IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SOUTHAMPTON COUNTY COURT
(MR RECORDER MEGGESON)

CCRTF 96/0671/C

Royal Courts of Justice
Strand
London W2A 2LL

Thursday 19th June 1997

B e f o r e
LORD JUSTICE STUART-SMITH
LORD JUSTICE MORRITT
SIR JOHN BALCOMBE

HURST AND ANOTHER — Respondents

v.

HAMPSHIRE COUNTY COUNCIL — Appellant

(Handed down transcript of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD Tel: 0171 831 3183
Official Shorthand Writers to the Court)

MR SIMON RUSSEN (instructed by the solicitor of Hampshire County Council) appeared on behalf of the Appellant.

MR DERMOD O'BRIEN QC and MR JOHN McDONALD (instructed by Messrs C.A. Norris, Southampton) appeared on behalf of the Respondents.

J U D G M E N T
(As approved by the court)

LORD JUSTICE STUART-SMITH: This is an appeal from a judgment of Mr. Recorder Meggeson given on 15th April, 1996, in the Southampton County Court whereby he awarded the Plaintiff a total of £78,823.91 by way of damages and interest against the Defendants. The Plaintiffs are the owners of a semi-detached house at 213 Highlands Road, Fareham; the other part of the house is numbered 211. This house was built in 1954. The Defendants are the Highway authority for Highlands Road. In the verge of the highway outside the boundaries of 211 & 213 is an oak tree. It is between 170 and 190 years old. If the dividing line between numbers 211 & 213 is extended out to the centre of the road, the tree is on the 211 side of the line. Highlands Road is an ancient highway originally maintainable by the inhabitants at large, subsequently vesting in the Defendants or their predecessors. It is now accepted that the tree was planted and grew after the highway had been dedicated to the public.

In 1989 during a very dry summer the Plaintiffs' house began to suffer serious structural damage. It was the Plaintiffs' case that the damage was caused by subsidence due to moisture extraction or dehydration of the clay soil by the roots of the tree. The Defendants disputed this; they maintained that the damage was caused by rehydration of the soil resulting in heave rather than subsidence. The Recorder resolved this issue in favour of the Plaintiffs; and there is no appeal on this point.

The Recorder also found that the damage to the Plaintiffs' house from the tree roots was reasonably foreseeable by the Defendants. Following the decisions of this Court in Leakey v National Trust [1980] 1QB 485 and Solloway v Hampshire CC [1981] 78 LGR 449 this was a necessary precondition to liability in nuisance on the part of the Council. The Recorder based this conclusion as to foreseeability on the following matters: The tree was an oak which as a species notoriously has a high water demand. The tree and the house were situated on clay which is highly shrinkable; the geological survey clearly showed the nature of the soil, which was in any event known to the Council; the tree was 20 metres high and about 11-12 metres from the front of the building, well

within the danger area for a tree of that size and type. In his notice of appeal and skeleton argument Mr. Russen on behalf of the Council challenged the Recorder's conclusion on foreseeability. He did not develop this challenge in oral argument. In my judgment there was ample evidence to support the Recorder's conclusion on this point.

The principal grounds of appeal challenge the legal basis upon which the Recorder found the Council liable. The Plaintiffs' claim as originally pleaded alleged nuisance, negligence and breach of statutory duty. So far as the claim in nuisance was concerned, it was alleged that the Defendants owned the tree or exercised sufficient control over it to make them liable in nuisance. The claim for breach of statutory duty, based upon s.96(6) of the Highways Act, 1980 (the 1980 Act) was abandoned.

Although a number of authorities were cited to the Recorder, he does not refer to them in his judgment and I have not found it easy to discern the basis upon which he found the Council liable. He did not find that the Council owned the tree. He found them liable in nuisance and negligence, seemingly on the basis that they 'had power to maintain the tree and did so maintain it'. The power to maintain is a statutory one contained in s.96 (1) of the 1980 Act. And there was evidence that between about 1956 and 1984 the Council had pruned the tree from time to time.

Mr. Russen criticised the Recorder's conclusion. In summary he submits that s.96(1) provides a power only to maintain the tree. In the absence of a claim based on s.96(6) there is no statutory duty to act and mere failure to do so does not give rise to liability at common law. He relies upon the House of Lords decision in Stovin v Wise [1996] AC 923. The mere fact that the Council had pruned the tree in the past, cannot of itself give rise to a duty to continue to do so. He submitted that the tree was not the property of the Defendants, but of the owner of the subsoil. He relied upon the presumption that the owner of land adjoining the highway owned the soil up to the

mid-line of the highway. On this basis he initially submitted to this Court that the plaintiffs were the owners of the tree. However it is clear that the tree is in fact on the 211 side of the projected boundary between the two houses, so that if anyone other than the council is the owner, it is the owner of 211.

