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LIABILITY FOR DAMAGE CAUSED BY HAZARDOUS TREES

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Abstract. Summarized are the general principles of law that courts use to determine who is liable when tree defects result in personal injury or property damage. Three procedures to minimize liability—tree inspection, documentation of inspection, and adoption of other urban forestry practices—are discussed.

In many cities the professional arborist does not have to look far to find trees in hazardous condition. Many communities have prized landmark trees, often in ruinous old age but with too much historical and cultural significance to remove. Many trees planted as civic improvements at the turn of the century have become potential hazards (1, 4, 9). Trees subject to the numerous stresses and abuses of the urban environment decline in vigor, are invaded by wood rotting organisms, and deteriorate to the point of becoming hazards.

Because of their proximity to people and property, city trees are especially likely to cause harm if they fall or lose limbs (see Fig. 1). Hazardous trees threaten people using public streets and sidewalks, and may damage adjacent structures, parked cars, and other property. When trees cause damage, the question arises: Who will pay? Must the victims of accidents (or their insurers) absorb the cost of injuries or property damage even if they did nothing to "deserve" this fate? Or must the landowners or managers (or their insurers) cover at least some of the costs? What if the land managers did nothing "wrong" in the sense that there was nothing they could reasonably have done to prevent the accident?

Our society turns to the law to answer its "Who will pay?" questions, and this paper summarizes how courts decide who is liable for the costs of accidents involving hazardous trees. First, we present the general principles of law that determine liability. Second, because municipalities are often potential defendants in tree cases, we discuss some of the special issues that arise when the party responsible for a hazardous tree is a municipal or other government entity. Finally, we discuss the best strategy to minimize liability for accidents that may occur.

Basic Principles of Liability

A 1978 case, *Husovsky v. United States* (590 F.2d 944, D.C. Cir.), illustrates the fundamentals of liability in tree cases. A college student was driving to school through Rock Creek Park in Washington, D.C. As he passed beneath a multistemmed tulip-poplar, one limb dropped on

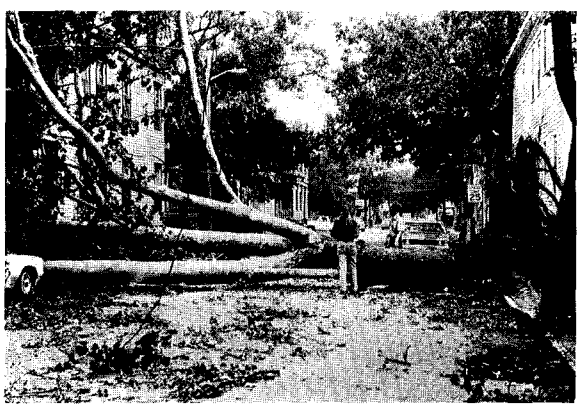

Figure 1. The municipality, the landowner, or both may be liable for damage caused by hazardous trees.

his car. The student suffered severe injuries, apparently leaving him paralyzed for life. His medical bills, the cost for permanent caretaking, his lost career opportunities, and his pain and suffering added up to a considerable sum. Here the court found the damages to be $975,000. The court also determined that the land managers had to pay the bill. How was this decided?

The fundamental rule in our Anglo-American legal tradition is that the injured party will absorb the costs unless it can be proved that someone else was legally responsible. Thus, in our example, the injured student would have paid for his injuries out of his own pocket (perhaps with help from his insurance) unless he established that the land managers did something that the law recognizes as "wrong."

There are two legal theories the student could use to establish that the land controllers should pay for his injury. One theory is that the land managers were *negligent*: if they had been reasonably prudent, they would have spotted the defective tree and taken steps to prevent its injuring passing motorists. The second theory is that the tree was a *nuisance* that the land managers were unreasonably maintaining adjacent to the road.

The distinction between negligence and nuisance is significant for lawyers involved in a case. For land managers, on the other hand, the essential similarity in the theories is the important feature: under either theory, the injured person must show that the defendant tree owners or land managers acted *unreasonably*. Either the land managers were negligent because they did not use reasonable prudence in removing the tree hazard; or they unreasonably allowed a nuisance tree to stand, menacing the highway. Here we will discuss the negligence theory because it most clearly shows the issues involved in establishing the presence or absence of "reasonableness."

