



Neutral Citation Number: [2021] EWHC 1589 (QB)

Case No: F90MA204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

The Civil Justice Centre
1, Bridge Street West,
Manchester

Date: 10 June 2021

Before:

His Honour Judge Bird
Sitting as a Judge of this Court

Between:

JOANNA PARKER

Claimant

- and -

THE NATIONAL TRUST

Defendant

Miss Jones QC (instructed by Irwin Mitchell LLP) for the Claimant
Mr Burns QC (instructed by BLM Solicitors) for the Defendant

Hearing dates: 21st, 22nd & 23rd April 2021

Judgment Approved by the court
for handing down

His Honour Judge Bird :

Background

1. Lyme Park (“the Park”) is in the Peak District National Park and close to Disley in Cheshire. It comprises a Mansion House with formal gardens surrounded by a 1400-acre medieval deer park. It attracts over half-a-million visitors a year and is managed by the National Trust (“the Trust”).
2. The Trust is under a duty to “*take such care as in all the circumstances of the case is reasonable*” to see that visitors to the Park are “*reasonably safe*”. The duty arises under the Occupiers’ Liability Act 1957 because the Trust is the occupier of the land.
3. In August 2016 whilst visiting Lyme Park with her husband David, her 3 sons George (who had just turned 10), Henry (aged 7) and Oscar (aged 5), a friend Helen Stanley and Mrs Stanley’s children Chloe, Honor and Evie, Mrs Parker suffered terrible and life changing injuries when she was struck by a substantial branch (“the Branch”) which had fallen from a Horse Chestnut tree (“the Tree”).

The claim

4. Mrs Parker argues that the Trust failed to discharge its duty and that failure caused her injuries. Whether the Trust is liable depends on the reasonableness of the steps it took to keep Mrs Parker safe from the consequences of falling tree branches.
5. The Trust argues that it has discharged its duty by operating a comprehensive and multi-faceted tree safety system. At the heart of that system is a formal system of tree safety inspections set out in the Trust’s “National Tree Safety Management Policy” (“NTSMP”) which sets the frequency and nature of inspections depending on the location of the tree. In addition, the Park closes in times of high wind and there is a system of post-storm damage inspection. The Park has a Ranger team comprising 4 full time and 2 part-time Rangers. The Rangers are responsible for tree inspections and are trained to carry them out. In addition, there are between 60 and 70 park volunteers who, whilst not trained in tree safety management, do patrol the park and report anything of concern.
6. It is agreed that the NTSMP was, in principle, appropriate and that the frequency for inspections of the Tree was appropriate. Mrs Parker’s argument is that in December 2014, when the Tree was due to be inspected, the policy was not followed either because the Tree was not inspected at all or because the inspection was not carried out (by Mr Dunkerley) with the requisite degree of care.

The Tree

7. The Tree was located close to the meeting point of 2 footpaths, one (to Crow Wood) busier than the other. Parts of the Tree might in theory fall on or close to the busier footpath, but large parts of the Tree (including the Branch) would fall away from the

busy footpath and in an area of relatively low usage. The Tree was about 148 years old (give or take 5 years) and was 20 to 21 metres tall. It had a stem diameter of 700 mm measured at a height of 1.5 metres. The Branch fell from a height of about 8 metres and was some 9.5 metres long, leaving behind a stub of around 1 metre. At the point of fracture, it had a circumference of 63 centimetres.

