Case Comment

Cavanagh v Witley Parish Council
(QBD, Sir Alistair MacDuff, 14 February 2017, Unreported)

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Subject: Personal injury . **Other related subjects:** Local government. Negligence.
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Case:
Cavanagh v Witley Parish Council (QBD)

J.P.I.L. C159 On 3 January 2012, Andrew Cavanagh was driving a single-deck bus along the A283 Petworth Road in Witley, Surrey. Suddenly a large lime tree fell across a road and onto the bus. Miraculously Mr Cavanagh escaped with his life. He was seriously injured and was in intensive care for 13 days after the accident. He sought damages for the personal injuries and consequential loss suffered alleging that the accident was caused by the negligence of the defendants.***J.P.I.L. C160***

The land was owned by the first defendant, Witley Parish Council. Tree inspections were carried out every three years. The second defendant was tree surgeon Kevin Shepherd.[1] Shepherd had been instructed by the council in 2006 and 2009 to inspect and report on the condition of the trees. The roots of the tree in question were extensively decayed.

The claimant asserted that the decay would have been detected by a competent arboriculturist at any time during the preceding four to five years. He claimed that the council had been negligent in employing Shepherd because he did not have the appropriate qualifications or expertise, and they had failed to ensure that he had adequate insurance cover.

The council denied liability and argued that a three-year inspection cycle was reasonable, and that it had relied on Shepherd's inspection and report which expressly stated that "no works" were required to the tree. Shepherd initially confirmed that the tree had been inspected in 2009, but later stated that he had not inspected it in 2009, as no maps of the particular area had been provided, despite repeated requests. He said that "no works" referred to trees which had not been inspected. Expert evidence confirmed that the fungal disease was just beginning to form in late summer 2009.

At trial, there were three issues:

1)
whether Shepherd had inspected the tree in 2009;
2)
whether the council had been negligent in instructing Shepherd; and
3)
whether a three-year inspection cycle was adequate, or whether a two-year or shorter inspection regime should have been adopted.

Sir Alistair MacDuff noted that Shepherd had insurance, but confirmed that it did not protect him from liability for such an accident. When the claim was first made, he notified his insurers and told the council's solicitors that he had inspected the tree in 2009 and that there had been no sign of disease. His solicitors subsequently notified the council's solicitors that the inspection had taken place "sometime in July/August 2009". It was not until Shepherd's insurers declined cover that he denied having inspected the tree. His evidence regarding the lack of maps and his requests for them was rejected.

The judge held that Shepherd had inspected the tree in 2009. When he knew that it had fallen because of root decay, he made the reasonable assumption that he had missed the fungal disease. He might have remembered that he had only given the tree a cursory examination, and expected to be found to have been negligent. He was not to know that, according to the expert evidence, the disease would not have been detected in the autumn of 2009. He therefore lied in an attempt to escape liability. If he had been insured, he would have continued to accept that the tree came within his survey and that the words "no works" meant, as might reasonably be thought, that no works were needed.

On the issue of whether the council had been negligent in instructing Shepherd the judge concluded that it was irrelevant. Given the finding regarding the age of the disease, the

question as to whether the council was negligent in instructing Shepherd was academic. In any event, such negligence, if proved, would not have been causative of the accident.
The key question was whether the council was negligent in adopting its three-yearly inspection policy. The tree was alongside a relatively busy public road and in a high-risk position. The judge held that it required regular inspection, more frequently than every three years. Applying simple negligence principles, taking account of the risk of failure together with the risk of serious damage, the tree should have been inspected at least every two years.
The judge went on to hold that an 18-month inspection cycle, when trees were in and out of leaf, would have been reasonable. The Forestry Commission Practice Guide supported that finding. It was significant that, prior to the accident, that was the advice being given to the council by arboriculturists, including Shepherd. ***J.P.I.L. C161***
The vast majority of trees in the parish were not along the roadside, or were not of a size and weight where they would cause severe injury or damage if they fell. The council's resources were finite, but it had not been suggested that the inspection policy had been influenced by a lack of funds. Recently instituted zoning policy enabled council resources to be channelled to a more frequent inspection of some trees, with savings made in making fewer inspections in zones where there was little or no risk. That was held to be a more sensible and economic policy.
Judgment was entered for claimant against the first defendant. The claim against the second defendant was dismissed.

