

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

4BS50384

Royal Courts of Justice
Thursday, 23rd March 2006

Before:

HIS HONOUR JUDGE MACDOUFF QC

BETWEEN:

GARY POLL

Claimant

- and -

(1) RAYMOUND BENEDICT BARTHOLOMEW MICHAEL
VISCOUNT ASQUITH OF MORLEY
(2) MARY C. BARTHOLOMEW
VISCOUNTESS ASQUITH OF MORLEY

Defendants

Transcribed by BEVERLEY F. NUNNERY & CO
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

MR. R. STEAD (instructed by Lyons Davidson) appeared on behalf of the Claimant.

MR. P. MOTT QC and MR. A. CHIPPINDALL (instructed by Greenwoods) appeared on behalf of
the Defendants.

PROCEEDINGS

INDEX

Page No.

OPENING SPEECH BY MR. STEAD

1

BARRELL, Mr. JEREMY, Sworn

Examined by Mr. STEAD

12

Cross-examined by Mr. MOTT

23

1 MR. STEAD: May it please your Lordship, I appear on behalf of the claimant,
2 Mr. Poll, and my learned friends Mr. Mott and Mr. Chippindall appear on
3 behalf of the defendants. I hope your Lordship has received firstly a trial
4 bundle.

5
6 JUDGE MACDUFF: I have.

7
8 MR. STEAD: With all the pleadings, statements and reports. There is also a
9 further bundle prepared by the defendants which includes invoices of
10 Mr. Rowe.

11
12 JUDGE MACDUFF: Right.

13
14 MR. STEAD: You should also have received skeleton notes from myself and my
15 learned friends.

16
17 JUDGE MACDUFF: Yes, I have.

18
19 MR. STEAD: Could I indicate at the outset that there is an issue between myself
20 and my learned friends as to the precise effect of this preliminary issue. You
21 will see at p.12 of the bundle the relevant direction for the preliminary issue.

22
23 JUDGE MACDUFF: Yes.

24
25 MR. STEAD: Item 2, which states that the issue of primary liability in relation to
26 the tree be dealt with as a preliminary issue to that of quantum and
27 contributory negligence. Now, we take that to mean that if a breach of duty is
28 proved in this hearing, then primary liability follows and since there cannot be
29 100% contributory negligence in a case, it must follow that judgment would be
30 entered for the claimant subject to the issue of contributory negligence. Now,
31 the defence does raise, at p.10, para.3(d), the contention that "it is denied that
32 the fall of the stem of the tree was an effective cause of the accident". I raised
33 that with my learned friend and said there is potentially a difficulty here with
34 the wording of the direction and that particular contention. I understand my
35 learned friend to say that he wishes to keep open the suggestion that
36 effectively the claimant's contributory negligence was wholly causative of the
37 accident. We contend that that is not possible in law on the basis of Phipps v.
38 Hunt. So I just flag up that that issue lies between us, but I do not think there
39 is any need for that issue to delay the hearing of the preliminary issue. If we
40 want to come back to it, we can come back to it at the end.

41
42 JUDGE MACDUFF: Yes. Why cannot I deal with the contributory negligence as
43 well in any event?

1
2 MR. STEAD: Well, we would suggest you could do so and certainly I understood
3 wrongly when I did my skeleton argument that it was to be dealt with. My
4 learned friend tells me that he has an expert's report and obviously that has not
5 been served and, in the light of the direction, they were not anticipating that
6 contributory negligence would be dealt with today. So far as I am concerned,
7 I am perfectly content to deal with it today, and one might think that it would
8 have been right that it should have been dealt with altogether with only
9 quantum perhaps left over.

10
11 JUDGE MACDUFF: Well, Mr. Mott, what is the position?

12
13 MR. MOTT: In relation to the driving and the extent to which the claimant was
14 negligent in failing to spot the tree, we would want to have evidence from
15 Mr. Francis who was driving the other way, and evidence from an expert in
16 relation to that which evidence I have not seen with the expert in conference.
17 We have not dealt with that, we have not exchanged it.

18
19 JUDGE MACDUFF: Have you got permission for an expert on that?

20
21 MR. MOTT: We have dealt with the directions on that. The general view on both
22 sides was that the most economic and proper way of dealing with this was to
23 decide whether there was negligence which caused the tree to be on the road or
24 nuisance which caused the tree to be on the road at that time before the
25 question of the causation of the accident itself.

26
27 JUDGE MACDUFF: So really you are holding open not only the issue of
28 contributory negligence but also the whole question of causation?

29
30 MR. MOTT: Yes.

31
32 JUDGE MACDUFF: So that if I find against you today, tomorrow, or whenever it
33 may be, there would not be a judgment to follow?

34
35 MR. MOTT: No.

36
37 JUDGE MACDUFF: It would just be a pronouncement on a preliminary issue.

38
39 MR. MOTT: Just a preliminary issue, and we wish to keep open the argument of
40 saying that this tree was not only easily visible from far enough away but what
41 was to be expected in the circumstances of very high winds and gales
42 overnight, and so forth.
43

1 JUDGE MACDUFF: Well, Mr. Stead, it looks as though, on the basis of District
2 Judge Exton's order, all I can do today, or when we get to it, is determine
3 whether there was a breach of duty.

4
5 MR. STEAD: My Lord, can I say that it goes further than that? I do not take
6 exception to my learned friend saying we cannot deal with contributory
7 negligence today in the light of the order. They have relied on that and
8 I understand that. But it is the last point my learned friend makes, that there is
9 an issue of causation which will be outstanding, that I do take issue with
10 because obviously if one is dealing with respective possible causations, it is
11 going to be very difficult for one judge to hear the evidence about the fall of
12 the tree and the other judge to hear the evidence about the driving and then
13 have a competition between the two.

14
15 JUDGE MACDUFF: Well, it may be that I will have to reserve it to myself. I can
16 come to London to hear it if necessary. But I see your point. I see his point.
17 But is this not really something perhaps we ought to deal with once I have
18 heard some evidence and we have got to final speeches?

19
20 MR. STEAD: Entirely.

21
22 JUDGE MACDUFF: So let just put it on the back burner and have a mental note
23 about it.

24
25 MR. STEAD: Certainly. That is all I say.

26
27 So far as opening the case is concerned, may I ask whether your Lordship has
28 had an opportunity to read all the papers?

29
30 JUDGE MACDUFF: Yes. I have not begun to master them of course, but I know
31 what it is all about.

32
33 MR. STEAD: Well, can I indicate that it is an accident on 11th July 2001 in which
34 the claimant was riding his motor cycle home - he goes home for lunch - along
35 the Old Wells Road in Somerset. He was riding his motor cycle in the
36 direction of Mells. He had reached a point between two farms, one of them
37 named... Farm and one named Clavey's Farm. He went through two bends and
38 he collided with an ash tree which fell across the road into his path. As you
39 are aware, there is an issue between the parties as to whether the tree fell as he
40 approached or whether it had fallen prior to his approach. The tree fell from
41 his left and he collided with the tree such that he believes it struck him across
42 the chest. It took him off his motor cycle. The motor cycle carried on down

1 the road some little distance. The claimant was rendered unconscious and was
2 airlifted away from the scene.

3
4 The defendants are the owners of the land on the left hand side of the road
5 where the tree was standing. They were responsible for the maintenance of
6 that tree, and there is no issue as to that. The tree was a multi-stemmed ash
7 tree and it was one of the stems which fell away from the remainder of the
8 tree. It had become a multi-stemmed tree because it had been coppiced or
9 layered at some point in time and thereafter had been left to grow so that the
10 multi-stems grew up. One can see it at p.51 in a photograph. I hope your
11 Lordship's bundle will now have colour photographs in.

12
13 JUDGE MACDUFF: Well, it has not. I see I have got some colour photographs
14 that I have only just -- well, they have not been hole punched. I will
15 reorganise my bundles. I can dispense with these, can I?

16
17 MR. STEAD: Indeed, the old ones, yes. (After a pause):

18
19 JUDGE MACDUFF: Yes, thank you.

20
21 MR. STEAD: Page 51, photograph number 1 shows -- can I, perhaps before
22 starting on that, say that the date of that photograph should be changed to 26th
23 March 2004. It currently says 15th July 2005. That is an error.

24
25 JUDGE MACDUFF: On p.51?

26
27 MR. STEAD: 51. I hope you have two photographs at the bottom there.

28
29 JUDGE MACDUFF: Yes.

30
31 MR. STEAD: The first one is 26th March 2004, rather than 15/07/05. That is a
32 view of the ash tree with which we are concerned, and you can see it identified
33 by an arrow.

34
35 JUDGE MACDUFF: Yes.

36
37 MR. STEAD: The second photograph on that page is looking from the field side.
38 You can see just to the right of the photograph is indicated a field entrance
39 which is a gateway, and further along you can see the subject tree. If you turn
40 over the page, in photographs 3 and 4 you see photographs from the road side
41 looking straight at the tree at right angles, firstly in winter and secondly when
42 it is in full foliage. Photographs 5 and 6 show the bottom of the tree after the
43 stem had fallen, some time after indeed.

1
2 If one then goes to p.128 one has photographs annexed to Mr. O'Callaghan's
3 report. Again the photograph at p.128, a larger version of the photograph you
4 have seen earlier. Photograph 129, a close up of the base of the tree. Beneath
5 the left hand stem you will see the wound where the stem has broken away and
6 fallen into the road. Going over the page to p.130, one can see the fallen stem
7 and the diameter of the stem which is believed to be about 220 cm by
8 comparison with the existing ones, falling towards the road, the road being at
9 the top of the photograph, there being a ditch between the road surface and the
10 tree. Photograph 131, you can see there identified the included bark union that
11 failed. Going on to p.132, one can see there - again this is some time later, a
12 matter of years after the accident - a fungal fruiting body which is identified in
13 the middle bottom of the page. There is an earlier photograph of that fruiting
14 body at p.127, if one just goes back. This was taken shortly after the accident,
15 and one can see in the first photograph on that page, which is titled "Appendix
16 3-1: Photograph 2" the fungal bracket at the bottom of the tree. You can see
17 the white rot which is emanating from the fungus which causes decay and the
18 growth of the fungal bracket. The fungal bracket effectively follows on over a
19 number of years and grows in size. The size of this was estimated by
20 Mr. O'Callaghan as between 15 and 20 cm. Then indeed on p.127 you see the
21 base of the failed stem, again showing the white rot and the fungus, the black
22 colouring.

23
24 My Lord, if one then moves on to p.161, Mr. O'Callaghan helpfully sketched
25 what he believed the tree would have looked like before it fell. One can see on
26 the right hand side the stem that failed and highlighted in black the union, the
27 included bark union, between the two stems which failed. Beneath that the
28 fungal bracket which you have seen in the photographs. There is a ditch and
29 then the road surface on the right hand side, the arable field on the left hand
30 side. There is an issue between the parties as to whether the fungal bracket
31 would have been seen by a reasonably competent inspector. We rely upon the
32 fact that it was in fact visible and indeed any inspection is assisted by the fact
33 that one's feet when standing in the ditch are lower than the bottom of the tree
34 stems which are in effect about knee level, so one can get underneath and see
35 quite easily anything that might be under there.

36
37 The defendants' case in the first instance is that the included bark union was
38 itself visible but only if one made one's way through the herbage at the side of
39 the road, pushing aside some shrubs and clearing away herbage which was
40 growing up from the ground, such as nettles and so forth, and that because it
41 was shielded in that way it was not reasonable to expect Mr. Rowe, who was
42 the forestry contractor working on behalf of the estate, to observe this
43 particular defect and hence no liability should follow. The defendants go on to

1 say that even if he should have seen that particular defect, that would not have
2 caused anyone to suggest that the tree should be felled, and it should only be
3 necessary to fell it at that juncture if one discovered the fungal defect as well.
4 It is accepted on both sides that the tree fell as it did and at the time it did as a
5 result of a combination of the effects of the structural defect and also the decay
6 caused by the fungus. It is also agreed between the parties' experts that
7 included bark union would have caused the stem to fail inevitably at some
8 point, but it was accelerated by virtue of the presence of the decay caused by
9 the fungus.

10
11 The claimant says, simply, that it is pointless having any kind of inspection
12 unless one does go and look at the tree, whether or not there should be shrubs
13 and herbage in front of that tree. One cannot hide behind the suggestion that
14 purely because you cannot see it from the road because there are things in the
15 way, one cannot then be blamed for not seeing structural defects of the type we
16 have here which are commonly known.

17
18 In any event, the claimant says that one can see from the road that this is a
19 multi-stemmed ash. Multi-stemmed ash trees commonly have structural
20 defects such as we are dealing with in this case and so by seeing the multi-
21 stemmed ash the reasonably competent inspector should have gone and looked
22 further with a view to seeing whether or not there was an included bark union.
23 If one had gone to look at the tree, it would have been quite apparent - and
24 both experts are agreed on this - that there was an included bark union. We
25 say that if one knows there is the included bark union and a structural defect
26 and potential weakness in the tree, one should then carry out a very detailed
27 inspection to ascertain whether there are any other causes for weakness in the
28 tree such as fungal growth. If any reasonably competent inspector had carried
29 out an inspection of this tree knowing that there was an included bark union,
30 he would have found the fungal growth which both experts accept was there,
31 albeit that it was at the base of the tree. But we say that that is somewhere that
32 one would expect to find fungal growth, it is primarily at the base of any tree.

33
34 The parties then to move on to disagree as to the nature of the inspection that
35 should be carried out. Historically, the cases say - and there is the House of
36 Lords case of Camina - that one has to have regard to duty of care owed by a
37 landowner to passers-by on a road, and that that duty is that of the reasonable
38 and prudent landowner. My learned friend contends that Camina is authority
39 for the proposition that the reasonable and prudent landowner is not required to
40 obtain expert advice upon the condition of his trees. We respectfully
41 submission that Camina is not authority for that proposition, and would refer
42 you in particular to the speech of Lord Radcliffe at the end of the report, who

1 goes to some lengths to suggest that it should not be authority for that
2 proposition.
3 ago in the past because I remember doing a similar case when I was at the Bar.
4 But I would imagine the reasonable and prudent landowner depends on the
5 nature of the land, and I suppose somebody who has a tree in a semi-detached
6 garden will have a different duty of care from somebody who has a stream of
7 trees alongside a road.
8

9
10
11 MR. STEAD: Yes. My Lord, it may be —
12

13 JUDGE MACDUFF: I do not know. I could be wrong.
14

15 MR. STEAD: — that different situations may well call for different responses. But
16 one point we do make is that in assessing the reasonable and prudent
17 landowner in 1950, as opposed to 2001, may bring in very different
18 considerations. So we certainly say that if my learned friend is right in what
19 Camina says, it is not the final word on the issue and this court will have to —
20

21 JUDGE MACDUFF: The law of negligence has moved on.
22

23 MR. STEAD: It has, and standards have moved on. Local Authorities and
24 Highways Authorities use competent inspectors who are trained in the
25 recognition of tree defects and tree hazards, and both experts indeed are agreed
26 in their joint statement that a level 2 inspector should carry out roadside
27 inspections, and indeed they are agreed in the definition of a level 2 inspector
28 that he is someone who is trained in the recognition of tree defects and tree
29 hazards.
30

31 JUDGE MACDUFF: And if this tree has been the responsibility of the Highways
32 Authority, that is what one would have expected.
33

34 MR. STEAD: Indeed. One no doubt would have arguments from the Local
35 Authority about resources and so forth, but Local Authorities employ
36 arboriculturalists in this role to inspect trees for which they are responsible,
37 and we say that no less should the owner of a large estate with a significant
38 number of trees.
39

40 JUDGE MACDUFF: The Highways Authority in fact has no responsibility, even
41 though it is responsible for that highway, for trees which are on somebody
42 else's land?
43

1 MR. STEAD: They do not have a responsibility, no, albeit they do have the power
2 to require the landowner to do something about a tree about which the Local
3 Authority is concerned. But we are not dealing with highway trees because, as
4 you say, they are on the land of the landowner. This is a landowner with
5 considerable estate and no doubt a number of miles of boundary which abut
6 highways. We say, nonetheless, it is still an obligation upon the owner of such
7 land to take reasonable care for those using the highway which abut his land
8 and that they should ensure that a reasonable and competent inspection is
9 carried out.

10
11 JUDGE MACDUFF: Well, at first blush one might think that a large landowner
12 has a higher duty if he has got many miles of roadside trees than a small
13 landowner who has only got a ---

14
15 MR. STEAD: Indeed. The defendants say: "Well, these defendants satisfied that
16 obligation by employing Mr. Rowe, who was a forestry contractor".
17 Mr. Rowe readily accepts that he saw nothing wrong with this tree both before
18 the accident and indeed after it. So it is quite clear that he was not competent
19 to recognise the structural defect which existed in this tree, and the central
20 issue for this court to consider is whether, by appointing Mr. Rowe to deal
21 with these inspections, the defendants satisfied their obligation. The court will
22 have to consider what a reasonable inspection should have revealed and what
23 should have been done ---

24
25 JUDGE MACDUFF: And what a reasonable inspection was, in all the
26 circumstances.

27
28 MR. STEAD: Yes, indeed.

29
30 My Lord, those are the issues. It is really repetition of what I have already set
31 out in skeleton note. You have before you reports from Mr. Barrell, who is the
32 claimant's arboricultural expert. He did a report subsequent to that of
33 Mr. O'Callaghan, which is at p.88 - Mr. O'Callaghan being the defendants'
34 expert. Mr. O'Callaghan has prepared a second report which is at p.167. Then
35 both experts have prepared joint statements, the first of which is at p.174 and
36 the second of which is at p.180. My Lord, those joint statements effectively
37 set out the issues that lie between the experts fairly comprehensively. I do not
38 know whether you wish me to take you to them.

39
40 JUDGE MACDUFF: No. They are summarised in the skeleton arguments, are
41 they not?

42
43 MR. STEAD: They are.

1
2 JUDGE MACDUFF: There is a great deal of agreement.

3
4 MR. STEAD: There is a great deal of agreement.

5
6 JUDGE MACDUFF: As one might expect, but then there is disagreement —

7
8 MR. STEAD: An important area of disagreement.

9 JUDGE MACDUFF: When it comes to the crunch.

10
11
12 MR. STEAD: There is an issue, on which I can take you to p.183 to look at. The
13 experts were asked questions, and one can see the question at p.180. The
14 experts then go on to explain how one conducts a tree risk hazard assessment,
15 and the conclusion is at p.183, as to what was meant by medium risk and high
16 risk. They were both agreed that the tree with the included bark union alone
17 without the fungus constituted a medium risk. It is set out at p.183 that that
18 means the tree should be assessed regularly, i.e. annually for preference but
19 not less than once every two years and if the problems worsen, then
20 intervention management would be implemented at that time. Can I make it
21 plain that Mr. Barrell's position in respect of any tree is that one needs to
22 assess the context in which one finds the tree. Both experts recognise that fact
23 at p.181 in the middle of the page, where it says:

24
25 "Obviously scenario (b) is of more concern than scenario (a) and
26 therefore the context is important, not simply the score. However, the
27 score does give an indication of the hazard or risk potential."

28
29 So one cannot look at the terms "medium risk", "high risk" or at scores in
30 isolation. One has to look at the state of the tree with which one is dealing, its
31 location and various other aspects and exercise judgment. The fact that one
32 has definitions for "high risk" or "medium risk" or indeed "low risk" does not
33 of itself define what one should do with the particular tree.

34
35 Both experts are agreed that the tree with the included bark union and the
36 fungus constitutes, under these risk assessments, a high risk and should have
37 been felled as soon as possible as a result. If a medium risk, then the question
38 is not so clear as to precisely what one should do. Certainly Mr. Barrell's
39 position is that he would be concerned to commit himself to a particular view,
40 not having been in a position to see the tree in its original state because it is
41 only in those circumstances that one can truly say.

42
43 My Lord, in those circumstances, may I move on to call Mr. Barrell?

