

Claim No. BS250655.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

BETWEEN:

PETER GORDON MACLELLAN

Claimant

and

THE FORESTRY COMMISSION

Defendant

JUDGMENT

2004 - 2006

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1. On 18th December 1999 the Claimant Peter Gordon MacLellan was walking from his furniture making workshop in Monmouth to his home in Lydbrook in the Forest of Dean. It was dark and it had been snowing. The weather had affected the running of public transport and the Claimant did not think he would be able to persuade a taxi to make the journey. He chose to walk.

2. It was a familiar route for him albeit that it was some 12 or 13 miles in length. He set off at about 8.00 to 8.30 pm and the snow on the ground was not thick and the moon was lighting his path. At a point some four miles into the journey just short of the Biblins Bridge he heard a crack like a gunshot.

3. Within a short space of time he was enveloped within the upper part of a falling tree which had crashed upon the path. A direct blow from the main trunk I imagine would have killed him but he was pinned beneath the branches of the tree and the ivy foliage and could not move. Miraculously the occupant of a house on the far side of the River Wye heard his cries and alerted the emergency services who freed him.
4. He suffered serious injuries to his spine and legs which continue to cause him significant pain and disability. I am concerned with the issue of liability only.
5. The Claimant brings his action against the Forestry Commission which is the agency responsible for the management of the forest containing the falling tree. The essence of the claim lies in negligence and the law which I shall turn to later in this judgment is not controversial.
6. The Defendant is the freehold owner of the Forest of Dean and in particular of Lady Park Wood in which the tree was growing. The tree was an ash some 60 to 70ft tall and a little over 70 years old. Its position was close to a wire fence marking the edge of the wood where it abuts upon the old forest path. Beyond the path is a thin line of undergrowth and saplings which separates it from the compacted ballast roadway which now runs where the old forest railway tracks were positioned. This was the path properly described as a public right of way or highway along which the Claimant was walking that night.
7. Lady Park Wood is designated a non-intervention area of woodland within which no active forestry management takes place. The whole region is a national Nature Reserve and a Site of Special Scientific Interest (S.S.S.I).
8. Lady Park Wood is marked out as an area where the natural woodland development can be studied. One man in particular is the acknowledged expert on the wood. Dr. Peterken from whom I heard has written a book together with a Mr. Mountford entitled "Lady Park Wood Reserve - The First Fifty Years" which was published in 1994. The wood is an ecological haven uninterfered with by man.


9. Trees such as the ash that fell which grow along the border of the wood where it abuts the old forest path and the old railway line are rooted in soil which contains scree from the cliffs which rise above and overlook the River Wye. The shoots press up in the shadow of the cliff and have a tendency to grow away from the rising slope before straightening in search of light, a process known as phototropism. On the second day of the hearing a site visit took place which permitted this characteristic to be observed in the trees which remain at the site. The many photographs and a DVD made by Mr. Gissop, one of the Defendant's employees, likewise demonstrate this tendency.
10. It is apparent that a number of trees have fallen in the general area and consistent with the policy of non-intervention they are left to rot and are not harvested. It is also clear that a number of trees have been felled on the border of Lady Park Wood since the incident and others have been marked for felling.
11. Trees which have ivy growing upon them do not have the ivy removed. Ivy provides a year-round habitat for animals and birds and is of course a natural part of the forest growth. The tree that fell had a very substantial ivy root twining around its trunk in an anaconda-like fashion. There was likewise a significant quantity of ivy foliage at the crown of the tree in its canopy. This was measured by Mr. Finch one of the Defendant's experts.
12. The Claimant's case in negligence can be summarised as follows:- the tree that fell did so because it possessed certain characteristics which could and should have been noted as a cause or causes for concern. A proper system of inspection would have revealed its lack of root support and/or its extreme or substantial lean and/or the large mass of ivy and should have taken into consideration the skeletal nature of the soil in which its roots lay. It was further contended by amendments to the Particulars of Claim that warning signs of the hazard presented by the tree lay in the history of the micro environment of the area (notably Peterken and Mountford), the presence of the wind blown or fallen trees, the presence of a fungus *daldinia concentrica* on the tree itself or on adjacent trees and from the size of the ivy root upon the trunk of the ash.

the western side of the lower stem which resulted in the loss of the securing roots on the upslope side of the tree. This decay would not have been easily visible when the tree was viewed from level ground to the east. The other experts including Mr. Bashford gave their opinion that growth at the base of the tree would have concealed the presence of decay of the lower stem. Mr. Bashford indeed stated that the ash was outwardly sound and healthy when viewed from the path. I am quite satisfied that this is the conclusion that I should reach on the evidence.