8. The experts instructed in this case have reached agreement in respect of a number of important matters. The agreement allows me to set out an agreed, brief and recent chronology of the life of the Tree:
- a. From about 2012 the Tree was subject to Horse Chestnut Bleeding Canker (“HCBC”), a common disease of the Horse Chestnut.
 - b. The failure of the Branch was the indirect result of the Tree being infected with HCBC.
 - c. The cambium in the Branch is likely to have died over the Winter of 2012/2013.
 - d. The Tree was due to be inspected in December 2014. At that time HCBC was likely to have been present in the Branch and there may have been some staining of the bark.
 - e. In December 2014 symptoms of HCBC may have been present in the stem but if they were present at all they are likely to have been relatively subtle.
 - f. Some weeks or months before the failure of the Branch there had been an initial, partial, fracture which could not be seen from the ground.
 - g. In August 2016, immediately before failure, the top of the Branch was decayed and had lesions to its upper side, but neither the decay nor the lesions would have been visible from ground level at that time or before.
 - h. In August 2016 there was exposed sapwood on a root buttress, but it presented no threat to the structural integrity of the Tree.
 - i. By October 2017 the Tree was showing significant signs of HCBC.
 - j. The Tree was inspected on 12 December 2017. It showed signs of Honey Fungus at the site of an old wound. No remedial action was recommended.
 - k. The Tree was felled in August 2019. It is agreed that there was no pressing need to fell the Tree.
9. The effects and nature of HCBC are agreed. It is an infection caused by a bacterium *Pseudomonas syringae* pv. *Aesculi*. Initial symptoms include weeping bark lesions exuding a rusty brown or almost black liquid. These lesions and exudates are probably the most common outward symptom and may degrade and disappear a short time after death of the underlying tissues. The infection often affects a particular branch which is then colonised by the bacteria during the spring and summer. Over the next dormant period the infection will kill axial strips of phloem and vascular cambium eventually exposing the xylem. The death of infected tissue can extend downwards resulting in axial lesions and eventually visible cracks in the bark although it may be several years before the bark falls away. Trees infected with HCBC often exhibit premature leaf fall in the Autumn, but foliar symptoms are often limited to particular sections of the tree. Symptoms may appear worse in some years than others and infection does not necessarily signal death or irreversible decline.

Was the Tree inspected in December 2014?

10. I can deal with the factual basis of the first argument (that there was no inspection) relatively shortly. I declined permission to amend the Particulars of Claim after the evidence had concluded to include an express plea that the inspection had not taken place. I concluded that it would be unfair to do so because trial preparations, including disclosure and the preparation of witness statements, had proceeded on the basis of a common understanding that there was an inspection in December 2014. The absence of any pleaded issue meant that there was no disclosure of records which might have shed further light on the point. I accept that it is open to me to consider the issue on the evidence I have heard despite the refusal to allow amendment. However, the context against which I make a finding must include a consideration of the absence of disclosure.
11. It was put to Mr Dunkerley during cross examination that he had not carried out the inspection. He was shown a tree safety management inspection schedule, recording inspections in the years 2014 to 2015, 2015 to 2016 and 2016 to 2107 which omits any reference to an inspection in 2014 to 2015. Mr Dunkerley told me he did not recall inspecting the tree in 2014 (it would have been surprising if he did remember) but told me about his usual practice. He said he had inspected trees in nearby high usage zones and would have carried out the inspection of the Tree at the same time. I accept his evidence. I formed the view that Mr Dunkerley took his job as Head Ranger at Lyme Park seriously and rightly treated it as a responsible job to be undertaken with appropriate professional commitment. To find that he had not carried out the inspection would fly in the face of that conclusion. I should add also that if I had found that there was no inspection, I would still have been required to consider the causative effect of such a failure. That would require me to make findings about the counterfactual position, namely what would have happened if the inspection had taken place. On that basis, the finding is not central to the outcome of the claim.

The main issue in light of my finding

12. Given my finding that an inspection took place, the issue in this case (as it was in *Bowen v The National Trust* [2011] EWHC 1992 (QB) a decision of Mackay J) is whether the Tree inspection was carried out with such care as was reasonable in the circumstances of this tree at this place. The standard of care expected of a tree inspector is the standard of an ordinarily skilled tree inspector (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). If, the tree inspection was conducted in accordance with a practice accepted as proper by a responsible body of arborist opinion, appropriate care was exercised and there was no negligence.