In the light of these submissions it is necessary to consider the way in which the plaintiffs' case has been presented to this Court. The primary submission made by Mr. O'Brien QC on their behalf is that under the statutory provisions whereby the highway was vested in the Defendants and their predecessors the property in the tree also vested in them so that they became owners of the tree or alternatively sufficient property in it to found liability for nuisance. This submission was not made to the Recorder and he cannot be criticised for not dealing with it. Mr. O'Brien's alternative submission is that the statutory power to maintain contained in s.96(1) of the 1980 Act coupled with the exercise of that power by pruning the tree for at least thirty years demonstrated sufficient control over the tree to found an action in nuisance.

Before considering the relevant statutory provisions, it is convenient for the purpose of this judgment to divide trees growing in the highway into three categories:

1. Those planted and growing in the highway before dedication/adoption of the highway by the inhabitants at large or the highway authority. I shall refer to these as pre-adoption trees.
2. Those planted or growing in the highway after dedication/adoption, but not planted under statutory powers. I shall refer to these as post-adoption trees. The tree in this case is a post-adoption tree.
3. Those planted under express statutory powers granted to the highway authority. I shall refer to these as planted trees.

At common law the owner of land over which ran a public highway did not lose any of his rights of

ownership whether of the surface or subsoil. Any trees growing in the highway were his trees (1 Rolle's Abridgement (1668) 392. Goodtitle v Alker (1757) 1 Burr 143.

This position remained the same until the Public Health Acts of 1848 (Section 68) and 1875 (the 1875 Act) (Section 149) so far as urban streets are concerned. S.149 of the 1875 Act provided so far as is material:

> "All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements stones and other materials thereof, and all buildings implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority."
>
> "Any person who without the consent of the urban authority wilfully displaces or takes up or who injures the pavement stones materials fences or posts of or the trees in any such street shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding five shillings for every square foot of pavement stones or other materials so displaced taken up or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the Court may award."

Highlands Road is an ancient highway and is within the urban district of Fareham and the highway would have vested in the district council at some stage under the 1875 Act, if not the earlier 1848 Act. Mr. O'Brien submits that the property in the tree also vested in the council or their predecessor within this section, or alternatively sufficient property in it vested in them to make them responsible in nuisance.

Similar provisions for the vesting of highways other than those in urban areas were contained in S.29 of the Local Government Act 1929. Broadly speaking urban and non-urban highways continued to be dealt with separately until the Highways Act 1959. The current provision as to vesting is contained in S.263(1) of the 1980 Act which provides that, subject to certain exceptions referred to in Subsection (2), every highway maintainable at public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority

for the highway.

So far as urban authorities are concerned the power to plant trees, provided they did not become a nuisance to the users of the highway or adjacent owners or occupiers, was first introduced by S.43 of the Public Health Acts Amendment Act 1890.

By the Road Improvements Act 1925 similar provisions were granted to the Ministry of Transport, county councils and highway authorities. Since the law has remained substantially the same since that time I will set out the relevant provisions.

Section 1 (1) provides:

> "The Minister of Transport (hereinafter referred to as the Minister) and any county council or other highway authority shall have power to cause trees or shrubs to be planted and grass margins to be laid out in any highway maintainable by him or them respectively; and to erect and maintain guards or fences and otherwise to do anything expedient for the maintenance or protection of such trees, shrubs and grass margins."

Section 1 (2) provides:

> "No such tree, shrub, grass margin, guard or fence shall be placed, laid out or allowed to remain in such a situation as to hinder the reasonable use of the highway by any person entitled to the use thereof, or so as to be a nuisance or injurious to the owner or occupier of any land or premises adjacent to the highway."

Section 1 (5) provides:

> "If damage is caused to the property of any person by anything done in exercise of the powers conferred by this section, that person shall, unless the damage was caused or contributed to by his negligence, be entitled to recover compensation therefor from the Minister, county council or other highway authority by whom the powers were exercised."

