

rmp

## Tree root claims



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## Overview

Relatively dry winters followed by warm, dry summers, reminiscent of 1976, 1992 and 2006 have led to a dramatic increase in tree root claims activity.

Such climatic conditions are likely to be repeated more often in the future as we progress into the age of global warming. How should local authorities prepare for this eventuality?

For some time now the law on tree root liabilities has been settled. In short, the owner (or controller) of a tree whose roots can be shown to have encroached on neighbouring land and/or has drawn sub-soil moisture affecting property, is liable to the owner of that property for the resultant damage.

The main reason for this almost strict liability is because claims are usually brought in nuisance rather than negligence. Many of the defences available to actions in negligence are simply not available when it comes to the tort of nuisance. However, there are several salient points to note:

- The right of action rests solely with the owner of the affected property.
- That right of action may not pass to subsequent owners unless the nuisance and damage is on-going.
- The defending local authority does not need to own the tree to be liable in nuisance. If the LA have control over the maintenance of the tree, that is sufficient to create a right of action against them. [Jones v Portsmouth CA (2002)]
- If the tree roots are the 'substantial and effective cause' of damage then the LA may be wholly liable for the damage to property. [Paterson v Humberside (1995)] & [Loftus-Brigham v Ealing CA (2003)]
- The damage must be foreseeable. If the soil type and conditions are not normally associated with shrinkage and there is no locality history of problems, then there is a possible defence. It is believed that if such a defence is to be sustained, the LA will probably have to demonstrate a pro-active tree inspection and maintenance programme.
- The 'damage' does not have to be physical. If the tree roots are still present and extracting moisture then there could be damage to the 'load bearing qualities of residential land'. [Delaware Mansions HL (2001)]
- The defendant LA is entitled to rely on notice of the nuisance (and damage) and to have the 'reasonable opportunity for abatement before liability for remedial expenditure can arise'. [Delaware Mansions]
- But the LA must act promptly once given notice of damage. [Jones v Portsmouth]
- Formal notice is not always necessary. The LA may be deemed to be on notice bearing in mind all of the circumstances. [Kirk v Brent CA (2005)]
- Despite what is said above and notwithstanding the apparent strict liability, there are a number of defences available.
- Whilst the LA tree may be encroaching and drawing soil moisture, the main or '**substantial and effective**' cause may be from other trees in the vicinity, not in ownership or control of the LA.
- **Foreseeability**. Although, strictly speaking an available defence, it is questionable whether this has any practical value for a local authority. It is perhaps more appropriate in situations where the offending tree is in private ownership and where the individual does not have the same level of knowledge or experience as a LA who employs trained and qualified arboriculturalists.
- Although not a defence in law, tree pruning or pollarding at an early stage may **abate the nuisance** and mitigate or avoid a claim.
- **Failure to give notice**. The onus is upon the claimants to give notice when they become aware of the problem and before any repair work is carried out. An absence of evidence may provide the LA with a practical defence.
- **Limitation**. The period is 6 years from the date of damage. If the property has changed hands in that period, the new owner may not have any right of action for damage caused before ownership was acquired.

In the final analysis very few claims where causation is established are capable of defending. At best, efficient claims handling may mitigate the claims cost.

A lack of diligent claims handling (perhaps where claims have been handled in-house and without the involvement of expert evidence and assistance) has resulted in many properties being repaired/reinstated to a higher standard. This degree of betterment is not recoverable in law. The legal principle of indemnity still applies, but many first party loss building insurers will cover this element in their initial claim.

Where a liability for loss is established, most local authorities have agreed (sometimes with a degree of reluctance) to remove the tree or undertake a programme of pruning and pollarding. However, there is a sea change taking place in the attitude and approach of many local authorities.

Perhaps it stems from an acceptance that the perceived imbalance of the law will not change in the foreseeable future or a greater importance placed on environmental issues, but simple tree removal is not always the first or obvious solution to a tree root damage problem.

Many local authorities are realising that trees in 'public ownership' are an asset upon which an intrinsic value can be placed. As a result trees in public places are subject to asset management schemes and registers. Thus the 'value' of a mature tree can be taken into account when deciding upon the solution to a tree root problem. Substantial underpinning coupled with the construction of a root barrier may, for example, be a more cost effective answer than simple tree removal or severe pollarding.

This approach, however, is largely dependant upon dialogue and discussion between local authorities and property insurers. All too often first notification of a subrogated claim sets in motion an adversarial stance and attitude on both sides. Whatever the future holds, effective claims management is the obvious solution to the immediate problems. The correct and diligent use of experts can save substantial costs to a local authority, by way of seeking a cost effective solution to the tree root issue and to avoid betterment situations which are included in subrogated claims from property insurers.

Property damage claims usually have a lower value than one might imagine, with the average cost being circa £4,000–5,000 (records kept by individual insurers may differ). The fees of experts are often modest given the potential savings if a cost effective remedy can be found.

Ideally, local authorities, wherever possible, should adopt a pro-active rather than reactive approach to the problem. Certain types of tree have a propensity to cause such problems and careful planning in new development areas could well have a positive impact in years to come.

The problem is unlikely to resolve itself, nor is there any realistic prospect of a significant change in the law in the immediate or near future. Local authorities ignore the consequences at their peril.

## Further information

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