Comment

Perhaps unsurprisingly, trees are a fruitful source of litigation. They are omnipresent and frequently the cause of accidents, yet the standards of care owed by owners of trees and contractors working on them are variable and very fact specific. In addition, the circumstances of and reasons for tree failures are infinitely variable. Whilst the present case determined no point of legal principle, the judgment may be said to have importance in setting the standard occupiers (or those otherwise responsible for trees) should meet in relation to the frequency with which they inspect trees which are in high-risk locations. The duty owed must inevitably be a matter of fact and degree in each case, but Sir Alastair McDuff determined that the guiding principles were as follows:
"Where a tree (or group of trees) is within an area (one may say high-risk area but the language is unimportant) where people or high value property are within their falling distance, inspection is necessary. If it can be reasonably foreseen that there is a risk of serious injury/damage a duty arises to minimise that risk; this is particularly the case alongside a public road, more so if it is busy and more so if the relevant tree(s) is/are large or old. It is known that trees (particularly older trees) can become disease and unstable within a short time frame."
He then held that the tree in question was in a high-risk area and should have been inspected more frequently than every three years. Inspection should have been at least every two years. There was no suggestion that a different or higher standard was being imposed because the tree was owned by a public body, but such reasoning has applied in other highway tree cases where a higher standard of inspection has been required of corporate owners.[2] In an ideal world the liability to an innocent motorist hit by a tree ought not to depend upon the status of the tree's owner so much as where the tree was located and what state it was in, but that is not the law. However, this case ought to sound a warning even to owners of ordinary domestic properties who may have trees which could cause injury or serious damage if they fell.[3]
Whilst this case does not set a legal precedent, it is hard to see why the minimum of two-yearly inspections (founded on the judge's review of the published guidance and expert evidence) should not apply to any civil action relating to trees in high-risk areas. Of note, however, it was found by the judge that the council had not followed the advice of its own expert, tree consultant Mr Shepherd, who had recommended two-yearly inspections. This is important because a reasonable occupier in the council's position would probably have satisfied its duty of care if it had acted on expert advice. This is likely to have been so even if the advice was wrong unless the owner ought reasonably to know it is wrong. Whether and to what extent an ordinary domestic owner of trees would be expected to engage an expert is another matter. ***J.P.I.L. C162*** [4]

Practice points

- Arboricultural experts are likely to be required in most cases of serious injury arising from failed trees.
- Ensure experts are instructed and carry out site visits promptly and that evidence is preserved. The tree in this case failed due to severe decay evidenced by a fungal bracket, but only one of the three experts actually assessed the fungus before it was destroyed. His evidence carried the day.
- The standard of care owed by landowners in respect of trees is very site specific. Not all trees in a wood will have the same inspection intervals, and landowners will act reasonably if they follow expert advice.
- Landowners must ensure that the expert they obtain advice from is suitably qualified, experienced and insured.

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J.P.I. Law 2017, 3, C159-C162

1.
Trading as Shepherd Tree Surgeons and Forestry Contractors.
2.
See *Stagecoach South Western Trains Ltd v Hind [2014] EWHC 1891 (TCC); [2014] 3 E.G.L.R. 59*, and an appeal from another decision of McDuff J (as he then was) in *Micklewright v Surrey CC [2011] EWCA Civ 922*.
3.
Though for ordinary individual landowners the standard of inspection required may not be high; see *Caminer v London & Northern Investment Trust Ltd [1951] A.C. 88 HL*, and *Stagecoach South Western Trains Ltd v Hind [2014] EWHC 1891 (TCC); [2014] 3 E.G.L.R. 59*.
4.
See *Stagecoach South Western Trains Ltd v Hind [2014] EWHC 1891 (TCC); [2014] 3 E.G.L.R. 59*.