These provisions were substantially re-enacted in the Highways Act 1959, Section 82(1) (5) & (6). It should be noted that the power it gave to do anything expedient to maintain or protect trees was limited to trees planted by the authority, i.e. 'planted trees'. This was amended by the Highways (Miscellaneous Provisions) Act 1961, S.5 so that the power extended to all highway trees whether or not planted by the authority.

The current statutory provisions relating to highway trees are contained in S.96 of the 1980 Act.

Subsection 1 provides:

> "(1) Subject to the provisions of this section, a highway authority may, in a highway maintainable at the public expense by them, plant trees and shrubs and lay out grass verges, and may erect and maintain guards or fences and otherwise do anything expedient for the maintenance or protection of trees, shrubs and grass verges planted or laid out, whether or not by them, in such a highway."

The power to maintain trees, which in my judgment includes the power to prune them, relates to all three categories of trees.

Section 96(6) provides:

> "(6) No tree, shrub, grass verge, guard or fence shall be planted, laid out or erected under this section, or, if planted, laid out or erected under this section, allowed to remain, in such a situation as to hinder the reasonable use of the highway by any person entitled to use it, or so as to be a nuisance or injurious to the owner or occupier of premises adjacent to the highway."

This subsection applies only to planted trees. In my opinion Tudor Evans J. was in error in Russell v Barnet London Borough Council (1984) 83 LGR 152 when he held at pp 170-171 that on the true construction of the predecessor of this subsection, which was in substantially the same terms (Highways Act 1959 (the 1959 Act) S.82 (S.1 as amended by Highways (Miscellaneous Provisions Act 1961 (the 1961 Act) S.5), that the subsection applied to all trees whether or not planted by the highway authority. It was for this reason that the Plaintiffs, rightly in my view, abandoned their claim in statutory nuisance.

Section 96(7) provides:

> "(7) If damage is caused to the property of any person by anything done in exercise of the powers conferred by this section, that person is entitled, subject to subsection (8) below, to recover compensation for it from the authority or parish or community council by whom the powers were exercised."

This subsection refers back to subsection (1) and therefore applies to all categories of trees. But it appears to be concerned with misfeasance rather than non-feasance. However it is unnecessary to

decide this point and we have not heard full argument upon it. The Plaintiffs have not sought statutory compensation within the subsection.

There does not appear to be any comparable provision in the 1980 Act to that contained in S.149 of the 1875 Public Health Act creating the offence of damaging highway trees and providing for compensation. Under the Highways Act 1959, by S.117(2) it was provided that:

> "If a person, without lawful authority or excuse..
>
> (a) wilfully damages...a tree, hedge or shrub planted or laid out in a highway....he shall be guilty of an offence."

That section was repealed and replaced by the Criminal Damage Act 1971. S.1(1) provides:

> 'A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.'

By S.10(1) 'property' means property of a tangible nature whether real or personal, but does not include the flowers, fruit or foliage of a plant (which includes a tree) growing wild. A planted tree and its flowers, fruit and foliage is within the section, so also is any other tree but not its flowers, fruit or foliage.

By S.10(2):

> "property shall be treated for the purposes of this Act as belonging to any person:-
>
> (a) having the custody or control of it;
>
> (b) having in it any proprietary rights or interest."

Mr. O'Brien is, I think, right in submitting that if a charge under S.1. of the Act is laid in respect of a highway tree, whether or not it is a planted tree, the property in the tree would be alleged to be in the highway authority.

Although there is no provision comparable to that found in S.149 of the 1875 Act for compensation to be paid to the highway authority under these Acts, since the powers of Criminal Courts Act 1973, S.35, a criminal court has power to make a compensation order, and such a compensation order in respect of a highway tree could be made in favour of the highway authority.

So far as planted trees are concerned it is clear that the highway authority will be liable under S.96(6) if the roots of the planted tree cause dehydration to the soil and consequent subsidence of a building adjacent to the highway.

In my opinion the authorities also show that a sufficient property in post-adoption trees also vests in the highway authority to ground an action for nuisance both at the suit of the user of the highway who is injured as a result of the dangerous condition of the tree and also at the suit of an adjoining owner who suffers damage to person or property, provided the damage was reasonably foreseeable.

Turner v Ringwood (1870) LR 9 Eg 418 was a case of post-adoption trees, but before any statutory vesting of the highway. The highway extended to a width of 50 feet. After adoption trees grew in that part not used as the actual road. The Highway Board was held entitled to cut the trees and the Plaintiff who had bought the adjoining land was not permitted to stop them. Sir W.M. James V.C. said at p.422:

> "The right of the public is to have the whole width of the road preserved free from obstructions, and is not confined to that part which was used as via trita."