The law of negligence requires the injured party or plaintiff to show four elements to establish the right to collect damages from the defendant. First, the plaintiff must show that the defendant had a *duty* to exercise reasonable care to protect people like the plaintiff from some foreseeable hazard. Second, the plaintiff must show that there was a *breach* of this duty in that the defendant failed to act reasonably under the circumstances. Third, the injured party must show that the defendant's breach of duty was the *cause* of injury. And fourth, the plaintiff must show that he indeed suffered some *harm* that the law recognizes, such as physical injury or property damage. We will highlight how these four elements—duty, breach, cause, and injury—work in a hazardous tree case.

Duty. From the early days of Anglo-American law, landowners had no duty to protect anyone against natural conditions on their land, including any dangerous trees. But in the last 80 years or so, the law has recognized that owners and managers of land ought to mitigate some natural hazards associated with their land, at least if the hazard threatens people and property on other land or on adjacent roadways. Today, then, most courts recognize that landowners must, at a minimum, remove any defective trees growing near the borders of their property if the landowners have actual knowledge of a hazard. The old no-duty rule still benefits controllers of rural forest land to the extent that they do not have to inspect naturally growing trees for hazardous conditions. Even rural landowners, however, have been held responsible for accidents in three contexts: when the landowners actually knew the tree was defective (often because other people had complained to them about it); when the tree was not naturally growing but rather was deliberately planted by the present or previous landowners; or when the tree grew in a developed area within a forest stand, such as a public campground.

Of more interest to arborists is the development of the duty principle for urban landowners. Owners or controllers of urban property now have a duty not only to remove known defective trees but also to inspect their trees for defects. This duty extends to all trees that threaten other property owners or passers-by, whether or not the trees are deliberately planted. The duty to inspect greatly increases the landowners' potential liability. Plaintiffs may have some difficulty establishing that the landowner *actually knew* of a defect, but plaintiffs can more easily show that the defendant *would have learned* of the defect upon an inspection.

The distinction between urban trees and rural trees reflects the different degrees of risk posed

by decayed trees in the two settings. Rural landowners have no duty to inspect because the degree of risk from a hazardous tree is much smaller in lightly populated areas compared with the risks from a tree overhanging a busy street in a densely populated area. In other words, the duty to inspect for hazardous trees grows as the degree of risk grows.

In the *Husovsky* case the tree grew in a park in Washington, D.C. The land controllers tried to avoid liability by arguing that the park was "rural," so that they had no duty to make inspections for tree hazards. The land controllers even produced written agreements that the land was to be maintained in its natural state. The court, however, looked at the high degree of risk involved where adjacent streets carried a high volume of traffic, and held that the capital's parks, no matter how "natural," are still urban land, and that trees in the parks must be inspected for defects. Even in rural forests, where a recreation facility increases the degree of risk by concentrating visitors, the land controllers must inspect overhanging trees because the degree of risk is increased in such cases.

The duty to inspect for tree hazards increases every day as suburban land is developed. Homebuilders increasingly preserve natural vegetation on homesites for the higher sales price that "wooded lots" command (6, 7). Thus the number of trees left growing in newly urbanized areas increases, although many of these trees may be weakened by construction damage. The rural/urban distinction is no longer a sure defense for the suburban landowner, where development has increased the public's exposure to risk.

The duty question is especially important because the judge, not a jury, decides whether the plaintiff has established this aspect of the case. Only if a duty to inspect for and remove dangerous trees is found, will the trial proceed to the next question, breach, where a jury's decision is often controlling. Although the perception may not be valid, juries are widely thought to be more sympathetic to the injured plaintiff than to defendants. For this reason, a defendant's attorney may strive to resolve the case on the duty issue. If no duty is established, the defendant automatically wins: the judge can dismiss the case before the jury has the opportunity to decide the outcome.

Breach. Determining what is "reasonable" conduct in fulfillment of duty is almost always a question for a jury. When the jury decides the outcome, the results become less predictable. Nevertheless, we can describe the kinds of evidence that the jury will hear as it attempts to determine whether the defendant acted with reasonable care.

