

## TREES AND PUBLIC LIABILITY – WHO *REALLY* DECIDES WHAT IS REASONABLY SAFE?

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### Abstract

This article has its origins in investigations that the author has been undertaking into the effects of public safety and liability perception in the built and natural environment (e.g. BENNETT and CROWE, 2008; BENNETT, 2009 and BENNETT and GIBBESON, 2010). In these previous studies the author and colleagues have examined the impact of public safety and liability concerns upon memorial management in cemeteries, access to the countryside and to the training of built environment professionals. In these studies the aim has been to explore how the liability perceptions of owners and managers of such places is formed, and specifically whether public safety and liability perceptions have a tendency to cluster around certain patterns and conventions within particular ‘interpretive communities’ (FISH, 1980). Underlying these studies is a hypothesis that lay communities are at least as important as lawyers and courts in setting what the law regarding liability for site safety actually is *in practice*. In this paper the aim is to directly engage with an interpretive community that is engaged in a phase of public safety and liability anxiety, in this case current debate about the merits (or otherwise) of setting explicit standards for the safety inspection of trees.

### Introduction

The author is an academic, currently teaching property, environmental and safety law to environmental, real estate and housing students, but with a previous career working as a solicitor in legal practice as an environmental and public safety specialist. This article has its origins in a paper on street trees and liability risk perception given at a conference at Sheffield Hallam University in February 2010. However, in developing the paper for publication in this journal, the opportunity has been taken to focus specifically on engaging with arboriculturalists through your professional

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journal (one of the key forums of your interpretive community). The author does so with some trepidation – as it would be easier to write a paper on trends in tree safety and liability risk perception for an academic, socio-legal audience who have no day to day, expert and practical engagement with the dilemmas and physical reality of managing trees. However, by engaging with those that the author is (with every respect intended) observing and studying it gives those with views and/or vested interests an opportunity to comment (whether formally through this journal) or privately in correspondence with the author and thereby influence his ongoing analysis of safety and liability debates in a variety of place management situations. It is hoped that through this approach the author's understanding of how this particular interpretive community has evolved its patterns and conventions of liability perception will be all the clearer.

But this article is not merely a glorified research questionnaire – it offers up a substantive analysis of recent trends in the tree safety debate by reference to wider themes and context. For it is the opportunity to see what is happening in other fields of place management, and generic processes at work in the courts, that may be the key contribution that this article can offer to current debates within tree management.

This article will look at the issue of public liability for tree safety from two angles:

- A) What liability does the law impose for trees and public safety?; and
- B) How do landowner perceptions of such liability affect what the law actually requires?

The first angle requires a fairly traditional legal analysis. By looking at recent cases trends we can see how the law is interpreted by the courts. However, the second angle is more complicated – and may meet with hostility. You may say “*But surely the law is what the courts say it is? – it doesn't matter what people perceive it to be*”. But this article will argue that it does matter – greatly, in fact.

### **Trees as *problem***

This article will not outline the *benefits* of trees. Clearly there are many of these: aesthetic, ecological and economic and this author agrees with commentators like BALL (2007a) and WATT (2007) that greater attention needs to be paid to the risk-benefit of having trees. The article's focus will necessarily be upon trees as (perceived) problems: trees as object of (liability) fear. By such a (pessimistic) reading trees can equate to obstruction, potential collision hazard, disease bearer, pest shelter, child

allurer, built structure deformer<sup>2</sup>, and/or imposing structures in their own right, as EDEN ominously puts it:

“the earth’s largest living organisms: objects often larger than houses, often heavier than cars, almost always taller than humans...”  
(2007:127).

Thus, looked at pessimistically, trees can be seen as ‘an accident waiting to happen’ – often accompanied by a related perception that such an ‘accident’ would bring with it consequent exposure to liability (criminal or civil) for the unlucky owner of that wayward tree.

In broad terms (let’s skip the detail<sup>3</sup>) through a combination of the common law (the torts of nuisance and negligence) and statute (the Occupiers’ Liability Acts of 1957 and 1984) persons with control over property have a duty to manage that property reasonably and thereby achieve a reasonable level of safety related to things on that property. If an accident or injury arises (e.g. from a diseased tree falling over) then the question becomes, in liability terms, was that owner *careful enough* in how they managed that thing on their land<sup>4</sup>? An equivalent duty also exists under the criminal law, here the Health & Safety at Work Act 1974 requires ‘reasonable safety’ to be achieved by persons controlling property as part of their business. This duty to provide for safety applies not just to safeguarding employees, but also providing safety for visitors and passers-by.

### How much care is needed? What is reasonable?

Here we get to standard lawyerly caveat: “*well, it depends on the circumstances*”. Factors such as the following will need to be investigated (ultimately by a court) on a ‘case-by-case basis’ in order to determine whether what was done was reasonable (and sufficient)<sup>5</sup>:

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<sup>2</sup>Under a variety of statutes public agencies have powers to address dangerous or meddlesome trees: e.g. Highways Act 1980, Local Government (Miscellaneous Provisions) Act 1976, Railway Improvements Act 1871, Telecommunications Act 1984, Electricity Act 1989 and the Civil Aviation Act 1982.

<sup>3</sup>For the detail the reader is referred to the exposition of public liability principles and case law regarding tree safety in MYNORS (2002), STEAD (2008) and FORBES-LAIRD (2009)

<sup>4</sup>Ownership of (and therefore responsibility for) street trees has historically been a complex issue. However, since *Hurst –v– Hampshire County Council* (1997) 2 EGLR 164 it appears that these legal complexities are likely to be ignored in most cases – and the Highways Authority assumed to have responsibility for street trees.

