General Form of Judgment or Order

In the County Court at Oxford	
Claim Number	D91YJ083
Date	30 January 2021

MISS ANNABELLE ORRITT (CHILD BY MOTHER & LIT FR MRS VICTORIA BROOKS)	**1st Claimant** **Ref** EM/ORRITT/ Y1460237
MR DAVID BROOKS	**2nd Claimant** **Ref**
MR GEORGE MATTHEW BRANTHWAITE MOSER	**1st Defendant** **Ref** IJS/N50024-32300
MR IAN BRANTHWAITE MOSER	**2nd Defendant** **Ref** IJS/N50024-32300

Before His Honour Judge Rochford sitting at the County Court at Oxford, St Aldates, Oxford, OX1 1TL.

UPON THE trial of the preliminary issue in these claims on 16, 17 and 18 December 2020 and the Judgment handed down in the absence of the parties on 26 January 2021

IT IS ORDERED THAT: -

1. The claims by the First and Second Claimants are dismissed.

2. The Claimants shall pay the Defendants' costs of the claim, not to be enforced without further order to the extent permitted pursuant to CPR 44.14

Dated 26 January 2021

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IN THE COUNTY COURT AT OXFORD

Case Number D91YJ083

Judgment handed down 26th January 2021

BETWEEN

Miss Annabelle Orritt (A child by her mother and litigation friend Mrs Victoria Brooks)
Mr David Brooks

Claimant

And

Mr G.M.B. Moser
Dr I.B. Moser

Defendant

His Honour Judge Rochford:

I direct that pursuant to CPR PD 39A para 6.1 no tape recording shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Introduction and background

1. On 23rd May 2014 Anabelle Orritt, the First Claimant, was walking home from school with her friend along a public footpath in the village of Woodford Halse, near Daventry, when an ash tree fell and struck her, causing her serious injury. The footpath, known as the Cinder Path and forming part of Jurassic Way, ran through an area of woodland that extended to just over 10 hectares. It served as one of a number of routes between what were in effect two parts of the village of Woodford Halse. Annabelle's school, the village primary school, was in one part of the village, and her home in the other. Annabelle's date of birth is 9th August 2003.

2. The tree had been growing on the steep embankment of a disused railway. Its base was about 2.9 metres above the level of the path, and some 6.5 metres in from the path. I understand that 6.5 metres to be measured up the slope, rather than being a horizontal distance.

3. That woodland in which the ash tree grew and through which the Cinder Path ran had been bought by Mr Moser, the First Defendant, in 1988. In 2005 he transferred a 50% interest in the woodland to his son, Dr Moser, the Second Defendant. Their evidence, which I accept, is that this transfer was effected for the purposes of Inheritance Tax planning. The wood has, since the accident, been sold to the Parish Council. Whether that sale was because of the accident I do not know and it matters not.

4. The First Claimant asserts in this claim that both the First and Second Defendants are liable for her injury. It is accepted that her claim under the Occupier's Liability Act 1957 must fail; this was a public path, she was there as of right, and thus she was not a visitor within the meaning of that Act. She also alleges that the Defendants owed her a duty of care, and were in breach of that and, further, that the falling of the tree on her, whilst she was on the public path, amounted to a public nuisance for which the Defendants are liable.

5. The First Defendant accepts that he owed her a duty of care. The nature and extent of that duty, and whether it was breached, are in issue. The Second Defendant denies he owed any duty; he was no more than an owner of the woodland and took no part in its management. He did not occupy, control or manage it in the way necessary to give rise to a duty of care. No party sought to argue that, if the Second Defendant owed any duty, it was different in nature or extent to that owed by the First Defendant.

6. All parties are agreed that the claims in nuisance should succeed if, but only if, the claims based on breach of duty succeeds.

7. The Second Claimant was the First Claimant's stepfather. He was a firefighter. He reached the scene of the accident shortly after Annabelle had been injured, and before the air ambulance arrived to take her to hospital. He asserts that the closeness of their relationship and the nature and extent of the psychological reaction he suffered entitles him to damages. In short, he says he is a secondary victim.

8. The matter was listed before me for trial on the question of liability. I determined at the outset that that did not include the question as to whether, if the First Claimant's claim succeeded, the Second Claimant had satisfied or overcome the various control mechanisms such that he could recover for any psychiatric injury he could show he had suffered. It is common ground that if Annabelle's claim fails, his must fail too. The matter had been allocated to the multi-track and the trial on that preliminary issue took place before me on 15th, 16th and 17th December 2020.

9. The Claimants were represented by Mr Seabrook of Counsel, the Defendants by Mr Davis of Counsel, to both of whom I am grateful. All four parties gave evidence. The Claimants called other factual witnesses also. The Claimants and their non-expert witnesses attended in person (save for one, Mrs Barker, whose evidence was given remotely). The Defendants

gave their evidence remotely, by CVP. Each side called expert evidence from an arboriculturalist; Mr Barrell (remotely) for the Claimant, Dr Hope (by attendance) for the Defendants. Both experts are well qualified, both academically and by experience.

