# Trees, Forests and the Law in Ireland

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# Foreword

Rapid change in land use and a growing concern for the conservation of trees and other notable landscape features have been a feature of Irish life over the past two decades, especially since the mid 1980s. Over the same period the size and output of the forest industry has more than doubled. Close on three million cubic metres of roundwood are now harvested each year from Irish forests, equivalent to some 8,000 tonnes of timber every day of the year.

These developments have inevitably given rise to a body of case law and new legal frameworks. Many of these parallel developments in other jurisdictions, particularly the United Kingdom which has a similar forest industry to Ireland.

Forests have also featured significantly in many international processes, but especially in the three UN conventions on biodiversity, climate change, and desertification. Ireland is a signatory to all three conventions, but what does this mean in terms of forestry practice and national forest policy? *Trees, Forests and the Law in Ireland* unravels these and related developments and explains their impacts in a clear manner.

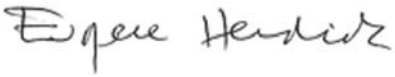
Distinct policy initiatives in relation to forests have also been underway at UN level, aimed at the addressing the management, conservation and sustainable development of all types of forests based on the Forest Principles in the Rio Declaration. Currently these issues are being addressed in the UN Forum on Forests (UNFF). By 2005, the UNFF will consider recommending the parameters of a mandate for developing a legal framework on all types of forests. It is important that Irish practitioners and indeed the public are made aware of these developments.

H.M. FitzPatrick's work *Trees and the Law* has for many years guided forestry practitioners and legal experts in dealing with litigation in relation to trees and forests. However, since its publication in 1985, case law has developed in Ireland and in a number of other jurisdictions and, as has been stated, the scale and impact of the forestry sector, at both national and international levels, have greatly increased. For these reasons COFORD has decided to republish *Trees and the Law,* adding the word *Forests* to the title, to reflect the expanded scope of the book. And while the book is aimed primarily at forestry and legal practitioners, members of the public will find much between its covers that is of interest and relevance.

COFORD has been fortunate in being able to call on the services of two eminent practitioners – Damian McHugh and Dr Gerhardt Gallagher – to author

this successor to H.M. FitzPatrick's work. Damian McHugh, the principal author responsible for the first twelve chapters of this publication, is well-known in the area of libel law. He has penned a number of highly successful publications in this and related areas, aimed at the legal profession and the lay person. Gerhardt Gallagher is one of the foremost forestry experts in Ireland, with a unique insight into the many policy-related and legislative issues that impact on the forestry sector in Ireland.

Compiling this publication without *Trees and the Law* would have meant a great deal of additional research and time. We were fortunate therefore to have had H.M. FitzPatrick's work at the disposal of the authors; we pay a special thanks to his estate for making this possible. This work is a fitting epitaph to his memory.



David Nevins
Chairman

Dr Eugene Hendrick
Director

# Réamhfhocal

Gné den saol in Éirinn thar an dá deich mbliain atá thart, ach go háirithe ó lár na n-ochtóidí, ba ea an t-athrú sciobtha in úsáid talún agus cásmhaireacht méadaithe ó thaobh caomhnú crainn agus gnéithe suntasacha eile den radharc tíre. Thar an tréimhse chéanna, mhéadaigh níos mó ná faoi dhó méid agus aschur an tionscail foraoiseachta. Déantar an fómhar ar bheagnach 3 mhilliún méadar ciúbach de choill ó choillte na hÉireann gach bliain, rud atá ar chomhbhrí le 8,000 tonna d'adhmad gach lá den bhliain.

Go cinniúnach, thionscnaigh na forbairtí seo bailiúchán mór de chásdlí agus creataí nua dlíthiúil. Tá roinnt mhaith acu ar aon dul le forbairtí i ndlínse eile, go mór mór sa Ríocht Aontaithe, áit a bhfuil an tionscal foraoiseachta an-chosúil le tionscal na hÉireann.

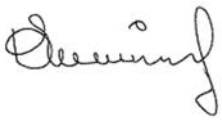
Sonraíodh foraoisí freisin go suntasach in an-chuid phróisis idirnáisiúnta, ach go háirithe sna trí choinbhinsúin de chuid na Náisiún Aontaithe ar bhithéagsúlacht, athrú aeráide, agus fairsingiú fásaigh. Is sínitheoir í Éire ar an trí choinbhinsúin, agus céard is brí leis sin ó thaobh cleachtas foraoiseachta agus beartas foraoiseachta náisiúnta? Réitíonn *Trees, Forests and the Law in Ireland* iad seo agus forbairtí leasmhara, agus mínítear na himpleachtaí i mbealach soiléir.

Tá tionscnaimh soiléir beartais maidir le foraoisí á bplé ag leibhéil na Naisiún Aontaithe, dírithe ar chonas plé le bainistíocht, caomhnú agus forbairt inbhuanaithe de gach cineál foraoise bunaithe ar na Prionsabail Foraoise a leagadh síos sa bhFógairt Rio. Faoi láthair tá na ceisteanna seo á bplé ag an bhFóram de chuid na Naisiún Aontaithe ar Fhoraoisí (UNFF). Faoi 2005, breithneoidh an UNFF na paraiméadair le haghaidh sainordú le creat dlíthiúil de gach cineál foraoise a fhorbairt. Tá sé tabhachtach go mbeadh cleachtóirí na hÉireann agus ar ndóigh an phobail eolach ar na forbairtí seo.

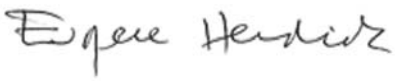
Threoraigh saothar H.M. FitzPatrick ar *Trees and the Law* cleachtóirí foraoise ar feadh na mblianta chomh maith le saineolaithe dlíthiúil i mbun plé le dlíthíocht a bhaineann le crainn agus foraoisí. Ó foilsíodh é afách i 1985, d'fhorbair cásdlí in Éirinn agus i líon mór dlínsí eile agus, mar a luadh cheana, mhéadaigh go mór scála agus tionchar na hearnála foraoise ag an leibhéil náisiúnta agus idirnáisiúnta. Mar gheall ar seo, shocraigh COFORD *Trees and the Law* a athfhoilsiú, ag cur an focal *Forests* sa teideal, le scóip leathnaithe an leabhair a léiriú. Cé go bhfuil an leabhar go príomha dírithe ar fhoraoiseacht agus ar chleachtóirí dlíthiúil, aimseoidh baill den phobail an-chuid idir an dhá chlúdach a bheadh spéisiúl agus ábharthach.

Bhí an t-ádh ar COFORD bheith in ann iarriaidh ar an mbeirt saoi – Damian McHugh agus an Dr Gerhardt Gallagher – a gcuid seirbhísí a chur i bhfeidhm mar udair ar an gcomharba de shaothar H.M. FitzPatrick. Tá clú agus cáil ar Damian Mc Hugh, an príomhudar de cead 12 capadil den leabhair, sa réimse dlí leabhail. Scríobh sé líon foilseacháin ard-rathúil sa réimse seo agus i réimsí leasmhara, dírithe ar an lucht dlí agus ar an ngnáthduine. Is duine de na saineolaithe is mó sa tír é Gerhardt Gallagher ar fhoraoiseacht in Éirinn, le léargas ar leith aige ar cheisteanna bainteach le beartas agus le reachtaíocht a mbíonn tionchar acu ar earnál na foraoise in Éirinn.

Gan *Trees and the Law* bheadh i bhfad níos mó taighde agus am i gceist leis an bhfoilseachán seo a thiomsú. Bhí an t-ádh linn mar sin saothar H.M. FitzPatrick a bheith ar fáil do na h-udair; gabhann muid buíochas ar leith lena estát as é seo a cheadú. Is feartlaoi chuí an saothar seo dá chuimhne.



David Nevins
Cathaoirleach



An Dr Eugene Hendrick
Stiúrthóir

# Preface

The primary purpose of this book is to explain the system of law that affects and impinges on trees and on the growing of trees in this country. It is written to give lay people as full an understanding as possible, and in as simple a fashion as possible, of the applicable law concerned with trees, whether they are growing on a boundary with a neighbour's property, abutting a public road, on the road boundary itself or in a wood or forest to which the public has access as visitors or trespassers. The law has fixed the owner or occupier in each and every one of those situations with a legal responsibility that the main author has endeavoured to address. The accession of Ireland to the European Community has resulted in many Directives relating to forestry which have been translated into Irish law. While such court cases are rare it is hoped that this book will put our international legal obligations into context.

However, while the target audience is the general public and forestry practitioners, the barrister or solicitor researching dusty library shelves for precedents will have a lighter load to carry if they delve through the pages of this book. For them and for the student of law whose research time is also precious, case references have been added where possible.

An important objective of this book is to throw light on an area of the law which, it can be argued, affects not only people engaged in the forest industry but almost every person in this country who has a tree, hedge or shrub growing in their garden or land. These can all, conceivably, affect a neighbour or passers-by because of a high hedge causing a nuisance, an overhanging branch, spreading roots or perhaps the fall of the tree itself in stormy weather or even in calm weather because of some defect in the tree.

When the authors were commissioned by COFORD, the National Council for Forest Research and Development, to write a book which would include detailing the common law – as distinct from the statute law- aspect of trees, the only publication which came near what we were trying to achieve was H.M. FitzPatrick's *Trees and the Law,* which was published by the Incorporated Law Society of Ireland in 1985. This excellently researched book by the late Mr FitzPatrick, who was a forester, has long since been out of print. We acknowledge with gratitude some of the original case law he unearthed through his thorough research, and hope that our knowledge and use of comparative law here provides a fresh insight into how Irish and English law deals with different problems that can arise in this whole area. While one of the authors of *Trees, Forests and the Law in Ireland* is a lawyer, nothing in this book should be taken

as constituting legal advice on the various topics covered. Neither the publishers nor the author accept any responsibility for any errors or omissions. The law stated here is as of 1 May 2004, an auspicious occasion in itself as it coincides with the enlargement of the European Union.

We wish to thank Dr Eugene Hendrick, Director of COFORD, for his advice and support throughout. Very special thanks are also due to John McLoughlin, Director of the Tree Council of Ireland, who provided valuable information used in the compilation of the book, Michael Maloney for turning up some very useful information, Paul Muldowney, High Court Reporter, for looking under rocks to try and uncover more case law, to Lyndsey Blackmore for helping with the planning issues, to Martin Heron, litigation section of Coillte, for guiding us through some tricky case law, and also to Gerard Cahalane and Brendan Ennis of the Forest Service for information on European and international law and regulations.

Damian McHugh and Gerhardt Gallagher

July 2004

# Réamhrá

Is é bunchuspóir an leabhair seo ná an córas dlíthiúil a bhaineann agus a théann i bhfeidhm ar chrainn agus ar fhás na gcrann sa tír seo a mhíniú. Tá sé scríofa i mbealach a thugann tuiscint mhaith do ghnáthdaoine, agus i mbealach is simplí agus is féidir faoin dlí infheidhme maidir le crainn, bíodh siad ag fás ar theorainn le talaimh na comharsan, teorainn ar theorainn le chéile ag taobh an bhóthair, ar theorainn an bhóthair fhéin nó i gcoill nó i bhforaois, áit a bhfuil teacht ag an phobail air mar chuairteoirí nó mar fhoghlaithe.

Chuir an dlí freagracht dhlíthiúil ar úinéir nó ar shealbhóir i ngach ceann de na cásanna sin, a thug an príomhudar aghaidh orthu. Tháinig an-chuid Treoracha a bhaineann le foraoiseacht mar thoradh ar theacht isteach na hÉireann chuig Comhphobal na hEorpa, a aistríodh isteach i nDlí na hÉireann. Cé gurb annamh na cásanna cúirte céanna, tá súil againn go gcuirfidh an leabhar seo ár gcuid oibleagáidí dlíthiúil idirnáisiúnta i gcomhthéacs.

Cé gurb í an phobail ghinearálta agus na cleachtóirí foraoise an sprioc éisteachta, beidh ualach oibre níos éadroime ar an abhcóide nó ar an aturnae atá ag déanamh taighde ar réamhshamplaí ar na seilfeanna leabhar deannachúil má dhéanann siad taigdhe i leathanaigh an leabhair seo. Dóibh siúd agus don mhac léinn dlí a bhfuil a gcuid ama taighde an-luachmhar freisin, cuireadh cás-tagairtí isteach gach áit arbh fhéidir.

Sprioc thábhachtach leis an leabhar seo ná léargas a thabhairt ar réimse den dlí, a bhfuil tionchar aige, is féidir a chruthú, ní amháin orthu siúd atá bainteach leis an tionscal foraoise, ach beagnach gach duine sa tír seo a bhfuil crann, fál nó srúb ag fás sa ghairdín nó ar thalamh acu. D'fhéadfadh siad ar fad tionchar a bheith acu ar chomharsa nó ar dhuine ag dul an bealach mar gheall ar fhal ard ag déanamh núis, géag crochta amach, ag síneadh fréamhacha, nó b'fhéidir crann a thit in aimsir stoirmiúil nó fiú in aimsir shéimh mar gheall ar laige éigin sa chrann.

Nuair a d'iarr COFORD, An Chomhairle Náisiúnta um Thaighde agus Forbairt Foraoise, ar na h-udair leabhar a scríobh a chuimsódh an dlí coiteann a shonrú- murab ionann agus dlí reachtach, ó thaobh crainn de, an t-aon foilseachán a bhí gar don rud a theastaigh uainn a chur i gcrích ná an saothar *Trees and the Law* H.M. FitzPatrick, a foilsíodh ag Cumann Dlí Comhshnaidhmthe na hÉireann i 1985. Tá an leabhar seo leis an t-Uasal FitzPatrick, trócaire air, a bhí ina fhoraoiseoir, ar fheabhas ó thaobh taighde de, ach tá sé as chló le fada an lá. Tugaimid aitheantas le buíochas do chuid den bhunchásdlí a nochtaigh sé tríd a chuid miontaighde, agus táimid ag súil leis go

dtabharfaidh ár tuiscint agus úsáid den dlí comparáideach anseo léargas nua dúinn ar chonas a phléann dlí na hÉireann agus dlí na Breataine le fadhbanna éagsúla a thagann chun cinn sa réimse seo ar fad. Cé gur aturnae daoine de na h-udair ar *Trees, Forests and the Law in Ireland*, ní cheart go nglacfaí le haon rud as an leabhar seo mar chomhairle dlíthiúil ar na ceisteanna éagsúla a bplétear leo. Ní ghlacann na foilsitheoirí ná an t-udar aon fhreagracht as aon bhotún nó faille. Tá an dlí atá luaite anseo ag tagairt don 1 Bealtaine, 2004, ócáid rathúnais inti féin mar go gcomhtharlaíonn sé ar mhéadú an Aontais Eorpaigh.

Is mian linn buíochas a ghabháil leis an Dr Eugene Hendrick, Stiúrthóir COFORD, as a chuid comhairle agus tacaíocht tríd ar fad. Ta buíochas ar leith freisin ag dul do John McLoughlin, Stiúrthóir ar Chomhairle na gCrann in Éirinn, a chur eolas luachmhar ar fáil a úsáideadh i dtiomsú an leabhair, Michael Moloney as eolas an-úsáideach a chur ar fáil, Paul Muldowney, Tuaisceoir san Ardchúirt, as breathnú faoi charraigeacha le níos mó cásdlí a nochtadh, le Lyndsey Blackmore as chabhrú le ceisteanna pleanála, le Martin Heron, an rannóg dlíthíochta de Coillte, as sinn a threorú trí chásdlí casta , agus freisin le Gerard Cahalane agus Brendan Ennis ón tSeirbhís Foraoise as ucht eolais a sholáhtar ar dlí agus rialachán Eorpaigh agus Idirnáisiúnta.

Damian McHugh agus Gerhardt Gallagher

Iúil 2004

# Contents

# 1.
# The High Trees Case

No matter who we are or where we live, our lives are affected in some respects by trees or, more specifically, by the law surrounding them. It is important begin this book by dealing with a few areas where trees impinge on our daily lives, in ways many people would not be aware.

## CONVEYANCING

When a solicitor is engaged to arrange for the proper acquisition of a house, apartment or some other type of property, one of the most important functions that will be fulfilled will be to raise requisitions on the title of the vendor or seller. These requisitions cover a multitude of matters, although not all of them may be relevant to a particular property transaction. For this purpose, solicitors use a standard form of requisitions drawn up by the Law Society, entitled '*Objections and Requisitions on Title*'. There are about 44 questions or requisitions involved and two of them relate to trees and forests:

- Requisition number 5, which is headed '*Forestry*', asks whether there was a Tree Felling Licence in existence in respect of the particular property and, if so, to furnish the licence. It also asks if there was any unfilled condition requiring planting or replanting under the provisions of the Forestry Acts. It requires details of any such obligation, whether grants had been obtained and, if so, whether any portion of the grant remained payable.
- The second requisition is number 12, relating to notices. It asks if any notice, certificate or order been served upon or received by the vendor or had the vendor notice of any intention to serve any notice relating to the property or any part of it under more than 30 Acts of the Oireachtas, including the Forestry Acts. If one has, the vendor is directed to furnish it and state whether it had been complied with. It also asks if the vendor has served such a notice and, if so, to furnish it to the purchaser's solicitor.

## DEVELOPMENT PLANS

People living in Ireland are directly affected by their respective county's development plan. Each planning authority is obliged to make a Development Plan for their functional area every six years. The plan presents a strategy for the proper planning and development of the area and the setting out of each county's development objectives. In addition, the plan is obliged to identify the likely effects on the environment when it is implemented. The plans are drawn up in draft form initially and, after public consultation and examination, are then implemented.

It is necessary to make reference to the development plan to give a full picture of how the lives of ordinary people living in new housing estates over the next six or more years will be directly affected by its provisions as to trees.

The current plans have to have regard to the requirements laid down in the Local Government Planning and Development Act, 2000, and the Planning and Development (Amendment) Act, 2002. Trees and forests may be central to the objectives set out in these plans, as they are in Co Wicklow for which the Draft Plan must be implemented by 9 March 2005.

Under the heading '*Design and Development*', the Wicklow plan stipulates that when mature trees or substantial hedgerows are located on lands that are being considered for development, a detailed tree and hedgerow survey must be submitted with the application. All trees with a diameter of 75 mm and above (measured at a height of 1.4 m above ground level) should be included in the survey.

It also provides that hedgerows should be surveyed by reference to species, branch canopy spread, shape, height and condition. It adds: 'Remedial works should also be indicated where appropriate and trees should be identified on site with suitable tags. Provision should be made in the site layout for incorporating specimen trees that are in good condition.'

It adds a warning for developers who fell mature trees before they apply for planning permission in the statement: 'If mature trees or hedgerows are felled prior to lodging a planning application, this will reflect negatively on the case for planning permission.'

The Draft Plan provides for existing trees on development sites to be securely fenced before work begins and it also warns that development will not generally be permitted 'where there is likely damage or destruction either to trees protected by a tree preservation order or those which have a particular local amenity or nature conservation value.' The plan adds that development that

requires the felling of mature trees of amenity value, conservation value or special interest, even though they may not be listed in the development plan, will be discouraged.

