection rota, but the inspection is no longer carried out on roads below the level of SPN1.

28. Matters were not made any easier for Mr Banks by the fact that although the Defendant tried to recover records from the Borough and District Councils when it took over management of the trees, it had no great success. The local authority for the area in which the oak in question stood was Runnymede. Mr Banks said that the local tree officer there had limited records and Mr Banks did not know if Runnymede was conducting inspections on a programmed basis.

29. At the time of his witness statement, and of the death of the Deceased, Mr Banks had two inspectors carrying out routine specialist tree inspections. The method by which they carried out their inspections was by driving very slowly along the road in question, passing and re-passing the same trees. They operate as a pair, one driving and the other observing. They then change positions because of the danger of repetitive strain injury to the observer from constantly craning his neck to observe trees. As necessary an inspector will alight from the vehicle to make an assessment of a tree with hand-held tools and to observe trees from directions hidden when observing from the highway.

30. The inspectors will note any defects and mark the location of the tree using GPS equipment. Data is sorted and an order of priority for remedial works is

established, according to the number of defects found on each road's survey. Defects requiring urgent attention fall into a separate category and are notified to the area maintenance engineers within 24 hours. A pair of inspectors can cover approximately 7km a day.

31. Apart from this pair of inspectors Mr Banks had two other inspectors whose tasks might be best described as dealing with ad hoc tasks that arose.

32. It was Mr Banks' view that in order to inspect the entire highway network (ie not simply those roads currently inspected) on an annual basis it would be necessary to have at least eight pairs of inspectors. He does not have this manpower and in the present economic climate he will not get it.

33. Mr Cocking, the expert instructed on behalf of the Claimant, was critical of the method of inspection adopted by the Defendant and expressed the view that if the inspectors inspected on foot, simply driving between the different locations, they would be able to inspect a greater number of trees. In my judgment this is not a valid criticism. Whilst the method advocated by Mr Cocking, and used by him when inspecting roadside trees in Devon, is no doubt a proper and appropriate method, it does not follow that the method adopted by the Defendant is inappropriate or wrong.

34. Apart from the specialist inspections to which I have referred the Defendant's case was that the highways were subject to routine safety inspections. Trees were included in regular highway inspections. Wick Road would have been inspected on an annual basis by a highway inspector. The last inspection by a highway inspector (Mr Jim Watson, now deceased) took place in the March before the accident. A highway inspector, though

primarily concerned with the surface of the highway itself, would be expected to report any obvious defect which he saw in any highway trees during the course of his highway inspection.

35. In addition to the highway inspectors the Defendant employs community highway officers (CHOs) of whom there were 43 covering 11 areas within the Surrey Highways Group structure when Mr Banks made his witness statement in July 2009. They were described by Mr Banks as fulfilling "a role of applying the Surrey County Council tree policy when interfacing with customers." They are trained to look at trees, though they are not qualified as trees specialists. Their training teaches them to see when the tree is dead or has "other potentially actionable problems outside the scope of normal maintenance activities".

36. When CHOs carry out inspections the focus of their inspections tends to be responding to customers. They are however expected to act in a responsible way to any hazard which threatens highway safety whether or not it has been reported by a customer. If they observe a potential problem they may seek advice from a specialist. To assist them in doing this they are furnished with digital cameras so they can send photographs of the problem tree to the appropriate specialist. Mr Banks' evidence was that it was through his work with CHOs that many trees reported on the unclassified roads received specialist assessment. In this case the CHO for the area was Mr William Turmeau, who gave evidence. He had never had occasion to look at the tree until the accident.

37. The upshot of the scheme as introduced by Mr Banks and, subject to the obvious financial constraints that local government necessarily faces, is that there is in place a scheme.

38. The scheme which Mr Banks introduced is no doubt an effective scheme, but the plain fact of the matter is that by the time this accident occurred the scheme had not been in place long enough for the tree ever to have been subject to any detailed inspection, or so far as the evidence goes ever to have attracted the attention of a Highways Inspector or CHO. There had, as he said in cross-examination, been no formal inspection process in place when he arrived.

