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TREE CONSULTANCY

Responsibility for risk

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Four recent court judgments have helped to clarify the duty of care expected from tree owners in the UK. Jeremy Barrell explores the case law and its implications.

That trees offer multiple benefits to our communities is understood intuitively by the public. Yet trees can cause accidental injury or harm, and when they do, liability must be established and, as part of that process, probing questions have to be asked about responsibility and management.

Statistics show that the level of risk from trees is very low; on average, around six people a year are killed by trees, compared to 10 people a day killed on the roads. Clearly, there is no need to panic, but land management professionals do need to be aware of their responsibilities.

Basic principles

In broad terms, a tree owner (and/or whoever has control over a tree) 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. Case law upholds the principle that the standard of the duty of care varies according to the resources available to the duty holder, i.e. a large landowner, such as an estate or a highway authority, would be expected to apply a higher standard of management than smaller landowners, 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.

In the event of a tree causing harm, court deliberations often focus on 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 formulae that can be applied and final decisions depend on the interpretation of the evidence by a judge, in the context of relevant case law. Since 2006, there have been four judgments from the lower courts that provide some limited pointers to how these matters may be viewed:

Poll v Bartholomew (2006): This High Court case covered the standard of the duty of care and decided that, in the circumstances, a drive-by inspection was not a sufficient level of inspection and the claimant succeeded.

Corker v Wilson (2006): In this case, the City of London Court considered the failure of a branch that had been cracked on its upper side and whether or not the householder 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 losing the case.

Atkins v Scott (2008): The County Court focused on the inspection regime and the competence of inspectors. It confirmed that it was desirable, although not essential, to have a written record of inspections. 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 visible during a competent inspection. The decision was that it was not visible and the defendant successfully refuted the claim.

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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 that the lowest standard applies to home owners, requiring them to be aware of obvious defects, but not expecting them to have specialist knowledge. 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.

Potential for harm (Figure 1)

In the face of these and previous judgments, duty-holders need to be able to decide 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 potential for harm warrant any proactive intervention? Potential for harm is affected by the size of the tree part that could fail, the likelihood of that part failing and the 'targets' that could be harmed. The most important of these is the last; without targets, there cannot be any potential for harm. And the more people use the land (for example, driving along roads, parking in car parks, travelling along footpaths or visiting or occupying buildings around trees), the more potential for harm there is. The precise thresholds for action are a matter of judgment, but it is likely that all duty-holders who go through this assessment process would be considered to have gone some way to meeting their duty of care.

If the process illustrated in Figure 1 identifies trees that might present a significant risk, then the required standard for managing them will vary according to land-holding. As *Selwyn-Smith v Gompels* sets out, the lowest standard applies to 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 in these judgments, it is likely that householders would be expected to identify obvious defects, such as dead branches, broken branches, decay, large splits or cracks, fungal brackets, etc, and call in an expert if they don't know what to do. However, it is unlikely that they would be expected to consult technical publications. In summary, a quick visual check, looking for obvious defects, is likely to be sufficient at this lower end of the spectrum.

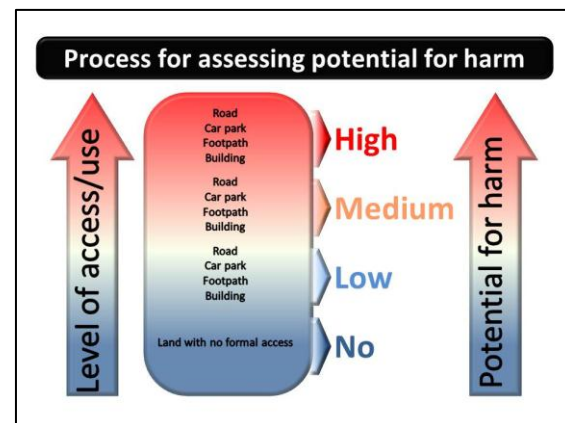


Figure 1: The greater the access and/or use of land, the greater the potential for harm, therefore the greater the obligation to manage trees proactively

At the other extreme, large landowners with greater resources would probably be expected to know about, and operate according to, recognised published guidelines. One of the most relevant is the Health & Safety Executive Sector Information Minute (HSE SIM, 2007) called *Management of the risk from falling trees*, which contains the following guidance on inspection requirements: "For trees in a frequently visited zone, a system for periodic, proactive checks is

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

This document is focused on a proportionate and staged approach, recognising that many trees may not need inspecting at all.

checked - by the householder without specialist training, or, where the landholding is more substantial, by someone with "a working knowledge of trees and their defects". If defects are identified, remedial works may be specified immediately or a further, more detailed, inspection carried out.

- **Stage 3:** A court would probably expect the more detailed inspection to involve a person with specialist knowledge, formally trained for the task.

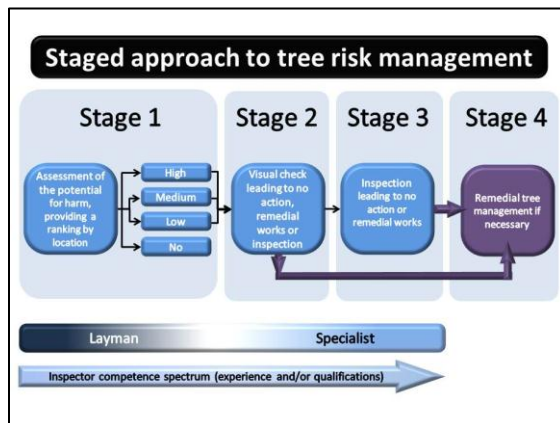


Figure 2: The three stages of action in responsible tree management

Figure 2 illustrates three obvious stages in the responsible management of risk from trees:

- **Stage 1:** The assessment of the potential for harm based on the level of access and use, carried out by a layman with no tree expertise.
- **Stage 2:** If there is significant potential for harm, trees should be visually

In short ...

Unless trees are so remote that there is no realistic potential for harm, duty holders are expected to manage their trees proactively: first through a quick visual check and then through a more detailed inspection if necessary. In the event of harm, all duty holders should be prepared to justify and defend their decisions during examination in court - a formidable prospect that all aspiring tree inspectors should be aware of.

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