

TREES AND THE LAW¹

by Bernard V. Borst

Trees are one of the great natural wonders of nature in our world. They contribute both materially and aesthetically to our existence and we are told that trees, as a renewable source of energy, promise to play a greater role in our lives in the future, but it is not my purpose to pay homage to the tree even though it may be deserving of it; my purpose is to discuss trees as a municipal problem and more particularly the municipal arborist's problems and responsibilities pertaining to trees located within the geographical boundaries of his/her municipality.

Because you come from various states and cities and laws differ from state to state and city to city, I have prepared this paper using general statements of the law which have been accepted by the greater number of states. In law, such statements, which have been widely accepted, are known as the "prevailing or majority" rule. In doing so, however, it must be understood that a "minority" rule may also exist. I point this out so that if or when, you hear something that does not apply in your particular state or city, you will understand that such differences exist.

I will begin by discussing with you the relationship between the municipal government and the public, the relationship between municipal employees and their employer, and the exposure of municipalities and public employees to suits and possible liability in instances which arise out of one's employment.

A municipality is a unit of local government. As such, it is usually recognized as having only a "paper" existence because it really exists only because of a state-issued corporate charter or because the state statutes authorize its existence. As the municipality has no tangible existence and like other corporate entities it can only function by and through its officers, employees, and agent.

Although the municipal arborist may in some instances be classed as a municipal officer for the

purpose of this discussion we will consider him or her to be a municipal employee. The arborist is employed by the municipality to assume and carry out the municipality's duties and responsibilities to the public as they relate to trees, shrubs, and other growing plants.

Generally, the municipality's duties and responsibilities as they relate to trees will be set out either in the statutes of the state, the municipal ordinances, or in the court decisions interpreting both the statutory law and common law in that jurisdiction.

Many states have adopted statutes imposing certain mandatory obligations upon its municipalities or at least the larger municipalities to take certain action to protect the public and their trees. In other states, such as Kansas, permissive statutes have been enacted which merely authorize municipalities to regulate the planting, maintenance, treatment, and removal of trees and shrubbery if the governing body deems it appropriate to do so.

To the municipal arborist, the distinction between the mandatory requirements of a statute and the permissive requirements of a statute are important. For example, if a state statute says "municipalities **shall** remove and burn all dead trees located anywhere in the city annually" the municipality has an affirmative duty to fully comply with the statute and remove and burn all the dead trees annually from within its corporate borders. Should the municipality fail to do so and as a result someone is injured or otherwise damaged, the injured or damaged person will generally have a valid claim against the municipality or its arborist or perhaps both depending upon the law in the particular jurisdiction which we will discuss shortly. However, if the statute provides "municipalities **may** remove and burn all dead trees wherever located within the municipality" such language is generally considered to be permissive authorization from the state and the municipality is not re-

¹ Presented at the annual meeting of the Tree Wardens, Arborists and Utilities Conference in Chicopee, Massachusetts in March, 1981.

quired to remove the dead trees or risk exposure to liability. Further, if the municipality has no responsibility under such a statute and in the absence of a municipal ordinance requiring that it be done, the municipal arborist would expect to have no liability exposure under the statute.

Our hypothetical mandatory and permissive statutes are merely examples of what the municipal arborist might find in the various statutes. It is important to the arborist to know what the state requires of the municipality as it relates to the trees and shrubs within the municipality's jurisdiction if he/she is to fulfill his/her employment responsibilities and protect his/her employer from possible liability to third persons. What has been said here concerning state statutes can also be said about municipal ordinances. An ordinance may require the arborist to act affirmatively or may grant his/her discretion to act if in his/her considered opinion such act would be appropriate. Should the arborist fail to act when required to do so by the municipal ordinance and such failure on his/her part results in injury or damage to a third person, such inaction can also give rise to lawsuits and possible liability on the part of both the arborist and his or her employer, the municipality.

At this point I would like to discuss with you briefly a problem which frequently arises where a municipality is sued because of the alleged negligence of its arborist which negligence is also alleged to have resulted in injury or damage to the claimant.

Before the United States came into existence, a rule of law existed in England which is variously described as "the king can do no wrong" or "sovereign immunity." When the United States was created most, if not all, of the states adopted the common law from England as their law. The doctrine of "sovereign immunity" continues to be alive and well in many of our states.

Under the "sovereign immunity" doctrine a state or municipality was not liable and could not be sued for the negligence or other tort actions committed by their employees, even though such acts arose out of and in the course of the employee's job. Such immunity does not protect the employee and such employee can be sued and subjected to a liability judgment if the employee's

conduct was, in fact, negligent or otherwise recognized as actionable under the law and the complainant could prove damages. Needless to say, the municipal employee is placed in a rather precarious position by this rule because defending lawsuits is quite expensive and the payment of any judgment in the absence of insurance, and there usually is none, can be a tremendous, if not impossible, problem.