<sup>5</sup>Suggestions that a greater level of care was required for street trees because of their location was rejected by the *House of Lords in Caminer –v– Northern and London Investment Trust* (1951) AC 88. Instead it is the condition of the tree, rather than its location *per se*, that indicates how much care is required.

- **How likely was it that the tree would fall?** – for example was it old and diseased or exposed to high winds and vibration?
- **What scale of harm would be likely to manifest if the tree did fall?** – is it right next to a road? Is the road busy? Is it on a bend (poor visibility)? Is it close to a school? (And thus likely that there would be a higher than average proportion of young children potentially exposed to the risk of injury).
- **What practicable steps could be taken to safeguard the tree?** – is there actually any workable (and cost effective) way of making the tree safe? Could remedial works make matters worse? Would a competent periodic survey of the tree's condition have spotted the defect?

The senior courts<sup>6</sup> have been consistently reluctant to impose liability for natural hazards (a category into which trees are often bracketed) – fearing the resource implications, both for public and private sector pockets of doing so<sup>7</sup>. Take, for example, the House of Lords' ruling in *Stovin –v– Wise* (1996) AC 323 that courts should not lightly intervene in judging the wisdom of local authorities' decisions about management of the highway fringe, as to do so would see the courts:

- (i) encouraging litigation against the public purse; and
- (ii) interfering in finite resource allocation by the councils.

In *STOVIN* the House of Lords refused to allow a claim against a Highway Authority by an injured motorist which was based on an allegation that that council had been negligent in having not used its powers under the Highways Act 1980 to improve visibility at a road junction by removing an embankment that was obscuring lines of sight. In that case the House of Lords echoed a line of argument also seen in a number of senior judicial decisions in recent years – namely that, the world cannot be made 100% safe and that people must accept the consequences of their actions (e.g. if they choose to drive on the roads) and that the courts should seek to discourage the (perceived) growth of a “compensation culture”<sup>8</sup>. This can also be seen in *Tomlinson –v– Congleton Borough Council* (2004) 1 AC 46 where the House of Lords refused to impose liability upon a council for

<sup>6</sup>For our purposes, the 'superior courts' are The Court of Appeal and the House of Lords (the latter now replaced – since October 2009 – by the Supreme Court). These are the courts, comprised of senior judiciary, to whom cases can be appealed. It is the superior courts that set the precedent (i.e. generic and future decision guiding) character of reported case law.

<sup>7</sup>See *Leakey –v– National Trust* (1980) QB 485; *Holbeck Hall Hotel –v– Scarborough Borough Council* (2000) BLR 109.

<sup>8</sup>See also s1 of the Compensation Act 2006 which has the same objective.

failing to ensure that a young man could not render himself paralysed by diving into a shallow pond. In that case, Lord Scott presented this ‘personal responsibility’ theme in strident tones:

“Of course there is some risk of accidents arising out of the joie-de-vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone.”(Para 94)

Clearly, risk-taking by reckless adventurers is one extreme, but in *STOVIN* the court was applying this principle to something more mundane: road use. We can also see this principle in a case involving a pedestrian who was blinded in one eye when he tripped on a tree root whilst walking along a nature reserve path. Here, the court declared that such paths (and tree roots) cannot be rendered 100% safe – and users must take responsibility for their own safe passage<sup>9</sup>.

However, the problem is that it is always possible to find cases that appear to point in the opposite direction. For example, a 2007 case<sup>10</sup> in which an injured passer-by successfully claimed compensation after slipping on a single flower petal adjacent to a florists shop at Marylebone station. The claim was successful - on the basis that the presence of the petal proved that the shop did not have an adequate system in operation to ensure that no one could come to harm as a consequence of its operations. Permission to appeal against this ruling was refused by the Court of Appeal, leaving this lower-court judgement to stand unchallenged. And it is these cases which tend to be picked up by the media in their self-declared war upon the alleged rise of a ‘compensation culture’<sup>11</sup>.

Somehow, pointing out that:

- (1) the ‘negative’ (i.e. liability imposing) cases tend to be in the lower courts (and therefore carry much less weight in law as ‘precedents’ to guide the evolution of the principles under which future cases will be determined);
- (2) that the more ‘positive’ judgements are in the senior courts (and therefore of higher precedent value); and
- (3) that often the salaciously reported ‘negative’ cases are overruled if they are appealed up to the senior courts,

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<sup>9</sup>*Mills-Davies –v– RSPB* (2005) CLY 4196 – High Court

<sup>10</sup>*Piccolo –v– Larkstock Ltd* (trading as Chiltern Flowers) (2007) All ER (D) 251 (Jul) – High Court.