39. The experts were agreed in their joint statement that an inspection interval of between one and two years would have been acceptable for this tree, though it is clear that ideally Mr Barrell would have liked to see annual inspections. The type of inspection which they were agreed was appropriate was "a quick visual inspection carried out by a person with a working knowledge of trees as defined by the HSE". If, on such an inspection, any significant details were noted which required further attention, then a more detailed inspection by a qualified and experienced arboriculturalist should be undertaken.

40. The experts agreed that the tree is a significant enough feature and is in a sufficiently busy location to warrant some sort of written record. This seems an inevitable conclusion from the fact that the tree is a massive tree overhanging a public road and designated parking area alongside a well-known and much frequented park: Mr Cocking described it as a high risk

area and I accept this evaluation. It is apparent that there was no written record in respect of the tree.

41. In my judgment it is clear from this material that the Defendant did not have in place at the time of this tragic accident an adequate system of inspection. There was a system in place as a result of Mr Banks' efforts, but as a result of the failure of the Defendant to have done anything adequate before Mr Banks' appointment, the hangover from the pre-Banks days remained and it could not be said that the system was yet adequate. No doubt if Mr Banks' system had had time to clear all of the backlog in time the Defendant would have been able to say it had an adequate system in place, but at the time of the accident it could not do so.

42. Whether there is now an adequate system in place is not an issue in these proceedings: it may be that budgetary constraints now require the Defendant to operate a system which cannot be regarded as satisfactory.

Would an adequate system have avoided the accident?

43. This is the central point in the case. The Defendant says that even if an adequate system of inspections had been in place, so that the tree had been inspected by a suitably trained Highways Inspector before the accident, nothing would have been found which would have resulted in a detailed inspection by a qualified arboriculturalist and then works which would have prevented the accident.

44. The two experts disagreed as to the cause of the branch's failure. Mr Cocking noted that the branch appeared to be complete, having the full

weight of leaves and smaller branches along its length so that the failure mechanism was the increasingly weakening timber structure being unable to support the increasingly heavy burden of leaves and branches. He initially described the internal decay as being "very significant as it was the undisputed cause of the branch's failure" but resiled to some extent in the joint report by agreeing it was unlikely to be the sole cause. Mr Barrell's view was that the fungal infection inside the branch may have contributed to the failure but is unlikely to have been the sole cause. He expressed the view that the failure was most likely caused by "summer branch drop", a phenomenon he described as being heavily influenced by warm weather conditions drying the wood in old trees and making the branches less able to support their weight.

45. Mr Cocking was dismissive of summer branch drop, saying he had only come across about six cases of it and he regarded it as a name given to branch failure when no other cause could be ascertained. Mr Cocking quoted from the text book Diagnosis of Ill-Health in Trees that Summer Branch Drop is often the cause of branch failure "where fungal decay and prior injuries can be ruled out". In my view he was overly dismissive of what is plainly a generally recognised but inadequately understood phenomenon. He characterised it (and Mr Barrell agreed) as a diagnosis by exclusion, which would only be reached where other causes for failure had been ruled out. This does not however mean that the phenomenon was not the cause of the failure on this occasion, though the text quoted by Mr Cocking tends to support the suggestion that it was, at the least, not the only cause.

46. Mr Banks had taken the view, expressed at the inquest on the Deceased and confirmed in his evidence in the case, that the cause of the failure of the branch was the internal decay.

47. In my judgment it is of little importance whether the failure of the branch was caused by the decay alone or summer branch drop or some combination of the two factors. On any view the extensive internal decay was at least a major factor in the branch's failure. The substantial question is whether an inspection of the type the experts agreed was required would have revealed the internal decay. This involves two stages of inquiry: first whether the routine inspection which the experts were agreed was what was appropriate in the first instance would have led to a request for an inspection by a qualified arboriculturalist, and, if so, whether the qualified arboriculturalist's inspection would have led to the removal of the branch so preventing the accident.

