

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(from the Bristol District Registry)
4BS50384

BETWEEN ;

GARY POLL

Claimant

- and -

(1) RAYMOND BENEDICT BARTHOLOMEW MICHAEL
VISCOUNT ASQUITH OF MORLEY and (2) MARY CLARE
BARTHOLOMEW VISCOUNTESS ASQUITH OF MORLEY

Defendants

Approved JUDGMENT 11/5/08

1. This is a claim for damages for personal injuries and consequential losses arising out of an accident which occurred on 11th July 2001. The Claimant Gary Poll was riding a motor cycle along the Old Wells Road in the vicinity of Claveley's Farm, at or near Mells, Frome in the county of Somerset, when he collided with a fallen ash tree. There is a dispute as to whether the tree fell at the very moment that the Claimant was passing, or whether it had fallen earlier and was already lying in the road as the Claimant approached. That issue, however, is for another day. In either event, the Claimant collided with the tree, and sustained injury.
2. The Defendants are and were the owners of the land from which the tree fell, and were responsible (as is admitted) for the maintenance of the tree. The

Claimant alleges that the Defendants were negligent in their care and management of the tree, and that his injuries were the product of that negligence.

3. This is the trial of a preliminary issue, namely whether the Defendants were in breach of their duty of care to the Claimant and other road users. In fact, as the parties agree, this issue is wider than that. The issue includes whether, if the Defendants (through their servants or agents) had subjected the tree to reasonable and proper inspection, the crucial defect, namely the presence of a fungal bracket, would have been found. I will return to this later. However, I may record at this stage that there are other issues between the parties, which (subject to my decision on the preliminary issue) are to be determined later. These include contributory negligence and quantum. There is also a potential issue on causation. The Defendants contend that the tree had fallen across the road before the arrival of the Claimant, that it was clearly visible, and that (even if negligence be found against them) the fallen tree was not causative of the accident. The sole cause of the accident was the failure of the Claimant to keep a proper look out, to see and avoid the collision. That is also a matter which it is not for me to decide at this stage.
4. I should say a word or two about the evidence. In view of the nature of the issue which I have to decide, the parties called no evidence except that of the two arboricultural experts – Mr Barrell on behalf of the Claimant, and Dr O'Callaghan on behalf of the Defendants. There were other witnesses whose statements were included in the trial bundle, but none of these (including the Claimant himself) was called. In fact, as it transpired, there was little if anything between the experts. I will, of course, need to review their evidence later in this Judgment.
5. The Defendants are the owners of a large estate covering many acres and with many miles of boundary alongside public highways. Large parts of these

boundaries have trees and hedgerows running along them. Thus the obligation (to protect the highways from the dangers of falling trees) is an extensive one. Of course the Defendants are not insurers. They have to take the care to be expected of the reasonable land owner who has trees abutting the highway. There is a wide measure of agreement between the parties and their respective experts as to the nature and extent of that duty.

6. The tree which fell into the road on 11th July 2001 was a multiple stemmed ash. In fact it was one stem of the tree which separated from the other stems and fell. There is agreement as to the cause of the fall. There was a structural defect in the tree, namely an included bark union (or, as it may otherwise be called, an "included bark defect"); there was a fungal bracket immediately beneath the stem which fell; and there were moderately high winds on the day of the accident, with possible gusts of up to 40 knots. It was a combination of these three factors which caused the stem to separate and fall.

7. The Defendants used an independent forestry contractor to undertake inspections of their many roadside trees. He (Christopher Rowe) carried out "drive past" inspections. I do not have the full details of the nature of his inspections as he was not called as a witness. There is, however, no dispute about it, and I have the evidence of the Defendants' arboricultural expert, Dr O'Callaghan which includes some detail of the inspection regime. At the beginning of the trial, it was the Defendants' case that this level of inspection was reasonable (see Defendants' skeleton opening paragraph 29) and that no more was required, unless and until some defect was observed. If (as sometimes would happen) Mr Rowe was able to observe some patent structural defect in a tree, or some obvious decay or other clear danger (from his drive past inspections) he would make a closer inspection of the particular tree and take whatever remedial action he deemed to be necessary. This might include calling for the services of a tree surgeon. However, as the trial

progressed, it became clear, as Mr Mott conceded, that this submission could not be sustained. The experts were agreed that the particular tree called for more than a relatively cursory examination.

