IN THE ALDERSHOT & FARNHAM COUNTY COURT CLAIM No. 6KB04804

SITTING AT WINCHESTER

BEFORE HIS HONOUR JUDGE IAIN HUGHES QC

DESIGNATED CIVIL JUDGE

Draft delivered: 5th August 2008

Handed down: 14th August 2008

BETWEEN:

ALBERT ATKINS

Claimant

- and -

SIR JAMES SCOTT, Bt.

Defendant

JUDGMENT

Introduction

1. This is a trial on liability only of a claim for damages for personal injuries. At about 1.40pm on 30th September 2004 the claimant was driving in a proper manner and at a safe speed along the A32 in Hampshire, in the direction of Alton, when his car was struck by part of a branch from an oak tree. The weather was windy at the time. The tree was located within the defendant's estate, the Rotherfield Estate.

2. The claimant was injured in the accident. There are no allegations of contributory negligence. It is clear that the claimant was blameless.

3. The parties were represented before me by counsel: Mr David Regan for the claimant and Mr Andrew McLaughlin for the defendant. I am grateful to both counsel for their helpful written and oral submissions.

The locus of the accident

4. The Rotherfield Estate comprises some 4,500 acres of which about 1,000 acres is woodland. The estate extends from Four Marks in the west to the outskirts of Selborne in the east. The A32 is a single carriageway road that runs from Gosport in the south to Alton in the north and bisects the estate. Where it passes through the estate, the A32 is a busy main road but not a major trunk road, in contrast to the A31 to the west and the A3 to the east. Along the material stretch of the road there are no footpaths and there is no pedestrian traffic of any significance.

5. The main house, Rotherfield Park, is to the west of this road and is opposite the small village of East Tistead. The house is surrounded by the park, an area of open grassland with a variety of mature, handsome trees. A mile or so to the north and on the west side of the road is Lower Lodge, one of the entrances to Rotherfield Park. Just to the south of Lower Lodge, on the same side of the road and within the park, is the material tree. Whilst there are other trees in the vicinity, this oak stands alone and is a typical park tree.

6. At the side of the A32 is a grassy verge, some 2.6 metres wide. The park is enclosed at that point by a boundary fence. The tree is 6.1 metres inside the park from this fence and is therefore 8.7 metres from the nearest edge of the A32.

7. The oak in question is mature and is about 200 years old. It is single stemmed to 5 metres high where it divides into a number of large scaffold limbs which in turn divide and sub-divide into the leaf bearing branches. The branch that failed was located at about 5 metres

above the ground and rose from the main trunk at an angle of about 55°. The branch failed at about 2.7 to 3 metres out from the main trunk and the part that fell was obviously of sufficient length to fall across the park and grass verge and into the road where there was a collision with the claimant's car.

8. It is common ground that this branch had decayed internally and that this caused the failure. Neither the tree nor the branch exhibited any sign of external decay before the branch fell.

The issues

9. The claimant's case is that a crack in the material branch ought to have been identified well before the accident and that this would have led to the branch being either removed or substantially pruned. In either event, the branch would have been made safe and there would have been no accident.

10. There are therefore two issues: first, did the defendant take such steps to prevent danger as a reasonable man in the defendant's position would have taken? Secondly, has the claimant proved that proper inspection ought to have led to something being done which would have prevented the accident?

The law

11. The law was not in dispute before me. The defendant, as landowner of property fronting a public highway, owes a duty of care to those passing along the road, to take reasonable care for their safety. The defendant is expected to act as a prudent and reasonable

landowner .

12. In *Caminer v. Northern and London Investment Trust Ltd* [1951] A.C. 88 at 99, Lord Normand commented:

> "The test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of the landlords which must necessarily fall short of the knowledge possessed by scientific arboriculturists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even of the countryman not practically concerned with their care."

13. In the same case, Lord Reid noted, at 105:

> "But it is not enough for the appellants to prove that the respondents failed to take any steps: to succeed they must also prove that proper inspection ought to have led to something being done which would have prevented the accident."

14. In *Quinn v. Scott* [1965] 1 WLR 1004 at 1010 Glyn-Jones J said:

> "In my opinion, there may be circumstances in which it is incumbent on a landowner to call in somebody skilled in forestry to advise him, and I have no doubt but that a landowner on whose land this belt of trees stood, adjoining a busy highway, was under a duty to provide himself with skilled advice about the safety of the trees."

15. Practical guidance on this subject has been offered by several bodies. In 2000, the Forestry Commission published a practice guide entitled *Hazards from Trees*. On 3rd July 2007 the Health and Safety Executive published a paper entitled *Management of the Risk from Falling Trees*. Although the latter publication post-dates the material events I accept that

it contains a summary of established good practice that would have been relevant during the preceding years. I also note that the guidance offered by the Health and Safety Executive is broadly consistent with the advice that had been published by the Forestry Commission in 2000.