<sup>11</sup>See, for example, on the *Piccolo* case: “A killer petal fells a very big banker and it’s common sense that is the victim” *Daily Mail*, 20 July 2007.

each fail to reassure land managers about the level of liability risk actually faced. This is perhaps not surprising – as there is never any *guarantee* that a claim that you receive might not end up being the exception to any ‘general trend’ that a practising or academic lawyer might try to persuade you exists in safety law. Those who have faced the internal (or external) investigations imposed following a serious tree accident know it as a major emotional shockwave to both the individual staff involved, and to an organisation’s health and safety culture. A ‘threat’ of potential civil claim or criminal prosecution can hang over an organisation for years, for example the Health and Safety Executive deliberated for four years before finally deciding not to prosecute the National Trust following the fatal crushing of a child by a falling tree at its Dunham Massey Park in Cheshire in 2005<sup>12</sup>. In a similar vein, EDEN (2007) writing as an arboriculturalist in defence of the then proposed British Standard on tree safety (BS 8516) (BSI, 2008), chillingly recalls his own personal experience of having his tree surveying abilities forensically investigated following a fatal accident. He interprets his experience as “a salutary lesson” that persuaded him of the need for a benchmark, a reference standard, to be devised against which individual tree inspectors’ competence could be validated. Elsewhere EDEN (2008) expresses concern that in the absence of clear inspection standards is causing a polarisation between landowners who do too much and landowners who do too little to manage the safety of their trees.

So, given these anxieties, and even if a feared claim might well ultimately be unsuccessful if taken (expensively) all the way through the appeal courts, one can perhaps start to see how a pragmatic view might emerge within a beleaguered land manager (or his organisation) that it might make more sense to chop a tree down as a precaution and thereby avoid the time and expense of a court case to prove that the tree was safe (and/or that the previous safety management regime was adequate). Clearly, this way of thinking ultimately leads to the equivalent of defensive medicine, a “defensive arboriculture”<sup>13</sup> (FAY, 2007: 145) which pre-empts claims by the precautionary destruction of trees. In this regard, the 30,000 street trees removed by the 33 London Boroughs between 2002 and 2007 for “health and safety reasons” may be testimony to such a defensiveness (GLA, 2007).

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<sup>12</sup>See “National Trust not prosecuted over boy killed by falling tree” *The Daily Telegraph* 17 February 2009

<sup>13</sup>FAY, applying the expression to arboricultural practice, defines the expression as “practice based on the anxiety of being found professionally wanting”

## Tree safety inspection standards

In 2006 the *Poll* case<sup>14</sup>, one involving a compensation claim from a motorcyclist injured when he collided with a fallen rotten tree, caused a wave of anxiety amongst tree owners, as it appeared to rule that tree inspections could only be carried out by professional arboriculturalists. This impression simplified (and generalised) the actual findings of the *POLL* case, but the effect appears to have been to trigger a wave of concern about heightened liability for tree related accidents in the aftermath of that judgment.

ADAMS (2007), HAYTHORNTHWAITE (in RRAC, 2008) and BALL (2002) each argue that there are ‘risk entrepreneurs’ operating within sectors of the economy who (wittingly or unwittingly) amplify liability anxieties, and Haythornthwaite has specifically directed this allegation in the direction of those who advocated development of a specific British Standard for tree safety inspections in the aftermath of *Poll*, commenting thus:

“The draft Standard has been put together by a rather narrow group of arboriculturalists and tree surgeons who stand to gain from its adoption, while the potentially enormous costs would have to be met by tree owners.” (DERBYSHIRE, 2008)

HAYTHORNTHWAITE, whilst speaking as a UK Government risk adviser at the National Tree Safety Group’s May 2008 conference called to galvanise opposition to the draft British Standard, also specifically called for identification of actions needed to “reduce the influence of [risk] entrepreneurs” within the tree safety debate (HAYTHORNTHWAITE, 2008).

It is easy to allege (and less easy to prove) that all professional advisers are cynically overstating what the law (and reasonable practice) actually require – however it would appear hard to argue against a view that themes of risk assessment, liability avoidance and a focus upon the dis-benefits of risk dominate land management discourse. In this precautionary climate, as ADAMS notes: “the job of the institutional risk manager is to try to imagine what might go wrong, and devise the means to avoid it” (2007: 100), for in the contemporary “risk-blame-litigation-compensation” culture (ADAMS, 2007: 99) accidents happen because of culpable negligence, they no longer apparently happen ‘by accident’: if by that we mean as a consequence of ‘bad luck’ or ‘an act of god’.

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<sup>14</sup>*Poll* –v– *Viscount Asquith of Morley* (2006) EWHC 2251 (QB) which also echoes the approach of a similar junior court judgement in *Chapman* –v– *Barking and Dagenham London Borough Council* (1997) 2 EGLR 141 which advocated regular proactive systematic expert inspection of trees close to highways.

It is understandable how the judgment in *Poll* could be perceived as a cause for concern that *absence* of documented safety inspection standards could leave tree owners exposed to the vagaries of the courts' best 'guesses' as to what was (and was not) reasonable safety provision. Indeed Ball (2007b: 123) has advocated the importance of the formation of 'sector groups' to gather evidence on the actual level of risk and to decide what a balanced approach to safety management in their arena should look like. Such initiatives have worked well in other related sectors, such as the Play Safety Forum<sup>15</sup> and the Visitor Safety in the Countryside Group<sup>16</sup> and myriad business and trade sector campaigns aimed at influencing how the generic requirements of law should be interpreted and applied in a 'workable' (and proportionate) manner in their area.

What appears key however, is that such initiatives need to be led by the duty holders, the persons upon whom the legal responsibility, and the attendant risk management and/or liability costs fall. The emergence of the National Tree Safety Group<sup>17</sup>, in opposition to the proposed British Standard on tree safety inspections appears a classic clash between adviser (i.e. arboriculturalist) advocates of that standardisation and the duty holders who feared the so-called 'ratchet effect' (BALL, 1995; FAY, 2008): that expert / adviser based standard setting seems invariably to set safety requirements ever tighter.