## WEATHER

As H.M. FitzPatrick pointed out in his book *Trees and the Law*: 'The weather conditions most likely to result in injury to persons or animals or damage to property by breaking branches or uprooting trees are high winds, especially when preceded or accompanied by heavy and persistent rainfall or heavy snow. A rare occurrence is a lightning strike on a tree which may cause injury to persons or animals sheltering beneath it or in its vicinity.'

In another part of the same chapter, he wrote: 'Hurricanes are rare occurrences in this country but when they come they cause serious devastation in woods and plantations. Hurricane Debbie, which strictly speaking was just a very intense depression when it reached Ireland, swept over this island from the Atlantic and levelled thousands of trees and acres of plantations. It came in early autumn, on 16 September, 1961 when deciduous trees still held their leaves so that the wind was able to exert its full force on them'.

## HURRICANE CHARLIE AND ACT OF GOD

On the night of the 25th and the morning of the 26th of August, 1986, a year after Mr FitzPatrick's book was published, counties Dublin and Wicklow were hit by one of the most powerful and devastating storms ever recorded in this country. It was named Hurricane Charlie and led to one of the most important decisions handed down by the superior courts in this country in **Superquinn Ltd v Bray UDC, Wicklow County Council, Uniform Construction Ltd., Coillte Teo and Powerscourt Estates [1998] 3 IR 542**. In this case, for the first time in this country, a court declared an event as an Act of God and thereby disallowed a claim by the supermarket for damages for flooding of its Castle Street premises in Little Bray on the basis that the storm fell within the category of the most extreme natural phenomena and could not reasonably have been anticipated or guarded against. Therefore, Miss Justice Mary Laffoy ruled, after a mammoth hearing, that the defence of Act of God succeeded. As a result, the claim against Coillte under the rule in **Rylands v Fletcher [LR 3 HL 330]** failed (see Chapter 3). Before the hearing began, proceedings had been discontinued against Wicklow County Council and Powerscourt Estates.

So devastating was the storm that hundreds of houses were flooded and large trees were uprooted and carried down the River Dargle towards Bray where they blocked bridges. In addition, rocks and stones in and on the banks of River Dargle were 'bleached' by the action of the water. Coillte were sued as successors in title to the Minister for Energy, as the owner, occupier and body responsible for an artificial lake or reservoir known as the Paddock Pond located upstream of the River Dargle.

On the night of the storm, the dam failed and the released waters joined the River Dargle, thereby increasing the volume and level of the river. In consequence, it caused or contributed to the flooding in Little Bray. The claim by the supermarket against Coillte was founded in negligence and nuisance for alleged failure to properly use and maintain the dam and to provide and maintain an effective overflow arrangement for releasing water from Paddock Pond when the level of the reservoir rose. It also alleged against Coillte that the existence of the reservoir constituted an unnatural use by Coillte of its land and that Coillte were liable under the rule in Rylands v Fletcher for the escape of the water and the resultant flooding of the supermarket.

One eye witness testified that the water from the dam had tumbled down big trees, while another said that from his first floor window he saw trees floating down the river and possibly flowing down Lower Dargle Road in the town of Bray.

The judge found that Coillte could reasonably have foreseen that if the dam at Paddock Pond failed and the impounded water escaped, it would flow via the gorge and the watercourse into the Dargle and that damage in the nature of flooding of the riparian properties downstream would ensue. In her view, the circumstances of the escape of the water from the pond came within the ambit of the rule in Rylands v Fletcher.

Coillte could only escape liability if it established one of the excusing factors recognised as constituting a defence to liability under that rule. Such a defence was Act of God, which the court declared.

The only previously reported decision in which the defence of Act of God had been successful was in an English case in the latter part of the 19th century: **Nichols v Marsland [1876] 2 Ex D 1**.

## THE HIGH TREES CASE

The High Trees Case, after which this chapter is named, may look like a reference to a court case involving trees which were tall and possibly causing a nuisance, or in some way interfering with a neighbour or a neighbour's property, such as blocking view or light. In fact, it refers to one of the leading court cases of the 20th century, but it had absolutely nothing to do with trees.

The proper title of the case is: **Central London Property Trust Ltd. v High Trees House Ltd. [1947] KB 130**. The facts of the case were that in 1937 the plaintiff company leased to the defendant (a subsidiary of the plaintiffs) a block of flats for 99 years at a rent of £2,500 a year. Early in 1940, and because of the war, the defendants were unable to find sub-tenants for the flats, and therefore unable to pay the rent. The plaintiffs agreed to reduce the rent to £1,250 from the beginning of the term. By the beginning of the 1945 all the flats were let, and the plaintiffs claimed the full rent as from the middle of that year. They succeeded.

Lord Denning, however, stated that they would have been estopped from claiming the full rent for the period from 1940 to 1945, on the ground that though not technically bound because of the lack of consideration (or price, as is necessary in a valid contract), the plaintiffs had intended the defendants to rely on the promise and the defendants had acted on the faith of it.

This case gave birth to what is known in law as *promissory* estoppel. Basically, estoppel is a doctrine, which prevents or estops a person acting inconsistently with a representation, which he had made to the other party, in reliance on which the other party had acted to his detriment. The doctrine had long been recognised at common law and equity but Lord Denning developed it with his decision in the High Trees case. Promissory estoppel prevents a party from insisting on his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which had taken place between the parties.

For example, a landowner encourages a sawmiller to build a sawmill and buildings on his land in order to harvest 100 ha of forest trees on his land, gratuitously promising that the sawmill would be allowed to occupy the buildings. The latter do so, and the landowner sues them for trespass and for an order to eject them. A court of equity would step in to prevent an injustice to the sawmill. An estoppel has been held to arise in these cases because the necessary elements have been established - the promise or representations made by the landowner and the fact that the sawmill acted on that promise to their detriment (cost etc.).

# 2.
# The Neighbour Principle

For a claim in negligence to succeed, the party against whom a claim is being made must owe a specific duty of care to the injured party. Such a claim would arise, for example, between a doctor carrying out a medical procedure on a patient, or in the case of a tree surgeon cutting down a tree in the environs of an occupied house whose owner engaged him to do the work. However, it has been established at common law that there is a general duty of care, an example of which could be a landowner who plants trees at or near a boundary with the public road. Does he owe a duty of care to passers-by? He could, in certain circumstances, under what is known as the 'neighbour principle'.

In a way, what has been termed this concept of relations giving rise to a duty of care is restating the Christian message: 'Love thy neighbour.' The first attempt to state a legal proposition of a general duty of care was made in an English court in the early 1880s but it was not until the early 1930s that it was formulated into what has famously become known to every lawyer and student of law as the 'neighbour principle' in the celebrated case of **Donoghue v Stevenson [1932] AC 562**.

The facts of the case were that a woman, sitting with a friend in a café in Scotland, was pouring ginger beer from a bottle onto a dish of ice cream when the decomposed remains of a snail came out of the bottle resulting in the woman becoming violently ill. Her claim for damages failed in every court, until she got to the House of Lords where eventually her claim for damages finally succeeded when Lord Atkin stated the neighbour principle for the first time: 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, "who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions, which you can reasonably foresee, would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably have been in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.'

The circumstances in the case were that a bottle of ginger beer was sold by the manufacturer to a wholesaler and by him to a retailer. It was consumed by a person who had no contractual relation with the manufacturer. The question

therefore was whether the manufacturer owed the consumer a duty to exercise care in the making of the ginger beer. The House of Lords held that it did, because the manufacturer must have contemplated that the ultimate consumer of the ginger beer might be injured if proper care was not taken.

In **Goldman v Hargrave [1967] 1 AC 645** it was held that an occupier of land comes under a duty to take positive steps to prevent a hazard, which occurs on his land through no fault of his own, from injuring a neighbour.

The rule and the policy considerations behind it have been discussed and analysed by courts in common law countries throughout the world and, according to McMahon and Binchy's '*Irish Law of Torts*', a plaintiff will not win his case even where the defendant was guilty of the grossest negligence to others, unless he can show that the defendant breached the duty of care to him. In1974, the Supreme Court ruled that the law of negligence laid down that 'the standard of care is that which is to be expected from a reasonably careful man *in the circumstances*.' (The court gave the emphasis.)

Elsewhere, this book will look at the actual standard of care that the law requires in the case of a farmer growing trees on his land adjoining the public road (see **Gillen v Fair, 90 ILTR 119**) but here we will continue to look at the duty of care owed to our neighbours. In some countries, particularly in the United States of America, this is generally known as neighbour law and encompasses different circumstances such as high hedges causing a nuisance, trespass by overhanging branches, or roots burrowing under neighbouring property. It may also include yew or some other poisonous trees killing animals on the neighbouring property.

In the leading Irish case, **Lynch v Hetherton**, decided in 1991, the High Court set down a landowner's duty when he had a tree or trees growing adjacent to his neighbour's property. It is to take such care as a reasonable and prudent landowner would take to guard against the danger of damage being done by a falling tree, and if he fails to exercise this degree of care, and damage results from such failure on his part, a cause of action will arise against him.

## VOLUNTARY ASSUMPTION OF RISK

Applying the neighbour principle, therefore, we can say that if a person notices a disease or stem defect likely to lead to branches or part of the stem falling off in one of his trees growing at or near a boundary with the public road or with his neighbour's house and chooses to do nothing about it, he is assuming a big risk.

If it is proved that the tree had the apparent fault, that its owner knew about it but decided to do nothing about it, the law will hold him liable for all the consequences. If the tree collapsed onto the neighbour's house and caused severe damage, the tree owner would be held liable. The basis of this is known as the doctrine of the voluntary assumption of risk or *non fit injuria volenti*.

Here the tree owner may be held to be voluntarily accepting the inherent risk associated with the damaged tree, in much the same way that a member of the public does when putting on a pair of skates and going onto the ice at an ice rink. Of course, the victim or the party who suffers as a result of tree owner's omission by failing to act, will have to prove to the satisfaction of a judge, on the balance of probabilities, that the tree owner was aware, or ought to have been aware of the damaged tree in the particular circumstances before it collapsed and caused the loss to the neighbour or passer-by on the public road. That is done by the production of cogent evidence that will sway the judge into finding in favour of the victim of the tree or branch fall.

Real life situations are an excellent way of understanding how these principles are applied. In such a case, a neighbour had a horse chestnut tree which overhung the next-door neighbour's property. Branches fell from the tree onto the garage next door, destroying the roof. Some months previously, the garage owner had noticed that the branch was damaged and wrote to the tree owner, asking that the branch be cut. No action was taken.

Having regard to the aspects of the law outlined in this chapter alone, can we say that the tree owner is liable for the cost of replacing the neighbour's roof? While it would be a foolish lawyer who would give a definite 'yes' to such a question from a client prior to the judicial determination of the issues at stake, the likely result of a claim in the circumstances as outlined here is that the tree owner would be held liable for the damage because a defect, or potential defect, was brought to his attention and he failed to act. He could, and should, have done a number of things: he could have sought advice from a tree expert or, if he did not want to incur that cost, he could have cut down the damaged branch himself or had somebody else do it.

There is another, albeit remote, possibility; the tree expert who was engaged, for a fee, to examine the tree and to offer his advice, may not have appreciated the extent of the damage and the potential risk or danger. He may be sued successfully for negligence, not necessarily by the owner of the damaged roof but by the man who engaged him. In reality what would most likely happen is that the owner of the damaged roof would sue the tree owner who, in turn and before the hearing, would join the tree expert as a co-defendant and claim a

contribution or an indemnity against the full cost of the claim, i.e. the cost of reinstating the damaged roof. Sometimes, courts faced with this kind of situation will order a hearing, as a preliminary issue, of the claim between the two defendants – the tree owner and the tree expert in this case – and the outcome may determine the entire claim with the loser, usually the insurance company, having to compensate the owner of the damaged roof.

## INSURANCE

This raises the question of insurance. The tree expert should have professional indemnity insurance to cover him or her in the case of a claim for, say, negligence in the performance of their duties. So also should property owners have public liability insurance – costly though it is – for certain kinds of trees that could cause damage to others if they fell or their roots spread into neighbouring property.

If they do not have such protection, they are leaving themselves very vulnerable should a tree or branch fall or roots undermine another person's property causing damage with possible devastating financial and other consequences for all concerned.

It is for this and other reasons that tree owners must be able to show that regular inspections were carried out on their trees, especially on trees growing at roadsides. A tree expert or specialist would need to be engaged to carry out such checks and to draw up a written report of his or her findings. In addition, tree owners would still be expected to keep an eye on their trees on a regular basis to check for any externally visible signs of disease or other evidence that might indicate weakness and to act on it as a matter of urgency, not just out of a sense of neighbourliness but for self-protection.

# 3.
# The Common Law and Trees

Legislation such as the Local Government (Planning and Development) Act, 1963, as amended, covers areas like tree felling and tree and woodlands preservation. Although this part of the book is not concerned with these issues, many other laws affect trees.

Principally, this country's fundamental law, *Bunreacht na hÉireann* or the Constitution of 1937, expressly states in article 43: 'The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.' It goes on to state *inter alia,* 'The State accordingly guarantees to pass no law attempting to abolish the right of private ownership.'

It has been held by the superior courts here that the right to private property is a personal right. A person who owns land and decides to plant trees on it would therefore have the protection of the Constitution because he is exercising his right to do something lawfully on his own personal property. But few, if any, rights given by the Constitution are absolute. To illustrate how such a restriction works we look at article 40 of the Constitution which guarantees press freedom and free speech. The same article also states that the State shall vindicate the good name (and property rights) of every citizen. This the State did by enacting the Defamation Act, 1961, which strives to strike a balance between press freedom and the right of a person to his or her good name.

Likewise, if somebody owns land and wants to build a house on it, he can do so but only if he first is granted planning permission by the local planning authority.

Returning to the tree owner exercising his property rights: if he plants trees such as oak, elm or beech on the boundary with his neighbour and the neighbour's house, is he not asking for trouble? Of course he is, because the more the trees grow the more their roots will spread and will probably undermine the walls of his neighbour's house with consequent loss and damage being suffered by the neighbour who may have to have his walls underpinned as a result.

Was this damage foreseeable or should it have been foreseeable by the tree owner when he planted his trees? The short answer is that it was and the law

fixes the tree owner with responsibility for his actions, as we shall see.

So what laws come into play in this whole area?

## COMMON LAW

The first area that must be considered is the common law itself. Common law is often referred to as civil law, case law, unwritten law and judge-made law. The latter is probably the most exact. It is a body of law, and to understand it properly we have to look at statute law.

Statute law is applicable to only some of the problems which arise in the daily contacts taking place between individual members of the community. When a dispute, say about an overhanging tree, is brought to a court for decision, and there is no statute law applicable, the judge must find his solution to the problem by other methods. After he has heard all the relevant facts, he must go on to consider what, if any, recognised legal principles are to be applied before he delivers his decision. When such a judgment is handed down by one of the superior courts, that is the High Court and Supreme Court, in a civil context, it becomes part of the law of this country, known as the common law. The judgment will then become a 'precedent' and in this way the common law is built up by precedent.

In any other case which involved similar facts as, for example, the one involving the dispute about the overhanging tree, the judge deciding the case would generally deliver a similar judgment. An individual High Court judge may - though very rarely – differ from another High Court judge but all High Court judges are bound by decisions of the highest court in Ireland, the Supreme Court, which as a general rule is itself bound by its own decisions.

The expression 'common law' is, accordingly, habitually used by lawyers to distinguish a class of case which is almost exclusively founded on 'precedent' as distinct from statute law. However, the common law may never override statute law. Ireland is a common law country, as are England, the Unites States of America, Canada, and Australia.

## DAMAGES

The only common law remedy is damages. For example, if a land owner enters into a written contract with a tree nursery to buy at any agreed price 10,000 oak

trees to plant on his property and the trees are delivered and subsequently planted. However, the land owner, in breach of his obligation under the contract, fails to pay for the trees. He is in breach of contract and can be sued in court for the price of the trees in the form of damages as well as interest on the amount. That is the only form of remedy that the common law recognises. Money was a cure for all legal ills but as time evolved another legal system emerged that provided other, more useful, remedies in given situations: that is equity.

## EQUITY: INJUNCTIONS

Equity is another source of law that has greatly enriched our legal system. 'Equity' means right or justice. If a land owner built an extension to his house and without permission or in defiance of an express refusal of permission to do so, encroached on his neighbour's property, money in the form of damages would not provide the victim with a remedy, even though damages is a remedy for trespass. Rather, the victim wants a special order from either the Circuit Court or the High Court to stop the encroachment or nuisance. The order is called an injunction and it will order the land owner to remove the wall or whatever is encroaching. This was developed by equity as a form of redress where damages were not appropriate as a remedy.

There is another form of injunction which may be used where a person believes that something is going to happen which will adversely effect his or her interests. This is called a *quia timet* injunction; *timeo* is the Lation word for fear. An example would be a land owner may fear that the roots of the trees that his neighbour is going to plant nearby will, in time, damage the walls of his house. The person may go to the High Court and seek such an injunction to stop the land owner from planting the trees.

Equity introduced a sense of fairness into the law. There are many other equitable remedies including specific performance, compelling somebody to perform his side of a bargain or contract for example the sale of land or property, and recission which applies to contracts.

## NUISANCE

Nuisance is a tort or civil wrong. Basically it is the unreasonable interference with another person in the exercise of his rights. There are two forms: public nuisance and private nuisance. Public nuisance happens when acts or omissions

cause danger or inconvenience to the public or a section of the public. A public nuisance is a crime. Obstructing the public road is a form of public nuisance.

We are more concerned in this book with private nuisance. It has been defined as 'the interference with the plaintiff's use or enjoyment of land or disturbance of some legal interest over land'. Trees are a prime source of nuisance and have been the subject of much consideration by courts and the authors of legal texts down through the years in this and other jurisdictions.

An anonymous author quoted in *Roots of Trees: Liability for Injury cased to Neighbour's Premises*, 6 Irish Jurist 39 at p.39 (1940) and cited in McMahon and Binchy's *Irish Law of Torts* stated: 'It is somewhat remarkable that in a country so largely agricultural as Ireland, there has been such a marked scarcity of decisions touching upon the rights and liabilities of occupiers of land resulting from the spreading of the roots of trees beyond the boundary of their owner's property.'

Where the encroachment of tree roots into a neighbouring property causes damage, this amounts to nuisance and entitles the owner of the damaged property to seek damages or an injunction, specifically a mandatory injunction compelling the culprit to remove the cause of the nuisance. He may also try and abate the nuisance by cutting or removing the encroaching roots. The same applies to encroaching branches. (For the law on nuisance abatement, see chapter 4).

Hedges that are allowed to become overgrown can constitute a nuisance for the neighbour living on the other side of the hedge

## RYLANDS V FLETCHER

There is a very close association between the law of nuisance and the rule in the celebrated case of **Rylands v Fletcher [LR 3 HL 330 (1868)]; [LR 1 Ex. 265 (1866)]**. In fact, it has been elevated to the level of being a legal doctrine. It is one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence (see below).

