

Trees & the Law

BY JULIAN DUNSTER



Liability, Negligence, and Damage Appraisal

THE FIRST STEP IN REDUCING YOUR EXPOSURE TO COSTLY LAWSUITS IS TO UNDERSTAND THE LEGAL FACTORS IN DETERMINING LIABILITY

When personal injury or property damage occurs as a result of tree failure, or when trespass takes place, the person affected may launch a legal action to try and seek monetary compensation. In these cases the person claiming compensation (the plaintiff) will try to show that the owner(s) of the tree (the defendant) is liable for the damage. The plaintiff's claim may allege that the defendant was negligent and should have known better.

Liability is a means to determine who was responsible for the tree. If it can be proven that the owner did indeed have a Duty of Care, did they fulfil it by adopting a reasonable Standard of Care? If, during the court proceedings, the judge and/or jury find that the Standard of Care was met, then negligence is unlikely. Liability may still exist, but to a lesser extent because the owner exercised reasonable caution. If it can be shown that the defendant did not meet an acceptable Standard of Care, it may be possible to prove negligence. Negligence has two forms: something was not done at all; an act of omission or, something was done that should not have been; an act of commission. Either way, the person or organisation with the Duty of Care failed to meet the test of acceptable actions, as measured by the Standard of Care.

Once liability is proved the Court must then determine the monetary value (the damages) of the physical damage that has been accepted. Value is a very subjective term. One person's prize tree is often a major nuisance for someone else. For one person it may provide shade and screening. For the other, it may block views and sunlight. Loss of value in trespass cases is usually determined in one of several ways. The physical value of the tree(s)



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cut down can be assessed, perhaps as a sawlog or as firewood. Foresters would typically undertake such valuations. The value of the tree as a part of the landscape, can be determined by arborists trained in the application of appraisal, using the most current version of the Guide for Plant Appraisal, written by the Council for Tree and Landscape Appraisers, and published by the International Society of Arboriculture.

Within the plant appraisal process there are several options to determine value. These include the costs to clean up and repair the damage or, costs to cure the damage by replacing the plants lost. For larger trees, a formula approach is utilized, using the cross sectional area of the tree trunk, and by application of

a series of factors the lost value is netted down to derive a monetary estimate of the landscape value. Other approaches might be a loss in property value, loss of rental income, or loss of productivity—for example, in orchards.

Property damage to buildings and other structures is usually the estimated costs of clean up and repair, as well as ancillary costs caused by the incident. Personal injury costs are derived by use of medical experts, actual costs, and in some cases, an allowance for pain and suffering, possibly lost income and other expenses arising.

As was discussed in Part 3 of this series, liability for damage will be less of an issue when the tree owner can convincingly show that they took all reasonable steps to

manage their tree(s) effectively. Of course, this does not mean that society should expect every tree to have been examined. All trees pose some degree of risk, and while society expects that public places will be reasonably safe, nobody can offer an absolute guarantee that the trees will be safe under all conditions.

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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