

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2011

Before:

THE HONOURABLE MR JUSTICE MACKAY

Between:

(1) Harry Bowen	<u>Claimant</u>
(a child by Mrs Tracey Bowen his mother and litigation friend)	
(2) Max Farley	
(a child by Mr Jeff Farley his father and litigation friend)	
(3) Katie Farthing	
(a child by Mrs Joanne Farthing and litigation friend)	
(4) Mrs Wendy Mullinger	
(mother of Daniel Mullinger deceased)	
- and -	
The National Trust	<u>Defendant</u>

Mr Jonathan Watt-Pringle QC & Ms Rhiannon Jones (instructed by **Ellisons**) for the
Claimants

Mr Stephen Worthington QC (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 21 – 24 June and 8 July 2011

Judgment

Mr Justice Mackay:

1. The National Trust is a well known charity and one of the largest land owners in England. One of its properties is Felbrigg Hall in Suffolk with its surrounding estate. This includes the Great Wood in which there are close to 250,000 mature trees. The wood is used by, among others, schoolchildren for outdoor educational activities. It is natural woodland, though managed, and is a Site of Special Scientific Interest because of the large stock of ancient trees it contains.
2. On 26 June 2007 one such group was using the Great Wood when a terrible event occurred. They were following a trail, supervised by a teacher, and had been using orienteering skills to find clues at various points on the trail to solve a problem. It began to rain and they sheltered briefly under the canopy of a large post mature beech tree (*fagus silvaticus*) which was probably between 160-180 years old. Beeches can live for 250 to 300 years.

3. Entirely without warning a large branch from that tree (“B3”) fractured at the point where it joined the stem of the tree and fell on the group. One of the children Daniel Mullinger was killed and three other children suffered fractures and serious injuries. All the children, including those who escaped physical injury, will undoubtedly have been severely traumatised by this terrifying experience.
4. This is the trial of the issue of liability in the actions brought on their behalves and by the mother of the deceased boy.

The Defendant’s legal duty

5. There is no difficulty in articulating this duty, though its application to the incident is another matter. The National Trust as occupier of the wood owed these claimants and all other lawful visitors to it the common duty of care imposed by the Occupiers’ Liability Act 1957 s. 2 (2) of which reads:-

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.”

6. There is also a co-extensive duty under the general common law of tort, the scope of which would not differ in any material way from the formulation in the statute. So there is no obligation to ensure the safety of visitors, merely to take reasonable care to provide reasonable safety. Both experts in this case agree with the saying that there is no such thing as an entirely safe tree. The issue in this case is whether those who inspected this tree, as they did on two occasions prior to the fall of B3, exercised such care as was reasonable in the circumstances of this tree at this place. It is easy to state the law in this area, but less easy to apply it, particularly in a case with such a tragic outcome as this. The thrust of the case against the defendant is that its tree inspectors, for whom it is vicariously liable, failed to exercise reasonable care in their task.
7. It is common ground between the parties, and I agree, that the standard of care imposed on such inspectors, who are exercising and professing to have a particular skill in their task, is the well-known test in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, that is to say the standard of an ordinary skilled person professing to have the skill in question. He is not acting negligently if he acts in accordance with a practice accepted as proper by a responsible body of opinion in the particular field. That the *Bolam* test as it is frequently called is not restricted in its application to the medical profession, or indeed to the learned professions generally, is now well established; see for example *Adams v Rhymney Valley D.C.* [2001] PNLR 4.
8. There are in addition allegations against the defendant itself in respect of its systems and training which fall to be considered under normal common law principles.

The Defendants Instructions Relating to Inspection of Trees

9. The instruction in force at the time of this event was called Instruction 1 issued in 1997, a four page document prepared by the defendant's Head of Forestry. It set out minimum standards of inspection and stated the need for risk assessment of trees in or near to public places "to assess whether they represent a risk to life or property". The next section has been criticised so I shall set it out in full.

"2 Hazard and Risk

Hazard is the potential to cause harm

Like all living organisms trees are subject to decline senescence and collapse and they can be damaged physically or invaded by pathogenic organisms. As trees deteriorate so they are increasingly likely to shed limbs or fall in strong winds and the potential to cause harm increases.

Ancient and decaying trees are often beautiful and uniquely valuable as habitat for wildlife, and however poor the physical condition of the tree remedial action is only necessary where there is a clearly perceptible risk to life or property...

