

Date: 27th March 2015

Before :

HH JUDGE RAESIDE

Between :

**David Middleton
- and -
Surrey County Council**

Claimant

Defendant

Mr Sinclair Cramsie (instructed by Universa Law) for the **Claimant**
Mr Jack Harding (instructed by DWF Llp) for the **Defendant**

Hearing dates: 23rd and 24th February 2015

JUDGMENT

HH Judge Raeside :

1. In this case the claimant seeks damages for personal injury from the defendant local authority as a result of a tree (for which the defendant was responsible) falling onto the highway on which the claimant was travelling. Quantum has been agreed subject to liability which remains in issue.
2. Representation: The Claimant is represented by Mr. Cramsie, the Defendant Local Authority by Mr. Harding.
3. The Accepted Background

It is common ground that the accident occurred on 23 December 2010 when the claimant was driving his Toyota Hilix along the A242 Gatton Park Road in Redhill Surrey.

A tree fell from the narrow verge on the claimant's left- side crushing the claimant's car and trapping him inside it. The tree was of such height that some of the gate panels on the other side of the road were smashed when the tree came down. The claimant had to wait for about two hours before the fire brigade could release him. He suffered from injuries to his neck, his sternum and his wrist.

Fortunately, he has made a good recovery and damages have been agreed in the sum of £24,000 subject to liability. The claimant is now living in Australia and so by agreement of both parties, he has not attended trial and his witness statement has been relied upon.

It is accepted that Surrey County Council has a system of inspection which involves the trees along all A roads being inspected by trained arboriculturalists every 3 years, and by a Highway Inspector at least every year on foot. The former inspection takes the form of a drive-by inspection, with one operative driving slowly and the other inspecting each tree, entering data into a dashboard mounted computer system which records the position of the tree and the assessment of the level of the work (if any) which is required. If further enquiry is needed, the operative leaves the vehicle to carry out a closer inspection. The inspection by the Highway inspector is part of a general highway inspection which takes place at regular intervals by car or by foot. I will consider this evidence in more detail below.

4. It is common ground that the last inspection of the tree in question by the arboriculturalists prior to the accident took place in July 2009, some 17 months before the accident and no cause for concern was noted. It is agreed between the experts that the tree was an ash tree of middle age and it failed at ground level. It was infected with a fungus which had destroyed 85-90% of the roots and basal trunk over the previous 10 years at least. The experts agree that had the inspectors carried out a close examination of the tree (in particular tapping it) they would have discovered the rot. It is accepted that the tree, when inspected in July 09, was covered in ivy and in vegetation at ground level.

5. The Issues Between the Parties are as follows:
- a. Was the system of inspection adequate? The Claimant says that in order to carry out an adequate system of inspecting trees which are covered in dense vegetation and ivy that more is required than a 3 yearly drive-by inspection; that such a regime should be a starting point only depending on the situation. The Defendant says that the regime is adequate in all the circumstances and that any higher duty is impracticable.
 - b. Was the inspection adequately carried out? This depends on whether it is accepted that (as argued by the Claimant) there were obvious signs of ill-health in the tree in 2009 which should have been noted and which would have resulted in a more thorough investigation. The Defendant argues that it is unlikely that there would have been any signs available to the inspectors to alert them to the problem.

The Evidence

6. I have considered the relevant written evidence in this case, primarily the witness statements of the witnesses of fact, the photographs and plans and the experts' reports. Each party has instructed an expert Arboriculturalist to assist on all the facts pertaining to the relevant tree. Each expert has provided their own report and there are two statements prepared jointly which outline the areas of agreement and disagreement between them.
7. One very regrettable fact in this case is that the Defendant local authority has permitted the tree itself to be cut up and removed by the Defendant's contractors before any photographs were taken or any other evidence gathered. This is particularly disappointing in the light of the fact that exactly this situation occurred in relation to another set of proceedings against the same local authority (reported as *Micklewright v Surrey County Council* [2011] EWCA Civ 922) in which a member of the public was killed by a falling branch. It was to be hoped that strict instructions would be given by all local authorities in such a situation to ensure that all relevant evidence is safely preserved for the purposes of evidential investigation. The effect of the failure will be considered later in this judgment.
8. **The witnesses of fact.**

