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NTSG: an alternative view!

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Managing the risk from trees is a complex matter because, in addition to knowing about risk and trees, it requires a detailed understanding of how the legal system works. When tree failures cause harm, it is the courts that ultimately decide if a duty holder has done enough, an uncomfortable truth that seems to be given little weight in the recent National Tree Safety Group's (NTSG) publications. Jeremy Barrell offers a personal view on why he thinks there is still more work to do before those documents can be reliably considered as definitive references.

From my outside perspective, the formation of the NTSG seems to have been driven by panic from two different directions. On the one hand, large landowners were spooked by a rather extreme interpretation of the Poll -v- Bartholomew case (2006), where a substantial private estate was found to have an inadequate tree management regime. Sensationalised speculation that this placed an excessive burden of tree inspection on duty holders created an air of anxiety that predisposed those with most to lose to jump on the first bandwagon that came along.

At the same time, environmental concerns were being stoked by a noticeable increase in the felling of ecologically valuable trees under the safety banner, again supposedly triggered by Poll. Understandably, this was a source of anxiety within the environmental community, resulting in considerable momentum to halt the loss of this important ecological resource. Although this enthusiasm was

undoubtedly well-intended, it failed to consider two rather important reasons for the increased tree losses. Firstly, landowners were taking advantage of an opportunity to finance necessary safety works through realising the timber value of roadside trees. Secondly, arboricultural advisors were obviously erring on the side of caution rather than run the risk of ending up in court. Two real causes of tree loss, neither of which can be reasonably blamed on Poll!

In 2007, the NTSG emerged as a vehicle for reducing these pressures on trees, and was embraced by both sets of interests. Indeed, it now places significant emphasis on being a wide-ranging grouping of stakeholders, with the implication that this is a good measure of reliability and broad support for its position. However, the history is important because it reveals the somewhat understated perspective that this alliance is dominated by a common interest to reduce the intensity of tree management. Property owners have a very strong incentive to keep their costs

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low and environmentalists want to stop unnecessary tree felling — similar objectives, but for very different reasons. Of course, the NTSG claim to bring common sense and balance to tree management is intuitively appealing but, in the context of the stakeholder group composition, have the recent publications delivered on these aspirations?

The NTSG has published its deliberations as three documents: a short summary of four pages for homeowners called *Managing trees for safety*; a longer 40-page 'summary' for landowners called *Common sense risk management of trees*; and the main document with the same title, running to 104 pages. The NTSG has got it absolutely right in identifying the need for a brief summary for homeowners because the detail is complex and just too much for a layperson to grasp from a quick read of the main document. Those with an eye for detail may be a little disappointed to find some dubious statements that could easily be misinterpreted and several inconsistencies with the main document. However, on the whole, it seems a valuable and useful contribution that homeowners should have no problem in understanding.

In contrast, the so-called '*Landowner summary*' is much more complex, running to 20 pages as a shortened version of what is covered in about 45 pages of the main document. By most common interpretations of 'summary', this is not one; it is simply too long and nothing like as effective as the homeowners' document. Of much more use to landowners would have been a real summary, i.e. shorter, along with a step-wise flow chart to help them work

out how to meet their duty of care. Such flow charts exist, they are not prescriptive and so they would fit in with the broad thrust of the NTSG approach, and yet there is no such inclusion. In short, an opportunity missed.

Turning to the main document, it is visually engaging, with good images and plenty of them. Chapter 3 on *What the law says* is very well written and one of the best short analyses of the subject currently in print. Similarly, the examples in Chapter 5 are valuable because most duty holders will be able to select a scenario that reflects their circumstances and use that as a template for action. These discussions will be extremely helpful to all duty holders wanting to know more about their duty of care and are a valuable contribution to the broader tree safety discussion. There is an excellent diagram on page 53, courtesy of The Tree Council, that fully utilises the value of images, with focused explanation to communicate an array of obvious tree defects. Similarly, the NTSG definition '*a defect in the context of the growing environment of a tree is a structural, health or environmental condition that could predispose a tree to failure*', is a very useful statement identifying that change to a tree's surroundings is an essential management consideration. All these points are very well made and a credit to the NTSG.

