



TREES AND THE LAW: AN UPDATE

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Material since 2002 underlined; material since 2009 **underlined and in bold**

"Always watch where you are going. Otherwise, you may step on a piece of the Forest that was left out by mistake."

Winnie the Pooh

OWNERSHIP

The normal rule: trees on freehold land

Trees on leasehold land: *Dayani v Bromley LBC* [2001] BLR 503, QBD

Trees on boundaries

Lemmon v Webb [1894] 3 Ch1, CA; [1895] AC 1, HL

Mills v Brooker [1919] 1 KB 555 (fruit)

Boundary disputes: *Alan Wibberley v Insley* [1999] 1 WLR 894. HL; *Haycocks v Neville* [2007] EWCA Civ 78 (go back to original title deeds)

Trees on highway land (*Hurst v Hampshire CC* [1997] 2 EGLR 164, CA)

Value of trees: *Lindsey v Highways Agency, 2000, LT*

BOUNDARY TREES

Encroaching roots and branches: nuisance

Hunter v Canary Wharf [1997] AC 655, HL

Davey v Harrow Corporation [1958] 1 QB 60, CA (roots)

Lemmon v Webb (branches)

Elliott v Islington LBC [1991] 1 EGLR 167, CA (trunk)

Strict liability:

Crowhurst v Amersham Burial Board [1894] 2 QB 281

Root damage:

Causation of damage:

- breach must cause or materially contribute to injury (*Loftus-Brigham v Ealing LBC* [2003] EWCA Civ 1490, followed in *Hilda's Montessori Nursey v Tesco Stores* [2006] EWHC 1054, QB and *Eiles v Southwark LBC* [2006] EWHC 1411 (TCC))
- care needed where there is more than one tree (*Malewski v Ealing LBC* [2003] EWHC 763, TCC), or ivy (*Eiles*)
- damage may be caused by removal of tree on site prior to construction of house, rather than presence of other tree nearby (*Siddiqui v Hillingdon LBC* [2003] 89 Con LR 13, TCC)

Foeseability of harm (*Solloway v Hampshire CC* [1981] 1 EGLR 129, CA)

Availability of alternative measures to avoid harm

Reasonableness of steps actually taken (*Delaware Mansions v Westminster CC* [2002] 1 AC 321, HL); *Raphael v Brent LBC* [2007] TCC

Opportunity to alleviate problem (*Jones v Portsmouth CC* [2003] 1 WLR 427, CA; *Kirk v Brent LBC* [2005] EWCA Civ 1701)

Removal of tree may cause heave: *Park v Swindon BC* (2011) January

Remedies:

Abatement (*Lemmon v Webb*)

Action for damages (*Delaware Mansions*; *Eiles*)

Injunction (*King v Taylor* [1976] 1 EGLR 132; *Mills v Dunne* 2007, Cty Ct)

Statutory nuisance

BOUNDARY HEDGES

Ownership

Inclosure Act awards

Stanton v Jones 1994, unreported, CA

Common law remedies

High Hedges: Anti-Social Behaviour Act 2003, Part 8; regulations; guidance

Complaints procedure: basis of appeals not clear

Enforcement

High Hedges Act (Northern Ireland) 2012

HAZARDOUS TREES

Nature of problem:

Tree or part that constitutes hazard

Potential target

National Tree Safety Group recommendations:

Draft BS 8516 (tree safety inspection) – probably not going ahead

Negligence caused by state of property: -

Owner causes it; or Arises due to neglect of duty, and not remedied within reasonable time (*Noble v Harrison* [1926] 2 KB 332)

Duty of care

Basic rule: *Donoghue v Stevenson* [1932] AC 562, HL

- *MacClancy v Carezza* [2007] EWHC 479 (QB) (riding instructor not responsible for low branch)

Occupiers' Liability Act 1957 and 1984; *Wheat v Lacon* [1966] AC 552, HL

- *Tomlinson v Congleton BC* [2004] 1 AC, HL (liability of council for lake; not required to cut down trees)
- *Mills-Davies v RSPB* 2004, QBD (not required to remove tree stumps in nature reserve)
- ***Bowen v National Trust* [2011] EWHC 1992, QB (only required to take reasonable care)**

Exclusion of liability (*White v Blackmore*)

Necessary action

Inspection (*Chapman v Barking and Dagenham LBC* [1997] 2 EGLR 141)

- *Poll v Asquith* 2006, QBD (level 2 inspector is appropriate; defect would have been discovered)
- ***Micklewright v Surrey CC* [2011] EWCA Civ 922; *Corker v Wilson* 2006, MCLC (no defect visible; no liability)**
- *Atkins v Scott* 2008, Aldershot Cty Ct (experience is key requirement)
- ***Selwyn-Smith v Gompels* [2009] Swindon Cty Court (relevance of owner's means)**

