

# PROFESSIONAL CONSULTATION TO HELP AVOID LEGAL PROBLEMS OF SHADE COMMISSIONS<sup>1</sup>

by William J. Porter

In the preparation of this manuscript I read many transcripts and reports of trials. During my career I have been involved as an expert witness in numerous cases. I am a member of the American Society of Consulting Arborists. Beyond that I have no formal training in law. Nor do I propose to present myself to you as an expert on municipal law. The cases I bring you are actual trials and the rulings are factual. I have condensed them since courts and their rulings tend to be long winded. They represent many similar cases with similar rulings which I have read and I hope illustrate circumstances where the services of a professional consultant might have prevented the necessity of going to court.

In one case several years ago, a street widening was proposed in an area where there were no sidewalks or curbs and the residents over the years planted a variety of plants and trees right up to the edge of the road. The new construction was going to change the character of the area considerably and was a major undertaking and especially since the residents were mostly elderly and had lived in this location for many years. Before any work was started the township hired a realtor and myself. We contacted each property owner and sat down with them and explained, in detail, what was proposed, the reason for the change, and how we were going to arrive at the value of the land and the plants that were to be removed. Not one property owner filed a protest and the work progressed without a hitch. This foresight on behalf of the township saved not only time and money, but also a lot of hard feelings that usually are associated with projects of this sort. ■

A similar case where the state came in and proposed a widening of an intersection ended up in a condemnation hearing. The new curb line was to come very close to an existing elm tree of considerable size. The state claimed they could do so

without damage to the tree but would not guarantee that. We asked for such a guarantee or removal of the tree. I was of the opinion that the necessary cutting of the roots for the new curb would put the tree in jeopardy of falling during a wind storm and also seriously weaken the tree which was in excellent condition. This would also increase the possibility of insect and disease infestation. The state countered that this was a lot of hogwash and that they have had many similar situations without any tree loss. After the hearing the Hearing Officer suggested the state re-evaluate it's position so they went back to their drawing board and redesigned the intersection and were able to leave the curb in that section at its original location, a condition that they said in the beginning was out of the question. ■

This next case does not specifically fit into the shade tree commission's responsibility, but I think you will find it interesting. Telephone company employees cut and pruned trees in front of a property for the purpose of clearing their wires and did so, they claimed, because of their responsibility to supply service to the public. The property owner sued, claiming he had lost shade and also aesthetic value to his property. The judge ruled in favor of the property owner. I was particularly impressed with his ruling.

"Among the many rights the lot owner has in the street, if not expressly prohibited by the city, is to plant and grow shade and ornamental trees along the edge of the sidewalk in front of his property. This is a very valuable right. As a rule shade and ornamental trees are very desirable in front of a residential property. They contribute no little to the comfort and enjoyment of a home. Not only that, shade trees of a city are conducive to the public health, comfort, enjoyment, and well being of her citizens. On that account most of the cities of the State encourage the property owners to plant and grow such trees in front of their proper-

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<sup>1</sup>Presented at the annual convention of the International Society of Arboriculture in Hartford, Connecticut in August 1980.

ties, and pass laws protecting the trees from injury and prescribe penalties for those who do injury to them. No one has the right or power to deprive the property owner of these trees or his right to maintain them in the street, except the city itself, or such as it may authorize. Even that power is not absolute. It must be exercised with prudence and within reason and not wantonly and willfully." ■

A limb from a tree that was within the right of way of the highway fell and instantly killed the driver of a passing car. His widow sued claiming the state had the responsibility to inspect the trees periodically which would have shown the dangerous condition of the tree limbs. The state claimed it was unreasonable to expect them to inspect each and every tree along its extensive highway system and that the falling of the limb was an act of God. The courts ruled for the widow declaring the State has the responsibility to ensure the roads were safe for the traveling public and this includes the trees and especially those that might fall into the roadway. ■

