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TREE CONSULTANCY

Tree Management within the Context of a Wider Legal Framework

Article 5/6 for ISA Arborist News (October 2012)

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In this fifth article on UK tree consultancy, Jeremy Barrell (www.barrelltreecare.co.uk) explores the tree management expectations placed on duty holders by the English 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 of the case), and whether this standard 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 avoiding blame for the harm.

The following article was adapted from an item first published in The ARB Magazine, the quarterly magazine for members of The Arboricultural Association (www.trees.org.uk).

Although arborists may like to think that they make the decisions about what is responsible tree management, in practice, that is not strictly the case. They may know how trees grow, and the minute detail of tree defects and failure, but it is the courts that decide who is to blame when a tree failure causes harm. Arboricultural detail is obviously important, and experts should rightly investigate and explore how trees work and be able to explain why failures happen. However, that detail yields in court to the fundamental principles that govern the application of the law. That legal decision-making process is essential knowledge for arborists aspiring to provide reliable and useful advice.

An important step in understanding the legal context is to know the meaning of common terms used by lawyers in a tree-management context. The broad context of the legal process is determined by the elements that must be established in court to prove negligence: 1) duty, 2) breach, 3) causation, and 4) harm (damages). Although their precise form and intricate legal definitions may vary

among countries, associated terms frequently encountered in England include:

- **Duty holder:** The entity, an individual, or an organization that is legally responsible for tree safety and management.
- **Duty of care:** A legal obligation imposed on duty holders to take care to avoid causing harm to others through the management of their trees.
- **Standard of care:** The degree of prudence and caution required of an individual who is under a duty of care.
- **Liability:** Where responsibility lies when a tree causes harm (i.e., who is to blame and who pays).
- **Negligence:** A failure to exercise the level of care in managing trees that a reasonably prudent person would exercise in similar circumstances.
- **Proportionality:** The relationship between the effort or cost to achieve an outcome and the scale of the benefits that arise from that outcome. This is a balancing process with the desirable

Tree Management within the Context of a Wider Legal Framework Article 5/6 for ISA Arborist News (October 2012)

objective being to avoid severe extremes between the cost of what is done and the benefit that the action achieves. In very general terms, if the cost of dealing with a tree condition is grossly disproportionate to the value of the benefits that the work delivers, then it may be reasonable not to do the work.

- **"Reasonable person":** A "reasonable person" is a tool for explaining the law; it is very much a loose concept and does not have the benefit of any universally accepted technical definition. However, it is still of great importance in assisting the legal decision-making process, and what a "reasonable person" could be expected to do is highly relevant to judgments about tree management.
- **Practicability:** In many situations, there is a range of actions available to address safety issues, but often the extremes may not be sensible, practically achievable, or reasonable in the circumstances. There is an expectation by the courts that, for actions to be appropriate, they need to be reasonably practicable. The difficulty for tree managers, however, is that there is no simple recipe for meeting this requirement. Instead, it is a matter of judgment that will be analyzed in detail by the courts.

How do duty holders decide how much tree management is enough?

On the one hand, all responsible duty holders want to ensure that if harm arises from a tree failure, they can successfully refute allegations of negligence and not be found liable for the consequences. On the other hand, all management activities cost money and no one wants to spend more than

necessary. So where does the balance lie? This is the crux of what duty holders want to know, and it leads to a host of subsidiary questions that advising arborists are frequently asked to answer.

- 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 enough or do I need to have expensive investigations carried out?

Since these are precisely the questions that the courts will ask if a tree fails and harm arises, the answers are very important. The conundrum for arborists and duty holders is that very little definitive guidance exists; one instead finds a complex web of apparent inconsistencies and contradictions!

Of course, the safest option is to remove all suspect trees, but that will likely be expensive in terms of both costs incurred and benefits lost. The challenge for arborists and duty holders alike is to find a way to make sense of the complexity, to drill down through all the confusion and filter out an approach that reasonably balances safety, cost, and benefits. A useful starting point is to identify significant factors that can influence the standard of the duty of care and attempt to weight them in an organized way. Such an approach is described in a paper called "*Balancing tree benefits against tree security: The duty holder's dilemma*" published in *Arboricultural Journal*, recognizing that important considerations include, *inter alia*:

- Civil and criminal legal principles and case law setting out the precedents

Tree Management within the Context of a Wider Legal Framework **Article 5/6 for ISA Arborist News (October 2012)**

that will be applied to tree incidents

- The resources available to the duty holder
- Published guidance and technical references
- Land occupancy and the potential for harm to people and property
- The benefits that trees provide

In practical terms, the actual requirement of what must be done to meet a duty of care is elusive, 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 path to that position. Instead, there are multiple interacting issues that have to be weighed and considered, which in turn inform a range of management options with no guarantee of protection if an accident occurs. The objective is a position of security, but a sustainable, proportionate, sensible, and defensible route to that end has proved very difficult to map.

A Framework for Proactive Tree Risk Management

Each of the issues listed in this article can have a significant impact on determining the standard of the duty of care, but more detailed explanations are beyond the scope of this feature. However, these headings do set out the beginnings of a process to help duty holders work out what to do. Figure 1 assimilates a detailed consideration of all that information into a decision-making framework to assist duty holders and their advisors in this task. This framework

can be summarized as follows:

Stage 1: Assess the potential for harm that arises purely because of the occupancy of the location by people and property. Occupancy is a measure of the level of access and has nothing to do with trees at this stage. Note that this is not the same as assessing the level of risk, which by definition (level of risk = likelihood of harm x consequences) requires a consideration of the tree. If there is no significant potential for harm because of low occupancy, then there is no need to even check whether trees are present or not. This assessment does not require any tree expertise and can be performed by a layman with knowledge of the land. It is likely, as a minimum, that all duty holders would be expected to undertake this process to meet their duty of care.

