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TREE CONSULTANCY

Insights for tree risk managers from 2014 civil cases and inquests

Municipal Tree Officers Association Newsletter (Autumn 2014)

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So far, 2014 has been a busy year for legal judgments and inquests resulting from harm that has arisen from tree failures. In this article, Jeremy Barrell references three that he has been involved in, drawing out practical aspects that he thinks may be of value to arboriculturists, managers and duty holders charged with managing the risk from trees. Jeremy offers this selection of observations from his perspective as an arboriculturist and they should not be taken in any way to be a definitive analysis of the law, which is beyond his expertise to provide.

Legal judgments relating to tree failures

Much of my work as a consultant focuses on advising duty holders on how to manage their trees so that, in the event of an incident where harm arises, they are in a strong position to defend allegations of negligence. Whether you are a tree officer, with direct responsibility for tree safety, or a consultant acting as an advisor, obvious issues of concern to duty holders include: 1) do their trees need inspecting at all and, if so, how often; 2) what sort of inspection is necessary; and 3) what credentials should an inspector have to undertake the task? You can find out more about answering these questions in this paper, *Balancing tree benefits against tree security: The duty holder's dilemma* (Arboricultural Journal, Volume 34, Issue 1, 2012), that can be downloaded at www.tandfonline.com/action/showMostReadArticles?journalCode=tarb20#.U9N_TmdOVLi.

In that paper, I explain that legal judgments, in tandem with many other considerations, can offer some value through insights into how the courts view specific issues. However, such cases are few and far between in the tree world, with only nine published in the last decade. Furthermore, each of those cases only deals with a limited number of very narrow issues specific to each set of circumstances, which often limits the potential for meaningful interpretations. Finally, the reliability of those interpretations is further diluted because significant legal weight is only given to cases that go to appeal to become authorities, with *Micklewright -v- Surrey County Council* being the only case out of the nine to achieve that status.

More about inquests

At the time of writing that paper, I had little experience of acting as an expert witness at inquests, and so did not include them in my analysis. However, more recently, there have been a number of inquests relating to deaths from falling branches, which may be of interest to tree managers, with two so far in 2014 (see below). In general terms, an inquest is a fact-finding enquiry to establish who has died, and how, when and where the death occurred (www.judiciary.gov.uk). It is a form of public enquiry to determine the truth and is intended to be inquisitorial. This is a different thrust from the adversarial approach adopted in criminal and civil trials. Furthermore, the inquest verdict cannot be framed in such a way as to appear to determine matters of criminal or civil liability.

Through the Coroners and Justice Act 2009, coroners now have a statutory duty (as opposed to a previous discretion) to issue a report to any person or organisation where the coroner believes that action should be taken to prevent future deaths.



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These are called prevention of future deaths (“PFD”) reports and it is the stated intention of the Chief Coroner that they encourage change for the better. There is a presumption in favour of publication and as many as possible are publicised on the judiciary website. These are deemed to be important instruments of change and they can be applied to deaths associated with tree failures. From a review of the published PFD reports, I have not discovered any so far that have been issued relating to tree failures, but the indications are that is soon about to change!

Inquest into the death of Michael Arthur Warren on 5 October 2012

This Inquest was heard in front of Mr Peter Bedford, the Senior Coroner for Berkshire, and lasted for three days, from 8–10 July 2014, at Windsor Guild Hall. Three tree expert witnesses were called; Dr Frank Hope appeared on behalf of Bracknell Forest Borough Council, Mr Henry Girling appeared on behalf of Mr Warren’s family and I was instructed by the Coroner. Horticulture Week reliably reported on this, with a short overview of the case available at m.hortweek.com/inquest-report-expected-wider-national-interest/arboriculture/article/1304974.

The incident was caused by the sudden failure of a large and severely unbalanced branch overhanging the road that fell and hit Mr Warren’s car. There was significant internal decay near the point of failure, which lay behind a large pruning wound that had fully occluded, hiding the decay. After hearing all the evidence, the Coroner issued a Narrative Verdict that concluded:

“The combination of visual signs was sufficient to have caused the landowner, his agent or a Highway Inspector to request a more detailed inspection of the oak tree by qualified Tree Officers. Such an inspection, on the balance of probabilities, would have identified the unbalanced nature of the branch and the large occluded wound which, in turn, would have led to more detailed examination. This, in turn, would have resulted in intervention works to the oak tree significantly reducing the risk of the branch falling as it did on 5th October 2012.”

The Coroner also advised that he would be sending a PFD Report to Bracknell Forest District Council relating to the training of inspectors checking trees and the manner in which drive-by inspections are carried out. This PFD Report is not yet publicly available and so its detailed content still remains unknown. However, due to the scale of highway inspections around the UK that have to include trees, it is likely to be of national interest once it is available.