8. The Claimant's case, in a nutshell, may be put in the following way. The Defendants owed a duty of care. That duty was to carry out inspections of trees upon the land to identify any potential hazard. There was a particular need to inspect trees alongside the highway. The inspection was to be carried out by a competent inspector, who would be able to identify the level of risk associated with a particular tree. A competent inspector, looking at this multi-stemmed ash, would and should have appreciated that it posed a potential risk. There is always a real possibility (even likelihood) that a multi-stemmed tree such as this will be found to have an included bark union or defect. A competent inspector (appreciating this potential for an included bark union in a multiple stemmed tree) would (and should) have inspected this particular tree more closely in view of its potential for danger. The purpose of such closer inspection would be to determine (a) whether there was indeed such a defect, and, if so, (b) whether there was any disease or other defect which should dictate remedial surgery to prevent a likely accident. In fact, Mr Rowe did not (as he should have done, seeing the multi-stemmed nature of the tree) carry out a closer inspection. If he had done so, the inspection (if carried out competently) would have revealed that there was a fungal bracket. The combination of structural defect and fungal bracket would have caused the competent inspector to appreciate that this was an unstable dangerous tree (or rather stem). It was alongside a highway. It was likely to fall, particularly in high wind; and it should be brought down at once. That is the way the case is put.
9. Before going on to consider that analysis of the case, I can mention two discrete matters of some importance upon which Mr Barrell and Dr O'Callaghan were agreed. They were agreed that the prudent landowner, with

the responsibilities of these Defendants, should have employed what they called a level two inspector to oversee the safety of these trees. There are, broadly, three levels of inspection. These levels are described in the joint statement of the experts at page 174 in the bundle. The work required the attention of a competent level two tree surveyor / inspector – one who has sufficient training, expertise and / or qualifications to identify tree hazards, assess the levels of risk and make appropriate management recommendations. The job did not demand the highest skills and knowledge of a level three expert, but it required more than a level one inspector – a generalist with no specialist tree knowledge. The experts also agreed that Mr Rowe was in fact a level one inspector. His actions would have to be judged against the deemed skills of a competent inspector (level two).

10. The second discrete point (also agreed) was this. It was possible, by the application of different formulae, to place a particular tree into a risk category. Essentially here the experts would be looking to see whether the particular tree should have been considered medium or high risk before the accident. If high risk, it should have been dealt with and the hazard removed. If medium risk there would have been no obligation to do more than monitor. The discussion of this point is to be found in a joint statement at pages 180 to 183 of the trial bundle. In summary, using different methods of assessment and calculation, three factors are put into the equation; the likelihood of failure, the size of the part likely to fall, and the position of the tree (here adjacent to a highway). There are two different systems which may be used to assess the risk. Each system has an element of subjectivity, because the assessor has to assign a score to each of the factors, and differences of assessment may arise. Moreover, both Mr Barrell and Dr O'Callaghan were at pains to tell me that these systems (there are two of them – the ISA system and the QTRA system) are no substitute for intelligent evaluation by an experienced arboriculturist. At best the systems are rough and ready; but they provide a loose guide which may be helpful. In this case the multi-stemmed ash would

have been considered medium risk if it were not known to have the fungal bracket, but only the included bark union. The structural defect alone would not have dictated removal of the stem unless and until it had become much larger, heavier and obviously closer to failure. However, if and when an inspector discovered the fungal bracket, the tree would immediately be placed into the "high risk" category. This would dictate that it should either be reduced considerably and monitored, or, more likely and preferably (given its proximity to the road) felled.

11. I now need to consider whether there was a causative breach of duty on the part of the Defendants. The starting point is, as stated earlier, the duty of care owed by the Defendants. There is no dispute. There was an obligation to inspect trees alongside the highway, and the standard of that inspection was to what we have referred to as "competent" or level two inspection. Such an inspector would have appreciated that a multi-stemmed tree was particularly prone to structural defect, namely included bark union – a structural weakness which occurs in trees which have been cut back in the past (as this one had) so that several stems sprout from the same base. There is bark "included" in the union between stem and original trunk, and this leads to a weakness in the union. The Defendants' expert Dr O'Callaghan explained this in his report at paragraph 4.4 (trial bundle page 101). "When trees such as ash grow back after cutting and produce multiple stems, they sometimes form what are known as 'included bark unions' which are structural defects of trees. These unions are prone to failure, particularly as the stems that emanate from them get larger and heavier".
12. It had always been the Claimant's case that, on seeing such a tree alongside a road, an inspector should be put on notice and would have an obligation to inspect more fully – in particular to visit the base of the tree and investigate. "The multiple stemmed form of the tree..... would have alerted a competent inspector of the potential for the included bark union....." and "should have

triggered a more detailed inspection which would have easily identifiedthe bark union....."