The Vice Chancellor reserved his opinion as to who owned the property in the timber when cut.

In Coverdale v Charlton (1878) 4QBD 104 the facts were these: By an award under an Inclosure Act passed in 1766 a private road E was set out.. In about 1818 road E became a public highway. A local board was formed in 1863 and in 1876 the board let the pasturage upon E to the Plaintiff. He thereupon commenced to depasture the herbage with his cattle. The Defendant interfered with

the Plaintiff's enjoyment of the depasturage. By S.149 of the Public Health Act 1875 the street vested in and was under the control of the local board. It was held, affirming the judgment of the Queen's Bench Division, that by virtue of S.149 the property in the soil of E, being a "street" so far vested in the local board that they could demise the right of pasturage thereon to the Plaintiff, who was entitled to maintain the action.

The first judgment was given by Bramwell LJ., and I shall have to refer to it but it does appear that it lacks somewhat the clarity that was characteristic of that great Judge. Brett LJ considered the language of S.149 and said at p.120:

> "We can give no other meaning to the words "vest in", except to say that it gives the property. It has been suggested that this meaning is so wide that it would give to the local board cellars which may be under the street, or houses that may be built over the street; or indeed, mines, however deep lying under the street. But when we have decided that the words "vest in," mean to give a property in, a further question would be in what does it give the property? That must depend upon the subject to which those words relate, and that is not land, but street; the section does not say that the land "shall vest in," but that "the street shall vest in." I think that the case of Brumfitt v. Roberts (1) is a guide in construing the section. The words of the private Act in that case were, that the fee simple of the pew should be vested in the subscribers or proprietors; the Court held that those words did not vest the land over which the pew was. So here, the words of this section vest the property in the street; and the street does not include the houses by the side of the street; it includes the space between the houses which is used as the footway and the roadway. "Street" means more than the surface, it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers; for, at the present day, there can be no street in a town without sewers, and also for the purpose of laying down gas and water- pipes. "Street," therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used, as streets are used. It does not include such a depth as would carry with it the right to mines, neither would "street" include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The legislature have, because the right of owners to the soil in a "street" is of so little value, intentionally taken away that right and have given it to the extent I have mentioned to the local board." (My underlining).

On the face of it the underlined passage would clearly include trees.

Cotton LJ at p.126 said:

> " Therefore, on the true construction of this Act of Parliament, the meaning to be given to the words "vest in" must be "passed to and vested in" the local board; it is sufficient in the present case to say that the street and the surface vested in the local board some property in the soil for the purpose for which it was to be used, and in my opinion I must hold that the "street" is a material thing, and that under this clause it vests in the local board."

Bramwell LJ in dealing with the construction of S.149 said at p.116:

> "And on account of the reasonableness of such an interpretation I am disposed to hold that this "street" vests without any property in the freehold of the soil. The word "vest" may have two meanings; it may mean that a man acquires the property usque ad coelum and to the centre of the earth, but I do not think that to be the meaning here. One construction of the word "vest" here is that it gives the property in the soil, the freehold, the surface, and all above and below it; but that would be such a monstrous thing to say to be necessary for the proper control of the streets by the local board, that I cannot suppose it to mean such a thing. Suppose the soil of the freehold passes, and consequently it carries the right to the land to an indefinite extent upwards, and to the centre of the earth below the surface: I cannot make up my mind to say that is the meaning of the word "vest" in S.149."

And later:

> "But the inconvenience and injustice of holding that the word "vest" would have that effect prevents my putting that construction upon it. What then is the meaning of the word "vest" in this section? The legislature might have used the expression "transferred" or "conveyed," but they have used the word "vest." The meaning I should like to put upon it is, that the street vests in the local board qua street; not that any soil or any right to the soil or surface vests, but that it vests qua street. I find some difficulty in giving it a meaning, and I do not know how far it adds to the words, "shall be under the control of." The meaning I put upon the word "vest" is, the space and the street itself, so far as it is ordinarily used in the way that streets are used, shall vest in the local board. I will refer to a few instances in support of this construction. The streets vest; the pavement, the stones, and other materials vest; all buildings vest which would seem to mean railways, and building implements which are chattels, and other things "vest" in the local authority. This Act also provides that the urban authority shall cause all streets to be levelled, paved, metalled, flagged, channelled, altered and repaired as occasion may require; they may cause the soil of any such street to be raised, lowered or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers; any person who without the consent of the urban authority wilfully displaces, or takes up, or injures the pavement stones, materials, fences or posts, or the trees of such street shall be liable to a penalty not exceeding 5L, and to a further penalty not exceeding 5s, for any square foot of pavement stones or other material so displaced and injured; he shall also be liable in case of injury to the trees to pay to the local authority such amount of compensation as the Court may award. Does that mean that the local board have a property in the tree and in the soil. I doubt very much whether that ought to be the construction put upon that enactment, but if it is, it goes a long way to show that the local board had such a property as they claim in this herbage. Even if it does not, if it will not apply to the tree which although surrounded by the street could be said in one sense to be no part of it, for the public had no right to pass over where the tree stood; and if it does not apply to a tree now in existence, but only to the trees the local board may plant or become otherwise entitled to, why even then it would show that they must have some property in the soil and its produce; that would assist the contention in favour of the plaintiff."