What Should an Inspection Have Found?

48. Mr Cocking's view was that there were warning signs evident within the tree which were there to be noticed by a competent person on an appropriate inspection. This, he suggested, should have led to a more detailed inspection by a qualified arboriculturalist and to action in respect of the branch.

49. These signs were:

i) Evidence of pruning wounds that suggested previous branch failures, particularly the branch shown in Cocking 9 [references to photographs are identified by the name of the person producing the photograph and

the number given to it in their evidence] which it is said appears most likely to have failed before the end was tidied up with a saw, leaving a large crack within the stump to provide a substantial entry point for decay.

ii) The wounds to be seen in Cocking 8 where there is a crack or hole in the wound and, as Mr Barrell accepted, evidence of advanced decay on the cut surface.

iii) Discoloured bark seen in Cocking 8.

iv) Defects evident in the cut section of the failed branch in Cocking 18 (Banks 15), including the decay within the old pruning wound. As a result of the late disclosure of Mr Banks' photographs it was submitted the defects included a crack of sufficient width in the failed branch extending over some metres to be visible with the naked eye or a monocular.

v) The dead branch stump on the large log in Cocking 18 (Banks 15).

vi) The cavity in the base of the tree seen in Cocking 16.

vii) Discolouration or thinning of the foliage.

50. In summary, Mr Cocking would have expected the branch that fell to be visibly different from those surrounding it because of the partially decayed state. He noted that the tree had a crown consisting of eight major limbs all ascending at angles away from the trees centre. In his view such a tree would have a tendency to drop major limbs. Its position over a busy parking area

on a well-used road and its immense size themselves justified an unqualified inspector asking for an inspection by a qualified inspector.

51. Mr Barrell expressed the view that there were no visible structural defects in the failed branch that could have been discovered, even if a climbing inspection had been carried out. While he accepted that the branch which failed was a long one he did not regard that, by itself, as a reason why it should have been pruned before failure. He disagreed with Mr Cocking in that he thought it unlikely that there were any abnormal foliage, bud or shoot characteristics on the fallen branch which would have alerted an inspector of the impending failure of the branch.

52. Mr Banks, though a witness of fact, is a qualified arboriculturalist and the qualified person who first had the opportunity to inspect the branch. He gave evidence at the inquest on the Deceased and expressed the view (to which he adhered at the trial) that there was no externally visible defect in the tree which might have been picked up on inspection. He drew attention to the difference between "observation defects", ie things to be noted and kept an eye on, and "intervention defects" ie defects requiring intervention of some form. He confirmed that there was nothing about the tree which suggested that intervention was required before the accident. This was in line with a passage in his witness statement "There was nothing about the tree that would have initiated a climbing inspection to be arranged. There was nothing visible from a visual inspection standing on the ground that would have caused any alarm or concern."

53. The experts both expressed the view that there are "usually obvious signs when failure through decay alone becomes imminent" (per Mr Barrell) and "There is also a strong likelihood that the branch which failed would have had significantly discoloured leaves during the summer months prior to its failure" (per Mr Cocking).

54. It is convenient to take the various heads on which Mr Cocking relied in turn. His first two heads can best be taken together.

Pruning Wounds

55. Mr Cocking's view was that when Cocking 8 and 9 were considered that there were splits and points of entry for decay. He suggested that the branch shown in Cocking 9 had probably failed and then the cut end tidied up later. There was a substantial split in the end which was an obvious possible entry point for infection. He did not think that these points by themselves would have merited a detailed inspection but relied upon them as part of a larger picture which overall meant that a detailed inspection would have been required.