16. Mr Regan submitted that the Health and Safety Executive guidance related to those who had duties under section 3 of the Health and Safety at Work Act 1974. I disagree. Paragraphs 5 and 6 make it apparent that it is intended to offer guidance to a wider class of duty holders.

17. It is clear from the authorities that were cited to me by counsel during argument that the nature and extent of the practical steps a landowner is required to take to discharge his duty of care will vary with the particular circumstances of the case. Material factors will include, but are not limited to: the type, size, age and position of the tree; the proximity of the tree to a highway, the nature and volume of traffic on that highway, the size of the landowner's estate and the resources of the landowner, the number and location of other trees on the estate, whether the ownership of the land vests in an individual or a body and the extent of continuity of employment of those tasked by the landowner with carrying out tree inspections.

The lay evidence

18. Given the issues to be tried and the uncontroversial circumstances of the road accident itself there was no reason for the claimant to give evidence. Mr Atkins was however, present in court throughout the case.

19. Sir James Scott gave evidence in a direct and completely straightforward manner. He readily accepted a number of propositions put to him by Mr Regan and made no attempt to shy away from his responsibilities as a landowner. Sir James was an impressive witness and I have no hesitation in accepting his evidence.

20. Sir James told me that there was no formal or written system for inspecting trees on his estate or for recording what trees had been inspected. However, he was at the centre of the small group of people who worked with the trees and woodland and he was confident that if there was a problem all understood that the policy was to err on the side of caution. This was confirmed by the estate workers when they gave evidence. If there was evidence of a tree or part of a tree being anything other than healthy, it would be lopped or felled, as appropriate. Sir James would expect to be consulted in respect of any serious problems with specimen park trees but otherwise his staff understood their duties without having to refer to him for permission to take action.

21. I have no doubt that the informal system for observing the trees worked adequately in the particular circumstances that obtained on this estate. Sir James told me that they were covering the ground albeit not in a systematic and recorded way. This informality has the obvious disadvantage that it makes it more difficult for the estate to resist claims based on an inadequate system of inspection.

22. Sir James summarised for me how the estate operated:

"Because the A32 is a busy road, and we go up and down it a lot we are spotting

those trees all the time. ... I feel we were doing enough by being there, by doing work, and by looking at the trees. We were covering the ground but not in a systematic way. My staff were encouraged to look out for trees in a dangerous state when working in or travelling through the estate. Our practice is where we have a concern we err on the side of caution and sometimes we find we have taken down a perfectly good tree, but we err on side of caution. If the staff had felt it necessary to remove a branch, they could have gone ahead and dealt with it. If the problem had been reported to me, and if it was an appealing tree, I would have taken advice but still erred on the side of caution. ... Messrs Bennett and Parratt were primarily responsible for reporting on the trees after an inspection. The other staff were extra eyes and ears. Mr Hamer was dealing with commercial forestry and I could consult him about any particular problems. I would not have to say to him to report anything dangerous that he spotted at the same time. ... Messrs Bennett and Parratt would have had jobs in the park every year so they would have been in the vicinity of the tree. There is also a small plantation over the road so we would have been doing work there as well. "

23. Sir James readily accepted that it would not have been unduly onerous for the estate to have undertaken an annual foot inspection of the trees that are adjacent to the A32 and that a suitable record of such inspection could have been kept. Indeed Sir James was prepared to accept that several inspections, when the trees were in leaf and when bare, could have been undertaken. However he considered that the informal inspections that were in fact carried out, by car and on foot, throughout the year and the different seasons meant that any problems would be spotted and proper action taken.

24. I heard evidence from two of Sir James' estate workers (albeit both are self-employed) Mr David Bennett and Mr Kevin Parratt. Mr Bennett is some 69 years old and has worked on the estate since 1954, retiring in April 2005. Mr Bennett has worked with

trees all his life and has had half a century or more of experience with the trees on this estate. Although Mr Bennett has no formal forestry qualifications I found him to be knowledgeable about trees in general and very knowledgeable about estate trees in particular. This is hardly surprising. He has devoted his working life to the trees on this estate and has very considerable practical knowledge and experience.

25. Mr Bennett described part of his duties:

> "I was expected to keep my eyes open when driving around the estate. If I noticed a gross defect I would do something about it. Not necessarily where a bough is just hanging off, if you see a sign of a defect you inspect it. We done it off our own back, not report it. I had authority to do it."

