

Liability for death or injury caused by falling trees or branches:

A review of the present position under English law

Summary

This paper provides a brief review of relevant statutes, discusses a potentially important non-statutory text, and summarises cases of interest, including cases not involving trees but nevertheless considered relevant.

It is apparent that the body of English case law on liability for death or injury from falling trees and branches is both surprisingly consistent and also is susceptible to classification under four headings: remoteness of tree, hidden defects causing failure (involving both inspected and uninspected trees), trees that should have been inspected but were not, and trees that had been inspected but where this was inadequately done relative to what was held to have been required. The first two heads see no attachment of liability, the latter two favour the plaintiff.

Part 1: Statutory and related framework for potential attachment of liability

The following statutes have been applied by, or may in future be found helpful to the courts when considering questions of liability in cases arising from tree failure. Set out below are the key salient provisions which the courts have brought to bear (subsections (a)i – (a)iii), or which could be applied in the future (subsections (a)iv and (a)v):

a) Statutes

i) Occupiers Liability Act 1957 & 1984 (See also Occupiers' Liability (Scotland) Act 1960)

Section 1(1) of the 1957 Act and section 1(1)(a) of the 1984 Act define the scope of these Acts in regulating the duty which an occupier of premises owes "in respect of dangers due to the state of the premises or things done or omitted to be done on them".

The 1984 Act extended the scope of duty of care to “others” (i.e. those present on land uninvited), though three additional criteria need to be met before any such duty is owed. These criteria are set out at section 1(3) of the 1984 Act in the following terms:

“An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if – (a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether he has lawful authority for being in that vicinity or not); and (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.”

The duty under both Acts applies to those who occupy the land, i.e. those who have a sufficient degree of control over it such that they ought to realize that any failure on their part could result in injury to those visiting (whether invited or not) or passing by. Two or more parties can simultaneously be occupiers, each with the same duty towards visitors/passers by.

The duty should be thought of as a requirement to take what care is reasonable, under all the circumstances, to ensure that the visitor/ passer by is reasonably safe. This includes a consideration of the circumstances of the occupier(s) and the reasonable availability of measures to prevent injury.

At section 2(3)(a) the 1957 Act states that:

“An occupier must be prepared for children to be less careful than adults”

ii) Health and Safety at Work etc Act 1974

This Act requires that risks both to employees and also to third parties be reduced so far as is reasonably practicable (see section 2). Section 3 of this Act has been used by the Health and Safety Executive (HSE) to prosecute a local authority following fatalities arising from tree failure. Section 3(1) states:

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.”

Further guidance on the HSE position on this subject may be found in its publication *Management of the risk from falling trees* [1]. However, this publication is explicitly aimed at HSE enforcement officers and sets out to benchmark appropriateness of criminal prosecution under the 1974 Act. It is, therefore, of limited relevance to the question of civil liability.

iii) Highways Act 1980

Section 130 confers on highway authorities a duty in law to “prevent, as far as possible, the stopping up or obstruction” of highways.

Section 154 of this Act provides highway authorities with the power to require any vegetation that threatens the safe use of any highway, or other road or footpath to which the public have access, to be cut or felled within 14 days. The power under section 154(1) relates to “danger”, “obstruction” and “interference” with the operation of the highway, including endangerment, impeding passage of vehicles, horseriders and pedestrians, and restrictions of visibility.

Section 154(2) of the Highways Act 1980 is designed to address dangers arising from hedges, trees and shrubs that are “dead, diseased, damaged or insecurely rooted”, such that the whole or a part “is likely to cause a danger by falling on the highway, road or footpath”.

Of particular interest here is that statutory bodies have been held not to be obliged to exercise discretionary powers (see, for example, *Stovin v Wise* [1996] A.C. 323 H.L.). Thus, notwithstanding the duty conferred by s130, the unwillingness of a highway authority to employ s154 powers to address dangerous trees appears to be a matter of its own volition.

iv) Countryside and Rights of Way Act 2000

Whilst emphasising at section 12 that access enabled through this statute does not increase the liability of occupiers, the Countryside and Rights of Way Act 2000 (CRoW 2000) reflects on the Occupiers’ Liability Acts referred to above in three ways of particular relevance to the present subject:

Firstly, with reference to the 1957 Act, at section 13(1) CRoW 2000 provides a substitute section 1(4) of the 1957 Act to make it clear that those enjoying public access enabled by CRoW 2000 are not visitors of the occupier;

