3 TREE SURGERY COUNTIES

2015

Trees and the Law

3 Counties Tree Surgery

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Trees and the Law (Customer Guidance Notes)

The legal framework

Under both the civil law and criminal law, an owner of land on which a tree stands has responsibilities for the health and safety of those on or near the land and has potential liabilities arising from the falling of a tree or branch. Civil law gives rise to duties and potential liabilities to pay damages in the event of a breach of those duties. Criminal law gives rise to the risk of prosecution in the event of an infringement of the criminal law.

The civil law

The owner of the land on which a tree stands, together with any party who has control over the tree's management, owes a duty of care at common law to all people who might be injured by the tree. The duty of care is to take reasonable care to avoid acts or omissions that cause a reasonably foreseeable risk of injury to persons or property. If a person is injured by a falling/fallen tree or branch, potential causes of action arise against the tree owner in negligence for a breach of the duty of care, in the tort of nuisance and, where the injured person was on the land of the tree owner at the time of the injury, under the occupiers' Liability acts of 1957 or 1984 (OLA 1957,OLA 1984), (for Scotland see the occupiers' Liability (Scotland) act 1960, for northern Ireland see the occupiers' Liability act (Northern Ireland) 1957 and occupiers' Liability (Northern Ireland) order 1987). some regulations under the Health and safety at Work etc. act 1974 may also give rise to liability under the civil law as well as under the criminal law (for which see page 36). However, a discussion of the applicable regulations is beyond the purview of this guidance.

Negligence

The dutyholder

This is the person who has control of the tree's management whether as owner, lessee, licensee or occupier of the land on which the tree stands. The relevant highway authority is responsible for trees on land forming part of the highway.

The person to whom the duty is owed

This is any person who can be reasonably foreseen as coming within the tree's vicinity and being injured by a fall of the tree or a branch from the tree. Those using highways, footways, public footpaths, bridleways, railways and canals are likely to come within striking distance of trees on adjacent land. In public spaces, and semi-public spaces such as churchyards and school grounds, those working in or visiting them can be expected to come within the vicinity of trees. On private land, visitors and employees can also be expected to come within the reach of trees. Trespassers may also, in certain circumstances, be expected to come within the vicinity of trees on private land.

The duty owed

This can be stated in general terms as being a duty to take reasonable care for the safety of those who may come within the vicinity of a tree. The courts have endeavoured to provide a definition of what amounts to reasonable care in the context of tree safety, and have stated that the standard of care is that of "the reasonable and prudent landowner"[2] the tree owner is not, however, expected to guarantee that the tree is safe. The owner has to take only reasonable care such as could be expected of the reasonable and prudent landowner. The duty owed under the tort of nuisance is owed by a tree owner to the occupier of neighbouring land. The duty, however, is no different to the general duty owed under the tort of negligence. A highway authority has a potential liability for fallen trees and branches for which it is responsible by virtue of section 41(1) of the Highways act 1980, which gives rise to a duty "to maintain the highway". It is open to question whether the duty extends to the maintenance of highway trees[3]. However, assuming the duty does so extend, the highway authority may, by section 58, defend itself by proving "that the authority had taken such care as in all the circumstances was reasonably required to secure that part of the highway to which the action relates was not dangerous for traffic". The duty under section 41(1) is, therefore, little different to that which arises under the common law in negligence. Similarly, the duty to maintain trees planted under section 96 of the Highways act 1980 requires the highway authority to take only "reasonable" care. a highway authority also has the power under section 154(2) of the Highways act 1980 (see also s.91 roads (Scotland) act 1984) to require trees growing on land adjacent to the highway that are dead, diseased, damaged or insecurely rooted, to be removed by those responsible for the trees and, in default of removal, to take action itself to have the trees removed. a failure to utilise the power in any particular case is unlikely to give rise to liability in the light of *Stovin v Wise*[4]. Similarly, it will not assist a person responsible for a tree growing adjacent to a highway to blame the highway authority for failing to require him to remove a tree that is found to have been dangerous. It is the duty holder's fundamental responsibility, in taking reasonable care as a reasonable and prudent landowner, to consider the risks posed by their trees. The level of knowledge and the standard of inspection that must be applied to the inspection of trees are of critical importance. It is at this point that the balance between the risk posed by trees in general terms, the amenity value of trees and the cost of different types of inspection and remedial measures becomes relevant.