No doubt many arboriculturalists (like EDEN, 2007) would respond that they also face liability if they fail to adequately manage tree safety and that they have the most experience and knowledge to lead an *expert* review and standard setting process, and that process should aim to embody their communal view of what represents a sensible level of tree safety. However (as the experience of recent years has shown) standard setting cannot be left to experts, for the decision about what is *reasonable* is not a technical judgment – it does not simply equate to 'what is possible?'<sup>18</sup>. Workable standards do not emerge automatically through distillation of current best practice, standard setting requires wider considerations of affordability, respect to the benefits of tolerating some risk of accidental death from tree failure and the vagaries of the risk of liability, given the paucity of case law and the prevailing attitudes of senior judges and policy makers.

<sup>15</sup>See [http://www.playengland.org.uk/Page.asp?originx\\_8211bi\\_369384372937k13w\\_20088151645w](http://www.playengland.org.uk/Page.asp?originx_8211bi_369384372937k13w_20088151645w)

<sup>16</sup><http://www.vscg.co.uk/>

<sup>17</sup><http://www.forestry.gov.uk/forestry/INFD-7T6BPP>

<sup>18</sup>See Lord Asquith's influential interpretation of 'reasonably practicable' in *Edwards –v– National Coal Board* (1949)1 All E.R. 743.



## Analysing the *Poll* judgement

It is instructive to note that in *Poll* the way in which the case was presented actually led to the court only having a narrow range of issues to adjudicate on, for the only evidence put before the judge was the expert testimony of the claimant's and the defendant's arboricultural experts. From the case report it appears that those experts had already agreed, out of court, that in their opinion a reasonable standard of safety provision for the tree in question would have been periodic inspection by a professionally competent person. Accordingly the judge was not asked to rule on this as a matter of law. The only questions for the judge (and he was required to determine these questions in the context of the particular accident and location – this was a junior court, not a senior court ruling aimed at creating a generic legal precedent) was whether (i) the person who had inspected the tree was sufficiently qualified to do so and (ii) whether inspection by a sufficiently competent person would have spotted the defect that subsequently led to the tree falling and blocking the road. On the first question the judge followed the views of the two expert witnesses and on the second issue the judge decided that a “Level 2” inspection would have involved a particularly intensive search for the fungal bracket which the judge surmised (given that there was no evidence available of how visible that feature would have been prior to the accident) was:

“probably...very well concealed...[but] a level two inspector would have been looking for that very thing*[i]*. He would have appreciated that decay could lie beneath this overhang. The very purpose of the examination was to eliminate this very hazard. It would have been imperative to feel carefully into the space – to scrape and discover *[ii]*. The size of the gap is not known. Was the overhang clear of the underlying ground by a few inches? Or was the bracket absolutely trapped, filling the gap completely? We will never know*[iii]*. That is because a competent inspection was never made. It ill behoves the Defendants, in these circumstances, to ask me to make assumptions which are unfavourable to the Claimant. I am quite satisfied, on a substantial balance of probabilities, that the fungal bracket would have been found*[iv]*”<sup>19</sup> (numbers added).

We can draw out some important observations from this passage, which was the concluding paragraph of the judge's judgement (each of the

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<sup>19</sup>Paragraph 26 (the concluding paragraph) of the Judge MacDuff's judgement in the *Poll* –v– *Viscount Asquith of Morley* (2006) EWHC 2251 case in the High Court (Queen's Bench Division) – heard at Bristol District Registry on 11 May 2006.

following numbered points references the relevant number added to the text above):

- [i] As Lonsdale (2007: 170) notes, the judge's optimism about whether competent Level 2 inspectors would have found the fungal bracket may not be not shared by all competent and conscientious inspectors;
- [ii] Does Level 2 actually require such vigour? Is it practicable? It is not even clear that the respective expert witnesses (upon whose testimony the judge was claiming to base his ruling) advocated as an imperative such 'feeling' and 'scraping';
- [iii] Even the judge conceded that much (including the crucial question: whether the fungal bracket would have been discoverable before the accident) was left in the realm of supposition – but the judge had to decide the case in one or other parties' favour. As Uff has noted (contrasting the difference between law and engineering):

“the law must always find an answer to a dispute. No matter how complex the facts of the case, or how uncertain or novel the law” (2009: 4).

In short: there has to be 'closure', even if that requires a decision to be made in equivocal circumstances, the case has to be decided in favour of one party or another – there is no scope for a 'draw'.

- [iv] Thus the judge in the *Poll* case cannot stop there, acknowledge the impossibility of finding out what really happened and leave the matter open<sup>20</sup> on a “we will never know” basis. Therefore, in a deft rhetorical manoeuvre he asserts that the defendant must be at fault because (extending his wording in order to expose the stretched logic) – if the defendant had properly inspected he would have found out whether the fungal bracket was discoverable or not. This appears to overstep the line between what is *reasonable* inspection and what is *physically possible* inspection (it passes beyond proportionality – or practicability – as the law terms that mitigating factor). The judge then (through further rhetorical flourish) bolsters his position by attacking the temerity of the Defence to suggest that the benefit of the doubt should lie with *them*, and does this by declaring that he is satisfied 'on the balance of probabilities' that the fungal bracket would have been detected by a competent Level 2 inspection.

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<sup>20</sup>The only exception would be a Coroner's Court, which on enquiring into a fatality could, for its own inquisitional purposes, rule (via an “Open” verdict) that the cause and circumstances of a death were unascertainable.