On the defendant's behalf I heard evidence from the 2 tree inspectors who carried out the drive-by inspection in 2009: Mr. Pieter Ross and Mr. Matthew Burnell. Their supervisor is Mr. Graham Banks, who gave evidence about the system of inspection. I also heard from Mr. Grice who is the highways inspector for the relevant area. All the witnesses were honest and hard-working people who did their best to assist the Court.
9. Mr. Ross's statement is at page 278 dated 8 January 2013. He started working in 2005 as arboricultural technician, and by October 2008 he was fully

qualified with a professional tree inspection certificate from LANTRA. He explained that:

- Trees on category A roads were inspected every three years from 2007 onwards;
- He was the person who carried out the inspection in July 2009 of the relevant area;
- On the day in question he was inspecting the trees and Mr. Burnell was driving; The car has good visibility including a see-through roof which can be taken off if necessary;
- The driver drives at about 2 miles an hour with the other operative looking at each tree carefully;
- Information about the tree is entered onto a computer mounted in the vehicle;
- If there are any concerns or defects or uncertainty about any tree then the car will be stopped and a visual inspection undertaken;
- For the drive-by inspection the inspectors start by looking at the base of the tree then they look at the state of the trunk and at the crown;
- The inspectors will note any matters of concern;
- The inspectors will look for a number of additional signs of problems including the dying back of the crown, fruiting bodies around the tree, broken branches from the stem and other structural defects and fungus;
- That if they need to inspect a tree more closely, they have specialist equipment which enables them to do so;
- This particular tree is on map PR1 at 507227;
- A defective tree was noted at SO5322 that had a branch that needed removing. It was suggested in the witness statement that this meant that the operatives would have got out of the car to look at this latter tree and so would probably have looked at the tree with which the Court is concerned, because these two trees are only 10 to 15 m apart; but the witness said that the probability is that the car didn't stop in order to log the problem with SO5322 which could have been done from the vehicle.
- Following the accident the inspectors looked at the residual root and they accept that there was fungal decay present; but the witness stated in his witness statement that such below ground rot could not be evident to anyone surveying the tree.
- In cross-examination he accepted that it would be hard to walk along the bank of trees in the circumstances given the width and steepness of the bank at the side of a busy road.
- His evidence was that many trees were covered in ivy and vegetation at the base which makes inspection difficult;
- He accepted that the operatives only get out of the car if there are visible signs of decay around a tree;
- The witness accepted that he has never seen a tree which had decay at the bottom to the extent that was apparent in the root of this tree, and which was also covered in ivy which didn't also show some signs of decay in tree crown.
- The witness accepted that an odd angled branch could be a sign of a defect in a tree.

- He considered that the photograph at 193 (E) is only slight evidence of leaning: he would not have identified this tree as one that needed a visual inspection.

10. I heard from Mr. Matthew Burnell, his witness statement is at page 296 dated 8 January 2013. He is also a fully qualified LANTRA certificate holder; he is senior to Mr. Ross and so he is ultimately responsible for the decisions in relation to each tree. He confirmed that the operatives would cut away ivy if it were necessary to carry out a detailed inspection of the tree. His witness statement said that on inspecting the remains of trunk after the accident he considered that the rot was all below ground level and that would mean that there was nothing evident on the tree inspection to give rise to concern.

