

STREET TREES AND THE LAW¹

by Michael J. Heydt

A boulevard lined with stately mature street trees is perhaps one of the most aesthetically pleasing images of the urban environment. Clearly, trees provide many benefits to us. They provide a source of shade from the sun and shelter from the wind. They bring a sense of the natural environment to us. Also, trees provide a natural form of delineation to the City street scape, thus offering an effective buffer between transportation corridors and residential and business centers. Indeed, trees are a valuable natural resource. Unfortunately, the existence of trees in the urban environment, particularly those under public entity or governmental control, also provide a source of potential civil liability. This potential liability must be managed to assure the elimination of known dangerous conditions which impose an unreasonable risk of harm to persons and property. This article will concisely discuss the nature of that liability, its relationship to street trees and the allocation and consequences of that liability should damages occur.

Forms of Liability

From the perspective of this article, there are two basic forms of liability, direct and vicarious. Direct liability occurs when a person acts or fails to act in accordance with existing legal duties based upon a particular set of facts and circumstances. For example, if a person driving a car fails to stop for a stop sign and collides with another car which has the right-of-way, then the person who ran the stop sign is directly liable for his negligent act to the person who was injured. To put it another way, a person, through his acts or omissions, is directly responsible for the natural and probable consequences which occur as a result.

Vicarious or indirect liability is a somewhat more complex and, at the same time, controversial subject. In essence, vicarious liability is a condition whereby a person is found to be responsible for

the acts or omissions of another. In fact, the person who is vicariously liable may not have even known of the acts or omissions which occurred, and if the person had known, might have stopped them from occurring. Vicarious liability occurs most frequently in connection with legal entities which are considered persons under the law but are not natural persons. The obvious example of this would be a corporation. Although a corporation is a legal entity, and in many instances has the same status as a natural person under the law, it can never be directly liable since it acts only through the conduct of its officers, directors and employees. Thus, vicarious liability of a corporation is nothing more than a method by which the law attempts to assure that third parties who deal with corporations through their agents or employees will have recourse against the corporation for injurious acts which the employees or agents have performed on behalf of the corporation within the scope of their authority or employment. In law, this concept is known as *respondet superior*. In returning to the example cited above, if the driver of the car which ran the stop sign was the employee of a corporation who was performing his duties within the scope of his employment, then the driver would be directly liable to the injured person for running the stop sign, and his employer, the corporation, would be vicariously liable to the injured person as well. These, then, are the major forms of liability in our civil law system. They are applicable to liability issues relating to care and maintenance of street trees.

Sources of Law

As a general rule, there are four sources of law in this country at both the federal and state levels: the Constitution; legislation; administrative regulations; and the courts. Additionally, ordinances or resolutions enacted at the local government level must be considered as another legislative source of law, particularly in connection with street trees.

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For our purposes, the major sources of law in connection with liability issues relating to trees comes from state legislation, local ordinances and decisions of the courts. The importance of the source of the law with respect to street trees in relation to the responsibilities between public entities, adjacent property owners and third persons utilizing public transportation systems cannot be overestimated. Initially, the local law will in all likelihood establish or allocate the responsibilities for the establishment of street tree programs, maintenance of trees, and in some cases allocation of liability for dangerous conditions existing due to the trees. The allocations of responsibility establish who is subject to the various legal duties to properly maintain the street trees. The inquiry, however, does not end there. Many times state statutes also set forth important limitations respecting public entity and public employee liability, most typically cast in the form of governmental or sovereign immunity acts. Finally, the court systems of the applicable jurisdiction in which the public entity is located will typically establish the standard of care to which the public entity or other person who is responsible for the maintenance and care of the trees will be held to under the law. In other words, whoever has the legal duty will be held to the level of care of a reasonable and prudent land owner in the maintenance of the street trees.