56. Mr Barrell pointed out that if the odd cut branch, stain and a couple of pruning wounds were together considered to be defects that required further inspection, then you would have to give further inspection to every mature oak in the country. Such defects were to be expected in a tree 200 or more years old, and they are no cause for alarm, individually or cumulatively, even though the defect in one of the wounds shown in Cocking 8 evidenced some advanced decay. This was particularly so where, as was apparent from the photographs, there is evidence of good woundwood (ie growth over an old injury whereby a

tree seeks to cover and heal the wound) over pruning wounds. Such woundwood is accepted, as was common ground, to be a sign of a healthy tree. He did not regard the defects to require inspection by a trained arboriculturalist.

57. I found Mr Barrell's evidence in this regard more compelling. It seemed to me Mr Cocking, who said he spent some three hours examining the tree, had been driven to picking on a very minor point which did not justify the weight he sought to give it.

Discoloured Bark (Cocking 8)

58. There was an area of discoloured bark visible in Cocking 8. This is a discrete point apart from the issue as to the bark found on the failed branch. Mr Cocking relied on it as a part of his proposition that cumulatively the tree warranted an expert inspection. Mr Barrell was unable to say what the cause of the discoloured bark was and noted that when he returned to see it during the course of the trial it was no longer visible. Mr Cocking's photographs were taken long after the accident. The cause of the marking on the bark is entirely unclear, but it appears to have been comparatively transient. I am not satisfied on the balance of probabilities, whatever caused it, that it was there before or at the time of the accident. It therefore does not support Mr Cocking's position.

Defects in the Cut Section (including the Visible Crack)

59. As a result of the late disclosure of Mr Banks' photographs which revealed a considerable amount of new detail, this part of Mr Cocking's evidence was necessarily revised and expanded as the case progressed. The decay that

caused the failure is said to be very clearly evident in the photographs taken by Mr Banks on 13 August 2007. In photographs Banks 19, 21 and 24 there was a clear contrast between the lighter healthier wood to be seen nearer the bottom of the stump, where the fracture in the bark and healthier wood commenced, and the darker widening funnel shaped cavity of decayed or modified wood further up the remains of the attached stump of the branch. This Mr Banks accepted was evidence of advanced decay. The point was reinforced by Mr Cocking's photographs 5, 7, 11 and 13 (taken a year later) which showed one of the branches cut following the accident on which there was evidence of new growth and the broken stump on which there was no evidence of new growth, but was said to look even more decayed. So far as the retained sample was concerned the experts agreed in their second joint statement that the "residual wall of lighter wood [that] is very thin and that the darker timber is structurally modified timber with significant internal decay."

60. I am satisfied that these two points are correct in that there was indeed irrefutable evidence of significant internal decay. However this does not assist in resolving the question whether there were indicia from which on an appropriate inspection the internal decay and the danger to the integrity of the branch should have become apparent.

61. It was apparent from the photographs of the cracked stump and the retained sample that a substantial part of the end of the branch, where it split from the tree, must have been taken away from the scene before Mr Banks arrived after the accident. The spur of lighter wood on the retained section could be

matched to the white scar to be seen in the photographs of the stump. A part of the failed branch where it was torn from the remaining stump was missing. It was suggested that the decay appeared to have been more extensive the further up the stump one looked and that if the missing upper part of the branch that broke away had been available for examination, on the balance of probabilities it would have provided further evidence of the decay the point of failure.

62. Again, it seems to me that the point is a good one in that it provides further support for the proposition that there was extensive decay within the branch. What it does not do is assist in determining whether any of that decay would have been visible externally on an appropriate inspection.

Discoloured Wood and Bark: the Open Crack

63. As a result of the late production of the Banks' photographs, the two points raised separately by Mr Cocking as to discoloured wood and bark and an open crack became interlinked and I propose to treat them together.