The reference in the last sentence to trees where the public has a right to pass, must be a reference

to pre-adoption trees; on the other hand in the next part of the sentence the dichotomy seems to be between trees now in existence, i.e. pre and post-adoption trees and those planted by the highway authority.

Apart from the dictum of Bramwell LJ it seems to me that the decision supports Mr. O'Brien's submission. It is difficult to see any logical distinction between one type of plant, i.e. grass and shrubs, and another, i.e. a tree, since a tree when the seed first germinates or the sapling is first planted will be in that part of the soil which does vest in the highway authority.

This appears to have been the view of Clauson J. in Stillwell v New Windsor Corporation [1932] 2 Ch 155. In that case the Plaintiff owned a house bounded on the west and north by public highways. There were a number of post-adoption trees of which the Plaintiff claimed the property. Having refused to comply with the Defendant's notice to remove the trees on the ground that they were dangerous and obstructive to traffic, and the Defendants as highway authority having, in consequence of the refusal, themselves removed three of the trees, the Plaintiff brought the action seeking an injunction to restrain the Defendants from removing the remaining trees. It was held that since the trees which had been cut down were a nuisance to the highway the Defendants had not merely a right but a duty to remove them: as to the remaining trees they were authorised to remove them as being an obstruction to the rights of the public over the entire width of the roads, which was not limited to the use of the carriageways. And further that the trees, as being parts of the 'streets' or as produce of the soil thereof, vested under S.149 of the 1875 Act, in and under the control of the highway authority, with the result that the Plaintiff was not in a position to complain.

In dealing with the argument that the trees vested in the Defendants as highway authority under S.149 the Judge said at p.165:

> "The argument is that these trees, in the circumstances which I have stated and as I find them to be, are part of the "street," they are things provided for the purposes of the street,

> the trees are planted and stand as trees in a street, an amenity of the street, possibly, as marking off the footway from the carriageway, a convenience and a protection to the public; and the argument is that under that section they vest in and are under the control of the urban authority. It is pointed out that, if the trees are injured, compensation for the injury is to be paid by the local authority: that would suggest that the property in the trees would be in the local authority. It is pointed out further that a penalty is put upon persons who without the consent of the local authority wilfully displace the trees; that would seem to imply that displacing the trees with the consent or by arrangement with the urban authority would not be an offence, which again fits in with the suggestion that the effect of this section is to place the control and, in some sense or other, the property in the trees in the local authority. In my view that is the effect of the section as regards such trees as those with which I am here dealing. In my view, for all the purposes of exercising the rights of the highway authority, these trees are to be treated as the highway authority's trees, and if they think it convenient to remove them it is proper that they should remove them. I am not called upon in this action to decide to whom the timber would belong when the trees were removed."

In coming to this conclusion I have to face this, that in the case of Coverdale v Charlton 4 QBD 104, 117, Bramwell LJ., in a judgment which has often been referred to, expressed some doubt whether the effect of this section was to vest the property in the trees in the highway authority. It was not necessary for the purposes of that case to decide this point, but that case did determine this, as I read it, that there was a right of property, of some kind at all events, vested in the highway authority, in the herbage growing in the soil of the highway; and I have some difficulty in seeing why there should not be a similar right of property, however far it extends, in the other vegetable growth in the soil of the highway which is constituted by the trees in the case with which I have to deal."

