

IN THE HIGH COURT OF JUSTICE

Claim No. HQ10X1869

QUEEN'S BENCH DIVISION

BETWEEN:-

(1) HARRY BOWEN

(A child by Mrs Tracy Bowen his mother and Litigation Friend)

(2) MAX FARLEY

(A child by Mr Geoff Farley his father and Litigation Friend)

(3) KATIE FARTHING

(A child by Mrs Joanne Farthing her mother and Litigation Friend)

(4) Mrs Wendy Mullinger

(Mother of DANIEL MULLINGER deceased)

Claimants

-and-

THE NATIONAL TRUST

Defendant

DEFENCE

1. The Defendant adopts the abbreviations in the Particulars of Claim.
2. Paragraph 1 of the Particulars of Claim is admitted.
3. The Defendant can neither admit nor deny and requires the Claimants to prove paragraph 2 of the Particulars of Claim.

4. Save that it is the Defendant's understanding that the children were on their way to rather than approaching the 7th clue; paragraph 3 of the Particulars of Claim is admitted. At the time of the accident the children were beneath the tree taking shelter from a rain squall.

5. As to paragraphs 4 and 5 of the Particulars of Claim:-
 - (1) The tree was approximately 160 – 180 years old and was one of seven (not eight) mature beech trees located in that part of the Great Wood.

 - (2) It is denied that the area around the tree was an obvious focal point for visitors to the Great Wood, particularly children. The tree stood at the confluence of three grass paths but it is denied that the confluence was a glade. The sweet chestnut tree was the site of a rudimentary "den" consisting of a few sticks propped against the tree. The "den" was one of dozens of a similar type spread throughout the woods at Felbrigg. The rudimentary construction and presence in one of the less frequented areas of the Great Wood probably meant that it had never been visited after its original construction.

 - (3) It is admitted that the branch was 21.7 m long, that it fell from a height of about 9 m and that the failed end of the branch measured approximately 1.4m x 0.76 m.

 - (4) It is admitted that the branch fell because of a failure of the union between the branch and its parent stem. It is also admitted that bulges on the sides of the fork (which the Defendant understands to be the "adaptive growth flares" referred to by the Claimants) would have been present for some time and would have been visible from ground level.

 - (5) It is denied that the existence of those bulges constituted clear evidence of weakness of the union or of any significant risk of failure of that union. Such bulges occur frequently on mature and post-mature beech trees and do not, by themselves, constitute evidence that a branch is likely to fall.

 - (6) Otherwise these paragraphs are denied.

6. The tree had been in a low risk zone until 8th February 2006 when it was upgraded to medium risk as a result of the activities of the Aylmerton Field Study Centre. Subject to that caveat; paragraph 6 of the Particulars of Claim is admitted.

7. It is denied that the Defendant or its agents or employees were negligent or in breach of its duties under the Occupiers Liability Act 1957 whether as alleged in paragraph 7 of the Particulars of Claim or at all. Causation is also denied. In particular and by reference to the specific allegations in sub-paragraphs (a) – (o) in paragraph 7 of the Particulars of Claim:-

(1) The tree was inspected competently and adequately by trained employees of the Defendant on both the 2nd January and 22nd January 2007 (following high winds on the 18th January 2007) and it is denied that defects apparent on those inspections should have led a competent inspector to undertake further detailed inspection and/or remedial action.

(2) On the contrary (a) a ground based visual inspection was all that was reasonably required (b) the inspections were carried out properly and (c) they revealed nothing which did or should have warranted a more detailed inspection.

(3) As to the other branch failures:-

(a) A branch fell in the Great Gale of 1987. A huge number of sound or apparently sound branches and trees across the country failed during that gale which was unusually extreme in its strength and power. The Felbrigg estate lost approximately 30 acres of forest cover during that gale together with extensive damage to other trees and buildings. It is denied that the failure of the branch occurred as a consequence of weak fork formation or that the failure evidenced any particular propensity to branch failure on the tree.

