

BRANCHES OF THE LAW: TREES AND LITIGATION¹

by Edmund DiSanto

During the past decade the explosion in litigation has gone unabated. This growth has occurred despite the fact that litigation costs have risen past the reach of most individuals and many small businesses, and have taken up an ever increasing percentage of the budget of many large corporations. The cost of liability insurance has also increased dramatically. In this environment, it becomes almost a necessity to adjust business practices to address the greater risk of suit.

For many years, utilities and tree companies have been experiencing the growth of litigation first hand — as defendants. This paper will identify the most commonly occurring tree-related claims and will suggest steps for preparing to defend against such claims.

Common Claims

Trees have often been at issue in litigation. Perhaps the high point in tree-related litigation occurred in 1971 when the United States Supreme Court, in *Sierra Club v. Morton* actually considered whether trees had standing to bring an environmental suit against a developer intent on clearing a substantial portion of the Mineral King Valley in California. However, the average tree-related claim does not raise such lofty legal questions. Nonetheless, there is a fairly wide variety of claims that can be made with respect to matters concerning trees, and the damages can be substantial.

The common law or non-statutory claims that are most often alleged in cases involving trees are negligence, trespass, conversion and breach of contract. The first three claims all fall under the "tort" category and the last is considered a separate category which may, depending on the facts, involve statutes governing commercial transactions. In recent years there have been general statutory enactments in many states, usually called Unfair Trade Acts or Consumer Protection Statutes, which can provide an independent basis for tree-related claims. Also, some

states such as Maine have long ago enacted statutes that specifically grant rights and remedies against persons who have violated certain prohibitions with respect to privately owned trees.

While the above may be a useful guide to those somewhat familiar with the law and legal classifications, some definitions and examples may serve to clarify the different potential claims.

Negligence. A claim of negligence is essentially a claim that a person who owed a duty of care to act reasonably to another — the claimant — failed to do so and has thereby caused injury. One simple example would be as follows: *Truncated Tree Company has been retained by one person to cut down an old oak tree. The Company misjudges the height of the tree and once the tree is cut, it falls through the living room of the neighbor's house causing \$30,000 in damages.* In such a case the neighbor's negligence claim would in essence be that any reasonable tree company would have taken the necessary precautions to prevent the harm that occurred.

A second somewhat more complicated example would be as follows: *Dr. Tree Treater is retained by John Appleseed to cure a disease that is killing the trees in Mr. Appleseed's orchard. After two seasons of Dr. Treater's treatment with chemical spray X, the disease is cured, but the trees no longer bear fruit. A second consultant hired by Mr. Appleseed reveals that the disease would have been better treated with chemical Y because that treatment would have contained the disease without harming the orchard's yield.* In this case the complication is that the question of reasonableness is not that of the person but that of the average expert. Thus such a negligence action is, in essence, a kind of malpractice action.

A third type of negligence claim is negligence in supervision. This, unlike the two examples above, is a negligence based on an act of omission. An example would be as follows: *Walter Warden has the duty to inspect trees on public property in Tree Town. Every day on his way into the en-*

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trance of the park he passes an old tree that appears to have roots extending to one side only. A relatively strong non-prevailing wind picks up one day, knocks the tree down and injures a passerby.

If it could be said that the warden should have noticed the unusual root condition, and had the tree removed, the passerby could recover damages for the injuries sustained.

Trespass. Originally trespass was treated as part of criminal law. In the civil context, trespass is the unauthorized entry upon the land of another or the unauthorized use of or interference with the personal property of another. One example of trespass would be as follows: *Peoples Power Company owns a 345 kV transmission line that extends through a number of parcels of land. Peoples Power hires a tree company to cut and trim along the line. However, one section of the line was not properly located on an easement or right of way. No prior permission had been obtained by the tree company or Peoples Power to enter onto the parcel where the line was mislocated.*

In this case, even though the tree company believed it had a right of entry, the parcel owner in most jurisdictions can still claim a trespass. A variation of this problem that occurs far more frequently and which does not have as sure a conclusion is the tree company that undertakes to maintain a right of way with herbicides but the easements along the right of way specify maintenance by a cut and trim method. In this situation there is the potential for a trespass claim.