There was a tree on private property which at some previous time had been cut off leaving a stump. This stump gave growth to several trunks that eventually grew to 18" in diameter. One such trunk grew so that it leaned out over the highway. Extensive decay set in at the base, it fell and killed the driver of a passing car. The courts ruled that the city should have taken notice of the regrowth of this stump and should have inspected the tree for decay and possible danger to traffic. Especially since they had an ordinance that permitted them to trespass upon private property for the purpose of inspecting trees that might pose a threat to the public and require the removal of such trees by the property owner or to remove the trees themselves and charge the costs to the tax of the property. The city appealed, said that while they did have such an ordinance, they had not initiated a program of inspection of trees and therefore they had no notice of the condition of the aforementioned tree. In answer to this argument the appeals courts said that even though they had no regular program for tree inspection they should have had notice of the tree since they had a regular police patrol and part of the duties of the police was to see that the streets were safe for

the traveling public, and the patrolman should have reported the overhanging trunk. The court acknowledged that while the patrolman was not expected to rule on the condition of the tree, he nevertheless should have recognized that the tree leaning over the street could be dangerous and should have brought it to the attention of the proper authorities. The court ruled the property owner not liable since he had no special knowledge of tree conditions while the city had in its employ two tree experts, the parks department head and an assistant, who have reasonable ability and attainments; and, furthermore, good tree practice as is known and carried out by reasonably educated tree experts dictates that multi-stem trees be examined periodically to make sure they are safe. ■

The two previous cases are similar in that both pleaded they did not have prior notice of the condition of the trees. The courts recognize notice as being either actual or constructive. Actual notice is described as if the public entity had actual knowledge of the existence of the condition and knew, or should have known, of its danger. Constructive notice requires the plaintiff to establish that the condition existed for such a period of time and was of such obvious nature that the public entity should have discovered it.

A delivery truck struck a low limb on a residential street injuring the driver and damaging the truck extensively. The truck was one that normally made such deliveries in residential areas and, in fact, this particular truck and driver had been on this street many times before. On the date of the accident the driver had to pull to the right, off the crown of the road, to make way for oncoming traffic causing the body of the truck to strike the limb. The city maintained that it had no notice of the limb and admitted the trees were the responsibility of The Shade Tree Commission which operated with a very modest budget. Consequently, it could not afford to periodically inspect each and every tree and had relied upon notification of property owners of dead and dangerous trees and then they would prune or remove the trees as the budget allowed. Sound familiar? The court ruled that a limited budget does not rule out the city's negligence in relying upon property owners to

give notice of dangerous trees and limbs since the property owners for the most part are not trained to determine the condition of trees. Further, the court said that the truck was within the legal size and height limits and since no evidence was presented indicating the posting of any low clearance signs to warn the driver as required under the Highway Sign Act. Therefore the city was liable. ■

A motorist approaching a railroad crossing was struck by an oncoming train. The flasher lights were not working on the evening preceding the accident. A patrolman noticed the lights were not flashing and tried without success to contact the railroad maintenance department. The following morning the lights were on but not flashing. The crossing was only one track. There was a large tree near this intersection. The date of trimming of this tree, if any, was unknown. Testimony, including photographs, showed that the tree limbs obstructed the view of an oncoming train even after the driver stopped and looked down the tracks. The city was held liable since despite the malfunctioning lights it was the responsibility of the city to remove any tree or underbrush that might obstruct the visibility at any railroad intersection. ■

*National Park in the Midwest.* A young boy was struck by a falling limb while camping out at a designated campsite. He was permanently injured and his parents sued, charging the park rangers and the National Park Service with negligence in maintaining the trees in the park. The National Park Service said they had a regular inspection program of their campsites for dangerous conditions including dead and dangerous trees and had, in fact, removed a dead tree at this site recently, but did not see the limb which injured the boy. Further, they argued the campers must be aware of the inherent dangers accompanying camping in areas such as national parks where it would not be practical to prune each and every tree in their parks. The courts agreed that it would be unreasonable to expect the park service to prune all their trees, but they had designated certain areas for camping and those who are allowed to use these sites should expect them to be safe for the use intended and awarded damages to the

boy. ■

This brings up the question of our city parks. How safe are they in your town? Certainly they are designated areas for the public to use and enjoy and would seem to fit the ruling of the previous case.