10. Dr Hope visited the site on five occasions, the first two being on 16th and 24th September 2014. He provided a report dated 23rd July 2018 and answered one set of Part 35 Questions.

11. Mr Barrell visited the site on 10th September 2015 and 30th September 2018, and provided reports dated 30th June 2017 and 14th January 2019.

12. They produced a joint report dated 20th September 2019

13. I was referred to two cases, namely *Stagecoach South Western Trains Ltd v Hind and anor* [2014] EWHC 1891 (TCC) and *Witley PC v Cavanagh* [2018] EWCA Civ 2232. I was also provided with a copy of Sir Alistair MacDuff's first instance decision in that latter case, but there is no neutral citation on the copy judgment.

The source, nature and extent of any duty

14. In order to determine whether any duty was owed by the Second Defendant, it is necessary to consider what the relationship of an individual to a tree or land must be before it gives rise to a duty. What must his status or position be before he owes a duty?

15. In claims under the Occupiers Liability Act 1957, and the predecessor common law, the status is that of occupier. But that duty is owed only to a visitor. So that duty arises only where the necessary relationship between alleged tortfeasor and victim arises. In *Stagecoach*, Coulson J stated as follows (para [56])

"Ms Hind, as the owner of the Tree, owed a duty to the claimant to act in the manner "to be expected from a reasonable and prudent landowner" : see *Caminer v Northern Investment Trust Ltd* [1951] AC 85."

The word "landowner" is used throughout *Stagecoach,* although Ms Hind was both owner and occupier. My tentative view is that the duty is one imposed upon a landowner, and is one arising out of landownership. It does not arise out of occupation. However, the point was always of little practical importance in this case, and indeed, as will be seen, is not determinative of my decision. The argument I heard on the point was limited. There may be other cases in which the point is of importance. In the circumstances, I prefer to reach no final conclusion on the point.

16. Mr Moser did owe a duty, namely the duty to be expected from a reasonable and prudent landowner (or, perhaps, occupier). For the sake of simplicity, I will use the expression landowner.

17. The experts agree that such a hypothetical landowner would be expected to carry out regular inspections. The frequency with which such inspections ought to be carried out in the case of the woodland and path in question was a source of disagreement. The experts agreed that a detailed inspection of each tree individually was not required. What was required was a "quick visual inspection" or "quick visual check". The phrases were used

interchangeably. This did not need to be carried out by somebody with a high level of expertise. A person with a basic knowledge of trees could carry this out. What was required was that they would be able to identify any obvious defects or areas of concern. These were referred to as triggers. If such a trigger was identified, a person with a higher level of expertise than that basic level would need to carry out a more detailed and expert appraisal. The quick visual inspection would not require the tree to be examined from all angles. In the case of this woodland path, a satisfactory quick visual inspection could be carried out from the path.

18. The experts agreed that additional checks (ie in addition to the periodic regular checks) might be required after a storm, but that is not relevant on the facts here.

The checks carried out

19. Mr Moser's evidence was that he personally, carried out "periodic visual inspections by walking along the section of Jurassic Way that passes through the Woodland." (s/m para 12) He says he carried these out about four times per year, "particularly if there had been storms or high winds." At all times, he lived about 15 to 20 minutes drive from the wood. He also had a friend who lived in the village, Mr Gascoyne. He had first met Mr Gascoyne when Mr Gascoyne had worked for Fountain Forestry, later Nicholson Nurseries, which firm Mr Moser used for woodland management. Mr Gascoyne was experienced in matters of tree management and would walk his dog along the path and would, Mr Moser said, report any concerns about the wood. There was no specific evidence of any such reports in fact having been made by Mr Gascoyne. Mr Gascoyne died about 18 months before Annabelle's accident. Mr Moser said he visited more frequently after his death.

20. In his oral evidence Mr Moser said that he would, on his visits, not only walk the path but would also leave the path and walk through the wood. He was cross-examined about the fact that his witness statement makes no suggestion of walking away from the path. The Claimants suggest that this addition casts doubt upon Mr Moser's evidence. Mr Moser is 85 years old and gave evidence by CVP. He says that in the last 18 months or so friends have suggested his memory is not as it was. I formed the impression that he was alert. He gave his answers carefully, but without obvious hesitation or difficulty. It is clear from his statement that Mr Moser has a longstanding interest in trees and their management. He has knowledge of trees above that of the average person. On the evidence, there were a number of informal paths in the woodland. Even allowing for the steepness of the embankment and his age, I would find it surprising if, when he visited the woodland, he did not from time to time venture off the Cinder Path. I find that the late mention of his leaving the path is not because this is a late invention or a false memory. It was simply omitted from his statement (and from the Defence and Amended Defence) by oversight or poor drafting. His evidence was that if he noticed any damage, fungus or other problems he would carry out a more detailed inspection; I accept that.