It is the source of law that will ultimately establish the legal responsibilities and duties in connection with the maintenance and care of street trees. Thus, a prudent public administrator will be aware of the sources of law in connection with the authority to regulate and control the location, maintenance and liability aspects of street trees.

Liability Aspects of Street Trees

In general, claims of liability in connection with street tree liability are usually cast in one of three ways: nuisance, trespass or negligence. Nuisance is the unreasonable interference with the use and enjoyment of property by some activity from an adjacent property. Trespass is a physical invasion of a person's property without permission. Negligence is subjecting another person, who is owed a duty of care, to an

unreasonable risk of harm that causes injury. Three examples will suffice to illustrate these claims of liability. The uprooting of a street tree which subsequently falls on adjacent property would be trespass. On the other hand, a tree imminently ready to topple over onto the adjacent property, thereby preventing that property owner from reasonably utilizing the jeopardized portion of his property would be a nuisance. Finally, the failure of a public entity to remove a dead tree which subsequently topples into the right-of-way causing personal injuries to the driver of the vehicle after the public entity had reasonable notice of the existence of the dangerous condition would be tantamount to negligence. Having established the major claims of liability, the next question which must be posed is how is that liability to be allocated among responsible parties.

Allocation of Liability or Fault

As noted above, the allocation of responsibility is established by the applicable source of law, such as a statute or an ordinance. However, there are shades of gray with respect to how that allocation is made under a particular set of facts. Therefore, it is extremely critical for the public administrator to understand exactly who is responsible for the care and maintenance of trees under the public entity's control. For example, an ordinance may establish ownership of street trees in the name of the municipality but foist the responsibility for maintenance onto adjacent property owners. However, even if such a legislative scheme exists within your jurisdiction, it must always be remembered that ownership of the tree itself by the public entity will in all likelihood render the public entity directly liable for injuries caused by a dangerous condition existing in that tree. In other words, under such a scenario, both the public entity and the adjacent property owner may well be civilly liable for injuries caused by a street tree on public property if the tree amounts to a dangerous condition which created an unreasonable risk of harm to passersby. Such ordinances may also allocate criminal liability to an adjacent property owner who fails to properly maintain trees, but some Courts prohibit the imposition of civil liability on the property owner. The public entity as owner, is responsible. Currently,

such is the case in Colorado, although this issue is currently pending before the Colorado Supreme Court. Thus, depending on the facts, the allocation of liability may be a function of both the Legislature and the Courts.

Obviously, passersby likewise have some reasonable duty of care that they are expected to follow in connection with their own activities on public thoroughfares. To that extent, drivers of vehicles and pedestrians have a responsibility to exercise due care for their own safety as well as the safety of others. If their negligence has primarily caused injury to a third person, then the allocation of liability may shift from the public entity or adjacent property owner to the driver. The most obvious example of this situation is where a driver negligently leaves the right-of-way, runs into an otherwise healthy street tree, knocks it over and does damage to adjacent property. Clearly, although the tree is owned by the public entity and perhaps the adjacent property owner has the responsibility to maintain it, the primary causation of the injury resulted from the negligence of the driver and not from the public entity or the adjacent property owner.

In another scenario, a public entity's liability may be ameliorated by the conduct of an adjacent property owner who, by his own conduct, directly creates a dangerous condition on the public right-of-way.

As one can well imagine, depending upon the particular facts and circumstances involved, the aspects of allocation of liability can become complex and are subject to analysis on a case-by-case basis. It is enough for the administrator to know that the allocation is dependent upon the source of law and the conduct of the relevant parties.

Consequences of Liability

Assuming that liability exists, our civil law system requires that, for there to be compensation, there be injury or damages. Typically, damages are cast in two major categories, personal or property. Under both categories, damages can be awarded for specific types of pecuniary losses, such as loss of wages, medical bills, repair to buildings or structures, as well as general or consequential damages, which are indirect losses which resulted from the injury.

