The Problem
Trees fail from time to time and cause personal injury and/or property damage. The mechanism of failure is either the whole tree falls over, or more commonly trees shed branches that fall onto highways or footpaths or other areas where the public has access, parks for example. In recent years, the potential for trees to cause harm has been highlighted by elevated media coverage of tree caused injuries or fatalities. The reality, however, is that the risk of being killed or injured by a tree is extremely low. For example, about three people per year in the UK are killed by trees in public places, and the fatality risk per tree is 1 in 150 million for all trees in the UK or 1 in 10 million for trees in or adjacent to areas of high public use. (source Health & Safety Executive 20007 and the National Tree Safety Group 2011). However, when a tree causes an injury or fatality it is common for the landowner or the person/entity with effective control of the tree to be sued in negligence.

When a lawsuit arises following a tree failure it is for the court to decide where liability lies. The court will be particularly interested in the process the landowner used to minimize his/her chances of being found liable, i.e. did s/he have the tree(s) inspected on a regular basis, by whom and did s/he act on the management recommendation of the tree inspector? In general terms the court will be very interested in what is reasonable in the circumstances of the case and this has a significant impact on the expectations of who should have done what. The court is equally concerned with whether or not the failure and subsequent harm was foreseeable and what was or could have been done, in the context of available resources; in other words was the management recommendation (if there was one) proportionate? In tree cases initial attention focuses on foreseeability. If the decision is that the failure was foreseeable, the attention moves on to the harm that was caused, i.e. property damage, personal injury/death, disruption of normal activities. If the management recommendation is considered to have been reasonable and proportionate, then the event is simply an accident. This was found to be the case in Atkins v Scott [2008]. Conversely if the management recommendation/response is considered unreasonable, then the court may attribute liability to the landowner and possibly his/her advising arboriculturist.

Typically, the initial focus is on whether or not the landowner had a tree inspection system in place and if the subject tree(s) was inspected and if it was, who did it; what are their qualifications and competence; the nature of the inspection; the frequency of inspection; and methodologies used. The purpose of all this is to try and determine if the failure was foreseeable and if any management recommendation/response was reasonable. This approach assists solicitors, barristers and the courts to understand the detail of the case such that established legal principles can be applied and to inform any judgment on who may have been right or wrong.

When Trees Fail and Cause Injury, Who’s To Blame?
When is an Arboricultural Expert Needed?

by Dr D P O’Callaghan, FICFor., F.Arbor.A., MISA Chartered Arboricultural Consultant
Recent cases have focussed on the issues of inspection systems and the competence of the tree inspector. For example in the case of Poll v Bartholomew [2006] EWHC 4BS50384 HHJ McDuff seems to suggest that a competent, or Level 2 inspector, i.e. a qualified and competent arboriculturist experienced in tree inspection, should be employed. The experts in the case differed as the quality of the inspection that the defendant had in place. The expert acting for the defendant argued that there was a system of inspection in place, while the expert for the claimant argued that the system was not adequate because the inspector was Level 1, i.e. at a basic level of competence and inspection records were not kept. The case was decided in favour of the claimant.

Conversely in the cases of Corker v Wilson [2006] (Mayor’s and City of London Court) before HHJ Simpson and Atkins v Scott [2008] (Aldershot & Farnham County Court) before HHJ Hughes QC, both trial judges endorsed an informal level of inspection as being adequate and in each case the claim failed.

It is significant to note that in the Atkins v Scott case, the trial judge, HHJ Hughes QC found that the objectivity of the expert arboriculturist acting for the claimant had been compromised and that he had failed in is overriding duty to the court as is required under Part 35 of the Civil Procedures Rules (CPR).