13. On the other hand, in his first report Dr O'Callaghan, the expert called on behalf of the Defendants, appeared to condone the "drive past" inspection of Mr Rowe and his failure either to note the multiple stemmed tree or to do anything further about it, concluding that the failure of the tree was not foreseeable. He also appeared to maintain this position in the joint statement (pages 174 to 179); "Dr O'Callaghan is of the opinion that the inspection regime in place at the Mells Estate is adequate for it to discharge its responsibilities. Mr Rowe is a level one inspector, i.e. one who can recognise gross deficiencies / defects in trees and call upon more competent inspectors to undertake more detailed inspections as appropriate. This is all that is required to comply with the Estate's responsibilities" (para 26 page 178). Mr Barrell disagreed with this statement.
14. In his earlier report, however, Dr O'Callaghan had observed that "this type of tree adjacent to the highway would normally be singled out for detailed inspection by an experienced inspector" (paragraph 4.15 on page 105) and "the (Defendants) could do more than (they are) currently doing to ensure that trees..... adjacent to highways and footpaths are inspected more thoroughly" (paragraph 4.21 on page 107).
15. It was put to Dr O'Callaghan that his assertion (that the actual level one inspection regime was adequate) could not sit easily with other statements to which he had signed in the joint statement. He had agreed that "multiple stems..... are signs of potentially weak or included basal unions that a competent tree inspector should be aware of and would normally be a sign that closer inspection is needed" (paragraph 15 page 176). A competent inspector was a level two inspector. A level two inspector would inspect the tree at close quarters as "standard practice" (para 14 page 176) and the

inspection should have been to that standard (para 20 page 177). In the event, when he gave evidence orally, Dr O'Callaghan readily accepted that his statement at paragraph 26 (that Mr Rowe's drive past inspection was satisfactory) could not be sustained. He agreed with Mr Barrell. The level two inspector would and should have identified the multi-stemmed nature of the tree. There then arose a duty of closer inspection principally to see whether there was an included defect. If none was found, and the tree was in a good state of health, it could be left well alone. If, however, an included bark defect was found, the competent inspector would do two things. He would classify the tree as of medium risk and keep it under observation, undertaking whatever pruning or other management may be necessary. Secondly, he would subject it to closer inspection to satisfy himself that there was no additional defect or disease which would make it necessary to fell the tree or remove the stem before it fell of its own accord, with the risk of injury to road users.

16. At one stage, it had seemed that other factors might have relevance to the determination of this case. It was agreed that one thing which the inspector would be looking for on his initial (whether "walk past" or "drive past" inspection) would be signs of ill health. This particular tree, it was agreed, appeared at the relevant time to be entirely healthy with no crown defect, no sign of dead or falling branches or other growth. If such signs had existed, they would have alerted the surveyor to make a closer inspection. There were also issues about access to the tree for further inspection. However, these considerations fell by the wayside when it became apparent that the experts were in agreement that the multi stemming alone was sufficient to require the competent surveyor to make a close-up inspection. This also resulted in Mr Mott's concession that he did not need to refer me to his bundle of authorities; the duty and standard of care were as now agreed by the experts, and as set out above.

17. As is accepted, Mr Rowe did not in fact inspect the tree, as he should have done. He did not give himself the opportunity to find either the included defect or the fungal bracket. To that extent the Defendants were in breach of their duty of care. This was accepted by Mr Mott in final submissions; there was a proven breach of duty. Mr Mott also agreed that this is now a "one issue" case. That one issue is this. What would reasonable inspection by a level two inspector have revealed? It is common ground that the inspector would have had no difficulty in seeing the included union and appreciating that this was a structural defect which gave rise to a potential future risk. The stem was not yet large or heavy, but the presence of the defect meant that the tree should be classified as of "medium risk" and in need of future monitoring. However, as was also agreed, the competent (level two) inspector would and should have gone on to make a more detailed inspection; in particular he should have looked for disease or decay. It is the Claimant's case that the fungal bracket was there to be found. The Defendants contend that, on the balance of probabilities, the competent inspector, making a proper and reasonable search, would have failed to find the fungal bracket. This is the one issue which I have to determine. Was the fungal bracket amenable to discovery by proper inspection by the appropriate competent inspector?

18. At this point, it is necessary for me to look at the agreed photographs. The tree itself may be seen in photographs forming part of Mr Barrell's report on pages 51 and 52 of the trial bundle. The multiple stemming is easily visible (photograph 1) and there is relatively easy access to the tree through the field. I need not consider the dead stem which is depicted on photographs 3 and 4. There is a view of the failed union on photographs 5 and 6. These photographs were taken in March 2004, long after the accident.

19. There are helpful photographs at pages 129 to 133. I think I am correct in thinking that these were taken in January 2003 at a time when Dr O'Callaghan was inspecting. P129 speaks for itself. The large scar, where the

failed stem broke free from the remaining stems is there to be seen. P130 shows the fallen stem (it is also to be seen on photographs at pages 87A and 87B: it goes without saying that the stem did not fall into the position shown on the photographs. It fell into the road and was subsequently moved). I think the stem was taken away at this time. It was no longer there when Mr Barrell inspected in 2004. Ps131 and 132 again show the failed union. The fungal bracket (or fungal fruiting body) is visible on both these photographs at the very base of the scar; it is small and triangular. It may be sensible to compare these photographs with the photographs at page 127, which were taken much earlier, probably in July 2001, just after the accident. The first of those photographs (the upper one marked "appendix 3.1 photograph 2") shows the fungal bracket, clearly marked. On the photograph it has an orange hue. The decay and white rot, which are labelled on some of the photographs, are not of any real significance to the issue which I have to try.

