ARBORICULTURE AND THE LAW: A CANADIAN CASE STUDY

by M. E. Donovan

On November 26, 1983 on a rural section of public highway, called the Falmouth Back Road, and approximately 50 miles from Halifax, a mature, 110 year old elm tree fell across the highway landing on a half ton pickup truck rendering 24 year old Patrick Swinamer a paraplegic.

The Province of Nova Scotia and the owners of the property were sued in nuisance and negligence for failure to recognize the hazard to users of the highway and for having failed to deal with that hazard. The court found the Province of Nova Scotia liable and awarded Mr. Swinamer 4 million dollars in damages.

The case was appealed and eventually went to the Supreme Court of Canada. In a March, 1994 decision, the Court overturned the finding of negligence on the part of the Nova Scotia Department of Transportation and determined that the Province was not liable.

Facts

At the time of the accident, Patrick Swinamer was driving his half ton pickup truck along the highway at a normal rate of speed on a cloudy, cold but fine day. The wind was only 37 kph (23 mph). The elm tree was not located within the road right-of-way but was instead located about three feet in on private property. The elm tree was approximately 60-70 feet in height and some 30 inches in diameter. The tree showed no signs of Dutch elm disease. It had no noticeable discolouration and had leaves the previous summer. The tree probably had Dutch elm disease but the cause of the collapse of the tree was its infection by a fungus called Ganoderma applanatum combined with wind.

The condition of the tree was such that even a light wind of 20 kph or 12 mph could blow it over. It broke off from 3 to 10 feet from the ground, leaving a chair back stump. The decay fungus entered the base of the tree through a mechanical wound which would have been visible on an inspection of the tree. The mechanical wound left a scar at least 3-4 inches wide and had probably been inflicted 8-10 years before the tree fell.

The Issue in Swinamer

The central issue in *Swinamer* was the extent of the liability of government where limited funds were available to maintain trees that may present a hazard to the traveling public and where, if there had been more funds available, a better highway maintenance system might have been achievable. A secondary issue was the ability of the Department of Transportation to enter on private lands to bring about removal of a hazardous tree.

The law Pre-1980's

In the past, government was liable only in situations where there was a direct link between government activity and the injury. An example is the case where highway workers leave a manhole uncovered resulting in a damaged undercarriage or ruined tires.

Another clear case of liability, but less direct than the first, is where the police report that a stretch of road is icy, nothing is done for an inexplicable reason, and an accident results. A third and equally clear case of liability is where a municipally owned tree falls after having been reported three weeks earlier as being a danger to cars and pedestrians. The above are three examples of what is described in legal terms as misfeasance.

In the past government was not however liable for non-feasance, in other words, damages caused by hazards of which it was not actually aware. For example, Departments of Transportation were not liable for potholes in the road of which they were not aware *[Barrett v. North Vancouver, (1980)*

2 S.C.R. 418].

The Law in the 1980's

a) Kamloops v. Nielsen. In 1984 in a case involving the City of Kamloops, British Columbia, the Canadian courts started moving away from the concept of misfeasance and non-feasance as a result of a 1978 English decision, *[Anns v. Merton Borough Council (1978) A.C. 728 (H.L.)].* The Supreme Court of Canada decision in Kamloops resulted in municipalities being found liable in a great number of instances where this would never have previously been the case. The courts began to take the view that once a municipality was in the maintenance or inspection business, whether that be tree maintenance, road maintenance or inspection business, building maintenance or sewer maintenance, then responsibility flowed toward those injured by any failure to maintain. It should be noted that the English courts have now reversed themselves and have abandoned this approach, although Canadian courts have not. *[Murphy v. Brentwood District Council, (1990) 2 All E.R. 908]*

b) Just v. British Columbia. An example is the decision in Just v. British Columbia, *[(1989) 2 S.C.R. 1228]* where Just was very badly hurt and his daughter killed by a boulder that fell on Just's car while traveling on the highway from the City of Vancouver to the ski resort at Whistler, B.C. The Supreme Court of Canada found that the B.C. Highways Department could be liable for any negligence in the making and carrying out of operational decisions. What was of particular interest in Just was that the court said that the manner in which the Highways Department carried out inspections and their frequency, how and when it cut trees or inspected them, and when it carried out scaling operations were all manifestations of the implementation of the policy decision to inspect and were operational in nature.

Only in the event of a policy decision that had been made to maintain the highway to the standard that the allocated funds would allow, would the municipality be protected. Liability would ensue if the allocation of the funds had been left to the discretion of the highway superintendent.

This presented a very scary situation for municipal staff which some have described as setting up municipalities as insurers for those who use the highways.

c) U.S. legal situation. In the United States there is generally no liability where the government agency has a discretion whether to provide the service. In addition, with respect to matters within the federal jurisdiction, the Federal Tort Claims Act applies which provides in part:

The provisions of this chapter...do not apply to...any act or omission...based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty...whether or not the discretion involved be abused.

The purpose of this provision was to prevent second-guessing of legislative and administrative decisions. The provision was considered in United States v. Varig *[967 U.S. 2976 (1984)]* where there was a claim arising from the crash of an aircraft and the Federal Aviation Authority's failure to check specific items, when certifying for use in commercial aviation. Based on the Federal Tort Claims Act, there was no liability found.