21. I do not regard it as significant that there is no written record of the visits (eg an inspection log) or any diary entry or other evidence to support his contention that he made the visits. There was no need for him to make any such record. He did not assert that the visits were scheduled in any particular way.

22. I find as a fact that Mr Moser did visit the woodland about four times a year and, on those visits, carried out a visual inspection from the path. I accept his evidence that the last inspection before the tree fell was in early spring 2014. I accept also that if he noted any concerns, he would have carried out a more detailed inspection and would have sought advice from Nicholson Nurseries if he had had concerns about the stability of a tree within falling distance of the path. I accept also that he would on occasions walk through the woodland away from the path, but I am unable to reach any view as to how often he walked away from Cinder Path, or how thoroughly he traversed the areas away from the Cinder Path

23. The Claimants say that the tree must have been in obviously poor condition for some time (a matter of years) before it fell. They say that it follows either that:

    1. the inspections were not carried out with the frequency claimed, or
    2. were not carried out properly or,
    3. if they were carried out properly and identified concerns, they were not followed through.

    The Amended Particulars of Claim are wide enough to cover all these possibilities.

    As indicated, I reject the suggestion that the inspections were not carried out with the frequency claimed.

    Required inspection frequency

24. I turn now to consider how frequently it was necessary for Mr Moser to carry out a quick visual inspection of the trees that were within falling distance of the Cinder Path if he were to avoid being in breach of duty.

25. Mr Barrell in his first report referred to a number of publications, and exhibited excerpts from them. They included, with their dates of publication in brackets:

    - HSE SIM 01/2007/05 Management of the Risk of Falling Trees or Branches (2013)
    - Forestry Commission Hazards from Trees. A general guide (2000)
    - Department for Transport Well-maintained Highways – Code of Practice for Highway Management (2005)
    - DoE circular 52/75 Inspection of Highway Trees (1975)
    - National Tree Safety Group – Common Sense Risk Management of Trees (2011)
    - Arboricultural Association Guidance Note 7, Tree Surveys: A guide to good practice (2009)

26. Such guidance is important evidence of how frequently a reasonable and prudent landowner would inspect.

27. It is to be noted that HSE SIM describes itself as providing guidance for HSE Inspectors and LA Enforcement officers, and states that it is not intended as a guide for duty holders. In *Cavanagh,* Sir Alistair MacDuff, and subsequently the Court of Appeal, rejected the landowning Council's attempts to rely upon this, noting that the guidance was concerned

with the situation in which criminal liability might arise. To the extent that HSE SIM might be regarded as setting a bare minimum or low standard of inspection, I agree.

28. Mr Barrell accepts and adopts the DOT Well-maintained Highways Code of Practice, which suggests (at para 9.13.4) a five year starting point. That appears to be the same DoT code to which Sir Alistair Macduff referred at para 58 ff of his judgment in *Cavanagh*, and on which he placed reliance. Para 9.3.14 states as follows:

    Most trees should ideally have an arboricultural inspection every five years but this period may be reduced on the advice of an arboriculturalist. Default intervals is for arboricultural inspection at least every five years

    Neither party suggested that the phrase "arboricultural inspection" meant anything other than a quick visual inspection by someone with a basic knowledge of trees.

29. It is to be noted that the other publications to which I have been referred refer to the need for inspection and the type of inspection, rather than the frequency of inspection. It is agreed here that a periodic inspection is required, and that it is sufficient for it to be in the form of a quick visual inspection or check, of the type already described.

30. The Forestry Commission guide suggests that hazards from large, old trees can develop rapidly, and an inspection frequency of "one year or more" may be required where such trees occur on high usage sites. Whether the phrase "one year or more" means that the frequency should be once a year or more frequent, or the opposite, ie that the period between inspections should be once a year or may be more (ie frequency of less than once a year) is perhaps unclear.

31. Mr Barrell, at line 408ff of his first report, states this:

    Considering the location of the subject tree next to a busy footpath, it seems appropriate to apply the Well Maintained Highways' *default inspection frequency of every five years as a starting point.*

    This suggests that he considers the busyness of this path is reflected in that starting point, although his next sentence perhaps suggests otherwise. He goes on to refer to a tendency on the part of ash trees to develop dead branches much faster than other species such as oak.

    These characteristics indicate to me that the five-year interval is too long because such a long period may not be sufficient to identify dangerous branches in good time and the consequences of any failures could be severe for the children walking beneath.

32. He concludes that he would feel more comfortable with a three to four year inspection frequency.

33. Mr Davis argues that, if there is a five year starting point, I can only depart from it with reason. That must be right. So I must then consider the factors that might require or justify a departure from this five year starting point.