64. There was considerable debate as to whether the two parts of the log shown in Banks 15 and Cocking 18 belonged together. I am not persuaded that they fitted exactly, despite a lengthy analysis of the photographs by counsel for the Claimant in his closing submissions. I do not, however, think the point matters. One of Mr Banks' three qualified colleagues (not Mr Banks, or he would have recalled doing so) put together the two pieces of wood in an abortive attempt to reassemble the branch. What they achieved was a "best available fit". Since the two parts of the branch had split apart by the impact when the branch fell, thereafter they been sawn up separately and then most

of the branch had been removed before the attempted reconstruction, it is unlikely there could have been an exact fit. What is significant is that Mr Banks saw the two pieces of wood together and with his 18 years experience in arboriculture was of the opinion that they had been part of the same section of the tree, whether or not they fitted exactly with each other. I accept Mr Banks' evidence on the point.

65. The more important issue is whether the crescent shaped piece of wood was (as Mr Banks and Mr Cocking believed it to be) structurally modified by decay and, if so, whether the presence of that decay would have been evident upon inspection of the tree prior to the branch's failure. The Claimant argues that the photographs demonstrate that the central part of this section of the branch was severely affected by decay, such that a cavity had been created. This resulted, it was submitted, in a crack of roughly the width illustrated by the photographs of the reassembled log, which it was said would have been observable on a proper inspection.

66. For the Defendant it was suggested that the crescent shaped piece was darker in colour because it had been sitting in standing water for a week. This was not supported by evidence. While there was evidence from the damp and mud in the 20 August photographs that between 13 and 20 August there had been rain, there was no evidence that the piece of wood had been in a ditch or other stranding water. While there was a ditch near the carpark I have no evidence this piece of wood was ever in it. Mr Banks actually saw and photographed the log. He made no mention of it being saturated or having

come out of a ditch. When he was recalled to give further evidence he explained the darker colour by saying that the wood was modified.

67. Both Mr Barrell and Mr Cocking concurred that the cavity shown in the log in Banks 4 was caused by decay. Mr Barrell also accepted that there was decay evident in the centre of the log show on at the bottom of Banks 2 and in Banks 5. He was not prepared to accept that the smooth edge and powdery appearance of the linear face of the crack were caused by decay. He said it was impossible to tell and that the appearance might simply be caused by sawdust. Both Mr Banks (who saw the decay at first hand) and Mr Cocking interpreted the photographs as evidence of decay extending from the centre of the log to the bark. Mr Cocking had no doubt that the discolouration of the bark evident on the linear face of the split surface shown in Banks 2, 4 and 5 was caused by decay and that the decay had reached the cambium. Mr Banks agreed. While I appreciate Mr Barrell's difficulty in forming a conclusion on the basis of the photograph, in my judgment the balance of probability is that the appearance of that cut surface is not caused by sawdust.

68. The bark near the decay on Banks 2, 4 and 5 shows a blackish colour which is distinguished from the reddish colour of the recently fractured bark elsewhere in the photographs. On each side of the fractured surface of the log in Banks 4 the reddish colour continues until it reached the area of severe decay. After that the bark is black. Mr Cocking's evidence was that the bark on the crescent shaped piece was discoloured as a consequence of the decay. This was supported by the differences in colour to be seen where

an edge of bark could be seen in Banks 2, 4 and 5 in the vicinity of the decay. There it is dark and discoloured as distinct from the reddish colour where the bark had been freshly fractured.

69. In the course of his oral evidence, in disputing that the discoloured bark marked decay Mr Barrell gave evidence that bark that is attached to live cambium adheres firmly to the wood and will remain so even after the tree is felled and sawn up, but that bark adjacent to dead cambium will always be loose and fall away if subjected to trauma, such as by being sawn with a chain saw. Cambium is the thin colourless layer running between the wood and the bark of the tree (or in dictionary terms "the layer or cylinder of meristem by whose differentiation into xylem and phloem new wood and bast are formed"). Therefore, he suggested, the decay could not have entered the cambium at any point where there was evidence that the bark was intact. Mr Cocking's view was different. As a matter of experience sometimes bark can be pulled away from dead wood with ease, in other places it remains firmly attached. Anyway, it was not the Claimant's case that the whole branch was dead but that parts of the branch were affected by advanced decay and that in places the decay had affected the cambium.