The development of the NTSMP

13. The earliest Trust tree inspection policy drawn to my attention dates from 1997 (it is the same policy dealt with in *Bowen*). It required each Trust estate to be divided into one of three risk zones (high, medium, or low) according to the risk posed by a failure of the tree. Trees in the high zone were to be subjected to a “*rapid but careful search for clear defects*” annually. Trees in the medium zone were to be inspected “*at least every 2 years*” using the same type of inspection and trees in a low zone were to be inspected informally during routine visits to note the general condition of the tree.

14. In 2005 the policy was revised. The description of the search as “*rapid*” was removed, now trees in the high and medium zones required a “*careful search for clear defects*”. Some slight flexibility in the frequency of inspection of medium zone trees was introduced.
15. There was a marked change in approach from 21 May 2007. Health and Safety Instruction no.11 for the first time differentiated between the type of inspection a tree in a high zone and one in a medium zone would undergo. It identified 5 risk zones, very high, high, medium, low and very low. A tree in a medium zone would be subject to a “*careful visual check for obvious defects*” every 3 years (but with a discretion up to 5 years). The frequency of inspection was therefore greatly reduced and the former need for a “*careful search*” was replaced by a “*careful visual check*”. Trees in the high and very high zone were to be subjected to a “*thorough inspection for defects*”.
16. The 2015 policy (which was in place before 2015 and is the relevant policy in place in December 2014) is designed, like its predecessors, to set standards which reflect best current arboricultural practice. It retains the need for medium zone inspection every 3 years (but with a discretion of up to 5) but now requires a “*walk by inspection of every tree looking for obvious defects*”. The shift from a “*careful visual check*” to a “*walk by inspection*” seems to be a further relaxation of inspection standards.

The National Tree Safety Group

17. The 2015 policy was clearly heavily influenced by work carried out by the National Tree Safety Group (“NTSG”) and in particular its report “*common sense risk management of trees*” published in 2011. The NTSG, was formed in 2007 to develop and agree a nationally recognised approach to the management of risks from tree failure. The organisation is headed by the Forestry Commission and comprises a wide range of stakeholders including the Trust.
18. In the section headed “*understanding the risk from trees*” the NTSG report makes the point that the overall risk to human safety from trees is extremely low. That conclusion was based mostly on a study commissioned by the NTSG from the Centre for Decision Analysis and Risk Management at Middlesex University. The study concluded that the risk of death from falling or fallen trees and branches is about one in 10 million per year and the risk of injury serious enough to warrant a visit to hospital is less than one in 1 million (about 55 incidents per year in a population of about 60 million). The figures are lower if incidents caused by high winds are excluded.
19. The Introduction to the NTSG report refers to a:

“pervasive perception in today’s risk averse society that the decisions people may make about the safety of trees on their land could result in an accident with serious legal and financial consequences, not to mention loss of life and injury....the NTSG believes that guidance which assists in setting a standard of action for tree owners, challenging this risk averse approach, would be beneficial. This document is supported by a wide range of stakeholders

involved in the ownership and management of trees. It provides guidance for inspecting and maintaining trees; guidance that is reasonable and proportionate to: the low risk from trees, the benefits of trees, and the health and safety obligations of those responsible trees.”

20. NTSG provides a useful definition of an “obvious defect” as defects:

“likely to be so apparent that most people, whether specialist or not, would recognise them. While obvious defects may include external indications of potential structural failure, they take many forms, not all of which are significant hazards. An obvious risk defect might be a large tree that is clearly braking up over a well-used road. A person doing a safety inspection is on the lookout for obvious defects posing a serious and present risk, particularly where the danger is immediate.”