These closing sentences reveal the judges aim: to reach a conclusion that will enable the claimant's compensation claim to be sustained. In short, the judge, faced with an absence of evidence, a situation that would point in other circumstances towards a decision that "it's impossible to say", has to rule one way or the other and thus decides 'on balance' to do so in a way that will not prevent the claimant's claim from proceeding any further.

Analysis of this paragraph unmasks the imperative, present in every court case (whether civil or criminal) that a decision (and an allocation of culpability) has to be made – there is no scope for an 'open verdict'. In this we can see a gap between legal theory and practice: for whilst, in concept the law assumes that its role is to regulate behaviour, and to uphold individual rights by expressing blame and censure, in practice, as CRANE (2006) and FUREDI (1999) both note, the functional primacy of negligence as a method of allocating responsibility (i.e. blame) has long since given way to the operation of negligence as a system of compensation, in which allocation of personal responsibility and "blame" is very much a secondary, and subordinated, factor. As HARRIS *et al.* (1984, p. 18) note from their empirical study of personal injury claims:

"... the basic philosophy of the judge-made law on the tort of negligence is individualistic: the law seeks a justification for compelling one individual (the casual agent) to pay compensation to another individual (the victim) and finds it in the concept of negligence."

Viewed in this way, the focus of claiming and case handling by the junior courts can be seen as a "means to an ends" (a contrivance) – the finer points of what the law says are actually secondary to a more instrumental question: namely, viewed in the round "is this claimant deserving of compensation?" (rather than "is this defendant at fault?"). In this way accident litigation has become depersonalised – it is a means to an end; and in the end it will be the insurer who pays (most) of a successful claim, not the party found to have been "at fault". The junior judge in the POLL case was acting pragmatically in a situation of limited information, his job was to rule upon the specific site, circumstances and parties before him. This was not an appeal court addressing its mind to the public policy implications of any 'general rules' that the judicial reasoning on display in the case report might, as binding precedent, cause to reverberate amongst tree owners across the nation.

Thus, for the various reasons now stated, *Poll* cannot be taken at face value as authoritatively setting a generic requirement for 'Level 2' inspections (however these may be defined – and the *Poll* judgement sheds little light on this) and we can apply ELLISON'S generic observation specifically to the circumstances of *Poll*:

“Tree managers and assessors should not be fearful of legal precedents that can be shown to have resulted from limited or defective expert evidence...judges are experts in law, but on all other matters they rely upon the evidence before them.” (2007: 141)

It will be clear from the analysis set out above that this paper’s author does not share FORBES-LAIRD’S (2009) certitude about POLL being “an exemplar on the question of inspector competence”. FORBES-LAIRD’S analysis of the case law on tree inspection liability (and there are only a handful of reported cases over the last 100 years) concludes that *Poll* can be taken as indicative of a clear and stable pointer towards inspection based regimes being required by the courts for all but remote trees. For FORBES-LAIRD *Poll* is important because it (in his view) puts the need for professional tree inspection beyond doubt, leaving then only the question of what level and frequency of safety inspection would be reasonable. FORBES-LAIRD appears to support the development of a British Standard on tree safety inspection because that will then help show (or tell?) the courts what is a reasonable level of inspection. Opponents of standard setting can argue that in fact the judgement in *Poll* doesn’t resolve anything. There is nothing in *Poll* that would prevent a court in a future occasion taking a different view even if presented with similar facts.

Indeed in August 2008, in another junior court decision (*Atkins –v– Scott*<sup>21</sup>) also involving injury caused by tree failure due to disease, the judge in that case carefully reviewed the factual and expert evidence presented to him about the defendant landowner’s (undocumented) tree inspection regime and the non-specialist nature of the arboricultural training of the staff responsible for carrying out tree inspection on the estate in question and concluded that the arrangements, and the skill of the staff, were adequate, and that (in his view) whilst a more systematic and document based inspection regime would have been advantageous:

“...it is important not to become lost in procedures and ease of proof. What is important is whether or not the [landowner] discharged his duty to take such steps to protect passers-by on the highway from danger as a reasonable man in [his] position would have taken” (para 66)

And, on the evidence, the landowner’s system in this case was found to be:

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<sup>21</sup>*Atkins –v– Scott* (2008) Unreported, Aldershot and Farnham County Court, 14 August 2008 (a transcript of the judgement delivered by Ian Hughes QC sitting as judge is available at: [www.qtra.co.uk](http://www.qtra.co.uk), last accessed 13 April 2010.)

“an unrecorded but well-understood and adequate system for obtaining specialist assistance in respect of any trees thought to present problems.” (para 72)

The judge then went on to criticise the claimant’s expert witness for having overstated what should be regarded as a reasonable safety regime and expressed preference for the HSE’s published guidance over attempts to invoke (as was the case in *Poll*) an emphasis on paper qualifications (and specifically the concept of “Level 1 and Level 2” competence), stating:

“I did not find such 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”. (Para 75).

Here the Judge in *Atkins* is much closer to contemporary dispositions of the senior (appeal court) judiciary. He is mindful of the dangers of what BALL (1995) and FAY (2008) have termed the ‘ratchet effect’: that standards inexorably tighten through the ability of experts to always be able to find an example of ‘better’ practice to point to or to create a ‘self-fulfilling prophecy’ through claiming in expert testimony that a particular level of conduct is reasonable.

