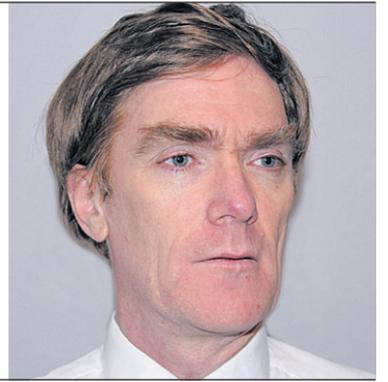


Trees & the Law

BY JULIAN DUNSTER



Risky Business Understanding all the factors in tree risk management

Trees sometimes fall down, or parts of them fall off and cause damage to people or property. No tree can ever be guaranteed 100% safe because all trees fail at some point, and especially in adverse weather conditions.

However, we can undertake some basic precautions to reduce the chance of damage, and these are the basis of tree risk assessment.

In the event of personal injury or property damage the Courts seek to determine the sequence of events prior to the incident. Any links between factors that caused the failure leading to the damage become very important. Many people have heard an "Act of God." In its strictest sense a tree failure triggered by an Act of God is defined as an incident that was linked directly to natural forces with no evidence of any human activities that may have served to predispose the tree to failure. If the tree roots had been damaged by a sidewalk installation; if the branches had been partly pruned, or if there are clearly other factors caused by humans, then the Act of God defence may fail if the human interventions can be shown to have caused (wholly or partially) the failure.

In order to decide if the tree owner is liable (responsible) for the damage caused by the failure, the Courts will want to know if the failure was foreseeable. It might be argued that all tree failures are foreseeable since all trees fail eventually. The unknown factor is when that may occur. Foreseeability hinges on whether or not the reasonable man would have been able to reasonably predict the failure within a reasonable time frame. If there were issues with the tree that would clearly lead to a failure in a short term, then the Standard of Care that should have been used will come under scrutiny. If all reasonable steps had been taken, there may be no issue to pursue. If the problems were obvious and should have been recognised and abated, then the owner may have a problem.

Assessing tree risk is a specialised area of professional practice. It involves

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Did this tree fail because of an Act of God? Or did recent roadwork weaken the tree and contribute to the collapse? Tree risk assessment deals with these and other similar questions.

examination of the biological and mechanical features of the tree, its context in the larger site, the past history of the site, the uses of the site (possibly by season), and the changes that may occur within the next year or two. The risk assessor provides an assessment of risk, along with recommendations to reduce or eliminate the risk, to the risk manager. The risk manager weighs the need for action against the need to spend time and money on other aspects of equal or higher importance.

Risk assessment is a key part of due

diligence. For owners with jurisdiction over extensive parks, roads, and public open spaces containing trees, designing and implementing a risk assessment and management programme is an important part of avoiding liability issues. The programme should start with a policy statement, followed by a clearly defined process showing who is responsible, how they should implement and operate the process, and who will undertake the risk reduction actions recommended. While it is often the case that time and budget constrain what can be accomplished,

having a well-defined programme and policy is essential. Without these, it would be much harder for the owner to prove that due diligence had been undertaken in the event of a claim.

Julian Dunster is the senior author of Arboriculture and the Law in Canada. Copies of the book can be obtained by emailing him : jdunster@bigfoot.com. Dr. Dunster is not a lawyer and the above notes only provide general guidance. If you have a tree issue, contact your lawyer for legal advice that will be specific to your situation.



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