

IN THE ALDERSHOT & FARNHAM COUNTY COURT  
SITTING AT WINCHESTER  
BEFORE HIS HONOUR JUDGE IAIN HUGHES QC  
DESIGNATED CIVIL JUDGE

CLAIM No. 6KB04804

**Draft delivered: 5<sup>th</sup> August 2008**

**Handed down: 14<sup>th</sup> August 2008**

BETWEEN:

**ALBERT ATKINS**

Claimant

- and -

**SIR JAMES SCOTT, Bt.**

Defendant

### JUDGMENT

#### *Introduction*

1. This is a trial on liability only of a claim for damages for personal injuries. At about 1.40pm on 30<sup>th</sup> September 2004 the claimant was driving in a proper manner and at a safe speed along the A32 in Hampshire, in the direction of Alton, when his car was struck by part of a branch from an oak tree. The weather was windy at the time. The tree was located within the defendant's estate, the Rotherfield Estate.
2. The claimant was injured in the accident. There are no allegations of contributory negligence. It is clear that the claimant was blameless.
3. The parties were represented before me by counsel: Mr David Regan for the claimant and Mr Andrew McLaughlin for the defendant. I am grateful to both counsel for their helpful written and oral submissions.

*The locus of the accident*

4. The Rotherfield Estate comprises some 4,500 acres of which about 1,000 acres is woodland. The estate extends from Four Marks in the west to the outskirts of Selborne in the east. The A32 is a single carriageway road that runs from Gosport in the south to Alton in the north and bisects the estate. Where it passes through the estate, the A32 is a busy main road but not a major trunk road, in contrast to the A31 to the west and the A3 to the east. Along the material stretch of the road there are no footpaths and there is no pedestrian traffic of any significance.
5. The main house, Rotherfield Park, is to the west of this road and is opposite the small village of East Tistead. The house is surrounded by the park, an area of open grassland with a variety of mature, handsome trees. A mile or so to the north and on the west side of the road is Lower Lodge, one of the entrances to Rotherfield Park. Just to the south of Lower Lodge, on the same side of the road and within the park, is the material tree. Whilst there are other trees in the vicinity, this oak stands alone and is a typical park tree.
6. At the side of the A32 is a grassy verge, some 2.6 metres wide. The park is enclosed at that point by a boundary fence. The tree is 6.1 metres inside the park from this fence and is therefore 8.7 metres from the nearest edge of the A32.
7. The oak in question is mature and is about 200 years old. It is single stemmed to 5 metres high where it divides into a number of large scaffold limbs which in turn divide and subdivide into the leaf bearing branches. The branch that failed was located at about 5 metres

above the ground and rose from the main trunk at an angle of about 55°. The branch failed at about 2.7 to 3 metres out from the main trunk and the part that fell was obviously of sufficient length to fall across the park and grass verge and into the road where there was a collision with the claimant's car.

8. It is common ground that this branch had decayed internally and that this caused the failure. Neither the tree nor the branch exhibited any sign of external decay before the branch fell.

*The issues*

9. The claimant's case is that a crack in the material branch ought to have been identified well before the accident and that this would have led to the branch being either removed or substantially pruned. In either event, the branch would have been made safe and there would have been no accident.
10. There are therefore two issues: first, did the defendant take such steps to prevent danger as a reasonable man in the defendant's position would have taken? Secondly, has the claimant proved that proper inspection ought to have led to something being done which would have prevented the accident?

*The law*

11. The law was not in dispute before me. The defendant, as landowner of property fronting a public highway, owes a duty of care to those passing along the road, to take reasonable care for their safety. The defendant is expected to act as a prudent and reasonable

landowner .

12. In *Caminer v. Northern and London Investment Trust Ltd* [1951] A.C. 88 at 99, Lord Normand commented:

“The test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of the landlords which must necessarily fall short of the knowledge possessed by scientific arboriculturists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even of the countryman not practically concerned with their care.”
13. In the same case, Lord Reid noted, at 105:

“But it is not enough for the appellants to prove that the respondents failed to take any steps: to succeed they must also prove that proper inspection ought to have led to something being done which would have prevented the accident.”
14. In *Quinn v. Scott* [1965] 1 WLR 1004 at 1010 Glyn-Jones J said:

“In my opinion, there may be circumstances in which it is incumbent on a landowner to call in somebody skilled in forestry to advise him, and I have no doubt but that a landowner on whose land this belt of trees stood, adjoining a busy highway, was under a duty to provide himself with skilled advice about the safety of the trees.”
15. Practical guidance on this subject has been offered by several bodies. In 2000, the Forestry Commission published a practice guide entitled *Hazards from Trees*. On 3<sup>rd</sup> July 2007 the Health and Safety Executive published a paper entitled *Management of the Risk from Falling Trees*. Although the latter publication post-dates the material events I accept that

it contains a summary of established good practice that would have been relevant during the preceding years. I also note that the guidance offered by the Health and Safety Executive is broadly consistent with the advice that had been published by the Forestry Commission in 2000.

16. Mr Regan submitted that the Health and Safety Executive guidance related to those who had duties under section 3 of the Health and Safety at Work Act 1974. I disagree. Paragraphs 5 and 6 make it apparent that it is intended to offer guidance to a wider class of duty holders.
17. It is clear from the authorities that were cited to me by counsel during argument that the nature and extent of the practical steps a landowner is required to take to discharge his duty of care will vary with the particular circumstances of the case. Material factors will include, but are not limited to: the type, size, age and position of the tree; the proximity of the tree to a highway, the nature and volume of traffic on that highway, the size of the landowner's estate and the resources of the landowner, the number and location of other trees on the estate, whether the ownership of the land vests in an individual or a body and the extent of continuity of employment of those tasked by the landowner with carrying out tree inspections.

*The lay evidence*

18. Given the issues to be tried and the uncontroversial circumstances of the road accident itself there was no reason for the claimant to give evidence. Mr Atkins was however, present in court throughout the case.

19. Sir James Scott gave evidence in a direct and completely straightforward manner. He readily accepted a number of propositions put to him by Mr Regan and made no attempt to shy away from his responsibilities as a landowner. Sir James was an impressive witness and I have no hesitation in accepting his evidence.
20. Sir James told me that there was no formal or written system for inspecting trees on his estate or for recording what trees had been inspected. However, he was at the centre of the small group of people who worked with the trees and woodland and he was confident that if there was a problem all understood that the policy was to err on the side of caution. This was confirmed by the estate workers when they gave evidence. If there was evidence of a tree or part of a tree being anything other than healthy, it would be lopped or felled, as appropriate. Sir James would expect to be consulted in respect of any serious problems with specimen park trees but otherwise his staff understood their duties without having to refer to him for permission to take action.
21. I have no doubt that the informal system for observing the trees worked adequately in the particular circumstances that obtained on this estate. Sir James told me that they were covering the ground albeit not in a systematic and recorded way. This informality has the obvious disadvantage that it makes it more difficult for the estate to resist claims based on an inadequate system of inspection.
22. Sir James summarised for me how the estate operated:

“Because the A32 is a busy road, and we go up and down it a lot we are spotting

those trees all the time. ... I feel we were doing enough by being there, by doing work, and by looking at the trees. We were covering the ground but not in a systematic way. My staff were encouraged to look out for trees in a dangerous state when working in or travelling through the estate. Our practice is where we have a concern we err on the side of caution and sometimes we find we have taken down a perfectly good tree, but we err on side of caution. If the staff had felt it necessary to remove a branch, they could have gone ahead and dealt with it. If the problem had been reported to me, and if it was an appealing tree, I would have taken advice but still erred on the side of caution. ... Messrs Bennett and Parratt were primarily responsible for reporting on the trees after an inspection. The other staff were extra eyes and ears. Mr Hamer was dealing with commercial forestry and I could consult him about any particular problems. I would not have to say to him to report anything dangerous that he spotted at the same time. ... Messrs Bennett and Parratt would have had jobs in the park every year so they would have been in the vicinity of the tree. There is also a small plantation over the road so we would have been doing work there as well. ”

23. Sir James readily accepted that it would not have been unduly onerous for the estate to have undertaken an annual foot inspection of the trees that are adjacent to the A32 and that a suitable record of such inspection could have been kept. Indeed Sir James was prepared to accept that several inspections, when the trees were in leaf and when bare, could have been undertaken. However he considered that the informal inspections that were in fact carried out, by car and on foot, throughout the year and the different seasons meant that any problems would be spotted and proper action taken.
24. I heard evidence from two of Sir James' estate workers (albeit both are self-employed) Mr David Bennett and Mr Kevin Parratt. Mr Bennett is some 69 years old and has worked on the estate since 1954, retiring in April 2005. Mr Bennett has worked with

trees all his life and has had half a century or more of experience with the trees on this estate. Although Mr Bennett has no formal forestry qualifications I found him to be knowledgeable about trees in general and very knowledgeable about estate trees in particular. This is hardly surprising. He has devoted his working life to the trees on this estate and has very considerable practical knowledge and experience.