Risk assessment (*Caminer v Northern & London Investment Trust* [1951] AC 88, HL)

- *Shirvell v Hackwood Estates* [1938] 2 All ER 1, CA
- *Knight v Hext* [1980] 1 EGLR 111, CA
- ***Bowen v National Trust* [2011] EWHC 1992, QB (zoning)**

Amenity v safety: *Quinn v Scott* [1964] 1 WLR 1004

Duty of care: *Dayani v Bromley LBC* [2001] BLR 503, QBD

Need to gather evidence after incident : *Micklewright v Surrey CC* [2011] EWCA Civ 922 - but sympathy not enough

Local Government (Miscellaneous Provisions) Act 1976, sections 23, 24

Liability under Health and Safety at Work Act 1974: *R v Birmingham City Council* 2002, Crown Court

HIGHWAYS AND STATUTORY UNDERTAKERS

Highways Act 1980: sections 96, 130, 154, 79

Stovin v Wise [1996] AC 323, HL

LE Jones v Portsmouth [2003] 1 WLR 427, CA (liability of highway authority)

Rooke v Liston 1999, CA (trees obscuring lighting)

Thompson v Hampshire CC [2004] EWCA Civ 1016 (tree obstructing path)

Spencer v Wirral MBC Liverpool County Court, 2008 (tree root)

London Local Authorities and TfL Act 2008, s 10 (overhanging trees)

Electricity Act 1989, Schedule 4

PROFESSIONAL ADVICE

Standard of care in giving advice: *Beaton v Nationwide BS* [1991] 2 EGLR 145

- *Charlton v Northern Structural Services Ltd* [2008] EWHC 66 (TCC) (heave)

WORKS TO TREES

Felling licenses; consent under TPO; notification in conservation area

Faculty for works in churchyards (Faculty Procedure Rules 2000)

Environmental impact assessment: EIA (Forestry) Regulations 1999

- *R (Tree & Wildlife Action Committee) v Forestry Commissioners* [2007] EWHC 1623 Admin (necessary to consider impact of whole project, not just deforestation)

Wildlife and habitats: Wildlife and Countryside Act 1981, Part I (inc birds, nests, eggs)

European Protected species (including bats)

- Conservation (Natural Habitats etc) Regulations 1994 (still applies in Scotland);
- **replaced by Conservation (Habitats and Species) Regulations 2010 (E&W) (removes “incidental result of lawful operation” defence)**
- *R (Morag) v Hampshire CC* [2011] 268. SC

Care in carrying out works:

General duty of care

Health and Safety at Work Act 1974; numerous regulations

Working at Height Regulations 2005

Lifting Operations and Lifting Equipment Regulations 1998 (LOLER)

Salsbury v Woodland [1970] 1 QB] 324, CA; *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575 (extra hazardous activities)

Koyn v Dept of Transport 2001, QBD (felling highway tree)

Damages for trespass: Cost of reinstatement: *Jordan v Norfolk CC* [1994] 1 WLR 1353; *Scutt v Lomax*, 2000, CA; *Bryant v Macklin*, 2005, CA.

Theft, criminal damage

FORESTRY

Duties of Forestry Commission (*R (Kanssen) v DEFRA*) [2005] EWHC 1024 (Admin))

- Regulatory Reform (Forestry) Order 2006

Plant health: Plant Health (Forestry) Order 2005, amended in 2006, 2008, 2009

- Plant Health (Fees) Forestry) Regulations 2006, amended in 2008
- Forest Reproductive Material Regulations 2002, amended in 2006

UK Forestry Standard (October 2012)

FELLING LICENCES

Needed for felling (including killing by other means): Forestry Act 1967

Exemptions: section 9 (burden on defendant to prove: *R (Grundy & Co) v Halton Division Magistrates* [2003] EWHC Admin)

- small scale
- orchards, gardens, churchyards, open spaces (*McInerney v Portland Port Ltd* [2001] 1 PLR 104; *Rockall v DEFRA* [2008] EWHC 2408 (Admin))
- to prevent a danger
- to prevent or abate a nuisance (*Perrin v Northampton* [2008] CA)
- authorised by other procedures; to carry out development
- by statutory undertakers
- in accordance with a plan

Application made to Forestry Commission

Compensation: section 11

Unauthorised felling: prosecution

Restocking notices: prosecution not needed: Regulatory Reform (Forestry) Order 2006

TREES AND DEVELOPMENT

Material consideration in planning decisions

- May be crucial (*Poole v Secretary of State* [2008] EWHC 676 Admin)
- BS 5837: 2005 (being updated)

Conditions to protect trees

APN 12

SPECIAL TREES

Ancient Woodlands (*Winter v Secretary of State* [2006] EWHC 491 Admin)

Historic landscapes, parks and gardens

Veteran trees **(mentioned in NPPF)**

Conservation areas

Tree preservation orders

Trees in churchyards (need faculty)