Secondly, with reference to the 1984 Act, it inserts after section 1(6) three new subsections, respectively (6)A, (6)B and (6)C. Subsection (6)A states that no duty is owed arising from risks associated with natural features; subsection (6)B specifically relates this *inter alia* to trees. However, subsection (6)C states that a duty is owed in cases where a danger arises from the occupier either deliberately or recklessly creating a risk;

Thirdly, CRoW 2000 inserts after section 1 of the 1984 Act a new section, 1A. So far as is presently material, section 1A states that, in determining whether a duty arises under section 1, regard must be had that the right of access enabled by CRoW should not place an undue burden on the occupier, and that maintaining the character of the countryside is important.

v) Compensation Act 2006

Section 1, 'Deterrent effect of potential liability', states:

"A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity."

b) Non-statutory guidance

The Network Maintenance Manual (Highways Agency 2007) [2] states at paragraph 3.13.3 within the section *Woodlands, Trees and Hedgerows*:

"Management of trees, woodlands and hedgerows must be planned to ensure these elements fulfil their objectives and functions as defined in the DMRB Volume 10, Section 0, and as set out in the appropriate landscape management plan.

Trees are an important amenity feature of the roadside soft estate and their contribution to the environment is such that they must be retained wherever it is safe to do so. Highway trees do however have the potential to pose a threat to the safety of road users, pedestrians and to adjoining property and livestock. Any external signs of decay or deterioration must be reported by the inspector for action by a qualified arboriculturist.

Trees that lie within falling distance of the highway boundary but located outside the highway boundary and not in the ownership of the Service Manager are classified as highway trees as described in Section 154, Highways Act 1980. If such trees are found to be in an unsafe condition the Service Manager has the power to order the owner to carry out such work as may be necessary to make the tree safe. If this is not carried out by the owner within 14 days, the Service Manager has the power, in accord with the provisions of Section 154 of the 1980 Highways Act, to carry out the work and recharge the cost of the work to the owner...

Qualified arboriculturists must be employed by the Service Provider to carry out specialist inspections and to advise on signs of ill health or damage to trees."

Should an accident occur as a result of structural failure of a highway tree, it seems likely that this text would or could be used to benchmark the inspection and management regime that was in place, such that material departure from the requirements could lead to an attachment of liability.

Part 2 Relevant case law not involving trees

Note: case references follow the neutral citation system in standard use under English law

i) Edwards v National Coal Board [1949] All ER 743 (CA)

This case gave rise to the concept of reasonable practicability in relation to risk reduction, as set out by the Court of Appeal:

“Reasonably practicable” is a narrower term than “physically possible” ... a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.”

ii) Tomlinson v Congleton Borough Council [2003] 1 AC 46; [2004] UKHL 47

The House of Lords ruling in this case held that natural features with inherent but obvious dangers could be left available for public access at the discretion of the users, rather than at the liability of the owners, providing that the features were no more dangerous than would normally be the case for others of their type. Thus, if harm to a user results from an activity that elevates the risk, rather than from the state of the premises, liability would not necessarily attach to the owner.

However, the House of Lords made clear that the danger may not be equivalent for all types of user, e.g. fit and active adults compared to children or the disabled, with this, in turn, affecting whether liability for harm suffered might attach to the owners of the features concerned.

Part 3 Case law involving trees

a) Case concerning a tree in a remote location – no attachment of liability

Shirvell v Hackwood Estates Co Ltd [1938] 2 K.B. 577

It was held that the owner of a tree standing in a remote location where no public access could reasonably have been foreseen was not liable for the death of a person which resulted from the tree’s collapse.

b) Cases concerning trees which failed as a result of hidden defects – no attachment of liability

i) Noble v Harrison [1926] 2 K.B. 332

This case concerned injuries sustained by the plaintiff from a falling branch. The tree had been inspected in the recent past and the branch was held to have failed as a result of a hidden defect not discoverable by inspection. The Defendant was found not liable.

ii) Caminer v Northern & London Investment Trust Ltd [1951] A.C.88;

This case concerned injuries sustained by the plaintiff from a falling branch. The Defendant was considered negligent as the tree had not been inspected.

However, liability did not attach to the Defendant as the defect that prompted the failure was hidden from view: inspection, even had it occurred, would not have prevented the accident.

iii) McLellan v Forestry Commission (2005) Q.B.D (TTC) Bristol, unreported

The tree concerned was under regular though somewhat casual observation. However, the defect principally held responsible for the collapse of the tree (root decay) onto a woodland footpath and, unfortunately, Mr McLellan, was considered to have been readily discoverable only on *close* inspection.

