TREE ROOTS: MORE KNOTTY PROBLEMS

Two recent court of appeal cases, B*rent v Family Mosaic Housing*[1] and *Robbins v LB of Bexley*[2], have looked again at what is required to establish liability in cases of encroaching tree roots. Where do these leave the law?

Extraction of moisture from subsoil beneath properties by encroaching tree roots, thereby causing subsidence, especially in the case of low-rise buildings, is a notorious problem. Clay soils are particularly susceptible to such desiccation, and it has been estimated that 60% of the UK's housing stock is built upon such shrinkable clay soils. However, even in such cases, most trees do not cause such problems, and it has been found impossible to predict which trees will[3]. Moreover, urban trees offer a much-appreciated enhancement of the environment, and nobody suggests that the solution is to remove them all. Offending tree-owners are frequently local authorities, and the property insurance industry has a very hefty economic stake in recovering losses paid to property-owners by reason of such damage[4]. It has been estimated that the annual cost to insurers is in the region of £200 million per year.[5]

However, the cases raise a number of difficult legal and evidential issues faced by claimants. Earlier cases appeared to treat liability by tree root encroachment as strict, and it was not until the court of appeal decision in *Solloway v Hampshire CC*[6] that it was clearly established that liability was negligence-based. Many earlier successful cases might therefore have failed post- *Solloway.* The essential starting point in establishing a duty of care is that the risk of damage has to be foreseeable. As formulated by the House of Lords in *Delaware Mansions v Westminster CC*[7], which approved *Solloway*, this requires that the defendant knows or "ought to know" of the continuing nuisance. This has raised questions as to whether the claimant can only claim for damage incurred after he has informed the defendant of the problem, or whether it is sufficient that the risk of encroachment and potential damage actually exist (e.g. subject low-rise building built on clay soil with moderate or high water demand tree(s) in sufficiently close proximity to it), even if not consciously appreciated by the defendant. In this writer's view, the latter ought to be the case[8], although the scope of the defendant's duty of care will be affected by the extent of his actual notice.

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[1] [2012] EWCA Civ 961

[2] [2013] EWCA 1233 (17th October 2013)

[3] The Building Research Establishment's Horticultural LINK project 212, entitled "*Controlling water use of trees to alleviate subsidence risk*" published in May 2004 ("the BRE report")

[4] There are cases, however, where the property owner's insurance does not cover the loss. For example, many policies (fairly or not) exclude "floor slab settlement", which may also be caused by the same process, as distinct from subsidence.

[5] See the BRE report

[6] (1981) 79 LGR 449

[7] [2002] 1 AC 321, applying *Leakey v National Trust* [1980] QB 485 and *Goldman v Hargrave* [1967] 1 AC 645

[8] It is considered that the former view is based upon a misunderstanding as to the point in issue in *Delaware* and the passage at paragraph 34 in that case, as pointed out by the court of appeal in *Kirk v L B of Brent* [2005] EWCA Civ 1701 at paragraph 26, but in turn paragraph 29 of the latter judgment appears to suggest that the view here being contended for may not be correct. Contrast M*ynors: The Law of Trees* 2nd ed at 4.6.1.

It is in relation to the scope of the duty of care that the two court of appeal cases have been decided. The scope of the duty depends upon such factors as the degree of risk and notice, the practicability of the steps available to the defendant to ameliorate the risk, the cost of so doing, and the resources available to the defendant[9]. All of this requires that the claimant establishes as a matter of evidence that the defendant could have prevented the damage upon which the claimant's case is based by taking particular steps which the court considers it ought reasonably to have taken.

In B*rent v Family Mosaic Housing*, although the facts were somewhat complex and the judgment (delivered by Tomlinson LJ) wide-ranging, the claimant's case failed essentially because her own expert evidence did not support her pleaded case that pollarding or crowning the offending trees would have eliminated the risk of damage, the expert's evidence being that this would simply have promoted more vigorous growth[10]. The court was also clearly concerned about the dangers of "imposing unreasonable and unacceptable burdens on local authorities or other tree owners"[11], particularly in circumstances where the council owns a large number of trees and no particular difficulties as regards the trees in question have been drawn to its attention.

In the second case, *Robbins v LB of Bexley*, the Claimant succeeded. The actual grounds of success were based upon a point which is unlikely to prove of long-term significance in this field, but it arose out of a development in the underlying tree management science which may well prove to be of more long-lasting significance. The Council's policy from 1998 to 2006 was to reduce the crowns of the poplars in question by 25% every 4 years. This was in accordance with the then prevailing view of good management and, had it done this, the judge would have held it to have fulfilled its duty of care, although this would not actually have prevented the damage (because growth would only have been more vigorously promoted). In fact, the council did not do this. In May 2004 the BRE report concluded that, to reduce soil desiccation by wild cherry and London plane trees (which were the trees it experimented upon), it was necessary to reduce crown volume by 70-90% ("the severe reduction") every two years. The judge found that this was applicable to the poplars and, had it been followed, this would have prevented the damage. The judge held the Council liable on the basis that, had it fulfilled its duty of care, which it would have done if it had followed its own policy, its employees would in fact have gone further and carried out the severe reduction, and thus prevented the damage. The court of appeal upheld this.[12]

This chimes with other evidence in the *Berent* case. This was to the effect that the London Tree Officers' Association in association with the Countryside Commission have produced a document written by a working group including insurers and loss adjusters entitled "A Risk Limitation Strategy for Tree Root Claims." This recommends a proactive cyclical pruning regime for highway trees close to buildings on shrinkable clay soils. This has been adopted by most London Boroughs. It is to be presumed that such pruning will, or should, now take place in the light of the BRE report, or such

[9] See *Leakey* and *Goldman* above, and *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.
[10] The expert was Oisin Kelly, co-author of a paper, well-known in the field, entitled "*Tree-related subsidence: Pruning is not the Answer."* he might not have been the best choice of expert for the claimant.
[11] *Delaware* at paragraph 34
[12] Applying the principle in the well-known medical negligence case, *Bolitho v City and Hackney Health Authority* [1998] AC 232.

pruning will not, on the basis of that report, be effective to prevent the potential tree root damage which it is intended to prevent.

In the long-term this suggests that it may now be arguable that a local authority ought to adopt a policy of cyclical (two-yearly) reduction of crown volumes, at least in the case of trees in sufficiently close proximity to low-rise buildings built upon clay soil. It may now be possible to run a case for the claimant based upon this, even where the council has no notice of any particular encroachment or risk of damage. At root (pun not intended), there is a policy question as to whether local authorities or property-owners' insurers should bear the costs of tree-root damage, and it may now be possible that we could see a swing of the pendulum back in favour of insurers.

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