This incident reflects my accumulating experience that severe imbalance of large branches or whole trees, in combination with other weakening conditions, is regularly associated with failures that cause harm. My observations indicate that where the imbalance really is severe, i.e. it looks obviously wrong, and there are other potentially weakening conditions, e.g. declining health or structural defects, inspectors should be vigilant when assessing the potential for failure. This particularly applies to large old wounds on mature trees that have fully occluded, because the lack of any external signs of decay can be taken to imply that there is no significant weakness. That may well be the case on young trees that are growing rapidly and have compensated for any weakness. However, older trees growing more slowly may not be able to put on



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sufficient reaction wood to adequately compensate against the inevitable decay that arises from the wounding, which may result in a gradual weakening over time (Photo 1). There is no automatic implication that large occluded wounds on mature trees are always a problem, but my observations suggest that they should be carefully considered when assessing the potential for failure.



Photo 1: Tree inspectors should be particularly cautious when assessing the potential for failure associated with large occluded wounds on mature trees, especially when associated with other factors such as poor health or additional structural defects.

Inquest into the death of Erena Wilson at the Royal Botanic Gardens Kew ("RBGK"), on 23 September 2012

This Inquest was heard in front of a Jury and lasted for three days, from 11–13 June 2014. In addition to evidence provided by RBGK, Dr David Lonsdale provided expert evidence on behalf of the Assistant Coroner and I appeared as the expert witness instructed by Erena Wilson's family. Horticulture Week responsibly reported on a daily basis as the Inquest proceeded, and these updates can be reviewed at:

- m.hortweek.com/inquest-hears-evidence-death-2012-erena-wilson-hit-falling-branch-rbg-kew/article/1298465



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- m.hortweek.com/second-day-inquest-2012-death-kew-erena-wilson-hit-falling-branch-hears-further-evidence/article/1298662
- m.hortweek.com/death-kew-visitor-hit-branch-accidental-inquest-finds/article/1299047

One of the main issues explored at the hearing was whether the branch failure was due to Summer Branch Drop, a loosely defined condition used to group branch failure events that occur on mature trees during the summer with no obvious cause. RBGK asserted that the cause of the failure was due to a combination of wind and rain; Dr Lonsdale thought the cause was something “akin” to Summer Branch Drop; my view was that it was Summer Branch Drop because it exhibited more than enough of the characteristics commonly associated with such events. After hearing all the evidence, and after less than an hour of deliberation, the Jury returned a verdict of accidental death, stating that “*there is insufficient evidence to establish the cause of the branch failure*”. As reported by Horticulture Week, the Inquest also heard evidence about the nature of the tree management regime in place at the time of the accident, but the finding of insufficient evidence to establish the cause of failure meant that the Jury did not have to comment on these management issues.

Subsequently, Horticulture Week wrote two further articles that can be reviewed at:

- m.hortweek.com/kew-death-2012-accident-inquest-rules/article/1300552
- m.hortweek.com/summer-branch-drop-warnings-wanted/arboriculture/article/1304973

Again, these provide a balanced analysis, but I add a short clarification on the following statement within the most recent, “*However, a jury found that the death was an accident with summer branch drop not the cause, and Kew was not at fault*”. This seems slightly at odds with the Jury’s verdict: “*there is insufficient evidence to establish the cause of the branch failure*”. My interpretation of the verdict is that the Jury could not establish the cause, which does not rule out Summer Branch Drop, as implied in the article. Despite the Assistant Coroner’s expert and myself aligned on the point that the cause was something “akin” to Summer Branch Drop, with me being more confident that it was Summer Branch Drop, the Jury were not convinced and hence the specific wording of the verdict.

During the lengthy preparation for this case, I worked closely with Mr Wilson and his legal team, researching previous incidents of Summer Branch Drop and its management on an international level. Those investigations revealed that Summer Branch Drop may not be as rare as first thought and there may be justification for rethinking the mantra often quoted that the risk is so low, it does not warrant any precautionary measures (Photo 2). These are important matters that I am continuing to work on, with a more detailed analysis anticipated for publication later this year.



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Photo 2: Accumulating observational evidence is indicating that old mature trees of certain species are more prone to summer branch drop, and that the risk of failure may be elevated at the end of extended dry summer periods followed by rain.

Stagecoach South Western Trains Ltd -v- Hind & Steel

In December 2009, a substantially decayed stem of a large ash tree fell from a private property in Stains and damaged a train causing over £300,000 worth of damage and consequential costs. The written judgment for this High Court case can be downloaded at www.bailii.org/ew/cases/EWHC/TCC/2014/1891.html, and the judge found in favour of both defendants. There is a very useful review of the legal authorities and principles relating to a landowner's duty in paragraph 68 of the judgment.