11. I also heard from Mr. Graham Banks, whose witness statement is at page 257 dated 7 January 2013. He has been the arboricultural team leader for Surrey since 2004 with extensive experience over 25 years. He oversees the team of three; due to a "business development review" in 2007, two members of the team left, and therefore there are only three people working for Surrey County Council to inspect and manage the trees. His evidence is as follows:-

- There are approximately 2,000,000 trees near the highway in Surrey;
- That each year the team finds approximately 1200 defective trees;
- That 1.38% of trees on the roadside has been noted as "defective"; but trees can fail unexpectedly for many reasons;
- That there was a high ratio of trees to inspectors in (geographically) a large county.
- That the highways inspector included looking at the trees in his inspection, but that his main role was to inspect the highway and he was not a trained arboriculturalist;
- That the operatives were looking for trees which were going to be at risk in the next three years. He accepted that there was no interim inspection regime nor was there a system to register trees which may need to be inspected sooner than in the next three years. He said that such a system was not practical.
- He agreed that the undergrowth and ivy on the tree were not a trigger for getting out of the car but confirmed that it was important that the operatives looked higher up the tree to spot signs of decay.
- At paragraph 14 of his witness statement Mr. Banks said this:

"when the surveyors are carrying out their tree surveys, they are required to look at the base of the tree at eye level, and then at the top of the tree. At the base of the tree, they will look for evidence of any decay, fungus, bark missing, loose wood or holes. The general growth of the tree and condition of the branches will be considered. If there is evidence of dead wood at all the surveyors will note this and the appropriate action to take. If a tree is dying or dead, this is easily identifiable. If there is anything to suggest that there is a concern with the condition of the tree or that it is dying, the tree will be examined more closely."

- He explained that the system was that trees which were considered to be a cause for concern would be graded on the system as a 1 to 4 in terms of the risk/concern (4 being the highest).
- He accepted that the removal of the dead tree following the accident was regrettable. He accepted that there was no written policy put in place after the Micklewright case to assure that evidence was preserved.
- He accepts that the claimant's father took a photograph of another tree along the same road immediately following the accident which looked dangerous and that should be logged as needing urgent action; (photo at pages 396) He exhibited GB2 (page 193d) which shows an image of the tree which injured the Claimant from (it was thought) September 2009; Later enquiries showed that it was identified as being taken in October 2008.
- In his statement he gave the view that the rot in the tree in question was below the ground so there would have been nothing for an inspector to see above the ground.

12. Dean Rice filed a witness statement dated 19 February 2013 to be found at page 305. He is the highways inspector, responsible for inspection of the areas that include this road. He said that Denton Park Road is inspected every three months in a drive-by inspection by the highways inspectors and once a year by foot. This is a totally separate inspection regime to the tree inspections. He said that he was looking for highway defects including defects to the footpath and to the fabric of the highway but his inspection also included a visual inspection of trees along the highway. He would log any concerns as to the trees with the horticultural team. He also logs inspections on a Feature History Report (which he exhibited marked as exhibit DR1). These show that he carried out 4 inspections in the year from January to October 2010 and he says that three of these would have been driving inspections but one on foot. He said that it was possible for him to log trees on this report where there were concerns, but that there were no such concerns in relation to this row of trees. He also gave evidence of the electronic system for the public to log concerns about trees and stated that there were no concerns reported by the public about this specific tree. He accepts that he doesn't know all the signs of decay in trees but recognises that a tree that looks like it is falling or has dead wood might be such a sign. He accepts that there were two reports of actual tree failures in Gatten Park Road which were not included in his reports in a 6-month period.

13. The Experts

Dr Hope (for the claimant) and Mr Barrell (for the defendant) agree, in their joint statements, as follows: -

- i. That the tree trunk broke or snapped at ground level;
- ii. That the tree was almost certainly an ash of "maturing age". Its height is estimated at greater than 15 m and its trunk diameter at the base is estimated at about 40 cm
- iii. That at the time of the accident some 85% to 90% of the trunk of the tree was decayed.
- iv. The decay would have been present for around 10 years

- v. That the tree was covered in ivy and at the point of failure would also probably have been covered in ivy;
- vi. That the extent of the vegetation would probably have prevented an inspector from seeing the base of the tree during a drive-by inspection;
- vii. That the presence of the decay at the base would not have been visible during a drive by inspection because of the dense vegetation.
- viii. That had an inspector walked up to the base of the tree and tapped it with a rubber mallet or prodded it, the extent of the decay would have been discovered.
- ix. That the tree failed at ground level because of advanced decay in the lower trunk and roots that reduced the strength of the wood so that the tree could not resist the pressures of its own weight or the wind.

