

Trees - Legal Update A Quick Review of Recent Cases & Developments

Dr Dealga O'Callaghan FICFor, F Arbor A, MISA
Chartered Arboricultural Consultant

www.dealgas-treeconsultancy.co.uk



Arboricultural
ASSOCIATION

Fellow Member

 Institute of
Chartered Foresters
Registered Consultant

What's New in Planning?

Following consultation the National Planning Policy Framework (NPPF) was revised and came into force in July 2018.

This has caused consternation in some local authorities, notably Fareham BC in Hampshire and the 10 council that constitute Greater Manchester because of changes to the methodology for calculation 'housing need'.

With respect to trees - no change when it comes to planning and development, but

The Revised NPPF states at Paragraph 175 (c) that:

“development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists”.

What about URBAN TREES as a separate subset?

What's New in Planning?

In my experience, LPAs are placing far more emphasis on retaining trees on development sites - which is good, and

Placing greater emphasis on planting replacement trees and utilising s106 Agreements to ensure it happens; and to raise funds for planting new street and parkland trees, - here is an example from one NW LPA:

It has a policy requiring one new street tree for every five dwelling units; if these cannot be accommodated on the site then a commuted sum of £790 per tree is payable;

Another policy requires the number of replacement trees is calculated using the Bristol Method, i.e. one new tree per 10 cm dbh of the trees that were lost and again £790 per tree that cannot be accommodated on the site; and importantly

THE FUNDS RAISED ARE RING FENCED FOR PUBLIC TREE PLANTING!

What's New in Planning?



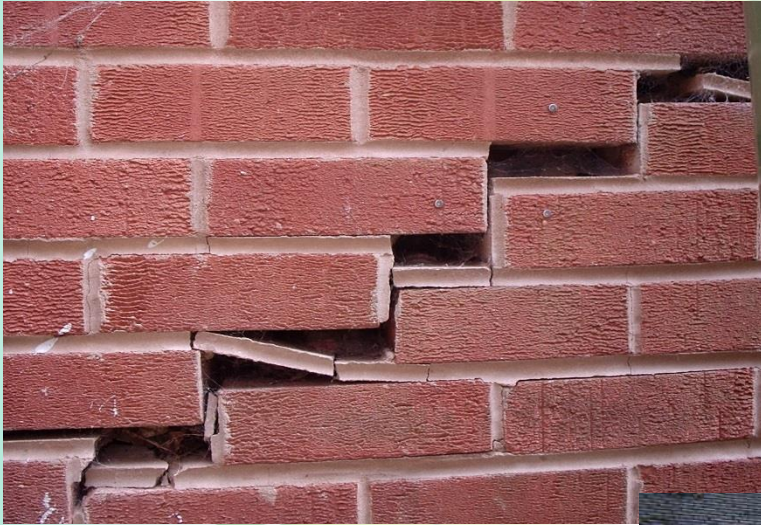
Greater emphasis is being placed on planting native species, which again is good, but we do need to keep any eye on attaining a 'sustainable' tree populations and the potential impacts of climate change and this will mean considering non-native species;

It is also good to see that in some emerging Local Plans 'Biosecurity' of the tree supply chain carries significant weight;

There are opportunities for Arboricultural/Tree Officers to influence emerging local plans and get robust policies in place for tree management, replacement planting and BIOSECURITY;

A policy on how the LPA deals with tree caused subsidence would also be good.