1
2 JUDGE MACDUFF: Yes. Can we just confirm what evidence I am going to be
3 hearing?
4
5 MR. STEAD: Yes. Mr. Poll is here and sits behind me, with the blue shirt at the
6 back. My learned friend does not ask that I call him in any way and indeed
7 since the accident is admitted and the collision with the tree on the defendants'
8 land is admitted, for the purposes of this preliminary issue there does not seem
9 much point in calling him.
10
11 JUDGE MACDUFF: Good.
12
13 MR. STEAD: So I will move straight to Mr. Barrell. My learned friend has asked
14 that I do that rather than that we have lay witnesses on his side first. So if that
15 is his wish ---
16
17 JUDGE MACDUFF: So you are calling Mr. Barrell, full stop?
18
19 MR. STEAD: Mr. Barrell and Mr. Barrell alone.
20
21 JUDGE MACDUFF: And Mr. Mott?
22
23 MR. MOTT: I shall call Dr. O'Callaghan. It may be more convenient to deal with
24 him straightaway after Mr. Barrell and have the experts back-to-back.
25
26 JUDGE MACDUFF: Yes.
27
28 MR. MOTT: Then Mr. Rowe here. I do not think there will be any other evidence
29 that will assist.
30
31 JUDGE MACDUFF: Can we just talk about timing?
32
33 MR. STEAD: Can I just talk about one point arising out of what my learned friend
34 said? He said more convenient to have the experts back-to-back. There may
35 be circumstances in which the experts would learn something new from what
36 the lay witnesses have to say and it may be necessary, as a result of that, to
37 seek to re-recall them. But we will see if that arises in due course.
38
39 JUDGE MACDUFF: Certainly. It seems to me sensible that we do the two experts
40 in turn.
41
42 MR. STEAD: Yes.
43

1 JUDGE MACDUFF: But if Mr. Rowe raises things that could have been dealt with
2 by them, they have presumably both considered his witness statement and
3 know what he is going to say.

4
5 MR. STEAD: Indeed.

6
7 JUDGE MACDUFF: And what about timing?

8
9 MR. STEAD: Timing - it was listed for two days but certainly from my perspective
10 I am confident that we will certainly get speeches in by the end of tomorrow.

11
12 MR. MOTT: Yes.

13
14 JUDGE MACDUFF: Well, a day and a half should adequately cope with the
15 evidence, should it not? Or a day even?

16
17 MR. STEAD: Yes. Speeches maybe. I just do not know.

18
19 JUDGE MACDUFF: Now, the question is how we most efficiently deal with the
20 expert witnesses. I have read their statements but it has been a very much a
21 speed reading and it may be sensible for me to read -- and I prefer, rather than
22 read both of them back-to-back, to read Mr. Barrell's evidence in detail before
23 he gives evidence. I anticipate you will be wanting to ask him one or two
24 questions in chief, in spite of the fact that his statement is there.

25
26 MR. STEAD: Well, I am in your Lordship's hands on that.

27
28 JUDGE MACDUFF: Well, if I have read him very carefully and know exactly
29 what is in his witness statement and made a detailed note of it, you can take
30 him much more shortly.

31
32 MR. STEAD: Indeed.

33
34 JUDGE MACDUFF: It also will assist Mr. Mott to cross-examine more
35 economically. But I would rather do it that way than read both of them
36 together. Read Mr. Barrell, let us have him in evidence, and then take a little
37 time out to read your expert.

38
39 MR. MOTT: Yes.

40
41 MR. STEAD: Could I also ask that you read the joint statements at the same time?

42

1 JUDGE MACDUFF: Of course I will do that. It is probably easier if I rise and do
2 that before you actually put him into the witness box. It is now twenty five to
3 three. Shall we say you will be back here at quarter past three, and if I need a
4 little more time, I will get a message to you.

5
6 (Adjourned for a short time)

7
8 JUDGE MACDUFF: I have read it, and I have nearly mastered it, I think, but
9 inevitably I have to read into Dr. O'Callaghan's report to fully take on board
10 everything because it is in part a response to that.

11
12 MR. STEAD: May I call Mr. Barrell?

13
14 Mr. JEREMY BARRELL, Sworn
15 Examined by Mr. STEAD

16
17 Q Are you Jeremy Barrell? A. Yes.

18
19 Q What is your work address? A. We work from a unit in Bridge House in
20 Pullman Way in Ringwood, Hampshire.

21
22 Q Can I ask you, please, to turn to p.48 in the bundle in front of you? We there
23 see a report of yours which you made, if you turn to p.66, on 17th July 2005.
24 A. Yes.

25
26 Q I think it has appendices which run through p.86? A. Yes, that is correct.

27
28 Q And apart from the correction of the date to the photograph on p.51, which
29 I dealt with in opening, do you adhere to the contents of that report?
30 A. Yes.

31
32 Q If you then go on, please, to p.174, do you there see the first joint statement
33 that you completed with Mr. O'Callaghan? A. Yes.

34
35 Q Signed by you on p.179? A. Yes.

36
37 Q Then on p.180 answers that you and Mr. O'Callaghan gave to questions posed,
38 which runs to p.183, where it is again signed and dated by you? A. Yes, that
39 is right.

40
41 Q I think we find your curriculum vitae at p.67? A. Yes.

42
43 Q Does that fully set out your qualifications and experience? A. Yes.

1
2 Q And then after that we have set out various articles, conferences and so forth in
3 which you have been involved? A. Yes, just to set the context of my
4 experience.

5
6 Q I think I am right in thinking that you inspected the site on 26th March 2004 in
7 the first instance and then 15th July 2005? A. Yes, that is right.

8
9 Q Is it also right that you recently visited the site again? A. Yes.

10
11 Q And how did you find this particular ash tree on that last visit? A. On the
12 last visit, which was a few days ago now, one of the stems which was dead or
13 dying on my first visit had fallen into the field. Then the other two stems were
14 still intact and alive and standing.

15
16 Q Did you take two photographs of the tree, the stem that had fallen on that visit?
17 A. Yes. (Same handed).

18
19 JUDGE MACDUFF: This is the stem that you first of all identified in your first
20 report? A. Well, there is one stem that had fallen, obviously the subject
21 stem which caused the accident. But then on the field side now in my first
22 report – or in my report I identified a dying stem.

23
24 Q Yes. Photographs 3 and 4? A. Yes.

25
26 Q On p.52? A. Yes, that is right.

27
28 Q And then you made the point I think later that, contrary to what was being said
29 on behalf of the defendants, when you revisited it, it had still not been taken
30 down, but it has now gone of its own volition. Is that where we are?
31 A. Yes, it has. But, fortunately, it has gone back into the field.

32
33 MR. STEAD: If one looks at the p.52, photograph number 5 —

34
35 JUDGE MACDUFF: I have got three new photographs here.

36
37 MR. STEAD: There should only be two in fact. I am sorry, have you got an extra
38 one —

39
40 JUDGE MACDUFF: I have got second copy of that.

41
42 MR. STEAD: There are two. Perhaps they could go in Mr. Barrell's report at
43 pp.87a and b.

1
2 JUDGE MACDUFF: Yes, certainly. 87a is that one, and 87b is the close-up of the
3 base.

4
5 MR. STEAD: Just so that we are clear, if you can go to p.52, please, Mr. Barrell?
6 A. Yes.

7
8 Q Photograph number 5, the stem which you found fallen into the field is which
9 of those stems? A. It is the left hand one, the sort of thick -- there are lots of
10 stems there, but the biggest left hand one that is just to the right of that plastic
11 bag which is that white ----

12
13 Q Right. Is that the one that was joined to the stem that fell into the road?

14 A. Partially through the included bark union, yes. It is the stem on the above
15 photo, in photo 3 and photo 4 actually, but it is dead. It had died.

16
17 Q Can you describe to us exactly what an included bark union is and how it
18 develops? A. It is one of the most common bark defects that you get in trees
19 and it can be either -- it is where two members of the tree, so it can be a branch
20 and a stem or two stems or two branches -- it is where they are formed very
21 close together or growing very close together at an early age and as -- in a
22 normal growing scenario the wood between both meshes as each twig or
23 branch or member, as it were, puts on a growth increment, they mesh together
24 and you get a very strong union. So most branches, they do not pull apart very
25 easily. In some circumstances, usually when the forks are quite tight, there is a
26 very narrow angle between them, then they do not mesh properly and you get
27 the bark presses against -- the bark of one presses against the bark of another
28 or of the other one, and there is not a contact, a physical contact between the
29 wood, so the bark -- that is why it is called an included bark union. So the
30 bark presses against each other. So, unlike a normal form or standard form of
31 stem or union, it can just pull apart quite easily.

32
33 Q And by way of example - I know it is not the same tree - if we go to p.54, the
34 bottom two photographs, 11 and 12, are photographs of the holly tree which
35 I want to ask you about in a moment. But do those show us an included bark
36 union or not? A. This one is actually so far decayed, it is difficult to say
37 whether it is just actually a split or an included bark union. But it is certainly a
38 split and it probably originated from the included bark union. This could well
39 be a progression from what we saw on the original -- well, on the subject tree.

40
41 Q While we are on this page, looking at photograph 9, top left, that is the holly
42 tree to which you refer in your report, is it? A. Yes.

1 Q Can you just describe to us, if you were going along this hedgerow carrying
2 out an inspection of the trees as a competent inspector, what are your thought
3 processes and actions when, for example, you see this holly tree? A. What
4 you are looking for is not a simple thing to do. That is the first thing. So you
5 are looking for a whole range of things. And the first thing you look for are
6 things which are excessively unbalanced or look like they are obviously
7 dangerous. Other obvious indicators are poor health so things that are dying
8 and not looking as they normally would. So you would be looking for those
9 sorts of things as primary indicators. But at the same time there are other - I
10 mean, health is not the only issue which can affect the safety of a situation.
11 There is also the structural elements of the tree, and you can have a perfectly
12 healthy tree that has got structural defects so you cannot see it from a health
13 indicator, but actually it is a serious problem. So you would be looking for
14 that type of - you would be looking for triggers, indicators of that type of
15 defect although you may not be able to see them from a distance. You would
16 be looking for indicators of those which there are from a distance, and one of
17 those, as I set out in the report, is multiple stems. So in addition to the obvious
18 things - unbalanced, stems, dying stems and those sorts of things - you would
19 be looking for trees with multiple stems which would be an indicator that there
20 could possibly be these included bark unions which are very common, so it is
21 not an unusual thing, and that would trigger the requirement to go and have a
22 closer look.

23
24 Q It has been suggested in the defence that because one cannot see the included
25 bark union because of growth, shrubs in front of the tree, between the road and
26 the tree, it is not necessary for an inspector to go and look at the tree so that he
27 will be able to see the included bark union. What is your view of that
28 contention? A. Well, if the point of the inspection is to try and assess the
29 hazard and identify any risks that are excessive, then you need to understand
30 what can cause those conditions, and there are two things: poor health or
31 structural defects. Those are the two things and they are equally as important.
32 Both of them are critically important. So you would be looking for indicators
33 of those, and if you saw any indicators then - if you have a single stem tree,
34 say, that is looking fine and healthy, then that may not - that would not cause
35 you unnecessary concern and you may well not go and make a closer
36 inspection of that if you were doing a preliminary walk-by or drive-by. But as
37 soon as you see either a dying tree or an unbalanced tree or any of those things
38 or multiple stem tree, then that should be the trigger to go and have a closer
39 look, especially in this scenario because we are on a hedgerow where it is
40 clear, it is common management practice for hedgerows, to basically cut trees
41 at the fence line and just let them re-grow.

- 1 Q And if that is done, what then happens? A. Well, as soon as you cut a trunk
2 or a stem, you get - I am sure everybody has seen it - the sort of paint brush
3 effect that you get on, say, pollarded trees. You get multiple buds all around
4 the cut. The edge of the cut surface starts to burst and over a period of time,
5 the weaker ones do not survive or die off and you get two or three or four take
6 over and become the main bulk of the new tree that is formed. And you can do
7 that with coppice trees on a regular basis. It is an established way of managing
8 coppice for various reasons, but it is also a way, historical way, traditional way
9 of managing hedgerows as well.
10
11 Q You see the multiple stems, you go and investigate, and I think you and
12 Mr. O'Callaghan agree that if one did, one would see the included bark union?
13 A. Yes.
14
15 Q What other, if any, investigations would you do in respect of the tree, having
16 found the included bark union? A. As soon as you have a tree that is
17 suspect and you go up to the trunk, the first thing that you do, and this is
18 standard practice with any type of assessment or inspection, is that you start
19 looking around at the base of the tree and kicking it. If you have a hammer, a
20 hammer is a very good way of assessing whether the tree is hollow because
21 you can tap it and it makes a hollow sound. So that is a fantastic way. You do
22 not need any sophisticated equipment. You just literally walk around the tree
23 in an open situation and look at it, pull any ivy off, have a good kick at it and
24 see if it all seems okay and bang it if you have a hammer. And if everything
25 seems okay, that is fine. This is not quite as easy to do that in the sense of it is
26 not in a park, it is actually in a hedgerow and the hedgerow is pretty thick.
27 You can get in there because I got in from the road, so you can. You have to
28 push bushes aside. And there is a difficulty as well because we have a ditch
29 and the tree is on a bank but it is not impossible - well, it is not impossible to
30 do, it is not hard to do, because I walked up around it and pulled a few bits off
31 and had a look at it, and that is what you would normally do. The reason being
32 that any - most fungal brackets, which is actually what you are looking for -
33
34 Q Why you looking for the fungal brackets? A. Because those are key causes
35 of failure or probably the most common cause of failure and they indicate
36 internal decay which may not be visible, and the way you see it is through
37 symptoms on the crown or actually through fungal brackets. And these fungal
38 brackets tend to be close to the point of wounding, and the thing about an
39 included bark union is because it is continually moving in the wind, then it is
40 continuing being wounded on a micro level and that is where you tend to get
41 quite often sources of infection.
42

1 JUDGE MACDUFF: Can I interrupt you for a moment? The first is question is
2 that I can see that you can get at it from the road, but is it more easily
3 accessible from the other side, this particular tree? A. Yes. I think the
4 photo that we had, 87a, shows you the open field, and you can just literally
5 walk in and around to it. In fact there is an entrance about 25 to 40 metres just
6 up, a field entrance that you can just walk through and go and see it.

7
8 Q Now, let me ask you this, because I see there is a dispute as to whether and to
9 what extent - there may not even be a dispute - the fungal bracket would have
10 been discernible even on close inspection. But if you as, I can say, a level 3
11 inspector with your expertise had gone in either through the ditch or round the
12 other side on the eve of this accident, a day or two before this accident, and
13 you had had a good look at the base of the tree, as I understand it you would
14 have undoubtedly found the bark defect. What are we calling it? A. Yes.

15
16 Q I am not ---

17
18 MR. STEAD: Included bark union.

19
20 JUDGE MACDUFF: The included bark union. Now, you would have seen that?
21 A. Yes.

22
23 Q No question about that. But you cannot tell me that you would have detected
24 the fungal bracket? A. Not with 100% certainty, but what I would like to
25 refer you to is p.127 of the bundle where we have a photograph of it that was
26 taken just after the accident. It is photo 2, it is the one at the top. You can see
27 that it is 15 to 20 cm in size, according to Dr. O'Callaghan's statement, and
28 that, just to give you an idea of that -- your hand is 4 inches, so that is 10 cm,
29 so two hands together is 20 cm. So you have got a fungal bracket that is a sort
30 of creamy/orangey colour, the size of two hands at the base of this tree. Now,
31 that is something which I think would be very difficult to miss for any
32 inspector that went in there and was close to the tree, especially standing in the
33 ditch.

34
35 Q So be it. I see what you are saying. But it was a slightly different question that
36 I wanted to ask you. Assume, please, with me that you have gone to look at
37 this tree just before the accident and you have found the included bark union.
38 A. Yes.

39
40 Q But you have not, however close an inspection you have made, found the
41 fungal bracket. What would you then have done as a tree inspector?
42 A. You would have -- the difficulty for me is that I have not seen the tree at
43 the time of the accident. In fact I was four years after the accident so things ---

1
2 Q Have moved on. A -- could have changed. The bottom line is that you
3 really -- there is no fixed course of action that you can take if you did discover
4 a specific defect. The defect is just one part of the wider scenario. You need
5 to look at its relationship to the other trees in the hedgerow, how exposed it is,
6 how near the road it is, whether it is excessively unbalanced in one direction or
7 another. On the basis of all of those assessments, you then come up with a
8 course of action that you felt was appropriate to reduce the risk to acceptable
9 levels and that is how you make the judgment. The difficulty for me is that
10 I have not seen the tree in those sets of circumstances. I have seen it four years
11 afterwards, and in fact I only saw the stem that caused the accident sort of laid
12 on the ground covered with undergrowth, and it had actually all been cut up, or
13 quite a bit of it had been cut up. So it is difficult to come to any firm or any
14 reliable conclusion on what would have been the most appropriate way to deal
15 with it.

16
17 Q Do I gather from that then that the included bark union in a tree adjacent to a
18 highway of the sort of size that this would have been two or three years before
19 you saw it, would not in itself give rise to your necessarily saying: "Get rid of
20 it, fell it"? A. No, it is not as simple as just saying: "Right, it has got an
21 included bark union, let us get rid of it". There is no way that that is an
22 appropriate -- well, that is a very shallow assessment, I suppose. You will find
23 tree after tree after tree in parks and gardens and on the roadside that have got
24 included bark unions, and the issue is not just the union, it is the context that it
25 is in. So obviously how many people, how many targets are around is
26 important. But the other thing that really is crucially important is really the
27 weight distribution on that stem. If it is a really unbalanced stem or it has got
28 lots of growth in one direction over the road and it is quite tall, then there is
29 going to be a lot more pressure on that union so ---

30
31 Q I have got the point. A. Yes, okay.

32
33 Q But of course had you discovered the fungal bracket -- A. Well, that adds
34 a whole new dimension.

35
36 Q And then what? A. Well, then there is almost -- once you have this level of
37 decay, what you have to sort of appreciate is that a fungal bracket of that size,
38 that sort of size, it actually has dissolved -- it is quite solid and hard, it has
39 dissolved all of that mass from actually inside the tree. That is how fungi
40 work. They dissolve the insides and then reproduce it as a fruiting body on the
41 outside. And once you have got that size of fruit body, then really it is almost
42 -- there is very -- you can be almost certain that the course of action would be

1 to fell the tree, or at least do some severe pruning to make sure if it did fall or
2 fail, then it would not reach the road.

- 3
4 Q Can you just marry up on p.127 for me the two photographs? Is the fungal
5 bracket in the bottom right hand corner of the bottom photograph, photograph
6 3, the little orangey area? I am just trying to marry up those two photographs
7 because they are obviously of the same thing but from different angles.
8 A. I have some difficulty ----

9
10 Q Yes.

11
12 MR. STEAD: My Lord, I am not sure they are the same thing. The top one is of
13 the remaining tree standing, whereas my understanding is that the bottom
14 photograph is the base of the stem that has come off.

15
16 JUDGE MACDUFF: Yes. I do follow that now, thank you very much.

17
18 MR. STEAD: I think one can probably fit them together. A. Personally I cannot
19 see it, no.

20
21 JUDGE MACDUFF: No, do not worry. I have got one other question and then
22 I will be quiet, I promise you. I think this is an appropriate time to ask. Page
23 177, please, para.22. The last sentence, it was not present, the fungal bracket.
24 (After a pause). Yes. No, I do understand that now. I beg your pardon.
25 A. I visited four years after and...

26
27 MR. STEAD: Can I ask you to look at p.161, please? That is Mr. O'Callaghan's
28 sketch that he did after he attended the scene, obviously again some time after
29 the stem had fallen. I think you agree that as a reasonable representation of the
30 state of affairs immediately prior to the stem falling? A. Its title says
31 "Diagrammatic Representation", and that is as far as it goes. It does give an
32 idea of where things are and I think it is quite useful from that point of view.

- 33
34 Q What I want to understand is you say that you would have expected to have
35 found the fungal bracket. How would you do that, looking at that sketch?
36 A. Well, I do not see this as actually being a complete cross-section of
37 everything with the fungal bracket stuck right underneath this stem. What you
38 have got to bear in mind is to try and visualise the 3-D nature of the way this
39 would be arranged, and I think that although that may have been the situation
40 if you stood directly on and looked at it, you would only just need to move
41 round the side and I am sure that you would have been able to see it. It does
42 not seem to me that there can have been a great big sort of shelf underneath
43 that this fungus was put on or that was growing out of and you could not see it.

1 And you have to bear in mind that the thing is that sort of size, the stem is 220
2 mm, that is pretty much the same size as the stem of the tree. So it is not like a
3 small — it is not relatively — it is not small in comparison to the diameter of the
4 tree. Obviously at the base it gets bigger, but it is still a considerable size. So
5 I think that it would have been as you moved around the tree, then it would
6 have almost certainly been visible.

7
8 Q Let us assume for a moment that it is not visible when you are just standing —
9 A. Yes.