14. Areas of Disagreement:

- a. What was the appropriate inspection regime? The Claimant's case is that any system of inspection which is not capable of inspecting the base of the tree (where root and butt decay can be seen) is valueless. The Defendant says that this is impractical.
- b. Were there any external indicators which would have alerted the inspectors to investigate further: in particular, were there signs of distorted or yellowing leaves in the canopy, was the tree leaning, were there heavy branches overhanging the road, was there dead wood in the crown.

15. The Law:

Both counsel agree that the obligation to the Claimant is owed by the Defendant in both nuisance and negligence, but that the test is the same for these purposes, and that the Defendant must take such care as in all the circumstances of the case was reasonable to maintain its trees.

In addition, I notice the direction given by HH Judge Robert Reid QC in the Micklewright case (supra) which was approved by the Court of Appeal as follows:-

"it does not follow that because an owner or occupier fails in 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... It is necessary for the claimant to show that if the owner or occupier had complied with his duty on the balance of probabilities 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."

HH Judge Reid went on to consider the problem of the destroyed evidence and said as follows: –

"this failure to conduct an immediate and thorough investigation into the cause of the branches 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 paragraph 19

in the context of the defendant's failure to make or keep proper records said that: "... The court should judge the claimant's evidence benevolently and the defendants critically."

In my judgment that is the 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."

Mr Cramsie also relies on the dicta of Longmore LJ in the Keefe case (supra) and invites me to treat the Claimant's evidence benevolently when it comes to the issue of deciding whether it was more likely than not that there were signs of ill-health in the higher part of the tree, given that the Defendant's failure to preserve it or to photograph it has meant that the Claimant has been prejudiced in presenting his case.

16. Findings of Fact.

The first issue that I have to decide is whether, on a balance of probabilities, the Claimant has satisfied me that there were visible signs of ill-health on the tree at the time of the earlier inspection which should have alerted the inspectors to the need to carry out a more detailed inspection. The experts agree that "85 – 90 % of the basal trunk cross-section and associated roots were dead and decayed at the time the tree failed and the decay is likely to have been present for at least 10 years" (Joint statement para 1 page 231). Dr Hope relies on the picture in Annex 1 of his report, and Mr Barrell relies on photo 3 of his report. These photographs show a very small section of sound wood remaining in the stump of the tree.

17. The conflict between the experts is stark. Mr Barrell says that he has seen many trees where there is decay at the trunk but no sign of decay in the upper tree. He says it will depend on the genetic variation between trees and that it is an oversimplification to say that one rule applies. He says (page 6/34 1st report) that "almost all central core [of the tree] was gone and there was only a segment on the western edge remaining that comprised 25% of the total circumference." He also says (page 8/34) "From my limited observations and those images, much of the remaining wood, although hard, is showing signs of advanced decay. Additionally the bulk of the stump is missing, which I presume means it pulled out of the ground when the tree fell over and was removed...there is no obvious evidence that any large roots pulled out of the ground with the stump, which indicates that much of the decay was at or below ground level and the roots broke where they joined the trunk rather than pulled out of the ground."

18. Mr Barrell says that it is not unknown to have very little of the cross section of the tree and cambium still alive, but to still have a healthy crown. He gave the example of ancient trees which were hollow inside; and younger trees where perhaps a horse has eaten the bark all around it. In both these instances

he has seen no signs of decay in the crown. . It was his view in this case that the small edge of sound wood could nourish the tree and that therefore it cannot be said that the crown would have shown signs of poor health at the time of the inspection. He says that has seen no evidence to suggest that the crown was not healthy. He said that the poor state of the trunk was not definitive, and therefore other factors would have to be considered. He points to photograph 274 and says that on the assumption that the branch shown in the photograph is from the subject tree then he can say that the tree was healthy.