34. Mr Seabrook places much emphasis in the busyness of the path.

35. There is some physical evidence of use, not only of the path, but also of the adjacent woodland. There are a number of paths running through it, criss-crossing it, as it was put. There is a rope swing, photographed at page 274 suggesting that children played there. Given its location in the village, it is unsurprising that children should play there. Mr Moser said that he would pick up litter on his visits and the photographs suggest quite a lot of litter, which indicates the passage of people. I do not draw any conclusion from the fact that the Cinder Path has not become overgrown; that may be because of regular use but there may be other reasons for it as well. Mr Barrell describes the path as being "well-worn" (1st report, line 368). The evidence is that there were dog waste bins, suggesting that the Parish Council or other authority considered them necessary. There is said to be a single street light somewhere on the path. Mr Moser said at one point he put signs up to indicate that the woodland was private but that, over a period, they were removed. The fact that somebody removed the signs is suggestive, but no more, of the fact that that person wanted to use the woodland.

36. The Defendants referred me to the large number of photographs and the fact that only one or two of those demonstrate anyone using the path. I have not checked all the photographs, but Mr Seabrook did not dispute this analysis.

37. There was also oral evidence from a number of sources to the effect that the path was regularly used by schoolchildren going to and from the primary school in the old, eastern part of the village. The evidence, unsurprisingly, was that many were escorted by family members. Indeed, Annabelle was returning from school on the day of her accident, and her evidence was that she would walk to and from school along the path, as would many of her friends. It was the usual route to and from school for them. At the only date for which evidence was provided, there were some 260 children at the school. I find that, on a typical school day, a significant number of children, many escorted, would use the path. In addition, a number of people working at the industrial estate in the village would use it. There was a football club with a bar, and visitors to that would use the Cinder Path. Others would use it for dog walking, recreation, and as part of ordinary village life. Sally Brooks, the Second Claimant's mother, who lived by the path and had worked from home, says she "almost got fed up" of waving and saying hello to people walking past.

38. In my judgement, this path was reasonably heavily used, considering its rural location. But it was not as heavily used as a path might be in a recreation ground or park in an urban or city location. It is not possible to put a figure on that use, nor is it necessary. In my judgment, use was not so heavy as to require a departure from the five year starting point. Making allowance for the fact that there would be peak times and quiet times, the absence of people in the photographs is, in my judgment, telling.

39. The fact that many of the users were children does not require or justify a departure from the starting point.

40. Nor does the fact that the wood was mainly of ash trees require or justify a departure from the starting point. Dr Hope rejects the suggestion made by Mr Barrell that ash trees are

especially prone to developing rapidly into a state of danger. I note that ash trees are a very common species in this country; I can take judicial notice of that. In my judgment, given how common they are, if the five year starting point was not applicable to areas that contained a lot of ash because of particular dangers posed by ash trees, the DoT guidance would have said so.

41. In short, the Claimants need to establish a reason to depart from the five year starting point. They have failed to do that.

42. For completeness, I revert to the suggestion in the DoT guidance that the five year period might be reduced on the advice of an arboriculturist. Was Mr Moser in breach of duty for not seeking the advice of an arboriculturist as to how often he ought to have inspected the trees and, if he was, what would that advice have been? I should add that the Claimants' case was not in terms pleaded or indeed put in this way. The DoT guidance does not suggest that advice should be sought as to inspection frequency for each tree or area of wood, and I do not consider that the observation that the five year period might be reduced on the advice of an arboriculturalist requires it. In my judgment, this refers rather to the situation where an arboriculturalist has inspected and identified a potential danger, or a slowly developing defect, and advises that a watch be kept on the problem. Most of the trees in this wood were comparatively young, so that problems were less likely than in a more mature wood. It was not suggested that the made-up nature of the embankment soil, or the slope, required more frequent inspection. For reasons given above, I reject the suggestion that ash requires especially frequent inspection. Even allowing for Mr Barrell's feeling that he would be more comfortable with a three to four yearly inspection regime, I do not consider that an arboriculturalist would have identified this wood as requiring anything more frequent than inspection at the five year interval of the DoT starting point.

43. Accordingly, I find that a reasonably prudent landowner in the position of Mr Moser ought to have carried out a quick visual inspection at least once every five years, and would have followed this up by carrying out more detailed inspection or work if the quick visual inspection revealed issues. In addition, checks should have been carried out after storms, or if the landowner became aware of potential hazards (for example, by a neighbour reporting them to him). There is no evidence here of storms or reports, and no suggestion that storm damage was a factor in this tree's failure.

44. The frequency of Mr Moser's inspections, carried out four times a year, was therefore greater than was necessary to discharge the duty. That assumes that the inspections were carried out with adequate care.