10
11 Q -- moving around the tree, and it is under part of the base of the tree. What
12 then? A. Well, you are about half a metre -- the ditch is just about half a
13 metre lower or something around that sort of depth lower, so you are standing
14 there, so the base of the tree is about knee height anyway. So it is not going to
15 be hard at all to just lean down and just have a pull around, and that is exactly
16 what you do in any type of tree inspection. Sometimes you kneel down. In
17 this case you do not even have to kneel, just have to bend down and pull
18 around whatever is in the way, if there is anything in the way, and you should
19 be able to get —

20
21 Q What kind of things in the way are you talking about? A. Sorry?

22
23 Q What kinds of things in the way — A. You can have ivy, you could have
24 just fern, you could have brambles. Quite often you get brambles and things
25 growing over. You just have to pull them out the way. It is just common
26 practice in tree inspection.

27
28 Q How confident would you be of a level 2 inspector finding that fungal bracket?
29 A. Well, a level 2 inspector should find any fungal bracket of that size in
30 almost any type of situation, and obviously I was not there, I did not see it.
31 I have seen the photographs. From the photographs it is not minute. It is not
32 small, it is not that big, it is that big. And it should — obviously there is always
33 an opportunity for human error, which was why I had to qualify the statement
34 that I made, that it may not have been seen. But I think there is a very, very
35 good chance that an inspector would find that every time.

36
37 Q Can you put it in percentage terms? A. Well, at least -- we are always
38 looking at percentages but at least 95% of the time. That is a 1 in 20. If you
39 had 20 inspectors visited this tree, at least 19 of them, in my view, and
40 possibly even more if you took it on a greater sample, would be able to find
41 that bracket. This is not the sort of thing that is unusual. You are looking for
42 this sort of thing. That is your job, that is what you are there to find. It is like

1 finding a pot of gold to find a fungal bracket like that. It just confirms -- it
2 justifies what you are doing.

3
4 Q Can I ask you about the last joint statement, p.183? The definition there that is
5 given of "medium risk", that:

6
7 "A medium risk tree should be assessed regularly, annually in
8 preference but not less than once every two years and if the problems
9 worsen then intervention management will be implemented at that
10 time."

11
12 As I understand it, the conclusion of medium risk comes from an application
13 of the risk assessment under either the ISA or QTRA method? A Yes.

14
15 Q To what extent does arriving at a conclusion based on the risk assessment of
16 medium or high risk or low risk then define what one does about a problem?
17 A. The first thing to try and get across is that this is not a very precise art. It is
18 not a very precise process in any way. It is very much a matter of subjective
19 judgment. Both methods qualify in their descriptions and how they should be
20 used, that they should not be used -- it is almost impossible to define the line
21 between medium and high or medium and low, those sorts of boundaries.
22 There is a very vague area where one could cross over with the other. So to try
23 and pigeon hole them and say: "Right, this is a medium risk tree", or: "This is
24 a high risk tree" is really an inappropriate approach to using these types of
25 systems. They are primarily designed for allocating or prioritising when work
26 should be carried out. So you get a rough idea, a comparative idea, of whether
27 something needs to be urgently worked out, it is a high risk, or urgently looked
28 at and given priority for attention, or a lesser priority for attention, and that is
29 what these are designed -- these systems, these methods are designed to do.
30 No one is any better than the other. The ISA one has been around longer. The
31 QTRA one is an evolution of the ISA method, but that is relatively new. In
32 fact it has only been published in a form where people can go out and actually
33 put it into practice for the last year or so.

34
35 Q Can I lastly, please, take you to p.84? This is an extract from a book of David
36 Lonsdale, which in fact you describe, I think, as the statement of current
37 practice. Is that correct? A. It is probably one of the most appropriate
38 references for this field.

39
40 Q You said "the most appropriate" - what does that mean? A. David Lonsdale
41 is one of the most respected practitioners. He has been around a long time and
42 he consulted widely on producing this book. I was one of the consultees, so

1 I was involved in that process. And he is recognised as being really the best in
2 his field.

3
4 Q And to what extent do you say that what he says here does indeed represent
5 current practice in tree inspection procedures? A. Definitely. It is five or
6 six years old now, I am not sure exactly when it was published, but it still
7 represents pretty up to date -- there might be minor deviations in places where
8 practice has moved on, but it is pretty much a fair reference for current best
9 practice.

10
11 MR. STEAD: I would not propose to take your Lordship through it. It is
12 something that your Lordship can read and I will refer to it in closing
13 submissions. But I will be referring to 5.1, 5.1.1, and 5.1.2.

14
15 JUDGE MACDUFF: Yes.

16
17 MR. STEAD: Would you wait there, please?

18
19 MR. MOTT: My Lord, did you want to deal with the timing?

20
21 JUDGE MACDUFF: Well, I am in your hands, Mr. Mott, as much as you are in
22 mine. You are going to be some little time with him.

23
24 MR. MOTT: I am going to be a little time. I am certainly not going to finish today.
25 It might be easier to have it all in one bite. Looking ahead, time estimates that
26 were given before your Lordship took time to read the papers are beginning to
27 come back to haunt us. I cannot do Monday for various reasons. I do not
28 know what your Lordship will do if we do go beyond tomorrow. I am still
29 hopeful that we can finish the evidence tomorrow. The issues, I think, will
30 narrow.

31
32 JUDGE MACDUFF: Well, in that case, if you do not mind, let us do a little bit
33 more work tonight, because I would not only like to finish the evidence
34 tomorrow, I would like to finish submissions tomorrow.

35
36 MR. MOTT: Yes.

37
38 JUDGE MACDUFF: Mr. Mott, if it would help, we can sit at ten o'clock
39 tomorrow.

40
41 MR. MOTT: Yes, certainly.

42

1 JUDGE MACDUFF: Let us do that. We will sit at 10.00 tomorrow, but let us do
2 another 20 minutes tonight.

3
4 Cross-examined by Mr. MOTT

5
6 Q Mr. Barrell, both you and Dr. O'Callaghan were brought in after the stem that
7 is the subject of this action had fallen? A. Yes, that is right.

8
9 Q So neither of you saw the tree as it might have been seen by the hypothetical
10 inspector prior to the accident? A. No. That is right.

11
12 Q Or as it might have been seen by Mr. Rowe prior to the accident. Neither of
13 you saw that situation? A. No, we did not.

14
15 Q But Dr. O'Callaghan went first and he had the benefit of actually seeing the
16 fruiting bracket in situ? A. Yes.

17
18 Q And so you have to accept his description and the indication of what he saw
19 coupled only with your attempt to interpret the photographs? A. Well,
20 I think the point that is relevant here is that he saw it three years after the event
21 as well and I saw it four years after the event. So I think the photograph is a
22 particularly important reference because it does give us a visual representation
23 of what was there immediately after the accident.

24
25 Q If my maths is working, the event was in July 2001? A. Yes.

26
27 Q And Dr. O'Callaghan visited in early January 2003? A. Okay, right. Two
28 years after, yes.

29
30 Q 18 months. A. Okay.

31
32 Q Then you did not go until, first of all, March 2004? A. That is right.

33
34 Q Over a year later? A. Yes, there was a considerable time between the
35 accident and both of us visiting, I think is the thing.

36
37 Q So both of you were being asked by different sides to do your best to assess
38 what the hypothetical inspector should have concluded about this group of
39 stems making up this tree on different assumptions. One, that only the
40 included bark union was found and, secondly, that the included bark union
41 plus the fungus was found? A. Mm.

1 Q The whole purpose of the questions and answers that you were asked was to
2 try to, as best you could, put some conclusion on to the terms "high risk" and
3 "medium risk" which appeared in the reports and in the joint statement.

4 A. Mm.

5
6 Q We can see at p.180 your answers to the questions. You start by setting out the
7 questions themselves.

8
9 "In your report the term 'high risk' appears and in the joint statement the
10 term 'medium risk' appears. Can you provide an agreed definition as to
11 what these terms mean with regard to two matters: (1) what action
12 should be taken, (2) the appropriate time scale for taking that action."

13
14 A. Yes.

15
16 Q So of course the best judgment that you could make is if you were able to
17 transport yourself back in time to see the tree before the accident, and you
18 cannot do that? A. No, we cannot do that.

19
20 Q So you were both putting together your experience and the information
21 available and seeking to come up, if you could, with an agreement which
22 would at least help the court, which has seen even less than you have. All
23 right? A. Yes.

24
25 Q And you go on, after that:

26
27 "In answering the questions, the experts agree that an explanation of
28 what is generally understood by the terms 'high risk' and 'medium risk'
29 in relation to the subject tree should be set out first and they are agreed
30 about the following explanation."

31
32 Right? A. Yes.

33
34 Q So no doubt that this was to be directed specifically to the subject tree, as it
35 was prior to the accident. No doubt about that? A. Yes. No, I think that is
36 fine. I think I just draw attention to what is generally understood by the terms
37 of "high risk" and "medium risk". It is very difficult to be precise about these
38 things.

39
40 Q You were seeking to give an explanation, as best you could, with all the
41 provisos we have gone through? A. Yes, that is right. Generally, yes.

42
43 Q Generally understood by those terms in relation to the subject tree? A. Yes.

- 1
2 Q Not generally in relation to all trees? A. No.
3
4 Q But in relation to the subject tree? A. Yes, but generally in terms of the way
5 that you interpret "medium" and "high risk".
6
7 Q And you put your experience together and came up with figures using two
8 systems, two matrices of figures - the ISA system and the QTRA system?
9 A. That is right.
10
11 Q And you pointed out at the end of the section on p.181 on the ISA system that
12 context is important, not simply score? A. Yes. It is crucially important,
13 yes.
14
15 Q Yes. And that comes because you are simply adding together figures rather
16 than multiplying. Right? A. No.
17
18 Q Well, you know the standard health and safety test, the matrix of 5 by 5 by 5
19 and you are multiplying? A. No, that is -- well, we are not multiplying here
20 and we are actually ---
21
22 Q No. And that is the problem with it? A. No, I do not think it is a problem.
23 There is no problem, because you are not multiplying it. I do not understand
24 the point you are trying to get at there.
25
26 Q At any rate, you say the context is important, not simply the score?
27 A. I think that is exactly it. This is all something where you can put it into
28 little pigeon holes and say one thing means exactly -- you have to take a
29 certain course of action, and one other thing means you have to take another
30 course of action. It is very much a general assessment, and the primary reason
31 for that assessment is to be able to prioritise which items of work you give the
32 highest priority for attention.
33
34 Q I understand. In other words, whether your hypothetical inspector does
35 anything before the accident or not? A. Well, it is how he prioritises what
36 work he decides needs to be done is done.
37
38 Q What he does immediately and what could get left to be observed and dealt
39 with later on? A. Yes.
40
41 Q Fitted in? A. Yes.
42

1 Q All right. And having pointed out the difficulty of the ISA system and the
2 importance of context, you go on together to look at the QTRA system, and in
3 the third sentence under that you say:

4
5 "The risk probability is based on the ISA system but with the Health and
6 Safety Executive probability of harm matrix incorporated."

7
8 That is the multiplication factor? A. Yes, okay.

9
10 Q And you say:

11
12 "Whereas the ISA system is a broad assessment, the QTRA system
13 refines the risk."

14
15 A. Well, there is no doubt that both of the assessments are general ways of
16 trying to define things in broad categories. What the QTRA system does is try
17 to put figures to that, those broad categories, so that you can compare them
18 with the crucial part of QTRA which is the 1 in 10,000 reference. And that
19 defines whether the risk is acceptable or unacceptable.

20
21 Q Absolutely. And the way the maths is put together is designed to deal with the
22 context and to avoid the difficulty that you point out at (a) and (b) half way
23 down though the page? A. No, that is not what the maths is designed to do.
24 This is just a way, another way, of deciding whether it is broadly medium, low
25 or high risk. And the maths does not -- just because we have got mathematics
26 involved here does not mean to say that this is more precise or this is a more
27 appropriate or more accurate way of defining it. It is just one method out of
28 many methods. In fact we have just set out two methods here. There are other
29 methods as well and no one method is any better than the other.

30
31 Q Can we put aside any other methods because I have no doubt if you thought
32 they were going to assist the court you would have, in accordance with your
33 duty, put them in the joint statement and raised them. A. This is ---

34
35 Q Can we put them on one side --- A. This is illustrative to show you, to give
36 the court some idea of the methods that are available and how we can deal
37 with these things. It is not a definitive list, it is just a list. It is two methods
38 that we have set out. There are other methods as well.

39
40 Q Let us look at what we have got then. We have got a more sophisticated
41 system --- A. It is not more sophisticated. It is just a different system. It is
42 a system that uses numbers. Just using numbers does not make it more
43 sophisticated.

1
2 Q I will change the wording then. A more refined system? A. No. It ---

3
4 Q Well, let us --- A. It ---

5
6 Q Just a moment. Just look at ---

7
8 JUDGE MACDUFF: No, no, no. Please. Mr. Barrell, do not interrupt counsel, and
9 I will not let him interrupt you. A. Okay.

10
11 Q Though I might have to because you are tending to use six sentences where
12 sometimes two would be all right. A. Okay. That is fine. I mean, I can be
13 as brief or as long as ---

14
15 Q Just try and be a bit briefer. A. Okay.

16
17 Q But do not interrupt counsel, please. A. Okay.

18
19 MR. MOTT: Just in that first paragraph under the QTRA heading, the last
20 sentence:

21
22 "Whereas the ISA system is a broad assessment and the QTRA system
23 refines the risk."

24
25 So can we call it a more refined system? A. Well, it is -- I think you just
26 need to take it in a broad context that you can only get broad -- you can only
27 get a broad or rough idea from using any of these systems. So to infer that it
28 makes it better than the other is probably inappropriate. I think that is the best
29 way to answer that.

30
31 Q Within the three labels of high risk, medium or moderate risk and low risk,
32 there are, we see subdivisions so that in the middle range of medium or
33 moderate risk, you say:

34
35 "This would be further broken down as follows: 1 in 1,000 moderately
36 high; 1 in 2,500 moderate; 1 in 5,000 moderately low."

37
38 A. Yes.

39
40 Q And the 1 in 5,000 is down at the bottom end of that bracket therefore insofar
41 as it can be mathematically assessed because between 1 in 5,000 and 1 in
42 10,000, the risk is considered to be low. A. Yes, in a general sense. That is
43 how these things should be looked at.

1
2 Q You then, at p.132, together apply those two systems to the subject tree prior to
3 failure and assuming the decayed fungus was either not present or not
4 detected. So just the included bark union? A. Yes.
5
6 Q With all the other context of the position, the likelihood of targets and so forth?
7 A. Mm.
8
9 Q Whatever the system. So it is the subject tree prior to failure. Right?
10 A. (No audible reply).
11
12 Q The ISA comes to medium risk? A. Yes.
13
14 Q And the QTRA is also applied to the subject tree prior to failure under the
15 same conditions, i.e. no decayed fungus. Okay? A. Yes.
16
17 Q And you produce a risk level of 1 in 5,000 and you show the calculation?
18 A. Yes.
19
20 Q That includes the context of the road. Right? A. Yes.
21
22 Q And that 1 in 5,000 is part of the medium but it is the bottom end, it is the
23 moderately low end of medium risk, is it not? A. Yes. It is medium risk
24 and the boundaries are blurred, I think is the best way to put it.
25
26 Q Insofar as you can quantify it, and I accept you are saying this is a slightly
27 speciously form of quantification because it is not as precise as that -- but as
28 best you two could do together after the event, you put it at the bottom end of
29 the medium risk range? A. It is just -- it is a means of giving you some idea
30 of where it fits into that range.
31
32 Q And that is at the bottom end of the medium risk bracket, is it not? Is that a
33 difficulty? A. It ---
34
35 JUDGE MACDUFF: Yes, it is, is it not, Mr. Barrell? A. Yes.
36
37 MR. MOTI: Then you go on to the decayed fungus, again dealing with the subject
38 tree prior to failure and you both quite clearly come to the conclusion that that
39 puts it into high risk? A. Yes.
40
41 Q And high risk means fell it as soon as possible? A. Yes. That is general,
42 yes.
43

1 Q And that last page, 183, where high risk means fell it as soon as possible is
2 answering the question:

3
4 "What do those terms mean with regard to (1) what action should be
5 taken and (2) the appropriate time scale for taking that action?"

6
7 A. Yes.

8
9 Q And you knew that that was absolutely vital to this claim, did you not?

10 .. Yes, and I think it is with the high risk, when you have a combination of
11 severe defect and an aggravating factor of fungal decay, then there is no real
12 question about it. So we are quite clear on that. So I feel quite confident that
13 even after the event we can say that is the type of action that should be taken

14
15 Q Now, medium risk, if you have got that classification right, and I understand
16 the proviso that you did not see that tree before the accident, before the stem
17 fell, but if that classification is right, then you do not need to fell it as soon as
18 possible, keep it under review, watch it annually to see if the problems get
19 worse? A. Yes. Because you have to take it, as we qualified before, in the
20 context of the situation and because we had not seen the situation until in fact
21 quite a while afterwards it is very difficult to know the precise details of —

22
23 JUDGE MACDUFF: Mr. Barrell, you know, you are repeating yourself again.

24 A. Okay, right.

25
26 Q When you can agree with Mr. Mott, just agree with him. A. That is fine.

27
28 MR. MOTT: So watch it and there will come a time as it grows upwards and
29 outwards when it needs felling? A. Mm.

30
31 Q And it may be convenient to fell it earlier if it is in the system but it will not be
32 essential until it grows a bit more upwards and outwards, if you have got that
33 medium risk classification? A. Well, I think the difficulty is that we just do
34 not know what the circumstances were. So medium risk does not
35 automatically mean that you have to take some action or you have to leave it.
36 It means that you need to look at it and monitor it and come to a view based on
37 the circumstances that you find there.

38
39 Q I will try and approach it from the open field, from the other side. You could
40 not criticise any inspector who, if all that was visible was the included bark
41 union, said: "That is on your list to keep an eye on, but you do not have to fell
42 it immediately"? A. That is right.

1 Q And we understand the difficulty you had, that you did not see the fungus and
2 it was not present when you inspected. Can I ask you just to look at the sketch
3 for a moment at p.161. The road on the right, field on the left. If you want to
4 keep a finger in that - I have got the photographs detached - and look at p.131,
5 looking at the base of the tree after the detachment of the stem that fell, and it
6 is looking at it with the arable field furthest away from the camera that you can
7 see through the remaining stems? A. Yes, that is right.

8
9 Q And on the sketch plan the line of failure is the thick line shown as "Included
10 Union"? A. Yes.

11
12 Q So we have to imagine it is not that scarred face, that failed face that is visible
13 in the photograph, but an area of barked stem coming out towards the
14 photographer in the photograph at 131 by a very substantial extent. I know it
15 is only a sketch, but it is at least a third and getting towards half the whole
16 thickness of that... is it not? A. Well, I think you can get a fair idea of what
17 it looked like by looking at the left hand stone on that photograph.

18
19 Q Yes. A. Because if you just imagine that as sort of extending around in front
20 of you and try and take a sort of 3-D visualisation of it, then there is no doubt
21 that that would have been there.

22
23 Q So coming towards the camera, and we are told that the girth of the stem that
24 failed is something like 220 mm? A. Yes.

25
26 Q So that is what, 11 inches or thereabouts? A. It is about 10 inches. In fact it
27 is 8 inches actually.

28
29 JUDGE MACDUFF: I am sorry, what is the 10 or 11 inch measurement?

30
31 MR. MOTT: That girth of the - sorry, not the girth. The diameter of the stem that
32 failed. That comes from --- A. Page 97.

33
34 Q Thank you very. A. 3.2.4.

35
36 Q 97, para.3.2.4 in Dr. O'Callaghan's report, which is agreed. The stems that are
37 standing, that is average 220mm in diameter and are between 12 and 15 metres
38 in height. So on the assumption that this has been cut down and they have all
39 grown up together, that is the nearest we are going to get as to an indication of
40 the --- A. As long as we have got a fair idea ---

41
42 Q -- diameter of the stems as they are. So we have got that much coming -- 10 or
43 11 inches coming towards the camera. Now, another comparison. I do not

1 know if you need to take the bundle apart further, but the photograph on p.127,
2 two pages back, at the top it shows a bright yellowy/brown area which is
3 shown as the fungal bracket? A. Yes. The arrow points to the fungal
4 bracket.

5
6 Q Yes. And if we look at the shape of it at the bottom end of the fungal bracket,
7 the same shape can be traced on the photograph at p.131 and indeed 132?
8 A. Sorry? I just —

9
10 Q Yes, I have got grave doubts about having them all pulled out, but do you see
11 what I mean? A. Yes, I do. I do agree, yes.

12
13 Q And the obvious difference between the two is the colour of that bracket, is it
14 not? A. Yes.