26. Mr Bennett was challenged as to whether he had ever inspected the tree in question:

> "We did visit the area of the tree in question in the park because we had to clear up all the bits and pieces such as dead wood that fell during the year. We had to clear it all up before the grass cutting machinery started. This was for silage and it was mown in May. Later on in the year we would do the same thing again, all round the trees in the park. It was hand picking. There were always two or more of us. We do all of the trees and go right under all the trees. We would have done this every year. It was my way of life, I have done nothing else, that is all I know, you are there and you notice things. ... I cannot remember any detailed inspection of the tree in question, no more than any of the other trees on the estate. But we would have looked to that tree as much as we looked at the others. There was no reason why you would think this bough would fall. If I had seen a gross defect, I would have done something about it. When it fell I discovered that the bough was not healthy because it was decayed within. I knew cracks in a tree or a bough were risk factors. I would not carry binoculars with me. There was no need. If I saw a sign of danger I could reduce the foliage, or the bough or fell the tree. The

object would be to remove the danger."

27. Mr Bennett described in more detail the action he took in respect of the trees in the park. It was plain that he was not confining his observations to defects that were gross and obvious:

> "I would check each tree in the park in Spring to see if there was any wood to pick up, usually it was bits and pieces. I would walk around each tree. I would look for leaves discoloured or very small leaves, going off, hanging off, that sort of thing, and I would check the trunk. If we see anything like that we examine the tree. You can spot disease in a limb just by looking at it, it comes from experience. It might have lost its bark, all sorts of signs. Fungus is mostly easy to see. Cracking also shows a defect. I would look at each tree to see if there were any defects like that in a park tree because you have got to see it is safe."

28. Mr Parratt has been working on the estate for some 15 or 16 years, initially as apprentice to Mr Bennett. He told me that he thought he was still learning and that everything he knew about trees had been taught by Mr Bennett. Having heard Mr Bennett I have no difficulty in accepting that evidence. Mr Parratt was fortunate in his teacher.

29. In his evidence Mr Parratt described what he looked for when checking trees:

> "dead branches, broken branches, any visible cracks, yellowing leaves and fungal brackets."

30. Mr Parratt confirmed how the estate trees were inspected:

> "We drive around and stop if we see signs of damage or potential damage. We keep our eyes open all the time. In winter after stormy days we are looking for damage and sorting it out. In spring we are in the front park. Defects show when

leaves are on a tree, it is the best time to spot them. We err on the side of caution. If there is a potential problem, we take the tree down or the bough down or reduce foliage to remove any danger."

31. I found both Mr Bennett and Mr Parratt to be impressive and credible witnesses upon whose evidence I might safely rely. Neither was defensive during cross-examination and both candidly described how they went about their duties. I do not regard their lack of formal, paper qualifications to be in any way detrimental to the quality of their evidence. I regard both men as workmen who are skilled and expert in their chosen trade through constant practice and diligent observation.

32. The evidence of Mr David Bowyer, the farm manager, was peripheral to the issues before me. However Mr Bowyer did describe the various uses to which the park was put, including those to which the public were invited such as an annual horse show and occasional events such as a plant fair. The trees in the park where cleared of fallen wood and checked prior to these events. If he noticed a serious problem with a park tree he would report the same. However he had no special experience in or duties connected with, estate trees.

33. I also heard from Mr William Hamer, FRICS, a forestry consultant employed by Sir James to advise on the management of the estate woodlands. Mr Hamer has a degree in Estate Management. He told me that on his visits to the estate and whilst travelling through the estate he would keep an eye open for any problems with any trees. Any defects would have been brought to the attention of Sir James. Mr Hamer readily accepted that his

primary task was not to inspect trees for possible defects but to offer advice on woodland management. I accept Mr Hamer's evidence.

The expert evidence

34. I heard oral evidence from two arboriculture experts: Mr Ian Murat for the claimant and Mr Jeremy Barrell for the defendant. Mr Murat prepared two reports, one in March 2007 and a second report prepared in about November 2007. Mr Barrell prepared a report dated 10th February 2005, a first supplementary report dated 10th September 2007 and a second supplementary report dated 4th October 2007. There were two joint statements, one dated 22nd August 2007 and a second dated 2nd April 2008.

35. I regret that I found the evidence of Mr Murat to be unimpressive and unpersuasive. My reasons are these.

36. First, Mr Murat seemed somewhat ill at ease and defensive when giving evidence. Whilst this might be unremarkable in a lay witness, Mr Murat put himself forward as an expert in his field and I received a clear impression of a lack of confidence in his own evidence.

37. Second, I became and have remained concerned at whether Mr Murat's overriding duty to the court was compromised. A joint site inspection was due to take place on 12th October 2007. Shortly before this meeting Mr Murat sent a copy of a draft joint statement to his instructing solicitor. The solicitor was present when Mr Murat met Mr Barrell at the site with a view to a joint inspection and discussion between experts at Mr Barrell's offices. Despite Mr Barrell's protests, the solicitor prevented any discussion taking place

until she had reviewed the draft joint statement. Accordingly, no discussion took place between the experts that day.