70. In any event it is apparent that the crescent shaped part of the log in Banks 15 has come away at some points.

71. The Defendant suggested that even if there were discolouration of the wood and of the bark, this would not have been apparent. Self-evidently the discolouration and decay within the branch would not have been visible before the branch fell. As to any discolouration of the bark, this would not

have put an inspector carrying out an appropriate inspector on notice. Even if it had been, there was no indication that any discolouration of the bark would have been visible. The tree was heavily shrouded in ivy which would have impaired visibility and there was no evidence that any discolouration was on the lower side of the branch as opposed to having been above the branch and so invisible except to a climbing inspection.

72. The Claimant accepted that without records of previous inspections of the tree, without photographs of the branch before it was cut up, and without the possibility of reassembling the branch (which Mr Banks and his colleagues tried unsuccessfully to do), there could be no certainty as to whether there was a visible crack in the branch before it failed. It was submitted however that there was enough evidence to infer the probable presence of an extensive crack that had breached the bark and that extended over several metres.

73. For this proposition the Claimant relied on two matters: (i) the reconstruction of the log in Banks 15 showed a probable crack in the reassembled log, and (ii) Banks 2, 4 and 5 show decay across more than half of the surface of a number of logs. It was submitted that it extended to an edge of discoloured bark. Mr Banks accepted that a crack extended for more than a metre (Mr Cocking felt several metres) and that the reason for the discolouration of the bark could be oxidisation.

74. As to the first of these points, it depends on the proposition that the log as re-assembled in Banks 15 is indeed an accurate reinstatement of the original log. While I accept that the two pieces of wood come from the same log the

evidence does not show on the balance of probabilities that the pieces fit together as the Claimant suggests. I therefore cannot accept that the photograph by itself is evidence on which a Court could properly hold that there was an open crack.

75. So far as the second point goes, Banks 2, 4 and 5 show decay extending to an edge of discoloured bark. Mr Cocking's view was that this demonstrated that there would have been a crack several metres long, that it would not have been on the upper side of the branch and that it would have been visible from beneath. He noted there was no ivy on the underside of the branch. Mr Barrell accepted there would have been a crack of perhaps a metre in length. He did not attach importance to it, noting that cracks are common in old oak trees. He was not prepared to accept that the crack would have been visible and would have extended through the bark. He pointed out that if there had been, then woundwood would have started to grow over the crack so as to form a raised rib across the defect. There was none.

76. On this state of the evidence I am not satisfied that the Claimant has established that there would have been an external crack visible on an appropriate inspection.

77. So far as discolouration is concerned, the position is rather different. There was clear evidence of discolouration to the bark. There is no satisfactory evidence as to whether the discoloured bark was on the top or bottom of the branch above or below the branch. If it was above the branch, then it would probably not have been visible on a routine inspection and might well in any event have been covered in ivy. If it was below the branch, then the balance

of probability is that it would not have had such a covering of ivy as to render it invisible to an inspection from the ground. I am prepared to assume in the Claimant's favour that the discolouration was such that it could have been seen from the ground on inspection. However this is of little assistance to the Claimant since Mr Cocking's evidence was that discolouration of bark would not of itself prompt a detailed inspection by a trained arboriculturalist.

The Cavity

78. It was said on behalf of the Claimant that although that the cavity was not relevant to the failure of the branch, it was the sort of thing that ought to have been reported and that should have provoked a visit by a qualified inspector.

79. Mr Barrell disagreed. He regarded the cavity as just one of the sorts of thing one would expect to see on a mature tree like the one in issue.

