

TREES AND *Negligence* *What the Law Says...*

BY PETER S. BEERING AND JUDSON R. SCOTT

Insurance files and court dockets are always full of catastrophes that were either preventable or at least could have been mitigated. Among them are frequently claims that involve damaged, distressed, diseased or improperly maintained trees.

It is hard to imagine a home, municipality, community park, school campus or a construction project that doesn't include trees, shrubs and other plants. These softscapes add significant aesthetic and financial value to a project. However, many property owners don't realize that part of their legal duty to maintain their premises in a safe, hazard-free condition includes their trees.

CONSTRUCTION & DEVELOPMENT PROJECTS

When a property is under development, the construction of roads, utilities and amenities is the primary focus. Often times, existing trees and other plants located on the property are overlooked. To the untrained eye, a tree may appear to be fine on the surface. Yet, many trees have suffered damage from lightning, wind, construction activity, insects, disease and even vandalism.

It is not uncommon for a healthy-looking tree to become dangerous. With the right combination of wind, rain, ice or other circumstance, a tragedy could easily result. It is imperative to protect these existing trees and plants and so that they do not become a liability if damages result during construction.

A properly performed inspection of trees and implementation of a maintenance program can lessen a property owner's exposure to expensive negligence lawsuits, reduce hazardous conditions and preserve the landscape's value. By establishing a tree protection plan during construction projects, potential, long-term problems can be lessened and even alleviated.

WHAT THE LAW SAYS

Trees have caused legal problems for centuries. Every budding lawyer studies the 1466 Thorns Case concerning property damage caused by trimming procedures. In the past when a tree fell and caused harm, it was considered an act of God. As the law evolved, property owners have been found to be liable for injuries and damage caused by their trees. Courts across the nation have found that property owners have a duty to inspect, maintain, and in some cases, remove limbs or trees if they are hazardous or impede line-of-sight. This has been a natural progression of cases and state statutes that deal with premises liability and the duties owed to invitees, guests and the public regarding any foreseeable problems from trees.

HAZARDOUS TREES AND NEGLIGENCE

As a development progresses, hazardous trees are sometimes left standing. They are retained for various reasons, such as a call by zoning officials to preserve trees, a public outcry to keep a beautiful tree, an owner's desire to minimize expenses or simply out of ignorance regarding tree structure, biology and the law. The fact is that, far too often, project managers and property owners keep trees that can present a potential for harm without realizing the possible consequences.

A property owner may be considered negligent if their tree falls and harms someone or damages property. Generally, injury or damage would be required for negligence to be claimed. Often, courts take into consideration whether the property owner was acting as a "reasonable man" in the care of his trees, but that standard of care can vary for different people and jurisdictions. Inspection and maintenance of trees might be considered reasonable for a property owner. However, professionals may be held to a higher standard if a hazardous tree goes undetected.



When property is under development, existing trees are often overlooked.

Many states recognize that property owners have an expressed duty to inspect and maintain their trees. Attorneys have extended that responsibility to developers, builders, property managers and others who have agreed to “act in a property owner’s stead,” as they have included professionals in law suits. Although some management development and construction agreements cover these matters, many do not. For those acting as an agent for the property owner, it’s important to make sure the contract defines responsibilities regarding tree inspections. Without a contract, those acting in the property owner’s stead may take on this “duty to inspect” responsibility unknowingly or inadvertently and expose themselves to liability lawsuits.

WORKING WITH AN ARBORIST

Some forward-looking planning can avoid weeks of time that may be required after a disaster. Therefore, it’s highly beneficial to contact a consulting arborist, who can develop an annual inspection and maintenance plan for the trees that will alert the property owner to structurally unstable trees and set forth how they will be dealt with.

In many states, property owners and those acting in their stead have a legal duty to protect visitors, workers and passersby, including pedestrians and motorists, from hazardous conditions. Most property owners and managers recognize this responsibility and remove snow and ice, repair fences, fix sidewalks and make

sure there are no line-of-sight conflicts that impede the safe flow of auto and pedestrian traffic. This duty can obviously extend to trees and their care.



A professional arborist may be required to remove hazardous limbs.

ROUTINE INSPECTION

Who should perform the routine inspection the law requires? Theoretically, the required inspection can be performed by anyone. However, there are many problems more difficult than those highlighted in this document that only a specifically trained arborist can identify.