Risk is the level of likelihood that a hazardous tree will cause damage

Risk is related to the location of the tree. It reflects the intensity of use of the immediate surroundings of the tree and the proximity of the tree to buildings and other structures."

10. In section four, entitled "Assessing the level of risk", the document set out three Risk Zones in order to concentrate resources where there was potentially most risk to people and property. These were high, medium and low. High risk was defined as "close to main public areas, work yards, buildings, roads, car parks, major footpaths, picnic areas etc". Medium risk was defined as "footpaths bridleways etc in regular but not intensive public use, quieter areas of parks etc." Low risk was "...woodland away from paths or only lightly used etc." This categorisation or division of risk zones strikes me as a practical and sensible approach to the question of inspections.
11. As to the method of assessing the hazard the document stated that inspectors could "reasonably only address the conditions most likely to lead to injury or damage to people or property. These are physical or physiological conditions which might lead to a break up or collapse of the tree.... In practice only visible defects are likely to be identified." More intensive or invasive methods of testing would not be used as a matter of course except where the tree already showed symptoms of decline.
12. As to the frequency and method of inspection, so far as medium risk zones were concerned the frequency of inspection was mandated at "at least every two years" and the method was a "rapid but careful search for clear defects". The document also dealt with record keeping, remedial action and competence levels of staff involved.
13. The current instructions and guidance are contained in instruction number 11 dated 21 May 2007 which was in an advanced stage of preparation at the time of this event but

which was not brought into force until after it had happened. It is a much longer document. The summary of its mandatory requirements contains the sentence “where hazards are identified the risk must be assessed to determine what remedial action is necessary”. It introduced five zones instead of the previous three (very high, high, medium, low and very low). It spelt out that the assessment of risk in an individual tree was based on three factors, the magnitude of the hazard (the size of the part of the tree most likely to fail and the distance it would fall), the probability of failure (which it described as a matter of informed judgement) and the consequences of failure (which would depend on the location of the tree and intensity of use of the area in which it was found.)

14. Instruction 1 is criticised by Mr Watt-Pringle QC for the claimants as likely to cause confusion in a way that instruction number 11 does not. In particular section 2 “Hazard and Risk”, is said to be capable of confusing inspectors particularly by the sentence “risk is related to the location of the tree”, which might mislead them into thinking that risk was to be assessed solely on the basis of the location of the tree.
15. The source of this criticism is Mr Forbes-Laird’s view at 5.2.7 of his report. He said the instruction did not recommend an assessment in the light of tree condition as discovered, and this was a “serious omission... ignoring the essential input factor of tree condition” rendering the Instruction “fundamentally flawed”. He maintained this view when cross examined, though conceded that “ignoring” might be overegging the pudding, as he put it.
16. I have to say I am not impressed with his argument. That section read as a whole makes it entirely clear that there are two main considerations in the risk assessment that is being contemplated. The first plainly relates to the condition of the tree and its likelihood of collapse or shedding a limb in such a way as might cause harm and the second consideration is that if that likelihood materialises it will actually cause damage, which depends on where the tree is. I agree that instruction number 11 is much more explicit and that section 2.3 “assessing risk” spells out a more elaborate and arguably clearer description of the steps in a risk assessment. But I find the original instruction perfectly clear. More to the point there is no basis for finding that those who were inspecting on this occasion were in any way confused about what they were doing. The issue the claimants take with the inspectors is whether their observation of the tree was sufficiently acute to spot the warning signs that the claimants say were there and secondly if they did do so whether their judgment, that the tree did not require to be reported as hazardous, was in a *Bolam* sense a reasonable judgment in all circumstances of the case.
17. The result is that I find Mr Forbes-Laird’s criticism is misplaced and unjustified, and that diminishes my confidence in him as a dispassionate expert witness for this case. I found him in general inclined to set unrealistic standards, perhaps influenced by hindsight which is an understandable reaction to an event such as this, albeit one to which an expert should be immune. For another example, he called the three Zone system “too broad brush” said there should be six zones, and questioned why this tree was ever assessed by those on the ground, who he agreed were those who had to make the zoning decisions, as low risk as it was until 2006. He in fact thought it should have been high risk; though para 7 (g) of the Particulars of Claim reflected this view, despite the evidence of likely usage by those on foot, the claimants’ counsel sensibly discarded that allegation at the end of the evidence.