17. Mr. Ross' case on lean was initially described as "severe" or "extreme" and later modified to "significant" and "noticeable". He placed the angle at 35° to the vertical. When cross-examined he preferred the adjective "noticeable" and acknowledged that a particular angle could not be demonstrated. He accepted that lean by itself would not be a cause for concern whereas lean plus ivy should arouse interest. He said that a lean of as little as 10-15° plus a large ivy mass should prompt attention when one took into account the slender nature of the tree (this last point not having featured in his written reports).
18. When he used the term "extreme" lean he meant 35° to 40°. He believed that the ash had grown across the old forest path and had reached a point at its crown where some of its foliage was overhanging the path on which the Claimant was walking. He would not accept the degree of lean advanced by Mr. Finch of 10° or thereabouts nor Dr. Lonsdale's general lean of 15° (these are the Defendant's experts' assessments) although as I have indicated he would have advocated further action at these angles if accompanied by the presence of a large mass of ivy.
19. He acknowledge that the adjacent so-called banana tree had a greater degree of curve in its initial growth . That tree did not have ivy stems on its trunk and its phototropic adjustment was not shown on the photographs. It has since been felled.
20. Mr. Bashford who again is a highly experienced arboriculturalist with a specialisation in the inspection of trees also advanced a case of lean in the region of 45° at the start of growth with allowance for some degree of straightening. He produced the schematic at page 162A which showed his assumed commencement of growth angle based upon the general slope angle of some 40°. This schematic was intended to assist in a proper

13. The Defendant's case in response was to deny that the appearance of the tree from a casual or opportunistic inspection from the path on which the Claimant was walking would have revealed anything untoward in the appearance of the tree or its surroundings. There was probably no significant lean, the ivy growth though large was not remarkable in size of root or appearance. The lack of support from the root base was a highly significant feature of the tree which led to its collapse but this was almost certainly not visible from the road albeit that it would have been on close inspection. Close inspection was not warranted because of the nature of the micro environment, the fallen or wind blown trees or the presence of fungus. The soil structure was not a matter for concern. Close inspection of the trees adjacent to highways had to be based upon a recognition of prioritised usage. This forest footpath was rarely used by vehicles or bicycles at the time and was not a footpath which carried the volume of pedestrian traffic which crossed the Biblins Bridge en route between Monmouth and Symonds Yat - the Wye Valley Walk. It was appropriate in all the circumstances for a non-regular system of inspection to be instituted which required the Defendant's employees to keep an eye open for signs of danger when in the area from time to time.
14. The Claimant in rebuttal contends that a proper understanding of the usage of the path would have led to the introduction of a regular system of inspection which would in turn have led to the close inspection of the tree by reason of the presence of one or more of the characteristics relied upon as indicating a need for closer inspection.
15. The principal issue which falls for my decision in the case is that of the appearance of the tree in the years before it fell. In particular, since the rotting of the roots on the western side of the trunk had in all probability been evident for some 16 years, since about 1983. If I am not satisfied that it is sufficiently demonstrated on the evidence that the tree was showing a sign or signs which might warrant a closer examination then it is conceded by Mr. Brilliant on behalf of the Claimant that the claim cannot succeed.
16. I turn to deal with the features in turn starting with the lean of the tree. This is an important if not an essential part of the Claimant's case. It is founded upon the evidence of his two experts Mr. Ross and Mr. Bashford. Mr. Ross is a very experienced arboriculturalist. He identified the cause of collapse of the tree as the extensive decay on

understanding of the replacement of the root plate which all agreed to be the best way of assessing the lean of the tree. When cross-examined Mr. Bashford indicated that a lean of 20° plus straightening plus ivy would suggest inspection of the tree if all other relevant factors were taken into account. He believed that the top of the tree would have reached the edge of the path if not overhanging it. This would have been sufficient to indicate a danger.