The "sovereign immunity" rule has been abolished in many of the states recently. Today the public is demanding that state and municipal governments which have been previously granted immunity from lawsuits be placed in the same liability status as private individuals and private corporations. In response to such public clamor, our courts and legislatures are responding. For example: In 1975 the Kansas Supreme Court considered a "sovereign immunity" defense in a lawsuit for negligence against Wichita State University, and in the first of two opinions ruled "sovereign immunity" dead in the State of Kansas. However, on a motion for rehearing the court reversed its ruling and reinstated the doctrine in our law. Such action on the part of the court was merely a forerunner to what subsequently occurred. In 1978, the City of Parsons was sued by a private individual for negligence. The city claimed to be immune from liability under the "sovereign immunity" doctrine. However, the Kansas Court, with a great degree of finality, struck down the doctrine. As a result, in 1979, the Kansas Legislature enacted what is called the "Kansas Tort Claims Act" which establishes a procedure whereby the State of Kansas and its municipalities can be sued for the acts of negligence committed by its employees.

In reality, the abolition of the doctrine may be a benefit to the municipal employee. The Kansas Tort Claims Act provides that upon request from an employee the city must provide for the defense of any civil action against such employee in his or her official or individual capacity or both on account of any negligent act committed in the scope of his or her employment. Also, the city is required to indemnify the employee against any judgment except one for punitive or exemplary damages.

You perhaps have noticed that the area of our principal concern for liability has been in the area

of negligence. There are other legal bases for lawsuits against the city or against you as the city's employee or against both. However, the theory of "negligent conduct" exposes the public employee to the greatest degree of risk of suit and economic loss.

Negligence in the legal sense has been defined as a violation of the duty to use care. In Kansas, as is common throughout the United States, there are three elements that must simultaneously exist before the legal right of recovery is said to exist under the negligence theory:

1. The existence of a duty on the part of a defendant to protect the plaintiff from the injury of which he or she complains.

2. Failure of the defendant to perform such duty.

3. Injury to the plaintiff from the failure of the defendant.

You will recall that when we were discussing the performance of statutory duties it was said that it is imperative that the municipal arborist know and understand what acts or duties the statutes required of the municipality and him or her as the arborist; such statement was made because failure to perform a duty imposed by a mandatory statute or a municipal ordinance is "negligence per se." If the plaintiff can show that a statute or ordinance requires you, as the municipal arborist to perform a certain act, that you did not do the required act and because you did not do it, the plaintiff was damaged, you are liable for those damages. For example, a statute provides: "The municipal arborist shall spray all trees in the city on or before April 1st of each year with arsenate of lead because arsenate of lead kills the catawampus bug." Now assume you do not spray any trees in the city for two or three years, as the statute requires, and suddenly you are being sued because a city resident lost some very expensive trees due to an infestation of catawampus bugs. You and your employer have a problem. Why? Because you failed to perform a duty imposed upon you by the law and your dereliction resulted in damage to one of those persons protected by the statute.

All acts of negligence are not "negligence per se." Let us look at an example of more typical negligent situation that you might find yourself involved with. Near one of the primary or grade

schools in your municipality and immediately adjacent to a sidewalk leading to the school, a number of trees are located. The trunks of these trees are covered with large poison ivy vines. You, the city arborist, are being bombarded with phone call after phone call by mothers of the children using the sidewalk because their children are being infected by the poison ivy vines and they demand you do something and do it now. Being a conscientious public employee who responds to the voices of the public, you immediately grab a sprayer, fill it with herbicide and you go spray the vines to kill them. Unfortunately, at the time you are spraying, the wind is blowing at a pretty good rate, and as a result your spray is carried away from the vines and into a yard downwind from the trees. As a result, a few days later, the owner of the downwind property files claim with your employer for the damage caused by the herbicide to his trees and shrubs which were not infested with the poison ivy vine.

Although you may have had a duty to treat the poison ivy, you also had a duty to use reasonable and prudent care in doing so and by using a toxic spray which you know will kill other vegetation, as well as the poison ivy, on a windy day you probably have been negligent by not waiting for better weather conditions or by not using another method of eradicating the vine which methods would avoid the wind borne distribution of the herbicide indiscriminately in the nearby area.