The Mechanics of Failure

18. B3, the branch which fell, was 21.7 metres in length and about half a metre in diameter at the end which joined the trunk or stem of the tree. Its weight is estimated at about 1 ½ to 2 tons. It was the largest branch on the tree and it joined the main stem about nine metres above ground level. It grew upwards at an angle of about 45 degrees from the stem.
19. Examination has revealed that where it joined the main stem of the tree there was a depression or cup on the upper surface and at either side of that point of the branch there was the phenomenon of adaptive growth (“AG”) in the form of what Mr Forbes-Laird calls adaptive growth flares, and which some others call “bulges” or “ears”. These, it is agreed, would have been visible from the ground, and are very much at the heart of this action. In simplified terms AG is a biomechanical response by the tree to load stress on a branch, or to gravitational forces causing deflection of the branch, or as a “repair” response, for example, to some internal damage to the cambial cells on the outer surface of the wood of the branch. This autonomic response causes the normal annual growth ring process, programmed into every tree, to become exaggerated in thickness in order to reinforce or add strength to the branch at this point. In other words it is autonomic response by a tree to a stressed branch.
20. Beech trees are known to have a high resistance to bending due to the hardness of their wood and in relative terms have a high propensity to form weak forks which fail through decay as compared with other types of tree. They are the second most likely species so to fail.
21. All agree that inspection of trees for safety purposes is carried out from ground level – a system called visual tree assessment or VTA, first defined by Professor Mattheck. It is based on inspection from ground level and does not require any aerial examination. The depressed area I have described above would not have been visible from the ground. The claimant’s expert estimates that the AG flares had been in place for 5-10 years. At some later stage a crack or fissure had developed in the central upper surface of the join as a primary failure due to stress and this had led to oxidation and water ingress into the wood of the branch at this point. This too would have been impossible to see from the ground. Once this crack process started it is said that a secondary failure leading to the shearing from the branch of the stem was inevitable.
22. At the heart of the claimants’ case is the proposition that the mere presence of the AG at this point was a warning sign of a possible failure and meant that further investigation of the join was indicated. The defendant’s case is that AG is a frequently found feature on many if not most mature beeches of the age of this tree.

The inspections of the tree

23. Since 1998 Mr Daplyn has held the post of Forester at Felbrigg Hall. Prior to that he had worked as a volunteer on the estate, and prior to that he was a farm manager in Kent. He has a HND in agricultural farming and a BSc from the Open University and a postgraduate diploma from Luton University in management science. As a forester he has attended both a four day and one day course on the subject of tree inspection organised by the defendant. His day to day responsibilities include the carrying out of such inspections which are an important part of his job.

24. It is not disputed that this witness did inspect the incident tree together with a volunteer Mary Ghullam on 2 January 2007. This was because the area in which it stood had in 2006 been reclassified as medium risk and therefore the tree fell to be inspected every two years. The reclassification itself was largely as a result of input from Mr Daplyn, who knew that school groups such as the claimants' did walk past this tree from time to time. Its inspection could therefore have been delayed but in practice he said the estate adopted a more frequent rate of inspection for medium risk zone trees, inspecting them annually. This was therefore the first formal inspection of this tree and he accepted for that reason it needed to be a particularly careful one.
25. He had however, I accept, looked at and considered the tree many times before. He walked past it he thought perhaps once every six weeks. It is one of only 8 large beeches in Zone 7, the central zone of the Great Wood. When a smaller branch in the crown (B2) fell, he thought two or three years prior to the accident, he believes he looked at that and looked at the tree at the same time. I believe he probably did. He was also aware of the large wound a metre or so below the fatal branch (B1), which he understood to have been caused in the great gale of 1987 which did such damage to the trees in southern England and did not spare this wood. Mr Zealand the Head Warden confirmed that this was the case; the wood lost about 30 acres of trees in that storm.
26. Mr Daplyn had known this wound for years. It is obvious and immediately visible to any user of the path. He thought it not worthy of any note from a safety point of view because he had known about it for years and it had not changed its appearance; there were no fruiting bodies or other indications of active decay. He did not consider it a significant defect in the tree. Dr Lonsdale agreed that he thought the decay in the wound looked compartmentalised.
27. Mr Daplyn must look at thousands of trees each year. He therefore faces the difficulty that any honest witness in his position has to deal with. The documents tell him there was an inspection of this tree at that time and the post accident photographs show what had happened. The reporting system in operation was a negative system, i.e. if a tree was not a cause for concern that fact was not recorded. That system is now modified in respect of inspections in the highest risk areas of the (now) 5 risk area gradations, but a system of negative reporting remains in place for the medium risk areas and is not criticised as such by the experts. He does not pretend as a less scrupulous witness might have been tempted to do that he has a distinct recollection of this particular inspection. He relies on the fact that he and Mrs Ghullam did not "tag" the tree as requiring further investigation as showing that they did not form a judgement that such an action was required.
28. His evidence was that on such an inspection he would always look at any branch union with AG. He said that he would have looked at the base of the tree for fruiting bodies, looked at the branch unions and forks for signs of weak attachments and he thought he could remember himself and his accompanying volunteer Mrs Ghullam "going around the base of it". Beyond that he had and did not claim to have any direct recollection of the inspection process or of what he saw on 2 January. He was in my judgement a patently honest witness and a conscientious forester and there can really be no doubt that the two of them must have looked at the union of this particular branch, which was well exposed due to the absence of B1 immediately below it thus leaving the fatal branch B3 readily visible from the ground. He must,

