

IN THE MAYOR'S AND CITY OF LONDON COURT

5MY04657

Guildhall Buildings
Basinghall Street, London EC2V 5AR

Friday, 10th November 2006

Before:

HIS HONOUR JUDGE SIMPSON

BETWEEN:

ALAN CORKER

Claimant

- and -

PAUL JONATHAN WILSON & Anor.

Defendants

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MS. L. WYLES (instructed by Laytons) appeared on behalf of the Claimant.

MR. R. STEAD (instructed by Bond Pearce LLP) appeared on behalf of the Defendants.

J U D G M E N T

(As approved by Judge)

1 JUDGE SIMPSON:

- 2 1. This case arises out of an accident which took place on 3rd July 2004. The
3 defendants, Mr. and Mrs. Wilson, own a property on the B2126 Horsham Road
4 near Abinger Hammer in Surrey. This is well known to be a heavily-wooded
5 area of that county. The defendants own land on both sides of the road. At
6 about half-past twelve at lunch time on 3rd July, the claimant, Mr. Corker, was
7 driving along Horsham Road when a branch of an oak tree which was standing
8 on the defendants' land broke away from the trunk and fell upon the claimant's
9 car. As a result, he suffered certain injuries and his car was damaged. He
10 brings these proceedings against Mr. and Mrs. Wilson in negligence. At the
11 outset of the trial, I was told that the parties were agreed on quantum,
12 including interest, subject to liability, and that a pleaded claim for contributory
13 negligence was not pursued.
14
- 15 2. Mr. Wilson, himself, gave evidence and I record at the outset that I thought he
16 was very honest and very fair. He is a reliable witness and I accept his
17 evidence. He and his wife had purchased the property about six months before
18 the accident. In spite of some uncertainty, there is no doubt that the tree was
19 (and is) on his property and he said at the outset of his cross-examination that
20 he was aware that it was his tree when he bought the property. At the time of
21 the accident he was not at home; he arrived some time later. He said, at the
22 time of the accident, it was unclear what had happened because of the foliage.
23 Because there was an element of uncertainty about the ownership of the tree,
24 he said that that did not affect his attitude to it before the accident.
25
- 26 3. He covers all parts of the property on a regular basis and he frequently passed
27 the tree and noticed its condition. He said there was nothing unusual about it.
28 He also told me that it would not be possible to see the top side of the branch
29 from the field opposite. He is a layman in these matters and does not have any
30 particular knowledge about trees; his everyday work is not concerned with
31 them. He is the managing director of a recruitment company. He said, to
32 a layman, there was nothing unusual about this tree; that he looked at all the
33 trees on the property, of which I gather there are a number. This tree looked
34 healthy to him.
35
- 36 4. He described himself as an outdoors man and said that he was aware of the
37 objective danger of falling trees. He also told me that he was more than
38 normally aware of trees because he had previously served in the armed forces
39 and served in Borneo, where it seems that there is a danger of falling trees. So,
40 in that part of his life, he was clearly alert to the possibility of trees falling. He
41 was aware of certain dead wood in the area of this tree. He employs gardeners
42 to manage the grounds but they were not particularly instructed to look after

1 the trees and he did not instruct them to do a full tree inspection; they cut the
2 field opposite and generally did work managing the grounds. Mr. Wilson has
3 a full-time job and carries out maintenance work, clearing rubbish, clearing
4 culverts and so on at weekends and he passes this tree frequently. It was
5 submitted that, on those occasions, his mind would be on other matters and no
6 doubt he would be thinking about the next job to do, but he would be, I think,
7 more normally alert than many property owners would be, in view of his
8 background earlier.

9
10 5. The defendants, as landowners of property fronting the highway, owe a duty of
11 care to those passing, to take reasonable care for their safety and they must act
12 as prudent and reasonable landowners; that much, of course, is common
13 ground, so Mr. and Mrs. Wilson certainly had a duty of care to this claimant
14 upon that occasion. The issues in this case concern the practice of Mr. Wilson
15 and whether he should have done more and, if so, what more should he have
16 done? The case largely turns upon expert evidence.