21. He would not have been worried by a lean of 15° plus ivy but he had some additional contribution to advance on the appearance of the ivy root. This had not been included in his disclosed report. He was fortified in his belief that there had initially been two stems one of which had not prospered and which had died causing the root decay. He could not say how extensive had been the growth of the failed stem and this had not been considered as I have indicated in his written report. Before the tree fell it would have been blindingly obvious and would have required a close inspection. Mr. Bashford as appears later was concerned about the size of the ivy root and the presence of *daldinia concentrica*. 

22. For the Defendant the evidence came from Mr. Finch and Dr. Lonsdale. Neither felt that the available material led to an inference of lean beyond 15° or so. Mr. Finch, an arboricultural consultant with similar background and experience to Mr. Ross agreed with Mr. Bashford that the tree would have appeared healthy. It was his view that the tree would have been a cause for concern if its straight lean angle plus ivy was as much as or greater than 25° if all or the majority of its canopy was growing on the compression side of the trunk. His examination of the canopy did not suggest this was so. At paragraph 5.4 of his report he concluded that the presence of moss on the trunk of the tree when he examined it in February 2001 suggested that it was nearly vertical when it commenced its growth. He illustrated the point in his photograph No. 8. When he was challenged on the basis of the time that had elapsed since the fall of the tree and the possibilities of growth and/or the drying up of moss in the interim he replied that he had examined the tree carefully with such possibilities in mind and was cautiously confident in his conclusion. He had seen no dead moss remnants on the bark which he would have expected to find had growth existed. It helped him to match the stump to the hole in a way which seemed acceptable. He had been the originator of the twin stump idea which was accepted by all

the experts in the end. It may be that Mr. Ross had independently reached such a view. Both Mr. Finch and Dr. Lonsdale had relied on the position of the pith within the trunk but subsequent testing of this approach showed it to be unreliable to their joint surprise.

23. Having listened to all the evidence Mr. Finch adhered to his view that the lean was 10° or thereabouts with a slight curve in the trunk and a lopsided canopy. While he could not rule out 20-25° he said he would have wanted to see the tree in the forest canopy which of course could not be done.
24. Dr. Lonsdale's report on tree lean is dated 13th January 2004. He is a much published author and expert in the field of tree hazard assessment. He has undertaken research on behalf of the Defendants in their Forest Research Department for some 20 years between 1982 and 2002 and I was urged to treat his evidence with some caution by reason of this connection. I have considered whether I should have reservations about his evidence on the basis of potential subliminal partiality. I believe that I am entitled to regard his evidence as completely objective and in his closing submissions Mr. Brilliant did not suggest that I do otherwise. Among his many publications are to be found - "Principles of Tree Hazard Assessment and Management" 1999 and "Hazards from Trees: A General Guide. Forestry Commission Practical Guide" 2000. Dr. Lonsdale concluded that the tree in question was leaning for most of its life but that the lean was unlikely to have been unusually pronounced in comparison with other trees in the locality. He disavowed his pith-based approach having subjected it to detailed analysis. His evidence was that in performing the root plate replacement exercise depicted in the schematic at page 162A he would envisage a rotation of at least 70° to relocate the broken roots which would produce an initial lean of below 20°. Thereafter there would be straightening with phototropism. He believed that there was a general lean for the trees in that section of the wood of about 15°. The so-called banana tree was not helpful and could not be any sort of indicator of the degree of lean of the subject tree.
25. Dr. Lonsdale had an impression of the tree that fell of being near vertical at 12 metres of height. He believed his views received general support but no more from the siting of the moss on the bark noted by Mr. Finch and from the runnel pattern of water passing down lichen formations on the bark. As a matter of general impression Dr. Lonsdale formed the

view that the lean of the tree would have been unremarkable to the eye of a forester looking at this part of Lady Park Wood from the path on which the Claimant walked.