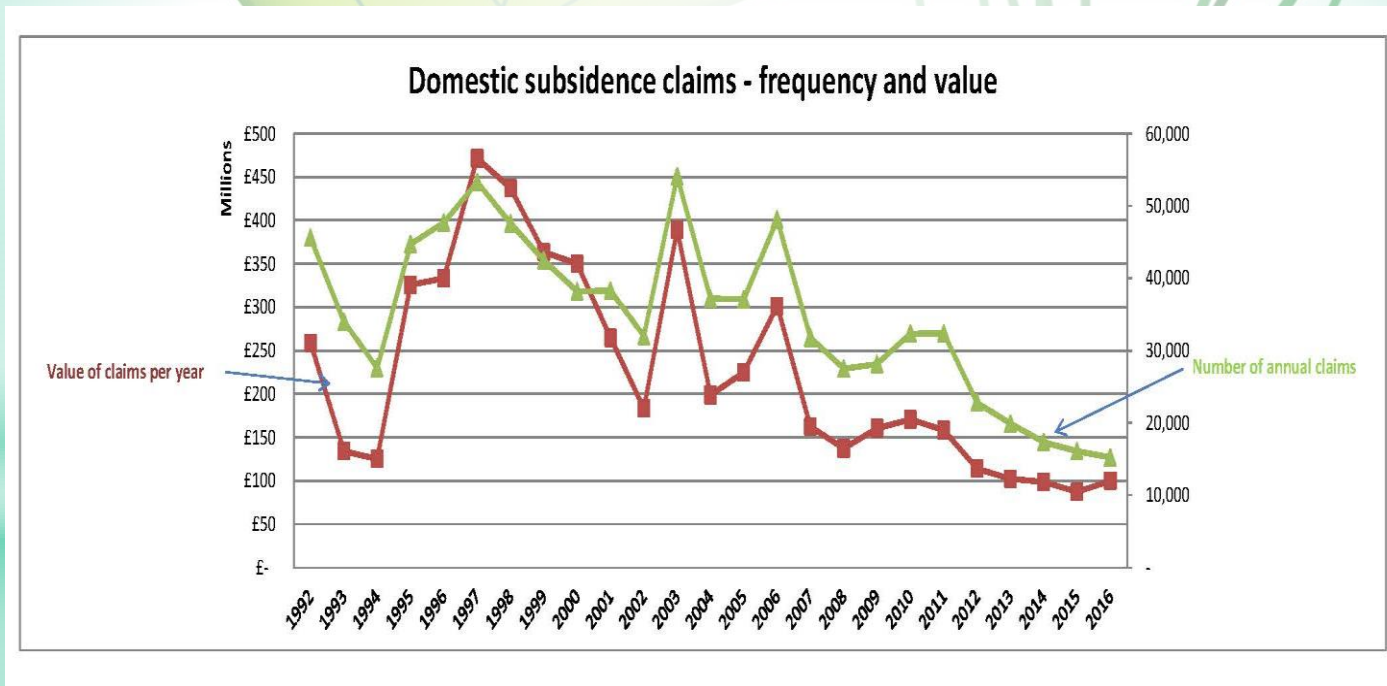
What's New in Subsidence?



What's New in Subsidence?

Tree caused subsidence is still probably the No 1 issue in the Urban Forest!

Since 2006 it's been pretty static in terms of annual claim numbers and values of the claims



What's New in Subsidence?

There have been a number of important judgments in cases involving subsidence, the most significant of which probably is that of *Berent v Family Mosaic Housing Association and Islington LB* [2012] EWCA Civ. 961

Two important points emerge from this case:

1. Cases involving tree root damage are subject to the same rules of law as claims brought in common law negligence; and
2. The issue of reasonable foreseeability came to the fore, i.e. is/was it reasonably foreseeable that the implicated tree(s) would cause subsidence?

The appeal was dismissed on the grounds that it is not possible to foresee which trees will cause subsidence damage to what buildings. Essentially does the tree pose a RISK (in subsidence) to a property or does it pose a 'REAL RISK'?

What's New in Subsidence?

Essentially all trees growing on shrinkable clay soil in proximity to buildings pose a RISK - that's a given!

Is it reasonable therefore, to remove or heavily pollard all the trees in case they cause subsidence at some time in the future?

Once a tree(s) has been shown to have caused subsidence and causation has been established it/they should be removed - pruning at that stage even pruning in line with HortLink 2012 and BRE IP 7/07 would be inappropriate;

Cases taken in recovery focus on the issue of 'reasonable foreseeability'!

This is where the landscape of subsidence recovery is these days.

What's New in Subsidence?

In all my recent and current cases the question for the opposing expert and myself in our agreed statement is did the tree(s) pose a risk or a 'real risk'?

A 'real risk' is defined as “*a risk that it is unreasonable to ignore or do nothing about*”, and in my opinion there are four criteria that must be met to establish reasonable foreseeability as follows:

1. Knowledge that the soil in which the tree is growing and upon which the building is founded is shrinkable;
2. That tree caused subsidence damage is a frequent occurrence in the locality;
4. That the species/genus of tree(s) is/are one that is frequently implicated in subsidence damage; and
5. That the tree(s) is within influencing distance of a property (properties).

What's New in Subsidence?

Since the Berent case there have only been three subsidence cases that went to trial:

1. Denness & Denness v East Hampshire DC, [2012] EWHC 2951 (TCC), AND
2. Pattichis & Pattichis v Enfield LB, The County Court at Central London [2016] HHJ Parfitt Claim No CO20CL016
3. Kahn & Kahn v Harrow Council & Mrs Kane [2013] EWHC 2687 (TCC).