The application of the NTSMP

21. As far as zoning and frequency are concerned the Tree was assessed to be in a medium usage zone. In fact, the Tree stood in a low use zone, but if it fell was capable of causing damage in a medium use zone. It is accepted that the frequency and nature of inspection was to be based on the medium zone.
22. The NTSMP requires the inspector to identify obvious defects by carrying out a “walk-by” inspection. Any risk posed by the defect must be evaluated and a view taken about the need for remedial or further action. The policy neatly sums up the exercise by noting that an inspector “*can only reasonably identify the obvious defects most likely to lead to injury or damage to people or property*”.
23. Mr Palmer told me, from his practical experience rather than as an expert, that a medium zone inspection might take no more than 20 to 30 seconds and no more than 10 minutes. It was, he told me, realistic to inspect hundreds of trees in a working day.
24. Remedial actions (or risk control measures) are aimed at achieving a balance between the reduction of risk trees pose to visitors on the one hand and avoiding unnecessary removal or disfigurement of trees and conserving habitats on the other. In providing guidance on how to strike the balance, the policy notes that “*old trees are often uniquely valuable as habitat for wildlife, and even if the physical condition of the tree is poor, remedial action should only be necessary where there is a clearly perceptible risk to life or property*”.
25. The NTSMP is of course not written in stone and the frequency of inspection was always left to individual properties. In 2012, when the 2007 policy recommending medium zone inspections every 3 years was in place, Emily Ball who was then charged with making decisions on frequency at the Park opted for different frequencies sometimes requiring annual inspections in low zones and annual or two-year inspections in medium zones. When Mr Dunkerley came to decide on frequency, he stuck more closely to policy recommendations, putting the Tree in the category of 3-year inspections. The claimant raises no issue in respect of Mr Dunkerley’s

application of the policy to zoning.

26. The Trust provides training to its employees on the application of the NTSMP at 2 levels. It is agreed that the level 1 training is appropriate, and it was agreed that Mr Dunkerley was appropriately trained to act as a level 2 inspector. It was also agreed that a level 1 inspector could have competently carried out the inspection and that a level 1 inspector would not have had the training to identify HCBC.

Claimed obvious defects

27. Mrs Parker's case is that when the tree was inspected in December 2014 it suffered from 7 obvious defects which ought to have been identified by the inspector and which ought to have led to further investigation to ascertain whether decay had become extensive enough to weaken the stem and branches and appropriate remedial action taken, namely:

- a. Loose peeling bark with staining.
- b. Root damage.
- c. Extensive cracking in the bark on the Trunk.
- d. Large cavities with staining beneath the cavities.
- e. Numerous long branches poorly attached at points of historic failure which were overhanging the adjacent footpaths.
- f. Exposed, dry sapwood.
- g. Significant resin bleeding in the tree stem.

28. Loose peeling bark with staining, extensive cracking in the bark on the Trunk, exposed, dry sapwood and resin bleeding in the tree stem are all accepted to be signs of HCBC. The experts now agree that root damage was in fact not serious. The non-HCBC related issues are the cavities with staining and the long branches poorly attached at points of historic failure which overhanging the adjacent footpaths.

The evidence

29. I read statements from Mrs Parker, her husband and Mrs Stanley. I heard evidence from Mr Chris Dunkerley, Mr Stuart Palmer, Mr Paul Hanson (the tree expert instructed on behalf of Mrs Parker) and Mr John Ellison (the Tree expert instructed on behalf of the Trust). I read statements from Luke Barley, Hilary Makins, Craig Oliver, and Christine Brain.
30. Mr Dunkerley was unable to recall what the precise condition of the Tree was in December 2014 when he inspected it and there is no contemporaneous record (photographic or otherwise) to indicate the extent to which any of these apparent defects was present. In determining what state the Tree was in in December 2014. I must therefore rely in the main on the evidence of experts to help me to arrive at a conclusion. The experts have the benefit of various photographs taken at around the time of the accident and on 18th August 2016, 13 September 2016, 18 November 2016 by Mr Ellison, the Defendant's expert, and on 30 October 2017 by Mr Hanson the Claimant's expert. Both experts also had the benefit of examining the Tree after it had

been felled in August 2019 and there was a further tree inspection in December 2017.

