

REDUCTION OF PUBLIC TREE LIABILITIES¹

by W. James Evans

Abstract. This paper examines the legal liability that governmental agencies have when they manage urban trees along their streets, parks, and public lands. Several recommendations are made so these agencies can reduce their liability through good management and maintenance programs. Court cases, where cities were found negligent because of falling branches or entire trees, are discussed.

In today's society, more and more people, companies, corporations, institutions, governmental and public agencies are being sued for negligence. In the past, it seemed that people took the responsibility for their own actions. For example, if someone tripped over a sidewalk, it was his fault for not picking up his feet.

Today, there seems to be a different trend regarding responsibility and/or negligence when an accident occurs. Everyone wants to find fault with someone else. Today, lawyers who prosecute get a percentage of the final settlement, often as much as 40 percent. So, the more money that is asked for in a settlement, the more commission the lawyer stands to make. This is one reason for the extremely large settlement amounts. The purpose of this paper is to present major liability issues as they relate to trees and to provide recommendations to minimize the chances of being sued.

There are several cases dating from 1890 to 1970 dealing with fallen trees or branches that injured persons and/or property. All these cases were tried while there was still governmental and sovereign immunity. During this period, governmental agencies and their departments could not be sued because of governmental and sovereign immunity. There was one exception to this rule — where dangerous conditions exist.

Today, because of Supreme Court rulings, governmental agencies are no longer protected. Their immunities against being sued have been erased. In the past, when governmental agencies were sued because a branch or whole tree fell and injured someone or someone's property, the

plaintiff had to prove that the tree was in a dangerous condition before the accident occurred. Today, if a small branch falls out of a healthy tree and injures a person or property, the governmental agency may be sued whether the tree was in a dangerous condition or not, provided the plaintiff can prove the governmental agency was negligent.

Liability and Responsibility

When a governmental agency such as a county, city, town, township, or a school accepts the responsibility for the care of trees, it also assumes the liability for those trees. This holds true for trees along right-of-ways and/or on public property, by a charter, an ordinance or by whatever means that empowers the agency to regulate the planting, removal, and maintenance of trees.

In the case of *Eugene Mitchell v. the City of Meriden, CT* (1) a charter empowered the city to regulate the planting and removal of trees. The office of tree warden was established for this purpose. The city enacted by-laws which provided that consent must be obtained from the city to plant any tree in the right-of-way areas and that the city is empowered to remove trees in the right-of-way and to remove or trim diseased, decayed or dangerous trees.

By virtue of these provisions the city assumed the responsibility for superintending, regulating and putting in proper condition trees situated along city streets, and it was the duty of the city to take proper care and diligence in superintending and regulating trees and the removal of dead, decayed and broken limbs from the trees.

The allegations stated that the plaintiff, Mr. Eugene Mitchell, was operating his motor vehicle on Warren Street in the city of Meriden when a tree limb fell and damaged his car. Mr. Mitchell claimed neglect of the tree by the city and this negligence caused the damage to his vehicle. The damage was the result of the city's breach of a

¹No portion of this paper may be reproduced without the express permission of the author.

special privilege assumed by the city to control trees growing within its right-of-ways. The court ruled in favor of the plaintiff.

In another case, *Jones v. Great Barrington*, the city had maintained and permitted a public shade tree to stand which had been in a dangerous condition for a long time (2). The city had sufficient notice of its condition, but it permitted the tree to stand and failed to hold a public hearing or have it removed. At a later date the tree, by reason of its unsafe condition, was blown over upon the plaintiff's house causing damage to the property and injury to the plaintiff. The court held that the city thereby created and maintained a nuisance that caused damage to the plaintiff.

Cities which exercised reasonable care in removing reported dead, dying, or damaged trees or their branches fared well in court cases brought against them.

Ways to Reduce Liability

Today, with the more liberal stands the courts are taking toward libel neglect, how can our governmental agencies continue to offer the benefits of trees in the urban environment? There are a number of things that can be done.