15
16 Q Because 131 is the one that Dr. O'Callaghan took a photograph of before
17 removing it for investigation. And the discolouration is because that has
18 become exposed to the air and the elements, is it not? A. It is a factor of the
19 age. They deteriorate anyway after a certain period of time and obviously this
20 one has been weathered over a couple of years.

21
22 JUDGE MACDUFF: Just tell me when 131 was taken?

23
24 MR. MOTT: 8th January 2003. In the bottom right hand corner, you can just see it,
25 I think. 8th January 2003 is when Dr. O'Callaghan visited.

26
27 JUDGE MACDUFF: Well, that is on 131. Yes?

28
29 MR. MOTT: Yes.

30
31 JUDGE MACDUFF: I have got that. But it is 127.

32
33 MR. MOTT: I am sorry, 127 is July 2001, we are told, soon after the accident.

34
35 JUDGE MACDUFF: Who took that one?

36
37 MR. MOTT: Someone on the claimant's side, although it is annexed to
38 Dr. O'Callaghan's report.

39
40 JUDGE MACDUFF: But it is much closer to the accident.

41
42 MR. MOTT: Taken on behalf of the claimant in July 2001, so we have not actually
43 got the photographer, but taking it on that basis. (To the witness): What has to

1 be envisaged is not only therefore another stem with a curving and protruding
2 base then coming up towards the camera in 131 but also that bracket being
3 tucked up tight underneath that failed stem and flat against it. That is right, is
4 it not? A. It is difficult to say exactly how they were all orientated. I think
5 the fact of the matter is it was beneath – it was down, underneath that main
6 part of the stem that split off. So there is no real dispute about that.

7
8 Q Well, you say that, but what you can tell from that discolouration with age is
9 that the bracket, although it is 15 to 20 mm across, 6 to 8 inches across, that 6
10 to 8 inches is, as it were, clustered up on the other side of the tree, partly what
11 is remaining and partly the stem that failed, and it is quite a thin cluster, so that
12 you would not see that face if you had looked under before the stem failed
13 would you? A. Yes, I would refer your Honour to p.157 —

14
15 JUDGE MACDUFF: Well, could I just ask you a question first? That fungal
16 bracket that we see on all those photographs, that did not move in the
17 accident? A. Well, I did not see it. It does not look like it has moved. It
18 may have been knocked off and in fact it could have been knocked off when
19 the stem fell. So it is really difficult to be precise or clear about it. It does not
20 look like it has been knocked off in the first photo and in all honesty
21 Dr. O'Callaghan did see where it was when he visited and I did not, so ---

22
23 JUDGE MACDUFF: Mr. Mott, just remind me, you will know the answer to this,
24 where do I see the photograph of the stem that has fallen?

25
26 MR. MOTT: There is a photograph at the end of the stem at the bottom of p.127
27 and there is a photograph of the stem itself half way up at p.130. That does not
28 show the end.

29
30 JUDGE MACDUFF: Well, it is the end that ---

31
32 MR. MOTT: The only one with the end is at 127.

33
34 JUDGE MACDUFF: (To the witness): When the failure came - I just want to
35 understand this because this is detective work - would there would be a
36 fracture across the face of what we see as a face at the top of that fungal
37 bracket? Was that part of the fracture line? A. We can see -- well, it is
38 difficult to describe but what there would have been -- there would have been
39 the main stump that we can see in front of us there and then this branch or this
40 stem would have been sort of circled around towards us. And it would not
41 have been properly attached to that main stump. So there would have been or
42 there was a layer of bark between the wood of the stem and the wood of the
43 stump. So it actually was not attached to it very strongly. It must have been

1 attached in some places, probably towards the bottom, but it was not attached
2 very strongly. And in fact it looks like it has fallen -- it has come straight off
3 and detached completely from the tree, which means that it was obviously a
4 very weak union indeed.

5
6 Q Well, that is something we may have to come back to tomorrow but, before we
7 break off for today, Mr. Mott asked you a question a moment ago. A. Yes.

8
9 Q And you were going to refer me to another photograph? A. Yes, it was the
10 photograph that Mr. Mott ---

11
12 Q What page number? A. Yes, it was p.157. Half way down the second
13 paragraph, in fact the second sentence of the second paragraph, it says:

14
15 "The upper surface is initially whitish but darkens with age to become
16 fuscous and then dark broken or black. The flesh is soft and yellowish
17 at first but soon turns hard and woody."

18
19 Now, the flesh is the bit that you see on the top, that is the top surface. But
20 also:

21
22 "The tubes... are similar in colour to the flesh..."

23
24 Now the point is that the tubes, these fungal brackets have a solid sort of upper
25 side but they have an underside that is actually very fleshy and consists of lots
26 of very small tubes. They are like lots of straws packed together. And those
27 are actually quite -- they differ in colour and that is how you can tell certain
28 fungi apart from others. But to try and imply that just because it is creamy on
29 top, it is not the same colour underneath, is not actually correct. And I think it
30 would have been the same colour underneath as it was on top, and I think that
31 is the point. That is all I wanted to say.

32
33 JUDGE MACDUFF: Just give me a moment to make a note. (After a pause);
34 Now, Mr. Mott, is that a suitable moment for you?

35
36 MR. MOTT: Yes.

37
38 JUDGE MACDUFF: We will resume at ten o'clock.

39
40 (Adjourned until 10.00 a.m. on Friday 24th March 2006)
41

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

4BS50384

Royal Courts of Justice
Friday, 24th March 2006

Before:

HIS HONOUR JUDGE MACDUFF QC

BETWEEN:

GARY POLL

Claimant

- and -

(1) RAYMOUND BENEDICT BARTHOLOMEW MICHAEL
VISCOUNT ASQUITH OF MORLEY
(2) MARY C. BARTHOLOMEW
VISCOUNTESS ASQUITH OF MORLEY

Defendants

Transcribed by BEVERLEY F. NUNNERY & CO
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

MR. R. STEAD (instructed by Lyons Davidson) appeared on behalf of the Claimant.

MR. P. MOTT QC and MR. A. CHIPPENDALL (instructed by Greenwoods) appeared on behalf of the Defendants.

PROCEEDINGS

INDEX

	<u>Page No.</u>
BARRELL, Mr. JEREMY, Cont'd	
Cross-examined by Mr. MOTT, Cont'd	1
Re-examined by Mr. STEAD	16
O'CALLAGHAN, Mr. DEALGA PEADAR, Sworn	
Examined by Mr. MOTT	22
Cross-examined by STEAD	29
Re-examined by Mr. MOTT	37
CLOSING SPEECH BY MR. MOTT	43
CLOSING SPEECH BY MR. STEAD	47

1 Mr. JEREMY BARRELL, Cont'd
2 Cross-examined by Mr. MOTT, Cont'd
3

4 Q Mr. Barrell, we finished yesterday with the aid, if necessary, of the sketch
5 which is at p.161, particularly the photographs at p.167, trying to understand
6 what you were saying about the fungal bracket. I will give you a moment to
7 find those pages. (After a pause): A. I have the sketch and I have the
8 photograph.
9

10 Q Thank you. You pointed out the approximate measurement that
11 Dr. O'Callaghan put, 15 to 20 cm. Are you envisaging in drawing your
12 conclusions about visibility that this is, if I can use extremely unscientific
13 terms, a fungus more like a pancake than a football? A. Certainly it is a flat
14 type of fungus, which is why a hand is a good representation of it.
15

16 Q And with the flat surface of the pancake attached to the underside of the stem
17 where it curves down and under into the ditch? A. No, that is not right.
18

19 Q Well, you say that is not right. You did not see it, did you? A. No, but fungi
20 do not attach themselves in that way.
21

22 Q So your evidence as to visibility is on the assumption that it is attached in a
23 different way? A. Yes. I mean, if I can ---
24

25 Q Can you explain what your assumption is? A. The fungi grow out. They do
26 not attach themselves from the whole flat surface at the top up on to a piece of
27 wood. They actually grow out from the side and grow out sideways. So in
28 fact if you look at my hand and imagine that is the plane of the fungal bracket,
29 then it is attached at this back part against the tree. It is not attached by this
30 top section. So it grows out from the side, and you can see that in photo 2.
31

32 JUDGE MACDUFF: Starting where? It starts with the exterior of the wood of
33 the --- A. Yes, basically the fungus is a series of tubes inside the wood that
34 is decaying it away and over a period of time, and quite often you do not see
35 that for 10 or 20 years. And then when it has got sufficient energy to initiate a
36 fruiting body or it has got enough reserves, then basically it bursts out through
37 the side of the trunk, and the fungal bracket starts to form, and then it grows
38 quite quickly, sometimes over a few days. Mushrooms come up literally
39 overnight. And it grows out and it is attached at the back of the fungal bracket.
40 So when you see these on a -- if you imagine this was on a straight stem that
41 was coming out from the side of the stem, it would be attached at the back side
42 of the bracket.
43

1 MR. MOTT: I understand. I am not sure whether we are at cross-purposes. Let me
2 just see if I can use words, whereas being on site if we could reconstruct it
3 would be much easier. So far as the tree is concerned pre-accident, there is,
4 very broadly speaking, a -- was a horizontal surface, roughly horizontal
5 surface, facing downwards towards the ditch. A. On the underside of the
6 stem that fell?
7
8 Q Yes. A. Well, I should imagine it was curved. I do not imagine --
9
10 Q Yes, quite. A. -- it was just completely horizontal. I should imagine it
11 curved upwards.
12
13 Q Starting on the sort of horizontal, coming up in a curve until it was roughly
14 vertical? A. Yes.
15
16 Q The fungal bracket, a pancake sort of shape, flattish shaped, was on the plane
17 so that the flat surface was on the upside and the downside, and the thinner
18 rimming of the pancake, as it were, was attached at the back and facing
19 outwards? A. Yes. I would say it must have been below the actual stem
20 that fell off because it did not come off when the stem came off.
21
22 Q So the top surface of this fungal bracket is horizontal and facing upwards to the
23 horizontal element of the failed stem facing downwards? A. Yes.
24
25 Q And little or no gap between the two? A. Well, I mean, I do not know.
26 There clearly was a gap because otherwise it would have tipped off with the
27 stem when it fell off.
28
29 Q And you are not really in a position to judge, are you, to what extent it was
30 attached to the stem that failed or attached to the part that remained, save that
31 on the photographs the majority, if not all, of the fungal bracket has stayed
32 with the part that remained? A. I mean, I can only -- from the evidence
33 I have seen, it clearly was not attached to the stem that fell or that failed
34 because it is still attached to the tree. And it looks -- I mean, it is difficult from
35 photographs but it does look like it is attached and it is intact.
36
37 Q So although I understand the sophistication of the attachment process you are
38 putting forward, I was not trying to deal with that and I apologise if I have
39 misled you, but it is right that the upper flat surface of this pancake fungal
40 bracket was right underneath the curved and then horizontal undersurface of
41 the failed stem, as you envisage it? A. I think it was certainly beneath.
42

1 Q If you look back to p.126 in the photographs you see the dense undergrowth in
2 the ditch, so that in order to see the fungal bracket there would have to be
3 clearing or pushing aside of the undergrowth? A. Yes.
4

5 Q And one would have to bend down until one eyes were at or below the level of
6 the base of the failed stem? A. Yes. It is normal practice, you have to look
7 at that interface between the soil and where the tree trunk goes into the ground.

8 So it is normal practice.
10 Q And the gap between the bottom of the failed stem, as it curved down, and the
11 base of the ditch, something like a foot? A. Maybe. It is really difficult to
12 tell.
13

14 Q You saw it only after the failed stem had come off? A. I did, yes.
15

16 Q But you would have some idea. Is that sort of 300 mm, if you want it —
17 A. Well, I mean, looking at the photograph, it was clearly attached. It broke
18 off just above the fungus by the look of it. So it is just a matter of judgment
19 and mine is probably no better than anybody else's on how much was visible.
20

21 Q But it is a case of getting down on your hands and knees to see the fungus?
22 A. No, I would not say so because I stood in the ditch and it is about half a
23 metre down, so you could bend down and — you know, I mean, if this was
24 directly underneath the trunk, and you will bear in mind the trunk is 220 mm,
25 so it is not much bigger than the fungus, it is almost the same size. So if you
26 just looked around the side, then it would probably be more visible. You do
27 not look at it straight on.
28

29 Q We have at p.129 photographs taken in January 2003 which show what was
30 left standing. All right? A. Yes.
31

32 JUDGE MACDUFF: Which of those three stems, are you able to tell me, has failed
33 recently? A. Yes, the left hand side one.
34

35 MR. MOTT: We have a little more detail at pp.131 and 132. 132 is probably easier
36 because the fungal fruiting body is there shown. Now, the measurement of
37 220 mm that you have just referred to is taken from Dr. O'Callaghan's report,
38 is it?
39

40 JUDGE MACDUFF: Which measurement is that?
41

42 MR. MOTT: 220 mm is the — A. Diameter of the trunk.
43

1 JUDGE MACDUFF: Can we avoid metric?
2
3 MR. MOTT: Yes, certainly.
4
5 JUDGE MACDUFF: I am hopeless. I think in feet and inches still, I am afraid.
6
7 MR. MOTT: 100 mm, 4 inches - is that right? A. So it is about eight inches.
8
9 Q 10 cm, 4 inches, so it is eight plus a bit, nearly nine inches? A. Mm.
10
11 Q If you want to just confirm, can we look back, keeping fingers where
12 necessary, to p.97 to see where that measurement comes from? Have you got
13 p.97 in the bundle? A. Yes. Yes, I am aware of it.
14
15 Q Para 3.2.4, and it is the measurement of the average of the stems.
16
17 "Three of the stems are still standing, while the fourth is the one that
18 failed and caused the accident. The stems average 220mm in diameter
19 and are between 12 and 15 metres in height."
20
21 A. Yes.
22
23 Q That is what you are taking as 220mm? A. Yes.
24
25 Q So that those stems which remain, one can see certainly two at p.129 and to
26 some extent on p.132, those are making up the average of the 220mm or nine
27 inches diameter? A. Yes.
28
29 Q And that is diameter of the stem after it comes out from the base? A. I think
30 the way that I have interpreted this is that this is just a rough estimate. It is an
31 average of these three or four stems. It is reasonable. It gives you an
32 indication of the range, of the size that we are dealing with. We are not
33 dealing with huge stems, we are not dealing with small ones. But whether it is
34 220 or 210 or 230 I do not think is -- you know, I have not looked at it in that
35 sort of detail.
36
37 Q I understand that. Looking at p.132 and that photograph, the left hand stem
38 something around nine inches across in diameter, if we are avoiding metric?
39 Okay? A. Yes.
40
41 Q That sort of thing. Maybe eight, maybe ten? A. Yes, it is in that range.
42

1 Q The extent of the base of the failed stem can be seen from, as it were, the
2 scarring, what has clearly been torn away. It is right from that point above the
3 "g" of "fungal fruiting body". Right? A. Yes, that is right, yes.

4
5 Q Right over beyond the last line on the right of area showing decay where we
6 see the ivy starting beyond that? A. Yes.

7
8 Q And the whole of that is torn away? A. Yes, but that is much wider than
9 the ---

10
11 Q Absolutely --- A. -- diameter of the stem.

12
13 Q So that although you have got about a nine inch stem as it comes into a stem,
14 the bit at the bottom that would be potentially obscuring the fruiting body is at
15 least twice that? A. Yes.

16
17 Q Just looking at it very simply with photographs? A. Yes, and if you looked
18 at it from directly in front of it, that is quite right.

19
20 Q So that you have an area at the base that has been torn away of at least 18
21 inches across? A. Yes, I think that is quite right. You can see it from the
22 photo.

23
24 Q With a pancake-type fruiting body flush up underneath it which is six to eight
25 inches across, 15 to 20 cm? A. Yes.

26
27 JUDGE MACDUFF: Six to eight?

28
29 MR. MOTT: Six to eight inches across. If one takes the pancake analogy, six to
30 eight inches in diameter. It is not ---

31
32 JUDGE MACDUFF: If you are looking face on, slightly left of centre, Mr. Mott
33 suggests flush up underneath it. I suppose that depends upon how quickly the
34 stem curves upwards? A. I think that is exactly right. I mean, none of us
35 really know exactly what the circumstances are. What we can do is look at
36 what is there, and I think if you look at the left hand stem, the fungal bracket,
37 if you sort of imagine that twisted around this way, and that actually being the
38 one we are looking at and the fungal bracket is underneath, it will give you a
39 very good estimation of what it looked like. That is probably the best that
40 I can come up with.

41
42 Q To find that fungal bracket - let us see if I can just get at it - assuming that the
43 stem was still there and bearing in mind that you do not know precisely the

1 shape or the curvature at the bottom of the stem that is moving towards vertical
2 position, you would either have to come in from, as it were, on photograph
3 132, the left, past that rag, or whatever it is, and look in that way. Yes?
4 A. Yes.

5
6 Q Or come in from where the photographer is? A. Yes.

7
8 Q And that would depend to some extent upon how quickly the stem moved from
9 the horizontal into the perpendicular or near perpendicular condition?

10 A. Yes. And I accept, I think it is almost certain that if you looked at it
11 standing up, it —

12
13 Q You would not see it? A. No, I do not think you would.

14
15 Q No, you would not. A. And I think there is no doubt about that.

16
17 Q And the fruiting body is, as it were, left of centre. So although it is six to eight
18 inches across beneath a piece that is torn out that is 18 inches approximately
19 across, it is, as it were, a third of the way in from the left — A. Yes.

20
21 Q — by the look of it, roughly, perhaps a bit more than a third of the way in rather
22 than midway? A. Yes.

23
24 Q And as a tree inspector do you in fact when you are inspecting trees that you
25 have cause to investigate, get on hands and knees sometimes? A. Yes, every
26 time. I mean, every time is an exaggeration but very frequently. I think the
27 point is that you do not just look at it from the easiest angle. You have to look
28 at it from all around because these things by their very nature are quite often
29 difficult to see because people do not see them often.

30
31 JUDGE MACDUFF: I am sorry, Mr. Mott.

32
33 MR. MOTT: No, that is all right. That is helpful. (To the witness): The
34 proposition, the assumption is that this is a level 2 competence inspector
35 coming in and doing a reasonably careful job, not just looking at this tree but
36 doing a survey of the trees all the way along the highway. You are not
37 assuming that this is a particular tree identified which is then being looked at
38 more closely; this is part of a general survey, is it not? A. Yes.

39
40 Q So you are saying that in all those trees where there is any sign or potential
41 problem — A. Yes.

1 Q -- or every tree, regardless of whether there is any sign of a problem, you have
2 to get on your hands and knees and look all around the base? A. If you were
3 doing a drive-by survey or walk-by survey, you would be looking for signs of
4 ill health, which would alert you and you would be looking at signs for
5 structural defects. And if you notice those in any of the trees that you looked
6 at, those would be the trigger to go in and actually do a more detailed -- or a
7 closer visual inspection of the base of the tree which is where you tend to see
8 the defects.

9
10 Q In this case we know there was and would have been no sign of ill health in the
11 crown of the tree prior to the accident. A. Yes.

12
13 Q That is agreed. So it is the structural nature of having a multi-stemmed ash?
14 A. Yes.

15
16 Q And when you get closer seeing the included bark union -- A. That would
17 be the trigger.

18
19 Q -- you would hope would lead you to get on hands and knees and look right
20 down underneath? A. Yes.

21
22 Q Can I ask you to look, please, at your own report on p.59. Just putting it in
23 context as a reminder, unusually in this case you had seen Dr. O'Callaghan's
24 report before you prepared your report? A. Yes.

25
26 Q And sensibly you used the natural process of, as it were, commenting on that
27 and agreeing where you could and disagreeing where you needed to?
28 A. Yes.

29
30 Q And about the middle of the page in the paragraph numbered 4 under 3.2, you
31 say:

32
33 "I agree with the discussions set out in 4.8 and 4.9 relating to the nature
34 of the fungal infection."

35
36 Right? A. Yes.

37
38 Q You go on then later in the report to areas of disagreement. You do not refer
39 again to 4.8 or 4.9, do you? A. (No audible reply).

40
41 JUDGE MACDUFF: I think you can probably take it that you do not. A. Yes.
42 I do not think so.

1 MR. MOTT: So if we look on p.103 at paras.4.8 and 4.9 to see what you are there
2 agreeing with, it sets out the fungus:

3 "This is generally thought to be a comparatively rare fungus in Britain."

4
5 We can read what is said thereafter. The text at appendix 6-3.

6
7 "However, Dr David Rose information me that it is more common than
8 was previously thought but seems to be restricted to Ash and possibly
9 Plane and with such a narrow range of hosts, it is not commonly seen by
10 Arboriculturists."