38. A further meeting between the experts took place on 25th February 2008. The claimant's solicitor had prepared an agenda for this meeting. A joint statement was largely agreed. Mr Barrell sent this further draft to Mr Murat who in turn passed it to his instructing solicitor, I infer for comment. She apparently informed him that not all the items on her agenda had been covered and Mr Murat therefore proposed a series of amendments. The draft statement then went through a large number of additions; nine was the number put to Mr Murat in cross-examination but he sharply replied that he did not know how many there had been. Plainly there were an unusual number. Mr Murat agreed that at least three of the drafts were copied to his instructing solicitor. The final draft was discussed by Mr Murat in conference with counsel and solicitor.

39. Although I accept this may not have been the intent, this history of legal interference in the procedure whereby experts meet to try and narrow the differences between them and to prepare a joint statement setting out the remaining areas of agreement and disagreement, gave me the clear impression that Mr Murat's overriding duty to the court was being diluted. I do not know why the usual practice of allowing the experts to prepare their joint statement with written questions afterwards if necessary was not followed.

40. If this hesitation by Mr Murat was unprompted by others then it indicates someone who lacked confidence in the opinions he was expressing. If the changes were prompted then Mr Murat's independence has been compromised. Whatever the reason, Mr Murat's

reliability as an expert witness has been adversely affected.

41. Third, initially, Mr Murat disagreed with elements of the advice published by the Health and Safety Executive in 2007 and by the Forestry Commission in 2000 where that advice conflicted with his opinions in this case. For example, in respect of paragraph 10 of the Health and Safety Executive advice, which describes in some detail an effective system for managing trees, Mr Murat told me:

> "I say it is not applicable because it was published many years after the event and would not apply in retrospect. ... I do not think that the standard this paper sets is adequate. I do not believe that a quick visual check is sufficient for a tree by a busy A road. Or any busy road. A thorough inspection by someone knowledgeable about trees is required. I have looked though this advice and it is the nature of the check that is inadequate."

42. In respect of the Forestry Commission advice, Mr Murat said:

> "This advice is not adequate either. I accept it is applicable to this case. I disagree with the guidance issued by both the Health and Safety Executive and the Forestry Commission. A quick visual check by a landowner is not sufficient."

43. However, when further challenged, Mr Murat conceded:

> "I accept that these documents are recognition of an acceptable practice and many people do proceed in accordance with them."

44. The inspection regime advocated by Mr Murat was significantly more rigorous than the guidance offered by either of these bodies. From time to time an expert may come to the conclusion that official guidance is too rigorous. It is however unusual for an expert to

describe current official guidance provided by two respected bodies, seven years apart, as lax. It is even more unusual for the same expert to then agree that the guidance nevertheless details acceptable practice that is followed by many people.

45. Fourth, Mr Murat changed his mind on a number of important topics between writing his reports and giving evidence. At paragraphs 4.04 and 5.01 of his first report (March 2007) Mr Murat indicated that a person carrying out an inspection of the tree in question would need formal arboricultural qualifications and/or academic training on tree hazard evaluation before being properly regarded as competent. In his second report Mr Murat reinforced this opinion:

> " the assessment of risks associated with trees is a highly specialised form of risk assessment requiring a thorough understanding of the principles of arboriculture, tree biology and biomechanics as a basis and detailed training, followed by a period of supervised application. There is no evidence to suggest that any of the people involved in the estate have undergone specific risk assessment training."

46. Mr Murat then set out details of two systems of training and concluded:

> "By combining the concept of hazard evaluation with visual tree assessment techniques and arboricultural training, an inspector will be able to assess a tree pre-failure to ascertain its potential risk in a particular setting."

47. However, in cross examination Mr Murat resiled from this emphatic view:

> "I accept that the level of inspector does not denote the level of qualification, the levels denote persons with different degrees of knowledge about trees and their defects. A working knowledge is required but he does not have to be an arboricultural specialist. Such a person is competent to carry out an inspection. Informing staff of what to look for is sufficient and I know that is what happens

in Cheshire County Council. I agree that the knowledgeable owner is able to carry out his own inspections. Mr David Bennett, who has spent a lifetime in forestry generally, would clearly be someone with a working knowledge of trees within the Health and Safety Executive guidelines and so would Mr Kevin Parratt. I accept that the competence of those two people would satisfy my requirement to have someone of adequate skill to carry out tree inspections."

48. Fifth, so far as the frequency of inspections is concerned the claimant's pleaded case is that the tree should have been inspected "at least annually". However, Mr Murat changed his mind between his first report:

> "it is considered accepted practice to survey mature trees frequently preferably on an annual basis"

and the first joint statement dated August 2007:

> " inspections should have been undertaken ... annually"

and his second report in November 2007:

> "Such trees should be inspected at regular intervals. In my view, inspection once a year of those trees that are within falling distance of the highway would not be sufficient. In my view, the absolute minimum would be twice a year."

