

When the bough breaks...

30 November 2021

Force majeure or Third Party negligence? How to identify a recovery



When trees fail, they have the potential to cause significant damage and disruption to property and businesses.

We often see trees fail during strong winds. Whilst there will always be exceptions, it is unlikely that a healthy tree will fall due to strong winds alone. Invariably, the weather conditions are simply a catalyst for the failure of trees that are suffering from damage, disease or decay.

Alternatively, the structure of the tree may have become compromised by nearby groundworks, landscaping or drainage, rendering it vulnerable to adverse conditions.

If it can be shown that the ill health and/or compromised structure of the tree was the material cause of the failure, without which the tree would not have failed, there is the potential for recovery. This will be a

matter for expert evidence. For there to be a potential recovery (1) the risk has to be evident to a tree owner and (2) the tree owner has to have failed to take reasonable action to prevent damage.

"If there is a danger which...the ordinary layman can see with his own eyes, if he chooses to use them, and he fails to do so, with the result that injury is inflicted...the owner is in those circumstances responsible, because in the management of his property he had not acted as a normal reasonable landowner would act"

Brown v Harrison [1947] 177 LT 281

Was the risk evident?

Damage, disease, decay or vulnerability (a defect) of the tree must be reasonably discoverable.

Often, disease or decay will manifest with fungal fruiting bodies on the exterior of the tree. Alternatively, damage may be more literal, with evidence of broken or cracked branches, a significant lean of the trunk or discolouration of or absence of leaves on the tree. Where there is evidence, photographic or otherwise of a defect, then one might reasonably conclude that a danger was evident to the tree owner and a liability may attach.

Has the tree owner acted reasonably?

In order for liability to attach, the tree owner must have failed to act as a reasonable and prudent landowner.

The obligation is 'to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property'.¹

A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis. Anecdotal evidence suggests that this could be a visual inspection from the ground every two years.²

The resources available to the landowner will be taken into consideration in determining the potential breach of duty. If the potential Third Party is a large landowner, local authority or commercial entity, they will invariably be imputed with a greater knowledge of the risks posed by trees and the standard of maintenance required in order to satisfy the duty of care will be greater. When identifying a potential recovery action, the status of the landowner should be considered.

Case Example: Micklewright v Surrey CC [2011] EWCA Civ 922:

The tree had extensive internal decay, but no external signs were visible. The tree owner had not implemented any inspection or maintenance regime for the tree. It was found that the tree owner (a Local Authority) was not liable because even if an inspection regime had been in place it would not have revealed the tree's condition and would have been unlikely to prompt the appointment of an arboriculturalist (though it was accepted an arboriculturalist would have diagnosed the condition).

In the above case example, the tree owner escaped legal liability because the defect was not reasonably discoverable even if they had inspected. However, a landowner may be found in breach of their duty of care, if they ought to have observed signs of ill health and failed to engage a suitably qualified arboriculturalist to advise on necessary maintenance works. If a third party has previously notified the tree owner of concerns, the prospects of recovery will be increased.

High risk locations

"as a first step in tree risk management, the trees' location in the context of levels of use is key to understanding what risks, if any, may be associated with them"

National Tree Safety Group, Common sense risk management of trees

The location of the tree and its potential to cause damage as a result increases the standard of care required of the tree owner, for example more frequent inspections may be required. Public highways, amenities and areas of high footfall will represent high risk locations and where the tree is situated within one of these areas, there may be an increased likelihood of legal liability, and potential recovery.

Conclusions

- Tree owners owe a duty to act as a reasonable and prudent landowner.
- A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis, typically every two years or more frequently if a high risk location.
- Where preliminary/informal inspections or observations have revealed a potential problem, the tree owner should arrange for a further inspection by an arboriculturalist and complete any recommended maintenance.

Is there a potential recovery?

- Was the tree demonstrating visible signs of deterioration?
- Had there been any groundworks or re-landscaping in the immediate vicinity of the tree?
- Had the insured notified the tree owner previously of concerns regarding the tree?
- Was the tree owner a local authority, commercial entity or large landowner owing a higher standard of care?
- Where was the tree located? Could it be deemed a high-risk location?

Notes

1. *Leakey v National Trust* [1980] 1 QB 485
2. *Micklewright v Surrey County Council* [2011] EWCA Civ 922; *Witley Parish Council v Andrew Cavanagh* [2018] EWCA Civ 2232

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If you have any questions in relation to the legal considerations of fallen trees, or tree damage more generally, please feel free to contact Ally Yeandle or Andrew Roper.

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