25. Mr Bennett described part of his duties:

“I was expected to keep my eyes open when driving around the estate. If I noticed a gross defect I would do something about it. Not necessarily where a bough is just hanging off, if you see a sign of a defect you inspect it. We done it off our own back, not report it. I had authority to do it.”

26. Mr Bennett was challenged as to whether he had ever inspected the tree in question:

“We did visit the area of the tree in question in the park because we had to clear up all the bits and pieces such as dead wood that fell during the year. We had to clear it all up before the grass cutting machinery started. This was for silage and it was mown in May. Later on in the year we would do the same thing again, all round the trees in the park. It was hand picking. There were always two or more of us. We do all of the trees and go right under all the trees. We would have done this every year. It was my way of life, I have done nothing else, that is all I know, you are there and you notice things. ... I cannot remember any detailed inspection of the tree in question, no more than any of the other trees on the estate. But we would have looked to that tree as much as we looked at the others. There was no reason why you would think this bough would fall. If I had seen a gross defect, I would have done something about it. When it fell I discovered that the bough was not healthy because it was decayed within. I knew cracks in a tree or a bough were risk factors. I would not carry binoculars with me. There was no need. If I saw a sign of danger I could reduce the foliage, or the bough or fell the tree. The

object would be to remove the danger.”

27. Mr Bennett described in more detail the action he took in respect of the trees in the park. It was plain that he was not confining his observations to defects that were gross and obvious:

“I would check each tree in the park in Spring to see if there was any wood to pick up, usually it was bits and pieces. I would walk around each tree. I would look for leaves discoloured or very small leaves, going off, hanging off, that sort of thing, and I would check the trunk. If we see anything like that we examine the tree. You can spot disease in a limb just by looking at it, it comes from experience. It might have lost its bark, all sorts of signs. Fungus is mostly easy to see. Cracking also shows a defect. I would look at each tree to see if there were any defects like that in a park tree because you have got to see it is safe.”

28. Mr Parratt has been working on the estate for some 15 or 16 years, initially as apprentice to Mr Bennett. He told me that he thought he was still learning and that everything he knew about trees had been taught by Mr Bennett. Having heard Mr Bennett I have no difficulty in accepting that evidence. Mr Parratt was fortunate in his teacher.

29. In his evidence Mr Parratt described what he looked for when checking trees:

“dead branches, broken branches, any visible cracks, yellowing leaves and fungal brackets.”

30. Mr Parratt confirmed how the estate trees were inspected:

“We drive around and stop if we see signs of damage or potential damage. We keep our eyes open all the time. In winter after stormy days we are looking for damage and sorting it out. In spring we are in the front park. Defects show when

leaves are on a tree, it is the best time to spot them. We err on the side of caution. If there is a potential problem, we take the tree down or the bough down or reduce foliage to remove any danger.”

31. I found both Mr Bennett and Mr Parratt to be impressive and credible witnesses upon whose evidence I might safely rely. Neither was defensive during cross-examination and both candidly described how they went about their duties. I do not regard their lack of formal, paper qualifications to be in any way detrimental to the quality of their evidence. I regard both men as workmen who are skilled and expert in their chosen trade through constant practice and diligent observation.
32. The evidence of Mr David Bowyer, the farm manager, was peripheral to the issues before me. However Mr Bowyer did describe the various uses to which the park was put, including those to which the public were invited such as an annual horse show and occasional events such as a plant fair. The trees in the park were cleared of fallen wood and checked prior to these events. If he noticed a serious problem with a park tree he would report the same. However he had no special experience in or duties connected with, estate trees.
33. I also heard from Mr William Hamer, FRICS, a forestry consultant employed by Sir James to advise on the management of the estate woodlands. Mr Hamer has a degree in Estate Management. He told me that on his visits to the estate and whilst travelling through the estate he would keep an eye open for any problems with any trees. Any defects would have been brought to the attention of Sir James. Mr Hamer readily accepted that his

primary task was not to inspect trees for possible defects but to offer advice on woodland management. I accept Mr Hamer's evidence.