An alternative argument

45. Mr Seabrook argues that breach of duty is established provided the Claimants demonstrate that any of the inspections were carried out without proper care, ie fell below the standard expected of a quick visual inspection. Accordingly, he needs only establish that there were obvious visible issues with the tree in the spring of 2014 (last inspection). Mr Davis disagrees. He says that a prudent landowner need do not more than carry out a quick visual inspection (with appropriate follow up) every five years. Accordingly, the Defendants' duty is breached if, but only if, he or they allow five years to elapse from the last adequate (ie non-negligent) quick visual inspection.

46. Neither party was able refer me to authority on the point.

47. To determine this, it is necessary to consider how the duty arises (its source), because this is likely to reveal the nature of the duty.

48. The duty arises because the Defendant is the owner (or occupier, it matters not for these purposes, and I will use the word owner) of land containing trees that are within falling distance of a public path. In those circumstances, the law imposes a duty on the landowner. It is imposed as an unavoidable consequence of his land ownership. It is not imposed because he has elected or volunteered to take the duty on. In my judgment, it follows that the nature and extent of the duty (ie what needs to be done to discharge it) is also determined by the law, rather than by the choices, actions or elections of the Defendants. It follows that a defendant who chooses to inspect at more frequent intervals than is necessary to discharge the duty does not re-define what has to be done in order to discharge the duty.

49. If the contrary were the case, a number of problems and issues would arise. They include

    a) What would happen if a landowner who had chosen to gold-plate his obligations (ie to inspect more frequently than necessary) wished to revert to base level. Would he need to make some form of election, or give notice? Would he need to do this even though he made no election or given no notice of his gold plating?
    b) What if he sold the property? Would the new owner be obliged to continue the gold plating?
    c) Suppose, as one suspects was the case here, the owner carried out inspections simply or mainly out of a wish to ensure the woodland was kept in good order, without consciously considering what his legal duties and liabilities were, and without recognising that his inspections might amount to a discharge of legal obligations? Would frequent such inspections increase the duty on him?
    d) At what point does a landowner, walking his land in large part for pleasure (as one suspects Mr Moser may have here) but keeping an eye open for obvious problems, become liable if that walk does not satisfy the requirements of a "quick visual inspection"?

50. These issues demonstrate that it would be impracticable to have a situation where the nature and extent of the duties was set by the alleged tortfeasor and his actions. In addition, the law should be, and is, slow to discourage those who owe a duty of care from going above and beyond the bare minimum of that duty (gold plating). It would discourage them if they found they had thereby set themselves a new standard, and could render themselves liable if they fell below it.

The state of the tree before it fell

51. I must then turn to consider what it was that caused the tree to fail (or fall) and what, if any, signs there would have been before it fell that ought to have been apparent on a quick visual inspection. This has involved a careful consideration of the experts' reports, as well as of their oral evidence. Neither expert moved significantly in cross-examination from the views expressed in their written reports.

52. The first point to note is that Mr Moser had inspected the wood on many occasions in the period leading up to the tree falling. Mr Gascoyne, I find, had walked it, and perhaps inspected it, regularly up until the time of his death about 18 months before the tree fell. Neither had noticed anything untoward about the tree. It could be said that that shows that there was nothing obviously untoward about the tree. For reasons that follow, I reject that suggestion. In my view, the inspections of both Mr Moser and Mr Gascoyne were inadequate to reveal even obvious signs of danger in trees within falling distance of the path.

53. I base that in part on the invoices from Nicholson Nurseries that appear at pages 1367 ff in the bundle. These start at 2008. The only tree work that these refer to was clearing some trees that blocked the light to a house (Mrs Brooks' house, as it happens), pollarding a roadside elm (not, it seems, near the path) and clearing a tree that had fallen. Mr Moser carried out no work personally, beyond clearing some leaves, litter and twigs. It does not appear that on his inspections he took even basic tools such as some secateurs or a folding saw to carry out simple maintenance. There is no evidence that Mr Gascoyne carried out any maintenance, save as an employee at Fountain Forestry (previously) and Nicholson Nurseries. I have no doubt that those organisations would have charged for anything they did. It was not suggested that the collection of invoices in the trial bundle was incomplete. The obvious inference is that no maintenance work was carried out or identified as being necessary. Even allowing for the fact that the trees were mainly quite young, this is a little surprising, although I remind myself that there is no expert evidence as to the level of work that might typically be expected on trees within falling distance of a path in a woodland such as this.