49. In cross-examination Mr Murat attempted to explain this important change in his evidence between August and November 2007:

> "I changed my mind because of the overall site and other events. There were other trees I had had experience of in those three months It was not a dramatic change of opinion. It is true there was nothing I did not know about the road in August 2007 that I had learnt by November. It was the overall site and other cases that changed my mind. The new information which caused me to go from 'preferably once a year' to 'absolute minimum of twice a year' were the cases of Cheshire County Council where a fully mature oak tree is now inspected more frequently,

this was in September, and other cases in Lowestoft and in Cannon Hill Park in Birmingham. Even though in my own practice I had often advised twice a year inspections, in this first report I did not say that but only annually. Once a year would be adequate. Better in winter. Once a year in September or October would be sufficient. By no means every tree has to be inspected every year. It depends on location."

50. I found these explanations to be unconvincing especially given Mr Murat's admission that he had, on occasions, advised clients before 2007 to inspect twice a year. The change may have been prompted by the realisation that an annual inspection when the tree was in leaf would make the only relevant defect (the crack) more difficult to observe. Whatever the reason I found this part of Mr Murat's evidence to be inconsistent and unhelpful.

51. Sixth, in his written reports Mr Murat emphasised that binoculars should be used in any inspection. In his first report he wrote:

> "The use of binoculars is always recommended to view at close quarters, items that may be of concern."

In his second report he was more emphatic:

> "Given the size of this tree, in my view, binoculars are needed for competent inspection: in a tree of this size and density - and such trees are very common - inevitably the naked eye may miss defects. To omit the use of binoculars in a ground-based inspection would, in my view, be negligent."

52. In the second joint statement Mr Murat recorded his view that:

> " an inspection should be carried out by a ground-based inspection from all available angles with the naked eye assisted by binoculars to give a clearer view

of any possible defects."

53. However, this stance was abandoned when Mr Murat was cross examined and is a further example of his inconsistency as an expert. In his oral evidence Mr Murat told me:

> "Looking at a tree is done in the course of a few minutes. You stand back from a distance, look at the foliage, walk around to check the foliage, then move closer in and check the trunk. You would not use binoculars to study every branch of a tree, you would be there for ever. You use binoculars to look at very tall trees, or if you see something of concern. You look with the naked eye to start with. ... This branch was one of the lowest on the tree and so I am confident you would be able to see it with the naked eye. I would not criticise someone who did not use binoculars to examine this branch."

54. Seventh, when Mr Murat attempted to describe the location of the crack on the branch before the accident he wrote

> "Orienting the branch indicates that it was on the southern side of the branch probably between the 8 and 9 o'clock position."

After the branch was re-attached to the tree it was found that Mr Murat had erred in his evidence by some 60° and that in fact the crack was on the northern side, between 10 and 11 o'clock. At that position it was plainly much harder to see. Some small variation of opinion as to the location of the crack was to be expected. An error of this magnitude damages confidence in the evidence of the expert concerned.

55. Eighth, in his first report, Mr Murat gave the impression that the crack was the probable entry point for the decay that caused the failure:

> "The crack has exposed the wood. It can be seen that the wood has been exposed

to oxygen and has decayed."

However, when cross-examined Mr Murat said:

> "The crack is the only entry point for decay that I had identified at that stage. I didn't know at the time that the crack may not have been the main entry point for decay. I have not made clear that the main entry point for decay might have occurred somewhere else. I don't know why I did not make that clear in my later reports. I agree that from my reports it could be understood that I was attaching greater significance to the crack than was warranted. I was merely pointing out what I had found, and that cracks are a good entry point for decay."

56. There are occasions when an expert has reason to alter his opinion on some aspect of a case and if adequately explained such a change is not necessarily to the discredit of the expert. However in this respect it seems that Mr Murat failed to correct an impression he gave in his first report, even though by the time of the trial it no longer represented his views.

57. Finally, I note that during cross-examination Mr Murat accepted the proposition that:

> "I suppose I am devising the inspection regime with the benefit of hindsight."

58. Given the examples from Mr Murat's evidence that I have discussed, this was an accurate statement albeit one which undermined the claimant's case. During Mr Murat's time in the witness box I formed the clear impression that his evidence had been written and had evolved to present to the court an inspection regime of whatever rigour was necessary to have made probable the discovery of the only material defect.

59. The characteristics of and inconsistencies in Mr Murat's evidence have had a singular and

cumulative adverse effect on his credibility and reliability as an expert witness.

60. By contrast, I found Mr Barrell to be sensible, reasonable and consistent in his views. From time to time he made concessions to questions from Mr Regan but he did so as a sensible expert responding to a reasonable question. Mr Barrell was unshaken in his essential views in cross-examination and his opinions were broadly in line with the advice offered by the Forestry Commission and the Health and Safety Executive.

