

# COMMON LAW BRANCHES OFF INTO NEW DIRECTIONS

by Victor D. Merullo

It can be said that the law generally takes two forms: statutory and common law. Statutory laws are those laws made by the legislatures of the either the State or Federal government. Whereas, common laws are a result of Court interpretations of reasoned law, and are often referred to as "judge-made" laws. The Common Law dates back in history to the English Legal System. During that period of time, judges presided over cases, reached decisions and shared them with each other. Many legal issues pertaining to the rights and responsibilities associated with trees are governed by laws which are the product of court interpretation. Many such court interpretations have withstood the test of time and still remain the law of the land to this day.

However, it appears that new interpretations of old common law theories are taking place by today's courts causing common law issues pertaining to trees to branch off into new directions. What follows is a brief discussion of two recent changes of common law issues which have occurred regarding trees and the duty of care to be exercised by landowners.

## "Urban" Versus "Rural" Distinction

The "reasonable man" standard has long been used to determine liability of an individual property owner (whether private or public) who has a tree which causes injury on such property abutting a city street or highway. The situation usually arises when an individual passing underneath is hit by a falling tree, which is defective due to age.

In the past, the courts made a distinction between the urban and rural landowner regarding the duty of care owed to others by the property owner whose trees abut a street or highway. The reasonable man standard was still utilized by the

courts; however, a relaxed standard of care was found to exist with reference to rural land as opposed to strictly urban property. The urban landowner was held to the duty of reasonable care relative to the trees located on such owner's property, including inspection to insure that such trees were safe. With regard to the rural landowner, the general rule was that while there was no duty imposed upon the owner of property with trees abutting a rural street or highway to inspect these trees to ascertain defects which could result in injury to a passer-by, an owner having actual or constructive knowledge of a patently defective condition of a tree had a duty to exercise reasonable care to prevent harm to a person using the street or highway from the falling of such a tree or its branches.

The justification provided by the courts for this "urban" versus "rural" distinction was that a rural landowner could have trees resembling a forest in dimension making a forced inspection standard unreasonable. In contrast, the urban landowner generally owns only a few trees which would not make the duty of inspection an unreasonable burden.

Recently, a case heard in the Superior Court of Connecticut took a different view from the urban-rural distinction used in the past. In the case of *Berenice C. Toomey, Administratrix of the Estate of Edward J. Toomey, III, et al., v. State of Connecticut*, No. CV-91-00571835, Superior Court of Connecticut, Judicial District of Litchfield, at Litchfield (Decided February 17, 1994), the plaintiff, Berenice Toomey, and her husband, daughter and mother, had embarked upon a Sunday drive during the Fall of 1987. As they were traveling on Route 7 in the State of Connecticut, a large tree limb, estimated to weigh between five and ten

tons, fell across the vehicle in which the parties were riding, injuring Mrs. Toomey and her daughter, and killing Mr. Toomey and Mrs. Toomey's mother.

The tree in question was estimated to be one hundred fifty years old and was located twelve feet, five inches from the edge of a well-paved and well-maintained through artery utilized by travelers to gain access from the northwest corner of Connecticut to the urban areas surrounding it. *Id.* The Court in the Toomey case made an indication that it was readily apparent that the tree in question was adjacent to an area where it could do great harm and that the area was characterized at the time of trial as being a "target" area.

The Court in Toomey recognized that for more than one hundred years owners of roadside property in the State of Connecticut had been required to inspect and monitor roadside trees which pose a threat to passers-by. The Court further recognized that an urban-rural distinction has developed throughout the United States wherein the standard of care with reference to rural, farm, timber or little-used land is less than that of strictly urban property. *Id.* The Court in Toomey declined to adopt the urban-rural distinction indicating that such a distinction is oversimplified and has become less workable with the growth of suburbs and the increase of traffic through rural countryside.

The Court in Toomey further indicated that the extent of a landowner's responsibility to either inspect his or her trees, or only to act on actual knowledge of potential danger, could not be defined simply by categorizing the land as urban or rural.