Act of God cases are also being more closely looked at by the courts. One such case again involved injury by a fallen limb, but this time during a rain or wind storm. The city maintained the limb fell because of the wind and therefore an act of God. Not so said the courts. True, the limb might not have fallen at that particular time if the wind wasn't blowing, but storms such as this type and intensity are common in this area and the city should have taken this into account and had the limb removed. A hurricane or tornado would, of course, be considered in most cases as an act of God and any injury or damage during or shortly thereafter would most likely come under that protection. Also, there would not likely be any liability in the event a minor limb or branch happened to break off during a wind storm as described before because there is no reasonable way to prevent this type of breakage during a storm.

For the most part, I have been referring to falling limbs and trees and have been ignoring the underground parts of the tree which is still the responsibility of the city. I have done so because where injury to persons or property have occurred because of the underground parts of the trees, such as uprooting sidewalks and root damage to sewers, the courts are not as consistent in their rulings and the controversy still thrives.

The problem of roots damaging sewer or other underground structures does not come under the same concept as I have been discussing, where the city is responsible because it failed to take notice of a dangerous situation. The essential invisibility of the roots and the inaccessibility of these parts, where to make periodic inspections, would put an unreasonable burden upon the city, more often than not will release the city from any liability in these cases. Additionally, the courts are recognizing the fact that if the sewer line is in good repair the possibility of root damage is remote. However, don't expect the same consideration from the courts if you plant a tree overtop or very

close to a property owner's sewer line. Ultimately, all this won't help at all when you are confronting an irate property owner with a backed-up sewer.

Of all the cases I have reported to you today and the many more I read, the common factor is lack of adequate inspection by professional people and the supplementing of maintenance programs to

prevent accidents from happening. This is, as I see it, the primary function of any shade tree commission or one that can be accomplished with the services of a consultant.

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## AN ECONOMIC EVALUATION OF THE PRUNING CYCLE

by Robert W. Miller and William A. Sylvester

City foresters and arborists have been pruning shade trees as long as they have been planting them. The reasons to prune are many, ranging from public safety factors to aesthetic considerations. The need to prune is well established, but the frequency of pruning is not.

Frequency depends on factors such as species, growth rate, tree age, and location. However, the city forester usually does not have the luxury of choosing the proper time to prune a given tree, but rather will depend on an arbitrary pruning cycle determined by budgetary constraints. Discussion with city foresters in the Lake States reveals that many feel an optimum pruning cycle exists; the most favored period being 5 years. Most researchers and managers recommend "frequent" pruning, but they do not define frequent in precise terms. Fenner (2) reported the use of a four year cycle in Lansing, Michigan, while Chapman (1) suggests two to three prunings the first four years followed by infrequent pruning to remove deadwood.

Additional interest in the pruning cycle has resulted during the development of two computer programs by the authors. The first program UW/SP URBAN FOREST (4) was developed as a computer inventory system based on tree value. This program is essentially a data reduction system, providing summary tables and a listing of

individual trees by location. The program uses the International Society of Arboriculture tree valuation system (3) to compute the value of city owned trees. The second program UW/SP URBAN FOREST MANAGEMENT is a management simulation model based on the inventory program. This program simulates the growth of an urban forest over time, allowing the user to make management decisions such as planting schedules and pruning cycles, and randomly remove trees based on historic mortality. UW/SP URBAN FOREST MANAGEMENT also calculates management costs and compares them to the value of the urban forest.

A key problem in development of the management model was determining the long range impact of the pruning cycle on tree value. While it is recognized that a judicious pruning schedule will produce a higher value shade tree by raising its condition class, there has been no attempt to quantitatively determine the effect of pruning.

The objectives of this study are to determine the effect of pruning cycle on the condition class of street trees, and to determine an optimum pruning cycle for a case study.

### Relationship Between Pruning and Condition Class

The UW/SP URBAN FOREST inventory pro-