Conversion. Conversion is the appropriation of the personal property of another. This claim arises surprisingly frequently with respect to trees. An example that would give rise to a conversion claim would be as follows: *Tree Company is instructed by Larry Landowner to cut certain trees on a certain parcel of land. Landowner has a survey map that indicates that he owns that stand of trees. The Tree Company cuts the trees and hauls the timber away. The survey used by Landowner is not correct and the trees were actually owned by another.* In many jurisdictions, the Tree Company would be liable as a joint tortfeasor for converting the timber.

Breach of Contract. A claim of breach of con-

tract in essence means that one party has failed to perform as agreed. Such claims are as varied as the agreements that support them. Also, most contract claims are more understandable and predictable to the non-lawyer than tort claims. However, the law implies certain warranties as a part of many contracts. Thus a contract for tree services may carry certain implied workmanship, or professional standards, warranties, and a contract for the sale of firewood may carry a warranty that the wood is indeed suitable for burning for heat in a fireplace or wood stove. These warranties can serve as the basis for claims, despite the fact that they are not expressly part of the agreement.

Statutory Actions. In many states a number of the tort actions may constitute an unfair or deceptive practice under an unfair trade statute, especially if the underlying action giving rise to the claim was done with intent. If this is the case, such statutes often provide for double or treble damages, as well as attorney's fees. In the conversion example above, if the tree company had independent knowledge of the fact that the landowner's survey map was incorrect, the tree company would be subject to such a statutory claim.

Many states have enacted statutes that specifically provide for a right of action with double or treble damages for the cutting down, destroying, injuring or carrying away of any ornamental or fruit tree, timber, wood or underwood. These statutes are actually codifications of the tort of malicious mischief to personal and real property, except that such statutes are especially confined to trees. In many instances, these statutes also provide for attorney's fees.

Proper Preparation for Litigation

Identifying potential litigation. Having briefly considered the legal basis for potential tree-related claims, the next consideration is the preparation for actual litigation. Such preparation should immediately begin upon the discovery of a claim that has the potential for a lawsuit. However, there is often some difficulty in determining exactly what factors indicate that an incident has lawsuit potential. Some of the more obvious factors are: 1) fatalities; 2) injuries to children; 3) injuries to

adults that require hospitalization; 4) extensive property damage, e.g., \$10,000 or more; and 5) issues that engender emotional reaction, e.g., herbicide treatment programs. In essence, however, it is only experience in the particular aspect of the industry of concern that will allow a compilation of an extensive set of criteria that indicate a potential lawsuit.

Investigation: Establishing a defense. Assuming that litigation is found to be looming on the horizon, the steps that follow immediately upon that discovery often make the difference between a successful defense or settlement and a disaster. The best way to determine the scope of the necessary preparation is to review the last step of the legal process — the trial — first. In a trial, the finder of fact, a jury, which is composed of 12 citizens selected at random, will review all evidence presented and drawing all reasonable inferences therefrom will make a determination of liability. If the claimant or plaintiff is the only one presenting evidence, in all likelihood the jury will find the defendant liable for all the damages supported by the evidence. Thus, the potential defendant's initial goal should be to find evidence that either serves to disprove liability or disprove the amount of the damages claimed.

Apart from considerations of indemnification, contribution and comparative negligence, there are several basic defenses that can be asserted against the claims stated above. Against a claim of negligence, the defendant might assert:

- 1) *no duty of care owed*: Claimant, for whatever reason, names a defendant that is not responsible for the work or for actions that led to the injury.
- 2) *contributory negligence*: Defendant is negligent but claimant is more negligent than the defendant.
- 3) *assumption of the risk*: Claimant knew the dangers either from express warnings or from surrounding circumstances but assumed the risk of harm.
- 4) *reasonable care undertaken*: Defendant took all steps that a reasonably prudent person would take and either the harm occurred in spite of these efforts, or occurred in a manner that was not reasonably

foreseeable.

The defenses that can be raised against trespass are that: 1) the entry to the land was with the consent of a person with authority to give it; and 2) the entry occurred on property owned by the claimant. The defenses to conversion are nearly identical to those against trespass, specifically: 1) the property was removed and used with proper consent; and 2) the claimant did not own the property taken or used. To defend against the statutory claims, the defendant must establish that the prohibited acts did not occur, or if they did occur, to avoid multiple damages, the defendant must establish that the acts were not intentional.