31. Although Mr Dunkerley did not give evidence as an expert, he was asked to explain what if any remedial action he would have taken if the tree had been in the state shown in photographs at the time of his inspection. He was quite clear, and firm, that no action was warranted. He was taken to his inspection of the tree in 2017. Even then, after the incident, he noted no need for immediate remedial action or further investigation.
32. Mr Hanson gave evidence as the claimant's tree expert. He had been involved in training arborists between 1995 and 1997 before the change in approach to tree safety management reflected in the 2007 NTSMP. Before 2007 the accepted method of tree inspection was broadly the same for trees in a high zone and those in a medium zone (in 1997 a "rapid but careful search for clear defects" was needed. By 2005 that had changed to a "careful search for clear defects"). After 2007 the method depended on the zone the tree was in (a "thorough inspection for defects" in high and very high zones and a "careful visual check for obvious defects" for medium zone trees). By 2015 that had changed to a "formal inspection of every tree for defects" for high and very high zone trees and a "walk by inspection of every tree looking for obvious defects" for medium zone trees.
33. Mr Hanson's evidence was that the inspection of a tree in any zone should be the same. It was suggested to him that that approach did not reflect modern practice as recorded in the NTSMP and in the NTSG document. He denied this. When it was suggested to him that his approach was out-of-step with modern thinking and closer to the now out-of-favour pre-1997 risk-averse approach, he again said that was not right.
34. Whilst Mr Hanson's expertise cannot be doubted it seems to me that these criticisms of his approach are well-founded. A theme of Mr Hanson's evidence was his view that certain features of the Tree ought to have been investigated in 2014 to determine if they presented a "serious and present risk" (in other words to determine if they were "obvious defects"). His evidence was that a reasonably competent inspector could not reach a conclusion without further investigation of a number of the highlighted faults.
35. A clear example of this approach came when Mr Hanson dealt with the long branches "poorly attached at points of historic failure". He accepted that around these branches there are signs of thickening and that the branches must have been like that for many years. He was not suggesting that the branches presented a serious and present risk in the near future but felt that an aerial inspection of the branches to check for internal decay was needed before a decision could be made. A similar point arose with the cavities. Again, Mr Hanson would have called for an aerial inspection of the Tree to check for internal decay.
36. Mr Ellison gave evidence as the Trust's expert. I formed the view that he was very familiar with the post-2007 practice of reduced and different inspections according to the position of a tree. His evidence was given in that context.
37. Mr Ellison accepted, going beyond the joint expert report, that some symptoms of HCBC are likely to have been visible in December 2014 high up in the crown of the tree. He felt that these symptoms were unlikely to have been seen and likely, if seen,

to have been assessed as low risk and so not an obvious defect. He also accepted on cross-examination that signs of HCBC would have been present in other branches but was not sure if those signs would have been apparent.