The rule has been formulated as the following: The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

The facts of the case were that that plaintiff was mining coal with the permission of the land owner. The latter granted permission to the defendants to build a reservoir to supply water to their mill on his land. The work was carried out by independent contractors who failed to discover that there was a disused mine shaft under the reservoir. Later, the water from the reservoir broke into the shaft and flooded the plaintiff's mine.

The defendant contractors were held liable for the damage on the basis of the rule outlined. It was a totally new development as they were not considered at that time to be guilty of nuisance, since there had been a single escape, or of negligence in the sense that the law of negligence was understood in the 1860s.

The rule may be applied in the case of trees that are poisonous, provided that the branches have 'escaped' onto the neighbour's property or the public highway. However, subject to such exceptions, trees are not normally regarded as falling under the rule.

In **Noble v Harrison [[1926] 2 KB 332]**, Mr Justice Wright stated of a beech tree: 'Such a tree is usual and normal incident of the English country; it develops by slow natural growth, its branches are not likely to cause danger, even if permitted to expand outwards over the highway. Such a tree cannot be compared to a tiger, a spreading fire, or a reservoir in which a huge weight of water is artificially accumulated to be kept in by dams, or noxious fumes or sewage.'

Shortly after Rylands v Fletcher it was decided that the rule which it embodied was not applicable to damage caused by the Act of God or *viz major*. This means that negligence cannot be found against any party because the accident was due directly to an Act of God such as a very violent storm. Such a finding was made only once by the courts in this country, in a case entitled Superquinn v Wicklow County Council, Coillte and Others (Superquinn Ltd. v Bray UDC, Wicklow County Council, Uniform Construction Ltd., Coillte Teo. and Powerscourt Estates Ltd. [1998] 3 IR 542) following Hurricane Charlie which caused the River Dargle to overflow its banks in Bray and cause extensive damage to the property of the plaintiff's supermarket (see Chapter 1).

## TRESPASS

Some forms of nuisance are very like the tort of trespass. Trespass to land consists in the act of:

(1) entering upon land in the possession of the plaintiff, or

(2) remaining upon the land, or

(3) placing or projecting any object upon it - in each case without lawful justification.

It has been defined as the intentional entering onto another person's land without lawful permission or remaining on the land after permission has been withdrawn. The interference must be direct, e.g. rubbish dumped onto another person's land is trespass, but if rubbish blows onto another person's land that is not trespass.

Trespass to land is actionable without the plaintiff having to prove that he suffered any special damage as a result of the unlawful encroachment. It is a trespass to cause any physical object or noxious substance to cross the boundary with the neighbour's property, or simply to come into physical contact with the land, even though the boundary itself may not have been crossed, for example to cause a Virginia creeper to grow on it.

Nuisance is indirect; trespass is direct. The spread of tree roots and branches has been regarded by the courts as consequential rather than direct, even where an occupier does nothing about it for years, knowing that eventually his neighbour's property will be damaged.

## NEGLIGENCE

Most people are familiar in some respect with the tort or civil wrong of negligence: a pedestrian suffers personal injuries as a result of the negligence of a motorist; a patient undergoing a medical procedure suffers some personal injury as a result of the (medical) negligence of the medical practitioner. But what is negligence and how does it arise?

A useful definition of negligence is: 'The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'

There are four very important elements which must be proved in order to establish that somebody has been negligent:

- the defendant or person against whom the claim is made must owe a legal duty of care to the plaintiff;
- there was a breach of that duty;
- the plaintiff suffered damage as a result of the breach;

- and lastly, there was a sufficiently close causal connection between the conduct and the resulting injury to the plaintiff or the person making the claim.

Liability for negligence depends on how foreseeable the risk was and whether proper steps had been taken to prevent the incident.

Negligence is conduct, not a state of mind – conduct which involves an unreasonably great risk of causing damage. It has been judicially decided that there is no necessary element of ‘fault’ in the sense of moral blameworthiness involved in a finding that a defendant has been negligent.

# 4.
# The Abatement of Nuisance caused by Trees

It is lawful for any occupier of land, or for any other person with the occupier's authority, to abate any nuisance by which that land is injuriously affected. In this context 'abate' means to terminate by his own hand, a reduction or decrease.

In the law of contracts an abatement is the reduction made by a creditor for the prompt payment of a debt due by the debtor. But here, in dealing with the tort or civil wrong of nuisance, abatement means the removal of the nuisance.

Specifically, the area of nuisance is one in which the injured party is entitled to take the law into his own hands and provide his own remedy. As a general rule, everyone who is damaged by a private nuisance is entitled to abate it, to bring it to an end by his own act. However, a word of caution must be advised and we will revert to this later in this chapter.

To get back to first principles, we can therefore say with some certainty that the law allows the occupier of land may, without notice, cut off the overhanging branches of his neighbour's trees, or sever roots which have spread from those trees into his own land.

Two cases which serve to illustrate these principles are:

- **Lemon v Webb [1894] 3 Ch.11**

  For more than 20 years oak and elm trees growing near a boundary had overhung the neighbour's land. The neighbour brought an action against the owner of the trees.

  It was held by the English Court of Appeal that the neighbour was entitled, without giving notice to the owner of the trees, to cut the offending branches provided he did not trespass on the owner's lands.

  The owner of the trees brought an appeal to the highest court in England, the House of Lords where the judgment of the Court of Appeal was upheld.

  The corollary of that ruling was that an aggrieved party could not go onto the soil of a neighbour to remove a nuisance unless he first gave notice to his neighbour to remove it.

  However, there was a different outcome to a case with almost similar facts a few years later.

**Smith v Giddy [1904] 2KB 448**

Ash and elm trees, which were growing on the defendant's land, overhung the plaintiff's garden and interfered with the growth of his fruit trees.

The County Court ruled that the remedy was for the plaintiff to cut back the overhanging branches himself.

However, on appeal, it was held that that the defendant had no right to put the plaintiff to the trouble and expense of such a remedy and the case was sent back to the court of first instance for re-trial.

On these and other authorities the aggrieved neighbour or abator (as he/she may be termed in law) can act without leaving his own land, but subject to certain requirements. This means giving the tree owner prior notice of what that action will be.

Returning to the caution we advised earlier. There is a very strong caveat that must be set out and that is that the abatement of a nuisance is a remedy which is not favoured by the law and is not usually advisable. One reason for this is the likelihood that taking the law into one's own hands could lead to a breach of the peace and thereby make a bad situation even worse. In any event, the party abating a nuisance must be careful not to interfere with the property of the party we shall call the wrongdoer, over and above what is necessary to abate the nuisance.

There is also authority for the proposition that in abating a nuisance any unnecessary damage that is caused is itself a tort or an actionable wrong. Therefore, where there are two ways of abating a nuisance, the less mischievous is to be followed.

In **Roberts v Rose [1865] LR 1 Ex.** it was laid down that if there are alternative methods of abatement, one of which will be less injurious to the wrongdoer than the other, the least injurious method must be adopted, subject to this, that 'where the alternative way involves an interference either with the property of an innocent person or the wrongdoer the interference must be with the property of the wrongdoer'.

It has also been established that no damages can be obtained against a defendant who has allowed a tree to overgrow his boundary, unless it is the cause of actual damage. The cases which support this are: **Smith v Giddy [1904] 2 KB 448** and **Lemon v Webb [1894] 3 CH.1**. However, there does not appear to be any such limitation on the right of the neighbour to cut the encroaching roots and branches.

It can be stated without hesitation that if damage has been caused, the court may grant an injunction against the defendant. It could be in the form of what is known as a mandatory injunction, directing the tree owner to do something such as removing the cause of the damage. Damage must be proven to establish nuisance.

We stated above that the occupier of land might, without notice, cut off the overhanging branches of his neighbour's trees, or sever roots, which have spread from those trees into his own land. There are at least four cases where notice must be given:

- When the predecessor in title, rather than the present occupier, committed the nuisance,
- When the occupier is not responsible for creating or continuing the nuisance,
- When the abatement involves the demolition of a house which is inhabited, and
- When the more mischievous of the two ways of abating a nuisance is followed.

While there is case law to support each of these four situations, it would be foolish to advise a neighbour to act against a nuisance involving a tree without giving notice to the tree owner. Bringing common sense to play in this question, it should be emphasised that in all cases of entry on the tree owner's land and abatement, notice should be given to the tree owner. The only exception to this should be in the case of an emergency.

# 5.
# Roots

Before approaching an examination of the common law as it affects tree roots, it should be emphasised that most of the law in this area does not derive from decisions of the Irish courts but from the English courts.

Lawyers and law students fully understand that decisions of the superior courts in England and other common law countries do not have binding authority in the Irish courts. Decisions of the Court of Justice of the European Communities, have direct effect in EU states but decisions of the English House of Lords or Court of Appeal have only persuasive authority in the courts in this jurisdiction. The same applies to decisions of the federal Supreme Court in the United States of America which is also a common law country. However, in certain circumstances, decisions of those foreign courts may be followed and adopted by the Irish High Court or Supreme Court.

Therefore, with such a paucity of recorded tree law in the superior courts in this country, solicitors and barristers preparing a claim for damages caused by roots, which spread and undermine a neighbouring property with serious consequences, will be only too happy to find precedents from courts in other common law jurisdictions. The District Court in this country is the lowest in the hierarchy of courts and is not a court of record. It is similar to a Magistrates Court in England. Its findings and decisions would not operate as precedents. Therefore, in preparing a claim, or defending a claim for that matter, a lawyer will research not only the decisions of the superior courts and the courts of similar jurisdiction in other countries, most especially in England.

One of the benefits of recording relevant cases from all sources in a book such as this is that lawyers when researching will look for cases with facts as similar to those of their own case as is possible. A judicial decision pronounced on those facts and circumstances is therefore highly relevant and valuable, not alone to lawyers but to members of the public who may have a similar problem.

Roots that encroach from a neighbouring property can cause damage to the foundations of houses. They may also cause damage to walls, drives, garages and conservatories. They may grow into masonry, either walls or foundations, and cause the mortar to crumble. Often they will penetrate sewers or other drains and effectively block them by proliferation of fibrous roots.

Another type of damage is usually associated with poplar trees, which make heavy demands on moisture in the soil. Their roots will spread far in search of water. In this way they can cause soils, especially heavy clay soils, to shrink. If this takes place adjacent to or under the foundation of a house, subsidence will occur, followed by cracking of the walls.

This is an extremely serious problem for the householder and can have knock-on effect for many years in terms of insurance costs because one of the questions which must be answered in an insurance proposal is whether the house has been the subject of subsidence. If it has, the premium will be loaded accordingly because of the risk involved.

The species of tree, its age, the nature and depth of the soil, its moisture content and the proximity of other trees are all elements that can affect the depth to which roots will penetrate and the distance they will spread. Tree experts estimate that adult trees of certain species will have roots that grow one metre deep and spread six metres while there are instances of roots spreading distances of one and a half times the height of a tree.

## CASE LAW

Later, we will report a number of very recent English cases on this topic, including **Delaware Mansions Ltd. and Others v Lord Mayor and Citizens of the City of Westminster [2002] 1 AC 321**, an extremely important case decided by the House of Lords on 25 October 2001. The issues raised in the case, which broke new ground in English law, centered on the recoverability of remedial expenditure incurred after encroachment by roots from a tree growing in the footpath of the public road into private property. The decision fully endorses action for potential structural damage caused by roots.

However, we will first look at a number of root encroachment cases, one of the earliest of which is one from the Irish courts that was cited in the Delaware Mansions case.

#### Middleton v Humphries [1912] 47 ILTR 160

In this widely quoted Irish case, the plaintiff claimed that his wall had been broken down and destroyed in some parts by the spreading roots of a neighbour's tree. He claimed damages and an injunction to restrain the defendant neighbour from continuing to permit the injury. The court granted the

injunction and awarded damages and costs to the plaintiff on the basis of findings of fact.

Mr Justice Ross took a common sense approach in arriving at his decision: 'I have heard all the evidence and am not bound by the testimony of any expert, good, bad or indifferent. I am allowed to use my own experience as to what I have seen, and what I understand about trees and such matters, I have spent a good portion of my life in the country.'

He continued: 'The one question I have to decide is – what brought down the wall? The defendant has suggested that it never was a very good wall. I do not say it was a very good wall; it was, at least, an ordinary wall, such as are seen surrounding residences about Shankill, and it was sufficient for the purpose for which it was built'.

'What brought it down?' the judge asked rhetorically. 'To decide that I must keep in mind that the garden of Mr Middleton is higher than the garden of Miss Humphries, but I am not at all satisfied that there was any such rush of water in the direction of Miss Humphries' garden as would sap the foundation of the wall. There is evidence that a bank of clay had been heaped up against the wall for the purpose of forming flowerbeds, but there is nothing in the physical conformation of the land to suggest that the wall was knocked down by the action of the water.'

'The trees were in such a position that their roots were extending under the wall. Any tree will naturally make for the place where there is good soil. The soil of Mr Middleton's garden attracted the trees and their roots went for it. There is not the smallest doubt that from top to bottom the wall was interlaced with the roots of these trees. I put great weight on the power of growing roots on walls. It is unwise to have trees near walls. It was the growing action of the roots of the trees which brought down this wall.'

He granted a declaration that the defendant wrongfully permitted the roots of certain of his trees to grow into and thereby damage the plaintiff's wall. Damages were measured at £25.

#### Butler and McCarthy v Standard Telephones and Cables Ltd. [1940] 1 KB 399

The facts in this English case were that the plaintiffs' houses were situated in a row of semi-detached houses between the defendant's sports ground and the public road. The sports ground was connected with the road by an avenue with wooden boundary fences. In the early 1930s, the defendants planted rows of Lombardy poplar on each side of the avenue, each row being about a metre

inside the boundary fence. In 1934 one of the plaintiffs, Mr McCarthy, found signs of serious settlement in his house. Excavations showed that the roots of the poplar had burrowed under the wall of the house. These roots were cut back but in 1937 cracks appeared in the wall. The second plaintiff, Mr Butler in the adjoining house, noticed the same trouble in his house the following year.

The plaintiffs brought an action, claiming that their houses had been damaged by the roots from trees on the defendant's land, which had burrowed under the houses and caused the soil to shrink by absorbing water from it. The defendant did not dispute that the trouble was due to the shrinkage of the soil but pleaded that it was not caused by the tree roots but by the drought that occurred between 1934 and 1937.

In its decision, the court ruled that there was no distinction in law between damaged caused by overhanging branches and damage caused by roots which burrow under the ground. The plaintiffs were entitled to cut the roots and to recover damages.

**In an important aspect to the ruling, the judge said: 'The encroachment of boughs and roots onto a neighbour's land is not a trespass; it is a nuisance. An action lies for damages and a neighbour may abate the nuisance if the owner of the tree after notice fails to do so.'**

#### Davey v Harrow Corporation [1957] 2 AER 305

The decision in this English case supports the decision in the Butler and McCarthy case that root encroachment is a nuisance, not a trespass.

The plaintiff built a house in 1937 and 12 years later cracks appeared in the walls. In addition, suckers of elm trees were forcing their way up in his garden. In August 1949 he first called attention to the damages alleging that it was caused by the defendant's trees, one of which was only 2.5 metres (eight feet) from the boundary. The defendant felled the trees but left the roots in the ground and failed to kill them with herbicide. Further suckers appeared and progressive damage was done to the house.

The plaintiff unsuccessfully sued the defendant for damages but his appeal was allowed by Lord Goddard who ruled that the encroachment was a nuisance.

#### Delaware Mansions Ltd. v Westminster City Council [2002] 1 AC 321

**(All of the cases reported above were cited in the course of the judgment of Lord Cooke with which the other law lords agreed, making it a unanimous**

**decision. Italics and bold have been added by the author to parts of the judgment for the purpose of emphasis.)**

The first plaintiff was Delaware Mansions Ltd, a management company owned by the tenants of Delaware Mansions, which consist of 19 blocks divided into 167 flats, occupying the north eastern side of the road. The second plaintiff was Flecksun Ltd., a wholly-owned subsidiary of Delaware, which had acquired the freehold of Delaware Mansions in 1990 from the original owners and developers, the Church Commissioners. The plaintiffs sued the council as highway authority for the area and as owner of a London plane growing in the footpath of the highway some 4 metres from the front boundary of the property at Delaware Road, Maida Vale. At an initial trial, at which expert evidence had been given, the claim for damages by both plaintiffs was rejected. One of the plaintiffs, Flecksun, brought an appeal to the Court of Appeal which awarded them STG£835,430 damages. These were composed of the expenditure claimed, including removal costs of the leaseholders, plus interest. The council appealed to the House of Lords which handed down its judgment on 25 October 2001.

In the course of his judgment, Lord Cooke said the flats were held by the individual tenants under long leases granted by the Church Commissioners. On 5 April 1990, the Commissioners agreed to sell their freehold reversion to Flecksun for STG£1 but this nominal fee was not influenced by the effect of the plane tree on the property.

The tree was probably planted in the early years of the 20th century and at the time of the appeal hearing was almost as high as the five-storey brick Delaware Mansions. It stood somewhat isolated from other smaller trees, approximately between flats number 73 to 82 and 83 to 92. Damage by cracking came to be caused by the roots of the tree, through causing desiccation and shrinkage of the London clay soil, to blocks 9, 10, 11 and 12. The council owned the tree, one of no less than 7,000 – half of them London planes – within its jurisdiction. These were regularly inspected by an officer of the council, and tree pruning was carried out by contractors. Records showed that in 1983 the contractors were told to trim the crown of this tree by 50% and in 1986 by 25%. From the mid-1970s the tree had been allowed to develop a large crown. About this time, severe tree pruning went out of fashion, as people liked to see a more pronounced crown, and with lighter pruning the demand of the foliage for water increased and roots grew more extensively.

During 1989, a year of drought, Delaware's then managing agents began to receive reports from residents in blocks 9 to 12 that cracks were appearing in the structure. A report by structural engineers, CSP, concluded that the cracking had

been caused by the roots of the tree, and recommended that it be removed. If removal was not possible, they recommended underpinning. The report, which was not seen by the council, was made before the transfer agreement between the Church Commissioners and Flecksun. After the transfer, another firm of managing agents took over and they requested a qualified architect specialising in the refurbishment of London properties, F. G. Finch of Finch Associates, to look into the damage in more detail and to collaborate with CSP. Mr Finch endorsed the view that the worst cracking had resulted from foundation damage and said that remedial steps were urgently required. Underpinning was necessary, he advised.

Lord Cooke referred to a finding made by the trial judge: 'all or almost all of the structural damage which is the subject matter of the plaintiffs' claim had occurred as a result of the 1989 drought not later than March 1990. If, which is not certain, some further cracking took place in the superstructure after that date, that cracking in my judgment was the further consequence of the 1989 to early 1990 damage to the foundations.'

Continuing, he said the attention of Westminster Council appeared first to have been drawn to the problem on 14 August 1990, a month and three weeks after the transfer, when Delaware's managing agents, Chestertons, sent CSP's March report to Westminster. While there was no immediate response, it was agreed shortly after 3 January 1991 at a site meeting that pruning would be carried out.