First, *expert testimony* will probably be introduced, especially where experts were involved in managing the land in question. The conduct of experts is evaluated in light of their superior knowledge. In the tulip-poplar case, the park managers inspected park trees weekly by driving through the park, but they were looking mainly for dead tree limbs. Testifying for the plaintiff, an arborist witness informed the court that the tight-V branching pattern of the tree should have alerted the inspectors, professional land managers, to a greater probability of rot in the joint. The jury was convinced by this evidence, apparently, for it found that the inspectors had acted unreasonably in failing to examine the particular branch juncture more closely, even though the tree was in full foliage and had no rot visible from the street.

The court in the *Husovsky* case recognized that professional land managers have expertise when it comes to spotting hazardous trees, and that society may require that such knowledge be applied to promote safety. Recent tree cases such as *Husovsky* clearly show that liability may be imposed for accidents arising not only from standing dead trees but also from "living hazard" (10) trees—those healthy enough to bear foliage, but structurally weakened to the point of being hazardous to people and property located near them. Does this mean that a community is better off not to hire professionals to manage its trees? Definitely not—a jury may easily expect any community with extensive tree cover to arrange inspections for hazardous trees, taking advantage of professional expertise. Deliberately maintaining ignorance about potential hazards is usually no defense to liability, for it unreasonably increases risk.

A second kind of evidence that may be important is *custom*, what others in the defendant's position do. Custom is not conclusive

evidence—one can follow custom and still be found unreasonable. But failure to follow custom can be damaging to the defendant's case. For one thing, if a safety precaution is customary, the defendant will find it difficult to convince a jury that the precaution is impractical.

At least one urban forestry text suggests that annual inspections of street trees are the custom (3). For some communities this may be wishful thinking, since many cities still do not have organized urban forest management programs (2). Nevertheless, expert testimony that annual inspections are customary will be evidence that the jury can consider in deciding whether the land manager has acted reasonably.

The land manager does not automatically lose at this point: the jury will also consider evidence of the land manager's costs for carrying out inspections. The verdict will reflect how jurors weighed the risks of not inspecting against the costs of making inspections.

Cause. When the plaintiff asserts that the action (or inaction) of the defendant was the cause of injuries, the defendant may point to some other factor that intervened and was the true cause of the accident. For instance, consider an 80- or 100-year-old urban tree that has stood without inspection all its life, and now has extensive crown dieback and rot. One day the tree falls, perhaps destroying a parked car. Is there liability? That the landowner had not inspected the tree seems to indicate negligence. But if the tree actually fell because highway department trench work severed all of its roots, the landowner would not be liable: the landowner's failure to inspect was not the cause of this accident.

In tree cases, defendants often invoke weather as a defense: "the tree fell because of high winds; it was an act of God." There seems to be a widespread misunderstanding that the "act of God" defense automatically applies to falling tree and limb cases, when in fact it does not. In the reported cases, the act of God and weather defenses rarely succeed. Indeed, the risk of trees or limbs falling in high winds is one of the reasons landowners should inspect in the first place. The courts have noted that, even where the weather was severe, it was not so extraordinary as to be unprecedented.

Injury. The final element of a negligence case does not usually involve controversy. Hazardous trees, like many other hazards, tend to cause relatively slight property damage (usually under $10,000) but possibly severe personal injuries (as in the tulip-poplar case), including many cases in which the victim is killed by the falling tree or branch.

Arborists might be interested in suits involving damage to other trees caused by another tree or limb that was defective. Various formulas may be applied by professional arborists, and at least sometimes the results are accepted by insurers or the IRS for purposes of determining casualty losses to ornamental trees, for example. However, there have been very few cases where an individual has claimed damage to his landscape trees caused by the failure of a neighbor's tree. Presumably such suits are rare in part because the amount of recovery would be too small to make the lawsuit worthwhile.

Insurers may provide compensation for damage to landscape material, but the amount is limited. For example, the provision in a standard homeowner's policy in 1984 was: "We cover outdoor trees, shrubs, plants, or lawns on the residence premises, for [some causes of] loss. The limit for this coverage, including the removal of debris, shall not exceed 5% of the limit applying to the dwelling. We will not pay more than $500 for any one outdoor tree, shrub, or plant, including debris removal expense."