54. Of more significance in considering the adequacy of inspections is the report of Nicholson Nurseries that was commissioned by Mr Moser after and as a result of Annabelle's injury. It is at p681 ff in the bundle, and was prepared by Mr Higginson after visiting the site on 7th July 2014 . Appendix 1 to the report demonstrates that Mr Higginson is a man of experience and expertise. He identified four trees that needed felling (or which he suggested should be felled as a simpler alternative to maintenance work), a further four trees that needed ivy clearing to enable them to be properly inspected, and a further four trees that needed dead branches removing. Dr Hope categorises this report as "knee-jerk". I do not regard this categorisation as fair or accurate. The report was a visual inspection from ground level. It is not stated that the surveyor remained on the path; I infer that he did not. Trees surveyed were those within falling distance of the road, footpaths or buildings (para 1.4). Mr Higginson refers twice to the work recommended as a minimum (section 3 and 4.1). The work recommended is to secure safety, rather than for wider woodland management. The inspection was carried out in a single day. I do not consider that, save as noted in the next sentence, and save that it involved the use of binoculars and leaving the path, this report goes to any significant extent beyond a quick visual check. The extent to which it does go beyond a quick visual check is simply that it appears to have been unnecessary for Mr Higginson to have called in a more experienced person when a trigger was identified, because he had the expertise to carry out detailed appraisal. It follows that most if not all the issues noted in that report are ones that ought to have been noted in a quick visual inspection had one been carried out on that date. Indeed, it may be that a quick visual inspection would have revealed more triggers, but they were not noted by Mr Higginson

because he was able to conclude that, notwithstanding a trigger, work was not required. Some of the problems noted in the Nicholson Nurseries' report might have developed as problems between the time of Mr Moser's last inspection in the spring and Mr Higginson's inspection, but I find that there must have been several triggers present which Mr Moser missed.

55. The irresistible inference, and my finding, is that there were triggers present in a number of trees at the time of Mr Moser's inspection in the spring of 2014 which he either failed to detect or which he did detect and failed to act upon. Accordingly, the fact Mr Moser had not detected or acted upon problems with this tree does not indicate that the tree was free of visible problems.

56. Insofar as any inspections of Mr Gascoyne were concerned, he died some 18 months before the tree fell. As noted, there is no evidence of any specific issues that he identified on his walks to which he in fact drew Mr Moser's attention. I am unable to accept that he carried out anything that could properly be described as an inspection, and I can attach no weight to the fact that he did not draw Mr Moser's attention to issues with this ash.

57. I do not find that Mr Moser identified any tree (including in particular the tree that injured Annabelle) as posing a foreseeable risk of injury but then failed to act upon that. My impression of Mr Moser is that he would have done what he considered necessary. He would have acted if he had considered that a tree was dangerous or in need of further inspection. Although I do not have full details, and note that it took time to act, he did act, at his own expense, when Mrs Brooks complained that trees were blocking her light. That suggests that he was not indifferent to the plight of others. There is no evidence that would support a finding that Mr Moser in fact became aware of any problem or issue with the tree but failed to follow it up.

58. There is a substantial collection of numbered photographs. Numbers 1 to 53 were taken by the Second Claimant the day after the accident. He was accompanied by his father, Mr Paul Brooks. Both the Second Claimant's witness statement and the witness statement of his father suggest that the tree is photographed in the position in which it fell. It had struck Annabelle a glancing blow, and so had not had to be moved in the course of rescuing her. But in the course of his oral evidence Paul Brooks stated that the main trunk had been moved before their arrival and he and his son put it back into the position in which it had fallen. The Second Claimant's evidence had concluded by this point, and no application to recall him was made. Whether or not the main trunk had been moved, I find that these photographs show it in or very close to the position in which it fell.

59. These photographs demonstrate that the tree fell across the path, approximately at right angles to the path. The main trunk is reasonably straight. It then (working away from the roots) forks in two. The branches of the fork are of approximately equal thickness. The parts that can be seen are both reasonably straight. They do not diverge significantly; both would have been approximately vertical when the tree was standing, there being no real evidence that the tree leant significantly. As the tree lies upon the ground, one of these branches is above the other, and I will refer to them as the upper and lower branch. Lying on the ground beyond the upper branch is a further section of tree approximately two metres long. The parties accept, in my judgement rightly that this had plainly snapped from

the upper limb as the tree fell or landed. It can be seen lying across and on the far side of a brook or ditch. The Second Claimant's evidence is that he walked around and retrieved this, and kept it for some time until its condition deteriorated. It is agreed that the bark on the upper limb shows signs of deterioration.

60. Dr Hope suggests that the lower branch, in contrast to the upper, shows healthy bark. He says that the photographs demonstrate a split in the lower branch, likely to be caused by its falling. He says that the split shows it was healthy; contrast the upper branch, which snapped rather than splitting. Mr Barrell does not accept that a split can be seen. Nor, having studied the photographs, do I. From the fact that Dr Hope has placed typed annotations on the photographs, I deduce that he had access to electronic versions (either the original photographic files, or electronic scans of hard copies), whereas I have only paper copies. But his evidence was to the effect that he could see the split in the photographs in his bundle, not that he had been able to see them when he examined other versions. I do not accept that a split can be seen. In my judgement, the lower branch has plainly had its end broken off at some point. Dr Hope accepts that it does not end in twigs or fine wood.