19. Dr Hope strongly disagrees. He states that the tree needs the cambium so that the nutrients and the moisture can travel between the roots and branches. He says that he has never seen a tree with that extent of internal decay at the base of the trunk which hasn't shown significant symptoms in the crown. In regard to this tree he said (orally) "If there is healthy growth around the outside of the tree then it is possible for the tree to continue growing... given the small fraction of bark which was sound then there must have been signs in the crown of the tree which showed the decay. It is inconceivable with that extent of decay and that little piece of healthy wood, that the tree would look healthy...the tree was both unstable and unhealthy...in this case there was hardly any cambium present...with a 90% rotten base water couldn't be put in the canopy to keep the whole...of the tree functioning. As the extent of the decay increases, the vigour of the tree decreases. When it fell over it would have been making almost no annual new growth, reducing in vigour all the time. For that size of the piece of live wood to maintain a full canopy wouldn't be practical...if there was live wood all the way round it could have been stable." His firm view is that a destruction of 85-90% of the basal trunk will severely limit the ability of the tree to thrive and that it is more likely than not that there will be clear signs of this higher up the tree (as well as having rotten roots). He says that there are bound to be dead branches, some of which may have fallen off over time leaving the tree "lop-sided"; he says that the spread of the canopy will be reduced due to the inability of the tree to be able to provide enough water to a full canopy. He points to the photograph at 193e, and even making allowance for the poor quality of the photograph, he identifies an uneven spread of branches on one side and a lean off-centre (see 193h). He says that the leaves would have been yellowed also. He accepts that there could well have been some healthy side branches and that the photograph at 274 might show one of these: but although he accepts that it is from an ash tree, he says that there is no way of knowing whether it is from the same tree or not; and whether it is from the main trunk or a side branch. He says that in October (when the photograph at 193e is taken) the tree would be dormant with very few leaves; the time to inspect would have to be in the summer when you could notice whether there were dead branches.
20. I prefer the evidence of Dr Hope on this point. I am satisfied that the extent of the rot in the base of the tree, and the negligible amount of remaining sound wood had the effect of severely limiting the efficacy of the cambium and hence must have interfered with the spread and thickness of the canopy, as well as producing dead branches. Dr Hope's explanation of a gradual reduction (over at least a ten year period) in the capacity of the tree to flourish

and to support a full canopy of healthy branches makes more sense than the suggestion from Mr Barrell that the tree could have remained wholly healthy at its canopy.

21. Mr Barrell relied heavily on the fact that he had seen no evidence to support the suggestion of an unhealthy crown, which was very unsatisfactory from my point of view. Without examination of the actual tree (or good photographs from when it fell down) I have to look for other available evidence and draw on the knowledge of the experts as to what is probable. Dr Hope's explanation is more rational: the examples given by Mr Barrell of unaffected trees are those in unusual circumstances i.e. a very old tree which is hollow inside but where the cambium is intact; or a young tree where the bark alone has been destroyed. Neither of those addresses a situation where there is a disappearance of the cambium layer to extent present in this tree.
22. I therefore find that on a balance of probabilities, there were signs of ill-health in the tree at the time of the inspection, probably consisting of dead branches, a thin canopy, yellowing leaves. I also find, looking at the photographic evidence, that there was a slight lean and a slight unevenness to the spread of the branches.
23. I make this finding without taking into account the dicta of Longmore LJ that the Claimant's evidence should be considered benevolently: once I make allowance for that direction, I am even more sure that there were signs of ill-health in the tree at the time of the earlier inspection.

Breach of Duty

24. Was there negligence in the carrying out of the inspection? It is important, as HH Judge Reid QC reminded himself, not to look at this with the benefit of hindsight. I am also acutely conscious that 2 men are trying to inspect all of Surrey's 2 million beautiful roadside trees, and that they are trying to gauge the ability of those trees to withstand the next 3 years in all weather conditions. If they are too cautious they will order the destruction of trees unnecessarily; if they are too lax then accidents such as this may occur and innocent people injured. It is a hard balance and they have very limited time. However, in the light of my factual finding of what was probably the condition of the tree at the time of the inspection, and having regard to the description of what Mr Banks expects each of the operatives to do in regard to each tree, I find that at the time of the drive by inspection there was a failure to identify this tree as needing further investigation. I quite recognise the difficulty in stopping the car and negotiating a narrow verge covered in vegetation; but in view of my earlier findings I consider that vital signs of decay were missed. I therefore find that there was negligence in the way that the inspection was carried out.