The judge in *Atkins* then closes (ruling in favour of the defendant landowner) by expressing his sympathy for the claimant, noting that he was injured through no fault of his own, but adds the following robust declaration:

“...I cannot allow that sympathy to affect my judgement in this case. Falling trees kill or injure a very small number of people each year. So do lightning strikes. So does flash flooding. [The claimant] was involved in an accident. That is all. No one was to blame.” (Para 101)

Such a view, and its resurrection of the notion of ‘blameless’ accident, echoes the robust judicial language of *Tomlinson*, *Stovin*, and section 1 of the Compensation Act 2006. The judge’s pronouncements in *Atkins* tell us more about how a senior court would be likely to rule on tree safety standards than *Poll*, given that the views expressed in *Atkins* are more closely aligned to contemporary dispositions of the senior judiciary, the HSE and risk policy commentators. The senior judiciary (as argued above) is now very sensitive about appearing to advocate a nil-risk world and this

stance chimes with developments in regulatory and political circles<sup>22</sup>. A future case that sought to follow *Poll* would have to reconcile its view with the clear message coming from the Health and Safety Executive and others advocating the need for the management of the tree safety risk to be proportionate. For, in the aftermath of *Poll* (and as the judge in *Atkins* noted), the Health and Safety Executive published guidance (HSE, 2007a) for its inspectors re-affirming the suitability of non-specialist based inspection for the majority of trees. As the HSE's Chief Executive later summarised (RRAC, 2008):

"In 2007 HSE became concerned that uncertainty was causing some organisations to over-react to the low risk from falling trees. HSE therefore produced guidance for its inspectors on what is required by the law we enforce – the Health and Safety at Work Act 1974. It makes the point that the risk is generally extremely low. For most trees around the countryside HSE does not believe any action at all is reasonably practicable under the 1974 Act. Where trees are in very public places we suggest that non-specialist staff with a working knowledge of trees should look out for obvious problems as part of their everyday work. Inspection by tree experts is likely to be appropriate only in very limited circumstances, for example where a tree in a very public area is known to be unstable but is kept for heritage or other reasons. There are several other relevant pieces of non-HSE law; we have encouraged stakeholders to agree a simple and proportionate approach to cover all the legal duties. We hope that by sharing our own guidance we have provided a useful starting point."

Furthermore a statement was issued by the Royal Society for the Prevention of Accidents giving less than effusive support to the level of inspection advocated by the draft British Standard:

"It makes sense to have standards for looking after trees, but the idea of stipulating that you must get a tree inspected on a three year cycle is probably over the top, especially for organisations like the National Trust or the Forestry Commission." (quoted in DERBYSHIRE, 2008)

In early 2008 the development of a draft British Standard came under scrutiny from the National Tree Safety Group (NTSG) and the Government's Risk and Regulation Advisory Council (RRAC). The RRAC's Chairman, led the charge

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<sup>22</sup>See for example then Prime Minister, TONY BLAIR's speech 'Common sense culture not compensation culture' to the Institute for Public Policy Research on 26 May 2005: <http://www.number-10.gov.uk/output/Page7562.asp> (last accessed 31 March 2010)

against the proposed standard (and the perceived ‘professionalisation’ of tree safety inspection that the British Standard’s critics felt that it entailed), declaring that:

“The risk from trees has not increased. The RRAC believes the existing legal principle, effective for the last 60 years, is sufficient. If the industry insists on pressing forward a new standard, then the cost-benefit analysis needs to be better thought through, and the public’s voice must be heard...I am deeply concerned by the proposed introduction of what could be a disproportionate, costly and unnecessarily bureaucratic system for managing trees.” (RRAC, 2008)

Due to the intervention of the NTSG and RRAC, development of the draft British Standard is currently suspended, pending the publication later this year of guidance being developed by the NTSG<sup>23</sup> and its funded research into the level of risk actually posed by falling trees in public spaces in the UK – an annual risk believed to be one fatality per 10 Million people (HSE, 2007a: 2).

### **The role of liability risk perception in ‘creating’ the law**

We have seen above the interplay between:

- selective media reporting of ‘compensation culture’ type cases;
- the prominence given in the courts to expert safety professional testimony on ‘reasonable practice’; and
- landowners’ and Governmental concerns upon affordability, manageability and proportionality of safety standards.

This starts to show us how determining what the law requires as ‘reasonable’ safety is not the sole province of the courts, it is the result of a multi-agency interaction, whereby through a process of evolution – one involving competition between rival views of what is reasonable/practicable – the law acquires its sense of what is the required level of safety provision.

The tree safety debate is currently within that gestation phase, and the final outcome on what is ‘reasonable’ safety provision remains to be seen. However, tree safety is not the only area in which this process of ‘safety-level’ setting has been playing itself out recently. One can identify similar tensions at play in the evolution of concerns about reasonable safety

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<sup>23</sup>The NTSG’s draft guidance (NTSG 2010) was issued for consultation on 21 May 2010.

provision for memorial<sup>24</sup> safety in municipal cemeteries. The evolutionary path of *that* safety issue may shed some light on how the tree safety debate will evolve, particularly given the multitude of existing guidance on tree safety<sup>25</sup>.