11
12
13 A. Yes.

14
15 Q You were agreeing with that? A. Yes.

16
17 Q In the next paragraph:

18 "Therefore, it is not surprising that the presence of *P fraxinea* would be
19 missed in any visual inspection."

20
21 You were agreeing with that? A. Yes, I accept that. Yes.

22
23 Q He sets out the general and specific size of the brackets and how it forms and
24 so forth. Then at the end of that paragraph:

25 "In comparison with other decay fungi such as *Gannoderma* or
26 *Inonotus*, it is a small and easily missed bracket."

27
28
29 A. Yes.

30
31 Q You were agreeing with that? A. Yes. The point about that is the
32 comparison with these fungi which have much bigger brackets, *Gannoderma*
33 and *Inonotus*.

34
35 Q Well, the case went on and there came a stage when you and Dr. O'Callaghan
36 were asked to prepare a joint statement, and we find that starting at p.174.
37 I want to take you to p.175 where in the same terms as your report, I think, but
38 here para.5, just below the middle of the page you say:

39 "The discussions with respect to the nature of the fungal infection set
40 out in paragraphs 4.8 and 4.9 of Dr. O'Callaghan's report are agreed."

1 A. Yes.

2
3 Q And you did not qualify that in that series of paragraphs indicating agreement?
4 A. No, and I think the end line, the end sentence of those paragraphs says it
5 clearly, that it is small. The fungal bracket is small in relation to the other
6 fungi that were mentioned.

7
8 Q Go back to p.174. You see it says just under the box showing who you are:

9 "The arboricultural experts met on 16th September 2005."

10
11 Just pause there. That is right? A. Yes.

12
13 Q You went to Dr. O'Callaghan's offices? A. Yes.

14
15 Q You arrived there in the morning, you had two or two and a half hours
16 discussion and you had lunch afterwards? A. Yes.

17
18 Q You agree that, broadly speaking? A. Yes.

19
20 Q It was a face-to-face discussion with plenty of time to deal with the issues?
21 A. (No audible reply).

22
23 Q Yes? A. Yes.

24
25 Q You are nodding, and it does not get picked up on the recording A. I am
26 sorry. Yes, that is right.

27
28 Q Thank you very much. And you discussed the matter frankly between experts.
29 Right? A. Yes.

30
31 Q And following that discussion this joint statement was produced. I think
32 Dr. O'Callaghan had started trying to produce a draft of what he thought might
33 be agreed and not agreed, and it went through a series of drafts by email before
34 the final version was approved? A. Yes. In fact I produced - I think
35 I produced the original draft and it was worked on.

36
37 Q You did. All right. Well, I do not want to undermine the process of frankness
38 between experts, but just to establish that this was over time, and we can pick
39 that up from p.179. I think on your copy you have the signatures, which show
40 that Dr. O'Callaghan signed it on 23rd November and you on 30th November -
41 I am sorry, September. A. Yes.

1 Q 30th September? A. Yes.

2
3 Q And his was 23rd September. So that is two weeks on from the morning
4 meeting that you actually attended? A. Yes.

5
6 Q If you look at para.22, under the disagreements, you take each issue and set out
7 the respective positions in separate paragraphs from 22 going on to the end to
8 27. A. Yes.

9
10 Q That is the format? A. Yes.

11
12 Q So the first three lines, the first paragraph under 22, is what Dr. O'Callaghan's
13 position is on the issue there being dealt with? A. Yes.

14
15 Q It says:

16 "Dr. O'Callaghan is of the opinion that the fungal bracket is unlikely to
17 have been detected even by a competent inspector as it was located
18 underside of the stem that failed and was only visible to him..."

19
20 That is Dr. O'Callaghan - right? A. Mm.

21
22
23 Q -- "because the stem had failed and exposed it". So it was clear that
24 Dr. O'Callaghan was saying the hypothetical competent and careful level 2
25 inspector probably would not have seen the fungal bracket? A. Yes, that is
26 what he is saying, yes.

27
28 Q And what flowed from that was that, if that were so, the tree would not
29 necessarily have been felled before the accident? A. Yes.

30
31 Q That would follow from what you were discussing? A. Yes.

32
33 Q So the significance to this case must have been clear to you of that area of
34 disagreement? A. Yes, and that is why I set out my position in the
35 following sentence on that area of disagreement.

36
37 Q Your position on that area of disagreement is then set out:

38 "Mr. Barrell believes that the fungal bracket could have been visible
39 during a detailed basal inspection of the subject tree had one been
40 undertaken by a competent person."

41
42
43 A. Yes, that is right.

1
2 Q Then:

3
4 "However, it was not present when he made his inspections..."

5
6 That is when you made your inspections - right? A. Yes.

7
8 Q Then:

9
10 "...and he is unable to be certain as to whether it could or could not have
11 been seen."

12
13 A. Yes.

14
15 Q Now, if I can just understand what you are dealing with there, what the "could"
16 means. There was no doubt, and it was accepted, that the fungal bracket was
17 there on the underside of the stem. That was an agreement between you?
18 A. Well, I do not dispute that, yes, and it is in the photo.

19
20 Q So clearly in absolute terms the fungal bracket could have been seen ---
21 A. Yes.

22
23 Q -- if you got yourself in the right position? A. Yes, certainly.

24
25 Q So what this paragraph is dealing with is whether it could have been seen, i.e.
26 it would have been within the sight lines of a careful and competent level 2
27 inspector carrying out a reasonable inspection of the tree? A. Yes, and
28 I have set out that I think it could have been visible.

29
30 Q And your conclusion was that you were unable to be certain as to whether it
31 could or could not have been seen by the competent inspector doing what
32 could reasonably be expected of him? A. Yes.

33
34 Q And it follows from that that at that stage you were unable to say that probably
35 it should have been seen or probably it would not have been seen? You could
36 not say one way or the other? A. Well, I feel my judgment is that it
37 certainly could have been seen, which is what I have said there. But because
38 I was not there and I was not able to analyse the situation at the time, I really
39 cannot be 100% certain, and that is how I have qualified that.

40
41 Q There is nothing to suggest in that vital paragraph that a level 2 inspector
42 should find a bracket of that size in almost any circumstance? A. Well, how
43 much detail do you go into in these things? You know, there is a limit to how

1 much we can put in. I think it is quite clear. I think the bracket could have
2 been visible and I have set that out quite clearly. I am not 100% certain
3 because I did not see it at the time.

4
5 Q What that is saying is that because you did not see the bracket, it was not
6 present when you made your inspection, you are not in a position to make the
7 judgment as to whether it would have been visible or within the sight line of an
8 inspector doing what you would expect an inspector to do? A. Well, I am in
9 a position to make a judgment because I am involved in these sorts of things
10 on a daily basis almost, and I know how they are carried out and I have seen
11 the photograph that we have both seen, and I have seen the situation as well.
12 So I have seen where an inspector would stand, I know what an inspector
13 would have done, which we have been through, and my opinion is that that
14 bracket should have been visible and should have been picked up.

15
16 Q And on paper here and your stance at the time of the joint statement was, in
17 effect, when dealing with Dr. O'Callaghan's opinion, "Well, you saw it, I did
18 not", and you could not express a contrary view? A. Well, Dr. O'Callaghan
19 did not see it at the time. He saw it after the event, and I saw the
20 circumstances after the event. I mean, Dr. O'Callaghan's opinion is his own.
21 He did not think it could have been seen by a competent assessor, that is fine,
22 he has based that on his experience. My opinion is clear.

23
24 Q Since the time of your signing this joint statement, there is no new factual
25 material that affects your judgment on it, is there? A. Well, no, not that I am
26 aware, no.

27
28 Q No, I do not believe there is. A. No, I do not think so.

29
30 Q Now, you annexed to your report an extract from David Lonsdale's book which
31 we find starting at p.84. I want to look at p.85 very briefly. Under the heading
32 of "Visual inspection" in the second paragraph there, the last two lines at the
33 bottom of the left hand page, "General inspections" and up to the first two
34 lines on the next page, it is quite clear that -- I do not know if he is
35 Dr. Lonsdale or Professor Lonsdale or Mr. Lonsdale, but David Lonsdale is
36 envisaging potentially a two stage inspection to take place: general inspection
37 followed by a more detailed inspection in certain cases. A. Yes, that is
38 right.

39
40 Q At the beginning of the next paragraph on the right hand side, 10 lines or so
41 down:
42

1 "Some defects, especially certain forms of decay, do not give rise to
2 external signs and therefore tend to escape detection in a purely visual
3 survey."

4
5 A. Yes, that relates to decay and not to the fungal bracket.

6
7 Q You point to another issue that I want to just investigate a little further with
8 you, at p.62 of your report. That is the question of allocation of resources in
9 potentially this two-stage process. You make the point that:

10 "Limited resources are a common problem and it is often not
11 realistically feasible to inspect every single tree in detail every year. In
12 such circumstances, a responsible and reasonable management approach
13 is to analyse the extent of inspections required and to prioritise the
14 allocation of the available resources."

15
16
17 Right? A. Yes.

18
19 Q And reading through - I do not want to read it through laboriously - the
20 remainder of that paragraph, you seem to be envisaging Mr. Rowe, who was
21 already employed, doing a more systematic assessment as the first stage, as the
22 visual inspection. Is that right? A. I mean, a standard way of approaching a
23 situation where you have got a lot of trees would be to do a visual assessment
24 in the first instance as a means of assigning the priority for areas where you do
25 more detailed assessments.

26
27 Q As to the question of funds, you come back to it in the disagreement in the
28 statement of experts at p.178, para.24. That seems to confirm the proposition
29 you have accepted, that what you had in mind was a prioritised tree inspection
30 regime undertaken by Mr. Rowe. A. Yes. I mean, the standard way of
31 dealing with this is the way I set it out.

32
33 Q Dr. O'Callaghan though was disagreeing, saying that the only way in which
34 that could work in effect was, first, to undertake a base line survey, which
35 would identify all trees, tag them and plot them on a map and prioritise
36 actions, and then have a system of regular systematic re-inspections which
37 could require a large expenditure in the first instance. A. Yes. I mean, I do
38 not think that is necessary, which is why I disagreed there. In a situation, if
39 you have got thousands of trees, it is ridiculous to suggest that it is necessary
40 to go and tag them all and look at them on that basis. The situation is that
41 what you do is you do a visual assessment of all the trees that you have got on
42 your estate, which could be a day or two days of walking or driving, and then
43 you use that to prioritise where you start to look at things in more detail, and

1 those would be areas where there was the greatest risk, i.e. where you had the
2 biggest trees nearest the most targets, that is people or property, where harm
3 could arise. So you would focus your resources in those areas.

4
5 Q If you were to do what Dr. O'Callaghan is suggesting, the proper base line
6 survey, identifying all trees, tagging them and so on, that is going to be a cost
7 of £10,000 or thereabouts? A. Yes. And it is hardly ever done. It is not the
8 normal standard way of doing it.

9
10 Q Not what you are expecting? A. No.

11
12 Q So you are envisaging Mr. Rowe, who is sort of level 1 or level 1-plus —
13 A. Yes, Mr. —

14
15 Q Did you understand that? A. Yes, level 1.

16
17 Q Going round and doing the first visual survey? A. Yes.

18
19 Q And making notes of any trees that might need further attention? A. Yes.

20
21 Q And you would expect him to note of this tree that it was multi-stemmed,
22 would you? A. Yes.

23
24 Q And to observe that there was an included bark union or not? A. Well, what
25 the multi-stemmed state does is it triggers the need for a more detailed
26 inspection. Whether Mr. Rowe or a specialist inspector is used to do that is up
27 to the estate. It depends on how confident he feels he is to do that.

28
29 Q Somebody has to make a judgment about that? A. Yes.

30
31 Q And one good way of making a judgment is to find evidence first of all, so for
32 Mr. Rowe to note — A. Well, the way this — in this situation, this area
33 would have been prioritised as a relatively high priority for attention because it
34 was near the road, and that would initiate or suggest that that is where the more
35 detailed surveys ought to be undertaken.

36
37 Q So I understand, are you saying that you would expect someone other than
38 Mr. Rowe with greater training and experience to do the whole of that set of
39 roadside trees or are you saying, as I thought you had agreed, that Mr. Rowe
40 could do the first visual inspection to identify trees that might be a problem?
41 A. It depends on the capability of the inspector. If he is capable of identifying
42 defects, then that is fine, he can do the detailed inspection. But what the visual
43 assessment should do is identify the areas where the hazard is potentially

1 greatest, and that is near roads with big trees with defects. That is what that is
2 meant -- that is the process that then focuses your attention on a detailed
3 analysis of individual trees which crop up as being potentially high risk.

4
5 JUDGE MACDUFF: Mr. Mott, I am a little perplexed as to why we are going
6 through this particular line of cross-examination. Is it not agreed that there
7 should have been a level 2 inspection and that Mr. Rowe is level 1 and that this
8 tree should have been more closely visually inspected than it was, and can we
9 not bypass this first stage as to how it should have been identified? It should
10 have been identified as at least requiring a level 2 inspection which, as
11 I understand it, was not taken. So it seems to me that you are going back a
12 stage to a place which has already been hurdled by joint opinion of the experts.
13 Is that fair?

14
15 MR. MOTT: My Lord, I do not think that that is quite where the experts are,
16 although it may be close. There is still an issue, largely a legal one, of how
17 this should be approached and what is a reasonable balance between cost and
18 duty and whether, therefore, the filtering process prior to further inspection is a
19 reasonable one. It is accepted that the multi-stems would have been visible --

20
21 JUDGE MACDUFF: Just look at p.176, para.12:

22
23 "The multiple stems would have been visible from a roadside survey.
24 The included bark unions at the base of the tree may have been visible at
25 certain times of the year and not at others. It would be standard practice
26 for a qualified and competent [I read] level 2 tree inspector to move
27 through and push aside shrubs and undergrowth. Multiple stems are
28 signs of potentially weak or included basal unions that a competent tree
29 inspector should have been aware of and would normally be assigned
30 for closer inspection as needed."

31
32 So we get, it seems to me, to the point where a level 2 inspector ought to have
33 been looking at this tree at some stage. Had he done so, he would have
34 discovered the included bark union. The issue then is whether he would have
35 found the fungal growth or not, on balance of probability.

36
37 MR. MOTT: My Lord, there is a gap there. Paragraph 26, p.178, it is clear that
38 Dr. O'Callaghan believes that the level 1 inspector, Mr. Rowe in this case, is a
39 sufficient first stage. Mr. Barrell, who is going to investigate it, apparently
40 disagrees -- disagreed then --

41
42 JUDGE MACDUFF: Even if I agree with Dr. O'Callaghan on para.26, where does
43 that leave you? Because he did not identify it as a tree that required what your

1 expert says it required, namely a level 2 inspection. I am not going to stop you
2 but you can hear where I am coming from. It seems to me that this cross-
3 examination ---

4
5 MR. MOTT: It is a secondary point, I concede that. I do not propose to take it
6 much further. I just want to understand from Mr. Barrell this, if I may. (To
7 the witness): You appear to be saying in your report - taking it away from
8 Mr. Rowe in particular - that somebody of a lower level, a level 1 inspector,
9 could do the first filter to prioritise the trees? A. Well, what I am saying is
10 that to discharge their responsibilities to identify any potential hazards or the
11 risk, then it has to be a level 2 inspector, because a level 1 would not have the
12 ability or knowledge to know about the risks associated with defects in a tree.

13
14 Q Let us get away, if we can - hoping to make what is quite a simple point
15 shortly - from the level 1 and level 2. Whoever is the inspector going along,
16 the first stage is to do a filter, as it were, to say which trees need to be looked
17 at more closely? A. But you have to be a level 2 to be able to do that
18 competently because you just would not have the knowledge or the ability
19 to ---

20
21 Q And one of the trees to be looked at more closely, i.e. not just from the road, is
22 a multi-stemmed ash? A. Yes, I think tree with multi-stems would be one
23 that would trigger a closer inspection.

24
25 Q You go in there and look at it and look for the included bark union that you are
26 almost expecting to find? A. Yes.

27
28 Q And find it? A. Yes.

29
30 Q And then you do your assessment on the item, the girth and the nature of the
31 union and how close it is to roads and any other hazards and so forth?
32 A. Well, the first thing you look for is if you have got one defect which you
33 identified, it is quite often ---

34
35 JUDGE MACDUFF: Well, we have been down this road before. A. Yes.

36
37 MR. MOTT: I think so, yes. All right. Thank you very much.

38
39 Re-examined by Mr. STEAD

40
41 Q Mr. Barrell, can I understand this? You have been taken to your report and the
42 description you agreed which had been given by Mr. O'Callaghan in his first
43 report of the fungal bracket and you agreed what was said about the nature of

1 the fungal bracket, and then I think at p.60, para.3.02, you went on deal with
2 the identification of a fungal bracket. Right? A. Yes.

3
4 Q At the end of that paragraph, having set out your reasons, you said:

5 "For these reasons, I do not believe that the presence of the fungal
6 bracket at the base of the tree would have been missed by an
7 experienced inspector."

8
9
10 A Yes, that is right.

11
12 Q Did your view as to that conclusion in any way alter when you met with
13 Mr. O'Callaghan? A. No, that did not change and that was one of the points,
14 at point 22 on p.177, where I had made that point clear.

15
16 Q I do not want to get too bogged down in this argument about two-stage
17 process. Once, though, one has got to the stage of actually looking at this tree
18 beside the roadside, seeing it is a multi-stemmed tree, are you envisaging that
19 at that point the person who has identified it as a multi-stemmed tree just keeps
20 walking down the road and looks at other trees and makes notes about them
21 without going to investigate, or are you envisaging that he sees that it is a
22 multi-stemmed tree and then goes into the undergrowth and has a look at it and
23 finds the included bark union? A. There are a number of different ways of
24 dealing with it. If you have got a level 2 inspector, someone who knows the
25 issues, then if I had seen that I would actually go in and I would look at it
26 straightaway. Alternatively, you could record it and then use that as a means
27 of prioritising how you looked at things in the wider scheme of things.

28
29 MR. STEAD: Does your Lordship have any questions?

30
31 JUDGE MACDUFF: Yes, just two fairly supplementals. I do not know whether
32 you can help me. Can we look at p.127? The white rot - tell me about that.

33 A. As the fungus decays away the wood inside, and it is not often visible
34 outside because the bark is still intact, you get a white mycelium, which is all
35 the fungal high feeder tubes which are dissolving the bits of wood. So they are
36 generally white, although they can be different colours. So that is one area that
37 could look white. White rots - you can get brown rots, white rots - are
38 specifically fungi which decay away the lignin the content of the wood. There
39 are two parts, lignin, which is brown, and cellulose, which is white. White rots
40 decay away the lignin and they leave the white stuff basically.

41
42 Q I want to simplify that for a bearer of little brain on trees. The white rot is
43 directly connected with and a product of the fungal bracket? Is that right?

- 1 A. It is the other way round. The decay inside the tree which you cannot see,
2 that is the main organism ---
- 3
- 4 Q Breeding ground for the --- A. That is the main organism, that is where it
5 feeds, and the bracket is actually the way it propagates, the way it produces
6 spores.
- 7
- 8 Q The white rot comes first and the fungus comes second? A. Yes.
- 9
- 10 Q White rot is all internal, is it, to the wood? A. Generally.
- 11
- 12 Q So that there is no question - I am sure I would have been told if there were - of
13 a visual inspection showing that there was any white rot? A. No. The only
14 way you would - I mean, there may be exceptional fungi where it is visible,
15 but as a general rule the only way you would be able to identify that is pull the
16 decayed piece of wood off and then you would see it, or actually if there is
17 dead bark you could lift the bark off and it is underneath usually.
- 18
- 19 Q But that is not suggested here? A. No. There is no way that would have
20 been ---
- 21
- 22 Q You are not saying there was a failure here to note the white rot? A. No. It
23 is purely related to the fungal bracket.
- 24
- 25 Q The bottom picture on p.127. That was my first question in a series of
26 questions. You have set my mind at rest about that, thank you. Looking at the
27 bottom picture on p.127, as far as I am aware, that is the only photograph -
28 I will be corrected if I will wrong - we have of the face or surface of the stem
29 that broke away from the tree? A. You know, I have really had had some
30 difficulty in identifying exactly what bit this is.
- 31
- 32 Q I am told the base of the failed stem. A. Okay.
- 33
- 34 Q So I am assuming that what one can see there is the surface that has sheered
35 away from the surface one sees in the photograph above? A. I think that is
36 probably right. It is just difficult to see it from that photo.
- 37
- 38 Q Well, it may be that I will have to ask Dr. O'Callaghan this, or somebody,
39 because it may be that you cannot help me, but if that be right, then that, as it
40 were, forms a jigsaw and if one were to get superglue and pick it up and put it
41 back, you could get it back to where it was before. A. Yes.
- 42

1 Q Subject of course to bits having fractured off and so on, but you see the point?
2 A Yes, you could, and in fact you could put the bit on the right — in fact it is
3 the other way round, is it not?