Claims of breach of contract, as noted above, can take many forms, and it is thus difficult to consider these claims in general terms. However, the common defenses asserted to contract claims are as follows:

- 1) no contract ever existed;
- 2) the contract expired before the claim was made;
- 3) the terms of the contract were fulfilled;
- 4) the terms of the contract excluded the claim; and
- 5) performance was impracticable or impossible or the contract itself was unconscionable.

It should be noted that a statute of limitations defense is available against all claims not made in a timely fashion. For contract claims, most states require that suit be commenced no later than six years after a breach. For tort and statutory claims, the limit is usually two or three years.

Even if no defense to the underlying claim can be asserted, the defendant can still challenge the damages alleged. The defendant can show either that the damages were not in fact sustained or that the claimant failed to take reasonable steps to reduce or mitigate the damages.

Significantly it is often only the defendant and not the defendant's lawyer who knows the subject matter at issue so as to be able to determine what evidence is available. Referring to the malpractice type of negligence case set forth in an example above, the defendant in such a case might want to obtain all evidence available on chemical X to prove that the chemical as used in the treatment in

fact had no effect on the orchard's yield. Also statements by others familiar with the orchard might tend to show that the yield from the orchard had been declining steadily for the last five years and thus that even if the chemical reduced yield further, the damages that can be proved would be reduced.

Often, the most important evidence is evidence that is available only at the time period of the incident giving rise to the claim. Precise locations of people, buildings, fixtures and equipment are forgotten. Statements made at the time of the incident are half remembered, totally forgotten, or distorted. Weather conditions often cannot be recalled. Work procedures, practices and customs generally applicable at the time of the incident are forgotten with subsequent modification. Copies of documents containing disclaimers or warnings that were given or received by the claimant at the time of the incident cannot be found.

The only way to prevent such costly losses in terms of asserting otherwise available defense, is to develop comprehensive investigation procedures to be employed in all cases where litigation is likely. Such an investigation should include the following:

- 1) a comprehensive report that summarizes in chronological order all pertinent transactions and events leading up to the claim;
- 2) sketches of the scene of the incident giving rise to the claim which sets forth pertinent details, and measured distances;
- 3) photographs of the scene of the incident giving rise to the claim which are labeled with the date of the photograph, the relative location and the name of the photographer;
- 4) statements of witnesses, signed if possible, which include the name, address, occupation and age of the witness;
- 5) copies of any police reports, ambulance reports, fire department reports;
- 6) a list of all physical items of evidence which includes the name of the item, the name and date of the incident, the storage location, the person having custody, and the relevance to the claim;
- 7) copies of all documents, *e.g.*, letters, memoranda, purchase orders, contracts,

policies, procedures, and notes that relate to the incident or the claim; and

- 8) clippings of all newspaper articles relating to the incident.

In most instances, the defendant's evidence needs only to be gathered and secured. An early and effective investigation conducted by people with the appropriate expertise can reduce the time an attorney spends simply trying to determine the facts of a case and thereby reduces legal costs.

Discover and maintaining privilege. The Federal Rules of Civil Procedure and the rules governing civil procedure in nearly all states allow for broad discovery of the relevant facts at issue in a case. Under these rules, interrogatories posed by the opposing party must be answered, documents requested by the opposition must be produced; and key witnesses can be deposed extensively by the opposition prior to trial. The policy underlying broad discovery is to bring all facts to light and eliminate, to a great extent, the element of surprise. Accordingly, information obtained through discovery often provides the basis for, or stimulates, settlement discussions.

One potential danger of broad discovery for a defendant is the claimant's ability to get access to materials that really constitute the substance of a defendant's investigation. If a claimant is able to discover a defendant's investigative reports, the claimant obtains a tremendous advantage, both in preparing for trial and at the settlement discussion table. As a result, care must be taken in investigation procedures to avoid situations in which the defendant actually ends up preparing the claimant's case.