26. Dr. Lonsdale was invited to consider the statements of the witnesses and in his reports he gave his comments upon them. He believed that foresters and rangers would have a good general knowledge of trees and could be inspectors of trees with some training. It was noted that Mr. Beasley, a forester, had said in his evidence both written and oral that he would inspect informally or opportunistically from his car once every two months. Mr. Gissop, the District Forester, would pass by the spot where the tree grew at least once per month by bicycle or on foot. Mr. Gissop had received training in the recognition of potentially hazardous trees inter alia on a course in October 1995. Mr. Gissop lives in Monmouth and uses the path as a route to work and recreationally. Mr. Rowlands' knowledge of the path was I think limited to a single visit which it was difficult to date. Mr. Wallis, the Line Manager or Beat Forester for Lady Park Wood between April 1997 and October 1999 used the track by car every 2 or 3 weeks and would walk it every 3 or 4 months. It was part of his job to look out for potentially dangerous trees. On two or three occasions he did arrange for trees to be felled that he believed were unsafe. None of these people saw a tree leaning dangerously on this section of the path.
27. Finally there is Dr. Peterken. He was called to deal with comments that he had made on the nature of the soil. At paragraph 12 of his written statement he states "I would have noticed a tree with a pronounced and dangerous lean". In conjunction with all of the remainder of the evidence I am entirely confident in concluding that if the subject tree had been leaning in the way suggested by Mr. Ross and Mr. Bashford it would have been noted by Dr. Peterken whose knowledge of Lady Park Wood I take to be second to none. He would have expected the trees under the cliff where this tree grew to lean early in their growth and to attract ivy in stronger growths than in the stands below the cliff. Such is the impression created by the evidence given by Dr. Lonsdale and Mr. Finch. Such trees are not uncommon let alone noteworthy dangerous in this part of the forest.
28. Having decided the issue of lean I must go on to consider the other matters which taken together might have given rise to concern on the part of the opportunistic observer.

29. The presence of a large mass of ivy and the nature of its growth. My approach to this feature of the tree's appearance must necessarily reflect the importance I attach to the evidence of Dr. Peterken when placed alongside the expert evidence of Dr. Lonsdale and Mr. Finch. I should indicate that I felt a greater confidence in what I regarded as the more measured approach adopted by the Defendant's experts as opposed to those called on behalf of the Claimant. Mr. Ross' use of the adjectives "extreme" and "serious" later acknowledged as inappropriate by him showed a commitment to a theory which lacked balance. Mr. Bashford's tendency to develop his analysis by reference to the double stem and the appearance of the anaconda root detracted from his evidence. Where differences arise I prefer the Defendant's experts. *stem*

NOTE

30. Mr. Finch found the ivy to have the appearance of a bottle brush and to be contained within the canopy in the crown of the tree. Dr. Lonsdale and Mr. Finch did not espouse the view given for the first time in the witness box by Mr. Bashford that the appearance alone of the ivy ~~root~~ *stem* would warrant further investigation of the tree. *stem*

31. I find that there was a large mass of ivy on the tree which probably brought about its failure when the snowfall came. By this I do not suggest that the weight of the snow was exceptional, merely that it is the most probable explanation for the timing of the collapse of the tree. Such a mass of ivy was not of itself exceptional and its extent may have been hard to identify in the forest canopy. It must at all times be remembered that this tree came down because its root structure was severely compromised. Such a tree with sound roots was "as safe as any tree can be" to use Dr. Lonsdale's words.

32. The "known instability of the soil". Paragraph 8(a)(iii) of the Particulars of Claim is I believe linked to (iv) the history of the micro environment of the area (particularly Peterken and Mountford). The passage in the book entitled "Stands below the Cliff" did not relate to the area of trees growing under the cliff which had not received particular consideration from Dr. Peterken. Representatives of the Defendant had they read the extract in question would be presumed to understand it to relate to transects VII, VIII and IX which lie closer to Biblins Bridge. Dr. Peterken indicates in his statement dated 3rd May 2004 that he intended no specific criticism of the stability of the soil at any point. Dr. Lonsdale who was at pains to make clear that he is not a soil expert could not see why

it might be said that the presence of scree in the soil for example might make it less effective as a root base. This part of the case seems to have sprung from a series of misunderstandings and in consequence weakens the matrix of concern relied upon by Mr. Ross and Mr. Bashford.