*The expert evidence*

34. I heard oral evidence from two arboriculture experts: Mr Ian Murat for the claimant and Mr Jeremy Barrell for the defendant. Mr Murat prepared two reports, one in March 2007 and a second report prepared in about November 2007. Mr Barrell prepared a report dated 10<sup>th</sup> February 2005, a first supplementary report dated 10<sup>th</sup> September 2007 and a second supplementary report dated 4<sup>th</sup> October 2007. There were two joint statements, one dated 22<sup>nd</sup> August 2007 and a second dated 2<sup>nd</sup> April 2008.
35. I regret that I found the evidence of Mr Murat to be unimpressive and unpersuasive. My reasons are these.
36. First, Mr Murat seemed somewhat ill at ease and defensive when giving evidence. Whilst this might be unremarkable in a lay witness, Mr Murat put himself forward as an expert in his field and I received a clear impression of a lack of confidence in his own evidence.
37. Second, I became and have remained concerned at whether Mr Murat's overriding duty to the court was compromised. A joint site inspection was due to take place on 12<sup>th</sup> October 2007. Shortly before this meeting Mr Murat sent a copy of a draft joint statement to his instructing solicitor. The solicitor was present when Mr Murat met Mr Barrell at the site with a view to a joint inspection and discussion between experts at Mr Barrell's offices. Despite Mr Barrell's protests, the solicitor prevented any discussion taking place

until she had reviewed the draft joint statement. Accordingly, no discussion took place between the experts that day.

38. A further meeting between the experts took place on 25<sup>th</sup> February 2008. The claimant's solicitor had prepared an agenda for this meeting. A joint statement was largely agreed. Mr Barrell sent this further draft to Mr Murat who in turn passed it to his instructing solicitor, I infer for comment. She apparently informed him that not all the items on her agenda had been covered and Mr Murat therefore proposed a series of amendments. The draft statement then went through a large number of additions; nine was the number put to Mr Murat in cross-examination but he sharply replied that he did not know how many there had been. Plainly there were an unusual number. Mr Murat agreed that at least three of the drafts were copied to his instructing solicitor. The final draft was discussed by Mr Murat in conference with counsel and solicitor.
39. Although I accept this may not have been the intent, this history of legal interference in the procedure whereby experts meet to try and narrow the differences between them and to prepare a joint statement setting out the remaining areas of agreement and disagreement, gave me the clear impression that Mr Murat's overriding duty to the court was being diluted. I do not know why the usual practice of allowing the experts to prepare their joint statement with written questions afterwards if necessary was not followed.
40. If this hesitation by Mr Murat was unprompted by others then it indicates someone who lacked confidence in the opinions he was expressing. If the changes were prompted then Mr Murat's independence has been compromised. Whatever the reason, Mr Murat's

reliability as an expert witness has been adversely affected.

41. Third, initially, Mr Murat disagreed with elements of the advice published by the Health and Safety Executive in 2007 and by the Forestry Commission in 2000 where that advice conflicted with his opinions in this case. For example, in respect of paragraph 10 of the Health and Safety Executive advice, which describes in some detail an effective system for managing trees, Mr Murat told me:
- “I say it is not applicable because it was published many years after the event and would not apply in retrospect. ... I do not think that the standard this paper sets is adequate. I do not believe that a quick visual check is sufficient for a tree by a busy A road. Or any busy road. A thorough inspection by someone knowledgeable about trees is required. I have looked though this advice and it is the nature of the check that is inadequate.”
42. In respect of the Forestry Commission advice, Mr Murat said:
- “This advice is not adequate either. I accept it is applicable to this case. I disagree with the guidance issued by both the Health and Safety Executive and the Forestry Commission. A quick visual check by a landowner is not sufficient.”
43. However, when further challenged, Mr Murat conceded:
- “I accept that these documents are recognition of an acceptable practice and many people do proceed in accordance with them.”
44. The inspection regime advocated by Mr Murat was significantly more rigorous than the guidance offered by either of these bodies. From time to time an expert may come to the conclusion that official guidance is too rigorous. It is however unusual for an expert to