61. For these reasons, where the evidence of Mr Murat conflicts with that of Mr Barrell, I prefer the evidence of Mr Barrell.

Did the defendant take such steps to prevent danger as a reasonable man in the defendant's position would have taken?

62. Applied to the facts of this case this issue might be expressed in two questions:

a. Was there a proper system of tree inspection in operation on the estate?

b. Even if no such system was in operation was this tree in fact properly inspected during the twelve months prior to the accident?

63. Mr Barrell considered that the Health and Safety Executive guidance applied to the circumstances of this case and was relevant in the sense that although published after the event it set out the nature and extent of the reasonable steps that ought to have been taken by Sir James:

> "For trees in a frequently visited zone, a system for periodic, proactive checks is appropriate. This should involve a quick visual check for obvious signs that a tree

is likely to be unstable and be carried out by a person with a working knowledge of trees and their defects, but who need not be an arboricultural specialist. Informing staff who work in parks or highways as to what to look for would normally suffice."

64. The Health and Safety Executive guidance is silent as to the frequency of inspections. The Forestry Commission suggests an annual inspection, preferably in the autumn in clear weather.

65. A significant problem faced by Sir James is his complete lack of records. Landowners that have a written system of tree inspection, where the method and frequency of the same are detailed, are at an advantage. Where such a system is allied to records establishing when and by whom such inspections were carried out and with what results, then it is more difficult for a claimant to prove a systemic failure.

66. However, it is important not to become lost in procedures and ease of proof. What is important is whether or not Sir James discharged his duty to take such steps to protect passers by on the highway from danger as a reasonable man in Sir James' position would have taken.

67. The absence of a formal, recorded inspection procedure means that I must consider the evidence put forward by and on behalf of Sir James with particular care. I am satisfied that in respect of the material tree, there is adequate evidence of regular visual inspection by competent, experienced staff. Both Messrs Bennett and Parratt exceeded the degree of competence identified by Mr Barrell and the official guidance notes. Mr Barrell and Mr

Murat both told me that having heard Messrs Bennett and Parratt give evidence they were now satisfied that both men were competent to inspect the tree.

68. I find as a fact that inspection of the material tree took place at least once each year and probably more than once, when both men visited each tree in the park, picking up debris and generally making the park safe for grass cutting, animals and humans. For the reasons I have given I accept their evidence that as they went about their duties in the park they went round and looked up at each tree for signs of disease, damage or defects and that is what they would have done when they visited the material tree.

69. These inspections were in spring and early summer rather than autumn as recommended by the Forestry Commission as best practice. Mr Barrell did not criticise the timing of the inspections on the estate and the impression I received from all the evidence was that there were advantages and disadvantages of inspections at different times of year and what was important was that an annual inspection by a competent person took place.

70. I find that Messrs Bennett and Parratt were familiar with the park trees through long acquaintance. This provided them with an advantage when undertaking their duties. They could and did observe growth or lack of it and any changes in the appearance of the tree.

71. I am satisfied that neither a climbing inspection nor the use of binoculars was reasonably required for the inspection of the material tree. Indeed, during his evidence, Mr Murat abandoned his earlier positions on those points. A swift unaided visual check from ground level by two experienced and competent staff who were familiar with the tree was, I find,

sufficient and would comply with the observations of the Health and Safety Executive. Such a check might well take less time than a similar inspection carried out by only one person and/or someone unfamiliar with the tree.

72. I find as a fact that Sir James had in place an unrecorded but well-understood and adequate system for obtaining specialist assistance in respect of any trees thought to present problems. Mr Hamer was fully qualified as a forestry consultant and was regularly and readily available if such expert help was needed. I am satisfied that the estate staff understood the need to report damage to or disease in trees and that Messrs Bennett and Parratt had the long standing knowledge of the park trees, and the authority and skills to enable them to deal with any problems they discovered. Where the tree in question was a specimen park tree, Sir James expected to be consulted and he was readily available to his staff. Nevertheless his policy was always safety first.

73. Even if I am wrong in my conclusion that the inspection system was adequate, I am satisfied, for the reasons I have given, that the material tree was in fact properly inspected by Messrs Bennett and Parratt during the twelve months prior to the accident.

74. An inspection of the material tree that was confined to incidental views when passing on the A32 or along the South Lodge drive would not, in my view, have been sufficient to discharge the duty of care on the landowner.

75. The discussion by the experts as to the required qualification and experience of tree inspectors led to them adopting a classification method: Level 1 and Level 2. These

classifications have an emphasis on paper qualifications, training certificates as well as practical experience. I did not find such a rigid system of classification to be of assistance. It has no basis in official advice or widespread practice and there is a risk it will become prescriptive simply by repeated use by experts in first-instance cases.

76. It is better, I consider, to seek guidance from the reported authorities and from the expert and other evidence in a particular case and then to apply such guidance and evidence when deciding whether those who carried out the particular tree inspections were adequately qualified for the task.

