Dear Editor

Poll v. Bartholomew [2006] EWHC (QB) 4BS50394

Many of the Association's members will be aware of the Judgment in the case of Poll v. Bartholomew, which found that the Defendants had a duty of care to "***to carry out inspections of trees upon the land to identify <u>any potential hazard</u>.***" (our emphasis).

For those who have not read the Judgment, the case considers whether or not the Defendants (the landowners) owed a duty of care to the Claimant (a motorcyclist) and if so, what that duty was and whether or not it had been discharged.

In summary, a stem of a multi-stemmed ash tree failed onto a minor road and the Claimant collided with it either after it had fallen or whilst it was falling. The arboricultural experts for the parties identified, post mortem, that the base of the tree was decayed by a fungus, which along with an included bark union and wind gusts of up to 40 knots contributed to the failure.

The duty of care set by the Court in this case was a particularly onerous one where the Defendants were expected to go to considerable lengths to discover "any potential hazard" and to this end Judge MacDuff suggests that the competent 'inspector' would "*scrape and discover*" until they found the fungus, which it was accepted would almost certainly not have been visible to anyone standing alongside the tree. That the duty set by the Court is particularly high becomes clear when referring to Mynors (2002) which summarises very clearly the duty of care as set out in the 1957 Occupiers Liability Act and in common law thus; "*The duty under the 1957 Act, which has been shown to be in this respect the same as the common law duty, is only to ensure that visitors (and thus neighbours too) are reasonably safe. This does not mean 'as safe as they possibly could be' – it is in any event impossible to ensure that anyone or anything is completely safe.*"

As a result of the Poll judgment, many landowners are in danger of spending disproportionate resources on the 'inspection' of trees and on reducing risks that are already imperceptibly low and might be identified as such were they only to be assessed in a reasonable manner. Or, as has already been reported, sanctioning indiscriminate felling to remove the risk and liability entirely. The cost of this Judgment goes beyond the financial burden on landowners to the diminution of the tree resource in all its facets.

Clearly, the issues of 'duty of care' and levels of 'inspector' and 'inspection' are secondary, and focussing on these matters misses the central issue of the case which is one of risk. When the experts tell the Court that the risk was 'high' and agree on this key issue, the Court then asks what the Defendants should have done to identify and remedy a high risk. Only then do the levels of 'inspector' and 'inspection' become germane. Judge MacDuff is clear that had the risk from the tree (with the fungus present) been 'medium' or 'low' on the scale of 'high' to 'low' agreed by the experts, nothing more would have been required than to monitor the tree.

When the experts advised the Court that the risk would have been 'medium' with the fungus not present (or not detected) and 'high' in the context of the fungus being present, this advice was based on their calculations in which substantial errors were made. Had the calculations been correct, the advice to the Court would, using the experts' own definitions, have been that the risk both with and without the fungus being present was using one method 'medium' and using the other method 'low'. Instead, the Judge relied upon the experts' agreement of the miscalculations and concluded "*if and when the inspector discovered the fungal bracket, the tree would immediately be placed in the high risk category*".

The advice that Judge MacDuff relied upon in respect of 'risk' is contained in the second joint statement entitled 'Answers to Questions Posed by the Court' where the experts provided guidance on the questions. "*In your reports the term 'high risk' appears and in the Joint Statement the term 'medium risk' appears. Can you provide an agreed definition as to what these terms mean with regard to: 1. What action should be taken? and 2. The appropriate time scale for taking that action?*" In answering the questions the experts set out for the Court an explanation of what is generally understood by the terms 'high risk', 'medium risk' and 'low risk' and to define these levels of risk they applied both the Matheny and Clark (ISA) system (Matheny and Clark 1994) and the Quantified Tree Risk Assessment (QTRA) system (Ellison 2005). The experts' guidance to the Court as set out in the second Joint Statement was substantially incorrect and as a result the Court was mistakenly led to believe that the tree with the fungus was a 'high risk'.

In the second Joint Statement, the experts provided bands of 'low', 'medium' and 'high' risk in relation to both risk assessment methods as follows.