4 Q Well, it looks as though it has slewed and turned round. But the question that
5 I am wanting to ask you is this, whether you can help me about it. A. Yes.
6

7 Q The bottom photograph, in the bottom right hand corner there is a bit of
8 orange? A. Yes.
9

10 Q Which on the filament on the photograph appears to be the same colour orange
11 at that stage as the fungal bracket? A. I do not think it can be, because
12 I think — well, in fact it cannot be by the look of this because I think this
13 bottom photograph can be inverted and put against the back side. So this
14 orangey bit there would be on the far left hand side of the top of the trunk on
15 photo 1. It looks to me — that looks to me — I mean, it is difficult to tell but it
16 looks to me like that is just a branch or a side stem — small stem that has had
17 the bark knocked off. That is what it looks like.
18

19 Q Well, yes. I see what you mean. You have to imagine swinging the whole
20 thing round — A. Yes.
21

22 Q — and pushing it up against — well, I follow that, but it may be that
23 Dr. O'Callaghan who saw it at the time will be able to —
24

25 MR. STEAD: These photographs were not taken by Dr. O'Callaghan. It is actually
26 gone, I think, by the time —
27

28 JUDGE MACDUFF: I see. So you are in as good a position to talk about it as
29 Dr. O'Callaghan. A. I think so.
30

31 Q And possibly not in even any better position than Hercule Poirot himself.
32 Those are the only questions I have. Does anybody want to ask anything
33 arising out of that? They were not world shattering, were they?
34

35 MR. STEAD: Could I just ask this, because I could not see what you were pointing
36 at when you were talking about trying to put these back together again.
37 A. Yes.
38

39 Q In simplistic terms, does one imagine that two areas of white rot would have
40 abutted each other and the two others of black would have abutted each other?
41 A. Well, actually looking at it, you can see these black areas and there is a
42 curved edge on the right hand side of the bottom photo which has got "fungal
43

1 sclerotia" beneath that, actually coincides with the curved edge and the top left
2 hand side of the top photo. And if you transpose them around, the white rot
3 would be in the right position. I mean, this cannot be the fungal bracket, it just
4 definitely looks like a branch to me and when ash is damaged ---

5
6 JUDGE MACDUFF: You are agreed about that.

7
8 MR. STEAD: Yes.

9
10 MR. MOTT: I hate to call that a red herring.

11
12 JUDGE MACDUFF: It is an orange herring.

13
14 MR. STEAD: My Lord, those are my questions.

15
16 JUDGE MACDUFF: Thank you very much.

17
18 MR. STEAD: Thank you, Mr. Barrell.

19
20 (The witness withdrew)

21
22 MR. MOTT: I call Dr. O'Callaghan.

23
24 Dr. DEALGA PEADAR O'CALLAGHAN, Sworn

25
26 JUDGE MACDUFF: Just before we start on Dr. O'Callaghan, you know, I am
27 rapidly coming to the view that this is very much one issue case, is it not? Can
28 we just go through the sequence? This was a tree which, to the visual
29 inspection that the inspectors say should reasonably have been carried out by a
30 landowner of the sort that the defendant was, should have been identified as
31 potentially a medium risk tree. It should therefore have been inspected by a
32 level 2 inspector to the standard that a level 2 inspector would have inspected
33 it. That being correct, if on the balance of probabilities that on a reasonable
34 inspection the fungal bracket would have been seen, then it should have been
35 brought down before this accident. If, on the balance of probabilities, it would
36 not have been seen, then the claimant cannot show that it should have been
37 brought down before this accident. The crucial issue for me: on the balance of
38 probabilities to proper legal reasonable level 2 inspection, would the fungal
39 bracket have been found? Is it as simple as that?

40
41 MR. STEAD: In essence, yes, I think it is. I am not immediately conceding one
42 part of the process, namely as to what should happen if it is only the included

1 bark union, but assuming you take the view that that is not sufficient cause to
2 have remedial work carried out, then there is only one ---

3
4 JUDGE MACDUFF: Well, your problem about that, reserving your answer on that,
5 was the answer that Mr. Barrell gave.

6
7 MR. STEAD: I accept that.

8
9 JUDGE MACDUFF: Mr. Barrell was able to say: "Really, I just cannot say".

10
11 MR. STEAD: He cannot say.

12
13 JUDGE MACDUFF: I really think I concluded from that that, on the balance of
14 probabilities, given the size of this branch, he would have not been able to say
15 you ---

16
17 MR. STEAD: And I understand your Lordship's reasoning entirely for that,
18 although I do not surrender to this point. But if one moves on from that, then
19 we respectfully entirely agree.

20
21 MR. MOTT: My Lord, we agree

22
23 JUDGE MACDUFF: Well, I am not going to stop you exploring peripheral issues
24 insofar as they have a bearing upon that, but can we really concentrate on that
25 one? It did just occur to me, you know, that the configuration of this stem or
26 the four stems -- (To the witness): There were effectively four stems?
27 A. There were four stems, yes.

28
29 JUDGE MACDUFF: We can perhaps discard two of them. Let us leave the main
30 one in with the two, one of which has subsequently fallen over. We could
31 almost reproduce some approximation of it by the use of plasticine, could we
32 not?

33
34 MR. STEAD: I am sorry? I missed that.

35
36 JUDGE MACDUFF: By the use of plasticine. It is just something that occurred to
37 me. You could make a stem, two stems out of plasticine, curl another stem on
38 to it -- anyway.

39
40 MR. STEAD: My Lord, nice idea as it is, I am not actually sure how far it would
41 necessarily take us ---

42
43 JUDGE MACDUFF: No, of course not. But, anyway, I think we have got ----

1
2 MR. STEAD: I think the configuration is not ---

3
4 JUDGE MACDUFF: It is an idea that crossed my mind yesterday but it probably
5 does not help us because I think we all know exactly what the configuration is
6 now, Mr. Mott, I am sorry, off you go.

7
8 MR. MOTT: ... a site visit.

9
10 Examined by Mr. MOTT

11
12 Q Dr. O'Callaghan, can we just have for the record, your full name, please?
13 A. My full name is Dealga Peadar O'Callaghan.

14
15 Q I will take you in a moment to CVs and so forth. Your professional address?
16 A. It has actually changed since that report. It is now Goodless House,
17 Goodless Road, Speke, Liverpool. We have moved office since I wrote that
18 report.

19
20 Q If I can just take you to the relevant parts of the bundle just to get your
21 confirmation. Page 88, first of all, right through the appendices to 165.
22 A. Yes.

23
24 Q Your report dated 30th January 2003? A. Indeed.

25
26 Q Correct? A. Yes.

27
28 Q We pick up within that, first of all, at p.112, three pages, as at 2003 of your CV
29 and publications. A. Yes.

30
31 Q I do not think it is going to help my Lord to bring that absolutely up to date.
32 You have published a bit more since then? A. I have published a few more
33 since then.

34
35 Q All right. And perhaps a little more easy to read at pp.164 and 165 ---
36 A. I would you point out on p.112 that although I was programme leader at
37 arboricultural college then, I am now principal consultant of the company
38 I work for.

39
40 Q Thank you.

41
42 JUDGE MACDUFF: Congratulations.

1 MR. MOTT: At pp.164-5 you have got, as it were, a bit more of a narrative of your
2 qualifications and experience? A. Yes.

3
4 Q I just want to ask you from the top of p.165, as we are passing through, you
5 say:

6 "I am a consultant specialising in tree failure, hazard evaluation, risk
7 assessment related to trees and buildings..."
8

9
10 A. That is correct.

11
12 Q And have you experience of both carrying out and managing projects for
13 assessing risk of trees and inspecting trees? A. Indeed, I have a great deal of
14 experience in that. Most recently I project managed the survey of all the trees
15 within Knowsley Borough Council for the Council. I have done major golf
16 course and estate surveys, and I think the biggest survey project I did was
17 32,000 kilometres of overhead electric line for Northern Ireland Electricity.

18
19 Q We need not get bogged down in the levels of people to be required, but you
20 know therefore the sort of time and cost — A. Indeed.

21
22 Q — elements in relation to doing an assessment of not just a single tree but a
23 whole highway — A. Yes.

24
25 Q -- or golf course, or whatever it is? A. Yes.

26
27 Q I think next comes the addendum to your report at pp.166 to 173. That is 24th
28 June 2005. A. Yes.

29
30 Q Then the joint statement at 174 to 179. A. Yes.

31
32 Q And the answers to questions at 180 to 183. A. Yes.

33
34 Q Those are the documents you have contributed to. A. Indeed.

35
36 Q Do they set out your views? A. Yes.

37
38 Q I do not need, in view of what we have just said to my Lord, to deal with your
39 assessment of the practical comparison between what this estate does and what
40 others do in practice and what should be expected, because we are not going
41 into that. A. Yes.
42

1 Q I want to ask you specifically though just to look at p.177, this is the joint
2 experts' statement. A. Yes.

3
4 Q Paragraph 22. A. I have it, yes.

5
6 Q It says:

7
8 "Dr. O'Callaghan is of the opinion that the fungal bracket is unlikely to
9 have been detected even by a competent inspector as it was located
10 underside of the stem that failed..."

11
12 A. That is correct.

13
14 Q "... and it was only visible to him", i.e. to you? A. Yes.

15
16 Q "... because the stem had failed and been exposed"? A. That is correct.

17
18 Q That was your judgment having been there while the bracket was still there but
19 the stem was not, the failed stem was not. I want you just to, if it helps with
20 the aid of either the sketch at p.161 — I think the most useful photographs in
21 your series are between 126 and 135. If it helps you to remove the sketch, you
22 may do so. A. Yes.

23
24 Q I just want you, in simple terms, to explain from your point of view, having
25 been there and using your own assessment, why you say that it is unlikely to
26 have been detected even by a competent person, i.e. a level 2 inspector.
27 A. When I went on site, I had been provided in advance with these
28 photographs which were more contemporaneous than mine. They were taken
29 by somebody else.

30
31 Q Can I just pause? I am sorry, I was going to let you go but just to make sure
32 for the record we know which. This is at pp.126 and 127? A. Correct, yes.

33
34 Q Appendix 3-1? A. Yes, appendix 3-1 photographs.

35
36 Q Those three photographs? A. Yes. They were provided to me with my
37 instructions. They were taken by another person. I then went to site and
38 undertook my own assessment. I noted — I would say that I had looked at
39 these briefly. I had not looked at them in detail before I did my site survey.
40 I went on site, made the examination of the tree and the failed stem, and
41 I noticed the fungal bracket, which is shown at — well, it is shown in a number
42 of photographs, but I think the one where I point it out is the photograph at
43 132, which is this one.

1
2 Q Yes, there we have got one of the photographs that you took during your
3 visit. — A. These are the ones that I took, yes.

4
5 Q — in January 2003. A. I recognised this as a fungal fruiting body and I think
6 — I know I said in my report I confess that I did not recognise it as to what
7 particular fungus it was.

8
9 Q I do not think that matters, does it? A. No.

10
11 Q Because if you find any fungus — A. It is... I was about to say that point.
12 So I sent it away to Forestry Research for identification, having first made an
13 attempt using my own library to identify it, and I will pleased to say that I
14 came to the same conclusion as Mr. Rose at Forest Research. I then went to
15 look back at the photographs I had been supplied with, which are the
16 photographs on p.127, and satisfied myself that the fungal bracket here, which
17 is older and more weathered, was in fact the same fungal bracket as shown in
18 the top photograph on p.127.

19
20 I then looked at the tree and the orientation of the tree. Two things stand out
21 about the tree. First and foremost, it is a tree grown on the edge of a bank and
22 in my opinion, and I think Mr. Barrell agrees with me, it had been previously
23 coppiced or layered in the past and we have the resultant re-growth.

24
25 Ash, particularly grown on banks, do form a curved — they sort of curve over
26 the bank. It is not unusual. In fact they are grown commercially that way in
27 Ireland for the production of ash to make hurling sticks because they grow in a
28 particular way. Looking at the orientation of the failed stem and the size of the
29 fungal bracket, I concluded that the only way the fungal bracket — or the only
30 position the fungal bracket would have been, would have been beneath the
31 tree, and I attempted to represent that in the sketch at p.161. That was my best
32 attempt at how the tree would have looked before the failure. Because the tree
33 is on the edge of the bank and the failed branch curved down over it,
34 I concluded, and I still hold to this view, that the fungal bracket would have
35 been underneath the base of the stem that failed and the remaining stem as
36 shown on the sketch. It would be in here. I believe from what I have seen and
37 the scarring it was attached to the wood at that point and was starting to grow
38 down and out, but the size of the fungus and the size of the branch led me to
39 the conclusion that it would —

40
41 Q I am going to stop a minute so that we can understand where you say it is
42 attached. You are holding the sketch, I think, and neither I nor Mr. Stead
43 could see, either with that or the photographs. Where do you say it is

1 attached? A. I think it is attached at the base of the -- jointly between the
2 stem that has subsequently failed and the stem that failed and caused the
3 accident. It was joined somewhere there, but the fruiting body itself would
4 have spread out down and outwards but underneath the curvature of the stem
5 that failed.

6
7 Q Very well. If I have understood it correctly, no substantial difference between
8 your assumptions and Mr. Barrell's. It is attached, as it were, at the back, at
9 the bank end? A. Yes.

10
11 Q As it were, nearer the bank, coming out away from the bank but coming out, as
12 it were, flush with and just under the stem? A. Yes, just under the forward
13 stem.

14
15 JUDGE MACDUFF: And it has not shifted? If I look at p.132, that was the
16 position it was in when you took this photograph? A. Yes.

17
18 Q In July 2003, and that was the position it was in immediately after the fall?
19 A. Yes.

20
21 Q And it was the position it was in immediately before the fall? A. Well, it
22 would have been -- again, going back to the last question you asked
23 Mr. Barrell, if you could put the stems back on, it would have been attached,
24 you know -- and I think when the stem came forward, it snapped the bracket
25 off and it landed where it landed. That is my impression.

26
27 MR. MOTT: As the stem falls, it pushes the fungus downwards -- A. It was
28 separated and pulled the bracket.

29
30 JUDGE MACDUFF: And you took it away -- A. Yes.

31
32 Q -- after July, 11th July. A. Yes. No, I took it on the date of my survey,
33 which was January 2003.

34
35 MR. MOTT: 8th January 2003. A. 2003. I took it and sent it to Forest Research
36 for identification.

37
38 JUDGE MACDUFF: What date was 132 taken? Because you have put 11th July
39 2003 as the accident, which is wrong. A. Sorry.

40
41 MR. MOTT: The bottom right, it is 08/01/2003.

42
43 JUDGE MACDUFF: Thank you. It is the accident --

1
2 MR. MOTT: The accident, it says 03, does it not?

3
4 JUDGE MACDUFF: It says July 2003.

5
6 MR. MOTT: In fact it was July 2001.

7
8 JUDGE MACDUFF: That is what threw me, I am afraid.

9
10 MR. MOTT: Yes. A. However, my Lord, to answer your question, I removed
11 the fungus from site on 8th January 2003 and sent it to Mr. Rose at Forest
12 Research, and his diagnostic report appears on p.137.

13
14 JUDGE MACDUFF: Thank you.

15
16 MR. MOTT: So that is your, as it were, reconstruction — A. Yes.

17
18 Q — of what you saw. Why is it that you say the competent inspector would not
19 have seen, probably not have seen that fruiting bracket? A. Well, if we take
20 the process that Mr. Barrell has describing, one is doing a survey, one notices a
21 multiple-stem tree and one goes to have a closer look at that tree, as one is
22 bound to do. If the fungus is attached in the normal way, as Mr. Barrell has
23 described, from the wound in the side of the tree, it will be growing out of the
24 side of the tree. But it just so happens in this instance it was growing from a
25 wound that was under the tree and there was space between the base of the tree
26 and the base of the ditch, and it was growing at that point. It would in time,
27 I suspect, have grown out from underneath there because it increases very
28 rapidly in size, as Mr. Barrell explained.

29
30 So having looked at it, the question then is: what assessment would one have
31 come to apropos the included bark union on its own? And we are agreed that
32 would have been a medium risk tree. Had the fungal bracket been seen -- and
33 we worked out that the risk goes from low to high, and the answers to the
34 question show that. But I feel that because of the size of the bracket and the
35 location of the bracket and the fact that there were no visible symptoms of
36 crown die back in the tree prior to the accident which would have made you
37 look that much closer, if you look at the crown of the tree and there is die
38 back, and then you look at the base of the tree and you cannot see anything
39 appreciable, then you will dig around a lot more to try and find something.
40 But taking it on the value that the photographs show, there is a photograph --
41 on p.135 there are photographs that were taken in 2002. The crown of the tree,
42 which is here, is typical, as I would expect an ash to be, so there is nothing
43 untoward there that would have brought my attention closer down to cause me

1 to look around more carefully at the base. I would have made an assessment
2 on the included union only or, shall we say, a competent inspector would have
3 made a decision on the included union only. The second point is the bracket
4 is, as decayed fungi go, a relatively small bracket. Thirdly, it is comparatively
5 rare. But the key point here is that no symptoms in the crown to make me
6 poke around in more detail at the base. I would suspect that I would have
7 focused solely on the included union as the issue to address.

8
9 Q I think it was my Lord who asked about getting down on hands and knees.
10 Would you have expected a level 2 inspector, given what could be seen of the
11 multi-stems and included bark union and the state of the ground, to have got
12 down on hands and knees? A. If there had been symptoms in the crown,
13 then I would have expected somebody to - pardon the expression - poke
14 around a lot more, down on hands and knees to see what one could find. But
15 in the absence of crown symptoms, the focus of attention would have been
16 simply on the multiple-stem configuration of the tree and whether that in itself
17 caused a hazard.

18
19 Q So you have got a healthy crown, an included union, no sign of any fungus
20 around that union and the fault line there - the wounding, I think Mr. Barrell
21 called it. A. Well, to understand it, basically what happens is the stems
22 grow together in such a way that there is bark inside the join and that will
23 always be in motion because it is not what one would call a more solid union
24 where the wood of both stems has anastomosed to the point where you have a
25 strong union.

26
27 Q And having heard what Mr. Barrell has said, have you changed your view at all
28 about whether the competent inspector should have seen the fungus? A. No,
29 I have not. I still hold to my view that, given the conditions prevailing, that
30 there were no crown symptoms, the only focus would have been on the
31 included union, and I also hold to my view that because of the size and
32 location of the bracket it was very unlikely that it would have been seen.

33
34 Q Very unlikely? A. Very unlikely.

35
36 Q When you met Mr. Barrell to produce the joint statement on 16th March 2005,
37 last year, you were dealing with the issues that are set out in writing in para.22
38 on p.177. A. Yes.

39
40 Q Did you make your view clear to him? A. I made my view clear to him and
41 in fact at para.10 we agreed that "the sketch illustration of the subject tree prior
42 to the failure at 7.1 of Appendix 7 of Dr. O'Callaghan's report is agreed". That

1 sketch is the sketch at p.16 — I have a bad memory for numbers. The sketch
2 I was just referring to. The sketch at p.161 —

3
4 Q You will have to keep your voice up a little, I am afraid. A. I am sorry.
5 Para.10 of the agreed statement refers to the sketch at 7.1, and that sketch is at
6 p.161 of the bundle.

7
8 Q But the conclusion as to whether the competent inspector, whether because of
9 the layout or because of what he or she did, whether the competent inspector
10 would have been expected to detect the bracket. What did you understand
11 Mr. Barrell to be saying at that time?

12
13 MR. STEAD: With respect to my learned friend, the content of the meeting is
14 without prejudice between the experts. The product of the meeting we know
15 about in the form of the statement and that, with respect, is as far as my
16 learned friend really can take it.

17
18 MR. MOTT: Well, it is interpreting words. Of course your Lordship can do it but
19 this is not the discussions leading up to it but the conclusion that I am asking
20 about.

21
22 JUDGE MACDUFF: Well, ask about the conclusion.

23
24 MR. MOTT: (To the witness): I do not want the details of your discussions, but
25 the conclusion of it, the concluded positions and the differences between
26 you — A. Well, my position is set out clearly in the first part of para.22 of
27 what I understood Mr. Barrell to say —

28
29 JUDGE MACDUFF: Well, it is there, it is in writing. You can make your
30 submissions about it.