(b) It is admitted that the wound left by that failure was prone to decay but it is denied that decay at the wound "*indicated that there was a clear potential for branch failure on the tree*". In the absence of extensive decay in the stem of

the tree there is no clear causal connexion between decay in the wound and potential branch failure elsewhere on the tree.

- (c) A branch fell from the tree about 2-3 years before the accident and was cleared into the adjacent undergrowth. The branch was a minor branch which also failed in windy conditions. The fact that this branch was the first branch on the tree to fail in "ordinary" circumstances would not have led a competent inspector to assume that this tree had a particular or unusual propensity to shed branches.
 - (d) It is admitted that a further branch fell from the tree about 10 days after the accident. This failure is irrelevant to inspections that took place before the accident. Nor does it establish the presence of evidence of likely branch failure. In fact tree experts appointed by both the HSE and the police inspected the tree after the accident and before the fall of the second branch and did not comment or draw attention to the likelihood of the second branch failing despite the fact that one of experts examined the tree from an elevated platform.
 - (e) It is denied that any other branches on the tree observed in October 2007 were at an unusually high risk of branch failure.
 - (f) The mature beech tree on the main drive was a tagged tree which was the subject of regular recorded inspections. The Defendant was well aware that this was a potentially problematic tree. It had been examined for decay with ultrasound and tested with a sounding hammer and it was being monitored for changes. It has been reduced in size since June 2007. The Defendant's inspection and maintenance of this tree does not support evidence of negligent tree management. On the contrary it shows an understanding and application of the balance required between the risk of tree failure and the visual and amenity value of mature trees.
- (4) It is denied that there was an obvious need to shorten the branch which caused the accident. There was no specific evidence that it needed shortening. It is denied

that it extended well beyond the mean profile of the crown of the tree. The branch was contained within the overall canopy of the tree.

- (5) It is denied that the failure to prune out a secondary crossing branch is evidence of an inadequate programme of maintenance. In a formally managed location crossing branches are sometimes pruned for cosmetic reasons or where there is a serious risk of branch failure due to abrasion. It is rarely undertaken in woodland settings unless inspection reveals a particular risk of branch failure which was not present in the tree in question.
- (6) It is denied that the Defendant implemented an inadequate and unsafe policy of risk assessment by adopting a policy of assessing risk according to location rather than by reference to the condition of the tree. This is a fundamental misunderstanding of the Defendant's philosophy and approach. Both the Defendant's 1997 Instruction (Trees and Woodlands Instruction No 1 and its revisions) and its 2007 Instruction (Health and Safety Instruction No. 11 – Tree Safety Management) recognise that the assessment of risk from trees is a combination of two factors: hazard and risk. Risk is a combination of the probability of an adverse event occurring coupled with the severity of the consequences. Risk therefore encompasses both the condition of the tree and its location. This is apparent from both the 1997 and the 2007 Instructions. In fact the contention in sub-paragraph 7 (e) of the Particulars of Claim that risk should be assessed solely on the condition of the tree irrespective of the location and the extent of use is contrary to HSE guidance and industry practice.
- (7) The tree management policy was implemented properly. The allegation to the contrary effect in the sub-paragraph 7 (f) of the Particulars of Claim is vague and unparticularised and is not amenable to a more precise response.
- (8) The zoning of the tree was entirely reasonable. It had been recategorised from "low" to "medium" risk because of the activities of the Aylmerton Field Study Centre. This was proportionate and reasonable. There was no justification for categorising the tree as "high" risk which would have put it in the same category as a tree near a road, building or car park. The area around the tree was not and

did not constitute a congregation point but, in any event, the usage of the area (including usage by field study children) was low.