On a broader level, the importance of introducing the concept of factoring tree benefits into the management equation cannot be understated and the document should be applauded for its bold support of this approach. Although there has been some scepticism from legal commentators on whether this will be embraced by the courts, it is



NTSG: an alternative view! **AA Arb Magazine (Summer 2012)**

nonetheless a starting point for future policy development that is likely to be widely supported. For all of the above reasons, 70–80% of the document is a useful and welcome contribution to mainstream tree management.

However, as with all high profile projects, the whole is only as good as the weakest part and, unfortunately, this document has some serious flaws. Most troubling is the conflicts of interest that exist for a significant proportion of its stakeholders. In general terms, a conflict of interest occurs when an individual or organisation is involved in multiple interests, one of which could possibly corrupt the motivation for an act in the other. In principle, conflicts of interest regularly crop up in business and there are accepted mechanisms for dealing with them, the easiest of which is a simple declaration. It is obvious that conflicts of interest exist for a significant proportion of the stakeholders relating to the management levels that the document recommends. A low level of management would result in direct financial gain for large landowners and an ecological gain for stakeholders with environmentally orientated objectives. A short statement declaring these conflicts would have added important transparency and subdued this anxiety. Its omission will provide critics with an obvious opportunity to undermine the credibility and integrity of the document.

Conceptual diagrams are extremely helpful for explaining difficult ideas to people who have little experience of the underlying detail, in fact, just perfect for duty holders trying to grapple with the interconnected complexities of the law, risk analysis and trees (see example over

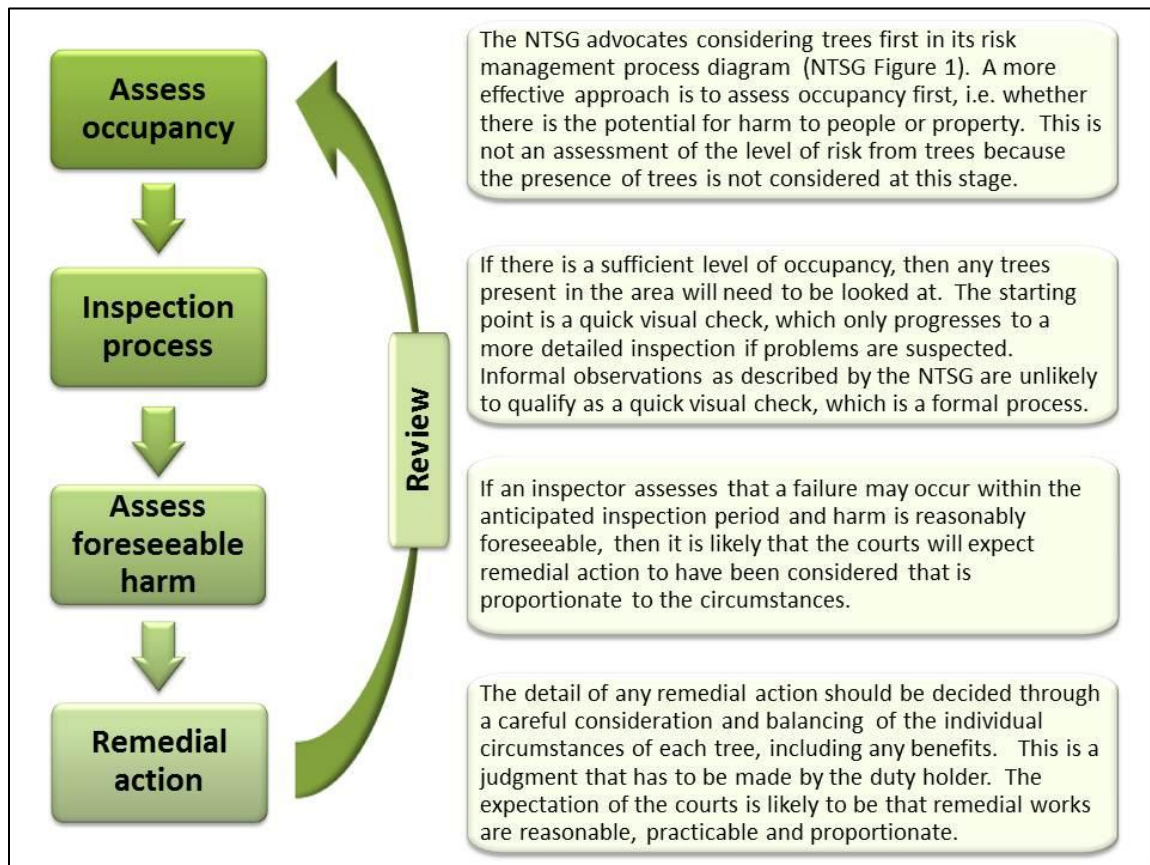
the page). The NTSG attempts to explain the risk management process in its Figure 1, which looks like a flow diagram of sorts, and it probably does have some relevance to managing tightly controlled industrial processes. However, to the average duty holder, it is likely to be more confusing than helpful: an academic exercise rather than a serious attempt to provide intelligible guidance. For arboriculturists, it bears very little resemblance to what actually happens on the ground; it is too remote from the practical reality of managing trees. It has obvious technical inconsistencies and there is no explanatory text at all to help the reader. Undoubtedly, whoever conceived it understood what it was meant to convey, but that wisdom is likely to remain hidden for the majority of the people it was intended to help. Of course, the test for the validity of this observation is simple: you read it and decide for yourself if it makes sense and would it help you in discharging a duty of care.