The Standard of Inspection

The courts have not defined the standard of inspection more precisely than the standard of "the reasonable and prudent landowner". it has been recognised that this test sounds simpler than it really is: "it postulates some degree of knowledge on the part of landowners 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"[5]. In individual cases, the courts have sought to apply this general standard to the facts of each case[6]. However, there is no clear and unambiguous indication from the courts in regard to the extent of the knowledge about trees a landowner is expected to bring to tree inspection in terms of type and regularity of inspection. Generally, the courts appear to indicate that the standard of inspection is proportional to the size of and resources available (in terms of expertise) to the landowner [7, 8, 9, 10&11]. It is of note that the HSE states in the HSE sector information minute *Management of the risk from falling trees* (HSE 2007), that: "for trees in a frequently visited zone, a system for periodic, proactive checks is appropriate. This should involve a quick visual check for

obvious signs that a tree is likely to be unstable and be carried out by a person with a working knowledge of trees and their defects, but who need not be an arboricultural specialist. Informing staff who work in parks or highways as to what to look for would normally suffice". In general terms, a landowner must identify those trees which might, if they fell, pose a risk to people or property. He should then inspect such trees and identify any obvious defects in the trees. if the landowner does not have sufficient knowledge of trees to enable him to identify such obvious defects, he should engage someone who has. Having identified a defect, the landowner (if sufficiently knowledgeable), or someone with appropriate knowledge and expertise, should assess the risk posed by the defect and take appropriate action, which might mean further monitoring of the defect, pruning of the tree or felling (see chapter 4). A number of commonly encountered obvious defects are illustrated in figure 3 in chapter 4 general features to look out for when assessing a tree.

The Occupiers' Liability Act 1957

The occupiers' Liability act 1957 provides for the liability of an occupier of land when an accident occurs on the land to a person who is a "visitor" to the land (for Scotland see the occupiers' Liability (Scotland) act 1960, for northern Ireland see the occupiers' Liability act (northern Ireland) 1957). the occupier owes a duty to the visitor to "take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he/she is invited or permitted by the occupier to be there"[12]. The duty of care under the act is effectively the same as that at common law in respect of the torts of negligence or nuisance.

A person visiting land by virtue of the national Parks and access to the countryside act 1949, the countryside and rights of Way act 2000 (CRoWA) or the marine and coastal access act 2009 is not classed as a "visitor" within the meaning of OLA 1957[13]. The person cannot, therefore, bring a claim under the OLA 1957. However, he/she may still potentially bring a claim in negligence or, if appropriate, under OLA 1984.

The Occupiers' Liability Act 1984

The occupiers' Liability act 1984 provides for an occupier's liability to people other than visitors, in particular trespassers, in circumstances where the occupier knows of the potential presence of such people on their land and of the risk posed to them by features of the land such as trees, and the risk is one against which, in all the circumstances, the occupier may reasonably be expected to offer them some protection. For Northern Ireland see the occupiers' Liability (Northern Ireland) order 1987.

The duty under section 1 of the act to a person on "access land" in the exercise of a right to roam conferred by section 2(1) of CRoWA 2000 will be determined having regard to the fact that the existence of the right ought not to place an undue burden upon the occupier, and having regard to the importance of maintaining the character of the countryside[14]. The duty under OLA 1984 is also limited in that no duty will arise in respect of risks resulting from any natural feature of the landscape (which will include a tree), nor from any river, stream, ditch or pond[15], providing that the occupier does not intentionally or recklessly create the risk[16].

Warning Notice

A warning notice that warns of a specific danger posed by a tree (or trees) may be sufficient to absolve an occupier from liability in that they may, by such notice, have taken all reasonable care for the visitor's safety in the circumstances[17]. However, in general, a landowner should not rely upon warning signs alone to protect against a danger. a business occupier cannot by reference to any contract term, or to a notice, exclude or restrict his liability for death or personal injury resulting from negligence or a breach of duty under OLA 1957[18], save where the access to the land is given for educational or recreational purposes (unconnected with the purpose of the business)[19].