The Court held that the duty to inspect a given tree increases as the risk of harm increases. *Id.* The Toomey Court further held that the appropriate level of inspection and maintenance of a particular roadway depends not only upon the expense and burden of various maintenance programs, but also upon the characteristics of the surrounding land and roadway itself, including the type and extent of dangers posed thereby. As an example, the Court indicated that a seldom-traveled roadway in a heavily wooded, rural area would require fewer inspections and a different type of maintenance program than a heavily-traveled thorough-

fare in an urban area would require. *Id.*

In making its determination as to the level of inspection and care which the State of Connecticut was obligated to provide, the Court determined that it was first necessary to examine the facts associated with the particular case. *Id.* First, the Court conducted an analysis as to the location of the tree in question and determined that the tree was adjacent to an area where it could do great harm as it was located in close proximity to the edge of a well-traveled roadway. *Id.*

The Toomey Court next reviewed the characteristics relating to the size, location, age and species of the tree itself. Testimony at trial revealed that the tree branch which fell was between five and ten tons in weight, was approximately one hundred fifty years old (this estimate was based upon its size) and was approximately thirty-nine feet in length. *Id.* The Court held that given the undeniable danger posed by the enormous limb that overhung the roadway on which the Plaintiff and her companions were traveling, the State had an obligation to at least periodically inspect the trees growing adjacent to its highways.

In essence, it appears that the Toomey decision expands the duty of care owed by the rural property owner regarding trees growing on his or her property located adjacent to streets and highways. The level of care to which the landowner is to be held liable regarding trees located adjacent to roads and highways in rural areas will be heightened by the existence of characteristics relating to size, location, age and species of the trees involved. Property owners (both public and private) should take notice of the Toomey decision as it appears that the "urban-rural" distinction regarding the duty of care, at least where trees are located adjacent to streets and highways, is branching off into new directions.

### **Right to Trim Neighbor's Tree Roots**

In the past, the prevailing view has been that a landowner is entitled to trim roots up to the property line which intrude onto the landowner's property. The Courts, in support of such position, have held that an adjoining property owner has an absolute right to cut those parts of the tree which encroach upon the landowner's property as it was

recognized that a landowner owns both the air above and the ground below his property, and the landowner therefor has a right to protect such property rights.

Upon a review of the following wire report reprinted and appearing in the Contra Costa Times, May 21, 1994, at 11A, it would appear that a landowner's absolute duty to protect his or her property has been tempered by a landowner's duty to act reasonably:

*Court says neighbor can't cut tree's roots*

SAN FRANCISCO— Don't like the roots of your neighbor's tree growing into your yard? Feel like taking an axe to them?

Think twice, a state appeals court said Friday.

With a lecture on neighborliness to two feuding San Francisco men, the 1st District Court of Appeal said landowners have no absolute right to sever roots of someone else's tree that extend onto their land, and disputants must act reasonably.

The court revived a suit by Steven Booska, who said he had to get rid of a 30- to 40-year old Monterey pine in his back yard after neighbor Ramanbhal Patel damaged the roots in his own yard.

Booska's suit, quoted by the court, said Patel hired a contractor in May 1991 to sever the tree's roots in his yard down to three feet below ground level.

Booska said the work was badly done and made the tree unsafe. Patel said the roots had caused cracks in his walkway, but Booska said the damage was minimal and could have been avoided without severing the roots.

Superior Court Commissioner Ralph Flageollet dismissed Booska's suit, saying Patel had an absolute right to cut tree roots on his property. The appeals court disagreed in a 3-0 ruling.

"Whatever rights Patel has in the management of his own land, those rights are tempered by his duty to act reasonably," said the opinion by Justice Robert Dossee. That depends on such questions as what damage Patel suffered, what alternatives he had and what harm he caused Booska, Dossee said.

The ruling allows the case to go to trial.

—Wire Report

Based upon the foregoing, in order for a landowner to avoid potential liability for the cutting or removal of roots growing on one's property from an adjoining landowner's tree, the prudent landowner should first determine what negative effect such cutting or removal of the roots might have on the adjoining landowner's tree, and then determine what alternatives are available to prevent such harm.

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