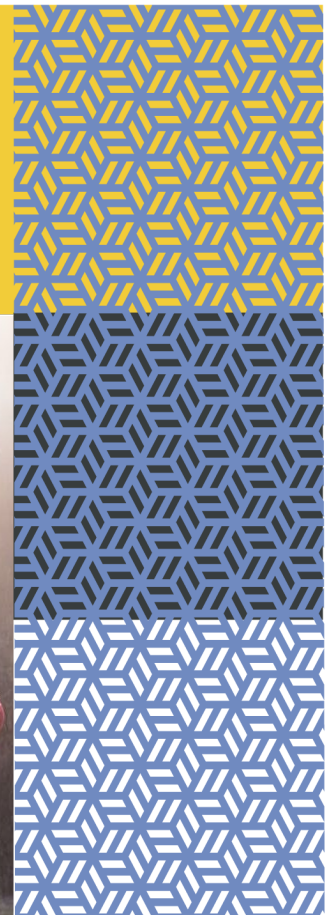
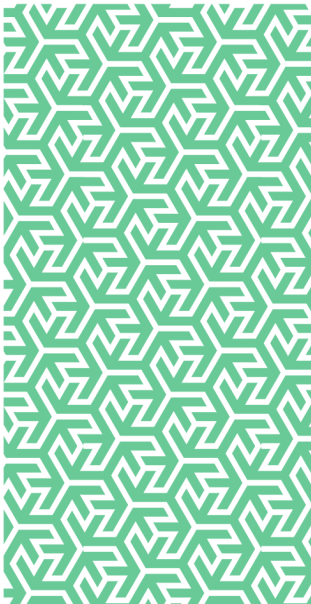




## **Risk control**

### **Tree Safety – Managing the Risks**



In partnership with



# Tree Safety – Managing the Risks

## Background

Whilst the risk of being injured or killed by a falling tree or branch is statistically very low, from time to time the British media carry reports of tragic fatal incidents involving trees. These incidents should remind landowners and those in control of land on which trees are present of the need to manage the risks associated with them.

When a tree becomes hazardous because of decay or structural weakness and exhibits external signs of being in such a condition, the occupier of the land on which it stands is normally liable under UK law for any personal injury or damage that it may cause. The occupier is identified as whoever has possession of and controls the land.

This guide considers the liability risks of local authorities and others in control of land on which trees are present.

## Why Manage the Risk?

### Common Law Duty of Care

In order to satisfy the common law duty of care we must all take reasonable care to avoid acts or omissions that cause a reasonably foreseeable risk of injury to persons or property. It is worthwhile noting that a duty of care may be established where a local authority has failed to exercise a statutory power.

### Statutory Duties

In England and Wales, liability is primarily governed by the Occupiers' Liability Act (1957)<sup>1</sup> and (1984)<sup>2</sup>. These acts establish liability relating to persons who enter land or premises either by invitation or by permission, or other persons which include trespassers. Within the provisions of the acts, the courts expect occupiers to be prepared for children to behave less carefully than adults; for example, by climbing trees which may have weak branches. It is especially important to consider this when designing and managing sites such as recognised play areas, where children may be reasonably expected to play unaccompanied.

In Scotland, a similar duty of care is created by The Occupiers Liability (Scotland) Act 1960<sup>3</sup>

The courts expect occupiers to make regular inspections of trees that, by reason of their location, could place people or property at risk. It is also expected that they should, if necessary, obtain specialist arboricultural advice and guidance on the interpretation of symptoms and assessment of tree safety and to take reasonable steps to reduce risk where it is required.

If specialist advice and guidance is sought, then it should be followed. There is the potential that failure to do so may be interpreted as negligence.

In Bowen<sup>4</sup> the specialist tree inspectors formed a judgement that proved to be wrong, but the judge found their approach to be reasonable and thus did not find the defendant negligent or in breach of its duty.

Whilst a claimant must own any property affected by tree nuisance, the defendant need not own the offending tree. In such cases, the degree of control the defendant maintains over the offending tree is of paramount significance to the case.

### Health and Safety at Work Act

The Health and Safety at Work etc. Act 1974 establishes, among other things, general duties of employers and self-employed to persons other than their employees, and of persons concerned with premises to persons other than their employees<sup>5</sup>.

### Corporate Manslaughter

Companies and organisations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care<sup>6</sup>.

### The Highways Act 1980

This act sets out a general legal duty to maintain the public highway, which includes risks presented by street trees. The courts have interpreted 'maintain' as 'repair', and the 'highway' as the 'fabric of the highway'<sup>7</sup>.

### Code of Practice

The Well-Managed Highways Infrastructure: Code of Practice for Highway Maintenance Management (2016)<sup>8</sup> recognises the potential risks that trees pose to users of the public highways and recommends that highway safety inspections should incorporate highway trees, including those outside but within falling distance of the highway.

