QTRA and the Poll Case

I have remained silent on this matter on the forum, but I assure all of you I did take the matter up with Mike Ellison off forum. I have watched the forum and read the postings related to the Poll Case subsequent to ME's posting of 31 August 2007, and now respond in an attempt to set the record straight. Before going into detail however, there are a number of things I need to point out, as follows:

First, both Jeremy Barrell (JB) and I are Consultants of long standing. We are both accredited and checked Expert Witnesses and when preparing Expert Reports and giving evidence in Court, we are bound by Part 35 of the Civil Procedures Rules, i.e. to be completely independent at all times. Our duty is to the Court, not to the parties that instruct us and we swear on Oath or attest that we understand that duty and comply with it. This is germane to points made later in this response.

Second, neither Jeremy nor I are technicians / surveying Arborists. We employ others to do that on our behalf. We are not therefore day to day surveyors and with reference to the Joint Statement that we prepared (www.aie.org.uk) we would be classified as Level 3, not Level 2, as we both exceed that level. We are Consultants and a Consultant is defined as *"A person who provides expert advice in a professional capacity"* (OED).

Turning now to the issue that so concerns ME, i.e. that of QTRA and the Poll Case, I refer you all to the papers of the case **all** of which are now available on www.aie.uk.org that Chris Skellern kindly posted for JB and I, and which ME refrained from posting on the QTRA website. You need to read both Expert Reports. Here you will find that following separate site inspections and separate assessments of the papers both JB and I concluded that the subject tree with both included union and the fungus present was 'high risk'. We independently arrived at that conclusion without recourse to any system of assessment, i.e. M&C, THREATS or QTRA etc. We concluded that an Ash tree with an included union at the base and a decay fungus present adjacent a road, posed a high risk of failure and threatened users of the road. Similarly we both concluded that the tree with only the included union present posed a medium risk of failure and a lower threat to the users of the highway. And I repeat, for the avoidance of doubt, we arrived at these conclusions without the use of any system. Both reports were submitted and exchanged between the parties' legal teams.

As is normal in these situations, the Court directed us to produce a Joint Statement of Experts setting out for the Court the facts upon which we agreed and those upon which we disagreed with reasons for disagreement. We did, this and we agreed that the tree with the fungus present was 'high risk' and without the fungus it was 'medium risk' without the use of any system of assessment but simply based on experience and common sense.

Both Reports and the Joint Statement formed the basis of Judge McDuff's decision. He only referred to M&C and QTRA in passing. At no time during examinations in Chief, Cross Examinations, Re-Examinations or questions from the Judge, was QTRA referred to. No questions were asked about it or M&C in relation to the risk the tree posed. Therefore, this formed no part of Judge McDuff's deliberations he simply referred to both systems in passing as being 'rough & ready'. He therefore, put them aside and decided the case based on the reports, joint statements and oral evidence. I repeat here, for the avoidance of doubt, that JB and I had drawn our conclusions about the tree without the use of any system.

The above sets out the facts of what happened. In no way, shape or form did QTRA or M&C influence the outcome of the trial.

I would also point out an extremely relevant fact. The judgment was that of a High Court Judge and there were no grounds for appeal. Despite an attempt by a QTRA person to advise that an appeal be made on the grounds that QTRA was misrepresented and thus a miscarriage of justice occurred, solicitors and a QC acting for Bartholomew decided that there were in fact no grounds for appeal. Thus the judgment stands and cannot be challenged. Not even Her Majesty the Queen can alter that, nor can the Right Honourable Gordon Brown challenge this decision. It is there and that is that.

I turn now to the allegations that ME has made in his posting of 31 August 2007. He is primarily concerned as I see it with the following:

1. That QTRA was misrepresented;
2. That QTRA calculations were incorrect;
3. That both 1 & 2 above influenced the decision.

I deal with each of these in turn.

1. It is conceded that the way the levels of risk within QTRA were set out in the Questions document did not comply with that set out in QTRA. As I understand it within QTRA one has an acceptable risk of harm or an unacceptable level of risk. Where the level of risk is unacceptable one needs to do something about it. What JB and I attempted to do was to break down or refine somewhat the unacceptable level to provide a gradation from very high/certain up to the 1/10,000 acceptable level. Our reasoning was as follows, if a tree manager, with limited resources at his/her disposal has a tree(s) with a RoH of 1/500 say and others with RoH of 1/5,000 and 1/9,500 then s/he would rightly be more concerned about the 1/500 than about the 1/5,000 and more concerned about these that those at 1/9,500 particularly when there are limited resources available. I have no problem with such gradation and see it as a natural way of using QTRA. However, forensically it can be argued that QTRA was not set out correctly in respect of levels of risk of harm, but the questions that then arise are, ***(i)*** was the misrepresentation deleterious to QTRA? ***(ii)*** was it done blatantly to misinform and misdirect the Court such that a miscarriage of justice resulted? ***(iii)*** has QTRA suffered injury or loss as a result? The answer to all three questions is no!

2. It is conceded that there will at times be differences between the calculations of different inspectors. I am also prepared to debate the calculations with ME or anyone else. However, I point out forcefully that the calculations that both JB and I agreed upon for both M&C and QTRA were prepared by way of example of how the systems work. They were **not** presented as a final and/or crucial piece of evidence in respect of the subject Ash tree. I remind you all that both JB & I had reached our own conclusions as to the risk the tree posed **without** the use of any system of assessment but based on experience and those conclusions were reached some years before QTRA was even published. The calculations merely served to illustrate how both systems worked as examples. Nothing in the case turned on these calculations.