An arborist can be of assistance, as there have been a number of instances where even highly trained professionals have missed defects in trees that later caused injury. Any professional should be knowledgeable about municipal ordinances and state case law as they relate to responsibility for trees on private and public properties.

As property owners perform their duty, they must ensure the inspector with whom they contract has knowledge of visual tree assessment, structural analysis of trees, tree biology and habits of particular species. The trees must be evaluated for their location, condition, size, likelihood of failure, target and risk of harm.

Among those sites requiring special attention are adjacent residences, public parks, schools and playgrounds, roadways and parking lots, college campuses, utility right of ways, golf courses, mature trees near a shelter, athletic fields, trail systems and walkways.



Trees that lean or are too close to the road must be inspected.

VISUAL TREE ASSESSMENT

A visual tree assessment is exactly what its name implies. It basically encompasses visual and physical assessment for each tree. Typically, the tree is identified, described, and sometimes photographed. Findings are noted with recommendations, such as maintenance, follow-up, monitoring or no action.

Areas to be assessed for overall tree health and safety factors include:

1. Ground around the root flare - area where roots are growing underground
2. Root Flare — looks like an elephant's foot
3. Bole or trunk of the tree, also known as the stem
4. Limb junctions where limbs branch off the trunk
5. Scaffold branches with large limbs that make up crown of the tree
6. Branches attached to scaffold branches
7. Twigs and fruit that could cause slip-and-fall accidents
8. Miscellaneous hazards, such as thorns, low hanging branches and line-of-sight conflicts that impede the safe flow of traffic

HAZARDOUS SIGNS

A visual tree assessment can identify a variety of potential problems. Red flags could include any of the following:

- Obviously rotted, dead or decayed limbs, trunks or roots
- Large holes in the trunk
- Broken limbs
- Lightning damage
- Storm damage
- Insect infestation
- Wind damage
- Improper trimming or aberrant growth
- Trees too close to the road
- Line-of-sight obstructed by vegetation



A property owner drove by this tree for years without recognizing the large horizontal crack that presented a risk of harm to passersby.

GET IT IN WRITING

Clients do not typically realize the danger a tree may present. Whether you are a developer, landscape management firm, professional arborist, property management firm, farm manager or groundskeeper, your contract with the property owner should set out what your duties are regarding tree inspections and the notification process.

Many people believe that if a tree has foliage, it is healthy. Consulting arborists and other qualified professionals often feel a responsibility to educate their clients about the frequently unseen interior decay in trees, and how they can stand in a weakened state, ready to be felled by wind, rain or ice storms. As professional arborists, they should inform their clients about trees that present a potential danger to people or property.

Sometimes, property owners will say, "Don't tell me about it," because they think that if a hazard is not identified, they are not liable. However, courts have repeatedly ruled that property owners have a duty to inspect and maintain their premises, and "not knowing" is not an adequate defense. Regardless of whether a problem is documented, in many states, the duty still exists to inspect and to maintain the trees.

Once identified, the consulting arborists and professionals should document the potentially hazardous trees in writing and the client should sign the report in acknowledgement of its receipt. Both parties should keep copies of the contract and reports on file.



This tree looked healthy to the untrained eye; however it had a cavity in the trunk and was toppled in a windstorm.

CONCLUSION

While trees add value to nearly any landscape, if they are not monitored and cared for properly, they can become a legal liability. Property owners and possibly those acting in their stead have a duty to maintain their trees and to manage foreseeable risks.

So what should a community, developer, planner, parks director or other property owners and professionals do? The following steps will help manage risk from dangerous trees:

1. Develop a tree inspection and management policy.
2. Put the plan in writing and document efforts to alleviate known hazards.
3. Work with your attorney to understand the legal requirements in your state.
4. Ask your insurance agent about your tree coverage. Request a discount when you develop and implement your tree plan, which lessens the carrier's exposure.
5. Work with a consulting arborist. This professional should be trained in Visual Tree Assessment and hazard tree recognition and be a member of one or more of the national arboricultural associations.

When in doubt, it's advisable to contact a consulting arborist who understands premise liability concerning trees and is trained in Visual Tree Assessment and structural analysis. A brief discussion with the selected arborist can help you ensure that they have the qualifications that are required for the job.

While property owners may not know about visual tree inspection, tree structure, botany, effects of construction on trees, laws on negligence, risk or duty, their ignorance is not an arguable defense. It is the opening to a nightmare! ☘

*For a Registered Consulting Arborist contact www.asca-consultants.org
For an Accredited Tree Care Company contact www.tcia.org*