61. There is no sign in the photographs of foliage, twigs or fine wood on the ground at or beyond the ends of the two branches of the fork. There is no sign of the vegetation having been flattened or disturbed by the falling or clearance of bushy branch ends. The Second Claimant's evidence was that he retrieved only one piece of fallen wood and did not see any obvious other piece, but did not look in the undergrowth.

62. However, the photographs also show that the bark on the lower branch is in very much better condition than that on the upper branch and, indeed appears very similar to the bark on the main trunk above 500 mm.

63. I preface this part of the judgment by setting out sections from the part of the joint report setting out areas of agreement. It is agreed by the experts that:

11. The subject tree was a semi-mature ash (Fraxinus excelsior) about 35 years of age with a trunk diameter in the region of 20 cm at a height of 1.5m above ground level; not at the base of the trunk. The basal root-plate was 930mm diameter at its widest point and 400mm diameter at its narrowest point. The tree would have had a height in excess of 12m when standing. The effective height of the tree would have been at least 15m from the level of the footpath, when its position on the embankment is taken into account.

16. Dead branches and dead trees are regularly recorded in the published technical literature as obvious hazards that should be looked for when checking trees in a safety context.
- Dr Hope notes that this is generic of all trees.

18. It is normal for closely growing trees in woodlands to have dead wood and dead or dying lower branches because of the intense shading the lower canopy.

19. Dead wood in a woodland situation does not automatically mean a tree is dangerous, and does not automatically warrant a detailed inspection. Each situation must be assessed based on how much risk the dead wood poses.

21. Had a close-up inspection of the lower trunk of the subject tree been carried out just before failure, it would have identified some bark cracks and minor bark lifting from the base of the trunk to a height of approximately 500mm. This would not have been visible from the footpath. It could have been discovered from a close inspection, but a visual trigger, e.g. excessive dead wood or abnormal crown condition would have been needed to justify such an inspection.
- Dr Hope is of the opinion that no such trigger would have been apparent

22. The bark of the trunk above this cracking up to the point where it divided into the stems and branches of the main crown would have appeared normal.

23. Light probing of the base of the trunk of the tree would have discovered decay in the lower trunk.

24. The primary cause of tree failure was advanced fungal decay in the main lateral structural roots.
- Dr Hope notes that this does not include the upper roots this.

64. The twelve metre minimum height noted above, appears to have come from the Second Claimant and is a measurement he identified on the ground after the accident. See Mr Barrell's first report, section 3.5

65. it is important to note that Dr Hope first visited the scene and inspected the trunk or stump on 16 September 2014, some 16 weeks after the tree fell. Mr Barrell first visited on 10 September 2015, some 16 months after it fell. The trunk or stump had been lying out in the open throughout.

66. Mr Barrell states at 4.3 of his first report (line 306) "I did not see the tree immediately after it fell, which limits the reliability of my conclusions on the cause of failure." His conclusion is expressed as follows (line 337); "in the absence of any obvious evidence to the contrary, my opinion is therefore that the primary cause of tree failure was advanced decay in the main structural roots." He noted the presence of honey fungus, and a casual reading of his report might suggest that he considered honey fungus to be the cause of the decay, but he subsequently clarified this, indicating that he could not say what the pathogen that caused the decay was. It was his opinion that the decay had been present for several years. He rejected the suggestion that fungal decay only occurred after the tree fell. Mr Barrell stated, in section 3.3 of his first report headed "observations of the incident tree remnants that remained on site" that "there was obvious and extensive soft decay roots" (line 238). In cross examination, Mr Barrell stated that he saw dead and decayed roots, and he says that it was because of these that the tree fell.

67. Dr Hope's opinion is that the tree was affected by *"Ustulina deusta",* which he describes at paragraph 20.11 of his report as "a common, aggressive pathogen of a wide range of tree species, including Ash". At 20.14 he states that "the brittle type of fracture associated with *Ustulina* often occurs with no warning of incipient failure". He detected physical signs of *Ustulina,* namely fungal fruiting bodies typical of the disease. Dr Hope was adamant that on his first two visits, which took place on 16 and 24 September 2014, there was no soft decay

in any of the roots, and only one showed any signs of dampness; para 24.3. This remained his position in cross examination. In my judgement, it is unlikely that he was wrong about this. The reason why Mr Barrell detected soft decay was simply that the stump had been lying on the ground and the roots were exposed to the elements in a damp woodland setting for a further one-year by the time he inspected it. This would have allowed softness, and perhaps honey fungus, to set in. I note also paragraph 4.2 of Mr Barrell's first report in which he notes that decay spreads quickly in ash once infected.