as I find, have seen the AG or bulges as he called them, as he accepted, and must have together with his volunteer assistant formed the judgement that these were not as he put it “significant”. He said that inspections were to discover and report on hazardous and potentially hazardous defects if they were significant. Significance he explained was a judgment by reference to a combination of the condition of the tree and its location. Because there was no record made he therefore deduces that he in fact noted no obvious fault that was significant.

29. I accept that the same two inspectors looked at the tree again on 22 January after a set of January gales. Again they made no record of the tree being appropriate for tagging.
30. The AG that is now apparent from the photographs and which would have been in the vicinity of the area of union between the branch and the stem he describes as snub nosed and round. He would not accept that they were unusually large in the context of what was itself a large limb. In his evidence he said you can get AG in many places on beeches and they have many causes which can include stress, damage or unknown causes.
31. When he went on the four day training course in 2000 he was taught in the classroom and in the woodland. So far as the classroom component was concerned they were shown pictures of adaptive growth in a book by Dr Lonsdale (now the defendant’s forensic expert) and were made aware of their significance. He was aware and had been taught that beeches had a high propensity to weak forks relative to other species, and was also aware of the problem of included bark either in forks or branch unions which made them much more likely to fail. This was a feature that could give rise to AG in forks. He did not believe that there was anything published at that time that inclusive bark on branch unions could cause AG but he was aware that AG could be a sign of a problem and as he put it we would look more closely at any union which had that feature and we would have done so with this union.
32. Mrs Ghullam also went on the same one day course as him in December 2004, and during her evidence it was discovered that she still retained (as had Mr Daplyn) the course materials handed out to those attending. She essentially agreed that the course covered much of the ground set out in the preceding paragraph. She was an intelligent person, with many years’ experience of inspections, and Mr Daplyn plainly viewed her as an equal partner in their work. She would I believe have spoken up if she had felt any qualms and she did not do so.
33. Such bulges, said Mr Daplyn, occur frequently on mature and post mature beech trees (as Dr Lonsdale agreed) and may not by themselves indicate that a branch is likely to fall. He took photographs after the accident of a large beech tree in the centre of Norwich and a number of beeches bordering a B road on the Suffolk/Norfolk border where numerous bulges and growths can be seen in what must on any view be high risk areas.
34. He gave evidence, which was not challenged, about the probable pedestrian usage of the path that ran past this tree. This was based on figures supplied by the field study centre to which all these claimants were attached on the day of the accident whose activities took them past this tree, as well as an estimate of the number of other visitors such as dog walkers who would take this path, which was not itself a “way

marked path” and therefore less likely to be used by family groups. The result of that estimate is that about 14 people a day would pass down this path system and therefore under B3.