Now let us see how these rules apply in actual practice. Although what we have said about the statutory duties and duties imposed by ordinances and the duty imposed by law to exercise due care in whatever you do, the care and management of trees and shrubbery located in municipally-owned property, such as parks or around public buildings, causes the arborist very few problems. This probably is due to the fact that the municipality has exclusive control over the public land and can exercise considerable discretion in what it does. The main problem area in all jurisdictions appears to be that portion of the street right-of-way called the "parking."

Trees located in the city's streets are a matter of concern to the municipal arborist because although the city's Public Works or Street Department may be responsible for the curbs, pavement,

and sidewalks, the trees and shrubs located in the parking are usually his or her responsibility.

In most, if not all jurisdictions, the law recognizes that a landowner whose property abuts a municipal street, alley, or boulevard has some right to use the street parking. Also, in almost all states, either under statute or otherwise, municipalities are liable for damages for injuries due to the defects or obstructions in public ways, provided the defect or obstruction results from the negligence of the municipality, the municipality knew or should have known of the defect or obstruction in time to repair or remove it or give warning of its existence, the injured person was not contributorily negligent, and the defect or obstruction was the proximate cause of the injury.

In Kansas, as well as in many other jurisdictions, the courts have imposed liability upon cities because the states' statutes have granted the cities "exclusive control" of the streets. However, several states in the New England area do not follow this theory and impose liability upon the cities only when express statutory provisions for such liability have been enacted.

How does a municipal officer or employee such as an arborist know the nature and extent of his duty? He or she, on behalf of the municipality is only required to exercise ordinary or reasonable care to keep the public streets in a reasonably safe condition, for those using the streets in a proper manner with due care and caution for their own safety; that care which an ordinarily prudent man would exercise under like circumstances, in maintaining public ways at all times in a reasonably safe condition for travel in the usual modes and for the customary street uses, day or night, in winter as well as in summer, on foot, or horseback, or in vehicles, whether one kind or another, including automobiles, and cycles.

There is no fixed standard of the reasonable or ordinary care required of a municipality or its arborist in the maintenance of its streets. Its measure is not accurately defined by statute or by court decision. Consequently, we cannot devise any unvarying formula. What is reasonable or ordinary care, therefore, in any given circumstance is dependent on the particular facts surrounding the event in question and in the end will usually be determined by the court or jury. The question to

be decided by the court or jury will be "did the municipality or its arborist in this instance exercise that degree of care which might reasonably be expected from an ordinary prudent person acting under the same circumstances."

Is the liability removed or shifted to abutting property owners in those jurisdictions which recognizes the ownership interest in the trees located in the street parking? Where the primary duty of maintaining the street right-of-way has been placed upon the municipality by statute, and in the absence of a statutory imposition of the sole liability upon the abutting landowner because the trees of the abutting owner interfere with traffic, our opinion, is no. Remember the city's liability arises out of a responsibility placed upon it by the State to keep and maintain the municipal streets for the traveling public to use. In certain instances, however, the acts of the abutting property owner can become an intervening cause which perhaps may cause the tree to fall into the street. Under such circumstance, the mere fact the tree fell into and obstructed the street is not cause for a claim for municipal negligence, but if the municipality had noticed that the tree was there, or because of a lapse of time should have known it was there, and did nothing to remove the obstruction, then the municipality or its arborist could reasonably be said to be negligent.

A municipality may be liable, in case of negligence to persons in a street injured by the falling of a tree being cut down by its employees; or, according to the more prevalent rule, by the falling of a decayed tree or limb of a tree where it had notice of the dangerous condition a sufficient length of time but did nothing to remedy the dangerous condition. There is no municipal liability unless the municipality had actual notice or by the exercise of reasonable care should have had notice of the condition of the tree.

Obstruction to travel upon city streets because of overhanging tree limbs is a problem with which the city and its arborist must cope. The beautification of streets by shade trees and shrubbery is a common practice throughout all the jurisdictions. In fact Kansas has encouraged such practice by recognizing that cities may, as a municipal public work, plant trees in the street parking area and assess the cost against the abutting properties.

Also abutting property owners may beautify the parking between the sidewalk and the curb by planting trees and shrubs although such right can be and by city ordinance is controlled and restricted in the City of Wichita. For example: By ordinance the city requires abutting owners to apply for a permit before planting and also specifies the kinds of trees that can be planted in the parking. The purpose of such restriction arises from the municipal duty "of rendering the highway safe and convenient," and can include such purposes as to carry out a plan or system of street improvements, or to prevent roots from clogging city sewer or water mains.

The municipal duty to the public regarding its streets includes the obligation to remove overhanging obstructions which interfere with travel upon the street. The public right to the use of the street goes to the full width of the street and extends indefinitely upward and downward. Correspondingly, the duty to keep streets in a reasonably safe condition extends to guarding against obstructions caused by overhanging tree limbs.