68. In my judgement, the likely cause of failure was *Ustulina.*

69. On that basis, it is at least possible that the tree appeared healthy up until it fell.

70. Dr Barrell's expresses the opinion, at page 29 of his first report, that it takes two or three years once the tree has died for all small twigs and buds to fall off "as seen in this case". The phrase "as seen in this case" to some extent begs the question of when this tree died, but Mr Barrell has expressed his view on this. Mr Barrell goes on to say that "There are normally obvious visual indicators in the form of discoloured leaves, reduced leaf density and scattered dead twigs for at least a year before the tree finally dies, and those symptoms may be present for up to 2 years before the tree dies." I note the word "normally", and, though the point was not explored with Mr Barrell, the extent to which any signs of distress are apparent must, as the word "normally" suggests, depend upon circumstances and upon the disease from which the tree is suffering. In short, Mr Barrell argues that, because the photographs show no twigs, leaves, or buds, the tree must have been dead for 2 to 3 years before it fell, and demonstrating signs of ill health for at least a year before that. By necessary implication, it would have been showing obvious, and increasing, signs of distress during the 2 to 3 years after death. As an aside, the question of what, in a tree, amounts to death and how it is diagnosed is one that was not fully addressed.

71. The experts are agreed that buds and leaves tend to grow at the tips of the twigs. That is where the light is.

72. I cannot rule out the possibility that the tree was suffering from some other condition as well. Nobody has said it was not. The upper branch (ie as the tree lay on the ground, and using that identifying expression in the same way as above) was clearly dead. Dead wood is not unusual in healthy trees. I cannot conclude that the whole tree was dead before it fell. The bark of the lower branch appears sound. The bark of the trunk above 500mm is also agreed by the experts to have shown no signs of decay in the photographs. There was decay in the trunk. Somehow the top of the lower branch has become detached. How and when I do not know. It could have snagged and broken off as it fell, or been broken by some other, earlier fall of a neighbour, or by something else. The bark condition suggests the lower branch was in better health than the upper branch. Dr Barrell's assertion that it takes 2-3 years from death for all buds and twigs to fall off is based on his own (considerable) experience, rather than on more formal research. There would be few buds or twigs at the lower extremities (agreed). Although the photographs show no buds or twigs, they do not show the underside of the fallen trunk, or the broken off end of the lower branch. It is possible that there are buds or other signs of life on the underside (ie the parts not photographed). I cannot dismiss the possibility that the end of the lower branch broke in

the fall and was lying on the ground, but was missed by the Second Claimant, although this seems unlikely. There is no sign on the photographs of it

73. I cannot conclude, from the absence of visible buds or twigs, that the tree had been dead for two to three years before it fell and showing obvious signs (that would amount to a trigger) for at least a year before that. It may well be that the lower branch did not, at the time the tree fell, have any or many leaves on it, and possible also that it was dead (hence its snapping off as it did). But I can reach no conclusion as to when it had reached that state, or as to when it was showing obvious signs such as to amount to a trigger. The Claimants accept that, even taking Dr Barrell's evidence at its highest, it cannot be show that there were obvious signs such as to amount to a trigger as early as five years before the fall.

74. Even on the Claimants' case at its highest, they cannot establish that the tree was showing signs of distress that an adequately completed quick visual inspection carried out five years before it fell would have revealed. Based on my findings as to the necessary inspection frequency, the claims must therefore fail. Indeed, Mr Seabrook realistically concedes that they cannot show that five years before it fell the tree was showing signs of distress that a quick visual check ought to have revealed. Accordingly, my finding that an inspection frequency of once every five years is sufficient (coupled with other determinations above) would dispose of the claims without further analysis of the state of the tree at different times.

The Second Defendant

75. Finally, I return to the position of Dr Moser, the Second Defendant. He was an equal owner with his father of the land. He and his father had equal rights in respect of it, including the right to occupy, control and manage it. The understanding between them was that his father would continue to look after the wood. The fact that the son did not choose to visit the wood, and left its management to his father, does not prevent a duty from devolving upon him. Nor does his allowing and expecting his father to carry out whatever work was needed discharge his duty.

Conclusion

76. The claims of both Claimants must therefore fail.

ADDENDUM TO AND FORMING PART OF THE JUDGMENT

77. Since I circulated the above judgment in draft, Mr Seabrook has, by email dated 4th January 2021, asked me to make an additional finding on a point addressed in evidence and submissions, namely a finding that "relates to the condition of the index tree at the time of inspections that you found were carried out inadequately, particularly those carried out in the winter of 2013 and in early Spring 2014". Neither he nor Mr Davis seeks to address me further on the matter. For the record, I received on 4th January 2021 two emails from Mr Seabrook and one from Mr Davis. Each barrister was copied into his opponent's emails.

78. In response to that invitation, I reiterate what I have said above at para 73, namely that "I can reach no conclusion as to when [the tree] had reached that state, or as to when it was showing obvious signs such as to amount to a trigger". I find that the Claimants have failed

to prove that the tree was showing obvious signs such as to amount to a trigger at any point before it fell. The Claimants have not established that a quick visual inspection carried out at any point before it fell should have resulted in problems being detected and action taken.

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HIS HONOUR JUDGE ROCHFORD

26th January 2021