

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

4BS50384

Royal Courts of Justice  
Friday, 24<sup>th</sup> 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

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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.

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PROCEEDINGS

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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 ripped 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

9 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.

42



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

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 A. Yes.  
13

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

16 Q In the next paragraph:  
17

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

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

40 "The discussions with respect to the nature of the fungal infection set  
41 out in paragraphs 4.8 and 4.9 of Dr. O'Callaghan's report are agreed."  
42  
43

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 16<sup>th</sup> 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 23<sup>rd</sup> November and you on 30<sup>th</sup> November --  
41 I am sorry, September. A. Yes.

1 Q 30<sup>th</sup> September? A. Yes.

2  
3 Q And his was 23<sup>rd</sup> 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 A. Yes, that is right.  
43

- 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 those 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:



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

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

16 Q Well, yes. I see what you mean. You have to imagine swinging the whole  
17 thing round --- A. Yes.

18 Q -- and pushing it up against -- well, I follow that, but it may be that  
19 Dr. O'Callaghan who saw it at the time will be able to ---

20 MR. STEAD: These photographs were not taken by Dr. O'Callaghan. It is actually  
21 gone, I think, by the time ---

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

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

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

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

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 30<sup>th</sup> 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 24<sup>th</sup>  
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