17
18 6. I have had the reports, joint statement and oral evidence of two experts:
19 Mr. Rose for the claimant, and Mr. Bashford for the defendant. I have to say
20 that I think that Mr. Rose's reports suffer from two defects. He does not have
21 any qualifications as an arboriculturalist. He is a tree pathologist. The fact
22 that he had no such qualifications was something which he was rather reluctant
23 to reveal in the witness box. It is said, and said rightly, that Mr. Bashford
24 indicated that he had no concern about Mr. Rose's qualifications and, in certain
25 respects, would recommend that he be instructed. That piece of evidence of
26 course I accept but there is no doubt that Mr. Bashford's CV and experience is
27 more impressive. For example, from 1976 to 1990, he was the senior
28 arboriculturalist at the Department of Environment and advisor to the
29 Government on trees and amenity. In the Queen's Birthday Honour's List of
30 that year, he was awarded the MBE in connection with that work. He
31 describes, in para. 1.3 of his qualifications and experience part of the report,
32 what that work entailed. He holds the National Diploma in arboriculture,
33 presently referred to as Master, and is a Fellow of the Arboricultural
34 Association. He is a past examiner and senior examiner for the RFS National
35 Diploma in arboriculture and a frequent member of consultancy committees
36 for the British Standards Institute and is currently chairman of the technical
37 committee for the review of two sets of standards. At 1.9, he says he is a past
38 chairman of the corporation of governors for Merrist Wood College, near
39 Guildford, which is renowned worldwide for its provision of arboricultural
40 courses and education in that area of work. He regularly lectures at colleges
41 and universities and is a lecturer and chairman at national and international
42 conferences. Earlier in that part of the report, at 1.5, he says that he advised
43 on, and was involved with, the campaigns against Dutch Elm disease and acid

1 rain and the many insurance claims following the droughts, principally the one
2 of 1976. This summarises his CV. He says other things as well but that is
3 a fair summary of it, and one can see that his experience is indeed impressive.
4

5 7. It seems to me that Mr. Rose does not have that wide degree of previous
6 experience. His personal details and qualifications take up less than half
7 a page of the report as opposed to a page-and-three-quarters for Mr. Bashford.
8 Mr. Rose summarises his experience. He provides an effective, efficient and
9 impartial service for the diagnosis of, and provision of advice on, the diseases
10 and disorders of trees in the southern half of Britain. He provides information
11 on the status of diseases and disorders, as well as a means of detecting new
12 diseases. He undertakes media interviews, talks, seminars and workshops and
13 he writes regular articles, information notes and papers on tree diseases and
14 disorders and he has undertaken assessments of trees as regards disease and
15 decay. He holds a BA in biological science and the Forestry Commission's
16 Forester's Certificate (equal to an HND). He is a member of the British
17 Mycological Society, the International Union of Forest Research
18 Organisations, working parties on root and ... rots of forest trees and
19 methodology of forest insect and disease survey in central Europe, and the UK
20 phyto-diagnostician's group. That is a summary of what he says about himself.
21 I think that Mr. Bashford's qualifications are more in point for present
22 purposes.
23

24 8. The other matter upon which I entertain much concern is that it seems to me
25 that, in several respects, Mr. Rose has stepped outside the role of an expert and
26 entered the arena as an advocate. There are times when he, in my view, seems
27 to be arguing the case for the claimant; it need hardly be said that that is no
28 part of an expert's duty. At para.5.7 of his report, he refers to an indication that
29 there had been no assessment of the remaining trees on the site since the
30 accident and then went on to say:

31
32 "I feel that this is of great concern and highlights the general lack
33 of understanding of the requirements of the tree owner in relation
34 to hazards and risks posed by the roadside trees."
35

36 It is not for him to tell me about Mr. Wilson's general lack of understanding;
37 that is a matter for the court. If I felt that Mr. Wilson had a general lack of
38 understanding (which I do not feel), I would say so. I do not need Mr. Rose to
39 tell me that. In that paragraph, he has gone outside his instructions and there
40 are several instances in his supplemental report where he appears to be arguing
41 the case. I went through them all with the claimant's counsel.
42