It goes on to recommend that authorities should provide some basic arboricultural training for inspectors in order for them to perform their tasks effectively, but that specialist arboricultural advice should be sought in respect of the appropriate frequency of inspections and works required for each individual tree that is considered to hold a high risk to users of the network.

### Tree-Related Prosecutions

It is worthwhile considering two significant and fairly recent public sector prosecutions for offences related to a failure to manage tree risk:

#### — A Borough Council

The council was fined £100,000 for failures which saw a tree branch fall and strike a pregnant woman, leading to the death of her baby daughter<sup>9</sup>.

The branch smashed through the windscreen of the victims' car, injuring her stomach. She was rushed to hospital for an emergency Caesarean but her baby died some hours later.

An investigation found the branch had a crack on its upper edge where it joined the main trunk and had begun to separate for at least one growing season before it fell. The tree had not been inspected for at least 13 years.

At Magistrates' Court, the council admitted breaching health and safety laws.

The council had failed to identify and manage the risks from falling trees and branches, and failed to implement a robust system of inspection of trees despite a similar incident occurring in the same location only months before the tragedy occurred.

The council admitted breaching the Health and Safety at Work Act 1974 and was ordered to pay £50,000 costs in addition to the fine.

#### — A County Council

The council was prosecuted for failing to inspect and maintain trees on a public footpath, following the death of a member of the public<sup>10</sup>.

The court heard how, on 3 October 2019, a man walking his dog on a popular trail was struck and killed by part of a falling oak tree.

An investigation by the Health and Safety Executive (HSE) found that the tree, a multi-stemmed mature hybrid oak, approximately 12-14 metre high and with a crown radius of between seven and ten metres, had defects from which it was foreseeable that it was likely to fall and cause injury.

The council had a programme of proactive tree inspection and maintenance in place across the county, but the trail in question had been omitted from the programme for many years.

The county council pleaded guilty to breaching Section 3(1) of the Health and Safety at Work Act 1974. They were fined £300,000 and ordered to pay costs of £13,164.90 and a victim surcharge £181.

Speaking after the hearing, the HSE said: "This tragic incident could have been averted if the required periodic tree safety inspections, as per the county council's own Code of Practice, had been carried out. Local Authorities need to ensure they have suitable inspection systems in place, including monitoring and audit provisions, to guard against situations such as this, and to ensure they have enough suitably trained and competent tree inspectors to enable compliance with their tree management policies and codes of practice."

The financial losses listed in either case do not include all financial losses experienced by the respective organisations. These losses would likely include additional legal costs and compensation payments made by the council's to the injured parties or their families.

#### — A City Council

The council was prosecuted for failing to detect a decaying willow tree which collapsed killing a six year old girl in the school playground.<sup>11</sup>

The court heard how, 25 September 2020, several children were underneath the tree when it fell but, while most were able to climb out to safety, the section that the girl was crushed under was too heavy for school staff to rescue her.

An investigation by the Health and Safety Executive (HSE) found the tree had decayed and was in a poor condition and the council had not carried out adequate inspections of the dangerous tree or properly informed the school of its condition.

The HSE investigation identified that the council failed to properly investigate the condition of the tree following an inspection in February 2018 that identified the need for another detailed look at it again within six months.

An inspection after the tree's removal found "extensive fruiting bodies" that would be considered a "red flag" for decay – something that the court was told should be picked up easily by someone with basic tree inspection qualifications and would most likely have resulted in it being felled.

The council also admitted to having failed to properly communicate the need for the tree to be further inspected with the school, with emails having been wrongly sent to other schools by mistake.

A scheduled review of the council's tree team earlier in 2020, which if carried out could have led to the tree's dangerous condition being picked up, had been put on hold because of the Covid pandemic.

The council pleaded guilty to breaching Section 3(1) of the Health and Safety at Work Act 1974. They were fined £280,000 and ordered to pay costs of £8,020. The council's

£280,000 fine was reduced from an initial £420,000 in recognition of the guilty plea.

## Climate Change

Global climate change has already had observable effects on the environment. Glaciers have shrunk, ice on rivers and lakes is breaking up earlier, plant and animal ranges have shifted and trees are flowering sooner.

Effects that scientists had predicted in the past would result from global climate change are now occurring: loss of sea ice, accelerated sea level rise and longer, more intense heat waves.

Many scientists have high confidence that global temperatures will continue to rise for decades to come.

Changes to the macroclimate will directly affect the microclimate, altering the growth of trees and other vegetation as well as the natural processes within soils. Some species will become less well adapted to the new conditions, and others will be better adapted. In managed environments, such as many urban greenspaces, this may have a major effect on the choice of plant species to grow, on establishment practices, and on the management of vegetation, such as the control of weed growth.

