



Highway tree inspections; what is the standard of the duty of care?

# Highway tree inspections:

## what is the standard of the duty of care?

Only about one in 60 tree failure incidents ever becomes public knowledge as a recorded civil judgment, with the remaining 98% usually being settled behind closed doors. There is emerging evidence that this mechanism is slowing the evolution of tree inspection procedures and training because these secret settlements prevent many of the existing shortcomings ever being revealed. During the past decade (2008–2017), Jeremy Barrell has been involved as an expert in 62 cases (civil, criminal, and inquests) relating to harm arising from tree failures, unique experience that is revealing some uncomfortable trends. This article is an interim report of ongoing research into how UK highway authorities are managing their tree inspection responsibilities, with a full scientific paper anticipated in 2019.

### The scale of harm arising from tree failures

A small UK research study commissioned by the National Tree Safety Group (NTSG) in 2010 reports that there were on average about six fatalities a year from tree failures, with extrapolations indicating that there may have been a further 55 annual serious injuries. The reliability of this research is limited by the vagaries of accident recording and the lack of funds to carry out sufficient investigations, suggesting that these figures should be treated with caution. However, the research does confirm that harm arises, and probably of a sufficient scale to be a material consideration in managing tree risk.

More specifically, during the last 14 years there have been 11 written legal judgments relating to harm arising from tree failures, so slightly less than one a year, which is less than 2% of the average 61 annual incidents reported by the NTSG. It follows that the remaining 98% are not reported publicly through the written judgment process, which leaves some mystery about their circumstances. Undoubtedly, some incidents are not pursued, but I know from my own experience (I deal with 3–10 cases per year) that many are, and those are settled before the cases get to court. These settlements are usually confidential, and so their details, including any shortcomings of the defendants' tree inspection regimes, are never revealed for public scrutiny. Effectively, these secret settlements mean that poor practice is rarely exposed, and that silence assists duty holders in avoiding challenge on the standard of their regimes.

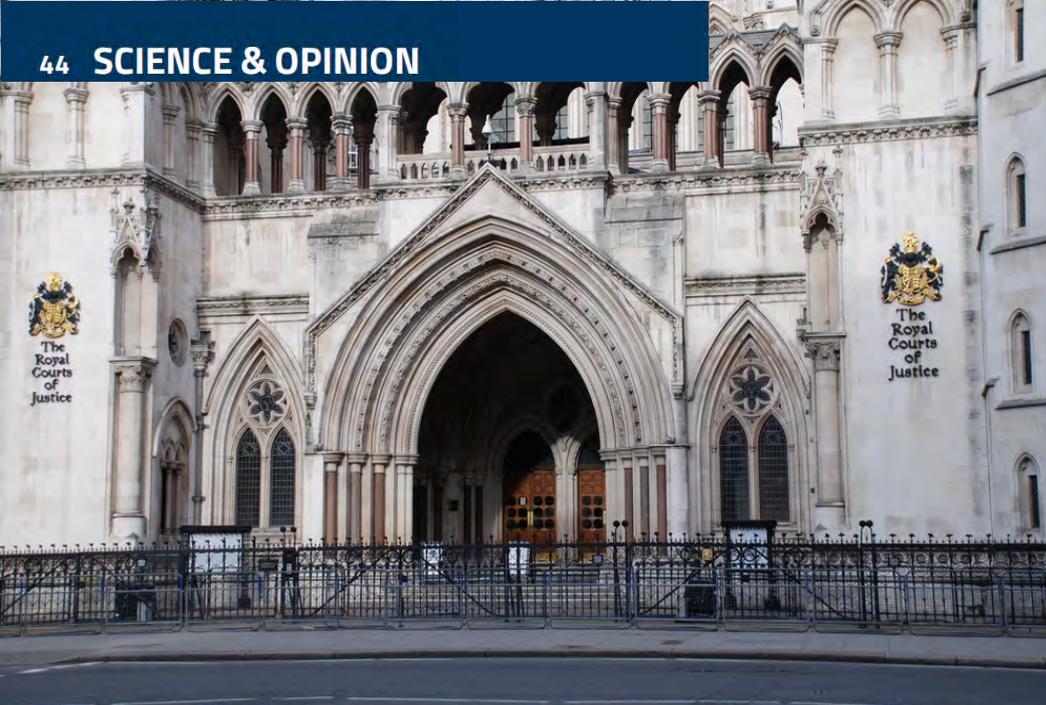
### What proportion of harm arises from highway tree failures?

The NTSG research identified 64 deaths over 10 years, but a review of the data indicates that 49 (77%) were highway incidents. From my own records of both deaths and injuries during the last 10 years, 37 (60%) of my 62 cases relate to highway trees. Despite the absence of detailed research into the proportion of highway trees causing deaths and injuries, these figures indicate that it is likely to be more than 50%. If that is accepted, then a loose extrapolation of the NTSG findings indicates that highway tree failures account for an average of at least 3 deaths and 26 injuries each year.

### Inquests and the evolution of highway tree inspection guidance

An inquest is a fact-finding enquiry to establish who has died, and how, when, and where the death occurred. It is a form of public enquiry to determine the truth and is intended to be inquisitorial. This is a different thrust from the adversarial approach adopted in criminal and civil trials. Within the inquest process, through the Coroners and Justice Act 2009, a coroner can issue a Regulation 28 Report to Prevent Future Deaths (PFD). It is the stated intention of the Chief Coroner that PFD reports encourage change for the better, with a presumption in favour





of publication on the judiciary website. PFD reports are deemed to be important instruments of change, and they can be applied to deaths associated with tree failures.