TREE PRESERVATION ORDERS

Town and Country Planning Act 1990, sections 198 to 210

- **to be amended by Planning Act 2008, sections 192, 193 (maybe from April 2012)**
- **Town and Country Planning (Trees) (England) Regulations (to be introduced)**
- **all rules will be in Regulations, not Act or order**
- **all TPOs, whenever made, will in effect be post-1999**

Tree Preservation Orders: a Guide to the Law and Good Practice (blue book): DETR, 2000, amended in 2008: maybe updated

Making order: amenity and expediency

Town and Country Planning (Trees) Regulations 1999

- amended in 2008 (England only)

Trees, areas, groups, woodlands

- Area orders: Robinson v East Riding of Yorkshire [2003] 4 PLR 1, CA

Definition of "tree" – *Bullock v Secretary of State* (1980) 40 P&CR 246.

- R (Plimsoll Shaw) v Three Rivers DC [2007] EWHC 1290 Admin; Palm Developments v Secretary of State [2009] 2 P&CR 16, QB (woodlands)
- R (Fowler) v Ealing LBC [2004] EWHC 2860 (shrubs)

Confirmation of order

- Gilman v Rutland DC [2004] EWHC 2792 Admin [2005] JPL 970; Hobbs v Horsham DC [2006] EWHC 1605 [2007] JPL 589 (Report must be fair)
- R (Aspdin) v Derby CC [2005] EWHC 591 (Admin); **Wilkson v Kensington and Chelsea RBC [2010] JPL 1083** (procedural irregularities)

High Court challenge

No right to compensation: (*Casey v Canterbury CC* 1995, LT)

Not a breach of human rights (*R (Brennon) v Bromsgrove DC* [2003] 4 PLR 12, QBD)

OTHER PARTS OF BRITISH ISLES

Town and Country Planning (Scotland) Act 1997, sections 159-178, amended by Planning etc (Scotland) Act 2006, s 28

Town and Country Planning (TPO and Trees in Conservation Areas) (Scotland) Regulations 2011

Scottish Planning Circular 1/2011

Planning Act (Northern Ireland) 2011

Planning (Trees) Regulations (Northern Ireland) 2003 (amended in 2007)

Planning and Development Act 2000 (Ireland)

NEED FOR CONSENT UNDER THE ORDER

Cutting down, topping, lopping, uprooting, wilfully damaging, wilfully destroying a tree

Causing or permitting works (*R v Bournemouth JJ ex p Bournemouth Corpn* (1970) 21 P&CR 163; *Groveside Homes v Elmbridge BC* [1987] 2 EGLR 199)

Exemptions in s 198:

Dying, dead, and dangerous trees (*Smith v Oliver* [1989] 2 PLR 1)

- need to plant replacement

Works to comply with statutory obligation

Works necessary to prevent or abate a nuisance (*Perrin v Northampton* [2008] 1 WLR 1307, CA, overturning [2007] 1 All ER 481)

- may include pure encroachment
- only exempts works necessary to abate

Forestry operations

Exemption in the order:

Works by statutory undertakers

Works needed to carry out development

Fruit trees (*R v Clearbrook Group PLC* [2001] 4 PLR 78, CA)

Need for consent in doubtful cases: application needed (*Chambers v Guildford BC* [2008] JPL 1459)

All exemptions will be in the Regulations

- **will probably retain exemptions for works to dead trees and to abate nuisance; but not for works to “dying” trees, but will retain**

APPLICATIONS FOR CONSENT

1999 Regs, amended in 2008 (standard application form, appeal procedure)

- information must be supplied with application (eg monitoring information)

Conservation area designation is relevant

Appeals and hearings

High Court challenges

COMPENSATION

Pre 1999 orders

- Trees of outstanding or special amenity value: article 5 certificates

Post 1999 orders (**and in future all orders, whenever made**):

- no claim for lost land value
- no claim based on information supplied post-application
- need for evidence (*Duncan v Epping Forest DC* [2004] RVR 213, 275);

- Woodhams v Chichester DC, 2008
- No article 5 certificate

Loss must be foreseeable (*Bell v Canterbury CC*)

Duty on claimant to mitigate

Reformation of Lands Tribunal (now Lands Chamber of Upper Tribunal)

UNAUTHORISED WORKS

Strict liability offence

Section 210(1): death or destruction

Section 210(4): other works

- Lauder v Bromsgrove DC [2008] EWHC 2303 Admin (tree surgeon in error)

Injunctions (*Kirklees BC v Brook*)

Need to plant replacement

CONSERVATION AREAS

Town and Country Planning Act 1990, ss 211 to 214 (to be amended by 2008 Act)

- Need for six weeks notice
- Exceptions: as for TPOs, plus small trees

HEDGEROWS REGULATIONS 1997

Removal notices

Important hedgerows

Retention notices

Forthcoming changes

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