Pests and diseases may be altered in many ways, including the types and species implicated in outbreaks as well as the frequency and severity<sup>12</sup>.

## Ash Dieback and other Diseases and Pests

Ash Dieback is the latest high profile disease to impact on the health and safety of the UK's tree population, but there are a number of other diseases and pests that have been identified that are likely to have an impact over the coming years<sup>13</sup>. The risks from diseases and pests need to be incorporated into risk management plans and specific measures, such as Ash Dieback Action Plans or Biosecurity Plans<sup>14</sup> implemented to ensure they are effectively managed.

## Amenity

The guiding principle in achieving effective tree risk management is that duty holders recognise the importance of trees for amenity and nature conservation, and that they should be preserved. The purpose of a tree management strategy is to recognise trees as an important resource for public and environmental benefit, and to identify standards for their management which ensures long-term conservation.

## Risk Management Strategy

For those in control of land containing trees, a planned management strategy should include:

- an overall assessment of tree stock in relation to people or property that prioritises trees according to the use of the land and risk of them causing personal injury or property damage.
- implementing a proportionate regime of tree inspection (based on their risk priority) to identify and assess obvious tree defects or conditions. This is referred to as zoning.
- managing the risk by using competent persons to undertake inspections and remedial treatments where appropriate
- maintaining records of the management strategy, inspections and remedial actions undertaken.

A suitable and sufficient tree management strategy can ensure the safety of the public and benefit ecology and wildlife.

### The overall assessment

The courts expect those in control of land on which trees are present to make regular inspections of trees that could place people or property at risk. It is expected that they should obtain, and act on, specialist advice and guidance on the risk assessment of trees if required.

### Implementing a proportionate regime of tree inspection

#### Tree inspections

There are many forms of tree inspection.

Inspection may be a superficial informal observation, undertaken by an employee or other party, who understands the extent of the danger should a tree display visual defects.

More formal inspections require a general knowledge of trees. Formal inspections require an ability to recognise normal and abnormal appearance which indicates potential for serious harm or loss from tree failure. Inspectors will have to assess approximate tree height and falling distance from the tree to the area of use, and when to request a more detailed inspection.

Detailed inspections are carried out by competent people, experienced in the field of tree investigation. The suitability of the inspector's qualifications and experience will form part of the due diligence checks on the part of the commissioning organisation. Professional Indemnity and Public Liability insurance maintained by the competent person(s) should also be a key consideration.



### Inspection criteria

The type of tree inspection required is primarily influenced by the number and quality of trees and the type and nature of surrounding area.

Determining if a tree requires a detailed inspection is influenced by factors such as its size and general condition.

The decision to make a detailed tree inspection should take into account the following factors:

#### Species

Physiological defects specific to the species.

#### Age of tree

Structural defects relating to its age.

#### Condition

Structural defects increasing the risk of failure during extreme weather events.

#### Location / type of use

Risk presented to surrounding structures, including their vulnerability / type of use, if the tree fractures or falls.

#### Frequency of use

Likelihood of injury to public if a tree were to fail, related to frequency of use.

#### Tree population

The size and distribution of the tree population.

#### Timing

The best inspection time for trees is when they are in full leaf, which is usually from mid-summer through to autumn, as leaf coverage is considered to be an indicator of the state of health of a tree during this period.

### Risk Reduction Strategies

Well-established techniques to reduce potential risks from trees may include:

- directing people away from higher-risk zones, or re-routing paths and tracks where it is legally allowed.
- placing structures or relocating facilities such as play equipment, seats and picnic tables beyond the falling-range of trees.

### Tree inspections and subsidence risk

The potential for subsidence damage should be a standard consideration of any tree inspection policy and procedure.

Subsidence is often a problem on shrinkable clay soils which are widely distributed throughout the UK.

Properties with shallow foundations are considered to be at a higher risk of subsidence, implicating a significant number of properties constructed during the Edwardian and Victorian periods.

Subsidence can occur when tree roots cause desiccation of the ground near to a property causing the clay soil to shrink. However, many other factors can cause or contribute to subsidence, and so a thorough investigation by a competent person (qualified and experienced tree specialist) is usually required.

Removing trees located close to properties can on occasion cause the surrounding ground area to swell, leading to building damage due to heave – the opposite of subsidence.

### Insurance

Although trees can and do fail at any moment, winter storms and heavy rain can increase the risk of tree failures. Land owners and controllers are advised to have insurance appropriate to their circumstances and to ensure that anyone who advises them, or does work on their trees, is also adequately insured in the form of Professional Indemnity and Public Liability cover.