80. Mr Banks, when he saw the cavity following the accident, did in fact arrange for tomography to be undertaken (this tomography revealed no decay in the trunk). This, like the shortening of the other two branches, was a precautionary measure in the aftermath of the accident. Mr Banks had, despite undertaking the tomography, felt able to tell the Coroner that there was no externally visible defect in the tree which might have been picked up on inspection. It is important to distinguish between those matters which in the course of an ordinary inspection would be a cause for comment and for action to be taken and those are done as part of an investigation following a catastrophe and in reaction to it.

81. In relation to the cavity I prefer the evidence of Mr Barrell to that of Mr Cocking. I do not accept that a reasonably competent person carrying out a brief inspection of the tree would have thought it grounds for referring the tree to an expert arboriculturalist, nor do I regard it as something which taken with other factors would have resulted in an expert arboriculturist being called on.

Discoloured Leaves

82. As to the discoloration of leaves, this was a matter on which the evidence was disputed. In the joint statement Mr Cocking accepted that there was no evidence that the failed branch had any discoloured foliage although he expected there would have been some. As the experts agreed, there is in fact no evidence of any dead foliage in the crown of this tree at any time. Furthermore Mr Banks gave positive evidence to the effect that the foliage on the fallen branch that he observed consisted of live green leaves, with no discoloured leaves seen by him on those branches. The various photographs show healthy green leaves attached to branches: none of them show discoloured leaves attached.

83. The experts were agreed that internal decay does not cause foliage discolouration until a very late stage when it starts to affect the cambium.

84. Mr Cocking expressed the view that the cambium was affected by the decay and there was a strong likelihood that the branch which failed would have had significantly discoloured leaves during the summer months prior to its failure. His view was that if the cambium was affected, this is likely to have led to discoloured foliage.

85. This was not a view shared by Mr Barrell, who would not have expected to see discoloured leaves on the basis of what he observed. It is common ground that for the foliage to have become discoloured, the cambium would need to have been affected, but the obverse does not necessarily apply. Even if there is an isolated pocket of decay, or an isolated area of cambium is affected, a tree can produce healthy foliage further along the branch. In Mr Barrell's view pockets of decay can be isolated by the tree's natural defences and by-passed so that the foliage above is not affected, and in his view he position that he would not have expected any discoloured foliage on this tree in the circumstances.

86. On behalf of the Claimant it was said Mr Banks and his qualified colleagues knew that the focus of the Coroner's enquiry would be into whether the failure of the branch could have been foreseen. They had the opportunity and responsibility of collecting relevant evidence, but on the evidence made no attempt to examine the foliage, collected only the single sample of wood from the scene, and did not examine any of the logs showing evidence of decay that may have affected the cambium.

87. Against this background it was suggested that the Court should be satisfied from what could be seen in the photographs, in particular Banks 33, that there had been discoloured leaves on the failed branch. This photograph, taken about 16 hours after the branch fell but only produced very shortly before the start of the trial, is "very much less than perfect" (to adopt counsel for the Claimant's euphemism). It is said to be the best of the evidence that is available on this point. As Counsel for the Claimant points out that, had

the Defendant done more at the time far better evidence might have been available.

88. Having had the belated opportunity of studying the photograph Mr Cocking pointed out a number of leaves in it. They were mainly oak leaves, yet these leaves lie under a large variety of tree species and the pile might, it was suggested, be expected to contain leaves from a greater variety of trees, were it not that they predominantly came from the fallen branch. Within the pile of leaves and on the adjacent verge it was said there are a few leaves visible with the brown coppery colour typical of oak leaves that fall in autumn (probably left over from the previous autumn) but that the great majority of the oak leaves appear to have a lighter greenish colour, typical of early discolouration caused by reduced vigour in the branch.

89. In support of the proposition that these supposedly discoloured leaves showed early discoloration counsel for the Claimant contrasted the quantity of leaves against the kerb with the far smaller quantity to be seen against the kerb away from where the branch fell, e.g. to be seen in Banks 11. In answer to the suggestion that even if there were some discoloured leaves on site, since over 95% of the foliage that would have been on the branch (assuming the quantity of foliage had not thinned as a consequence of reduced vigour) was no longer on site, and since it is likely that the branch brought down some healthy smaller branches and foliage as it fell, no inference of vigour in the branch could be inferred from the presence of a small number of dark green leaves within the pile of debris in Banks 33.