Lord Cooke noted that there was a strong conflict of expert evidence at the trial but in the end the trial judge found on the balance of probabilities that the ground beneath blocks 10 and 11, and to a lesser extent blocks 9 and 12, had become desiccated as a result of the activities of roots belonging to the plane tree in front of block 11. Tree pruning was carried out in October 1991 while a pavement-level root barrier was inserted as previously agreed by Westminster.

(Note: The process of abstraction of water by tree roots, if it is to affect the stability of the soil as a support for structures, must cause a reduction in volume, which in a clay soil can occur by a reduction in moisture content –essentially drying out the soil. This process is technically called '*desiccation*'.)

The programme of underpinning works began in January 1992. In the following March and April the contractors found tree roots beneath the foundations to blocks 10 and 11. As a result, piles, instead of underpinning, were inserted. The work was completed in July 1992 at a cost to the plaintiffs, including the removal costs of the leaseholders while the work was going on, of STG£570,734. If legal cause of action could be established, these costs were

properly and reasonably incurred, ruled the trial judge.

The trial judge had accepted the argument put forward by Westminster that all the existing damage had occurred before Flecksun acquired the freehold and that only the Church Commissioners could sue for that damage and that Flecksun could only sue for fresh damage if and when it occurred. The Court of Appeal held, however, that Flecksun could recover on the basis that there was a *continuing nuisance*.

The authority for that proposition is a passage taken from **Hunter v Canary Wharf [1997] AC 655**, stated, in part: 'Thus where there is a continuing nuisance, the owner is entitled to a declaration, to abate the nuisance, to damages for physical injury and to an injunction.'

Lord Cook said there were dicta to the effect that, in the law of nuisance, root encroachment into a neighbouring property was similar to bough encroachment over the property. For instance, in **Lemon v Webb [1894] 3 CH 1, affirmed [1895] AC1**, it was held that a neighbour could lop boughs overhanging his property without notice to the owner of the tree, provided that he could do so without entering the owner's land. The judges all said that a similar right of abatement by cutting applied to encroaching roots. Notice is necessary, of course, before any entry can be made onto the neighbouring land for the purpose of abating a nuisance.

## DAMAGES FOR ROOT ENCROACHMENT – CASE LAW

The Lemon v Webb decision, however, was of no help in relation to the question of damages and there were only a few reported cases decided in England on damages for root encroachment. These were:

- **Butler v Standard Telephones and Cables Ltd. [1940] 1 KB 399** in which the damages were agreed but on liability (responsibility or fault) the judge found for the plaintiffs following the dicta in Lemon v Webb and the Irish case, **Middleton v Humphries [1912] 47 ILTR 160**.
- **McCombe v Read [1955] 2 QB 429** decided that an injunction would lie to restrain a continuing nuisance to property caused by encroachment of tree roots and that while damages for underpinning that had taken place were allowed, damages for later damage could only be recovered if the plaintiff could prove continuing damage from the same nuisance, in which event he could claim the damage accruing up to the date of judgment. An inquiry as to damage was ordered by Mr Justice Harman.

Lord Cooke also referred to **Davey v Harrow Corporation** (above), **Morgan v Khyatt [1964] 1 WLR 475**, (an appeal to the Privy Council from the New Zealand Court of Appeal), **Masters v Brent London Borough Council [1978] 1 QB 841**, **Leaky v National Trust for Places of Historic Interest or National Beauty [1980] QB 485** and to **Solloway v Hampshire County Council [1981] 79 LGR 449; [1981] 258 EG 859**. The last case in this line of decisions was **Hurst v Hampshire County Council [1997] 96 LGR 27** which was of no assistance to the point at issue as it turned on whether a highway authority had a sufficient interest in trees growing on the verge of the highway to be liable in nuisance for root damage. That point was not in dispute in this case. In fact, none of the cases just reviewed was concerned with the argument that remedial expenditure was not recoverable by the current owner for pre-transfer damage, except the Masters' case which was against the argument.

## REASONABLENESS AND FORESEEABILITY

Lord Cooke stated that he felt the answer to the issue could be found by applying two concepts – *reasonableness between neighbours* (real or figurative) and *reasonable foreseeability*. 'The great cases in nuisance decided in our time have these concepts at their heart,' he said.

Approaching this case in the light of those governing concepts and the findings of the judge (in the trial court) he thought there was a continuing nuisance during Flecksun's ownership until at least the underpinning and the piling in July 1992. It did not matter that further cracking of the superstructure might not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land was, in his view, itself a nuisance. Cracking in the building was consequential.

Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found.

The judge then referred to the Solloway case as being important as a salutary warning '*against imposing unreasonable and unacceptable burdens on local authorities or other tree owners*.'

Lord Cooke amplified this: 'If reasonableness between neighbours is the key to the solution of problems in this field, it cannot be right to visit the authority

or owner responsible for a tree with a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree. Should they elect to preserve the tree for environmental reasons, they may fairly be expected to bear the cost of underpinning or other reasonably necessary remedial works; and the party on whom the cost has fallen may recover it, even though there may be elements of hitherto unsatisfied pre-proprietorship damage or protection for the future.'

**'But, as a general proposition, I think the defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise. In this case, Westminster had ample notice and time before the underpinning and piling, and is in my opinion liable.'**

**Dismissing the Westminster Council's appeal and finding for Flecksun, Lord Cooke said: 'The law can be summed up in the proposition that, where there is a continuing nuisance of which the defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it. In the present case this was Flecksun.'**

## OTHER RECENT DECISIONS

Since the Delaware Mansions decision in October 2001, there have been further cases involving similar tree root damage issues decided by the English High Court (Technology and Construction Court). These were:

**L.E. Jones (Insurance Brokers) Ltd. v Portsmouth City Council [2002] EWHC CIV 1723**; **Moiz Ahmed and Ishrat Siddiqui v Council of the London Borough of Hillingdon** and **Bhajan Singh Sohanpal v Council of the London Borough of Hillingdon [2003] EWHC 726**.

The L.E. Jones case involved a claim for damages for nuisance and negligence brought against the local authority by the plaintiff insurance brokers who carried on business at a terrace house at number 208, London Road, Portsmouth. By agreement, the local authority was responsible to the highway authority, Hampshire County Council, for the maintenance of the trees on highways in Portsmouth, including the plane trees in London Road, one or two of which situated outside the claimant's premises, were claimed to have caused subsidence and consequential damage to the property in the years 1990, 1991 and 1992. The roots had encroached on the property and it was claimed that the consequential abstraction of moisture from the ground caused the subsidence. The claimant sought damages including the cost incurred in underpinning the

property.

The defendant claimed that the proper defendant was the highway authority, not its agent Portsmouth City Council but Judge Havery stated that the lawful exercise of control over the tree, in the absence of ownership, was sufficient to make the defendant capable of liability in nuisance to the claimant. The potential liability of the defendant in negligence was not dependent on ownership or occupation of the relevant land. Nor was it excluded by potential liability of the highway authority for the same negligence.

Dicta in both the Delaware Mansions and Solloway cases were sought to be relied on by the defendant as a basis for the argument that the defendant was entitled to be given an opportunity to abate the nuisance, and was deprived of that opportunity. However, Judge Havery said that the members of the House of Lords who decided Delaware Mansions were disposed to think that a reasonable landowner would have notified the defendant as soon as damage from the tree roots was suspected. The claimant did not do that. Nevertheless, in his judgment, the defendant was not deprived of a reasonable opportunity to abate the nuisance before the claimant committed itself to underpinning works.

Finding for the claimant, the judge accepted the expert evidence that future subsidence of the property could not be ruled out if further desiccation of the soil occurred. He said there was a continuing nuisance. The question whether the underpinning works were necessary bore upon quantum (amount of damages), not liability. The underpinning works were necessary unless the trees were to be properly managed. Both parties failed to raise the question of management of the trees.

'I conclude that the defendant is liable to the claimant in negligence and nuisance for damage consequent upon the subsidence of the claimant's property at number 208, London Road,' stated Judge Havery.

The issues that arose in the Delaware Mansions and L.E. Jones cases also emerged in the Siddiqui cases where, it was claimed, cracks in walls in two houses in a residential development in Ruislip, Middlesex, were caused by the roots of oak trees in nearby Ruislip Wood – an area of 320 ha of ancient woodland that had existed for many centuries - resulting in subsidence of the London clay soil for which the council, as owners of the freehold of the wood, was claimed to be liable in nuisance to the plaintiffs. The council disputed liability, contending that the probable cause of the damage was heave of the underlying soil, not subsidence, and thus not the result of any encroachment of tree roots from the Wood. Because of the similarity of facts, the judge ordered that both cases be heard together. In the first action, the agreed cost of the

remedial works was STG£110,000, and STG£98,445 in the second action. He held for the council and dismissed both actions, finding on the expert evidence that there was heave, not subsidence.

# 6.
# Liability for Poisonous Trees

The best way to consider the duty of care which the owner of a poisonous tree owes to third parties is to first look at the following rule: *The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence*.

This rule encapsulates the statement of the law made by Judge Blackburn in the Court of Exchequer Chamber and affirmed by the House of Lords in the famous Rylands v Fletcher case that was discussed in earlier chapters. While courts have diluted or limited the effect of the rule with many exceptions in the years since it was first expounded in the 1860s, it undoubtedly applies in the case of trees that are poisonous.

According to Clerk and Lindsell on *Torts*, the principle has no application in respect of things naturally on land. Accordingly, there was no liability for thistles which spread, trees which fell or rocks which fall from natural causes, for water naturally on land in a hole formed by quarrying which erodes the adjoining land, or for water naturally on land through the obstruction of a natural stream by natural and not artificial causes. In all these cases of vegetation or elements of nature naturally present on the land, strict liability was negated essentially because the occupier was not responsible for their presence there by accumulation or collection. There is decided case law to back up each of these situations where no liability was attached to the relevant landowner.

Trees would not normally be regarded as falling under the rule. One case that illustrates this is the dicta of Judge Wright in **Noble v Harrison [1926] 2 KB 332**, in which reference is made to a beech tree: ‘Such a tree is usual and normal incident of the English country; it develops by slow natural growth; its branches are not likely to cause danger, even if permitted to expand outwards over the highway. Such a tree cannot be compared to a tiger, a spreading fire or a reservoir in which a huge weight of water is artificially accumulated to be kept in by dams, or noxious fumes or sewage,’ said the judge.

(In this case the principle in Rylands v Fletcher was held **not** to apply to the branch of a tree liable to fall on the highway.)

However, where the trees are of a poisonous variety and their branches have encroached or, in the words of the rule in the Rylands’ case, are allowed to

'*escape*' into the property of adjoining or neighbouring property or public road and causes damage thereon, the tree owner might be fixed with responsibility or liability for the ensuing damage.

According to the leading Irish authority, McMahon and Binchy's *Irish Law of Torts*: 'It seems consistent with the basic principles of the rule in Rylands v Fletcher that liability should not attach to the occupier in respect of a tree not artificially grown by him unless he was aware or ought to have been aware of a danger arising in respect of it.'

## THE 'POISON TREE PRINCIPLE'

The 'poison tree principle' is something that has nothing to do with the law of nuisance or any other civil law. However, it is extremely important in criminal law in the courts in Ireland and in other common law jurisdictions. In the context of the arrest of a person suspected of having committed a criminal offence, for example, application of the principle could basically mean that if a court subsequently ruled that the arrest itself was unlawful for some legal reason, then everything that followed that unlawful arrest in relation to the suspect, such as his incarceration and perhaps even his conviction for the most serious criminal offence, would be tainted by the defective arrest and would also be held to be unlawful. A court so deciding would release the convicted man from custody.

Another example would be if gardaí carried out an unlawful search of a suspect's private property without any or any proper search warrant, then on the basis of the poison tree principle, everything that followed would be tainted by the poisonous or defective search and would likewise be struck down as being unlawful.

## POISONOUS TREES

The best known tree with poisonous properties is yew. Its botanical generic name, Taxus, is derived from the word 'toxic'. The poisonous substance is taxine, an alkaloid contained in the leaves and in the fleshy part of the root. The common yew, Taxus bacatta, is widespread in Northern Europe and is a native Irish species.

Laburnum is also poisonous. The danger lies in the seedpods, which can be mistaken for green peas.

Box and rhododendron leaves may be harmful to grazing animals if large quantities are eaten on an empty stomach, according to experts, as may happen when grass is not available. Other poisonous varieties of trees are cherry laurel, daphne (mezereon), horse chestnut, privet and spindle. Practically all the case law dealing with poisonous trees are in respect of yews. According to *The Arboriculturalist's Companion: A Guide to the Care of Trees*, the foliage of yew trees seems to be rather more poisonous when it is dead and the leaves have withered, as occurs in the case of hedge clippings.

## CASE LAW

It should be emphasised that each of the following cases was decided on its own facts and circumstances or, as lawyers say, on its own merits, as are most cases where the court decides the issues after hearing the evidence of witnesses, their cross-examination and legal submissions, if any.

#### Wilson v Newbury [1871] 7QB 31

The defendant owned a number of yew trees and knew that the clippings of yew trees were poisonous to horses and cattle. Clippings from the yew trees were placed on the plaintiff's land and it was alleged that the defendant had not taken proper care to prevent this happening. As a consequence, the clippings were eaten by the plaintiff's horse and died.

The court held that the defendant was not liable, since there was no evidence that he had, in fact, clipped the yews or that he knew that the trees had been clipped or that he had placed the clippings on the plaintiff's land.

#### Ponting v Noakes [1894] 2 QB 281

The plaintiff and the defendants occupied adjacent fields separated by a fence and ditch owned by the defendants. A yew tree stood on the defendant's side of the ditch and its branches extended over the fence and partly over the ditch but no part of the tree extended over or up to the plaintiff's boundary. The branches, however, were within reach of the plaintiff's horse which died as a result of eating leaves from the yew tree.

The trial court held that the defendants were not liable on the grounds that there was no duty on them to take measures to prevent the horse belonging to the plaintiff from having access to the tree.

The plaintiff brought an appeal against that ruling but lost. The appeal court held that the tree was wholly within the defendants' boundary and that the horse had to reach over the boundary to eat the yew leaves and therefore had committed a trespass. It also held that there was no obligation on the defendants to fence out the neighbour's animals.

**Crowhurst v Amersham Burial Board [1878] LR 4 Ex.D.5**

The facts of the case were that the defendants had planted a yew tree on their land, 1.2 metres (4 feet) from their boundary. Its branches grew through the boundary railings and projected into the plaintiff's field. The boundary wall was about 0.6 metres (2 feet) high and was topped by iron railings a further 0.6 metres in height. The plaintiff's horse ate some of the poisonous leaves and died.

The plaintiff claimed that the defendant was negligent in permitting the yew branches to grow over the boundary. He also claimed that the fence was not high enough.

The court ruled in favour of the plaintiff and the Court of Appeal affirmed this.

This decision follows the ruling in Rylands v Fletcher, namely that if a person brings onto his land something which is dangerous or harmful and he allows it to escape, he will be held liable for any injury which may result.

**Erskine v Adeane [1873] LR 8 Ch. 756**

A yew tree grew in a plantation in the defendant landlord's land and a branch of the tree extended into a portion of his land, which he had let to the plaintiff tenant. Sheep belonging to the plaintiff ate some of the yew leaves from this tree and died.

It was stated in evidence at the trial that some time previously the plaintiff had lost 105 sheep after they ate the clippings of yew trees thrown over the fence by the defendant's gardener. The defendant would not agree to erect a fence around the plantation before the stock were poisoned.

It was held that the landlord owed no duty to his tenant to keep his yew trees on his own land, and so he was not liable if his tenant's sheep ate overhanging yew leaves. There was no contract between them about fences. He was not liable since the yew trees were quite apparent when the plaintiff agreed to rent the farm.

A second judge held that the rule in such a case was '*caveat lessee*' – a tenant must take the land as he finds it. He had taken the farm with his eyes open and without asking for a covenant from the defendant landlord to maintain a stockproof fence around the plantation. Judgment was given for the defendant.

**Cheater v Cater [1918] 1 KB 247**

The plaintiff was the tenant of the defendant. A field, which was occupied by the defendant, was separated from another field, which he had let to the plaintiff, by a yew hedge. The hedge overhung the plaintiff's land by about three feet and a horse, which belonged to the plaintiff, ate some of the yew hedge and consequently died.

It was held that the defendant landlord was not liable, in accordance with the judgment in Erskine v Adeane. The plaintiff appealed but the appeal was dismissed.

# 7.
# Falling Trees – Where Liability Rests

Scarcely a year goes by that we are not reminded by newspaper headlines of the extent of damage that can be caused by falling trees. 'Tree falls on forestry worker' (24 March 2004), '10 people injured after tree crushes mini bus' (21 February 2002), 'Mother of 7 and 12 year-old-son killed instantly when tree fell on their car' (11 November 1997), 'Woman and 7-year-old boy die after tree falls on car' (4 November 1996), are just a few of the tragic incidents that occurred in recent years involving death and serious personal injuries. The law of negligence principally governs this very contentious area involving the fall of trees, branches and other forms of natural growth.

The general statement of law that applies in the case of trees falling on the public road is that the owner of the tree is liable if he knew or ought to have known that the tree was dangerous. He is not bound to call in a tree expert to examine the trees but the law fixes him with an obligation to keep a look out and to take notice of such signs as would indicate to a prudent landowner that there was a danger of a tree falling.

## LEADING IRISH CASES

At this stage, it must be emphasised again that each and every case is decided on its own facts and circumstances, as was the situation with the cases that are reported here. One of the leading cases Irish cases was decided almost 50 years ago in:

#### Gillen v Fair [1956] 90 ILTR 119

This was an appeal taken from the Circuit Court to the High Court and arose out of an accident that occurred on the road between Foxford and Castlebar, Co Mayo, when the branch of a large ash tree, measuring about 21 metres (70 feet) high and 1.5 metres (5 feet) in diameter, growing at a point 8.5 metres (28 feet) from a wall which was 1.2 metres (4 feet) from the highway (9.7 metres (32 feet) in all from the highway), fell during stormy weather onto a passing car, killing the driver and injuring the plaintiff who was a passenger in the car.

Evidence was given that the tree, which was about 130 years old, was rotten in some respects but the defects, being high up, were not apparent at a casual glance and the owner was not aware of their existence.

The Circuit Court rejected the plaintiff's claim and an appeal was taken to the High Court, which dismissed the appeal. Mr Justice Lavery said that the condition of the tree could not reasonably have been discovered by an ordinary prudent landowner. It had been proved rotten in some respects, but this was high up where there was block spot and fungus and the bark had come off.

The standard of care required of a farmer in Co Mayo having trees growing on his land adjoining a highway might not be as high as that required of an owner of a tree growing beside a highway in a densely populated, built-up area. In his view the fact that the tree in this case had a defect, which in a storm might cause it to fall, was such a latent defect that it was not discoverable by ordinary inspection or reasonable care.

He held that the standard of care required was that of the ordinary, prudent landowner and that treating the plaintiff's case as one of nuisance did not put it any further. The case failed in nuisance as well as in negligence.