On 5 October 2012, a large branch fell from a mature oak tree (Photo 1) adjacent to the A332 near Windsor, Berkshire, and caused the death of a motorist, Mr Michael Warren. An inquest held in July 2014 resulted in a Narrative Verdict and the issue of a PFD report where the Coroner recorded concerns raised during the hearing ([www.barrelltreecare.co.uk/resources/useful-documents/2014-inquest-verdict-and-prevention-of-future-deaths-report-relating-to-the-inquest-of-mr-arthur-michael-warren/](http://www.barrelltreecare.co.uk/resources/useful-documents/2014-inquest-verdict-and-prevention-of-future-deaths-report-relating-to-the-inquest-of-mr-arthur-michael-warren/)). The highway authority was Bracknell Forest Council and the PFD report highlighted several concerns with its tree inspection regime, including a lack of guidance for highway inspectors, the limited training provided for those inspectors, and the need for a series of inspections limited only to trees. Taking a broader perspective, it also identified that there was: *'very little by way of clear, detailed guidance available to Local Authorities as regards the appropriate systems of highway inspection of trees abutting the highway. There is a potential need for clear direction from a suitably qualified source to assist Local Authorities in this crucial role.'*

After the inquest, the PFD report was sent to the Chartered Institution of Highways and Transportation, who forwarded it in September 2014 to the UK Roads Liaison Group (UKRLG) (the organisation publishing government-endorsed Codes of Practice for highway management). The relevant Code of Practice in force in 2014, *Well-maintained Highways*, was superseded by *Well-managed Highway Infrastructure* in October 2016, and the PFD concerns were considered for that update. However, highway authorities were given a two-year period of grace to transition from the old to the new, so the new guidance will come into force in October 2018.

*Well-managed Highway Infrastructure* sets out strategic guidance on tree inspections and training, as follows:

**A.9.9.3:** *'... Authorities should develop a policy for the installation, subsequent condition inspection and maintenance of highway trees....'*

**9.6.1:** *'Trees are important for amenity and nature conservation reasons and should be preserved but they can present risks to highway users and adjoining land users if they are allowed to become unstable. In England and Wales the highway authority is also responsible for ensuring that trees outside the highway boundary, but within falling distance, are safe....'*

**9.6.2:** *'Safety inspections should incorporate highway trees, including those outside but within falling distance of the highway. Inspectors should take note of any encroachment or visibility obstruction and any obvious damage, ill health or trip hazards. A separate programme of tree inspections, however, should be undertaken by arboricultural advisors.'*

**9.6.3:** *'Authorities should include some basic arboricultural guidance in training for inspectors but it is important that arboricultural advice is obtained to advise on the appropriate frequency of inspections and works required for each individual street or mature tree, based on assessment of respective risks.'*

## Summary of ongoing highway tree inspection research and an interim update

In parallel with these events, from a review of my recent cases, I identified that some highway authorities were not addressing some matters of concern raised in the Warren PFD Report, and subsequently articulated in the guidance above. However, the number of cases I was dealing with was insufficient to assess if these observations reliably reflected the national situation, and so I began further investigations.

These identified 212 UK highway authorities, and each was sent a Freedom of Information (Fol) request in February 2018, asking for information on tree risk management strategies, tree inspection protocols,

and training programmes, designed to establish the current state of the nation in respect of highway tree inspections. It is planned to compare these results with a second Fol request scheduled for 2019, to provide a before-and-after snapshot of the critical date (October 2018), when the above guidance becomes fully effective.

Not all the responses are in yet, but from about 200 received so far, it seems that there are a wide range of approaches to inspecting highway trees. At one extreme, some authorities have no proactive tree inspection regime in place, but a larger proportion are at the other end of the spectrum, using trained arboriculturists to regularly check highway trees. More specifically, the responses have highlighted driven inspections as an area of confusion, which indicates that further guidance may be worth developing.

I anticipate that, when published in 2019, this data could inform the evolution of the *'clear, detailed guidance'* on highway tree inspections called for in the Warren PFD report. It will be interesting to see how many highway authorities manage to comply with the UKRLG guidance by the October 2018 deadline!



**Jeremy Barrell** is an author and Managing Director of Barrell Tree Consultancy.

### Overview of the civil claims process

When a tree or branch fails and causes harm to people or property, injured parties can seek redress through civil litigation. If it is suspected that the entity with responsibility for managing the tree (the duty holder) had a duty of care to the injured party, then the foundation for a civil claim exists and the process of resolving the dispute can progress. The injured party becomes the claimant and the duty holder becomes the defendant, and the process starts with the claimant notifying the defendant of the particulars of claim, i.e. why the claimant thinks the defendant is to blame. At any time during the ensuing exchanges the parties can agree to settle the dispute and it is over, but if there is no agreement, then ultimately the details from each side of the case are heard by a judge, which results in a judgment in favour of one party or the other. This judgment is final unless permission is given to appeal, in which case it can be heard in the Court of Appeal, with the possibility of further hearings in higher courts under some circumstances. Judgments from the first round of hearings (first instance cases) have no significant weight in determining future cases, but those that go to the higher courts become precedents and are embedded in the body of civil law for future reference.