90. Mr Barrell was unable to identify any such discoloured leaves as Mr Cocking identified in the photograph. The joint statement stated that it is unlikely that a branch with good woundwood would be exhibiting symptoms of poor health such as discoloured foliage and he pointed to good woundwood on the branch.

91. In my judgment, even allowing as benevolent an interpretation as possible from the Claimant's point of view to the evidence of Banks 33, the quality of the photograph is such that it is impossible to say on the balance of probabilities that the photograph shows leaves discoloured as a result of the reduced vigour of the tree. There was an interesting exchange when Mr Cocking was being cross-examined and was asked what colour the line painted on the roadway was that is shown in that photograph. He replied that it was "White...or yellow". In these circumstances I do not think I can make any findings based on the leaf colour apparently shown in that photograph. I fully appreciate Mr Cocking's point of view, but he is approaching the matter from the other end. He starts from the proposition that he would expect to see discoloured leaves and sees leaves which, given the low quality of the photograph, are not inconsistent with his view, but I do not think the quality of the photograph properly enables him to go further than that.

92. In the end the resolution of the point comes back to the simple question: do I accept the evidence of Mr Banks that the foliage on the fallen branch that he observed consisted of live green leaves and that he did not see any discoloured leaves on those branches. Having observed him being rigorously cross-examined, I do accept that evidence. In my judgment the Claimant has

failed to show on the balance of probabilities that there were discoloured leaves on the failed branch.

Aggregation and Ivy

93. Mr Cocking suggested that the totality of the observable defects should have led to a detailed inspection. I am unable to accept that proposition. This was a tree some two hundred years old. It was bound to have a number of apparent defects. The question is whether those defects ought to have warranted an expert inspection. Like Mr Barrell I am unable to accept that the existence of a number of minor defects would have warranted a detailed expert inspection where there was nothing to indicate that any one of the defects posed a danger. There was nothing to suggest that the minor defects were interrelated. There were not in my view on the evidence before me any signs to lead any expert (whether a trained highways inspector or an arboriculturalist) to select this tree for branch removal.

94. Counsel for the Claimant sought to add the volume of ivy on the tree to the reasons why there should have been a detailed inspection. He did not submit that the ivy should necessarily have been removed as a precaution, absent indicators of a problem. But he suggested that the knowledge that the inspection of such a large and important tree was impeded by ivy, coupled with the knowledge that ivy could increase the tree's weight (especially after rain) and the knowledge that ivy can increase suitability for fungal infection ought to have increased the index of suspicion and tended to make the inspector to request an inspection by one of the Council's experts. So far as that was concerned, the evidence did not support the suggestion that the ivy

should have resulted in an expert inspection, whether taken alone or in conjunction with other factors, and the experts' joint statement seemed to contradict the proposition.

Conclusion

95. The overall picture, having looked at all the material which Mr Cocking was able to bring forward and the significant late additions in the form of the Banks photographs is:

i) The Defendant did not have in place an adequate system of inspection at the time of the accident in that although the system would have become adequate with time, it was still inadequate by reason of the previous absence of a system and the time needed for the new system to achieve full cover.

ii) Even adopting Longmore LJ's criteria for considering the evidence, the Claimant has failed to discharge the burden of proof on her. The balance of probabilities is that Mr Banks was correct in his view expressed to the Coroner that this was an unforeseeable accident. Even if there had been a proper system of inspection in place, the defect in the branch would not have been revealed so as to enable the accident to be avoided.

96. While I have every sympathy for the Claimant in this tragic case, as the law stands and with there being no absolute liability for damage caused by highway trees, the result is that her action must fail.