1. Matheny and Clark System: "*scores of 3-5 are 'low risk', 6-9 are 'medium risk' and 10-12 are 'high risk'.*"

2. QTRA System: "*1/1, 1/10, 1/100 or even 1/500 would be 'high risk'; while trees with risk factors of 1/1,000, 1/2,500 or 1/5,000 would be considered 'medium' or 'moderate risk'. This would be further broken down as follows 1/1,000 'moderately high'; 1/2,500 'moderate' and 1/5,000 'moderately low'. Between 1/5,000 and 1/10,000 the risk would be considered 'low'.*"

On the basis of their calculation using the Matheny and Clark system, the experts' description of the risk as 'high' is incorrect by their own classifications of risk using this system. Their risk band for the calculated score is actually 'medium'.

Using the Matheny and Clark system, the experts' calculations are:

No decay fungus
Likelihood of failure = 3 (numerous or significant defect present)
Size of the part likely to fail = 2 (150-450mm)
Target= 2 (intermittent use) or 3 (frequent use)
Therefore: 3+2+2 (3) = 7 (8), which is 'Medium Risk'

Decay fungus present
Likelihood of failure = 4
Size of the part likely to fail = 2 (150-450mm)
Target= 2 (intermittent use) or 3 (frequent use)
Therefore: 4+2+2 (3) = 8 (9) by the experts' own classifications of risk this score is a 'Medium Risk' but they advise the Court that "*in the context of the fungus being present this is 'High Risk'*."

On the basis of their own descriptions of target, diameter of the failed stem and their estimate of probability of failure, both of the experts' calculations using QTRA are incorrect. The experts' calculations are reproduced below followed by the correct calculations.

Using the QTRA system, the experts' calculations are:

No decay fungus
Target (minor road of moderate use) 1/2
Impact potential (one of four stems) 1/25
Probability of Failure 1/100
= 1/5000 (by the experts' description, 'moderately low' risk)

Decay fungus present
Target (minor road of moderate use) 1/2
Impact potential (one of four stems) 1/25
Probability of Failure 1/10
= 1/500 (by the experts' description, 'high' risk)

The correct QTRA calculations on the basis of the experts' descriptions are:

No decay fungus
Target (minor road of moderate use) 1/100
Impact potential (220mm dia.) 1/8.6
Probability of Failure 1/100
= 1/86,000 (by the expert's description, well beyond 'low' risk)

Decay fungus present
Target (minor road of moderate use) 1/100
Impact potential (220mm dia.) 1/8.6
Probability of Failure 1/10
= 1/8,600 (by the experts' description, 'low' risk)

On the basis of the experts' agreed descriptions of the tree and the target, both of their QTRA calculations overstate the risk of harm by a factor of 17. This is a gross exaggeration and it can only be concluded that the experts' agreed definitions of 'high' and low' risk have resulted in the court misunderstanding the issue upon which it sought guidance and clarification. The Judgment is based on an understanding that the risk without the fungus was 'medium' and with the fungus it was 'high' when in fact using the experts' descriptions, the risks were 'low' or at worst 'medium'.

The important errors by the experts in this case are quite transparent and call into serious question not only the value of the Judgment as a benchmark for levels of 'inspector' and 'inspection' but whether or not a miscarriage of justice has occurred. As a profession we should leave this Judgment to collect dust and move forward by promoting reasonable risk management, in whatever guise, to all tree managers.

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References

Ellison, M. J. 2005. Quantified Tree Risk Assessment Used in the Management of Amenity Trees. J. Arboric. International Society of Arboriculture, Savoy, Illinois. 31:2 57-65.

Matheny, N. P. and J. R. Clark. 1994 (2nd ed.) A Photographic Guide to the Evaluation of Hazard Trees in Urban Areas. International Society of Arboriculture, Savoy, Illinois.85 pp.

Mynors, C.. 2002. The Law of Trees, Forests and Hedgerows. Sweet and Maxwell, London. p 132-133.

Discussion of this case can be found in the searchable archive of the UK Tree Care Discussion List (http//lists.tree-care.info/uktc).