All of which went to reasonable foreseeability. Denness was actually heard before Berent but closing arguments and judgment were postponed until the Court of Appeal handed down its Judgment in Berent;

Denness was dismissed on the grounds that it was not reasonably foreseeable that the trees would cause subsidence;

Pattichis was also dismissed on the same grounds.

What's New in Subsidence?

The third case of *Kahn & Kahn v Harrow Council & Mrs Kane* [2013] EWHC 2687 (TCC) needs special mention in this context;

This case also went to the issue of foreseeability, it was pleaded that the fact that a Lawson cypress hedge in very close proximity to a building would cause subsidence was reasonably foreseeable to the second defendant Mrs Kane, i.e.

“this is common knowledge through extensive reporting in the media and hence something the Second Defendant knew or ought to have known”

A selection of articles on the subject was submitted to the Court, i.e. the Harrow Times, The Daily Mail and the Evening Standard.

It was argued that Mrs Kane had a duty to abate the nuisance her hedge caused - the Judge agreed and found that *“Mrs Kane is liable in nuisance for the damage to Mr & Mrs Khan’s property caused by the cypress hedge H1 ... “*

What's New in Subsidence?

Where does that leave us?

1. Once causation has been established on the balance of probabilities the tree owner/controller must act reasonably to abate the nuisance;
2. The battleground between Claimants and Defendants is now firmly centred on the issue of 'Reasonable Foreseeability';
3. The implications for local authorities is to take action to reduce the risk of subsidence at least in areas within the jurisdiction where incidences of subsidence have been high; (Ref. Camden)
4. In surveying trees as they do for general maintenance purposes, local authorities should give consideration to assessing subsidence risk as well as all the other parameters.
5. Keeping accurate records of all subsidence claims separate from other tree damage claims such as direct damage, broken branches etc.

What's New in Subsidence?

6. Importantly following *Khan v Kane* householders/property owners can be expected to (1) be aware of the potential of their trees to cause subsidence; and (2) be aware that they have a duty to abate the subsidence nuisance, particularly when notified that their tree(s) have caused or are implicated in subsidence!
7. They cannot use the presence of a TPO or the fact that the tree(s) is in a Conservation Area as an excuse not to have their tree(s) pruned or removed, i.e. for not acting to abate the nuisance!

The Court of appeal established in the case of *Perrin v Northampton BC* [2007] EWCA Civ. 1353 that in the case of subsidence Section 198(6)(b) of the 1990 Act applies to:

“to the cutting down, uprooting, topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance”.

What's New in Tree Failure Cases?



What's New in Tree Failure Cases?

In comparison to subsidence cases there have been quite a few cases involving tree failure / personal injury as follows:

1. Poll v Bartholomew (2006) - High Court Claim No 4BS5084
2. Atkins v Scott (2008) - High Court Claim No 6KB04804
3. Selwyn-Smith v Gomples (2009) - Swindon County Court Claim No 8SN00362
4. Micklewright v Surrey CC (2011) - Guildford County Court Case No 8GU02043
5. Fellbrigg v National Trust [2011] EWHC 1992 (QB)
6. Stagecoach v Hind [2014] EWHC 1891 (TCC)
7. Middleton v Surrey CC (2015) - Guildford County Court Case No 2YM50004
8. Cavanaugh v Whitley Parish Council & Kevin Shepherd (2017) - The High Court of Justice Case No HQ14 P05328 & subsequent appeal [2018] EWHC Civ. 2232

The Poll Case

This case involved injuries to a motorcyclist (Mr Poll) as a result of a collision with a leader of an ash tree that fell across the road;

The case came down to the adequacy of the survey the landowners undertook to assess their trees;

The tree was multi stemmed, growing on a bank & there was a bracket of *Perenniporia fraxinea* hidden beneath one of the stems;

The landowners had a local contractor do drive by surveys every year (Level 1) and commissioned him to do what work was required as a result of the survey;

The key issue between the experts was whether or not a more detailed survey, i.e. Level 2 ought to have been done and would this have discovered the bracket?

The Poll Case



Held:

HHJ Alistair MacDuff found that (1) a Level 2 survey would have discovered the bracket; and (2) a Level 2 survey was what was required;

Judgment was issued in favour of the Claimant, Mr Poll;

There were ramifications from this case which led to the formation of the NTSG and the publication of its 'Common Sense Guide'

It also precipitated a vitriolic attack on both experts by the creator of QTRA, which was resolved but the outcome cannot be made public.