Training of professionals. A person who is knowledgeable in urban forestry or one who knows good arboricultural practices should be hired or an arrangement should be made for consulting with such a person. An urban forester is trained and aware of the many facets in the field of arboriculture; for instance, biology, plant physiology, pathology, entomology, dendrology, landscape design, plant selection for urban areas, pesticides, pruning, trimming, removal, general maintenance techniques and general administrative management functions. He keeps himself apprised of current research in his field and implements new ideas when they have been proven effective. An urban forester, with his trained eye, can recognize problems before they become liabilities.

In an action against the City of Lowell Mr. George A. Chase, the plaintiff, sued the city for damages for personal injuries sustained by the falling of a tree which stood in a public street (3). Several witnesses reported that the decayed con-

dition had been reported to the city the year before the accident occurred. The court charged, in effect, that if there was a defect in the tree, and the city through its officers, had been notified, it was their duty to take all reasonable measures to guard the passers-by from injury; and if the officers charged with the duty of supervising, repairing, and maintaining its streets failed to take such precautions to have it removed, then the city would be responsible to the plaintiff. The verdict was in favor of the plaintiff.

Tree inventories. Another important tool that should be utilized to reduce liability is a tree inventory. In order to manage a resource one should know what one is managing. It is astonishing how many cities and towns that manage urban trees do not have a tree inventory. Certain types of inventory also work well as a management tool. It can tell you how many, what kind and in what condition the trees are in. The inventory will also tell which trees require immediate attention. As trees are maintained the inventory can be updated with current information.

Tree maintenance. Another important element in reducing the liability of trees is to have enough maintenance people so that all of the trees being managed can be maintained on a frequent schedule. All the trees under one's jurisdiction should be trimmed and pruned every three to seven years, depending on the type and condition of the trees. A tree in a declining state will require much more care and attention than a healthy one. For example, a declining sugar maple may be pruned one year and by next may have developed many more dead branches.

The cases of *Wright v. City of Chelsea* and *Murry v. City of Chelsea* are good examples (4). Actions were taken to recover for injuries received by Ms. Lucy Wright and Ms. Bertha Murry, the plaintiffs. While they were traveling in the defendant city, a limb fell from a shade tree which stood within the limits of a public way. The trees had been under the care of the city for more than 30 years. There was evidence sufficient to support a finding that the plaintiffs were exercising due care, that the limb was dangerous because of decay, and that it was blown down by ordinary winds. The plaintiffs claimed the defective condi-

tion of a public way. The court found the city negligent.

A tree branch does not die, decay, and break quickly. It takes a period of several years. If this city had a maintenance program sufficient to maintain their trees on a regular systematic schedule, this would not have happened.

Communication and evaluation. The urban forester or tree supervisor should respond immediately to reports of problem trees. Every tree should be inspected. If there is a defect, immediate attention should be given to correct the problem. If records are kept, this demonstrates that reasonable care was taken. If notice is given of the tree's condition, it is not inspected, and an accident occurs, then the municipality or jurisdiction may be liable.

A case to emphasize this point is *Slider v. City of Indianapolis* (5). In this case the plaintiff, Mr. Slider, notified the city of a tree that was extensively rotted and pointed out the tree's location between the curb and sidewalk. At a later date, the tree fell and injured the plaintiff. It was alleged by the plaintiff, that the city negligently and carelessly allowed the tree to stand for four weeks after the city obtained knowledge of its condition. If the city had exercised reasonable care, it could and should have been removed within that time. An examination of the stump showed that the wood was rotten and that it would crumble in the hand. There was also evidence that the tree inspector in August (before the accident in November) had recommended that the tree be removed. (In a prior case it had been held that the duty of a city in respect to keeping the street safe is not limited to the surface, but that it extends upward so as to impose a liability in favor of one using the street (*Grove v. City of Fort Wayne* 45 Ind. 429, 15 Am. Rep. 262)). The City of Indianapolis was found guilty of negligence. A responsible urban forester with proper management skills would have had this tree removed weeks before the incident occurred.