Was there an Adequate System of Inspection?

25. As far as the safe system is concerned, I return to my finding of fact. It was Mr Barrell's view that many trees covered in vegetation which rotted at the base would have no signs of decay higher up the tree, and that it was impossible to say at a drive-by inspection whether such trees were healthy or not. But he was prepared to say that a three yearly drive by inspection was adequate and that if trees were missed, that was the price that had to be paid, any other inspection regime was impractical.
26. Dr Hope considered that the 3 year inspection was a starting point only. He was of the view that there should have been a system whereby trees could be noted as needing further investigation with interim inspections. He was of the view that the Highway inspector should be better trained to recognise the signs of ill health in trees and that each tree should be walked around each year.
27. I have been referred to various statutory documents to indicate what might be expected. There is a Government Circular guidance to Local Authorities at page 542 published by the Department of the Environment dated 12/12/1975 which provides for Highways Inspectors to include trees in his inspections; and for a system of regular inspections. Paragraph 5 draws attention to the thinning of foliage and dying back of the branches as being a sign of ill-health in trees.
28. At page 229 I am referred to an Extract from the D of Transport "well maintained Highways Code of Practice (2005) which informs Local authorities to develop a management policy for their tree stock, and suggests a 5 year default inspection interval.
29. I have also been referred to the Health and Safety Executive advice of 2007 which states that there must be an effective system for management of trees. I do not find this particularly helpful: it advises "periodic inspection".
30. Taking into account the guidance from the Highways Code of Practice which suggests inspections every 5 years, I find that a properly carried out 3 yearly inspection system is adequate provided that the operatives are allowed time and opportunity to carry out a closer inspection of the butt and base of the tree (which may involved pulling off vegetation); and that coupled with the inspections carried out by the Highways inspector every 3 months (one of which is on foot) the Local Authority has established a safe system of inspection. A small amount more training for the person who looks at trees on foot would pay dividends because they would be able to identify vulnerable trees more readily and could alert the arboriculturalists for an expert view. In the light of my finding that trees such as this one, would and should be identified in such a drive by inspection (if properly carried out) it seems to me that the majority of trees that are rotting at the base will be identified by such a system.
31. I reject the suggestion, made by Dr Hope in evidence, that there should be a system involving an individual inspection on foot of each tree each year. I cannot see that this would be a practical approach to the problem. This seems to me to be going beyond what is reasonable. I accept Mr Barrel's evidence

that a 3 year drive by inspection is a good basic regime, coupled with periodic inspections by the Highways Inspector.

32. In those circumstances I find that although the Claimant has not satisfied me that the system of inspection was unreasonable, he has satisfied me that the inspection in July 09 was inadequately carried out; and therefore since both experts agree that a fuller inspection would have revealed the true extent of the damage to the tree which would have resulted in its immediate destruction, the Claimant's case is established. There will therefore be judgment for the Claimant for the sum agreed.
33. This judgment is being sent out in its draft format for either counsel to raise issues of factual inaccuracy, point out omissions or to state whether there is anything that needs to be further clarified.
34. Please could counsel also submit an agreed draft order, stating clearly whether a further hearing is needed and if so, giving a time estimate.

HH Judge Raeside
Guildford County Court
27th March 2015

I am grateful to counsel for their comments on the draft judgment, and I have made the minor typing corrections suggested. As a result of clarification being sought in relation to the expert evidence, I have re-written parts of the judgment from paragraphs 16 to 21. This judgment will be handed down in its final form at the costs hearing listed before me shortly.

HH Judge Raeside

27th May 2015