A similar ruling was made in a recent Irish case where the High Court laid down a number of important guidelines in terms of the responsibility that a landowner with trees on his land owes, not only to his neighbour where the tree or trees abut his neighbour's land, but to road users where the trees are adjacent to the highway. Like the previous case, this also was an appeal from the Circuit Court.

#### Lynch v Hetherton [1991] 2 IR 405

The plaintiff was driving his motor car along a country road in Co Westmeath, when a large ash tree which was growing on the defendant's land adjacent to the public road suddenly fell down across the road, hitting the plaintiff's car and causing extensive damage to it but not injuring the driver or his passengers. It was not a day of abnormally high winds. Subsequently, it was found that the tree was rotten on the inside but there were no external signs of disease or decay. The defendant inspected his trees regularly but he did not employ an expert to examine them.

The plaintiff brought a claim in the Circuit Court claiming damages for negligence and nuisance against the defendant. Judge Matthew Deery found in favour of the plaintiff but made a finding of contributory negligence against him, holding him to be 30% liable. He assessed damages at IP£5,390 and having

reduced the figure as a result of the apportionment of fault, gave a decree for the plaintiff for IP£3,773 and costs. The defendant landowner appealed to the High Court, which allowed the appeal and dismissed the plaintiff's claim.

Mr Justice Rory O'Hanlon, giving the judgment of the court, made a number of important findings:

1) The fall of the tree was caused by some inherent defect in the condition on the tree.
2) A landowner, who has a tree or trees on his land adjoining a highway or his neighbour's land, is bound to take such care as a reasonable and prudent landowner would take to guard against the danger of damage being done by a falling tree, and if he fails to exercise this degree of care and damage results from such failure on his part, a cause of action will arise against him.
3) For a plaintiff to succeed in an action for damages arising out of an incident of this kind, he must establish as a matter of probability that the landowner was aware, or should have been aware, of the dangerous condition of the tree.
4) The onus of proof will be discharged if the plaintiff can show that a proper inspection of the tree at reasonable intervals would have forewarned the owner that it was getting into a dangerous condition and that the danger should have been averted by lopping or felling or by other suitable means.
5) The standard of care required was that of the ordinary prudent landowner (as was decided in Gillen v Fair).
6) The defendant had exercised the degree of care that would have been exercised by a reasonable and prudent landowner in satisfying himself that the tree, which fell, should be regarded as a danger to persons using the highway and, accordingly, he was not liable for the accident.

In the course of the hearing, most of the English cases reported hereunder were cited in argument. With regard to the issue raised at no. (5), namely the standard of care required of a tree owner, Mr Justice O'Hanlon considered two English cases in particular: **Caminer v Northern and London Investment Trust Ltd [1951) AC 88** and **Quinn v Scott [1965] 1 WLR 1004**. He said the decision in Caminer was considered by Mr Justice Glynn-Jones in Quinn v Scott where the tree that fell across the highway was a beech tree, about 200 years old and about 27.5 metres (90 feet) high, showing signs of scanty foliage and die-back, and being of an age when decay was to be apprehended. It was one of a belt of trees of similar type, owned by the National Trust, and bordering the public road for

a distance of about a mile. Commenting on the speech of Lord Normand in Caminer, Mr Justice Glynn-Jones said: 'But, in my opinion, there may be circumstances in which it is incumbent on a landowner to call in somebody skilled in forestry to advise him, and I have no doubt but that a landowner on whose land this belt of trees stood, adjoining a busy highway, was under a duty to provide himself with skilled advice about the safety of the trees.'

He held they had, in fact, employed such skilled advisers, but they had failed to detect the signs of decay and danger in time, although these should have been apparent to them on reasonable examination of the trees. In these circumstances Mr Justice Glynn-Jones gave judgment against the landowner.

Continuing with his judgment, Mr Justice O'Hanlon said that in the circumstances of the present case, and having regard to the principles enunciated in the judgments he had referred to, he considered that the defendant exercised the degree of care that would have been exercised by a reasonable and prudent landowner in satisfying himself that the tree which fell should not be regarded as a danger to persons using the highway.

'Even if a higher degree of care were demanded of him, such as arose in the particular circumstances of Quinn v Scott, involving the employment of an expert to advise about the condition of the tree, the evidence adduced in the present case has failed to satisfy me as a matter of probability that the internal decay of the tree would have been detected as a result of such expert examination, and I have been left with the impression that there were probably no external signs of disease or decay visible on the tree prior to the accident,' he added, in holding that liability for the accident had not been established against the defendant.

## ENGLISH LINE OF AUTHORITY

A long line of English cases on this and related topics begins with **Noble v Harrison [1926] 1 KB 332**. The short facts of the case were that a branch of a beech tree, which overhung the highway at a height of 9 metres (30 feet) above the ground, broke off in fine weather and fell on the plaintiff's motor vehicle, causing loss and damage. The County Court judge, who tried the case, held that the defendant tree owner did not know that the branch was dangerous and the failure was caused by a latent defect not discoverable by reasonable inspection. The judge ruled that the defendant was, however, liable in nuisance and awarded damages to the plaintiff. The defendant appealed the ruling.

Further evidence was given in the course of the appeal that the tree from which the branch broke was at least 80 years old and that the branch was 6.1 to 7.6 metres (20 to 25 feet) long. It broke off in fine weather at a point 4.6 metres (15 feet) from the trunk due to a crack into which water had penetrated.

One of the Appeal Court judges found that there was no negligence. As regards the law of nuisance, he said the fact that the branch overhung the highway was of no significance. He posed the following question: 'Can the defendant be held liable when he neither knew or ought to have known of the danger? The answer is no!'

The second appeal Court judge said that the evidence was that the tree was carefully inspected. An overhanging branch was not *per se* a nuisance - it became a nuisance when a latent defect developed without any visible sign. The court allowed the appeal and dismissed the plaintiff's claim.

In summary, the court ruled that the landowner was not liable when the tree branch, which overhung the public highway, fell on a motor coach which was passing, due to a latent defect that was not discoverable on reasonable examination.

## CONFLICTING EXPERT EVIDENCE

Similarly, a landowner was held not liable when a tree fell on the highway, owing to a disease of the roots, and caused a motorcyclist to collide with it in the dark. The disease was not visible on an external inspection of the tree. This was decided in the following case, which also shows how experts can give conflicting evidence and the degree of difficulty that judges are faced with in that situation when trying to do justice between opposing parties:

#### Cunliffe v Bankes [1945] 1 AER 459

The facts of the case were that a 50 year-old elm tree was blown down and caused the death of a motorcyclist who rode into it. It had been growing in a belt 6 metres (20 feet) inside a wall, which was 1.5 metres (3 feet) high. When it fell, it rested on the wall with its top on the side of the road, 0.9 metres (3 feet) from the road surface.

During the hearing, a forestry expert testified for the plaintiff that he viewed the remains of the tree 11 months after the accident and gave his opinion that the tree died as a result of a disease known as honey fungus and that it was in an

advance state of decay. He had found evidence of the fungus under the bark and in his opinion the tree had been diseased for five years, and that evidence of decay had been visible from that time and should have been noticed. The trunk was sound but the roots had gone, and a reasonable inspection would have shown it.

For the defendant, a forestry expert said he had made an annual inspection of the trees and he would mark those with signs of disease. He had found nothing wrong before the accident. He agreed, however, that the tree had honey fungus (when it was inspected after it fell) but said that it may have spread rapidly through the stem. Other elms had been felled because of disease. The bark of the tree which caused the accident, looked healthy but 0.7- 0.9 metres (2 or 3 feet) of the top part of the tree had perished. When sawn up the trunk was found to be sound.

Finding for the defendant, the judge said that there was no certainty that an examination of the tree the previous summer would have shown the presence of honey fungus. It was extraordinarily difficult to prove a case of this kind.

## HOUSE OF LORDS RULING

Likewise, in another English case, a landowner was found not liable when an elm tree growing on his land adjoining a busy road fell on people who were passing by. The tree was apparently sound and healthy and it was not proved that examination by an expert would have revealed the danger. This was the verdict by the **House of Lords in Caminer v Northern and London Investment Trust [1951] AC 88**.

The elm tree was stated to be 120 to 130 years old with a large but not abnormal crown of branches 26 metres (85 feet) wide. After it fell its roots were found to be affected by ‘Elm butt rot’ which was of long standing but not apparent earlier. Evidence was given that elm trees are shallow rooted and liable to fall. At the initial trial where the action founded on negligence and nuisance was taken, the court held in favour of the plaintiffs and awarded them damages against the tree owner on the grounds that the tree fall was due to non-lopping of the branches, action of wind in the crown and rot in the roots.

The defendant appealed successfully to the Court of Appeal after which the plaintiff brought a further appeal to the House of Lords. (As with the Supreme Court in this jurisdiction, such appeals are grounded on legal argument by barristers, and occasionally by solicitors, in addition to a review of the evidence

and findings of the court below based on the transcripts. The court of final appeal in both jurisdictions does not hear any oral evidence.)

The plaintiffs' case rested on the fact that elm trees are notoriously dangerous and that either whole trees or branches are liable to fall suddenly. This, he argued was a matter of common knowledge and is generally recognised by landowners and people living in the countryside. In addition, this particular tree had never been lopped and this should have been obvious to the defendant. The test applied by the Court of Appeal was what a prudent and reasonable landowner would do. In their view he was under a duty either to lop or top the tree or to take advice of an expert as to necessary steps for public safety. If the owner had done this, the tree would not have fallen when it did. A landowner must take such steps as dictated by common knowledge about elm being unstable, and take positive action. The defendant's error was to apply the test of eyesight instead of that of the mind. The test, he submitted, was what knowledge, actual or implied, must be imputed to a reasonable landowner.

The defendant landowner pleaded that insofar as the tree was apparently healthy and sound and that the evidence did not establish that inspection by an expert would have revealed that it was dangerous, he was not liable in either negligence or nuisance. His case was that although the tree was diseased to a serious degree, the disease was not detectable by ordinary methods and no inspection would have brought out the true cause of the accident.

A reasonable landowner cannot be expected to have the knowledge of an expert, although he can be presumed to know of the usual dangers inherent in elm trees, such as their shallow rooting and tendency for branches to fall.

The five law lords, with one dissent, reversed the judgment of the original trial court and decided in favour of the defendant landowner.

#### Shirvell v Hackwood Estates Ltd. [1938] 2 KB 577

This landlord and tenant action arose out of circumstances in which a branch fell from a partly dead beech tree and killed a servant of the tenant who was working underneath. The court of trial and the Court of Appeal held that the defendant landowner was not liable.

The evidence was that the tenant had rented the land with the dead branch overhanging it. It was pleaded on behalf of the defendant that the farmhand, who was employed by the plaintiff tenant, had paid no heed to the sound of the branch cracking and was therefore guilty of contributory negligence. It was also pleaded that he was negligent in remaining under the tree when he knew or ought to have

known that it was dead and likely to fall. In addition, it was pleaded that the plaintiff ought to have complained to the owner about the state of the tree before the accident and that he ought to have warned the worker. It was pointed out that the situation was the same as when he took the tenancy of the land.

A forestry worker testified that the tree was alive but not sound for 4.9 metres (16 feet) up and that the rest of it was dead. It might stand for five years but there was a danger of the overhanging branch breaking off. The general appearance of the tree would indicate danger to anyone who knew about forestry and what happened might have been expected. A second forestry worker said he had spent two days examining the trees on the estate and he did not notice this particular tree until after the accident. It was sound up to the 4.9 metres and was not in as bad a condition as many other trees on the estate.

In the Court of Appeal it was pleaded by the defendant that the tenant should have given notice that the branch was in danger and that if the owner did not take action, he (tenant) had a clear right to remove the branch.

Dismissing the appeal, the court ruled that the defendant landowner was not negligent. In doing so, it applied the decision in another landlord and tenant case, **Cheater v Cater [1918] 1 KB 247**. In that case yew trees were overhanging from the adjoining land retained by the landlord and poisoned the cattle on the tenant's lands. The court ruled that the landlord was not liable.

According to Clerk and Lendsell on *Torts*, the decisions of the courts in these landlord and tenant cases were authority only where the danger was in existence at the time of the tenancy and had thus been impliedly accepted by the tenant.

In the cases cited above, the tree owners all escaped liability but the following are cases where the tree owners were held to be liable.

#### Brown v Harrison [1947] 177 LT 281

A decayed tree fell on a highway and injured the plaintiff. It was stated in evidence that the tree was an old horse chestnut, which stood about 9.1 metres (18 feet) from the public road. It had been decaying for many years and showed signs of being dead at the top; the leaves were very restricted. The trunk, however, showed evidence of life. The tree fell during a storm that was not considered unusually violent. A forestry worker told the court that when a tree died, the roots rotted away, sometimes before and sometimes after the branches. A dead tree was liable to fall.

Finding in favour of the plaintiff, the court held that although a tree in itself was not a dangerous object, in decay it might become so. In this case there was

a danger which was apparent not only to an expert but to an ordinary layman if he chose to notice it - the tree was so old it had become a danger and this should have been apparent to its owner. The owner had not acted as a normal reasonable landowner if he failed to notice it and to take reasonable steps.

**Quinn v Scott [1965] 1 WLR 1004**

Parts of the judgment in this case were referred to in the judgment in the Irish case Lynch v Hetherton, at the beginning of this chapter.. The facts were that in the summer of 1961 the plaintiff, Quinn, was driving a minibus along a road by a belt of broadleaf trees belonging to the National Trust when he saw a beech tree falling in front of him. He stopped in time but a car driven by Scott, coming the other way was struck by the tree and crashed into the minibus.

The court ruled that Scott was not liable. In the case against the National Trust, the evidence was that the beech tree which fell was about 200 years old and nearing the end of its normal expectation of life. There were visible signs of thinness of foliage and die-back (dead branch tips) in the crown of the tree, which indicated that the tree was unhealthy. These signs ought to have been noticed at the various inspections made by the forester or by the woodmen. Either they had not noticed or, if noticed, the signs were not thought sufficiently significant to be reported to the land agent of the National Trust.

Mr Justice Glynn-Jones said in the course of his judgment: ‘My task in this case is to decide what is the duty of the National Trust. Their duty is to take such care as a reasonable landowner - and that means a prudent landowner – would take to prevent unnecessary damage to users of the highway. There is not to be imputed to the ordinary landowner the knowledge possessed by a skilled expert in forestry. In my opinion, they were under a duty to provide themselves with skilled advice about the safety of the trees.’

He continued: ‘The facts were that the tree, which was between 90 and 100 feet [27-30 metres] tall, stood 53 feet [16.2 metres] west of the highway. There was no protection against the westerly winds. The tree was old and had reached a stage when disease was to be apprehended. There was the appearance of unhealthiness in the thinness of the foliage and the indications of die-back. A reasonable landowner ought to have said, “Let the tree be cut down at once”.’

He concluded that the Trust had not acted as a reasonable landowner and he awarded damages of STG£2,500 to Quinn. The judge then offered advice for organisations like the National Trust for whom he expressed some sympathy and reminded them that the safety of the public must take precedence over the

preservation of amenity: 'The commercial grower of timber will not leave a tree standing when there is a risk of decay. But a landowner with a conscience of amenity does not ruthlessly cut down every tree as soon as it pays him to do so. He has some regard for the beauty of the tree and the countryside. The National Trust is, and must be, careful of the amenity value. I am, however, bound to take the view that in the present case the safety of the public must take precedence over the preservation of the amenities and cannot hold that the Trust's duty to care for the countryside diminishes in any degree the duty not to subject the users of the highway to unnecessary damage.'

## WARNING LIGHT ON FALLEN TREE

**Hudson v Bray [1917] KB 520**

A large elm tree was blown down during a violent storm one night in December 1915. It lay across the road some 9.65 metres (3 feet, 2 inches) above the road surface supported by the banks on either side. It took the local road authority four days to clear the tree. On the first night, the road foreman asked the owner of the land on which the tree had stood to put a lamp on it as a warning. This was not done and on the second night a motorist ran into the tree. He sued the landowner who pleaded that the fall of the tree was 'Act of God' and consequently there was no obligation on him to remove the tree or to light it.

The court ruled that there was no obligation on an occupier of land on which a tree was growing and which fell across a highway without any negligence on his part to light the tree or to place someone there to warn of the existence of an obstruction before it was removed and he gave judgment for the landowner.

If a similar set of circumstances arose today, the plaintiff would be advised to sue the road authority for damages for negligence on the basis that their servant or agent, namely the foreman, was aware of the danger posed by the fallen tree on the very first night did nothing to warn road users of the obstruction on the highway when he ought to have.

## DUTY OF OCCUPIER

With regard to trees and other natural growth projecting over or into the highway, the duty of an occupier is based on reasonable foreseeability of harm. Thus the occupier who employed independent contractors to fell a tree adjacent to the highway was not liable for resulting damage unless there was some

inherently dangerous or specifically hazardous risk to highway users. This was decided by the English Court of Appeal in **Salsbury v Woodland [1970] 1 QB 324**.

Telephone wires led from a pole on the far side of the highway to the eaves of a house 12 metres (40 feet) away. The first defendant, who had just bought the house, wanted a large hawthorn, some 8 metres (25 feet) high, removed by an expert. The second defendant, apparently competent, undertook the task at the instance of the first defendant's wife, but mismanaged it so badly that a branch of the falling tree broke the wires near the house and they fell across the highway. The plaintiff, who had been watching from next door, saw that the wires were a danger to traffic and went on to the road to try to remove them, but before he could do anything the third defendant rounded the corner at speed. To avoid being struck by the wires with which the third defendant collided, the plaintiff flung himself down on the grass verge, an act which, thanks to a pre-existing back condition, caused him fairly severe injuries.

The trial judge gave judgment for the plaintiff against all three defendants, i.e. the occupier, the tree-feller and the motorist. The occupier's appeal was allowed while that of the motorist was dismissed.

# 8.
# High Boundary Trees – Anti-Social Behaviour

Apart from the damage, nuisance and annoyance caused between neighbours when certain types of evergreen trees are allowed to grow very tall, cutting off light, view and even heat from the sun to the adjoining property, there may someday in this country be legislation brought to bear against such thoughtless or uncaring neighbours, including criminal or pseudo-criminal sanction. While that day may be some way off in Ireland, it was due to become a reality before the end of 2004 in England and Wales.

We are not concerned here with the nuisance caused by overhanging branches from boundary trees or with roots from those trees that encroach into neighbouring property. Rather are we concerned with the situation that arises when two or more conifers or shrubs, planted side by side between adjoining properties, are allowed by their owner to grow more than 2 metres high.

There has been a long history of trees and high hedges causing bitter disputes between neighbours. It has become the subject of a long-standing campaign in England by politicians and pressure groups, such as Hedgeline, who have campaigned vigorously for the introduction of legislation in this controversial area. In recent years, a number of private member bills urging curtailment of the height of such hedges were presented to the Parliament in the form of High Hedge Bills but were subsequently withdrawn when the British Government introduced legislation governing the height of hedges and related issues. This was scheduled to come into effect later this year. The provisions relating to high hedges form part of an ingeniously-crafted Anti-Social Behaviour Act, 2003 (England), and because they serve as a precedent for possible similar future legislation in this country – as much English legislation historically does – they will be reproduced in this chapter for the purpose of illustration.