31
32 MR. MOTT: All right.

33
34 JUDGE MACDUFF: It is in English and I can —

35
36 MR. MOTT: All right. I will leave it, and my learned friend can investigate if he
37 wants. Thank you very much.

38
39 Cross-examined by Mr. STEAD

40
41 Q Mr. O'Callaghan, my understanding of your position is you see the tree, you
42 see it is multi-stemmed? A. Correct.

- 1 Q So you go through the undergrowth? A. Yes.
- 2
- 3 Q You find the included bark union? A. Yes.
- 4
- 5 Q That is what you would expect a level 2 inspector to do? A. Minimum, yes.
- 6
- 7 Q A minimum? A. Yes. You investigate a multi-stem tree and you see what it
- 8 tells you.
- 9
- 10 Q And an included bark union, you will agree with Mr. Barrell, is a common
- 11 problem on multi-stemmed trees? A. Yes, it is a very common, not
- 12 physiological, structural problem you find with trees.
- 13
- 14 Q And indeed, the nature of the structural problem means that inevitably that join
- 15 is going to fail at some point? A. At some stage they almost inevitably fail.
- 16
- 17 Q You go, you find the included bark union. We have looked at the crown of the
- 18 tree which is perfectly healthy for that type of tree? A. Yes.
- 19
- 20 Q And that concludes your inspection, does it? A. No. One looks at the
- 21 included union, one looks all round the base of the tree and obviously takes
- 22 into context the position of the tree in relation to prevailing winds and many
- 23 other factors, and then one makes a conclusion.
- 24
- 25 Q So one does look all around the base of the tree? A. Oh, absolutely.
- 26
- 27 Q The base of the tree being particularly important because that is very often
- 28 where fungal growths are to be found? A. Yes. Depending on the fungus
- 29 you will find them either growing on the root plate or growing on what we call
- 30 the root collar, which is a point where the stem emanates from -- where the
- 31 roots and the stem join.
- 32
- 33 Q So the point at where the tree comes out of the earth -- A. Yes, that is the
- 34 root collar point.
- 35
- 36 Q -- is a point that is always going to be subject to inspection? A. Yes.
- 37
- 38 Q Indeed, if the surface of the earth disappears beneath an overhang of the tree --
- 39 you understand? A. What you are saying is if the tree overhangs ground?
- 40
- 41 Q Let me try and explain what I am suggesting to you. You have got the earth
- 42 goes under an overhang. So you have a void effectively between the earth and
- 43 the bottom of an overhanging stem of the tree? A. Yes.

- 1
2 Q You follow? A. Yes. What you are saying is the tree is like this and the
3 ground slopes below it.
4
5 Q And you will follow the earth into that void to try and see whether or not there
6 is any fungal growth, will you not? A. Sometimes. It depends very much
7 on whether there are signs there to make you look closer but generally you
8 have a close inspection round the base of the tree.
9
10 Q Well, it is not dependent, I suggest to you, on whether or not there is any die
11 back or any failure in the condition of the crown of the tree. You have
12 accepted that you would look at the junction between the soil and the tree
13 where the tree emanates from the soil and in checking that, I would suggest to
14 you, inevitably you would follow the ground into that void beneath the
15 overhang of the tree, would you not? A. Insofar as you can, yes.
16
17 Q And if that involved bending down or going on your hands and knees, you
18 would do that? A. Like Mr. Barrell, I have done it many times, yes.
19
20 Q And if you had gone down on your hands and knees or indeed bent down in
21 this particular location, you would have expected to find this fungal bracket,
22 would you not? A. Sorry, I will answer that question as honestly as I can. If
23 the fungal bracket was there, it would have been found. But I am just being
24 sure that I am not saying every time I look under a tree I expect to find a
25 fungal bracket.
26
27 Q This fungal bracket that you have drawn in your sketch at 161, if you had got
28 down on your hands and knees or bent down to have a look into that void, you
29 would have found this fungal bracket, would you not? A. An inspector
30 could have found the fungal bracket. It depends on the size and where it was
31 in relation to the base of the tree and how closely he looked.
32
33 Q Page 161, have a look at it if you like. A. Yes.
34
35 Q You have drawn what your understanding of the pre-accident state of the tree
36 was? A. Yes. Insofar as I could, yes.
37
38 Q Sorry? A. That was my best ---
39
40 Q That is your best attempt. I understand that fully and I know you do not
41 suggest this is precisely how it was, it is your best estimate of it. If that was
42 the overhang that you were down on your hands and knees or bending down in
43 front of, you would have seen that fungal bracket, would you not? A. Well,

1 yes, one would have detected something and possibly, as Mr. Barrell indicated,
2 we always carry tools with us, whether it is a trowel or something to poke
3 around - sorry for the expression - just to poke around and see if anything
4 comes out.
5
6 Q Yes, and you would have cleared ivy or anything that might have been in front
7 of it? A. Yes.
8
9 Q And either with a tool or indeed your bare hands you would pull something
10 out? A. If there was something there to be pulled out, yes.
11
12 Q And if there is a fungal bracket there, you would have pulled part of the fungal
13 bracket out? A. Yes.
14
15 Q And you would have seen it was fungus and then you would have made an
16 even closer inspection --- A. Oh, absolutely.
17
18 Q -- of that bracket? A. At that point I would have probably used an increment
19 bore to bore into the tree and take a core from that point to see the extent of
20 decay.
21
22 Q In fact given the drawing you have given us, and given the fact -- well, tell me
23 whether you agree with this or not, but in fact one's feet in this ditch are
24 somewhat lower than the overhang of the stem? A. Yes.
25
26 Q In fact the overhang of the stem is at about knee height, is it not? A. Well,
27 my best estimate was about a foot but I do not think there is a great deal of
28 difference ---
29
30 Q No, as long as we are in the same vicinity. A. Same vicinity, yes.
31
32 Q So the reality is, if you bend down or if you get on your hands and knees, you
33 would in fact see this fungal bracket, would you not? A. Well, I am not sure
34 that you would see it. I mean, I am not trying to be obstructive here but I am
35 just trying to be as honest as I can. What I would have done in that situation
36 had my attention been drawn to it and had I gone down on my hands and
37 knees, I would have either put my gloved hand in or a trowel to scrape and to
38 see what would come out. Because, quite honestly, down in a ditch
39 underneath it is quite dark so I would be using an implement of some sort to
40 see if there was anything there. Because one would have to, sort of, like, do
41 this to look up ---
42

- 1 Q Mr. O'Callaghan, can I just take issue with one point there? We can see on
2 p.129, one of your photographs, the extent of the overhang. We can see what
3 the extent of the overhang is on the left hand side. A. Yes.
- 4 Q And we have got a similar overhang on the stem that has fallen? A. Yes,
5 which would have been up against it, yes.
- 6 Q Which is up against it. A similar kind of overhang, similar kind of hurling
7 stick curve? A. Yes.
- 8 Q There is plenty of light if you go in daylight hours to be able to see a fungal
9 bracket beneath that overhang, is there not? A. I can answer the question in
10 certain light conditions, yes, you could see. But I am saying that in practice it
11 is more likely that one would have used an implement to scrape to see if there
12 was anything in there.
- 13 Q But, one way or another, you would have found this fungal bracket? A. The
14 fungal bracket, yes.
- 15 Q Yes. There has been an issue in the past as to what is the meaning of medium
16 risk and what might have followed on from it. A. Yes.
- 17 Q We have all seen the final answers that you and Mr. Barrell prepared.
18 A. Yes.
- 19 Q Would you agree with him, however, that whilst these risk assessments are a
20 very helpful tool — A. Yes.
- 21 Q -- they are in fact no substitute for your judgment on the ground? A. The
22 judgment of an experienced and competent inspector carries a lot of weight.
23 As Mr. Barrell pointed out, when one is surveying a population of trees, in
24 other words, for example, along the side of this road, then one would rely on a
25 risk assessment to point to the priorities, the priority in which you would
26 undertake work if necessary.
- 27 Q Yes. If you have got something which, following the risk assessment, comes
28 out at medium risk, you as the tree inspector would go and use your experience
29 and judgment in deciding whether you are going to leave it there and monitor
30 it or whether you actually need to do some work upon it? A. Well, I suggest
31 that that decision would have been made at the time the risk calculation had
32 been made because one does not make it in isolation. One is looking at the
33 tree and —
- 34
35
36
37
38
39
40
41
42
43

1 Q I understand that, but you do your risk assessment? A Yes.

2
3 Q You are standing there, you reach a figure? A Yes.

4
5 Q And then you think: "What should I be doing about this tree?" A Yes.

6
7 Q Right. If we go to p.102, please, your para.4.7, you say:

8 "Thus, included bark unions are features that indicate probable failure
9 and would normally be what an arboricultural or forestry inspector
10 would look for when inspecting trees."

11
12 A. Correct.

13
14 Q So you are dealing here with the included bark union? A Yes.

15
16 Q Then you say:

17 "Had the subject tree been inspected closely by an experienced person, it
18 is likely that the included union would have been noted and remedial
19 work scheduled to abate the hazard."

20
21 A. Yes.

22
23 Q That was your judgment when you made your report, having visited the scene?
24 A. Yes.

25
26 Q What remedial work did you have in mind? A. Well, the remedial -- well,
27 remember I am looking post-failure, so putting my mind back, insofar as
28 I could, to how the tree would have looked pre-failure, and as neither
29 Mr. Barrell nor I did actually see this precise tree at that time, the decision
30 could be made on an included bark union tree depending, as you say, on the
31 judgment of the inspector at the time as to whether one could retain the tree
32 and monitor it in subsequent surveys with a view to doing further work as
33 necessary, or one could make a decision there and then that work needed to be
34 done immediately. It would depend very much on when found as we looked at
35 the tree. So what I am saying about -- sorry --

36
37 Q Remedial work schedule. A. Remedial work schedule - remedial work
38 could include regular monitoring.

39
40 Q So you are suggesting that this phrase does not mean that it was your view that
41 some kind of physical remedial work should be done? A. Well, I think in
42
43

1 the fullness of time, as we have agreed between us, that included bark unions
2 are at some stage going to fail.

3
4 Q Yes. A. At some stage in what we call intervention management, some
5 work would have to be done either to reduce the height of the tree or fell the
6 tree, or whatever is appropriate, would have to happen at some stage. But
7 having not had the benefit of seeing this particular tree pre-failure, I do not
8 know whether it would have been my decision or the decision of any
9 competent inspector to fell it immediately based simply on the included union,
10 or to say: "Oh, that tree is all right. I will look at it again next year".

11
12 Q One of the difficulties with included bark unions is that you do not actually
13 know when this is going to fail, do you? A. No, but this is where your risk
14 assessment comes in because the quantified tree risk assessment asks you to
15 look at, from your experience and your knowledge, how many similar trees in
16 similar conditions per 100 are likely to fail in the year, in the year post-
17 inspection.

18
19 Q But it was certainly your view that remedial work should be scheduled to abate
20 this hazard — A. But I am looking at —

21
22 Q — at the time of your report? A. Yes, but I am looking at the tree post-
23 failure.

24
25 JUDGE MACDUFF: I am sorry, in fact it was post-failure but you are saying:

26
27 "[Pre-failure] Had the subject tree been inspected... it is likely that the
28 included union would have been noted and [pre-failure] remedial work
29 scheduled to abate the hazard."

30
31 A. Yes, but I did also qualify, your Honour, that the phrase "remedial work"
32 could include monitoring.

33
34 Q Yes. I have made a note of that.

35
36 MR. STEAD: You go on in this paragraph:

37
38 "However, the subject Ash is deep within a dense hedgerow, which
39 forms the boundary between the estate and the ditch between it and the
40 road. This is illustrated in Photograph 1... Unless the inspector had
41 looked very closely from the road side, which would have entailed
42 access through dense undergrowth, I doubt that the union would have
43 been recorded in a routine visual inspection. Mr. Rowe's inspections

1 were limited to fairly rapid visual inspections from the road and field
2 sides."

3
4 At the time you did this report, Mr. O'Callaghan, it was your view that to
5 remain in the road and not go into the hedgerow through the undergrowth was
6 entirely reasonable? A. No, what I am trying to say here, perhaps I have not
7 articulated it correctly is that -- and I think Mr. Barrell said the same, but I will
8 not put words in his mouth. My view is this. That if a level 1 inspector is
9 doing a fairly quick walk or drive-by survey and does not get out of the car and
10 go to the undergrowth, he is not going to see the union. However, if he stops
11 his car and goes out and looks, he will see the included union.

12
13 Q And that is what he should have done? A. I believe that is what he should
14 have done, yes.

15
16 Q You do not say that anywhere in this report though, do you? A. Well,
17 perhaps I have not articulated correctly, but the point I was making here is that
18 if you are just driving by and you do not stop and go through the undergrowth,
19 you will not see the included union. If you do stop, you will.

20
21 Q Go to p.108, please, going straight to your conclusions, because I do not want
22 to spend long on this. A. Yes.

23
24 Q At 5.3 you say:

25
26 "Unless a detailed and close inspection of the tree had been undertaken,
27 the presence of the included union would not have been detected as it is
28 at the very base of the tree and obscured from view by dense
29 undergrowth on the road side. Additionally, it would not have been
30 seen from the field side as it was positioned over the bank of a ditch
31 away from the field."

32
33 Then go down to 5.7, if you would:

34
35 "Although the structural weakness and the decay fungus had been
36 present in the tree for some years, neither would have been likely to
37 have been recorded in anything other than a full and detailed assessment
38 of the tree."

39
40 Over the page:

41
42 "5.8 The failure of the subject tree was not reasonably foreseeable as
43 both the structural weakness and the decay fungus would only have been

1 detected by a full and detailed structural assessment of the tree. Such
2 inspections cannot reasonably be expected from either a contractor
3 acting for the estate or an inspector from the County Council Highways
4 Department.

5 5.9 In the absence of symptoms, the subject tree would have looked like
6 the hundreds of other hedgerow trees, i.e. typical of what would
7 normally be expected, with no signs that it warranted closer
8 examination."
9

10
11 A. Yes.

12
13 Q Your view now is that it did warrant closer inspection because it was a multi-
14 stemmed tree? A. Multi-stemmed trees should be looked at more closely,
15 yes.

16
17 Q Well, your position now is that that multi-stemmed tree should have been
18 observed to be a multi-stemmed tree? A. Yes.

19
20 Q That the inspector should have gone to look at the tree through the
21 undergrowth? A. Yes. If you are talking about a level 2 inspection, yes.

22
23 Q Which it should have been? A. Which it should have been, yes.

24
25 Q Would have found the included bark union? A. Yes.

26
27 Q Hence would have known that it was structurally defective? A. Had a
28 weakness, yes.

29
30 Q And would have found the fungal bracket? A. A full detailed inspection as
31 we discussed would have found the bracket, yes. Could have found the
32 bracket, yes.

33
34 Q Well, you accepted earlier you would have found it? A. Yes.

35
36 Q Thank you very much.

37
38 Re-examined by Mr. MOTT

39
40 Q Picking up that last point, Dr. O'Callaghan, you were taken, first of all, in the
41 series of questions to para.4.7 on p.102. A. Yes.

42
43 Q And your opinion at the end of that:

1 "Unless the inspector had looked very closely from the road side, which
2 would have entailed access through dense undergrowth, I doubt that the
3 union would have been recorded in a routine visual inspection."
4

5
6 A. Correct.

7
8 Q It is suggested that you never said in that report that anything more should be
9 done. Right? A. Yes.

10
11 Q May I take you to p.105, para.4.15. A. Yes.

12
13 Q You say:

14 "It is my opinion that there was one external sign present that would
15 normally have alerted a professional to the fact that the tree could fail,
16 i.e. the included bark union. However, as stated at paragraph 4.7 above,
17 this would not have been obvious as it is at the base of the tree on the
18 ditch side of the field and obscured by dense undergrowth. Unless a
19 programme of regular and systematic inspections [etc.] could easily be
20 overlooked. However, I am of the opinion that a multi-stemmed Ash
21 resulting from a previously cut stool is likely to have an included
22 union(s) and that type of tree adjacent to the highway would normally
23 be singled out for detailed investigation by an experienced inspector."
24

25
26 A. Correct.

27
28 Q Now, it is suggested that you changed your view, in effect, to come to that
29 point. A. I have not.

30
31 Q Do you think that is a change? A. It is not a change. It is in my report.

32
33 Q All right. Would you then look, please, at p.174, the joint statement where you
34 have the definitions, agreed definitions, of the three levels, 1, 2 and 3.
35 A. Yes.

36
37 Q At what level would you personally put yourself? A. 3.

38
39 Q You are a level 3. All right. You were asked a series of questions in relation
40 to what you would have done if you had been carrying out an inspection.
41 A. Yes.

42
43 Q Culminating in your discovery of the fungal bracket. A. Correct.

1
2 Q I want to ask you what you now say about what a competent level 2
3 inspector — A. A competent level 2 inspector would — I would expect a
4 competent level 2 inspector to, in the first instance, note it was a multi-
5 stemmed tree. Based upon that evidence, to look at the crown to assess
6 whether there were any symptoms in the crown. Then to approach the tree, go
7 through the undergrowth and from the field, look closely at the base of the
8 tree, look closely at the unions and make —

9
10 JUDGE MACDUFF: Wait a minute. Just pause there. First of all, a level 2
11 inspector would note from the road that it was multi-stemmed? A. It was
12 multi-stemmed.

13
14 Q He would note from the road that the crown was in good condition? A. Yes.

15
16 Q He would note from the road there was no sign of decay? A. Well, no —

17
18 Q No, not from the road. He would then approach the tree? A. He would then
19 approach the tree, go through the undergrowth and —

20
21 Q He would discover — sorry, you tell me if I get it wrong and if I have missed
22 anything out. I am doing it in my order. He would note it was multi-stem. He
23 would note the crown was in good condition. He would approach the tree and
24 he would discover the included bark union. A. He would, yes.

25
26 Q He would say to himself, would he not, "That puts it at least at medium risk
27 where this is"? A. Yes. And he would look closely at the architecture of the
28 union.

29
30 Q So medium risk. He would then look closely at the base of the tree?
31 A. Yes.

32
33 Q That is what you said? A. Yes.

34
35 Q He would look closely at the base of the tree. He would note that there was no
36 defect other than the structural defect. No decay, visible decay? A. On the
37 subject tree as I envisage it to have been before failure, he would not notice
38 any decay because, as Mr. Bartell said in answer to a question from you, my
39 Lord, decay was internal.

40
41 Q Surely. So what we have got now, he has gone to the tree. His cursory look to
42 begin at the base of the tree shows nothing wrong at all except for the included
43 bark union — A. Correct.

- 1
2 Q -- which puts it in medium risk? A. Yes.
3
4 Q Now we come to the crucial bit. He is looking closely -- A. Yes.
5
6 Q -- at the base of the tree. You as a level 3 inspector tell me you would have
7 found the fungal bracket? A. Yes.
8
9 Q What should he do when he looks at the base of the tree, given all the other
10 signs? A. Looking at the fact that there were no symptoms of die back in
11 the crown and looking around the base of the tree as was obvious to him on the
12 bank and so on, and there were no obvious fruiting bodies there, and no sign of
13 decay in the crown, what I am saying is it is possible that he would have said
14 to himself: "The union is the problem here".
15
16 Q Wait a minute. (After a pause): Why would he not say to himself: "Well,
17 there is an included bark union, it is near a road, the stem is where the stem is,
18 it is a multi-stemmed tree, I have got to schedule this for", using your
19 words -- A. Hazard abatement --
20
21 Q -- "schedule some remedial work to abate the hazard", which may, as you say,
22 include just monitoring. A. Um hum.
23
24 Q Why would not a level 2 worker at that stage, and I am looking at -- I just want
25 to remind myself of a level 2 worker. A level 2 worker - competent person,
26 sufficient training expertise and qualifications to identify tree hazards, assess
27 the level of risk and make appropriate management recommendations.
28 A. Yes.
29
30 Q Why would he not do what you would have done and put his hand or a tool
31 into that void that we see on your drawing to see whether there was some
32 fungus in there? A. Because his judgment would have been based on the
33 two things - what the crown was showing him in terms of was there anything
34 in the crown to indicate a problem that may be further down in the tree. In the
35 absence of that and looking around the base of the tree and not seeing any
36 obvious fungi growing out from the side of the tree, I would say the majority
37 of level 2 inspectors would have concluded to themselves: "It is okay from the
38 point of view of decay, as far as I can tell" --
39
40 Q "I do not need to look for fungus"? A. "I do not need to look any closer but,
41 however, my management recommendation will be based on the included
42 union". Now, that management recommendation may be, for example, he may
43 say to himself: "Well, the side of the road, let us get rid of the tree now, just to

1 be safe". He may say, dependent on the tree and the position -- if it was a very
2 prominent tree, possibly covered by a preservation order, he might say: "I will
3 monitor that more closely and notify the landowner and/or controlling
4 agency". Or he may say to himself --

5
6 Q "Lop that stem"? A. Yes, or another point, he may say: "I may need to get
7 another opinion on this. I shall bring in a level 3 inspector to give me another
8 opinion".