33. The wind blown and/or leaning and/or fallen trees in the vicinity. This point is dealt with by paragraph 17 of Dr. Peterken's statement and probably requires no elaboration. I understand this part of the case to have been added by amendment in the light of the Peterken and Mountford work.
34. *Daldinia concentrica*. Mr. Bashford noted the presence of this fungus which familiarly forms on dead ash wood. He did not find the fungus on the subject tree. It is his suggestion that an opportunistic observer should have noted its presence and investigated further. Mr. Ross did not support this part of the Claimant's case. Dr. Lonsdale and Mr. Finch gave it short shrift. *Daldinia concentrica* forms on dead wood of which there is an abundance in non-intervention woodland. Had it been noted in an overhanging branch it would have been another matter, it was not.
35. Taken as a whole the circumstances which the Claimant suggests existed before the fall of the tree and which should have led to its inspection have not been established by the evidence. It follows that the informal inspection system employed by the Defendant if itself open to criticism cannot be regarded as causative of the Claimant's loss. A considerable amount of time has been directed to the issue of system and I propose to set out my conclusions upon it.
36. The law as I have indicated is not controversial. The Defendant owed the Claimant a duty of care to take reasonable care for his safety as a user of a right of way through the forest. The fact that the tree in question was sited within a non-intervention zone set aside as an ecological research site did not absolve the Defendant from its duty to the Claimant. It was incumbent upon the Defendant to establish a reasonable system of inspection which would enable dangerous trees to be identified and if necessary removed. The Defendant had undertaken to fell and/or make safe trees on the periphery of Lady Park Wood

No arboreal!

pursuant to its agreement with the Ministry of Agriculture Fisheries and Food dated 21st June 1984 albeit that this obligation carries with it no benefit to the Claimant.

37. At the time of the incident Mr. Rowlands was responsible for the tree inspection regime within the Forest of Dean. He had commenced this role in about 1995. The system as operated by Mr. Rowlands followed a prioritising procedure developed in the New Forest which relied upon assessments of hazards and risks. It was far from sophisticated and its essence can be discovered at page 348 in Bundle 5. Dependent upon the allocation of risk and hazard rating a danger rating can be calculated.
38. It was Mr. Rowlands' evidence that risk ratings of 2 or 3 would lead to regular inspections at such sties. Risk rating 1 would be left to opportunistic inspections by foresters in the course of their duties. The principal witnesses on usage called for the Defendant were Mr. Rowlands and Mr. Gissop. Both categorised the footpath in question as risk rating 1.
39. In the light of my finding that the tree fell into hazard rating 1 I shall not deal with the evidence of usage in detail. Surveys of the usage of the path were carried out which produced figures of less than or equal to two persons per daylight hour and less than or equal to one person per night. The overall statistical picture was of a usage of less than or equal to one person per hour for each 24 hour period throughout the year.
40. There was evidence of higher usage of the area on the Lady Park Wood side of Biblins Bridge which came from Mrs. MacLellan, Mrs. Upton and Linda Wright. Plainly on occasion the footpath from Biblins Bridge to Monmouth on the Lady Park Wood side is used much more extensively than Mr. Gissop might have realised notwithstanding that he is the District Forester responsible for environment charged with overseeing the recreational aspects of the Forest of Dean as well as its conservation and heritage policy. He is of course as I have indicated a fairly regular user of the path.
41. Dr. Lonsdale told me that the system of hazard assessment and its operation was reasonable for 1999 and a good deal better than might have been found elsewhere in similar woodland areas in the country.

42. In assessing the acceptability of this assertion it is important to bear in mind that the Forest of Dean is some 16,000 hectares in size with over 1,900 linear features including A and B roads, bridle paths and cycle tracks. Calculations of the numbers of trees within 20 metres of each side of linear features have produced estimates which exceed two million. The Defendant employs fifty or so men and women to manage their forestry property in the Forest of Dean. Each forester is responsible for about 3,000 hectares. Mr. Rowlands had a budget of £10,000 in the year 1999 for tree inspection. There is no suggestion that funds would not have been forthcoming if they were needed but plainly there was and remains a need to manage resources effectively. This is not a case of a failure to heed past experiences where trees have fallen and caused injury. Not surprisingly no-one told me that they had personal knowledge of an accident of this type other than that which befell the Claimant. Dr. Peterken stated in paragraph 15 of his statement "In all the time I have spent in Lady Park Wood I have never seen or heard a tree fall: Indeed in 43 years as a woodland ecologist I have only once been within hearing distance of a fall."
43. On the evidence I should have concluded had it been necessary for me to do so that the Defendant had taken reasonable steps to assess the usage of the footpath in question and had implemented a reasonable system of inspection involving as it did opportunistic inspections by dedicated and skilled employees who as I found would know a danger when they saw one.
44. This was a tragic accident which occurred without fault on the part of anyone.