Until now, there was no maximum height in England beyond which tree owners must not allow their trees or hedges to grow. They could be as tall as the owner wished, provided they did not cause damage to neighbouring property. The only restrictions that could be imposed were those relating to planning permission conditions or, perhaps, a covenant in the title deeds to property.

Part 8 of the Anti-Social Behaviour Act, 2003, is entirely devoted to ‘High Hedges’. Responsibility for the administration of the new legislation falls on the

deputy Prime Minister's office. The new high hedges law is built into sections 65 to 84 of the Act. It provides that the owner or occupier of a domestic property may complain that their 'reasonable enjoyment' of their property is being 'adversely affected' by the 'height of the high hedge' situated on land owned or occupied by another person. 'Domestic property' means dwelling, or a garden or yard which is used and enjoyed wholly or mainly in connection with a dwelling. 'Dwelling' means any building or part of a building occupied, or intended to be occupied, as a separate dwelling.

'High hedge' is defined as '(a) is formed wholly or predominantly by a line of two of more evergreens; and (b) rises to a height of more than two metres above ground level'. Therefore, if the hedge is less than 2 metres tall, a complaint may not be made. However, section 66 states that a line of evergreens is not to be regarded as forming a barrier to light or access if the existence of gaps significantly affects its overall affect as such a barrier at heights of more than two metres above ground level. Evergreen is defined as evergreen tree or shrub or a semi-evergreen tree or shrub. Tree roots are expressly excluded from the new legislation. (A person who wishes to bring an action for damages for root encroachment has a right in common law to do so, see chapter 6.)

Of course, no complaint should be taken if neighbours can settle their dispute amicably. This is basic common sense and applies as much to disputes over the height of boundary hedges as it does to any other form of dispute that has a potential to end up in court with consequent professional fees and costs to carry.

If, however, the dispute over the height of the hedge cannot be settled, then, on payment of a fee, a complaint may be taken to the local authority in whose area the hedge owner's land is situated. The local authority, which will have discretion to refund the fee in whole or in part in certain circumstances, may refuse to accept the complaint if it is satisfied that the complainant has not taken all reasonable steps to resolve the matter. It may also decline to accept it if it considers that the complaint is frivolous or vexatious.

(This is a discretion that is also built into the rules of the Circuit and High Courts in Ireland, where one party to an action may bring an application to the court to have the proceedings against it dismissed on the grounds that the claim was frivolous or vexatious in the sense that the claim was unfounded for any one of a number of reasons, including that the action may have been taken maliciously.)

The Act provides that if the local authority accepts the complaint as valid, it is then obliged to investigate it and decide whether or not it is justified. By this is meant whether the height of the high hedge actually adversely affects the

complainant's reasonable enjoyment of their domestic property. The authority, which will be equipped with guidance notes and advice on such issues, must then notify its decision and its reasons for it to the complainant and to the hedge owner.

If the local authority decides that the hedge is too high, a remedial notice will be issued to the hedge owner specifying:

- Initial action to be taken by the hedge owner to reduce all or part of the hedge to the height calculated to be reasonable.
- Any preventative action that must be taken to prevent the recurrence of the adverse effect.
- The penalties for failing to comply with the remedial notice.

Section 69 of the Act specifies that a remedial notice was not to require or involve a reduction in the height of the hedge to less than two metres above ground level, or the removal of the hedge. Crucially, the remedial notice is valid as a local land charge on the deeds of the property, even if the property changes ownership.

The notice will give a time frame for the hedge owner to comply. Either party may appeal the local authority's decision if they are not satisfied with it under a specific procedure. But, should an appeal not be taken and should the hedge owner fail to comply, the local authority is empowered to enter the property, carry out the works themselves and recover the full cost of the work from the hedge owner by way of court action. These costs are recoverable as a local land charge on the property and would remain a burden on the property. This is probably the most severe penalty because it would effectively mean that his ability to sell the property would be hampered unless the burden was discharged through payment of the costs registered against the property.

The Anti-Social Behaviour Act, 2003, creates the offence of failing to comply with a remedial notice. The hedge owner may be fined up to STG£1,000 if found guilty by a Magistrates Court (the equivalent of the District Court in Ireland). The court may also order the offender to carry out the works directed and, should he still fail to comply, without reasonable excuse, the court may fine him at a rate of STG£50 for every day that the works remain uncompleted. A local authority worker is afforded protection by the Act should it be necessary. It is an offence to wilfully obstruct an officer of the council exercising a power under the Act and a court may impose a fine of up to STG£1,000 in this regard.

If the hedge owner is a company, as distinct from an individual, the new law will still apply, not only to the legal entity itself but also to its individual officers.

Section 78 provides that where an offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, will be guilty of that offence and be liable to be proceeded against and punished accordingly.

## RECENT CASE

The extent of the legal cost of a boundary dispute between neighbours was outlined in the English Court of Appeal, as reported by *The Times* (31 March 2004).

The evidence was that the defendants, a husband and wife, fell out with their neighbour, the plaintiff, in Essex when the husband chopped down a laurel and yew hedge between the two properties. Both households believed the hedge to be within the boundary of their properties but the plaintiff, a lawyer, won the backing of a judge in the County Court when he sought a ruling on the boundary. The Court of Appeal ratified the decision. The plaintiff said that when he bought the property in 1968, the 4.3-4.9 metres (14-16 feet) high hedges were a very distinct boundary feature. He claimed they were his property under a 1968 conveyance, but the defendants said they were not a boundary but a belt of woodland.

In the Court of Appeal, Mr Justice Waller ordered the defendants to make an interim payment of STG£25,000 to the plaintiff and he also directed that both sides would have to return to court to seek a ruling on the precise line. (Afterwards, the defendant husband and wife were reported as saying that they would have to sell their home to pay the STG£350,000 costs of their three-year legal battle.)

## THE RIGHT TO LIGHT

While the Act appears silent as to what ‘reasonable enjoyment’ of property is, common sense would dictate that it would include right to light in a general way. Right to light is often quoted in relation to trees cutting out light to adjoining property. While there may be an established right in the case of new buildings obstructing light, there does not appear to be any precedent that trees cutting out light can infringe a person’s right to light. However, that could soon change if

the proper case comes along, such as a complaint under the Anti-Social Behaviour Act by a domestic property owner claiming that his ‘reasonable enjoyment’ of property in the form of natural light being denied him by his neighbour’s tall evergreen trees or shrubs (see also Chapter 11).

# 9.
# Occupiers' Liability

The owners and occupiers of woods and forests have a legal responsibility for injury or damage to persons or property while on their land. Through the tort of negligence, the common law fixed such property owners with liability not just to visitors but also to trespassers. The law has since been amended, extended and formulated into legislation known as the Occupiers' Liability Act, 1995. In order to work within this law it is important for owners and occupiers to understand some of its technicalities and how it came into existence.

Until 1995, the level of the common law duty of care owed by an occupier, e.g. a farmer, a supermarket owner or a householder, to an entrant on his property depended on the classification of the particular entrant. There were three such entrants:

- Invitees – visitors whose presence benefited the occupier. The duty owed to them was to prevent damage from unusual dangers of which the occupier was, or ought to have been, aware.
- Licencees – visitors permitted on the property but who brought no benefit to the occupier. The duty owed by an occupier was to warn the entrant of and to refrain from exposing him to hidden dangers or traps.
- Trespassers – any entrant not an invitee or licencee. The occupier owed a duty not to injure the entrant deliberately or act with reckless disregard of his presence.

The problem raised by case law which came before the Irish courts was that the distinctions between invitees and licencees and between unusual and hidden dangers had become unreal and irrelevant. In addition, the Supreme Court interpreted the law in a way that had shifted the emphasis away from a duty based on classification to one based on the essential law of negligence, incorporating what was said to be a humanitarian *duty towards one's neighbour* (see chapter 2), be he visitor or trespasser.

After the Law Reform Commission produced its consultation paper on occupiers' liability in June 1993, legislation was enacted in 1995, which gave effect to recommendations made in that report.

## OCCUPIERS' LIABILITY ACT, 1995

Section 8 of the legislation states that the duties, liabilities and rights provided for by the Act replaced those previously attached by the common law to occupiers of premises in respect of dangers existing on their premises to entrants on them. The Act radically reformed the law relating to occupiers liability and does not have retrospective effect.

The Act defines 'entrant', in relation to a danger existing on premises, as a person who enters on the premises and is not the sole occupier. 'Visitor' is defined as a recreational user or trespasser. 'Recreational activity' means any recreational activity conducted, whether alone or with others, in the open air (including any sporting activity), scientific research and nature study so conducted, exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archaeological or scientific importance.

## DUTY OWED TO VISITORS

According to the Act, an occupier of premises owes a duty of care ('the common duty of care') towards a visitor except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5. 'Common duty of care' is defined by the Act as a duty to take such care as is reasonable in all the circumstances, having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.

As it is an extremely important section and there are a number of references to it in this chapter, it seems appropriate that we should set out the full extent of section 5.

Section 5 (1) An occupier may by express agreement or notice extend his or her duty towards entrants under section 3 and 4.

(2) (a) Subject to this section and section 8, an occupier may, by express agreement or notice restrict, modify or exclude his or her duty towards visitors under section 3.

(b) Such a restriction, modification or exclusion shall not bind a

visitor unless –

(i) it is reasonable in all the circumstances, and

(ii) in case the occupier purports by notice to so restrict, modify or exclude that duty, the occupier has taken reasonable steps to bring the notice to the attention of the visitor.

(c) for the purposes of paragraph (b)(ii) an occupier shall be presumed, unless the contrary is shown, to have taken reasonable steps to bring a notice to the attention of a visitor if it is prominently displayed at the normal means of access to the premises.

(3) In respect of a danger existing on premises, a restriction, modification or exclusion referred to in subsection (2) shall not be taken as allowing an occupier to injure a visitor or damage the property of a visitor intentionally or to act with reckless disregard for a visitor or the property of a visitor.

(4) In determining for the purposes of subsection (3) whether or not an occupier has acted with reckless disregard, regard shall be had to all the circumstances of the case including, where appropriate, the matters specified in seubsection(2) of section4.

(5) Where injury or damage is caused to a visitor or property of a visitor of which the visitor had been warned by the occupier or another person, the warning is not, without more, to be treated as absolving the occupier from liability unless, in all the circumstances, it was enough to enable the visitor, by having regard to the warning, to avoid the injury or damage so caused.

## DUTY OWED TO RECREATIONAL USERS OR TRESPASSERS

This duty is covered by section 4, sub-section 1, which states that in respect of a danger existing on the premises, an occupier owes towards a recreational user of the premises or a trespasser a duty not to injure the person or damage the property of the person intentionally, and not to act with 'reckless disregard' for the person or the property of the person, except in so far as the occupier extends the duty in accordance with section 5. It then sets out a large number of circumstances determining whether or not an occupier acted with 'reckless disregard'. As stated in the previous paragraph, section 5 modifies the occupiers' duty to entrants.

## RECENT CASE LAW

The Occupiers' Liability Act, 1995, and specifically the duty owed by an occupier to a trespasser, were central issues in the 2001 High Court case: **Keith Weldon (a person of unsound mind not so found) suing by his aunt and next friend, Margaret Kelly v Aidan Mooney and James Campbell, trading as Fingal Coaches,** (judgment delivered 25 January 2001 by Mr Justice Ó Caoimh ('the judge').

The evidence was that at 2.55 am on 3 December 1995, the plaintiff (Weldon) climbed into the luggage department of a bus owned by the second defendant and driven by the first defendant as it was pulling away from a stationary position on the main street in Swords, Co Dublin. The door had no lock and/or was unlocked and capable of being opened by anyone on the outside of the bus. While the bus was travelling on the Swords road near 'The Big Tree' public house, the plaintiff fell from the luggage compartment and suffered serious injury. The case came before the court as a preliminary application by the defendants to have the case dismissed on legal grounds. The plaintiff's lawyers argued the case on the basis of the Occupiers' Liability Act, 1995. It was accepted that at the time of the accident the plaintiff was of full age and was not a person of unsound mind.

The judge said it appeared from the pleadings that the plaintiff was a trespasser on the bus. The court had to address the issue as to whether the plaintiff had disclosed a reasonable cause of action in light of the assertion by the plaintiff that the action of the plaintiff in climbing into the luggage compartment was commonly adopted by a number of youths and was well known to each of the defendants, their servants or agents. He was not satisfied that the fact that the door of a luggage compartment may be unlocked and may be capable of being opened by anyone was such as to give rise in itself to a claim for damages for negligence against the owner or operator of the bus or its driver.

'However, if the defendants knowingly permitted persons to use the luggage compartment to be carried on the bus and drove the bus in knowledge of the fact that they were in the luggage compartment, I do accept that a cause of claim may exist in favour of the plaintiff,' said the judge, adding that in light of this fact alone he would refuse the defendant's application, in directing that the plaintiff's claim proceed against the defendants.

With regard to the Occupiers' Liability Act, 1995, he said it remained (to be decided) whether any case of acting with 'reckless disregard' – as appears in section 4 (see above) – for the plaintiff could be sustained. However, if, as alleged, the defendants knowingly permitted persons to use the luggage

compartment and drove the bus in circumstances where it was known that the plaintiff was in the luggage compartment, an issue of negligence remained, he added.

## GLENCAR WATERFALL CASE

A very interesting discussion on the distinction between an invitee and a licencee and the duty of care owed by occupiers to licencees took place in a case decided by the Supreme Court on 7 March 2001. The case related to an accident which occurred on 1 May 1995, just before the Occupiers' Liability Act came into force. In fact, Mr Justice Hardiman ('the judge'), in giving the judgment with which the other two members of the court agreed, stated that had the 1995 Act been in force at the time of the plaintiff's accident her position would have been a less favourable one than under the common law, which applied to this case. In other words, the 1995 legislation is more protective of occupiers.

In this case, **Ann Thomas v Leitrim County Council (Supreme Court, 7 March 2001)**, the plaintiff had travelled from England with her husband and three other people to take part in a ballooning event in Sligo. Weather conditions prevented the event from going on and the party went sight seeing instead to the resort area in which Glencar Waterfall is situated. The council had purchased this area in 1986 before they proceeded to renew all the footpaths, develop a car park with toilet facilities. The trees on the site were inspected by Coillte as a result of which four trees were removed.

The plaintiff, who was aged 62 at the time, and her party went up a footpath which led from the road up the side of the waterfall to a viewing platform and then began to descend. Towards the bottom of a steep part of the pathway they came upon a tree which had fallen across the path, completely blocking it. A row of trees made it impossible to pass the obstruction on the right hand side. The various members of the party, who had been walking in single file, stepped off the path onto the very steep bank leading downwards. The plaintiff slipped and sustained an injury to her ankle, which had serious consequences for her. The court was concerned with liability only.

The first issue the judge dealt with was whether the plaintiff was an invitee or a licencee, whether the defendant council was in breach of care to her as an invitee or licencee and, if they were, was the damage suffered by her caused partly by her own negligence or want of care, and if so, in what proportion. The High Court judge had held that she was an invitee and assessed contributory

negligence on her at two-thirds. He said the risk could have been avoided by the plaintiff simply retracing her steps a distance of 178 yards. The plaintiff appealed against the finding of contributory negligence.

The Supreme Court judge said the evidence did not establish that the presence of the plaintiff or similar persons conferred a material benefit – which grounds the status of invitee - on the defendant council nor that the defendant viewed the amenity in that light. The judge said that the provision of access to a naturally wild area should not require its being manicured to the degree required of commercial or industrial lands or premises. He ruled that the plaintiff (and anyone else in her position) was a licencee on the council's lands. He also adopted the statement that a licensor 'must act with reasonable diligence to prevent his premises from misleading or entrapping the licencee' that was laid down in the English case, **Mersey Docks and Harbour Board v Proctor [1923] AC 253** and the further statement that a duty 'to protect licencees against concealed dangers which he (the licensor) actually knows to exist' from the Irish case of **Aherne v Roth and Others [1945] IR Jur Rep 45**.

In applying this duty of an occupier to the facts of the case, it did not appear to the judge that the fallen tree could be regarded as a concealed danger or a trap. The nature of the risk was analogous to that undertaken by hill walkers. However, the decision of the people in the plaintiff's party to step onto the steep bank was significantly influenced by the presence of tracks, which had been permitted to be made, and to remain on the ground, by the defendants. They may have misled the plaintiff in altering her perception of the risk, though the course she still embarked on was still obviously risky. Applying the Mersey Docks formula (above), he agreed with the High Court judge's finding that the defendant had not acted with reasonable diligence to prevent the particular area from misleading the licencee (plaintiff), a failure that contributed to the accident. The court attributed two-thirds of the fault involved in the accident to the plaintiff and one-third to the defendant.

## SPREAD OF FIRE CAUSED BY LIGHTNING STRIKING A TREE

Reverting to the common law duty of care, an issue was raised in a well-known English case as to the extent of an occupier's duty to take reasonable steps to prevent the spreading of a fire caused by lightning striking a tree. What is decided here is that the standard of the duty ought to be to require of the occupier what is reasonable to expect of him in his individual circumstances. The duty

was set out fully by Lord Wilberforce in the Privy Council case **Goldman v Hargrave [1967] 1 AC 645**. The full relevant citation of the court on the issue is as follows:

'So far as has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable", since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast has, *ex hypothesi*, had this hazard thrust upon him through no seeking or fault of his own.'

'His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust.'

'One may say in general terms the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in Lord Justice Scrutton's hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstances should, have done more. This approach to a difficult matter is in fact that which the courts in their more recent decisions have taken.'

# 10.
# Liability for Accidents within the Forestry Workplace

Safety and health issues are of fundamental importance to everybody working in industry. The provisions of the Safety, Health and Welfare at Work Act, 1989, and the Regulations made under it are as important to people working in the various facets of the forest industry as they are in any other industry in the country.

While this book is concerned with the application of the common law, it is vital to understand the involvement of legislative law in the area of health and safety before we look more closely at the common law aspects of health and safety, involving the tort of negligence.

The 1989 Act sets out the general legal principles for the prevention of accidents and ill health in all places of work, whether in a factory, a farm or in other places of work.

The main elements of the Act include:

- The duty of all employers to compile a safety statement. This is the employer's detailed management programme on safety, health and welfare measures, which must be based on a comprehensive written identification of hazards and assessment of risks in the workplace.
- The right of employees to be consulted on safety, health and welfare and to select safety representatives.
- Duties on all employers to ensure, so far as is reasonably practicable, the safety. health and welfare of employees and non-employees. In practice, the 'reasonably practicable' test requires employers to check that workplace risks are controlled in accordance with legislation, codes of practice, standards, guidelines and good industry practice.
- Duties on all employees, whether at senior or junior levels in an organisation, to take reasonable care for their own safety and that of others.