The Compensation Act

Section 1 of the compensation act 2006 provides that:

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

The term "a desirable activity" is not defined by the act and is likely to be construed so as to give a wide meaning to the term. it is likely, therefore, that it includes an activity such as the growing of trees. While the act reinforces the importance of being able to balance the amenity, health, and other intrinsic biodiversity values of trees against the risk posed by a tree, it is doubtful whether it will materially alter the courts' approach to claims arising from falling trees. The act applies only to civil claims and not to criminal prosecutions.

The criminal law

the Health and safety at Work etc. act 1974 places a duty on employers to ensure, so far as is reasonably practicable, that in the course of conducting their undertaking, employees and members of the public are not put at risk (sections 2(1) and 3(1) respectively, see also section 3(2) in respect of self-employed persons). The acts of felling or lopping a tree clearly fall within the scope of this duty. it is also likely that the growing and management of trees on land falls within the scope of the duty if such operations fall within the employer's undertaking. the duty is subject to the words "so far as is reasonably practicable". This proviso requires an employer to address the practical and proportionate precautions which can be taken to reduce a risk. The courts have generally been unwilling to take into account environmental or aesthetic values when considering whether a step is reasonably practicable, confining the consideration to whether a precautionary step can "practically" be undertaken[20]. Nevertheless, in *HSE v North Yorkshire County Council* (20.5.10) Wilkie J., when directing the jury as to the meaning of "reasonably practicable", identified as a material consideration "the benefits of conducting the activity".

He said (NTSG emphasis):
"Now, in this context what does 'reasonably practicable' mean? Well, as you have been told correctly, it is a narrower concept than what is physically possible. It requires a computation to be made by the employer in which the amount of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk, whether in terms of money, time or troubles, or the benefits of conducting the activity, are placed in the other. If there is a gross disproportion between them where the risk to health and safety is insignificant in relation to the sacrifice and/or loss of benefit involved in averting that risk then the defendant discharges the onus upon him and is entitled to be acquitted, but if the defendant does not persuade you of that on the balance of probabilities then you would convict."

The management of Health and safety at Work regulations 1999 require employers, and self-employed persons, by regulation 3 to "make a suitable and sufficient assessment of the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking". This requires an employer, and a self-employed person, to undertake a risk assessment of the tree stock on the land which forms part of the undertaking.
Breach of the duty under the act, or the regulations derived from the act, can give rise to a criminal prosecution against the employer. Enforcement of the act is vested in the HSE and, in some instances, local authorities. The HSE has provided guidance for its inspectors and local authority enforcement officers in connection with the inspection of trees in the sector information minute *Management of the risk from falling trees* (HSE 2007)21.
The responsibilities under criminal law primarily arise in respect of employers, self-employed persons and those who control a business undertaking. However, responsibilities under criminal law can also, in exceptional circumstances, arise in respect of manslaughter by corporate undertakings or individuals, leading to a police investigation and possible prosecution (see the Work related Death Protocol 2003). There has been no prosecution for manslaughter in respect of falling trees.

High Hedges

Anti-Social Behaviour Act 2003: Part 8 in 2005

This is a summary of what constitutes a high hedge under the law:

- The hedge is **more than 2m** (approx. 6½ft) tall (there is extra guidance for hedge heights on slopes)
- A hedge is defined as a **line of two or more trees or shrubs**
- The hedge is formed wholly or predominantly of **evergreens** (these don't lose their leaves in winter) or **semi-evergreen** ones (that stay green most of the year)
- Bamboo and ivy are not included
- Where a hedge is predominantly evergreen, the deciduous trees and shrubs within the hedge may be included in the work specified. However, a council can exclude specific trees or require different work

Making a Complaint

The high hedges legislation has been designed so that the general public is able to use it without the need to involve lawyers. This would be a simple sequence of events:

- Where you feel that a hedge is too tall and affects the 'reasonable' enjoyment of your house or garden, **the first step is to negotiate with your neighbours.** Keep a copy of any letters to demonstrate you have tried. If negotiation is unsuccessful, **contact your local council to enquiry about using the high hedges legislation.** There is a fee for making a complaint (typically £400) to deter frivolous applications
- The local council will **consider both sides'** cases and make a decision
- The council will reject the complaint or **issue a notice** for the work – including the period in which to cut the hedge back and by how much
- There is a chance to appeal
- It is advisable for the hedge to be cut below the requested height. This will allow the hedge to grow in between trimmings, but still remain below the stipulated height

For more information on the complaints procedure, see the Communities and Local Government website: guidance on high hedges legislation.

How much hedge shall be cut back?

Although the law states that a high hedge is more than 2m (approx. 6½ft) tall, this is not necessarily the height to which a hedge is reduced. The final height will be decided by your local council based on the requirements and information provided by the complainant and hedge owner. For example, the following issues can be taken into consideration:

- The hedge **blocks too much light** to a neighbour's house or garden. However, the legislation does not guarantee access to uninterrupted light
- The hedge is **on a slope**, so is more overbearing
- The **hedge blocks a view**. This is a valid complaint but, by itself, is unlikely to be enough to justify action

There are guidelines (not mandatory) in the government's *Hedge height and light loss*.

References

1. For a more extensive analysis of the law relating to trees see *The Law of Trees, Forests and Hedgerows* by charles mynors, sweet & maxwell (2002), second edition to be published autumn 2011.
2. *Caminer v Northern & London Investment Trust Limited* [1951] ac 88.
3. *Chapman v Barking and Dagenham LBC* [1997] 2 egLr 141.
4. [1996] ac 923.
5. *Caminer v Northern & London Investment Trust Limited* [1951] ac 88 at 100.
6. *Noble v Harrison* [1926] 2 kB 332; *Shirvell v Hackwood Estates* [1938] 2 all er 1; *Cunliffe v Bankes* [1945] 1 all er 459; *Brown v Harrison* (1947) 63 tLr 484; *Lambourn v London Brick Co Ltd* (1950) eg 28th July 1950; *Lane v Trustees of the Tredegar Estate* [1954] egD 216; *Quinn v Scott* [1965] 1 WLr 1004; *Knight v Hext* [1980] 1 egLr 111; *Chapman v London Borough of Barking & Dagenham CA*, unreported 13th July 1998 (1st instance [1997] 2 egLr 141); *Poll v Viscount Asquith of Morley* 11th may 2006; *Corker v Wilson* 10th november 2006; *Atkins v Sir James Scott* 14th august 2008; *Selwyn-Smith v Gompels* 22nd December 2009.
7. *Chapman v London Borough of Barking CA* 13th July 1998.
8. *Quinn v Scott* [1965] 1 WLr 1004.
9. *Poll v Viscount Asquith of Morley* 11th may 2006; *Atkins v Sir James Scott* 14th august 2008.
10. *Caminer v Northern & London Investment Trust Limited* [1951] ac 88.
11. *Corker v Wilson* 10th november 2006; *Selwyn-Smith v Gompels* 22nd December 2009.
12. see also the occupiers' Liability (scotland) act 1960.
13. s. 1(4) occupiers' Liability act 1957.
14. s. 1a occupiers' Liability act 1984.
15. s. 1(6a) of the occupiers' Liability act 1984.
16. s. 1(6c) of the occupiers' Liability act 1984.
17. s. 2(4) occupiers' Liability act 1957.
18. s. 2(1) Unfair contract terms act 1977.
19. s. 1(3) Unfair contract terms act 1977.
20. *Hampstead Heath Winter Swimming Club v The Corporation of London* [2005] eWHc 713 (admin) para. 65 (contrast s. 1 of the compensation act 2006 in respect of civil claims).
21. Health and safety executive (2007). *Management of the risk from falling trees*. HSE sector information minute, sim 01/2007/05. (Guidance for HSE inspectors and local authority enforcement officers).