Has the claimant proved that proper inspection ought to have led to something being done which would have prevented the accident?

77. I am satisfied on the evidence and find as a fact that prior to the accident it was neither probable nor even reasonably possible for a competent inspector to have observed the crack in the branch that failed. There were no features observable on proper inspection that would have led to a detailed inspection of the tree, discovery of the crack and lopping of the branch. Any positive identification of the crack would in the circumstances have been pure chance. My reasons are these.

78. First, the location of the crack in the branch. The crack was about 80 cm long. At its nearest end to the trunk it was about 6.9 metres above the ground and at its farthest end about 7.7 metres above the ground. This was a small crack on an upward growing branch of a large tree.

79. Second, the position of the crack on the branch. Using a clock face analogy with 6 o'clock at the bottom of the circumference of the branch and nearest to the ground, it is agreed that the crack was located between 10 and 11 o'clock. This fact was established by the practical method of re-attaching the remains of the fallen branch to the tree. The following arithmetic was also agreed. Because of its location, the site of the crack could not be observed at all unless an observer retreated at least 4.5 metres from directly underneath the branch. A closer view from the ground was simply impossible. This meant that an observer, having retreated the 4.5 metres, would have to look up towards the crack from a distance of 8.57 metres, less some small allowance for the height of the observer. In terms that are both round and imperial, the inspector would be observing from a distance of about 25 feet.

80. This is illustrated by the photographs taken after what remained of the limb was re-attached to the tree. In photograph 10 the crack was identified by a white cord along its length and in photograph 11 the cord had been removed. Photograph 12 shows the branch from ground level. This series of photographs together with Mr Barrell's evidence illustrate the practical difficulties involved in observing the crack from a ground inspection.

81. Third, the characteristics of the crack. The experts agreed in their third joint statement that the crack was closed although there was some debate during the trial as to what "closed" meant in this context. They agreed that the crack was not accompanied by rolls of callous along the sides of the same. Thus the rib was smaller than is sometimes the case with longitudinal cracks. Nor was the crack of uniform width. The range of opinion varied

from a few millimetres to up to one centimetre. It is regrettable that Mr Murat thought it necessary to cut out a section of the crack in order to carry out some ring analysis on the wood. I cannot be confident that this procedure had no effect on the width of the remaining crack in the branch. However, I proceed on the basis that the crack exhibited the stated range of widths for the year leading up to the date of the accident. On any view this was a small crack.

82. Fourth, the extent to which the crack was camouflaged from view. The photographs of the branch on the ground taken after the accident indicate that different parts of the crack were obscured by outgrowths of moss which was also growing in places in the crack. In addition, the crack was surrounded by the natural fissured bark of an oak tree. When he gave evidence Mr Murat erroneously identified such a fissure as part of the crack, a mistake which indicates how difficult it is clearly to distinguish a crack in an oak branch from a fissure.

83. There was debate as to the extent to which the crack was obscured from sight by foliage. The photographs demonstrate that this tree had full and dense foliage although the material branch was at the bottom of the foliage spread and therefore more visible than branches located higher up the trunk. I find it impossible on the evidence before me to re-create the leaf conditions on the tree prior to the accident but I am satisfied that when the tree was in full leaf it would have been more difficult to see the site of the crack. First, because of the play of light and shade upon the branch from other parts of the tree; secondly, because the effect of light and shade would have been magnified in the event of a breeze moving leaves; and thirdly, because of the existence of smaller branches and their

foliage that had been removed after the accident which, even if they did not directly obscure the branch, would have added to the mass of detail in the relevant area.

84. Fifth, the length of time the crack had been in existence. The evidence indicates that the crack had been in existence for at least a year and probably longer. Mr Murat thought about five years. However I cannot find that the crack, with all the dimensions and characteristics present on the date of the incident, was present for more than about a year. It is, I find, impossible to determine its length and width in earlier years. On the evidence before me that I accept this would be no more than speculation. This means that the defendant had one or at most two opportunities in the year before the accident to observe the same.

85. Sixth, for the reasons I have given, I prefer the evidence of Mr Barrell to that of Mr Murat on this issue. As the case proceeded I had the growing conviction that Mr Murat was constructing an inspection regime designed to discover this crack, indeed at one point in cross-examination he admitted as much. This explains his initial stance on matters such as climbing inspections, the use of binoculars, the degree of expertise, the frequency of inspections, the location and dimensions of the crack and so forth. As Mr Murat's position was eroded on most of these points his opinion became unreliable and unpersuasive.

86. Seventh, there was nothing obviously wrong with the tree that indicated the need for close or enhanced inspection. The tree itself was and remains healthy. The crown was not thinning, the leaves were not discoloured or diseased and there was no evidence of recent significant branch fall.