This decision was followed at first instance by Stocker J. in Solloway v Hampshire C.C. (unreported transcript 20 Feb 1980) at p.28. That was a case of a post-adoption tree. The decision in favour of the Plaintiff was reversed on appeal on the question of foreseeability. In Russell v Barnet LBC 83 LGR 152 Tudor Evans J. also expressed the view obiter at p.168 that post-adoption trees vested in the highway authority. That was a case of a pre-adoption tree and the judge distinguished the two types and held that pre-adoption trees did not vest. He held the Defendants liable on the basis that they exercised control of the trees, Mr. O'Brien's second main submission.

Mr. Russen submitted that if the Plaintiff's submission was correct S.96(6) was otiose, because the highway authority would in any event be under a potential liability in nuisance to road users and adjoining owners and occupiers at common law. S.96(6) imposes a liability, he submitted, which would not otherwise exist at common law. But in my judgment Mr. O'Brien's answer to this submission is correct. S.96(6) has been inserted to guard against an argument which might otherwise be based upon the principle in Geddis v Bann Reservoir (1878) 3 App. Cas. 430, namely that if the statutory power to plant was exercised without negligence, the highway authority would not be liable if the consequence of the growth and redevelopment of the tree throughout its normal life resulted in nuisance to users of the highway or adjoining owners or occupiers. Moreover I would wish to reserve my opinion as to whether in an action for breach of statutory duty relating to damage caused by planted trees foreseeability was a necessary ingredient.

I have no doubt that so far as post-adoption trees are concerned the property in them vest in the highway authority for all purposes. If they were planted, albeit not under statutory power as the tree in the present case possibly was, they are planted for highway purposes in that part of the soil which plainly vested. If they are self-seeded, again they are seeded in that part of the highway which vests in the local authority. If as they mature, their roots encroach into the subsoil which remains the property of the adjoining owner I do not see how that makes the tree the property of the owner of the subsoil. And I can see no logical distinction between trees and smaller shrubs, plants or grass.

That is sufficient to dispose of this appeal in favour of the Plaintiff. But both counsel have urged upon us the view that there is no logical distinction between pre and post-adoption trees so far as the liability of the highway authority to adjoining owners is concerned. Mr Russen relies upon the decision of Tudor Evans J. in Russell's case and a decision of mine in Bridges v Harrow LBC

(1981) 260 EG 284 that the highway authority is not liable in nuisance to adjoining owners in respect of pre-adoption trees to persuade us that the highway authority is not liable for post-adoption trees. For the reasons I have given already I reject this submission. Mr O'Brien submits that Tudor Evans J. and I were wrong in those decisions. He points out that even in relation to pre-adoption trees the highway authority is liable in nuisance to users of the highway, as Tudor Evans J. recognised (see p.168). The law extends to users of the highway the same protection in relation to nuisance on the highway as an occupier of land enjoys in relation to a nuisance causing physical damage emanating from the adjoining land. Moreover from a practical point of view there is much to commend Mr O'Brien's submission. It may be very difficult to determine in any given case and without the expensive advice of dendrologists whether the tree is pre or post-adoption. Much time and expense may be taken in litigating this issue. Secondly in practice a highway authority can not make any distinction in management between the two, and in this case did not attempt to do so. If there is any logical basis in the distinction it depends upon the fiction that in the case of a pre-adoption tree there is a reservation from the public's right to pass over the full extent of the highway that part of the surface on which the tree is growing and that the owner of the land at dedication intended to reserve the tree from the dedication. This seems to me to be an unreal fiction, in the absence of an express reservation. There are no authorities binding upon this Court which preclude us from holding that pre-adoption trees vest in the highway authority for all purposes, though I appreciate that Bramwell LJ's opinion was to the contrary. The penal and compensationary provisions in S.149, as he recognised, suggests that the property of all trees rests in the highway authority. I think that the time has come when the Courts should adopt a consistent approach to all highway trees other than those already subject to the statutory scheme now contained in S.96 of the 1980 Act. And I take this view, notwithstanding that it involves holding that my previous decision in Bridge's case was wrongly decided.

In these circumstances I do not find it necessary to deal with Mr. O'Brien's alternative argument

based upon the control of the tree deriving from the statutory powers in S.96(1) and the exercise of that power over thirty years or more prior to the damage sustained to the Plaintiff's house. Nor is it necessary to deal with any free standing claim founded in negligence apart from nuisance, though in my view such a claim would present great difficulty in the light of Stovin v Wise.

I would dismiss the appeal.

LORD JUSTICE MORRITT: I agree.

SIR JOHN BALCOMBE: I also agree.

Order: Appeal dismissed with costs.