To correct such problems, the municipality may, if you as the municipal arborist have either mandatory or permissive authority granted you by traveling public. In those jurisdictions which do not recognize the municipality's right of removal, and as most jurisdictions do recognize such intrusion into the street right-of-way as being a public nuisance, the municipality can bring suit against the offending tree owner or owners under the State's Nuisance Abatement Laws.

Trees or shrubs which obstruct the view of vehicle drivers using the public streets may be another problem for the municipality and its arborists. The prevailing rule appears to be that where a street, itself, is reasonably safe for public travel, it is not rendered inherently dangerous solely because the municipality fails to cut down natural vegetation which tends to obstruct the view of a driver at an intersection. However, it also appears that when the trees or natural vegetation obstructs a driver's view of a traffic control device such as a stop sign or street light such obstruction is a street defect for which the municipality would be liable.

Now before I close, I would like to discuss with

you a problem which you may very well encounter if you as the municipal arborist have either mandatory or permissive authority granted you by statute or ordinance to treat or remove damaged or diseased trees or plants on private property. The need to enter onto private property would of course normally arise where a diseased or damaged tree can readily be observed from the public right-of-way. The need to enter on private property might also be occasioned by a need to conduct a blanket inspection of trees and shrubbery because a suspected epidemic of some disease or by reason of the influence of some other factor or factors which is suspected of damaging or destroying trees or shrubs on a wholesale basis.

Most of you, I am sure, are aware of your authority to treat or destroy diseased or damaged trees or shrubs on private property once this matter becomes obvious to you. Our own Kansas Statute, K.S.A. 12-32-4 provides, for example, that in Kansas whenever a diseased tree is found on private property the governing body may direct the owner to provide specific treatment or destroy the tree, and should he or she fail to do so then the City itself may remove or treat the shrub and assess the cost against the owner. In this connection you would do well to check your own state law and city ordinances.

What I wish to discuss with you, however, with respect to the management of trees on private property is what to do in those circumstances where entry onto private land is refused. There is no question that the entry upon private land for the purpose of inspecting diseased or damaged trees or shrubs or for the purpose of conducting a blanket inspection of trees and shrubs is a "search" of private property and subject to the warrant requirements of the Fourth Amendment. The warrant requirement of the Fourth Amendment pertains not only to search warrants issued for the purpose of discovering and retrieving evidence in criminal matters but applies as well to "inspection" type procedures utilized in the enforcement of regulations which may not in themselves be of a criminal nature. Historically the Fourth Amendment commands grew in large measure out of the colonist's experience with the writs of assistance that granted sweeping power

to customs, official and other agents of the king to search at large for smuggled goods, and the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. While legally the requirements for a search warrant to enter on private property for inspections has probably existed since the Constitution was adopted it was not until the late 1960's that the courts have been called upon to provide special emphasis to this particular constitutional requirement.

In the case of *See v. City of Seattle*, 387 US 541 decided in 1967 the Supreme Court held that the Fourth Amendment required that a fire inspector obtain a warrant before conducting a routine inspection of a warehouse for fire safety. In the same year in *Camara v. Municipal Court of the City and County of San Francisco*, 387 US 555, the Supreme Court again held that for a city inspector to inspect a building which was suspected of being used as a residence in violation of a building's occupancy permit would require a search warrant. In each of these cases and in the case of *Marshall v. Barlow's Inc.*, 436 US 307 decided in May of 1978, wherein the Supreme Court held that for an OSHA inspector to conduct a search of business premises for safety hazards and regulatory violations would require a search warrant, the Supreme Court emphasized that a search of private property is presumptively unreasonable if conducted without a warrant. By reason of the above cases and others it is clear

that if you are refused permission to enter on private property for the purpose of conducting a blanket inspection or if you wish to go on specific property to further assess disease or damage to trees which is obvious from the public thoroughfare you must obtain a search warrant.

Any search warrant, of course, issued for any purpose must comply with all the requirements of the Fourth Amendment which is to say that it must state with particularity the premises to be searched or inspected, it must describe the purpose for which the warrant is requested, that is, is it to search for specific items of property or specific conditions of trees and shrubs or is it for purposes of an inspection. If it is for the purposes of an inspection, the reason for the inspection must be set out in detail and as well as the inspection procedures to be utilized. These procedures must be reasonable and calculated to facilitate an inspection with a minimum amount of disruption to the occupant of the premises. My suggestion, however, in this vein is that when entry is refused that you then contact your city attorney or county attorney or district attorney who will assist you in the preparation of a search warrant as well as advise you with respect to where a search warrant must be served and in what manner it shall be served.

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