Liability highlights for arborists. Urban land managers have a duty to inspect trees periodically in order to spot the dangerously defective ones. This obligation is of special importance in developing suburbs, where more trees are being left during construction, often in poor condition. Also, arborists need to be aware that as experts, they may be charged with notice of a tree's defects even though the tree's condition would not alarm the average citizen.

Defendant Characteristics

Two characteristics of defendants in tree cases are relevant to urban forestry. The first is a legal distinction called sovereign immunity or governmental immunity, which may prevent recovery of damages from government entities. The second is

the frequency of cases having large numbers of defendants, all of whom may share responsibility for the defective tree.

Sovereign immunity. In our tulip-poplar case, the defendant land managers were the District of Columbia, which is responsible for road maintenance in the capital, and the National Park Service, which manages the capital's parks. If sovereign immunity had not been eliminated by a federal statute, neither the Park Service nor the District of Columbia could have been sued for damages, even if their conduct was negligent. In the tulip-poplar case, the plaintiff was able to sue under the Federal Torts Claims Acts, a 1946 act of Congress that enables private citizens to sue the federal government for liability in any context in which a private citizen would be susceptible to lawsuit. Many states have passed similar legislation.

The history of sovereign immunity is controversial: it may have arisen from the notion that the king, by definition the ultimate authority and source of law in the land, could not lose in his own court. On the other hand, it may have had more to do with practical problems of raising money to pay damages in a locale having no local government, and so no civic coffers to tap. In any event, this doctrine crossed the Atlantic with the rest of our common law-based legal system, and became firmly entrenched in American law.

Today, sovereign immunity is on the decline, with either the legislature or the court system discarding it in many, but not all, states. When the immunity is overturned, it is often only partially dissolved so that it continues to protect some government entities or activities, but not others. Where the immunity still exists, it may be applied only to "governmental" functions (activities characteristic of government entities, such as police and fire services) and not to functions the court considers "proprietary" (characteristic of private enterprise). In some states, specific statutes regarding road maintenance may override the immunity.

Sovereign immunity is a changing area of the law, and even in states that still observe it, there are many variations on the theme. The doctrine is complicated and, legally, often highly technical. For example, frequently statutes that waive sovereign immunity impose additional procedural requirements on plaintiffs who sue government entities. States that still observe the doctrine may have special statutes that could result in municipal liability for a tree hazard despite the immunity. For instance, some states have statutes making the local government responsible for street maintenance and safety. These special laws may also waive the defense of sovereign immunity for failure to keep streets free of hazards including defective street trees. Urban foresters must consult with lawyers in their communities to learn the status of government immunity for a particular situation. And keep in mind that the doctrine is on the decline. Even if a state observes the immunity today, there may be no guarantee that in the next case a court will not find a way around the doctrine or even overturn it.

Multiple defendants. Tree cases often have numerous defendants. For instance, when a roadside tree falls and injures a passing motorist, the injured party may sue the state transportation agency responsible for the rights-of-way, all private contractors who designed or built that section of the road, and the landowner, if the tree was on private property across which the public easement ran. In many states, where the combined negligence of several parties results in injury, the injured party may recover *all* of the damages from any *one* of the responsible parties under a doctrine called "joint and several liability." A defendant who has paid the entire bill may try to recover what is possible from the other defendants, but if they have an immunity from suit or have no funds to pay the damages, it is the codefendant and not the plaintiff who bears the loss.

Multiple defendants pose a more serious problem with respect to safety. Ironically, accidents may become more likely when more people are responsible for eliminating a hazard. The problem seems to be uncertainty: if several people are responsible for the hazard, each may be relying on the others to correct it. The landowner may assume the city would remove a defective tree if it were truly a hazard, whereas the city is relying on homeowners to call in complaints about defective trees, rather than inspecting for them. Uncertainty is not as likely to reduce hazards as would systematic, regular inspection by trained person-

nel.

Trees that stand in the planting strip between curb and sidewalk are among those about which there may be uncertainty. Liability for these trees may be a function of ownership, and that in turn may depend upon the wording of the documents conveying the right-of-way. Statutes may confer certain rights to either the landowner or the state, which may alter liability. Again this is a question of local law about which one would have to obtain specific advice.