Following the fatal crushing of a child in a cemetery in Harrogate in 2000, enforcement action by the HSE against Harrogate Council led to widespread remedial action by Burial Authorities across the UK. Many thousands of gravestones were either laid flat, removed entirely or staked as a precaution against them falling over. However, almost immediately, there was outcry from the press and families of the deceased at this perceived desecration. In this changed climate the Government and the HSE sought to distance themselves from ‘the great laying down’. Even the Local Government Ombudsman became involved (LGO, 2006). These agencies emphasised that the risk of ‘toppling tombstones’ was low and that remedial steps should not be undertaken as a matter of course (and then only with great sensitivity). Burial Authorities were told to draw upon industry best practice in the absence of any central standards. Safety consultants (often memorial masons) expanded their range of services to include “topple testing” based around a handheld pressure test gauge (an interesting parallel with the cautionary views of LONSDALE (2007) and FAY (2007) on the increasing dependency on device-based methods for tree safety testing and the consequent downgrading of the role of expert judgment). Meanwhile, in this vacuum various professional bodies developed their own standards (standards which were set fairly conservatively, with the aim of protecting their professional membership from perceived liability). By the time that official Governmental advice became available in January 2009 (MOJ, 2009) these professional standards were quite well embedded and the Governmental guidance was met with suspicion by the members of these organisations. The fear of liability, and defensive land management endorsed by the professional associations, appeared to create a resistance to the new guidance, and individual cemetery managers felt themselves in a no-win situation and doubting that centralised guidance could actually protect them against the inherent vagueness of the criminal and civil law expectation of ‘reasonable safety’, in the words of one manager interviewed in BENNETT and GIBBESON’S (2010) study:

“we’ve got to recognise, irrespective of whether the HSE are now saying you know ‘there’s a fair degree of risk that’s tolerable’ the reality is it doesn’t materialise like that and I certainly won’t accept that until I see evidence of that through the courts.”

<sup>24</sup>In this sense memorial means headstones, statues and other stone and iron grave architecture prone to risk of collapse onto persons visiting graveyards.

<sup>25</sup>For example, DOE 1973 & 1975, LONSDALE 1999, DAVIS *et al.* 2000.



This case study shows us that the Government and regulators (and even the senior courts) cannot directly control how liability (and what is necessary in order to achieve ‘reasonable safety’) is perceived by those who feel that the law does expose them to risk of liability. To assume that promulgation of ‘official’ guidance, standards or interpretation will easily ‘correct’ how liability is perceived by a particular ‘interpretive community’ is to apply a linear model of communication that has been seriously questioned in the last 40 years, by communication and risk perception theorists who emphasise the need to take account of the way in which the audience will interpret (and/or ignore) the message, based upon their own preconceptions of what they already think is relevant and/or correct (FISKE, 1990; LUPTON, 1999).

### **What’s in the mind of the individual manager?**

In situations involving debate about safety standard setting (specifically the benchmarking of what is (as the law requires) “reasonable” in relation to tree safety management) a contest of rival organisational views of what is reasonable, may well eventually produce a more stable consensus about what is reasonable safety provision. However, even where stable, widely held interpretations of what the law requires exist, it’s unlikely that the perception of the risk of liability at ‘front line’ level can ever be fully managed. Our research into individual interpretations of safety law (BENNETT and CROWE, 2008) suggest that, at local, on-the-ground level, the interpretation and application of safety law can be very ad hoc and approximate indeed. In even our study of safety liability perception within 21 major pro-access countryside organisations we found evidence that much of the subtleties of court judgments and legislation pass unnoticed by lay managers. Safety law, in reality, operates in a much more ‘approximate’ manner, informed by local practices, organisational expectations and experiences with claimants (and on occasion stirred by media reports a new case in the lower courts that has seen liability imposed upon a landowner as (to the reader) further evidence of the growth of a ‘compensation culture’ and/or a ‘nanny state’). There is also some evidence to suggest that safety/risk management may often be used as a more acceptable justification for other less socially acceptable urges: fear of crime, trespass or a simple desire to preserve privacy (see Forestry Commission, 2005). In that regard it is notable that there is very little detail in the Greater London Authority’s ‘Chainsaw Massacre’ report (GLA, 2007) to prove how many of the 30,000 trees reported as chopped down for ‘health & safety’ reasons were diseased or otherwise posing an actual safety hazard. It may be that ‘health and safety’ operates as a broad, morally and politically acceptable designation for getting rid of trees for other reasons.

However, on the ‘plus’ side, our studies have also suggested that interventions billed by the media as examples of risk aversion gone mad often have a far more prosaic and defensible basis when the matter is investigated in greater detail. The dangers of reliance upon press reports as evidence of anxiety about the tightening of the liability noose is illustrated by the example of press reports in 2006 of Torbay Council’s risk adverse stance on the planting of its signature “palm trees”. The story (which was picked up by various of the national papers, including the Daily Telegraph<sup>26</sup> from which the quote below are taken) had it that the Council’s senior landscape officer had blocked the planting of these trees in pedestrian areas because:

“as they have very sharp leaves, [they] need to be carefully sited in streetscapes, where they could cause injury to eyes/faces if inappropriately placed.”

In the local political spat that ensued, commentators lampooned their official’s stance, either intentionally:

“Torbay Council’s elected mayor, said he did not think that there was any risk from palm trees unless ‘you were in the Caribbean and a great big pineapple fell on your head!’.”

or unintentionally ridiculed their official whilst trying to support him – by attempting to explain that such trees could be dangerous, a local Councillor drew an unfortunately colourful metaphor:

“Its a bit like keeping tigers: they are beautiful to look at but you wouldn’t want them wandering the streets.”