Legal commentators report how the Judge held that Ms Hind's (the first defendant) duty in respect of a tree on her land had extended no further than the carrying out of periodic inspection through informal observation. In the absence of any trigger or warning sign of problems with the tree, there was no requirement to instruct a more detailed inspection by an arboriculturist. She was not required to clear ivy to inspect the base herself or instruct an arboriculturist to do so. The tree had been worked on before the accident by the second defendant tree surgeon, Mr Steel, but he had not been asked to consider the health or safety of the tree. The claim against him also



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failed because he did not owe a duty of care to warn of any structural instability, which could only have been discovered through a close inspection.

Through my involvement as the expert witness for Ms Hind, I pull out two issues that may be of interest to UK tree managers:

- **Ivy:** In my experience, ivy and its potential to hinder the discovery of defects regularly crops up in cases, with questions about whether it should be removed as part of a risk management regime. To date, there is no definitive answer, but recent cases provide some clues as to how the courts may view this. In *Micklewright -v- SCC*, the experts agreed that "*It would not be standard practice to remove heavy ivy from a tree during a quick visual check.*", which has a compelling logic in the context of the vast numbers of trees that large landowners have to manage. However, because it was agreed between the experts, it was never tested in the proceedings, and so that reference is unlikely to carry any significant weight. In this Stagecoach judgment, the matter of ivy was considered in more detail, with the Judge stating in paragraph 86: "*I reject the suggestion that as a reasonable and prudent landowner, Ms Hind was obliged to carry out inspections of the trunks of each of her apparently-healthy trees, no matter how difficult they were to access, and no matter how much they might be covered in ivy. A reasonable and prudent landowner in Ms Hind's position was not obliged to struggle her way through the nettles and brambles to the foot of what appeared to be a healthy tree, in order to pull off some of the ivy leaves and then strip off the lattice work of ivy stems from the base of the Tree in order to look for decayed areas behind the ivy.*" Whether such an analysis could extend to a formal inspection by an arboriculturist remains to be clarified, but this judgment does shed light on the likely expectations from a homeowner implementing an informal checking regime.
- **National Tree Safety Group ("NTSG") informal observations:** At paragraph 53, under *Published Guidance*, this judgment refers to the NTSG guidance that informal observations may be used as a means of checking trees. For this case, it was unchallenged that this was a legitimate form of inspection; it was held that Ms Hind was able to carry out such an inspection and did so properly. This is the first judgment since the NTSG document was published that has directly referenced the informal observations approach to inspections and, no doubt, many homeowners will feel that it is a welcome clarification on the nature of their obligations. However, it does not automatically follow that larger landowners, who may have greater resources, can rely on informal observations as being sufficient for all types of circumstances. This is an aspect that still requires clarification.

Finally, I am aware of suggestions that there may be some significant similarities between this case and *Poll -v- Bartholomew* because both centred on multi-stemmed ash trees with included bark unions. Having been involved in both, my opinion is that no meaningful comparisons can be drawn between these two cases on those grounds.



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Take-home points

There is nothing radically new here and not much of this should come as any surprise to the wise tree inspector. However, in the same way that refresher training is helpful in keeping up-to-date with specific skills, being alerted to emerging concerns that arise from legally oriented analysis can also be valuable. Some obvious reminders include:

- Refresher training is an important element of keeping current
- Drive-by tree inspections of roadside trees should be done at slow speeds
- Spotters undertaking drive-by tree inspections of roadside trees should only be looking at trees, and not trying to detect highway defects in the same operation
- Large occluded wounds on old trees should be carefully considered
- Severe imbalance of large branches or whole trees should be carefully considered, especially in combination with other predisposing factors to failure
- Summer branch drop is a known risk to specific groups of trees and that risk may be elevated at the end of extended dry summer periods followed by rain
- There is unlikely to be an automatic presumption to remove ivy when inspecting trees, but further investigations may be required if there are obvious indications of a potential problem
- Informal inspections are likely to be acceptable for homeowners, but it is unclear whether the same applies to larger landholders

Although such reminders can be useful, they cannot be a substitute for careful analysis that brings to bear the experience of the assessor on the specific circumstances of each situation. Knowledge, experience and common sense remain the cornerstones of effective tree risk management, and anyone still searching for simplistic formulaic solutions should brace themselves for disappointment.

Read more about assessing the potential for tree failures in the articles at <http://www.barrelltreecare.co.uk/resources.php>.

Keep up to date with tree risk management developments on Jeremy's Facebook page at <https://www.facebook.com/pages/Heritage-Tree-Management/573985506028429>.