3. It is clear from the preceding paragraphs and from the Judgment that QTRA played no part in the Judge's decision. Please refer to the Judgment and see what the Judge states to be the determinative factor in his thinking. It was not QTRA or M&C or any system. It was based on what in his opinion a proper Level 2 Assessment would have found.

I turn now to the issue of ME's statement is his posting of 31 August 2007 in which he says that both JB and I misinformed and misdirected the Court. I also refer you all back to the second paragraph of this response, i.e. that JB and I are Consultants/Experts bound by Part 35 of the Civil Procedures Rules.

There is a technical term for what ME says in his posting and that is **'PERJURY'**. In phrasing the posting as he did, he implies that JB and I deliberately misinformed the Court, in other words we committed perjury. That is the clear an unequivocal implication that is taken from the posting. I know it is, despite ME's rather rushed attempt at a retraction / clarification two hours after his first posting, because others have taken that meaning from it. A number of contributors to the QTRA forum have said as much and I have received a number of emails off forum expressing concern at the implication in ME's posting. I will refrain from naming the contributors to the forum who have repeated the allegation, they know who they are. This is a serious allegation and one not worthy of any Professional and I would ask all members of the forum to reflect upon this and to be careful in how they phrase postings in future.

I now clarify the chronology, which is germane to both the alleged miscarriage of justice and the misrepresentation of QTRA that has been seen by some as damaging to QTRA. In March 2005 ME published the QTRA methodology in a peer reviewed journal, i.e. Journal of Arboriculture. In this publication he set out the system, the rationale and the methodology. In fact he released QTRA to the Arboricultural profession and to the world. Towards the end of that paper, he stated that the intention was to provide training and licensing for the system. In August of 2005 ME published a less detailed account of QTRA in Arborists News and re-iterated the statement of intent with respect to licensing and training being developed.

Two points arise from the above. First, as the complete system was published in a peer reviewed Journal it was in effect made available to anyone to apply it. Second, the training and licensing was in development at the time and was not as easily available as it now is. Why is this relevant? Because the second joint statement or 'questions' document was signed in December 2005 before training and licensing was readily available but after the system had been released through a publication.

The question that now arises is how can there be any justified criticism of two Expert Consultants who having read the publication opted to use it to demonstrate to the Court how such a system could be used to assess trees? In my opinion such criticism is not justified. If ME was concerned that QTRA would be used in a way that he considers to be wrong, then why publish it in full? Why release it to the profession? Why not wait until the training and licensing was available and release it that way? I leave forum members to work out the answer for themselves.

Has QTRA been damaged as a result of the Poll Case? In my opinion it has not and any reasonable person reading **all** the papers would agree with me. The Barrister who acted for Mr Poll was asked at the Arboricultural Association Conference what would have happened if JB and I had assessed the tree as medium or low risk? His answer was that Poll would have lost. This has now been represented on the QTRA forum and elsewhere as 'proof' that the QTRA calculations in the 'questions' document swayed the Judge and thus there was a miscarriage of justice. This simply is not so because years before QTRA JB and I had independently formed the conclusion that the tree with both the included union and the fungus present posed a high risk and we did this without the use of any system. That is what our evidence says and it is on that evidence that the Judge decided the case.

I do believe that ME has done serious damage to QTRA by ***(i)*** taking issue with the Poll Case and blowing the matter up out of all proportion; ***(ii)*** Implying that two honest and experienced expert consultants sought to deceive the Court; ***(iii)*** making selected postings to the forum that best served his point of view ***(iv)*** giving the impression that his is the final word on all QTRA calculations. Not a happy set of precedents for future users of the guidance but perhaps not entirely unexpected from someone who has so lovingly nurtured his own creation.

The latter point has serious implications for QTRA. In acting as he did, i.e. in posting critical re-calculations in Poll, ME has set QTRA back. I say this because who out there is going to be confident in using QTRA if their calculations run the risk of ME questioning them if asked? For example, Consultant **A** undertakes an assessment of a tree using QTRA and calculates a RoH of 1/5,000, i.e. unacceptable. The report is submitted to a Council in support of an application to fell / prune the tree and Tree Officer **B**, who has not been trained or licensed to use QTRA, does not fully understand the system or the calculations other than in a very basic way, sends the report to ME for an opinion. ME re-calculates the RoH at 1/10,000, i.e. acceptable. The application is then refused on the basis of ME's opinion. In this way ME has become the final arbiter of the application of QTRA in that case.

It is not unreasonable to assume that scenario could be repeated across the country. In fact, in my experience it has already happened in a TPO appeal case. If this continues, and who can blame Tree Officers or Consultants for seeking a second opinion if they are not familiar with, trained or licensed in QTRA, then the system will be undermined if this continues. The confidence of users who are trained and licensed risks being eroded such that they will refrain from using the system. It cannot be correct that a system of assessment that has been published and thus made available, and which can be obtained through training and licensing, is referred to its creator, who then has the final say on its application in specific cases.

Since the Poll case, both JB and I, have attended QTRA training and are licensed. We did this to learn more about the system and having done so, we do not aver from our position in respect of Poll. It is important to repeat the point, that as Experts, neither JB nor I are day to day practitioners of QTRA, we employ others within our respective companies to do that. We are however Consultant / Experts and using the OED definition we *'provide expert advice in a professional capacity'*. That means we have the flexibility and skills to interpret systems and it is entirely proper that we and indeed other experts do and continue to do so.

As Consultant Experts we daily face questions from professionals far sharper than anyone using the QTRA forum, we are regularly subjected to questioning from Clients, Solicitors, Barristers, QCs, Judges and Planning inspectors we have to defend our opinion and face cross examination. We will continue to do that.

D P O'Callaghan