There are two privileges that offer protection from discovery. The first is the attorney-client privilege and the second is the work-product privilege. The attorney-client privilege protects communications made between attorney and client. The work-product privilege protects material gathered by or for an attorney in the preparation of a case likely to go to litigation. Thus, a letter sent to an attorney by the client concerning a claim would not be discoverable under the attorney-client privilege. Further, evidence and statements obtained at the advice and direction of an attorney preparing a defense in a case

likely to go to litigation, would not be discoverable by the claimant absent a showing of undue hardship under the work-product privilege.

As recently as January 13, 1981, the United States Supreme Court, in *Upjohn Company v. United States*, expanded the scope of the attorney-client privilege to include communications made to attorneys by employees of a corporation, who are not necessarily corporate officers or directors, provided that the employees are directed to assist or consult with an attorney on a legal matter. In light of this case, if a person is authorized to conduct an investigation of a claim that has litigation potential, much of the information gathered can be protected from disclosure.

However, some care must be taken to protect against the waiver of available privileges through ordinary business practices. Often routine or uniform investigations are conducted of all incidents without a clear distinction in treatment between the majority of cases that do not have litigation potential and the relatively few that do. With such undifferentiated procedures, an assertion of a privilege fails because the investigation documents have not been treated initially as anything other than documents produced and maintained in the ordinary course of business. Another practice that defeats a privilege claim is an excess of internal "publication" through employee communications, or excessive photocopying and distribution of investigation reports. This practice in essence amounts to waiver of the privilege. Still another common practice that can preclude an assertion of privilege is full or partial disclosure through press releases or reports to government agencies. In such cases, many courts feel that a partial disclosure of privileged information waives the protection with respect to the balance of the information.

The following procedures are suggested as a means of establishing and preserving applicable privileges:

- 1) Upon learning of an incident that constitutes a claim situation with litigation potential, an attorney should be notified as soon as possible and all subsequent investigation should be under that attorney's advice and instruction.
- 2) The number of investigators assigned should be limited to the number of people needed to conduct an effective investigation.
- 3) All investigative reports should be labeled **CONFIDENTIAL** and sent directly to the attorney handling the case in a sealed envelope also marked **CONFIDENTIAL**. Under no circumstances should investigators include opinions on liability in the report.
- 4) No copies of investigative reports should be sent to outside agencies.
- 5) One copy of the investigative report may be kept by the originator, but under no circumstances should copies be duplicated and circulated, or kept in a file accessible to others.
- 6) No partial disclosure of an investigative report or its content should be made to the press.
- 7) All oral statements to third persons concerning the case should be made by the attorney handling the case.

Conclusion

Litigation is on the increase and often concerns tree-related issues. With proper investigation procedures, the foundation for a solid defense against such claims can be established. Following certain guidelines will also protect information gathered in investigations from disclosure to claimants through discovery procedures.

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New England Electric System
 25 Research Drive
 Westborough, Massachusetts

ABSTRACTS

Chapman, Douglas. 1981. **Magnolia cultivars flower from April through summer.** Weeds, Trees & Turf 20(5): 46, 48.

If one large shrub or small tree represents a herald of spring, it certainly is magnolia. Magnolias commence blooming in mid-April and continue through June. They are useful as specimens, foundation plantings, or for large area landscapes. The outstanding magnolias include Lily, Saucer, Star, 'Dr. Merrill', and Sweetbay. Magnolia is susceptible to many insects and diseases but rarely is damaged by any. It can be pruned in early spring. It is effective as a flowering shrub or tree.

Kerr, John. 1981. **Scientists fight gypsy moth spread with intensified attack.** Weeds, Trees & Turf 20(5): 16, 18.

The gypsy moth, *Lymantria dispar*, the nation's number one shade tree insect, persists and thrives in the heavily infested Northeast. It defoliated 5.1 million acres of urban and rural forest in 1980. It will likely eat much more foliage in 1981 as it spreads south and west. Scientists, diversifying their attack on the hungry insect, have stepped up their efforts as it multiplies. Arborists have attempted to use scientific research to counter one of the most challenging problems they have faced. Although professional arborists and the U.S. Forest Service have become extremely cautious from environmental pressures, the problem has become so severe that it has solidified forces against the insect. Researchers and field applicators believe that pesticides cannot do the complete job. A management approach integrating pesticides with biological agents and nature elements and predators pervades the minds of the leaders in the scientific and industrial communities. Integrated pest management (IPM) has become not only a popular concept, but a necessity.