In recent years there has been an awakening to the import of the decisions of Canadian courts in the 1980's with the consequence that the Supreme Court of Canada commented in CN v. Nosk Steamship Co., *[(1992) 1 S.C.R. 1021]* that if there are no limitations on this concept, the courts may end up running the highway system and not the government agency that has been assigned to do so.

Swinamer

How does this tie in to the responsibility to maintain a healthy tree system? In the Swinamer case, the Supreme Court of Canada stated at p. 11

In Just it was found that maintenance extended to the reasonable prevention of injury to travelers from dangerously situated rocks which could fall on the highway Similarly, there is a duty owed to users of the highway to take reasonable steps to prevent accidents which can ensue from trees that constitute a hazard falling on the highway. There can be no reasonable distinction drawn between dangerously situated rocks which fall on a highway and obviously dead or hazardous trees which fall on the highway.

a) Legislative regime. The applicable statutory provision in Nova Scotia can be found in section 5 of the Nova Scotia Public Highways Act, which provides:

5. The Minister may construct or maintain any highway, or may on behalf of Her Majesty in right of the Province enter into contracts or agreements for such construction or maintenance, but nothing in this Act compels or obliges the Minister to construct or maintain any highway or to expend money on any highway.

The court was not prepared to rely upon section 5 of the Public Highways Act to absolve the Department of Transportation from liability. The Supreme Court of Canada took the position that the wording was not sufficiently clear that this was intended to limit the Department of Transportation's responsibility of ensuring that the roadway was free from hazards, such as overhanging trees.

b) Trespass. In the Swinamer case one of the arguments advanced by the Province of Nova Scotia was that because the tree was on private property it had no authority to enter on private property to remedy the situation. The Supreme Court of Canada found at p. 15

Once again I cannot accept this argument. The presence, adjacent to the highway, of an obvious danger to the users of that highway would justify the respondent entering on the property to remedy the situation.

It is rather bizarre to think that the Department of Transportation could leave a very old, very large tree leaning precariously over the highway without taking steps to remedy the situation, simply because it was located just outside the highway right-of-way. The tree would constitute a continuing danger to all that use the highway. Its removal would be essential for the safety of all who traveled the road.

In so stating the Supreme Court of Canada referred to an American case, a decision of the Supreme Court of Mississippi in Barron v. City of Natchez *[90 So. 2d 673 (1956)]* which in its turn, quoted another American case of Inabinett v. State Highway Department *[12 SE 2d 848]* where at p. 851 the court stated:

It is settled that the tree which caused the injury was growing just off the highway, on the land of Miss Gonzales, within two inches of the line of her land. The question arose and was discussed whether the highway agents or employees could enter the land of Miss Gonzales and remove the tree. We think it is held by most of the courts that such action is not a trespass, but falls within the scope of the duty of the Highway Department to keep the road safe for those who are lawfully upon it.

It is not to be understood that the highway officials may at their own free will enter upon the lands of others and cut trees, even for use on the highway, but we do say that if they know, or in the exercise of ordinary care in their duty of keeping the highway safe for public use should know, that a tree is dangerous to the safety of the public in its use of the highway, it is its duty to enter upon the land and remove the danger.

Thus both the Canadian and American law on the ability to access private property to remove a hazard to the traveling public is the same.

c. Policy vs administrative/operational decision. The key issue in Swinamer, however, was who had made the spending decision. And was that decision a policy decision or was it an administrative/operational decision? An important factor in the Swinamer case was that there was no general program in effect to inspect trees. In the Just case falling rocks were a continual problem on the Whistler Highway. The road often had to be closed during periods of heavy and prolonged rains. There was a regular program of rock inspection.

In Swinamer the Nova Scotia Department of Transportation had a policy to identify obviously dead and dangerous trees in order to apply for funds to remove them. There was no existing policy to always remove dead or diseased trees because of the limited availability of funds. The court in looking at this issue stated at p. 20

It is significant that Mr. Colburn, the divisional engineer, testified that if he had decided to use the money from his general budget to cut the identified trees, he would have had to make cuts in other maintenance activities which could equally adversely affect the security of users of the highway. He was, in fact, setting priorities for the allocation of available funds. It is also significant that the

requested funding for the removal of the 234 identified trees was only partially allowed, and that over a three year span. The evidence demonstrates this to be a classic example of a policy decision.

In spite of what has been said in the Supreme Court of Canada in Swinamer, it remains unclear what will constitute a policy decision as opposed to an administrative or operational decision in a particular case. It is incumbent upon those making decisions on level of service to ensure that it is clear what level of service is provided is a policy decision. This is particularly so where cutbacks in inspection programs are made due to budgetary problems.

Conclusion

1. Unless a municipality, state or provincial government has legislative protection for failure to maintain its roads, then municipalities, state or provincial governments will be found negligent if they fail to deal with obvious hazards to those using the roads, regardless whether that hazard is on private or public property.

2. Where the hazard presented by the tree is not obvious, liability for the failure to identify the hazard will, at least in Canada, be dependent on the nature of the tree inspection program that has been implemented and whether the nature of the tree inspection program was a policy decision or an administrative/operational decision.

City Solicitor's Office
1841 Argyle Street
Halifax, NS B3J 3A5
Canada