- 1 9. Ms. Wyles made submissions to the effect that what he had said did not
2 undermine his report, but I disagree. He makes the point, for example, that,
3 for seven months, the defendants made no attempt to identify any potential
4 hazards or employ suitable, qualified arboriculturalists to assess the trees.
5 That is a question of fact for me and not for Mr. Rose. Whether they did
6 attempt to identify or did employ a suitable person are factual matters and
7 nothing to do with the opinion of the expert. He has stepped outside his role.
8 At para.2, to give another example in a supplemental report, he says: "If they
9 were observed by the defendants then it must be asked why these hazards were
10 not dealt with at the time." He has no business making an observation like that
11 and it is no answer to say that he was led into that by the nature of the
12 questions and the content of the questions posed by the solicitors. As
13 an expert, he must know full well what his role is and I regret to say that, in the
14 present case, he has stepped outside it and made observations which he has no
15 business to do. In my judgment, this does undermine his report.
16
- 17 10. Mr. Bashford, for the defendants, told me that if there was a fungal infection in
18 a tree, one would see the result in the foliage. The foliage in the present case
19 was in good condition, colour and size. Mr. Bashford said there was no reason
20 to say that there was a real risk or anything needed paying attention. On
21 a Level 1 inspection, Mr. Bashford said that if he carried out an inspection,
22 either Level 1 or Level 2, he would walk up and down, and a more detailed
23 inspection once a year. It will be remembered that the defendants had only
24 owned the property and started to live there about six months before.
25 Mr. Rose accepted that there was no sign of disease or decay in the branch. He
26 could not say if there was any die-back. The photograph showed the healthy
27 foliage and there was no evidence that it had any disease but he told me there
28 has to be an obvious defect before you go further.
29
- 30 11. In Mr. Bashford's report, in 3.9, he said there was a good rate of extension
31 growth and good bud cover throughout the crown. There was no evidence of
32 any major dead wood in the canopy and no symptoms of pathological or
33 physical problems in either the crown or the trunk of the tree. Close
34 examination of the buttress roots and general rootplate area of the tree revealed
35 no evidence of pathological or physical problems and no physiological
36 weaknesses in the structure of the tree. In para.4.5, he said that, in the absence
37 of any such indication, the evidence as confirmed by the condition of the tree,
38 its good rate of extension growth and good bud cover, crown – it was an oak
39 tree – is that the tree was (and is) in good condition, with normal vitality and
40 vigour for a tree of that age and species. He found no evidence of unusual bud
41 formation or fibre-buckling, and any microscopic cracks would not have been
42 visible in any detailed inspection, let alone an inspection of the tree from

1 ground level. There was no reason, he thinks, to consider other than that the
2 junction of branch and tree was sound.
3

4 12. In his oral evidence, Mr. Bashford said that you could not see the crack with
5 binoculars; Mr. Rose says that it was visible from the field opposite. I reject
6 that evidence. I do not think that could possibly be so. Mr. Bashford says that
7 the crack at the top was not visible, and I accept his evidence in that regard, as
8 I accept the totality of his report and evidence. He said that the first inspection
9 can be by a lay person annually and you do not need to see all the tree for
10 a Level 1 inspection. He thought there was no immediate cause for concern
11 and if he had carried out an inspection, he tells me that the crack would not
12 have been visible and, therefore, he would have taken no further action.
13

14 13. It is, of course, common ground as to what the duty of care is. I was referred
15 to two other authorities but of course the facts were different and I cannot see
16 in either of them any statement of principle which is not contained in earlier
17 authority.
18

19 WHAT OF THE SITUATION OF MR. WILSON? 20

21 14. He owed the duty of care. He carried out informal observations of the tree on
22 an ongoing basis, although Mr. Bashford said it need only be done once a year.
23 Mr. Wilson passed the tree regularly. It was in good condition, good foliage, it
24 was not diseased, it was not decayed and the evidence is that there was no
25 indication of die-back. There were no apparent structural defects and,
26 therefore, in my judgment, there was nothing about this tree which ought to
27 have made Mr. Wilson suspicious or alert him in any way; therefore it cannot
28 be said that he should have obtained a formal inspection of the tree by either
29 Level 1 or Level 2 attention. But even if this had been done and even if
30 Mr. Bashford had been there, no defect in the branch would have been
31 revealed. I have just said that Mr. Bashford would have taken no further
32 action, so if there was a breach of duty, in my judgment, it would not have
33 been causative of the claimant's injury.
34

35 15. Liability cannot attach to the defendants in the present case. Where there is
36 any conflict or dispute between the two experts, I have no hesitation in
37 preferring the report and evidence of Mr. Bashford. Accordingly, this action
38 fails and is dismissed with costs.
39
40
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