

## TEP NOTE

### Cavanagh v Witley Parish Council Appeal Court judgement

A recent Court of Appeal judgement found a defendant local authority liable for a tree that fell onto the highway and collided with a bus. As with all such judgements, it rests on the facts of the case. However, in TEP's experience, the characteristics of the tree, its setting and the approach taken to its management are far from unique. The case turned on the matter of tree inspection; it therefore has potential relevance to all tree owners and managers. This note summarises the circumstances surrounding the judgement and TEP's advice to our clients.

#### The facts

In January 2012, after a stormy night, a mature lime owned and managed by Witley Parish Council fell onto the adjoining A-road. The tree collided with a bus being driven by the claimant and he was injured. The tree also caused damage to a dwelling on the opposite side of the road. The tree was subject to regular inspection every three years by a tree surgeon appointed by the local authority. It had last been inspected in 2009 whereupon no defects were observed. The cause of the fall was subsequently found to be decay that was purported to have begun to develop after the 2009 inspection, such that it was not discovered. The high wind was the trigger for the failure.

#### Decision of the trial judge and Court of Appeal

The claimant succeeded. The judge accepted the evidence of the claimant's tree expert, who stated that the tree was in a high risk position, next to a main road and in a very busy area. It was also a large tree therefore, given its size, location and potential to cause very serious harm, it should have been inspected no less than every two years and that this more frequent regime would have identified the decay and prevented the accident.

The defendant appealed. The thrust of the appeal was that it had been accepted by the experts and the trial judge that whilst the tree was in a high risk position, it was not in itself a high risk tree by reference to any recognised or published criteria. Indeed, a tree would only generally be deemed to be high risk if it had been identified as unhealthy and this was not the case.

The appeal was unanimously dismissed. The judge had made findings of fact that were open to him on the evidence. In particular, his conclusion that the size, age, weight and location of the tree, and the likelihood of it causing very severe damage if it fell, meant that it required more regular inspection was "unimpeachable".

## Evaluation of key points

Witley was arguably unfortunate to lose this case at first instance. Having a robust system of inspection carried out by an expert and the absence of signs of ill-health could be considered a strong foundation to any defence. The difficulty on appeal was that the Court had to overturn findings of fact on the nature of the individual tree, which it was unwilling to do. The Court found that this particular tree did require a more rigorous approach.

There has been considerable debate over the Court of Appeal's apparent endorsement of *Forestry Commission Practice Guide (2000) – Hazards from Trees* and its dismissal of the *Health and Safety Executive Sector Information Minutes (SIM) Management of the risk from falling trees or branches*. Despite experts on both sides agreeing that the SIM was a relevant reference for determining the type of inspection required for roadside trees, the judge did not find it useful in determining civil liability, since it was essentially directed to the standard required to avoid prosecution. This was a controversial decision, not least because the SIM has been accepted without question in previous case law.

With reference to a passage in the *Forestry Commission Practice Guide*, the judgement states, *“the force of the point being made in this passage about the need for particular “rigour” in inspecting large trees which are adjacent to a main road and which represent a significant potential hazard”* (para 36). At first reading, this has potentially significant implications for landowners as such a description may apply to significant numbers of trees. Further interpretation of the term ‘rigour’ and where it is particularly required may however provide some comfort. Witley Parish Council is small and the majority of its trees are, according to the first instance judgment, either not along the roadside or are not of a size and weight, whereby they could cause severe injury or damage if they failed. In the words of the trial judge; *“I suspect that there was none that had more potential for causing harm than this lime tree. What was required here was a distinction. If the vast majority of the tree stock had been inspected (as it could well have been) on a much more infrequent basis...a proper and more rigorous system of inspection could have been instigated in respect of the small number of trees which merited special care; trees which were large, heavy, old/mature, and in places where they could cause serious damage.”* It is therefore reasonable to conclude that what is both *reasonable* and *rigorous* may vary according to the particular circumstances of each tree.

Witley failed to heed the earlier advice of two independent specialist who both recommended the lime tree should have been inspected more frequently than every three years. This advice was supported by the judge, who expressed that had this been the case, it is probable that the decay would have been identified and the accident avoided. It is perhaps tempting to infer a benchmark inspection frequency for ‘similar trees’ from this judgement, but it is clear that this would be incorrect. What is reinforced, is the need for expert advice on the methodology for tree risk management as well as competent inspectors.