Two factors were considered to remove an attachment of liability in this case: i) the low level of public access along the path, and ii) the absence of any obvious sign on *casual* inspection that the tree was unsound. The regular, if ad hoc surveillance of the injuring tree was held to be an adequate scheme of inspection.

iv) Corker v Wilson (2006), unreported

This case concerned injuries sustained by a motorist when a falling branch struck his car. The tree was under regular though informal observation by its owner, the Defendant, but appeared healthy. It had not been inspected by a trained arboriculturist.

However, expert evidence was accepted by the court to the effect that the cause of the branch failure was a crack in its upper surface that would not have been visible on even careful inspection. The Defendant was held not liable.

v) *Atkins v Scott (2008)*, unreported

This case also concerned injuries sustained by a motorist when a falling branch struck his car. It is superficially similar to *McLellan* (see above) in that the tree had been regularly though informally inspected, including within the twelve months prior to the accident. The inspection was not undertaken by trained arboriculturists, but by persons with a good working knowledge of trees, including the tree in question, which was under frequent observation. The Judge found for the Defendant on the grounds that the tree had been adequately inspected and that the branch had failed as a result of a defect not visible from ground-level inspection in any event.

c) Cases concerning trees found not to have been inspected, where this was deemed necessary and where such inspection would probably have identified the defect responsible for failure – Defendant liable

i) *Kent v Marquis of Bristol (1940)*, unreported

ii) *Brown v Harrison (1947)* E.G. June 28 1947

iii) *Lane v Tredegar Estate Trustees (1954)* E.G. November 27 1954

iv) *Quinn v Scott [1965]* 1 W.L.R. 1004

d) Cases concerning trees where some inspection had occurred but where this was found to be inadequate – Defendant liable

i) *Chapman v Barking & Dagenham LBC [1997]* 2 E.G.L.R. 141; [1997] 48 E.G. 154

It was held that a local authority was liable for serious injuries caused to a member of the public due to a falling branch, in that:

“The defendant council did not at any relevant time appreciate the distinction between making lists of trees and routine tree maintenance, and systematic expert inspection as often as would reasonably be required” (p.145G of the Judgement)

ii) *Poll v Bartholomew and Bartholomew [2006]* EWHC

The preliminary judgement in this case held that the tree in question had not been inspected by a suitably competent inspector, thereby allowing a significant structural defect to go undiscovered.

4 Conclusions

Whilst it should be no surprise that the deliberations of the courts rehearsed above follow the statutory framework in broad terms, it is perhaps surprising that diverse circumstances and their consideration by courts of very differing authority are found to lead to consistent decisions, albeit that these are capable of sub-division as classified above.

From this review, it is concluded that only in cases where trees are remote from public access is an absence of some form of safety inspection likely to be defensible, should an accident occur. In all other circumstances, the law appears likely to require that occupiers be aware of the condition of their trees and manage them accordingly.

The nature of what is done can acceptably vary according to the circumstances, with a higher burden clearly placed on local authorities than on most private individuals. Of particular note is that the courts appear to consider regular ad hoc inspection by untrained persons acceptable in some circumstances, providing that the people concerned have a good working knowledge of trees generally and also are familiar with the trees in question. Where there is significant public access, formal tree inspection by trained specialists appears to be warranted, as is generally considered to be the case by the arboricultural profession.

In the author's view, it is over the issue of inspector competence that the consistency of the courts appears to reduce, as exemplified by a comparison of the preliminary judgement in *Poll* with the decision in *Atkins*. However, in the latter case it should be remembered that the defect precipitate of failure was held not to have been discoverable on inspection, and so the question of inspector competence, whilst explored, was not chiefly the point at issue: in *Poll* this was essentially the critical matter. Accordingly, the author considers that the judgement in *Poll* is to be preferred as an exemplar on the question of inspector competence.

Finally, there is considerable emphasis under statute law placed on avoidance of risk aversion in relation to natural features, and the reasonable enjoyment of these by the public. This tendency is fully supported by the two non tree-related cases cited in section 2. Taken together, this clear unity between statute and common law provides reassurance that the law tolerates an acceptable level of risk pertaining to trees, providing, in most cases, that this is kept under review by some form of inspection.

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Resources

Cases prior to 2003 are discussed in the work by Mynors (see Acknowledgements); most judgements are available from the website of the British and Irish Legal Information Institute: www.bailii.org
Copies of decision dated 2003 onwards are available for free download from the author's practice website: www.flac.uk.com; many can also be found on the BAILII website.

References

- [1] *Well maintained highways: code of practice for highway maintenance management*. London: Department of Transport, 2005.
- [2] *Management of the risk from falling trees*. HSE Sector Information Minute 01/2007/05. London: Health and Safety Executive, 2005.

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