- (9) The inspection of the tree was undertaken with reasonable thoroughness and frequency having regard to its species, age, location and condition. The Defendant was aware of the fact that mature beech trees are susceptible to limb shedding and that branch failure may occur as a consequence of weak forking but those facts do not justify any more rigorous system of inspection in a woodland area than that implemented by the Defendant in circumstances where there was no particular evidence from ground level inspection that this tree was more likely to suffer branch failure than other trees with similar characteristics.
- (10) The Defendant denies that its tree record system was inadequate. It operated a system by which trees which required particular monitoring were tagged. The dates and results of the inspection of tagged trees were recorded. For all other trees the Defendant operated a system, in common with many other organisations, by which a record was only made of trees with significant defects or which required attention. However at Felbrigg it was also routine procedure to record the dates of inspection of areas of trees in the high and medium risk zones. The system operated by the Defendant was reasonable having regard to the thousands of trees on the Felbrigg estate because it saved valuable time and money so that the Defendant's resources could be allocated in the most effective way for overall tree risk management.
- (11) There was no reason to classify the tree as "hazardous". In fact it is inappropriate to categorise trees as either "hazardous" or "non-hazardous". The hazards associated with trees, together with the corresponding risk of harm, exist on a continuous spectrum. There was no reason to consider that the tree presented an unacceptable risk to members of the public including children.
- (12) The Defendant's tree inspectors were properly trained in tree risk assessment and were aware of the potential significance of bulges/adaptive growth.

(13) It is denied that a system of inspection by in-house/resident tree inspection teams allowed a culture of excessive risk tolerance to develop. The Defendant also denies the implicit assertion that there was a culture of excessive risk tolerance on the Felbrigg estate. In fact the use of in-house tree inspection teams permitted far more tree inspections to be carried out by people with a good knowledge of the trees and the locations than would be possible if external tree inspectors were employed. Moreover the fact that the Defendant's tree inspectors were constantly on the estate meant that tree defects could be detected and monitored by them during normal day to day operations rather than simply during a formal inspection process. In fact if the Defendant had operated a system of external tree inspection then it would have had to do so for all its woodland which would be prohibitively expensive and would or might lead to the necessity to refuse admission to the public to some of those woodland areas.

(14) There was no reason to divert the path away from the tree prior to the accident. This would only have been appropriate if the risk of harm had been assessed as unacceptable which it was not. The mere fact that there was some risk that a branch might fall (as with any tree) would not justify a diversion. If that was the criterion then the public would not be permitted to walk in any of the Defendant's woods.

(15) There was no justification for warnings concerning this tree. If the Defendant had to provide signs warning of the possibility of branch failure on this tree then it would have had to do so for a huge number of other trees on the estate and in all the other woods owned by the Defendant.

(16) The Defendant did take reasonable care for the safety of the children whilst on the estate.

(17) If necessary the Defendant will rely on section 1 of the Compensation Act 2006.

8. In fact this tragic accident was a true accident without fault on the part of anyone. The Defendant's woodland provides an essential amenity for the public but its use carries

risk. Both the Defendant's philosophy and its legal duty required it to strike a reasonable balance between the amenity value of access to its woodland and the risks associated with that access having regard to the resources available to it. In that context there was nothing wrong with the system and quality of tree inspection on the Felbrigg estate and the accident was not the Defendant's fault.

9. As to paragraph 8 of the Particulars of Claim and the Schedules:-

- (1) The Defendant can neither admit nor deny the injury, loss, damage or causation alleged nor the contents or conclusions of the medical reports on which the Claimants rely.
- (2) The Defendant will (if necessary) obtain medical evidence of its own.
- (3) The Defendant can neither admit nor deny the claims advanced in the Schedules without disclosure and expert evidence of its own. Counter-Schedules will be served in due course if necessary. For the present the claims advanced are not admitted.
- (4) The claim for interest on past loss at full rate is denied. The rest of the claim for interest advanced is noted but not admitted.
- (5) Otherwise this paragraph is denied.

10. It is denied that the Claimants are entitled to the relief claimed in the Particulars of Claim or any relief.

STEPHEN WORTHINGTON QC

STATEMENT OF TRUTH

The Defendant believes that the facts stated in this Defence are true.

Name.....

Position.....

Signed.....

Dated this day of September 2010.