Stage 2: If the occupancy is such that there is a significant potential for harm, then the location will need to be visited and any trees present will need to be visually checked. If the quick visual check does not identify any obvious problems, then no further action will be necessary in that management cycle. If problems are identified, then remedial works (which could include tree work or changes to restrict occupancy around the tree) could be specified at that point.

Stage 3: If necessary, a more detailed inspection could also be carried out. The need and scope of this more extensive assessment 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.

Tree Management within the Context of a Wider Legal Framework
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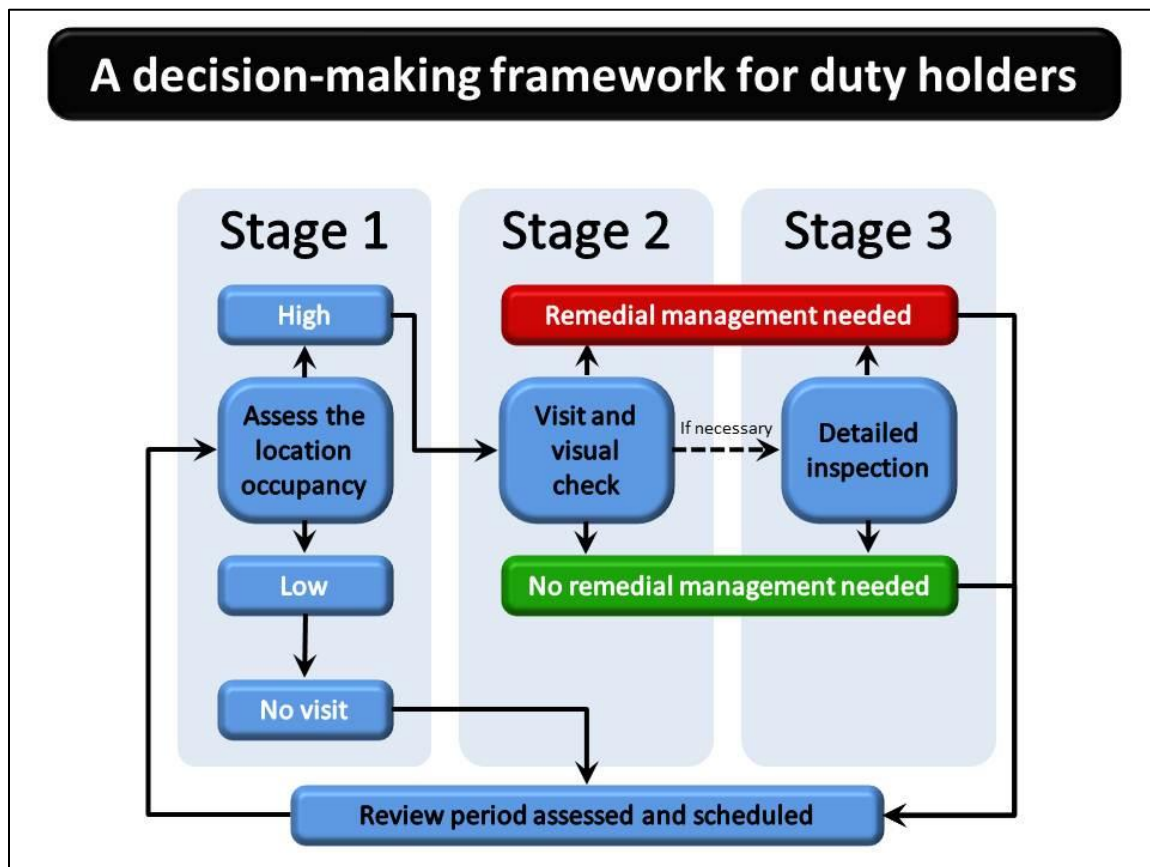


Figure 1: A strategic decision-making framework for duty holders.

If management work is required, it should be undertaken within a reasonable time period to discharge the current responsibilities. Indeed, it is likely that failure to carry out the recommended work soon after notification would leave the duty holder exposed in the event of any legal proceedings. Furthermore, the duty of care 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 re-inspection provision to complete the management 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 an organized approach and are able to demonstrate that what work was performed was reasonable, practicable, balanced, proportionate, and sensible are likely to have gone some considerable way toward meeting their duty of care.

Additional Reading

Barrell, Jeremy. 2012. *Balancing tree benefits against tree security: The duty holder's dilemma*. *Arboricultural Journal* 34(1). (www.tandfonline.com/doi/abs/10.1080/03071375.2012.691674)

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Are you ever lying in bed worrying when the wind blows? In the concluding article of this series, "*Decision Making for Arborists: How to Get it Right and Sleep Tight on Windy Nights (the sleep tight protocol)*," Jeremy will explain why it isn't necessary to worry so much. His view is that the last decade in tree management has seen a focus on complication, with an emphasis on theory at the expense of common sense. He will revisit old methods and apply them to modern decision making, with special consideration for the security of the inspecting arborist after a tree failure has occurred.



Jeremy Barrell has worked with trees all his life, building up a modest contracting business in the early 1980s and 1990s before concentrating on full-time consultancy in 1995. From those humble beginnings, Barrell Tree Consultancy (www.barrelltreecare.co.uk) now has six consultants advising on planning and legal issues throughout the UK.