While the 1989 Act established a general framework for the prevention of accidents and ill health at work, it did not specify the detailed requirements that employers in particular were obliged to put in place. Instead, the Act provided

that detailed regulations could be made over time to fill in the general principles contained in it, as Raymond Byrne states in his book *Safety, Health and Welfare at Work Law in Ireland: A Guide*. Many of these details have since been filled in by Ministerial Regulations and associated Guides and Approved Codes of Practice issued by the Health and Safety Authority.

The most significant single set of Regulations made under the Act are the Safety, Health and Welfare at Work (General Application) Regulations, 1993. These cover nine separate areas covering such topics as manual handling of loads, work equipment, personal protective equipment – all of which are very much part work in the forest industry.

Strains, pulls and lifting injuries constitute the most common injuries suffered by workers in the forestry industry in Ireland. It is probably impossible to apply the principles of the factory floor to the uneven and often mountainous terrain where forests are located but yet the law almost expects them to apply and in some situations does expect them to apply. The principles that govern cases of nervous shock, such as might occur, for example, where one employee finds another injured after a tree was felled during felling operations, would still apply as much in the woods or forests as they did in the factory setting in the Irish case of **Curran v Cadbury (Ireland) Ltd [2000] 18 ILT 140** (see also article by this author in the *Irish Law Times* issue number 10, June 2000) or in the Hillsborough Stadium disaster case in England.

While increased mechanisation has reduced the number of injuries suffered by forestry workers, the significant improvement in accident statistics has been brought about by a better health and safety environment such as the use of better protective equipment or 'PPE'.

Research was carried out for COFORD and the Health and Safety Authority by Maarten Nieuwenhuis and Marianne Lyons and published in their paper *Health and Safety Issues and Perceptions of Forest Harvesting Contractors in Ireland* (March/April 2004 issue of *Irish Timber and Forestry*). They concluded that between 1998 and 2000 the rate of accidents was not as high as was expected by staff in the Health and Safety Authority. This may be attributed to the recent and substantial shift from motor-manual to fully mechanised harvesting systems in Ireland.

However, the authors found that the number of respondents reporting work-related, long-term health problems (37.7%) was higher than expected by HSA staff. Some of these types of chronic injuries were found in the past to be linked with motor-manual systems, such as hearing impairment, vibration-related

problems, while other types, including repetitive strain injury, were relatively new and have been linked with (the increased use of) fully mechanised systems.

## CODE OF PRACTICE FOR FORESTRY OPERATIONS

No Regulations have been specifically produced for the forestry industry. However, on 2 May 2003, the National Authority for Occupational Safety and Health by virtue of section 30 of the Safety, Health and Welfare at Work Act, 1989, issued a code of practice entitled '*Code of Practice for Managing Safety and Health in Forestry Operations*'. The code came into effect on 1 July 2003 and provides practical guidance for the observance of the provisions of the 1989 Act and the 1993 General Application Regulations. The Safety, Health and Welfare at Work Bill, 2004 was introduced in May to supplement statutory instruments, regulations and codes of practice issued by the HAS. This includes the code governing forestry operations. The new Bill focuses largely on the prosecution of offences and increases the penalties for breaches of the safety laws.

The code acknowledges that contracting is the norm in the forest industry and advises that whether they were timber growers or purchasers, contractors or subcontractors (operator), they had legal duties to fulfil in order to ensure people's health and safety were not put at risk during, or as a result of, forestry operations. It further advises that when planning and carrying out forestry operations the law requires a number of safety and health duties to be carried out, including:

- Preparing written risk assessments;
- Selecting suitable equipment for the job;
- Protecting public safety and health;
- Setting out safe working procedures;
- Ensuring operators were competent;
- Supervising and monitoring work.

Four management roles are set out and defined by the code. These are the roles of the landowner, the forestry work manager, the contractor and the subcontractor. It is incumbent on each to be familiar with and observe the duties and obligations imposed by the law. Quite apart from the provisions of the 1989 Act and the General Application Regulations applying to each role, other laws may also come into play, for example in the case of the landowner's role, the

Safety, Health and Welfare (Construction) Regulations also apply. These Regulations apply while carrying out construction work such as building forest roads. It should be noted that an omission or compliance with applicable provisions of the Code of Practice is admissible in civil or criminal proceedings under section 31 of the 1989 Act.

## DUTY OF EMPLOYERS AND SELF-EMPLOYED TO PERSONS OTHER THAN EMPLOYEES

The Code of Practice pinpoints other very important pieces of legislation, which could be held to apply to specific forestry operations.

Section 7 of the Safety, Health and Welfare at Work Act, 1989, imposes a duty of care on employers and self-employed to persons other than their own employees. Every employer and self-employed person has a duty to conduct their respective business in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment are not exposed to risks to their safety or health. In such cases as may be prescribed, it will be the duty of the employer or self-employed to give information about such aspects of the way that the work of their undertaking is conducted as might affect the safety or health of these other persons. This could arise in the case of a supplier delivering ordered equipment onto the site of a landowner for a subcontractor engaged in harvesting trees there under contract.

Section 8 of the same Act imposes a duty of care on those who control, to any extent, of any place of work to ensure, so far as is reasonably practicable, that the place of work, all means of access thereto or egress therefrom, and any article or substance in the place of work or provided for use therein, is safe and without risk of harm to persons other than employees of the employer or self-employed.

## DUTY TO CO-OPERATE

Regulation 6 of the 1993 General Application Regulations imposes a duty on every employer and self-employed person involved in sharing a place of work with another employer or self-employed person to co-operate in implementing any safety, health, welfare and occupational hygiene provisions considered necessary and, taking into account the nature of the work activities, to co-ordinate their actions in relation to the protection from any prevention of

occupational risks, and to inform each other and their respective employees or safety representatives (or both) of any risks involved in such activities.

## TRAINING

The Nieuwenhuis and Lyons paper referred to also carried a conclusion from research they carried out which has a bearing on the training of people involved in forestry operations. They found that the attitude of the majority of the respondents they queried towards health and safety was positive and their suggestions for improvement were practical and informed.

A lack of training opportunities was the most common problem area highlighted by respondents, with suggestions made for more frequent and up-to-date training programmes at an increased number of venues around the country.

This finding has a resonance in Regulation 8 of the 1993 Regulations as inserted by Regulation 8(2) of the Safety, Health and Welfare at Work (General Application) (Amendment No.2) Regulations, 2003. This provides:

- For the purposes of the relevant statutory provisions, a person shall be deemed to be competent where, having regard to the task he or she is required to perform, and taking account of the size or hazards (or either of them) of the undertaking or establishment in which he or she undertakes work, he or she possess *sufficient training* (emphasis are mine), experience and knowledge appropriate to the nature of the work to be undertaken.

An employer or self-employed person who fails to properly or fully train an employee in the use of a piece of equipment and, as a result, the employee is injured because of the improper use of the equipment, the employer or self-employed, as the case may be, may be held liable in court under the provisions of this secondary legislation.

## COMMON LAW

In the absence of Regulations, the common law rules of liability in the area of civil law have special significance in the forest industry. These arise in the employer's duty of care to employees and the employee's own duty of care. With regard to employers, the duty of care that the common law imposes on them is to ensure that they provide their employees with

- A safe place of work,
- Safe plant and equipment,
- A safe system of work and,
- Competent fellow workers.

If it is proved in court, on the balance of probabilities, that an employer failed to comply with all or any of these duties and that an employee was injured as a result of that failure, the employer consequently will be held liable to the employee for the injury he has suffered. As a result he will be ordered to compensate him by the payment of damages. That, in essence, is the common law of negligence and the principles that underline it.

Equally, employees have a duty of care and if they are found by a court to be in breach of that duty, they will be held liable for it in the form of contributory negligence. Employees owe their employers a common law duty of care to take reasonable care for their own safety and if they breach that duty of care, they must answer for it. A simple way of illustrating this is to show what happens when a person in a motorcar is injured as a result of the negligence of the driver/owner of the vehicle he has been a passenger in.

In the ordinary case, once liability or fault has been established, the passenger will be entitled to 100% of the quantum or amount of the damages he is entitled to receive in order to put him into the position he was in before the accident, in so far as money can do that. However, if the passenger was found not to be wearing a seat belt at the time if the accident, the court will find the passenger guilty of contributory negligence and reduce the amount of the damages by 20%. So, if the passenger was entitled on maximum liability to €100,000, the final award will be reduced to €80,000 as a result of the finding of contributory negligence. A finding of contributory negligence against a plaintiff, therefore, usually results in a reduction in the amount of damages that would otherwise be awarded.

## REASONABLENESS

The law imputes the words ‘reasonable’ and ‘prudent’ into all relationships or areas where a duty of care is owed. For instance, the employer must act with reasonable care, so also must the employee act with reasonable care for his or her own safety. This important statement of the applicable law was cited in a number of Irish cases, including by the Supreme Court in **Bradley v CIE [1976] IR**

**217**, in which Mr Justice Henchy stated: 'The law does not require an employer to insure in all circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances.'

The test is the conduct and judgment of the reasonable and prudent man as applied in **Johnson v Gresham Hotel Company Limited (Unreported decision of the High Court (Mr Justice Lynch), delivered 13 November 1986)**.

In a very recent case, **Collins v McDermot (Unreported, High Court, judgment delivered 18 December 2003)**, Mr Justice Murphy applied the standard of care of a prudent and reasonable man – as reiterated in Irish and English courts - to the evidence given in the case and rejected the claim based on alleged negligence on that basis. He said the evidence tendered to the court was unsatisfactory in relation to proof, on the balance of probabilities, of negligence on the part of the employer. There was, therefore, no breach of duty of care by the defendant.

# 11.
# The Right to Light, View, Fruit, Carbon and Other Matters

## LIGHT

In the ordinary case the fact that a house has got a window through which light passes does not mean that the owner of the house can prevent other persons, such as the owners of adjoining land, from putting up buildings or growing trees which interfere with the light of the window or which entirely prevent any light from reaching it. This is so even though the room in which the window is has no other source of light and is made entirely useless by the erection of the building or the planting of trees on the neighbour's land.

However, it is possible for the owner of land to have a right to receive a certain amount of light through some of his windows, and also to prevent any other person from interfering with this light by building or otherwise. The windows, which have this protection, are called 'Ancient Lights'. It is only one or more particular windows that can acquire this right, not the house as a whole.

'Ancient Lights' mean that the window or windows to which it is applied has enjoyed the inflow of light under such circumstances and for such a length of time that its owner or occupier for the time being, has acquired the right to this flow of light, and may take legal action to prevent the erection of buildings which would obstruct it. This is technically known as an easement of light. Like other easements, it attaches to the land itself and not to the owner or occupier for the time being. It cannot be acquired for open land such as a garden and there is no redress in the case of trees which block sunlight from a neighbour's garden. A right to light exists only if the owner of a house can satisfy a court that he or she has enjoyed the light without interruption throughout the 20 years *immediately preceding* (italics) his action. This is laid down in the Prescription Act, 1832, which provides that the enjoyment of the flow of light throughout the 20 years, before any legal action is brought about the light, creates an easement of light unless this enjoyment was exercised under permission given by some written agreement. The bare fact of enjoyment for 20 years is enough in itself to create the right.

Gordon's *The Law of Forestry* noted that while all the reported cases on the obstruction of ancient lights concerned artificial structure there was not a single

reported decision on the interference by trees with the easement of light. In spite of this absence of any authority, 'there seems to be nothing to suggest that obstruction of ancient lights by trees does not amount to nuisance in the same way as any other obstruction,' it advised.

## HOW MUCH LIGHT?

The amount of light to which the dominant tenement (the house to which the right to light belongs) is entitled as against the servient tenement (the neighbouring land over which the right is claimed) is judged by the ordinary standards of human comfort which the courts in England have held are the same for all classes and all districts, without any regard being paid to the wealth of the occupiers or the amount of light which they themselves would consider reasonable. Provided a reasonable amount of light is received it is no ground for complaint that there used formerly to be more. If the use has been changed, for example from a dwelling to an office or workshop, he is not entitled to extra light. If the windows are enlarged, he is not entitled to more light than he had previously. The standard of a particular locality must be taken into account. Advice should always be sought from a professional such as an engineer or chartered surveyor specialising in right to light work, before embarking on the legal route to resolve a problem in this area.

## VIEW

In addition, obstruction of view or air, or unsightliness, is also no ground for complaint, although they may be offences against the local building regulations. In essence, there is no recognition of right to view no matter how long it may have been enjoyed from a house or premises. There is no redress, therefore, if a tree or a wood grows to a height which blocks the view to the sea or over the countryside.

There are few precedents in this area. While the first case (below) concerns a wall, the same law may hold for trees. Even though trees may obstruct light, the process is gradual and develops only as the tree grows tall. Therefore, it would be difficult for a neighbour to obtain redress against the tree owner unless the branches overhang his property. In England, however, with the passing of part 8 of the new high hedges legislation in the form of the Anti-Social Behaviour Act, 2003, it is possible that people who are adversely affected in one

or more of the ways under consideration here, may use this legislation to get relief against their neighbour's high hedges.

#### Potts v Smith [1868] LR 6 Eq 311

The plaintiff took a lease of a plot of land for 99 years and it contained the usual covenant of quiet enjoyment of its occupation. The lessor built him a house on this land and the plaintiff went into occupation. Subsequently, and before the house was 20 years old, the defendant leased a plot of land adjoining the plaintiff's garden and built a mews. It had a wall 7.0 metres (23 feet) high running the full length of this garden. The plaintiff sought an injunction to restrain the defendant from building the wall on the grounds that it interfered with access of light and air to his garden and its enjoyment by him.

The court dismissed the claim on the grounds that there was no contract, express or implied, to the covenant for quiet enjoyment of his garden and that access of light and air to it was not a reason for the court to interfere (by making an order against the defendant).

#### Webb v Bird [1862] 13 CB (n.s.) 841

The plaintiff was the owner of a windmill who claimed that the access of wind to his mill had been obstructed by the actions of the defendants.

The court ruled that the owner of a windmill could not claim (successfully) to be entitled to the free and uninterrupted passage of currents of air and wind to his mill. The presumption of a grant from long continued enjoyment only arises when the person against whom the right is claimed might have interrupted or prevented the exercise of the supposed grant. The right to the free access of wind and air from another property cannot be presumed from the uninterrupted user of the mill over 20 years.

## FRUIT

Fruit that falls into a garden from a neighbour's tree remains the neighbour's property, and cannot be used without his consent. If it is sold by the neighbour, its owner is entitled to the proceeds of sale.

It is not clear whether the owner of the tree is entitled to enter the neighbour's land to take possession of the fruit. The considered opinion, however, is that he

is not, unless he obtains the consent of the owner of the property. Otherwise, he could be considered a trespasser.

**Mills v Brooker [1919] 1 KB 555**

The defendant picked and sold the apples from the overhanging branches of 10 Bramley Seedling apple trees, which grew on his neighbour's land.

The court decided that the right of the adjoining owner to lop the branches did not carry with it the right to pick and appropriate the fruit. If he did, he was guilty of conversion and liable to the owner of the tree for the value of the fruit. Although a man may remove a nuisance, he could not appropriate the materials which caused it and convert them to his own use. Judgment was given in favour of the plaintiff who was also awarded STG£10 damages. The defendant appealed.

The appeal court, in dismissing the appeal, held: 'The owner of a fruit tree, the branch of which grows over the boundary of his land, is the owner of the fruit on the overhanging branch while it is still growing on the branch. The adjoining owner is entitled to sever the branch but that does not divest the owner's right of property. The adjoining owner is not entitled to sell the fruit.'

## OWNERSHIP OF CARBON IN TREES

If we substitute 'carbon' for 'fruit,' it is at the very least arguable that the Mills' decision is authority for the proposition that carbon in trees is the property of the tree owner. Fruit is a product of certain species of trees. Carbon is also a tree product. To have any basis in law, an assumption that the State owns a property in trees known as carbon needs very strong legal authority to support it. Such an authority would need to have its roots in this country's fundamental law, the Constitution of 1937 or *Bunreacht na hEireann*. It is arguable, at least, that it would require the strictest of interpretations, possibly backed by a legislative provision, to give effect to such an assumption were it to be claimed arising out of Article 10 of the Constitution.

Article 10(1) states: 'All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.' Article 10(2) states: 'All land

and all mines, minerals and waters which belonged to Saorstát Éireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstát Éireann.'

In addition, if carbon is considered a product of trees, the owner can look to Article 43 of the Constitution for protection. In Article 43(1)(i) the State acknowledges that man has the natural right to the private ownership of external goods and in the next sub-section it guarantees not to pass any law attempting to abolish the right of private ownership. Equally, if the State owns the trees in State forests, by virtue of the same argument it would own the carbon in those trees.

## TREE PRESERVATION ORDERS AND TREE FELLING LICENCES

The power to make Tree Preservation Orders (TPO) is a powerful weapon in the armoury of local authorities seeking to protect trees, groups of trees or woodland of special amenity value. Another legal mechanism used for this purpose is the Tree Felling Licence. Any trees the subject of a TPO cannot be felled unless the owner applies to the relevant local authority for planning permission to do so. Being a planning matter the grant or refusal of permission may be appealed to An Bord Pleanála. The Forestry Act, 1946 also covers tree felling and prohibits tree felling in rural areas without a felling licence issued by the Forestry Service.

The Heritage Council's publication *Evaluation of Environmental Designations in Ireland* states that even if permission to fell trees covered by a TPO is granted by a local authority, the owner must also have a felling licence, unless the site is within an urban area or county borough. Obviously, TPOs do not have their origin in the common law but in legislation, namely in section 45 of the Local Government (Planning and Development) Act, 1963 as amended by the Planning Acts of 1976, 1990 and 1992. It also describes the designation procedure: While the making a TPO is the function of the County Manager it can be proposed by anybody. Once it is made, the owner is obliged to apply for planning permission to fell the designated trees, although the local authoritie's decision may be appealed to An Bord Pleanála in the normal way. A TPO cannot be made solely on the grounds of ecological value. The local authority may in certain circumstances be liable to compensate the owner if damage has been suffered or property values have been reduced, although the making of a TPO of itself cannot give rise to the payment of compensation.

The Forestry Act, 1946 contains the main provisions with regard to the felling of trees. Under the Act it is an offence for any person to uproot or to cut down any tree unless the owner of the tree has obtained permission in the form of a felling licence from the Department. No felling notice is required under certain circumstances such as if a tree is being cut down by a local authority in connection with road construction or road widening or under the Electricity Supply Acts. A prohibition order may stop the felling of all or any of the trees specified in a Felling Notice. Such an order is normally followed by an inspection by a forestry inspector, according to An Foras Forbartha's *A Manual of Urban Trees* published in 1982, and the Minister then indicates whether he is prepared to grant a Limited Felling Licence for the felling of all or any of the trees.

Where a prohibition order has been served, a limited felling licence may be granted subject to certain condition including:

a) the planting and maintenance of trees to replace the felled trees;

b) the preservation and maintenance of other trees on the lands of the same owner;

c) the payment of a contribution towards the cost of State forestry.