9
10 Q Well, if he is going to say that, if he is going to say: "I need another opinion
11 on this, I need to bring in a level 3 inspector", he might as well have a look for
12 the fungus himself, might he not? A. Well, he could do but normally in the
13 level 2 inspections and the inspectors that I know and we have trained, that
14 really look -- this is an unusual position where the tree was growing.
15 Normally a tree comes straight out of the ground and if there is going to be a
16 problem, it is going to be around the collar area. This is an unusual situation.
17 I would not have expected your average level 2 surveyor to do that. But I am
18 saying it is possible that a level 2 inspector may say to himself: "I need
19 another opinion".

20
21 Q There we are. Thank you. Well, I have got a straight divergence of opinion
22 between the two experts on that, Mr. Mott, it seems.

23
24 MR. MOTT: Yes, absolutely right.

25
26 JUDGE MACDUFF: I am going to have to make up my mind about it, am I not?

27
28 MR. MOTT: Yes. I have nothing else. Thank you, Dr. O'Callaghan.

29
30 JUDGE MACDUFF: Thank you, Dr. O'Callaghan.

31
32 (The witness withdrew)

33
34 MR. STEAD: My Lord has observed the point made by Mr. O'Callaghan about the
35 level 2 inspector being interested in whether there is die back or not and hence
36 leading to a certain conclusion. That was not something that was put to
37 Mr. Barrell. Now, unless your Lordship wishes it, I do not propose to ask to
38 re-call him --

39
40 JUDGE MACDUFF: I think it was put, you know, more or less, because it was
41 said that the only thing that was wrong with this tree to visual inspection was
42 the included union, and the crown was all right.

1 MR. STEAD: Yes. He fully accepted that. What is being suggested by this last
2 witness is that because you see die back, then you do not actually carry out any
3 significant inspection at base level. But I do not think I need to re-call
4 Mr. Barrell.

5
6 JUDGE MACDUFF: No, neither do I.

7
8 MR. MOTT: I have to say not only does he not need to call Mr. Barrell to deal with
9 it, but it is not an issue because it is in para.4.17 of Dr. O'Callaghan's report on
10 p.106, crown symptoms would not be expected, and that is one of the
11 paragraphs which is agreed in the joint statement at 175. It says:

12
13 "The discussions with respect to there being no crown symptoms
14 evident before the failure as set out in paragraph 4.17 of
15 Dr. O'Callaghan's report are agreed."

16
17 I believe...

18
19 JUDGE MACDUFF: I think his point was going a fracture further than that. But
20 you can make submissions about that in the fullness of time.

21
22 MR. MOTT: Yes. My Lord, that is the case for the defendants.

23
24 JUDGE MACDUFF: That is the evidence?

25
26 MR. MOTT: That is the evidence.

27
28 JUDGE MACDUFF: Right. Well, I am not going to try and give an ex tempore
29 judgment today, and you are not available on Monday?

30
31 MR. MOTT: I am not available on Monday, no... judgment that could be dealt
32 with. I do not know what your Lordship would like to do about submissions.

33
34 JUDGE MACDUFF: Well, I think I would like to have submissions completed
35 today.

36
37 MR. MOTT: Yes.

38
39 JUDGE MACDUFF: And then I will either give you a spoken judgment on
40 Tuesday morning or provide you with a written judgment at some later time
41 and spend some time next week actually writing a judgment which can be sent
42 out to you as a provisional judgment in the post.

1 MR. MOTT: My learned junior can be here on Monday if your Lordship would
2 like to do that.

3
4 JUDGE MACDUFF: I shall probably spend some time on Monday preparing the
5 judgment one way or another. Let us have submissions today and then we will
6 discuss the logistics of handing down the judgment when we have finished
7 those. Now, do you want to go straightaway?

8
9 MR. MOTT: May I have a little time just to gather my thoughts?

10
11 JUDGE MACDUFF: Yes. It is now five to twelve. I anticipate that if I give you
12 15 minutes or so, or even a little longer, you will be able to complete by
13 lunchtime.

14
15 MR. MOTT: Certainly.

16
17 JUDGE MACDUFF: Because it is a very short point now, is it not?

18
19 MR. MOTT: Yes.

20
21 JUDGE MACDUFF: Shall I say half past twelve? I will come back here at half
22 past twelve.

23
24 (Adjourned for a short time)

25
26 JUDGE MACDUFF: I am sorry I kept you waiting.

27
28 MR. MOTT: A single issue case - the issue which, after the preliminaries, we have
29 set out in some detail in the case summary, paras.39 to the end of that opening
30 note. I will not take your Lordship to it in detail now, but I invite your
31 Lordship to look back at those when considering judgment.

32
33 It is a dispute between experts. Our submission is that Mr. Barrell was an
34 unsatisfactory witness in general. We cite the exchange at the opening of
35 cross-examination and his extreme reluctance to admit the classification which
36 had been so clearly admitted, medium risk, in the questions and answers, and
37 the consequences of that which again had been so clearly admitted. That does
38 not bode well for the independence and reliability of him as an expert.

39
40 JUDGE MACDUFF: Yes.

41
42 MR. MOTT: Specifically in relation to the fungus, he agreed, in his report and in
43 the joint statement, paras.4.8 and 4.9 of Dr. O'Callaghan's report. The

1 reference to that is B103, the bundle at p.103. I simply give your Lordship the
2 reference. It is the one where he ends up saying: "It is not surprising that the
3 presence of the fungus would have been missed in any visual inspection" at the
4 end of that paragraph. It is a small and easily missed bracket. Although there
5 were other parts that stood against that, it is important that that was affirmed in
6 the joint statement.

7
8 When we came to investigate the difference yesterday, Mr. Barrell in chief and
9 in cross-examination was saying in effect this bracket, he believes, was visible
10 from either a standing position whilst moving round the tree and looking from
11 the side or with only a little bending. Can I assist your Lordship with my note
12 in relation to that in chief? Having been asked about the sketch of
13 Dr. O'Callaghan, which is at p.161, he said:

14
15 "It is diagrammatic. It does not give an idea of where things were. It is
16 not a complete cross-section. In 3D one would only need to move round
17 the side and would have been able to see it. As moved around tree
18 almost certainly would have been visible"

19
20 That is my note. So the dispute appeared to be as to the geography and
21 positioning of the bracket in relation to the whole tree with the failed stem
22 upright. That appearance in evidence yesterday is confirmed by the way in
23 which the vital paragraph 22 in the joint statement appears, which ends:

24
25 "However, it was not present when he made his inspections so that he is
26 unable to be certain as to whether it could or could not have been seen."

27
28 So it was a positioning problem he was talking about.

29
30 That has now been completely abandoned and today he has accepted that it is
31 only if the inspector got his eye level with the base of the failed stem, which is
32 knee height or about a foot above the ditch, whichever measurement one takes,
33 that it could be seen. That is to say, it is only if the level 2 inspector should
34 have been on hands and knees and looking into that void that the fungus would
35 have been seen. That is a sea change in what he is saying. It does not appear
36 anywhere in that joint statement and it makes a nonsense of the wording of
37 para.22 of the joint statement at p.177 because on that issue, as to the degree of
38 inspection of that sort of tree that a level 2 inspector ought to carry out, it
39 makes no difference at all whether the bracket was present or not when
40 Mr. Barrell made his inspection. The "however, it was not present when
41 he made his inspections" only makes sense on the theory that was being put
42 yesterday, which was that it could have been seen as you moved round with a
43 little bit of head movement and mild bending.

1 So, my Lord, our submission is that this is an expert witness whose account
2 has changed, and has changed significantly so that it moves the case, and that
3 is a ground alone on which your Lordship should reject his evidence.

4 There has not been movement as to the visibility of the bracket in relation to
5 the kind of inspection to be required of a level 2 inspector in the case of
6 Dr. O'Callaghan, and he gives cogent reasons, which your Lordship can accept
7 because they are agreed, as to why such an inspector would not scramble
8 around in the void under the overhanging stem.

9
10 Firstly, there were no crown symptoms, it is a healthy crown. This is para.4.17
11 of Dr. O'Callaghan's report on p.106, and that is a paragraph agreed in the joint
12 statement. The agreement is at p.175 in the bundle.

13
14 Secondly, there was no sign of fungus around the bark union. Again, I want to
15 just take your Lordship in detail to the evidence that was given yesterday by
16 Mr. Barrell in chief. He was talking about the difficulties of getting to the base
17 of the suspect tree and explaining why one should want to do so. He said:

18
19 "You would be looking for fungal brackets. It is most common cause of
20 failure. It indicates internal decay. They tend to be close to the point of
21 the wounding and an included bark union is continuously being
22 wounded as it moves."

23
24 So that is Mr. Barrell's evidence yesterday, and the significance which
25 Dr. O'Callaghan pointed out this morning is that around that point of
26 wounding, that included bark union, right now there is no sign of fungus and
27 that would have been a comfort to the level 2 inspector and something which
28 would have encouraged him to say: "It is an included bark union. It has not
29 got worse than that. We can put it on the list for dealing with when convenient
30 but not immediately". Now, at that point in the examination in chief,
31 Mr. Barrell went further in a rather interesting way when your Lordship was
32 asking the questions and, as I have noted both the questions and answers, they
33 are these. Your Lordship asked:

34
35 "If you had gone in as a level 3 inspector [making the distinction] just
36 before the accident, you would have undoubtedly seen the included bark
37 union? A. Yes.

38
39 Q But you cannot say you would have seen the fungal bracket? [That is
40 as a level 3.] A. Not with 100% certainty."
41
42

1 That is a huge change. So no crown symptoms, no sign of fungus around the
2 bark union where there is the wound continuously being re-opened. No sign of
3 decay is the third comforting feature. It is apparently complete and healthy
4 bark. There is no sign of the white rot that becomes apparent when the stem
5 comes away. So nothing to induce, Dr. O'Callaghan's says, the level 2
6 inspector to go further.

7
8 And in considering that against common sense as well as expert evidence, your
9 Lordship has to come away from the concentration we have in court on a
10 particular tree and consider this as just one of hundreds of roadside trees being
11 inspected in the course of, albeit by a competent level 2 inspector, a day, a
12 week, or however long it takes. And there are others with included bark to a
13 greater or lesser extent with some other features that need some examination.
14 So it is not just a single tree standing out like a sore thumb from the rest. This
15 sort of pattern would be repeated all over the country with landowners here
16 there and everywhere. So although it is very easy for a court, as we are used to
17 concentrating in detail on... the logic of the reality supports Dr. O'Callaghan's
18 evidence, that this goes beyond what should be expected of the competent and
19 reasonably careful level 2 inspector carrying out a consistent roadside
20 inspection of trees, however they have been identified.

21
22 So for those reasons we submit that your Lordship should find that the
23 probability is that the level 2 inspector would not have discovered the bracket
24 and it follows from that, in our submission, that this claim fails.

25
26 My learned friend wishes, I think, to re-open somehow medium risk. Whether
27 your Lordship wishes to hear from me on that —

28
29 JUDGE MACDUFF: I will give you an opportunity if he wins me round on it.

30
31 MR. MOTT: Yes.

32
33 JUDGE MACDUFF: Or prima facie wins me round on it.

34
35 MR. MOTT: It is difficult to see - some might - how it could be criticised for not
36 taking place. My Lord, those are my submissions.

37
38 JUDGE MACDUFF: Before you are sit down, just three things. First of all, you
39 handed in some authorities. I do not need to read them, do I?

40
41 MR. MOTT: No.
42

1 JUDGE MACDUFF: You handed in a second bundle with various -- I have
2 glanced at them but no more.

3
4 MR. MOTT: Mr. Rowe's invoices.

5
6 JUDGE MACDUFF: And Mr. Rowe (whose evidence I glanced at), I just
7 disregard?

8
9 MR. MOTT: Yes.

10
11 JUDGE MACDUFF: So I think probably, if you will forgive me, I can get rid of
12 these from the desk and these can all go back to counsel. (Same handed).
13 I will find my material then more manageable. Thank you. Yes, Mr. Stead?

14
15 MR. STEAD: My Lord, so far as the position of Mr. Rowe is concerned, following
16 on from your observations, it is obviously right that he has not given evidence.
17 Having said that, the evidence of Mr. O'Callaghan in his report carries a
18 number of observations on what was done or not done by Mr. Rowe.

19
20 JUDGE MACDUFF: Well, I think one of the findings I have to make is that the
21 defendants did not comply with what it is said their duty was.

22
23 MR. STEAD: Yes.

24
25 JUDGE MACDUFF: I do not think it is argued otherwise and that goes by default.

26
27 MR. STEAD: There is a breach of duty ostensibly, and what the court is dealing
28 with is: is that breach of duty causative of the accident by reason of failure to
29 find the fungal bracket?

30
31 With great respect to my learned friend, it appears as though we have been
32 doing different cases because it really is our respectful contention that there is
33 no issue between the experts on the evidence you have now heard.

34
35 JUDGE MACDUFF: It was that part of the cross-examination of Dr. O'Callaghan
36 that you ---

37
38 MR. STEAD: Well, with respect, not just the final bit of cross-examination. The
39 whole of the cross-examination was premised from the outset on the basis that
40 one was talking about a level 2 inspector, and the cross-examination started,
41 and I am looking at the note of those sitting behind me:
42

1 "First, one sees a tree with a multiple-stem in the road. One goes in,
2 finds the included bark union."

3
4 He agrees with that. Then he agrees that the included bark union was a
5 common structural defect in ash. It means it will fail at some stage. He agrees
6 with that. He then says you find the included bark union and one sees a
7 healthy crown. I cannot follow the next bit. Then it is put to him:

8
9 "One then looks around the base of the tree. This is important for fungal
10 growths are often found there."

11
12 He agrees, yes, and it is put to him:

13
14 "You look at the point where the tree comes out of the earth, which
15 would always be subject to inspection."

16
17 He agrees with that. And it progresses on that basis. It is somewhat
18 opportunistic to suggest that all of that cross-examination was being put to
19 Mr. O'Callaghan on the basis that it was considering what a level 3 inspector
20 would do rather than a level 2 inspector. Indeed, the aim of the cross-
21 examination made it quite plain that it was a level 2 inspection that was being
22 considered. I put to him:

23
24 "Your view now is that it warranted a closer inspection because it was a
25 multiple-stem tree, that that inspector would have gone into the
26 undergrowth, found the included bark union and would have found the
27 fungal bracket? A. Yes."

28
29 We respectfully suggest it is abundantly clear from the answers given in cross-
30 examination that Mr. O'Callaghan accepted that a level 2 inspector would have
31 found the fungal bracket. In those circumstances, there is no difference
32 between the outcome of the evidence of Mr. O'Callaghan and Mr. Barrell.

33
34 Should your Lordship not be persuaded by the evidence that you heard this
35 morning and my observations upon it, can I take it at a little further length? If
36 one starts by looking at p.174 and the different definitions provided for level 2
37 and level 3 inspectors, level 2 is:

38
39 "A competent person recommended... will have sufficient training,
40 expertise and/or qualifications to identify tree hazards, assess the levels
41 of risk and make appropriate management recommendations."
42

1 It is our contention that that clearly includes fungal brackets. Level 3 then is a
2 quantum leap above:

3 "A specialist or expert in tree biology, pathology, internal detection of
4 decay in trees, failure and hazard evaluation, e.g. a tree pathologist [it
5 goes on] an experienced arboricultural consultant who is qualified to a
6 high level in their discipline and who has considerable experience..."
7

8 So quite clearly we say from those definitions the identification of fungal
9 bracket is within the level 2 level of competence, and indeed Mr. O'Callaghan,
10 we say, has accepted that.
11

12 In any event, if one thinks about this inspection and stands back and looks at it,
13 you see the multi-stem tree, you find the included bark union, you know it is
14 weak by virtue of that. Inevitably a competent inspector would then look to
15 see if there is anything that adds to that weakness, and by virtue of the
16 acceptance by both experts that fungal brackets are to be found at earth level,
17 the examination inevitably must take place at earth level. It may take place
18 elsewhere as well but primarily at earth level to see whether there are any
19 brackets, and the moment one does that examination, with respect, one finds
20 this fungal bracket as Mr. O'Callaghan accepted.
21

22 My Lord, I am not going to take you through various parts of
23 Mr. O'Callaghan's report when he considers ---
24

25
26 JUDGE MACDUFF: Well, it seems to me that, whatever points are made about
27 Mr. Barrell and any inconsistencies there, you can point to similar ones with
28 Mr. O'Callaghan -- Dr. O'Callaghan, forgive me.
29

30 MR. STEAD: Indeed. Well, I apologise for making the same error. Yes, exactly
31 so. So ultimately ---
32

33 JUDGE MACDUFF: You know, sitting here on the Bench, it is inevitable. I want
34 to give both Mr. Barrell and Dr. O'Callaghan an element of comfort. You
35 make your report, it is a long and detailed report. The other side make their
36 report, it is a long and detailed report. Then you get supplementals, then you
37 get joints, then you get answers. It is very, very rare, except in the simplest of
38 cases, that you cannot point somewhere in the first report to something which
39 is inconsistent to some extent or another with something that has been agreed
40 later on.
41

42 MR. STEAD: Well, indeed.
43

1 JUDGE MACDUFF: And they shift. One of the shifts sometimes happens in court
2 as a result of cross-examination pointing things out. But there it is.

3
4 MR. STEAD: My Lord, I take the point. We do respectfully submit that
5 Mr. Barrell has been consistent in his view. My learned friend has pointed to
6 the assertion that he has agreed to a paragraph in Dr. O'Callaghan's report, but
7 the agreement was qualified to the nature of the fungal infection rather than
8 anything else. So he has not deviated from that point.

9
10 There is an issue about wording in the joint statement and your Lordship has
11 the point that is made by my learned friend, and Mr. Barrell has dealt with it,
12 that he meant nothing more in that than he said in his report at some length
13 about detectability of the fungal bracket.

14
15 So we say, respectfully, that the claimant has proved that on the balance of
16 probability a reasonably competent inspector would indeed have found that
17 bracket.

18
19 My Lord, may I say this about the other approach - namely the fungal bracket
20 is not found - that you do have the evidence from Mr. O'Callaghan's first report
21 that remedial work would have been undertaken, or words to that effect. That
22 is what I rely upon as a matter... I readily acknowledge the stance of
23 Mr. Barrell does not assist me on that point. Having said that, it is a position
24 he has adopted heavily qualified by the fact that he cannot say because he did
25 not see it.

26
27 JUDGE MACDUFF: Well, I am not with you on that. If it was the bark defect
28 only ---

29
30 MR. STEAD: Well, I understand that.

31
32 JUDGE MACDUFF: - I do not think I would find for you.

33
34 MR. STEAD: I will not push it. Unless I can assist further on any aspects of the
35 evidence, then I will not take it any further.

36
37 JUDGE MACDUFF: No. Thank you very much. Thanks to both of you for
38 helping me for this case to be heard in an economically short time. What
39 I think I have decided to do is I will reserve judgment only for a short time and
40 I will do a written judgment, and I will hand it down between now and Easter.
41 I will hand it down in the morning. I will not send it out to you, but I will get
42 the listing office to liaise with those who are instructing for a suitable date for
43 me to hand it down. It may be towards the end of next week, it may be the

1 following week. But I will hand it down at ten o'clock one morning. If you
2 two individually are not able to be here, I shall miss you of course but I will
3 put up with it so long as there is somebody here to deal with any costs and
4 consequential orders.

5
6 MR. STEAD: My Lord, I have indicated already that there is an outstanding issue
7 as to the effect of what you will find if you find in our favour.

8
9 JUDGE MACDUFF: If I find in your favour, whoever is here, whether it be you or
10 somebody else, should be able to deal with that point.

11
12 MR. STEAD: Yes.

13
14 JUDGE MACDUFF: But first of all we will try and do it on a date which is
15 suitable to solicitors and counsel on both sides so that you can all be here if
16 you want to be.

17
18 (The court adjourned)
19