Typically, indirect or consequential damages can include such things as pain and suffering, emotional distress, attorneys' fees, loss of business profits and the like. These damages, once determined, are then awarded based upon an allocation of fault between the parties who are responsible for the liability. Thus, in any given case, the damages can be allocated to the public entity, the adjacent property owner or perhaps the driver himself if the particular facts and circumstances warrant such a result. Therefore, there is a direct and rational relationship between the allocation of liability or responsibility to the payment of damages which are the natural and probable result of that liability. The amounts are then distributed in a proportionate relationship among the parties responsible according to degree of fault.

An important consideration for administrators is that, in many cases, the public employer is responsible for payment of damages assessed against the public employee who was directly responsible for the injuries. This limitation of responsibility for payment of damages by public employees is established by law, and is typically found in governmental immunity acts. In Colorado, for example, a public employer must pay the damages as well as the cost of defense of a public employee for his acts or omissions which cause liability unless that liability was created by the wilful and wanton conduct of the employee. Therefore, even though the public employee may be directly liable for the creation of the dangerous condition which gave rise to the injury, the public employer is vicariously responsible to the injured person, and must pay all damages caused by the employee's negligence. Typically, governmental immunity acts also cap damage awards against the governmental entity and employee. These are important rights not typically available to private sector employees. Private sector employers are vicariously liable for the acts of their employees, but are usually not required to pay damages on behalf of the employee if the injured party attempts to collect damages from the employee alone.

Conclusion

Trees are an important and integral part of our urban environment. To that end, their existence

and proliferation within our cities should clearly be encouraged and fostered. Although liability aspects in connection with the care and maintenance of street trees are of concern, the risk can be managed and where necessary, eliminated. Importantly though, the public administrator charged with the responsibility of street tree maintenance must have a basic understanding of the source of laws and allocation of the responsibilities in connection with those trees. If so, the resource can be prudently managed in a manner which provides for the enhancement of values to the community without the crea-

tion of an unreasonable risk of harm to adjacent property owners, passersby and users of public thoroughfares.

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This article should not be substituted for legal advice. Laws may differ in various jurisdictions, and the reader should consult legal counsel in his or her community based upon the facts and circumstances of each case.

Abstracts

CRAUL, PHILLIP J. 1986. **Assess urban soil for better tree survival.** Am. Nurseryman 164(7): 67-69, 72-74, 76, 78.

Many who work with urban vegetation agree that most problems of tree survival and growth can be traced to the poor soil and site conditions presented by the urban environment. Anyone who excavates soil, especially by hand, in an urban area soon realizes that the soil material is not like the natural soil of the surrounding countryside. It has been disturbed and modified by human activity associated with urbanization. The practices of cutting and filling, digging utility trenches, stripping topsoil, and rebuilding over foundations, sidewalks and yards of previous structures create a very diverse and unpredictable material. This material has properties unlike those of a soil formed in place through natural processes over a long period. The characteristics of urban soils are as follows: *Great vertical and spatial (horizontal) variability. *A modified structure tending toward compaction. *The presence of a surface crust, which is usually water-repellent, on bare soil. *A modified soil reaction (pH), usually elevated in humid regions. *Restricted aeration and drainage. *Interrupted nutrient cycling and modified organism activity. *The presence of anthropic (man-made) materials and other contaminants. *Modified soil temperature regimes.

CROMROY, H.L. 1986. **Florida nurserymen should be wary of eriophyid mites.** Am. Nurseryman 164(7): 92-94.

Nurserymen who grow shade trees and woody ornamentals are concerned with the production of clean, healthy-looking plants. Abnormal growth of plant leaves or inflorescences can reduce plant values and sales. This article is intended to acquaint growers with some of the symptoms that commonly occur with shade trees and woody ornamentals in Florida as a result of eriophyid mites. The information provided can make growers aware of the potential damage caused by these mites. Since eriophyids rarely kill their plant host and remain with a plant as it matures, young nursery stock with such abnormalities is much more of a problem than mature trees with the same afflictions.