These sound bites reinforced the view of this story as an instance of the “nanny state” gone mad. However buried away within the story were hints that the article was less clear cut than this. But, only a careful reading would spot these more prosaic aspects. It is not that the press reports were inaccurate – but rather that it is the most salacious elements that stick in the mind of the reader. As part of our 2008 study we traced and interviewed, the Landscape Officer involved. He was able to explain that the story had its origins in a very specific local planting decision. His aversion to planting the palms, was part of a rational risk assessment. It was not inspired by a fear of litigation or a risk-averse culture within that Council. The decision related to the request for these palms to be planted at one specific shopping

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<sup>26</sup>“Palm tree ahead danger” *The Daily Telegraph* 10 June 2006

precinct location – one where there would have been a real risk of eye level contact between members of the public and sharp fronds. As the article mentioned (but only subtly, and in passing) the Council had not stopped planting these trees at *all* locations, there was no general issue of policy imposed here. In the officer's view the national press had picked up on this story from the local press (where the clash of stakeholder views *was* of consequence) because of its colourful quotes, and had portrayed it within a new, wider context, that of a “nanny state” discourse.

In a similar vein, another national press story, concerning Swansea City Council, *appears* to say it all in its title:

“150 year old Monkey puzzle tree facing chop because council says its needles are ‘like syringes’”<sup>27</sup>.

Once again the use of unfortunately colourful metaphor by a Council spokesman gives ready opportunity for ridicule of the Council's decision, probably betraying an underlying rationality / complexity that – if unearthed by the journalist – would spoil the neat extremity of the story.

Our ongoing research seeks to empirically test the views of those commentators who view society as rapidly falling into a deep pit of risk aversion, thus Landry:

“The evaluation of everything from a perspective of risk is a defining characteristic of contemporary society. Risk is the managerial paradigm and default mechanism that has embedded itself into how companies, community organisations and the public sector operate. Risk is a prism through which any activity is judged ... It narrows our world into a defensive shell.” (2005: 3)

Whilst this author shares some of Landry's concerns, the evidence of defensive land (and/or tree) management is actually harder to find when you start looking for it. We can indeed find signs of greater risk *assessment*, thus greater levels of slips and trips recording as a defensive response to perceived ‘compensation culture’ (for example HSE, 2007b) – but at individual level risk aversion borne of heightened liability perception becomes harder to spot, as at individual level perceptions and actions are likely to have been more sublimated, more naturalised and rationalised. At an individual, on-the-job level safety and other factors are more likely to become intertwined.

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<sup>27</sup>“150 year old Monkey puzzle tree facing chop because council says its needles are ‘like syringes’” *Daily Mail*, 24 May 2008

## The circulation of cases and interpretations

In researching this paper it has been apparent that within the arboricultural sector web postings by individual practitioners on their own websites and/or forums such as the Arboricultural Information Exchange (AIE)<sup>28</sup> can draw attention to junior court cases that might otherwise not catch media or peer attention. In particular it is noteworthy that the expert reports and other court papers for *Poll* were available on the AIE site, but with less information accessible there on *Atkins*. It would appear (to the author as an outsider looking in) that in this relatively small professional community there is a relatively easy opportunity for an individual contributor to raise the profile of a particular case or point of law that he has been dealing with (or is troubled by). This may explain the way in which *Poll* came to be 'picked-up' by the trade and mainstream media as a perceived step change in what the law required, with the consequent focus upon (and then reaction against) the move towards setting a British Standard. Clearly, it is common practice, in many professional sectors, to write articles, press releases or postings based around cases that one has been involved with (particularly if successful) or matters that one is concerned about. Therefore these observations are not intended to impose judgement upon these practices, they fall short of discovery of a 'smoking gun' of risk entrepreneurship, but these practices do show an interpretive community at work debating and evolving perceptions of 'reasonable safety' in tree management.

In the aftermath of *Poll* arboricultural commentators appear to have progressively adjusted their position – there now seems resignation to a more pragmatic approach – this is perhaps best summed up by BARRELL (2009) writing in an article highlighting his involvement as successful expert witness in both *Poll* and *Atkins*:

“There are no simple answers to all these questions; a recipe based approach does not work and the final decisions are made from the subjective interpretation of all the evidence by the judge” (2); and

“It is human nature to seek formulaic solutions to important problems because that approach delivers consistent and reliable answers, with little need for subjective interpretation. This works well in disciplines such as accountancy and engineering where the inputs are mainly objective, but it cannot be so reliably applied to trees.” (4)

This candour is, in itself, notable – for an expert witness (particularly one in a relatively small specialist community) may well in his career

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<sup>28</sup>[www.aie.org.uk](http://www.aie.org.uk)

find himself acting in turn for claimants and defendants. BARRELL's erudite and credible article, and his embracing of a 'subjective' and case specific approach to determining reasonable safety, would appear necessary in order to reconcile his success as expert in advocating a systematic and qualification driven approach to tree inspection in *Poll* but successfully defending the effectiveness of a un-documented and non-expert based inspection system the following year in *Atkins*. Clearly, the court found the factual circumstances to be different in each case, but BARRELL's document makes interesting reading – for it seeks to rationalise *Poll* within a trend justifying pragmatism. Perhaps in a small interpretive community such rapid evolution of 'conventional' views is to be expected.

## Conclusion

This article set out to show that it is not just the courts who determine what level of safety inspection the law requires for trees. The significant role of arboricultural and tree owner view points (both "expert" and "lay") has been shown and yet, perhaps, it is actually at the level of day-to-day actions of individuals, and their decisions upon whether or not to fell a tree as 'unsafe' that the law is made, and made through (and because of) liability perception. The fate of trees lies in the hands of these processes as much as in the hands of the judiciary, the would-be standards setters or the politicians.

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