### Competent persons to undertake remedial treatments

Only competent (qualified, experienced, trained, skilled) persons may be permitted to carry out hazardous work on trees. Work must be undertaken with the health and safety of the competent persons, and anyone who could be affected by their work, of paramount importance. Ensuring adherence to The Health and Safety at Work etc. Act 1974, and the Management of Health and Safety at Work Regulations 1999<sup>15</sup>, should be part of the due diligence checks on the part of the commissioning organisation<sup>16</sup>.

### Selecting a contractor

When evaluating the competence of a tree surgeon or consultant, the following questions should be satisfied:

- Can the contractor provide evidence of competence in tree work?
- Is there evidence of formal training for the contractor and staff?
- Does the contractor maintain adequate insurance cover (Professional Indemnity and Public Liability)?

- Have risk assessments and safe systems of work been provided?

The national standard for tree surgery work is defined in British Standard 3998:2010 'Tree Work Recommendations'<sup>17</sup>. This should be the basic standard of competency followed by all tree surgeons and contractors.

#### Maintain records of the adopted strategy / policy

Records, including maps, form part of the review process in good risk management practice. In the event of an accident, records are an important proof of reasonable tree management. Records include the policies and procedures for the regular inspection of trees. The creation and maintenance of computer generated tree inventories and management records may assist with the monitoring programme. Records demonstrating adherence to procedures are essential (such as inspections and any remedial / maintenance work undertaken). Even if nothing unusual is observed during inspection, this fact should be noted as it may become important in time.

Demonstration of compliance with policy, such as frequency of inspection, is part of the armoury of a successful claims defence. Factors such as extremes of weather, or construction work in a tree's immediate vicinity may initiate monitoring of the stability of a tree. Responses to such events should be recorded.

It is important to note that messages communicated via social messaging platforms such as WhatsApp and Facebook Messenger, as well as emails and standard text messages, can be used as evidence in court if discovered.

#### Outline of Legal Responsibilities

There is a body of statute law relevant to local authority liability and land-owners in respect of trees.

Below is a (selective) list of civil law concepts that apply to this guidance, and attempts to summarise the extent of liability as defined by current civil and case law.

- Local authorities have a responsibility to take reasonable care to avoid acts and omissions which could reasonably foreseeably injure a neighbour. Donoghue created the modern concept of negligence, by setting out general principles whereby one person would owe another person a duty of care<sup>18</sup>,
- No one can exclude or restrict their liability for the death or personal injury of another resulting from their negligence. Liability for negligence in other cases of loss or damage can be excluded or restricted only if it is reasonable to do so<sup>19</sup>.

- Where an occupier invites others onto his land, or has trespassers, he owes a minimum duty of care for personal safety<sup>1,2</sup>. Section 2 (2) of the 1957 Act establishes a duty to "... see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there"; under s. 2 (3) (a) of the act an occupier must be prepared for children to be less careful than adults, such as climbing trees which may have weak branches. It is important to consider the design and management sites of recognised play areas, where parents can reasonably expect children to play unaccompanied.
- The definition of reasonable is not fixed. In Robbins<sup>20</sup> the High Court held that tree roots could cause reasonably foreseeable damage to shallow foundations, such as building extensions.
- Bringing hazards to the notice of visitors comes within Section 1 (5) of the 1984 Act<sup>2</sup>. The occupier discharges his duty "by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk". The sign must be clear enough to ensure that the risk is obvious to the user or trespasser. Warning notices are often considered inadequate for children, who may be either unable to read or unable to appreciate the danger.

#### Summary

Under both civil law and criminal law, an owner or controller of land on which a tree stands has responsibilities for the health and safety of those people on or near their land and thus has potential liabilities arising from the falling of a tree or branch.

For local authorities and large land-owners that may be responsible for tens of thousands of trees, it is clearly unreasonable to expect that every tree is individually assessed and inspected. However, by the adoption of a pragmatic system of management, effort and resource can be directed to where the most significant risks arise.

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- 4 Harold Stock & Co, 'Bowen v National Trust EWHC 2011'. Available at: <https://www.haroldstock.com/occupiers-liability-courts-consider-reasonable-appropriate-maintenance/>
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## Useful Links

Arboricultural Association. Available at: <https://trees.org.uk/>

London Tree Officers Association. Available at: <https://www.ltoa.org.uk/>

Royal Institute of Chartered Surveyors, Guide to Subsidence. Available at: <https://www.ricsfirms.com/media/1196/rics-consumer-guide-subsidence.pdf>

Visitor Safety in the Countryside: Tree Safety Management. Available at: <https://www.visitorsafety.group/publications/>

Institution of Structural Engineers "Subsidence of Low Rise Buildings" 2000 ISBN:1 874266 549. Available at: <https://www.istructe.org/resources/guidance/subsidence/>

## Further information

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the RMP Resources or RMP Articles pages on our website. To join the debate follow us on our LinkedIn page.

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