Atkins v Scott

This was a case in negligence against a landowner as a result of a large, heavy branch of an oak tree fell into the path of a car severely injuring the driver, Mr Atkins;

The Claimant sued the landowner in common law negligence on the grounds that the Defendant failed to undertake a proper inspection of the tree that would have revealed the fault in the branch;

HHJ Hughes QC dismissed the claim on the facts:

1. The Defendant did have a sufficient system of inspection in place although it was an informal one;
2. Although there had been a crack in the branch for some time; it would not have been discoverable by a competent inspection; and
3. On the facts, the Claimant had been injured by an unfortunate accident for which no one was to blame.

Atkins v Scott

The Judgment in this case is important because:

1. It clarifies the nature of the landowner's duty to inspect trees for damage and potential failure;
2. It confirms that it is possible to discharge this duty, even where the system of inspection is un recorded and *ad hoc*; and
3. Illustrates the importance of ensuring an expert's objectivity and independence as required under Part 35 of the Civil Procedures Rules (CPR).

HHJ Hughes clarified the law concerning the nature and extent of a landlord's duty to inspect:

- The standard of care is that of the reasonable and prudent landowner. This is higher than an ordinary urban or rural casual observer of trees but less onerous than a scientifically qualified arboriculturist, per Lord Normand in *Caminer v Northern and London Investment Trust Ltd* [1951] AC;
- A claimant must prove that proper inspection would have led to something being done that would have prevented the accident, per Lord Reid *ibid*;
- The court will look to the practical guidance issued by relevant bodies, such as the Forestry Commission or the Health and Safety Executive, when determining what is established good practice. The latter states that a quick check by a person with a working knowledge of tress, once a year, is sufficient to discharge the duty of care.
- The nature and extent of the practical steps that a landowner is required to undertake will vary with the particular circumstances of each case;
- Climbing inspections and the routine use of binoculars when inspecting each tree were not reasonably required;
- An annual inspection by a competent person was an important component of any suitable system of inspection;
- In determining whether any individual inspector was competent top undertake this task adequately, regard should be had to any reported authorities and to expert and other evidence in the individual cases in preference to any formulaic system of qualifications or classifications in particular such as whether a person should be regarded as a level 1 or 2 inspector.

Selwyn-Smith v Gomples



This case involves the failure of a 28m high black pine onto a garage/workshop in which the Claimant was working at the time, causing serious personal injuries to the Claimant and considerable damage to the garage and its contents;

The tree failed in squally but not exceptional wind conditions - it snapped at a point about 1m above ground;

The base of the tree was infected with *Phaeolus schweinitzii* and it was agreed that this was the predominant cause of the failure, i.e. the wind was a trigger;

The case turned on whether the Defendant had been negligent in inspecting the tree and whether or not his observations should have led him to call for expert advice;

It was found that Mr Gomples had sufficient knowledge of trees such that he was not negligent in failing to call for expert advice;

The claim was dismissed.

Micklewright v Surrey CC

This case involves the failure of a large branch of an oak tree that struck the claimant causing him fatal injuries.

The arguments at court centred around (1) whether Surrey CC had an adequate system of inspection in place; and (2) whether the fault in the branch, which was internal decay, would have been detected in a brief walk by/drive by inspection;

The Court held that:

1. Surrey CC's inspection regime was inadequate although it would have become adequate in time; and
2. A routine brief inspection would not have detected that the branch had internal decay, and therefore a more detailed inspection would not be justified.

The experts disagree on the cause of the failure; the Claimant's expert was of the opinion that the decay was the sole cause of the failure; while the Defendant's expert was of the opinion that the decay was partly responsible and the main cause was the phenomenon of 'summer branch drop'.

Fellbrigg v The National Trust

This case involves the failure of a large branch of a mature tree in a woodland at Fellbrigg Hall fell onto a group of school children sheltering from the rain under the tree; one child was killed and three others suffered serious injuries.

This case, like the previous ones went to the issue of (1) the adequacy of the inspection; and (2) whether the defect that caused the failure should have prompted a more thorough inspection;

The Court also considered the issue of tree risk assessment and whether the National Trust's inspectors had (1) classified the tree correctly as low risk prior to the failure; and (2) whether the NT's tree risk assessment process was adequate; in other words was the NT negligent?