20. Looking at these photographs now, it is necessary to try and imagine the scene immediately before the events of 11th July 2001. I will do this by reference to the photograph at page 129. The leading side of the stem would have projected from that base towards the camera, approximately horizontally to begin with, so that it would have concealed the fungal bracket beneath it; it would then have bent through almost 90 degrees, to grow in a near vertical plane. A rough attempt to reproduce the pre accident condition of this tree was made by Dr O'Callaghan in a drawing on page 161. The fungal bracket would have been "trapped" underneath the first few inches of the stem, in a narrow space between the stem and the ground. Almost certainly, it would not have been visible to anyone standing alongside the tree. This drawing was agreed by Mr Barrell as accurate, although it could be no more than a rough and ready depiction of the condition of the tree immediately before the stem separated. Thus, in one sentence, the bracket would have been concealed in a narrow gap underneath the base of the stem, which was about to fail.

21. Would it have been found by a level two inspector, who was alerted to the potential hazard, and whose inspection was largely concerned with establishing or eliminating the risk that (in addition to the included union which had already been found) there was some additional defect or disease?
22. In his report Dr O'Callaghan had said that "the presence of the decay fungus would have easily been missed from all but the most detailed of inspections the fruiting body (bracket) seems to have been positioned under the base of the tree" (paragraph 5.4 page 108). This was subsequently agreed by the two experts in their joint discussions (page 175). It was upon this statement that Mr Mott relied in support of his submission that, on the balance of probabilities the bracket would not have been found.
23. In parentheses, I should perhaps dispose of Dr O'Callaghan's opinion in paragraph 5.8 of his report on page 109 (that the failure was not foreseeable as the structural weakness and decay would not have been detected by a contractor). That statement is not to the point, once it is established (as it is) that a level two inspector should have been employed.
24. Although Mr Barrell had signed up to the statement above (that the presence of fungus would have easily been missed by all but the most detailed inspection) he was not prepared to agree with Dr O'Callaghan's statement (at para 22 page 177) during their discussions that "the fungal bracket is unlikely to have been detected, even by a competent inspector, as it was located underside of the stem that failed". It was only visible to him (Dr O'Callaghan) because of the failure of the stem, which exposed the bracket. Mr Barrell, although cautioning that he could not judge, as he had never seen the bracket, said that it "could have been visible during a detailed basal inspection".

25. As is so often the case, it was not until the expert witnesses gave their evidence from the witness box that a clear picture emerged. Both experts agreed that a competent inspector (by which they meant a level 2 inspector) would have wanted to see what lay beneath the stem. They agreed that the bracket could have been found. A proper inspection would have included using a hand or a tool to feel and scrape into the space between the ground and the stem; an inspector would have known that this was a place where decay may have been hiding. Crucially, Dr O'Callaghan told me, towards the end of his cross-examination, that a competent inspector, searching for disease would have found this bracket. It would not have been easy, but it would have been found. He was clearly referring to a level 2 inspector. That concession, it seemed to me, was determinative of the issue.

26. However, even without the concession, I would have found this issue in favour of the Claimant. Mr Mott, referring to the drawing, and to the photographs, had made the point that the fungal bracket would probably have been very well concealed. One could deduce that the overhang to all sides of the bracket would have been at least a few inches; - there would likely have been a reach of several inches before the bracket could be found. This can be judged by looking at the size of the remaining scar and the position of the bracket on the photographs. Nevertheless, in my judgment, a level two inspector would have been looking for that very thing. He would have appreciated that decay could lie beneath this overhang. The very purpose of the examination was to eliminate this very hazard. It would have been imperative to feel carefully into the space - to scrape and discover. The size of the gap is not known. Was the overhang clear of the underlying ground by a few inches? Or was the bracket absolutely trapped, filling the gap completely? We will never know. That is because a competent inspection was never made. It ill behoves the Defendants, in those circumstances, to ask me to make assumptions which are unfavourable to the Claimant. I am quite

satisfied, on a substantial balance of probabilities, that the fungal bracket would have been found.

27. The issue is found in favour of the Claimant. I will entertain submissions about costs and consequential directions. This Judgment will be handed down in draft form on 11th May 2006, and will be perfected, when the parties have had an opportunity to consider it and to make submissions upon any consequential matters.

Alistair MacDuff

11.05.06