38. He expressed the firm view that no further inspection of the Tree in December 2014 had been called for. In short, the risk posed by the Tree did not warrant it. In his view, the only defects that would have been identified on a reasonable inspection in December 2014 were cavities in the stem. He felt that they were not structurally significant and was clear that a competent tree inspector would have been able to make a judgment from the ground about the likelihood of internal decay. High levels of structural adaption would mark areas for concern, here there are none. He pointed out that cavities of this kind are very common. For the same reason Mr Ellison was not concerned about the staining beneath the cavities.
39. Any root damage would have been “minor and insignificant”. He told me that he tapped the roots with his tapping hammer in 2016 and concluded (as an analysis of the felled tree proved) that the root buttresses were solid. As to the numerous long branches poorly attached at points of historic failure which overhanging the adjacent footpaths, Mr Ellison felt they would have been there to be seen in December 2014 but did not amount to a significant hazard. Exposed, dry sapwood on the branch that fell would only have been visible from above and so only seen if an aerial inspection was warranted. Mr Ellison was clear that no such inspection was justified and the same would have been true even if the Tree was in a high usage zone.
40. Mr Ellison was criticised for downplaying his past involvement with the Trust in the CV prepared as part of his expert report and for advertising his consultancy services on the basis of (as it was put in cross examination) “keeping costs to a minimum and then providing an escape route” to tree owners who tress caused injury. This, it was suggested, tended to show that Mr Ellison’s approach to his evidence was not objective. It was also suggested to him that he had wrongly approached his evidence on the basis that the Tree was subject to a low zone inspection regime.
41. I do not accept any of those criticisms. I am satisfied that Mr Ellison, who is an experienced expert witness, gave his evidence with care and in accordance with his duty to the Court.
42. On balance I prefer the evidence of Mr Ellison to that of Mr Hanson. The latter’s evidence was in my view based on an overly risk-averse approach which is not in line with modern arboricultural thinking. In my view Mr Ellison’s evidence better expressed the standard of the ordinary skilled tree inspector. I also formed the view that Mr Ellison’s evidence and approach were corroborated by Mr Palmer, who, whilst not giving evidence as an expert is a very experienced arborist. By way of example, Mr Palmer’s evidence was the cavities did not suggest internal decay, he told me that cavities were “*a natural process in the evolution of a tree and not a sign of an immediate hazard.*”

Discussion

43. Against that background I come to consider the key questions:
44. First: what was ‘there to be seen’ by way of obvious defects from a ground level walk-by tree safety inspection carried out in December 2014?
45. It seems to me that there was very little difference between the experts on the state of the Tree in December 2014. I am satisfied there would have been some signs of root buttress damage and that cavities with staining beneath would have been evident. A number of long thin branches attached at points of historic failure would also have been evident. I am satisfied that all signs of HCBC would have been subtle.
46. In light of what was there to be seen, would any reasonable competent tree inspector, undertaking an inspection in December 2014, have heeded the defect(s) alleged, noting the threshold for obvious defects, and required work to be done to the tree or further inspection?
47. In my judgment, for the reasons given by Mr Ellison in his evidence, a reasonably competent tree inspector conducting an appropriate inspection of the Tree in December 2014 would, on the balance of probabilities, not have identified any obvious defect or required any further investigative work (such as an aerial survey).
48. To come to any other conclusion would require me to impose a standard of care on Mr Dunkerley above and beyond that accepted as appropriate by arborists. The standard of care set by Mr Hanson is in my judgment inappropriately high and out of step with modern tree safety thinking. I think it likely that if Mr Hanson’s approach were adopted by the Trust the process of safety inspection would become unworkable as too time consuming and too expensive.
49. In the circumstances I need not consider causation. In my view the only route to establishing liability in this case, in light of the expert evidence, would have been for me to find that an aerial inspection was required in December 2014 to allow Mr Dunkerley to form an opinion about the seriousness of defects. In my judgment that finding is simply not open to me. The condition of the Tree in 2014 did not warrant any further investigation. In addition to the points I have raised, I note that even in 2017 (although I accept that by then the Branch had fallen) there was no recommendation for aerial investigation even though, by then it was absolutely clear that the Tree was suffering from HCBC and the cavities and long jutting branches would have been in no better state than they were in 2014. Further, I note that when the Tree was felled in 2019 the experts agree that there was no real justification for the decision.

Conclusion

50. The conclusion then to which I am forced is that, on the balance of probabilities, the Defendant (as the body vicariously responsible for Mr Dunkerley’s conduct as a tree inspector) properly discharged its duty to take reasonable steps to ensure that Mrs Parker was reasonably safe when visiting the Park. It did so through a sensible and properly implemented policy of tree safety management which included not only inspections but the shutting of the Park in high winds and informal tree inspections.

In those circumstances I regret to conclude that the serious injuries suffered by Mrs Parker were the product of a tragic accident rather than the product of the Trust's negligence. For those reasons I must dismiss the claim.