The Court held, reluctantly it must be said, that the NT was not negligent or in breach of its duty;

In respect of tree risk assessment the Court commented that *“risk assessment is by its very nature liable to be proved wrong by events, especially when judging the integrity of a tree is an art not a science”*.

Stagecoach v Hind

This case involves the failure of a stem of a multi-stemmed ash tree across the railway from Staines to Feltham when one of the Claimant's trains collided with it causing damage in the amount of £325,000.

The branch failed from a tree in the First Defendant's garden which abutted the railway track. There was a separate claim against a Second Defendant, a tree surgeon who had worked on the tree on behalf of the First Defendant prior to the failure;

The base of the tree was covered in dense ivy such that a flaw was on visible in a quick inspection of the tree;

There were no signs of ill health in the tree prior to failure and therefore no 'trigger' to prompt a more detailed inspection;

The First Defendant was sufficiently knowledgeable about trees such that her informal inspections were enough to discharge her duty;

The claim was dismissed.

Middleton v Surrey CC



This case involves the failure of a tree from a narrow verge across Gratton Park Road in Redhill onto a Toyota Hilux trapping the Claimant and causing personal injuries.

Like the previous cases, this went to the adequacy of the tree inspection system;

The Court accepted that the system of tree inspection at Surrey CC was not unreasonable, but the inspection of this particular tree:

“was inadequately carried out; and therefore as both experts agree that a fuller inspection would have revealed the true extent of the damage to the tree would have resulted in its immediate destruction”.

The Claimant’s case was established and the Judgment found for the Claimant in the amount of £24,000.

The Cavanaugh Cases

This case involves the failure of a mature lime tree across the A283 Petworth Road in Whitley which struck a single deck bus being driven by Mr Andrew Cavanaugh causing his serious personal injuries.

The failure occurred on 03 January 2012 in strong but not exceptional winds;

The base of the tree was infected with *Ganoderma* spp, *Armillaria* spp and possibly *Kretzschmaria deusta*;

Whitley Parish Council had a three yearly inspection regime in place for all its trees and the lime tree had been inspected previously in 2006 and 2009 and was due for inspection again in 2012;

At trial in evidence the tree inspector claimed not to have inspected the lime tree in 2009 because he had not been supplied with a map of its location;

The case turned on two points (1) the adequacy of the inspection regime; and (2) the age of the *Ganoderma* bracket, i.e. had the tree been inspected in 2009 would the *Ganoderma* bracket have been discovered?

The Cavanaugh Cases



A salient point in this case was that Whitley PC specifically asked for the lime tree to be inspected because of its location in a raised planter between two public benches next to a bus stop;

It was successfully argued that although a three year inspection regime was generally adequate, the lime tree was in a high risk area as defined by the Forestry Commission and should have been inspected more frequently, i.e. every 18 months to two years;

HHJ MacDuff agreed and upheld the claim against Whitley Parish Council;

The Parish Council appealed and in October 2018 the Court of Appeal dismissed the appeal stating that the Judge's decision that inspection every two years was "*unimpeachable*";

The basis for this is that had the lime been inspected more frequently, the Ganoderma bracket would undoubtedly been found and thus the failure would have been prevented.

The Cavanaugh Cases



As part of his judgment HHJ MacDuff was very critical of the tree inspector and dismissed his evidence entirely;

However, he got off the hook because of the age of the *Ganoderma* bracket. Only the expert for the First Defendant had actually seen the bracket while the other the experts for the Claimant and Second Defendant had to work from photographs;

Understandably, the Judge preferred the evidence of the expert who had actually seen the bracket and he was of the opinion that it was just three years old; therefore it would not have been discovered had the lime tree been inspected in 2009;

The Judge was critical of the fact that the remains of the tree and the bracket had mysteriously disappeared just before it was due to be inspected by the other two experts - not the first time this has happened in cases in Surrey!

Expert Witnesses

In giving evidence expert witnesses must comply with Part 35 of the Civil Procedures Rules;

“I understand that my duty included in providing written reports and giving evidence is to assist the Court, and that this duty overrides any obligation to the party/parties who have engaged me. I confirm that I understand that duty and have complied with it”.

Judges are very critical when they find experts not to be independent and objective - they lose faith with them and tend not to accept their evidence, see for example:

Atkins v Scott (2008) - High Court Claim No 6KB04804;

Stagecoach v Hind [2014] EWHC 1891 (TCC);

And to a lesser extent

Fellbrigg v National Trust [2011] EWHC 1992 (QB)

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**Thank You For
Listening**

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