In general terms the owner of the land upon which a tree(s) is growing has a duty to act in respect of tree nuisances (and indeed all natural nuisances) on his/her land, and the corresponding duty of care varies with the resources available to him/her. The principle that the duty of care varies with the resources available was established in the case of Goldman v Harding [1967] AC 645. Application of the principle set out makes it obvious that the standard of the duty of care varies as one moves from local authorities or highway authorities, to the owners of large estates, to farmers (large and small) down to individual house holders. Thus it is reasonable to expect large estate owners and highway authorities to apply higher standards of tree management than residential householders. In summary the law expects duty holders to act in a practical and sensible way, in line with the size of their land holding and the resources available to them. This principle was reiterated in the un-reported case of Selwyn-Smith v Gomples [2009] 8SN00362 (Swindon County Court) in which Recorder Adrian Palmer QC concluded that the defendant’s (as an individual householder), omission to call an expert to assess his tree did not fall below the standards of a reasonable and prudent landowner and the claim failed.

What should prudent landowners do to avoid liability?

The first thought is that landowners should have their trees inspected on a regular basis by a qualified and competent arboriculturist, the Poll case suggests that. However, Atkins v Scott is clearer on the matter, this case (1) clarified the nature of a landowner’s duty to inspect trees; (2) confirmed that it is possible to discharge this duty even if the system of inspection is unrecorded; and (3) emphasises the importance of experts being independent and objective. The trial judge emphasized that systematic and formally recorded inspection regimes would make it easier for landowners to resist claims resulting from tree failures, but an informal system of inspection undertaken by experienced people who do not hold formal paper qualifications would be sufficient.

The courts have not ruled consistently on the level of competence required of tree inspectors that landowners might employ to undertake regular assessments of their trees, and in my opinion they are unlikely to, but they will take each case on its merits and the evidence. Not withstanding the judgment in Atkins, it is better for landowners to err on the side of caution and to employ competent and experienced arboriculturists. The owners of large estates and perhaps farmers may well employ staff who are knowledgeable trees and thus meet the criteria, but this would not normally apply to individual house holders, who should employ a competent tree works...
contractor or consultant if available. But this would depend on cost in relation to the landowner’s resources, i.e. what s/he could afford to pay.

When a tree fails and causes injury it is instinctive to think that someone has to be at fault; that blame must lie with someone or somebody. But the fact is that sometimes trees fail and it is just an accident or ‘an act of God’. ‘An act of God’ is defined as “an event caused exclusively by forces of nature without any human intervention with the very important characteristic that there is no obvious indication of the event before it happens” (Barrell1, 2012).

Sometimes trees fail due to a defect that is hidden and only revealed when the failure occurs. In the case of Micklewright v Surrey County Council [2010] 8GU02403 (Guildford County Court); the trial judge ruled that Surrey County Council had breached its statutory duty of care through failing to inspect the tree that failed. However, it was found that even if and inspection had been undertaken, the defect that caused the failure would not have been discovered and the claim failed.

**The Role of the Arboriculturist**

The role of the arboriculturist when inspecting trees on behalf of landowners is to advise. S/he will identify problems and potential threats that trees pose and make recommendations on management to remove or abate the threat(s). The arboriculturist can do no more than that. It is then up to the landowner to accept or reject the management recommendations. However, having received advice as to the health, condition and vitality of the trees and of any risks they pose to the public and the extent of those risks, if they fail to implement the management recommendations, they risk being held negligent if a tree(s) fails and causes injury and/or damage.

In assessing trees for hazard and the risk of harm the hazard tree poses, the arboriculturist should balance the cost of abating the hazard against the benefits the tree(s) provides. This is not the approach of the existing tree risk assessment systems; rather they are simply used to calculate the risk of failure and/or risk of harm. Now the emphasis is shifting and the principles of quantified risk assessment (QRA) are being applied such that systems that use a ‘Risk-Based, Cost-Effective’ approach are being developed. The approach is changing; indeed the Arboricultural Association is devoting a full day of its 2013 Conference in September to the subject of tree risk assessment.

In the end the best option for landowners is to employ a qualified, competent and experienced arboriculturist to inspect their trees on a regular basis and keep formal records of inspections and management work that has been done as a result of the inspections. The level of inspection will be related to the resources available.

**References**
