



TREES & THE LAW

BY JULIAN DUNSTER

Foreseeability in tree risk assessments

One of the key issues to be considered when a tree falls down and causes injury and/or damage is whether or not the failure was foreseeable, or if there was a foreseeable risk of harm. Of course, given a long enough time, the point is moot; all trees on the planet will eventually fall down.

But usually, we are trying to determine if the tree failure and potential harm could have been foreseen with some level of accuracy, in a defined time frame.

In tree failure cases a key consideration will be the series of events and conditions prior to the tree failure, whether or not these were visible, and how they might have been interpreted in a risk assessment.

These may include changes that occurred on the site that might have affected the tree's short or long-term health and stability. The history of the tree, including any past pruning, or disturbances of the ground underneath the canopy will be another factor.

Not all tree failures will be associated with fault. Foreseeability of failure will depend upon who was looking at the tree, and the level of skill that they employed at the time of observation. The average person on the street will typically have a limited understanding of tree biology, stability and risk. Even so, they might correctly identify an issue of concern. For example, a tree that has been seriously damaged after a major storm, and stands partly uprooted and leaning out over a major highway, or dead trees within striking distance of well-used trails would be obvious to most people. Observers, including those with little expertise in tree risk assessment, might reasonably expect such trees to fail sooner rather than later.

The untrained observer may identify a possible issue that seems critical, but an expert can examine the same issue and conclude that it is in fact of no immediate consequence, and failure is not likely in a defined time frame. For example, simply because a tree has a cavity does not mean it will automatically fail soon. The cavity may or may not have structural significance. Conversely, the expert may identify one or more issues of concern that have been completely overlooked by the untrained observer. A dying tree may be in that condition as a result of extensive root decay, and thus be highly unstable, an association that the layperson may not recognise at all. There will also be instances when a tree that failed had no clearly defined external indicators of internal problems, even up to the point at which it failed. Here, even a skilled risk assessor might reasonably have concluded that failure was very unlikely in normal weather patterns; trees that have no structural or biological defects can fail simply because they have been mechanically overloaded in an adverse weather event. In between there will be a range of issues that can, and should be considered when evaluating foreseeability of failure and harm.

The likelihood of an event actually occurring needs to be demonstrably real or highly likely, not far-fetched or extremely unlikely. In *Bolton v. Stone* [1951] AC 850, 1 All ER 1078, a case dealing with a cricket ball that struck a person walking by the outside of the cricket grounds, Lord Normand noted "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous." Nonetheless, that does not absolve the tree risk assessor from conducting a reasonable assessment that meets or exceeds the standard of care applicable.



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While hindsight is typically perfect, it is often not possible to have perfect foresight, especially as the time frame extends further into the future. Clearly, the consequences of a tree failure, such as fatalities, and/or extensive property damage, are undesirable. Tree risk assessment attempts to evaluate all of the available evidence that can be seen on the day of the assessment. In combination with other information that may be available after discussion with the tree's owner, the assessor uses this data as the basis for predicting what may or may not occur within some foreseeable future time frame, typically one to five years hence.

In essence, when considering foreseeability, tree risk assessors need to consider each tree in light of its present condition, the various risks it may or may not present now or in the future, and in particular, under certain circumstances. That means the assessor not only needs to know what to look for on the day of the assessment, and in discussions with the owner, but also to recognise and understand the implications of what they are looking at. Only then, can the foreseeability aspect be reasonably fulfilled.

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