35. At the inquest into this matter he said he recognised there were significant defects in this tree and that if it had stood in a high risk zone he would have tagged it. Mr Watt-Pringle calls this an illogical approach, but I do not accept his criticism. Risk as defined in Instruction 1, and as a matter of common sense, has to take into account both the defects in the tree and the physical location or “the intensity of use of the immediate surroundings” looked at together and not in isolation from each other. Mr Watt-Pringle argues that this amounts to a form of double counting, in that intensity of use has already been taken into account in the risk zoning exercise. I do not agree that this is the right way to construe either Instruction 1 or 11. It is worth repeating that No 11 at section 2.3 explains risk assessment as a 3 stage process, first the magnitude of the hazard (how big is it and how far will it fall), the probability of failure (a matter for informed judgement) and the consequences (including location and intensity of use). This revised instruction was the product of extensive consultation with all appropriate agencies and has not been criticised in this case, rather the reverse.
36. Prof Mattheck’s book “The body language of trees”, which Dr Lonsdale edited, says at Chapter 8 (“Recognising predictable tree failure, the principles”) that “In reality there is actually only a single symptom; the presence of apparently superfluous material!” Chapter 14 “A practical guide for tree inspection” says VTA seeks to define failure criteria and says that “If symptoms of defects are noticed these must be confirmed by means of rigorous investigatory methods and then evaluated”. But Dr Lonsdale points out that this work does not set out to deal with the assessment of risk but is considering one component or aspect of it namely the examination of the tree’s condition, or the “hazard” to use the language of Instruction 1. I agree.

Previous failures

37. B1 fell in 1987 and left a massive and obvious wound in the stem about 6.5 metres from the ground. It was possible thought Mr Forbes-Laird that it had been weakly attached but he was not certain about this. Some decay is visible from the ground in the form of a darkening of the exposed wood or aerial rooting. Mr Daplyn was not working at Felbrigg when it fell but was familiar with this tree which he walked past every 6 weeks or so. He was not concerned that this wound required investigation. There were no fruiting bodies visible and it did not appear to be deteriorating; Dr Lonsdale thought that the decay in the wound appeared to have been compartmentalised. Though it is true as Mr Watt-Pringle argues that familiarity can breed contempt I accept that Mr Daplyn formed the view he says he formed and that it was reasonable for him to have done so. There was nothing in this fall to have put him on notice that the tree was unusually susceptible to branch losses.
38. B2 fell 1-3 years before the accident and its branch remained in the undergrowth below. It showed obvious signs of bark inclusion. Mr Daplyn said it fell because of high winds and so did Mrs Ghullam. As it had fallen on a path they looked at it and moved it. At the time the tree was in a low risk zone. Mr Daplyn agreed that they should have looked at the branch when it fell and they would have done so. Mrs Ghullam specifically remembered doing so and noting the included bark. It was a

branch attached to another branch, smaller and higher than B3 she said and they plainly did not consider it significant in terms of indicating any heightened propensity in this tree to shed branches.

39. There was nothing in the fact that two branches had fallen from this tree in a 20 year period to make it an uncommon specimen of a beech tree.

The crucial issue between the experts

40. Mr Forbes-Laird considers that the signs of AG on B3 were some of the largest he had seen and that a reasonably competent inspector should have concluded there was an obvious defect in the union. It was not reasonable he thought to assume the tree was coping with the stress which causes the AG. Therefore the tree should have been tagged and remedial measures put in place, either removal or shortening of the branch or re-routing of the path passing below it.
41. Dr Lonsdale believes that the signs present would not have indicated to such an inspector a foreseeable or likely failure of the branch, and the defence case is that given the relatively low use of this path the defects were not significant, in the way they would have been had this tree stood next to a car park or highway. The tree was not a “risk to life or property” until a failure occurred at a time when a person was in the area affected.
42. I leave aside the fact that Mr Daplyn, while accepting that there were significant signs, did not describe them in the dramatic terms used by the claimants’ expert. If as the claimants argue the bare possibility of a failure of a tree branch in a medium risk zone is enough to trigger tagging and remedial works the bar would be set at an unreasonably low level in my view. It would substitute for an exercise in risk assessment taking condition and location into account, which is what the inspectors here were engaged on, the mere identification of potential defects in trees without consideration of their significance, which is what both these inspectors said repeatedly they had in mind. I have to decide whether the judgment they formed, acting together as they did, was one which no reasonable tree inspector in those circumstances could have formed.
43. In the event their judgment was wrong and disastrous consequences followed, because of the cruellest coincidence of the failure occurring at the very moment this small group was standing under the branch when it did so. But risk assessment in any context is by its very nature liable to be proved wrong by events, especially when as here the process of judging the integrity of a tree is an art not a science, as all agree. I accept these inspectors used all the care to be expected of reasonably competent persons doing their job, and the defendant had given them adequate training and instruction in how to approach their task. To require more would serve the desirable end of compensating these claimants for their grievous loss and injuries. But it would also be requiring the defendant to do more than was reasonable to see that the children enjoying the use of this wood were reasonably safe to do so. I regretfully conclude that I cannot find that the defendant was negligent or in breach of its duty in respect of this tragedy.