Avoiding Liability

We assume that most cities are diligent in removing any trees whose hazardous condition the city knows about, either by citizen complaint or by the city's own inspection process. While all cities do not have a formal urban tree management program, most have an office somewhere that receives complaints about potentially dangerous street trees. Tree removal costs may come from street or right-of-way maintenance budgets when there is no urban forestry department.

Assuming that removals of known defective trees are accomplished in a timely fashion, the issue that is most likely to give trouble is the duty to inspect. A plaintiff will argue that, because a tree defect had existed for some time, the responsible city officials, land managers, or homeowners should have detected and corrected the problem.

We suggest three steps that a community can take to reduce its potential liability for tree accidents: inspection, documentation, and adoption of urban forestry principles to promote tree health. These measures reduce potential liability in two ways. First, they can help a defendant in court by showing that the defendant's conduct was reasonable under the circumstances. These measures are even more important because they can reduce the potential for liability by reducing the chances of an accident. This increase in safety is the most desirable goal of any program to reduce liability.

Inspection. Clearly urban landowners and land managers have a duty to inspect for tree hazards. Recently a California city attorney urged cities to abandon "crisis management" strategies that rely on citizen complaints to locate potential hazards and, instead, to adopt a systematic inspection program (11).

By mapping the tree-lined streets in the city, and establishing a pattern of orderly, annual inspection of these streets, a community can more easily show that its tree management program has been "reasonable." Even more important is the fact that a program of systematic inspection will inevitably reveal more of the potential tree hazards in a city than crisis management does, and so enhance community safety.

During inspection the urban forester is looking for more than just dead wood. Foresters and arborists know a great deal about the defects in trees that are signs and symptoms of potential trouble (5, 8, 10). Such signals include certain kinds of fungi or decay. Or the tree may show unusually thin or discolored foliage, profuse fruit or seed production, or unseasonal flowering or leaf coloration. Further, arborists know that some tree species are more susceptible to breakage than others, and that some branching patterns indicate higher degrees of risk. Increasingly, too, arborists see human disturbances that may weaken or destroy a tree, such as mower damage, grade or drainage changes, and construction damage. Descriptions of more subtle indications of potential hazard, including "living hazard" trees, are available (8, 10).

Documentation. Records that show how and when trees were inspected and what action was taken can be extremely helpful evidence for the defendants in a trial. More significantly, records can help the urban forest manager to plan inspection and maintenance work more efficiently, provide continuity through changes in program leadership, and better justify requests for funding from the city.

For several years now, the urban forestry literature has urged practitioners to establish tree inventories both to help plan maintenance work and to inform selection of species and locations for tree planting. Cities that still lack tree inventories would be well advised to consider them in the context of a hazard management program.

Adoption of urban forestry principles. Urban landowners and managers can reduce their potential liability for tree hazards by adopting sound urban forestry practices. Inspection is one such practice, but an urban forestry program can do

much more than passively wait for trees to decline to such a state that removal is required. Urban forestry can promote the health of city trees through proper tree planting and maintenance.

Trees, like people, have their periods of youth, maturity, and old age. Old trees may be the largest and most attractive specimens in the urban forest, but they also tend to be the most dangerous. If a city manages its forest cover to maintain a good mixture of trees from young to old, as sound urban forestry practice dictates, then the city will enjoy attractive forest cover over many decades. Where there are plenty of young and middle-aged trees along the streets, it is less wrenching to remove those overmature trees that have become hazardous. By protecting the health of trees, small and large, the land manager or homeowner will be preventing some of the accidents and injuries that sooner or later structurally weaken the tree to the point at which it becomes a hazard to people and property around it.

Conclusion

Trees are desirable elements in urban settings, but they can become dangerous hazards as their condition deteriorates. By enforcing an obligation to inspect for hazards, the law attempts to reduce the exposure of the public to harm. By following sound urban forestry management principles, including documented inspections and other planning and management actions that promote the overall health of the urban forest, arborists and urban foresters can assure the continued enjoyment of the many benefits conferred by trees, without exposing the community to unwarranted risks.

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