The facts of the case seem to demonstrate that a mature tree can develop critical decay within a 3 year period, such that the tree became a “high risk tree” in a “high risk location”. This makes two points: firstly, that many trees may be quite properly inspected less frequently than this, and secondly, that any rigorous approach must also deal with the most risky ‘outliers’. There are few agents capable of weakening a tree to the point of collapse within 3 years. It is therefore likely that the onset of decay in the lime tree started prior to inspection in 2016, but that there were no outward signs at that time. However, any system must be capable of capturing the most rapid conceivable decline that could lead to actionable harm.

## Implications for TEP clients

TEP manages thousands of trees using, broadly, two approaches. We are confident that the circumstances encountered by Witley would not arise under either. These are:

- A feature-led approach with more hazardous trees and those capable of causing greater harm being inspected more frequently.
- A fixed survey approach in which trees of whatever age or location are inspected at the same interval but with interventions to reduce risk made at defined thresholds.

Under both approaches, the risk of harm is considered on the basis of three separate criteria: the likelihood that the tree will fail in some way; the possible severity of the outcome if it did; and the likelihood of any vulnerable targets actually being present.

A **feature-led approach** would consistently require large trees close to areas of high sensitivity, irrespective of their Failure Potential, to be inspected more frequently than those in inherently 'less risky' circumstances. In Witley, all trees were treated in the same way, which was insufficient for at least one particular individual.

Within a **fixed survey approach**, surveys may be simpler and more efficient. However, the risk demonstrated in Witley is that the level of 'rigour' which is acceptable for the majority may not be adequate for some individuals. This is addressed by TEP in a number of ways, which may be combined:

- **Land may be zoned.** Where information allows, land and trees are split into defined management zones, which would each have a different inspection frequency. In other words, the same tree would be treated differently in different locations. This may be regarded as a hybrid between the feature-led and fixed survey approaches.
- **A threshold for action may be set.** Results of the survey will, in accordance with a defined assessment matrix, establish whether the fixed survey cycle (the time until the next survey) is adequate for the individual tree. If it is not, the surveyor would specify an intervention to reduce the risk, rather than resurvey sooner.
- **Early inspection may be recommended.** If trees are identified for which inspection prior to the next site-wide survey would be beneficial, this may be prescribed as a one-off intervention. In particular, this would be used where the cost or harm of works required cannot be justified, or where inspection at a certain time of year is desirable.

The incorporation of at least one of these measures into every tree risk assessment undertaken by TEP enables reasonable differentiation between trees of varying risk and in areas of varying sensitivity. This was an absent factor in the Witley tree inspection regime and something that weighed heavily against them in court.

## Advice to tree owners

1. This ruling should not be seen as a radical departure from existing industry guidance and good practice; it is a case on its own facts. It does, however, highlight that zoning is still a material safeguard against the risk to the public, and it reinforces that a one-size-fits-all approach to the management of a tree population may not be legally defensible.
2. It should not be interpreted from this ruling that every mature tree adjacent a main road must be inspected every two years or less. Individual circumstances will require different approaches but all tree risk management should include a means of differentiating between areas of relatively high and low sensitivity, and trees of relatively high and low potential risk. Tree owners should be able to identify their most risky trees and the additional measures in place to manage them appropriately.
3. It is normal for the courts to take into consideration resources and expertise of the landowner. This was only discounted in the case of Witley Parish Council because they applied a blanket 3 year inspection cycle without any mechanism for interim inspection. They also failed to implement the recommendations of their arboricultural advisors. Landowners should seek expert advice and discuss their needs and resources with their advisors.
4. The principle of diminishing returns may influence the nature of any prescribed risk management action. As residual risk diminishes, further reductions will become increasingly costly to implement. Doubling the frequency of surveys will not make a tree population 'twice as safe'. Managers, particularly those allocating public resources, should therefore establish thresholds for action and prioritise areas where the potential risk reductions are greatest.
5. The adoption of a systematic and properly considered re-inspection cycle does not constitute management; it is simply the means towards a system of management that is defensible, rationalised and proportionate. In order to demonstrate reasonable and prudent risk management the recommendations of a competent inspection must be implemented and recorded.
6. Land owners are responsible for ensuring tree risk inspections are carried out at appropriate intervals. This should usually include a formal inspection at a frequency determined by an arboriculturist but may also include ad hoc inspections, not necessarily by trained arboriculturists, by close observation of trees in the course of carrying out other tasks or individual inspections with the sole object of assessing whether there is any defect to be seen.

If you would like to discuss tree risk management with a specialist, please call 01925 844 018 or email [jonathansmith@tep.uk.com](mailto:jonathansmith@tep.uk.com).