87. My conclusion as to the visibility of the crack is supported by a number of contemporaneous close-up photographs of the fallen branch (3rd October 2004) which indicate that the crack is difficult to identify even with the branch on the ground. Indeed Mr Murat saw these photographs before he first visited the site and did not spot the crack. Later photographs of the branch on the ground must be regarded with care: the branch had obviously dried out to some extent, movement of the branch is likely to have dislodged moss and pieces of bark, the branch had been rolled to present the crack directly at the camera and in due course Mr Murat cut out a section of the crack.

The further features of the tree

88. Mr Regan relied on a number of features of the tree in support of his argument that an inspection of the same ought not to be rushed. Although I will consider the detail of his submissions there is a preliminary problem with this point. There is no evidence that the inspection of this tree was in fact rushed. Neither Mr Bennett nor Mr Parratt struck me as the sort of staff who would rush any task they had been given. Furthermore, I have found as a fact that because of the size and location of the crack, a careful, ordinary inspection of the tree would not have revealed its existence.

89. Mr Regan identified seven features of the tree, six of which he conceded did not require specific remedial action. However, he argued that they were reasons why an inspector might linger over the tree rather than rush through his observations. I consider them in turn.

90. First, the position of the tree adjacent to the main road. This imposed a more onerous duty on the landowner in that an annual inspection of the same was required. A similar tree in a wood well removed from a public highway would not require inspection at such a frequency. I have found that this tree was in fact inspected at least annually and probably twice a year.

91. Secondly, the size of the tree. This was a mature oak tree but was not oversized for its location. Insofar as any part of the tree might overhang the public highway, the point adds nothing to the first matter.

92. Thirdly, the crack. I have considered this in detail above.

93. Fourthly, the presence of a number of pruning wounds. There is no evidence as to when this pruning was carried out although they were described as "old". Mr Barrell told me, and I accept, that none of them presented any danger to the bough in question or to the tree. The existence of pruning wounds did not, by itself, indicate the need for a detailed or climbing inspection of the tree.

94. Fifthly, a small dead branch at the top of the stub of the branch which failed. I find that for practical purposes, this defect was not visible from the ground while the tree was in leaf. Even Mr Murat did not attach significance to this defect. He said:

> "This defect was less likely to have been visible while the leaves were on the tree. This small stub is not sufficient to cause problems, it is an indicator on which you make a judgment. It is something you would take account of. It is not significant,

it is just one of many dead stubs I picked out. When I did so I was trying to identify the cause of the failure."

95. Sixthly, a growth deformity in the branch. This was found by Mr Murat when the tree was bare of leaves. He was unable to say whether it was visible from the ground when the tree was in leaf. In any event Mr Barrell told me and I accept that it was not a cause for concern.

96. Finally, the presence of dead wood in the tree. This wood was much higher up in the tree and it was not disputed that all mature oaks have some dead wood. The presence of dead wood was not, I find, significant.

97. Mr Regan very properly put these various points to Mr Barrell in cross-examination. I accept Mr Barrell's answers:

> "A growth abnormality is not necessarily a cause for concern. It is simply an indication that the branch has grown in distorted way. That by itself is not sufficient to require a more detailed inspection. Oak trees sometimes have hundreds of small dead stumps and merely one near a branch is not an indication for concern. ... This pruning wound is of little concern. On an inspection you ask how big are the wounds compared to the branch and here the answer is 'not big'. There is no decay and there is vigorous wound growth round the margins. Oaks are renowned for their durability and they resist decay well. ... These are two more pruning wounds. There is no risk from these at all."

98. Mr Regan asked Mr Barrell about the cumulative effect of such features:

> " Question: The pruning wounds, the growth abnormality, the small stub and the fact the tree is near the A32; all indicate a greater need for inspection than trees

which do not have those features?'

Answer: I do not believe that to be the case, all of these features are relatively insignificant. They are commonplace on mature oaks.

Question: They are reasons to treat the bough with a little more care and to spend more time on it?'

Answer: All of them are relatively insignificant and the combination of them does not give them any more significance."

99. I accept Mr Barrell's evidence. Mr Regan presented his case with great skill and thoroughness but in the end liability depends on whether the crack ought to have been observed. None of these other matters are material to that issue.

Conclusion

100. It follows that there must be judgment for the defendant. My preliminary view is that costs should follow the event. If the parties can agree an order I will hand this judgment down in their absence. Otherwise the matter should be listed without delay.

101. I have considerable sympathy for Mr Atkins. He was involved in a road traffic accident through no fault of his own. He suffered injuries from which he has not made a full recovery. However I cannot allow that sympathy to affect my judgment in this case. Falling trees kill or injure a very small number of people each year. So do lightning strikes. So does flash flooding. Mr Atkins was involved in an accident. That is all it was. No one was to blame.

Lain Hughes