# 12.
# Other Relevant Legislation

There is such a wealth of legislation impinging on the various aspects of tree growing on the one hand, and forestry operations on the other, that it would be impractical to include each and every Act, regulation and EU directive in a book such as this which, basically, attempts to examine the common law as it affects in one way or another the growing of trees. Other publications, such as Barbara Maguire's '*A review of legislation that impacts on Irish forestry*' also published by COFORD, admirably cover all the legislation impacting on forestry operations. This chapter, therefore, is limited to chronicling, in brief form, just some of the primary and secondary legislation that might be considered relevant for the purposes of this publication.

(1) Occupiers Liability Act, 1995, which has only eight sections, amends the (common) law relating to the liability of occupiers of premises (including land on which forestry operations are conducted) in respect of dangers existing on these premises for injury or damage to persons or property while on such premises and provides for connected matters.

(2) The Health, Safety and Welfare at Work Act, 1989 sets out the general legal principles to try and prevent accidents and ill-health in all places of work. It established the Health and Safety Authority, which produced the code known as the '*Code of Practice for Managing Safety and Health in Forestry Operations*,' which took effect on 1 July 2003. The Act repealed other legislation, including parts of the Safety in Industry Acts, 1980 and the Factories Act, 1955.

(3) The Safety, Health and Welfare at Work (General Application) Regulations, 1993 cover manual handling of loads, work equipment, personal protective equipment. Forestry operations come within their ambit.

(4) EU Machinery Directive 89-392 EEC (1st January, 1995), which sets down a standard in terms of the permitted level of vibrations from machinery for hand, arm and whole body. It could apply to forestry workers using chainsaws or other machinery, which causes vibrations.

(5) Telegraph (Construction) Act, 1907 (8 Edw. 7c.33); Telegraph Act, 1878 (41 & 42 Vic.c.76) as amended by the Postal and Telecommunications Services Act, 1983. The 1908 Act makes provision for the lopping of trees,

which obstruct a telegraphic line on a street or road. Provision is also made for the owner of the land on which the tree is growing to be given notice of the proposed lopping while there is also provision for arbitration in the event of a dispute.

(6) Roads Act, 1993. This Act covers some of the area, which has now been included in part 8 of the Anti-social Behaviour Act, 2003 in England. However, while the English legislation deals with disputes between neighbours over the height of shrub or tree hedges, the Irish legislation involved situations where hedges, trees or shrubs growing in private property may cause a hazard to users of a public road. The Act empowers the road authority to request the occupier to lop or fell the hedge, tree or shrub and, if the request is refused, the authority may enter the land and perform the work necessary to prevent the danger. A Tree Felling Licence is not required by the tree owner when complying with such a notice from a roads authority.

(7) The Planning and Development Act, 2000 repealed and updated the Local Government (Planning and Development) Act, 1963. It empowers a planning authority to make orders to preserve trees or woodlands (Tree Preservation Orders). A TPO may, for example, prohibit the felling, loping or wilful destruction of trees. It may also direct the owner or occupier of the land affected to enter into an agreement to ensure the proper management of the trees with the possible assistance, including financial assistance, of the planning authority towards the management.

(8) The Finance Act, 1969, the Value Added Tax Act, 1972, the Capital Gains Tax Act, 1975, the Wealth Tax Act, 1975, the Capital Acquisitions Tax Act, 1976 and the Corporation Tax Act, 1976, all have provisions which may be applied, in different respects, to the business of farming and growing of trees.

(9) Industrial Relations Act, 1946 (section 43) empowered the Labour Court to make the Employment Regulation Order (Agricultural Workers Joint Labour Committee), 1977. Statutory minimum rates of pay are set under this order, which also regulates statutory conditions of employment for agricultural workers. The word ‘agriculture’ includes the use of land as woodland.

(10) The Factories Act, 1955, as amended, states in section 32(1)(a) and (b) that a person shall not work at any machine unless he has been fully instructed as to the dangers, has received a sufficient training in work at the machine and is under adequate supervision.

(11), (12), (13), (14) and (15) are other Acts which cover redundancy situations, including the Redundancy Payments Act, 1967, 1971 and 1973 and two Acts with the same title, one enacted in 1971 and the other in 1973. There are also other Acts, which are extremely important, including the Minimum Notice and Terms of Employment Act, 1973 and the Unfair Dismissals Act, 1977.

(16) Organisation of Working Times Act, 1997 makes provision for such things as daily rest, hours of work and holiday entitlements.

(17) Road Traffic (Construction, Equipment and use of Vehicles) Regulations, 1963 to 2000. These set out the maximum weights and dimensions for heavy goods vehicles. The measure by which a load of timber may overhang a vehicle (the distance that the timber may exceed the vehicle in length) is also governed by these regulations.

(18) Environmental Protection Agency Act, 1992. An integrated pollution control licence is necessary under the Act to manufacture paper pulp, paper or board (including fibre-board, particle board and plywood) in installations with a production capacity equal to or exceeding 25,000 tonnes of product per year, and for the manufacture of bleached pulp. It is also necessary for the treatment or protection of wood, involving the use of preservatives, with a capacity exceeding 10 tonnes per day.

# 13.
# International Legislation and Protocols

During the second part of the 20th century, two developments of significance impacted on Irish legislation and on forestry legislation in particular. These were the growing concern by the international community about environmental issues and sustainable development, and the accession of Ireland into the European Community (now Union).

The European Union (EU) has established provisions to strengthen the free marketing of goods within the Community while ensuring the maintenance of quality standards and protection from dangerous pests and organisms. This has particular relevance to forestry materials. The EU has taken a lead role on environmental matters which are also reflected in its legislation. Forestry and Wildlife were combined in one government department as the Forest and Wildlife Service between the 1970s and 1980s so it is not surprising that there has been an overlap in forestry and environmental legislation.

## ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT

Environmental issues gained prominence following the publication of Rachel Carson's book *Silent Spring* in 1962. A number of significant international conventions, to which Ireland was a signatory, took place during the 1970s. The most notable of these were RAMSAR in 1971 and CITES in 1973. The first, named after the Iranian city in which it took place, dealt with the conservation of wetlands (O'Gorman and Wymes 1973), and the second was a convention on trading in endangered species. The listing of wetlands following RAMSAR led to the provision for the designation of reserves and ecosystems in the Wildlife Act of 1976 to ensure their conservation, and also the European Communities Council Directive 79/409//EEC on the conservation of birds. This legislation could preclude or control forestry development on such areas. The CITES regulations impinge on forestry through the Wildlife (Amendment) Act, 2001, with regard to the requirement for valid certificates and permits for the possession of certain listed species (Maguire 2000).

Many recent international impacts on regulations affecting forestry have come through the process that started in 1987 when Dr Gro Brundtlandt, former

prime minister of Norway, published *Our Common Future*, the report of the World Commission on Environment and Development. This followed the environmental disasters of Bhopal and Chernobyl which had focussed international attention on dangers to the environment. The report highlighted the destruction of forests in developing countries in order to meet debts. The Brundtland Report triggered off a series of World, Regional and Sectoral Agreements culminating in the United Nations Conference on Development in Rio (UNCED) and its attendant Conventions on Climate Change (UNFCCC) and Biodiversity (Mulloy 1997). The Convention on Climate Change led, in 1997, to the Kyoto Protocol within which the EU has undertaken to reduce the annual emissions of greenhouse gasses. Ireland's target is to limit emissions to 13% above 1990 levels over the period 2008-2012. In Ireland a climate change strategy has been formalised (Department of the Environment and Local Government 2000). The regulation of greenhouse gas emissions can have serious consequences for Irish industry and details of the requirements, including credits and penalties, have been formulated by the Department of the Environment and Local Government (Oiffig an Aire Comhshaoil 20046). Forestry, as a source of carbon sequestration, plays a significant role in climate change strategy and Ireland, under the Kyoto Protocol and UNFCCC, is obliged to forward reports including estimates of the forest resource, afforestation, reforestation and deforestation in terms of greenhouse gas storage and emissions (McGettigan and Duffy 2003). Although not yet included in legislation it is highly likely that obligations under the Kyoto Protocol will be included in statutory regulations.

Meanwhile, in Europe a series of Ministerial Conferences established criteria for the protection of forests. In 1991 six resolutions were passed and endorsed by the EU at the Strasbourg Conference of Ministers. These have strengthened forest research and health monitoring initiatives arising from the United Nations Convention on Long Range Transboundary Air Pollution (1979), financially supported by the EU Council Regulations EEC 3528/86 and 2158/92 which allowed for the protection of Community forests against atmospheric pollution and fire and established a series of monitoring plots, 34 of which are located in Ireland (Anon 1986-2002). The regulations have been reviewed and are being replaced by a broader based scheme, under Commission proposal 2002/0164(COD) (Commission of the European Community 2002), termed Forest Focus, which include environmental interactions such as biodiversity and carbon sequestration. The evolution of Sustainable Forest Management developed further at the Helsinki Ministerial Conference of 1993, with four resolutions dealing with forest management and biodiversity. The process was

completed at a third conference in 1998 at Lisbon where six criteria for sustainable forestry were agreed, through two resolutions, on the enhancement of socio-economic aspects of sustainable forest management and establishing pan European criteria, indicators and operational level guidelines. The EU Community actions supporting the Ministerial Conferences are Commission Regulations 526/87, 1696/87, 1091/94 and 2278/99.

The Lisbon Criteria, which encompass the broad principles of sustainable forest management, are:

1. Maintenance and appropriate enhancement of forest and their contribution to global carbon cycles;
2. Maintenance of forest ecosystem health and vitality;
3. Maintenance and encouragement of productive functions of forests (wood and non-wood);
4. Maintenance, conservation and appropriate enhancement of biodiversity in forest ecosystems;
5. Maintenance and appropriate enhancement of protective functions in forest management (notably soil and water);
6. Maintenance of other socio-economic functions.

These criteria form the basis for the National Forest Standard published in 2000 (Forest Service 2000). Although not yet incorporated into Irish law, these principles are likely to be enshrined in a new Forestry Act, which is now at drafting stage.

The IPF/IFF Process is an ongoing process in which Ireland is participating at government level and which may at some stage impact on forestry legislation. This is a dialogue under the Intergovernmental Panel, and now the Intergovernmental Forum on Forests. It was established by the Commission on Sustainable Development mainly to implement forest-related decisions made at UNCED-Rio, and is proposing wide-ranging actions relating to forest management, co-operation and capacity building on resources. The proposals are aimed at a wide group, including governments (Cody 2003).

The accession of Ireland into the European Community has brought with it a number of legislative changes relating to conservation. While no common EU policy on forestry has emerged, a number of directives that impinge on forestry, notably in relation to the environment, have been incorporated into Irish law. As mentioned, the Birds Directive 79/409/EEC designates habitats for wild birds as Special Protection Areas (SPAS) and prohibits any activity that might disturb or

pollute the habitats. Council Directive 92/43/EEC and the European Communities (Natural Habitats) Regulations 1997 which gave effect to this directive resulted in a list of candidate sites for approval as Special Areas of Conservation (SACs). Owners have the right to object and the areas then go to the Council for approval. If designated, the owner is informed and constraints are imposed, with the right of appeal. Appeals are decided by arbitration and compensation can be awarded. The Minister with responsibility for Wildlife has the right to direct restoration after unauthorised works. A management agreement involving payment can be arranged under the Wildlife (Amendment) Act (2001). Whereas implementing the legislation may rest with the Minister with responsibility for the Environment, in these cases much of the administration to ensure the regulations are adhered to is dealt with by the Forest Service under their Code of Best Forest Practice (Forest Service 2000a), environmental guidelines (Forest Service 2000b) and grants procedures (Forest Service 2003).

## PLANNING-ENVIRONMENTAL ASSESSMENT

Council Directive 85/337/EEC on the procedures for environmental impact assessment (EIA) had little impact on forestry, which had been exempted from planning permission, when initially adopted. However, as translated to Irish law in the European Communities (Environmental Impact Assessment) (Amendment) Regulations, Statutory Instrument 101 of 1996, the revised Directive 97/11/EC, the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999 (Statutory Instrument 93 of 1999) and further recent changes to the regulations, forestry has been brought into the planning net. In Statutory Instrument 538 of 2001, the regulations facilitate the compliance with a European Court of Justice ruling on EIA thresholds for initial afforestation. They provide for a statutory Forest Consent System which sets out comprehensive procedures for afforestation setting the threshold for afforestation without an Environmental Impact Assessment at 50 hectares. It also allows for sub-threshold EIAs where a project is likely to have significant effects on the environment. Statutory Instrument 539 of 2001 removes initial afforestation from the planning control system under the Planning Acts, to coincide with the introduction of the statutory Forest Consent System by the Minister with responsibility for Forestry under the European Communities (Environmental Impact Assessment) (Amendment) Regulations 2001 (Cody 2003).

The case which gave rise to the new regulations was European Court of Justice ruling of 21 September 1999 (Case C - 392/96) against Ireland by the Commission of the Communities arising from afforestation on the Pettigo plateau, Co Donegal and peat extraction at Ballyduff/Clonfinane Bog, Co Tipperary. It was found that the EIA thresholds adopted by Ireland in relation to initial afforestation (70 hectares) and peat extraction (50 hectares) exceeded the discretion available to Ireland under Directive 85/337/EEC on Environment Impact Assessment in that they did not take account of the nature, location or cumulative effect of projects below these thresholds (Court of Justice of the European Communities 1999).

Developments which also require an EIA under the European Communities (Environment Impact Assessment) Regulations 1989 include the conversion of broadleaf high forest to conifers, all installations of fibre board, particle board or plywood, all installations for manufacture of pulp, paper or board, cellulose processing and production installations of over 10,000 tons production capacity.

Two other major pieces of EU legislation are likely to impact on forestry in the near future. The first is EU Directive 2001/42/EC on Strategic Environmental Assessment (SEA). Measures under Council Regulations 1275/99 dealing with the Rural Development Plan under which afforestation is carried out, are currently excluded from SEA but those under its successor will be included. This involves assessment of likely significant impacts of plans and programmes prior to their adoption. The second is a Water Framework Directive, 2000/60 EC, which will enable the establishment of River Basin Management Plans. The overall objective is to achieve a ‘good status’ for all of Europe’s surface and ground waters within a 15 year period and landowners with property located in river basins will be affected (Cody 2003).

## PLANT HEALTH LEGISLATION

EU legislation is represented by Council Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants and plant products. This is transposed into Irish legislation by Statutory Instrument 125 of 1980 The European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) Regulations.

The directive establishes common phytosanitory regulations relating to trade between EU member states. The directive also covers phytosanitary regulations relating to the import of plants and plant products of non-EU origin. Wood,

forest plants and Christmas trees come under these provisions. A plant passport must accompany plants and plant products of certain species. Producers must be registered as must importers into the EU. Registration requires that production and sales records are kept. In the context of the internal market, Ireland (South and North) has been granted a Protected Zone status with regard to eleven harmful pests and diseases. Protected zones cater for particular disease risk situations within the EU and listed material moving into or within these zones requires source registration, and special passports, e.g. plants of *Pinus* moving within or into Ireland to confirm that the production area is free from the disease *Brunchorstia* (Cody 2003, Forest Service 2003).

Many injurious diseases and pests originate in countries outside the EU and, as imported material can circulate freely, three types are distinguished, (a) prohibited material, (b) material allowed for import with a phytosanitary certificate and subject to inspection, (c) material not subject to the regulations, e.g. most tropical timbers. Many types of plants and plant products also require certificates for export to non-EU countries.

The Forest Service administers the scheme for forestry material for which the Minister for Agriculture and Food has overall responsibility. Forest nurseries, Christmas tree farms, sawmills and points of import are subject to inspection by designated forestry officers. Material can be destroyed or returned under the regulations and fines can be imposed where the regulations are broken. Inspections frequently result in importers having to apply appropriate treatment, destroy or return the material (Calahane pers. comm.). Recently, for example, importers of stone material from China, secured by timber packaging which was barked or showed evidence of beetle infestation, were required to burn this packaging at destination or fumigate at dockside.

## TRADE IN FOREST REPRODUCTIVE MATERIAL

Since its accession to the EU, Ireland has been subject to two EU Directives on Forest Reproductive Material, which comprises seeds, parts of plants and young plants. Council Directive 66/404/EEC concerns the marketing of Forest Reproductive Material and Directive 71/161/EEC the external quality standards for forest reproductive material marketed within the Community transposed into Irish Law by Statutory Instruments 165 of 1973 and 359 of 1978 respectively. These Directives were replaced by a new Directive 1999/105/EC and Statutory Instrument 618 of 2002, European Communities (Marketing of Forest

Reproductive Material) Regulations 2002 which set standards for trading forest reproductive material in the context of sustainable forest management, biodiversity and conservation. This Directive defines categories of basic material as seed sources, stands, seed orchards, parents of families, clones and clonal mixtures. The Directive provides for the maintenance of a National Register of Approved Basic Forest Reproductive Material. No forest reproductive material may be marketed unless it is derived from approved material or imported unless in accordance with the Directive. Prior to delivery to the final consumer, all material and for so long as it is collected, processed, stored, transported or raised, must be kept in lots separated and identified in accordance with the criteria as set out in the Directives. Special measures are allowed for material not traded, and exemptions are allowed for material for export or re-export to third counties. An entitlement for additional restrictions can be made for material produced or traded within the country. Scheduled species are listed under the Council Directive. The documentation required by the directive includes a master certificate of provenance according to category and approved labels for seed lots. Provisions allow for control, for prohibition of unsuitable material and for less stringent conditions to apply if needed. Special standards set for poplar and protection in relation to Genetically Modified Organisms (GMOs) are also included in the directive. The regulations are administered by the Forest Service (Forest Service 2000a, Forest Service 2003).

## RURAL DEVELOPMENT

Council Regulation 1257/1999 provides support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF). The regulation outlines specific areas that are eligible for support, including forestry. The regulation highlights that funding must contribute to the maintenance and development of the economic, ecological and social functions of forests in rural areas. Early retirement, compensatory allowances, agri-environment (REPS) and forestry are funded. Forestry schemes include afforestation grants and premiums, native woodlands, harvesting, roads and other schemes.

Regulation 1260/2001 lays down general provisions on the funding regime and outlines requirements for programmes, publicity, financial management and monitoring. Regulation 2419/2001 lays down rules for administration, control and cross-checking agricultural aid schemes (Cody 2003, Forest Service 2003).

## TRANSPORT

The European Community (Vehicle Testing) Regulations, 1991, require that all heavy goods vehicles undergo an annual test to ensure that they are roadworthy, so it is illegal to used untested vehicles for timber haulage (Maguire 2000).

## WOOD PACKAGING

An International Standard for Phytosanitary Measures (ISPM No. 15 Guidelines for Regulating Wood Packaging Material in International Trade) is part of the UN FAO global and technical assistance in plant quarantine under the International Plant Protection Convention to reduce the risk of introduction or spread of quarantine pests associated with wood packaging, including dunnage. The scheme is administered by the Forest Service. The standard requires heat treatment or fumigation of pallets, boxes, and crates, with labelling (stamping) to accompany all wood packaging with an officially approved mark verifying treatment and the registration number of the producer (COFORD, 2004).

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