Personnel and equipment. Another factor a municipality should consider in reducing liability is to assure that the maintenance crews will conduct their operations in a skillful and safe manner. Arboriculture can be a rather dangerous profession

and only properly trained and supervised personnel should be allowed to perform arboricultural activities. By letting unskilled personnel do this type of work, the municipality is greatly increasing the chances for an accident and thus, increasing its liability. There should be an atmosphere for continued learning, such as on-the-job training for the less skilled personnel. This should be conducted by a competent person who is knowledgeable in current arboricultural practices. There are a number of other training devices that should be considered that aid in the training process (correspondence courses, continuing education classes, professional journals, professional conferences and meetings, etc.).

Having the proper and necessary equipment in good working order is essential to do a job correctly. When a worker is injured due to not having the proper equipment in safe working condition or by not using it correctly, this contributes also to the liability for the municipality. Safety guidelines have been published for arboricultural practices and are available from the International Society of Arboriculture.

Conclusion

The purpose of this paper was to present major liability issues pertaining to trees located within public sector jurisdictions (municipalities, cities, towns, public parks, schools, etc.). It can be concluded that the major liability issues involve the determining of who is responsible for the trees. If a public sector jurisdiction is responsible, how can the risk of liability be reduced?

In reducing the liability, the jurisdiction is able to do a number of things, such as: 1) hire trained and knowledgeable professionals to manage the urban trees; 2) conduct an inventory to establish a base from which to work; 3) implement a regularly scheduled maintenance program and keep records that can refute claims of negligence; 4) respond to and evaluate trees that have been brought to their attention and act according to the findings; 5) allow only properly trained and supervised personnel to perform arboriculture practices; 6) provide proper and necessary equipment that is in good working order; and 7) follow and use safety equipment and procedures in everyday

activities. The implementation of these suggestions can provide useful information for public sector jurisdictions and can ensure the protection for citizens and/or property.

References

1. The Atlantic Reporter 217:487. Mitchell v. City of Meriden.
2. The Northeastern Reporter 174:118. Jones v. Town of Great Barrington.
3. The Northeastern Reporter 24:212. Chase v. City of Lowell.
4. The Northeastern Reporter 93:840. Wright v. City of Chelsea. Murry v. City of Chelsea.
5. The Northeastern Reporter 105:56. City of Indianapolis v. Slider.
6. The Atlantic Reporter Digest.
7. The Northeastern Reporter Digest.

*Municipal Arborist
Borough of State College
State College, Pennsylvania*

ABSTRACTS

Bingham, S.W. 1980. **Controlling spray drift through proper pesticide application.** Weeds, Trees & Turf 19(5): 26-28, 30.

Spray drift causes many problems for the sprayer and his neighbor and is of utmost importance to control. In general, insecticides and fungicides are applied using smaller droplets and sometimes larger spray volumes to obtain the desired coverage of the pest. Herbicides appear more likely to show up in symptoms on adjacent areas and it becomes extremely important to utilize larger droplets with very low numbers of fine droplets in the spray application. The large heavier droplets fall from the spray boom more directly to the ground or plant surface while small droplets require long periods to fall and may float to greater distances in the air. Three major means exist to produce the proper size droplet and control drift as well as possible during the application of pesticides. These are the equipment, chemicals, and environmental conditions.

Johnson, W.T. 1980. **Wood preservatives on structures may harm nearby landscapes.** Weeds, Trees & Turf 19(5): 46, 48.

Durable, decay-resistant wood types such as cypress, redwood, cedar, and to some extent oak and ash are becoming increasingly difficult to get and to pay for. Consequently, cheaper construction lumber, primarily the soft pines and spruce, are being used for landscape purposes. Such lumber is often treated with wood preservatives to resist decay. Although the common wood preservatives are toxic to plants, there is little doubt that treated lumber will continue to be used in outdoor living areas. Paints and penetrating oils applied to treated lumber will give some protection from copper preservative. Such products are said to seal in the preservative salts and allow the natural grain to show through.