Another anxiety is the excessive emphasis placed on the key principle '*the overall risk to human safety is extremely low*'. Whilst this is technically correct, questions are likely to be asked about how appropriate such a statement is in a document that is promoted as guidance for duty holders. For them, it is not the overall risk that is of any importance at all, it is the local risk, and that is what the courts will be looking at. A defence of 'the overall risk is extremely low' is unlikely to carry any weight in court, which begs the question, why is it given so much emphasis in this document? To mention it once or twice would be acceptable, but it is repeated more than 30 times throughout the text; the dominating impression is not one of

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balance and proportionality, as advocated by the NTSG; it is of a hard-sell of an irrelevant issue! The NTSG seems to be confused and promoting a partisan position about the importance

of overall risk compared to local risk, a vulnerability that will certainly be exploited once the lawyers start to look at the detail.



An alternative to the NTSG Figure 1: This conceptual diagram illustrates at a glance a strategic framework for duty holders to follow on the left, with brief explanatory notes on the right. This approach logically places the consideration of tree benefits at the end of the process, not at the beginning, as advocated by the NTSG.

Turning to inspections, the NTSG advocates three types: informal observations, formal inspections and detailed inspections. This seems a significant departure from the Health and Safety Executive (HSE) guidance set out in its Sector Information Minute *Management of the risk from falling trees* (2007), where only two levels of inspection are noted: the quick visual

check and the detailed inspection. There is no mention that informal observation is a means of discharging a duty of care and yet this seems to be what the NTSG is implying. Indeed, there is a clear impression that duty holders may be able to rely on reports from the public or the casual observations of employees to meet their duty of care, which is likely to raise some legal eyebrows! However, in



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all fairness, the whole issue is not well explained, which makes it a confusion needing urgent clarification.

In summary, the bulk of this document is useful and informative, making it a valuable contribution to the debate. However, Chapter 4, which should pull it all together and provide a duty holders' framework for management, falls well short of doing that. It is poorly structured, with a seemingly superficial appreciation of the wider legal context. Indeed, its messages are not at all clear, with little practical help for the duty holder. Most of the issues are explored, but it is not structured or presented in a way that assists the decision-making process.

At a recent London Tree Officers' meeting, a representative of a significant

stakeholder stated '*This document is aimed to influence the courts.*' Although an aspiration likely to find favour with many arboriculturists, is it realistic or, indeed, ethical that those with undeclared conflicts of interests should be seeking to exert such influence under the banner of 'broad stakeholder support'?

Fortunately, these matters will not be settled by arboriculturists or powerful stakeholders, but by some of the finest minds that the UK has to offer. It will be lawyers and the judges of our legal system that will issue the final judgment, and that will be based on what is reasonable, practicable and proportionate, not what is in the best interest of one party or the other.