

TREES & THE LAW

BY JULIAN DUNSTER



What is Evidence?

All cases before a court rely on two fundamentals: facts, and evidence.

The judge or jury make decisions based on what they can learn from the evidence presented to them. Some of that will be agreed upon as factual; that is, an accurate representation of what took place or what was seen, heard, said or written. Other parts of the evidence may be controversial or inconclusive and open to interpretation.

Documenting evidence effectively is a skill that should be more commonly developed. Many court cases note that "... what the evidence tells the court is just as important as what the evidence does not tell the court. . ."

The role of the judge is to review all of the available evidence

and establish what is or is not acceptable, and what is or is not going to be accepted as "fact."

In order to do this there needs to be evidence that accurately describes the matter before the court. Judges and juries use the evidence and established facts to make decisions about what took place, who is or is not responsible and who shall pay for what. All of these steps are based on evidence.

In my new book *Documenting Evidence: Practical Guidance for Arborists* the role of evidence is discussed in detail. The material will be of benefit to anyone working with trees, attending meetings, working in negotiations or simply being on a site. All of the many court cases available rely on the evidence presented to them at the time of the trial. In most civil cases the judge and / or jury have never seen the site, do not know the people and often have little or no knowledge about the technical issues involved. All they have to work with is the evidence presented in court.

Evidence can take many forms. It can be pieces of material, documents, digital records, photographs or video, as well as test data, other records, analysis of results and process descriptions. For example, in a tree case, the starting point would be the tree itself. That is the primary evidence. The process used to determine if decay is present or absent may be the next stage, and the results of testing would become the next piece of evidence. The analysis of the results and the implications of the analysis then become

a further piece of evidence, and all pieces, taken together, are used to support the final opinion.

One of the most common areas of dispute in courts reports deals with verbal evidence. Who said what to whom, and when? Commonly Party A will claim that Party B was told about certain issues. Party B will refute this stating that they were not told, or were only partially told, or that they thought that what was said was X when, according to Party A, they meant Y. Verbal misunderstandings cause a lot of uncertainty, which is why clearly written reports, meeting minutes, and site notes can become such a critical part of evidence later on.

Reading through court reports certain phrases commonly occur:

Phrase	Implication
... there is insufficient evidence to support the stated opinion ...	The claim made doesn't hold water and cannot be believed.
... the evidence presented is contradictory and inconsistent ...	How are we supposed to know who is right or wrong?
... the evidence presented by Party A is not credible when considered against their actions ...	You say you did one thing but we know you also did other things which are different. We don't believe what you say.
... the evidence was not supported by cross examination ...	When questioned, your answers seem to be different from what you claim the evidence implies.
... there was no evidence suggesting that ...	There is nothing to prove or support a claim.
... despite other arguments the evidence cannot be disregarded ...	The evidence before me suggests that these other arguments are not credible.

In a court case, evidence has to be credible to be useful. There are of course many areas outside the court where evidence plays a vital role. Simply having a clear record of meetings, discussions on site, photographs of site conditions or of work undertaken is often an important step to preventing issues going to court. Other professionals use these techniques all the time to assemble a defensible record of who did what, when, why, and how and with what result.

Learning how to document and explain evidence is important for any assignment, whether it is a simple letter or an expert report for court testimony. Evidence is the foundation of analysis, discussions, conclusions and final opinion. Describing evidence requires effective communication, which includes written or verbal descriptions, photographs, sketches, diagrams and plans. These forms

In a tree case, the starting point would be the tree itself. That is the primary evidence.

of communication are used to tell the story.

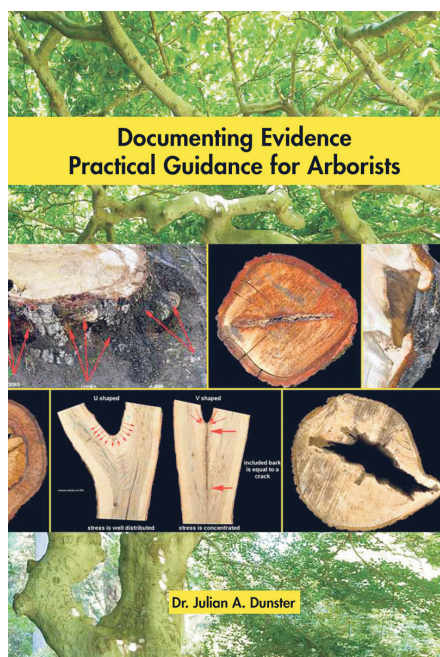
They describe:

- What you saw at various scales
- How you recognized the evidence
- How you analysed it
- How you interpreted all of this to arrive at your opinions

To collect and document evidence effectively, several important steps are required. You need to know:

sional protocols that go with these steps. Pitfalls abound, and in a legal setting they can undermine if not completely discredit your efforts.

To accomplish these steps documentation has to be thorough. You need to know and understand the subject matter, and the various procedures and protocols used in collecting and analysing evidence. The procedures used, along with the thought processes and decisions that led to the final opinion, need to be effectively and ethically reported and communicated. Describing these steps



Julian Dunster's new book will be of interest to anyone working with trees, attending meetings, working in negotiations or simply being on a site.

Dunster & Associates Environmental Consultants Ltd.

Dr. Julian A. Dunster R.P.F., M.C.I.P. ISA Certified Arborist
ASCA Registered Consulting Arborist
Tree Risk Assessor # 1
Honourary Life Member ISA and PNWISA

Risk Assessments - Expert Witness - Appraisals
Tree Protection - Urban Design - Policies and Bylaw Development
Research and Training

4621 Cliffwood Place, Victoria, B.C. Canada
T:(778) 433 8465 C:(778) 977 1395
jadunster@gmail.com www.dunster.ca

1. What to look for and how to find it
 2. What you are looking at and understand its implications
 3. What to sample and why
 4. How best to collect and record the data
 5. How to describe what you saw
 6. How to best analyse the evidence collected and be aware of the various strengths and weaknesses of any one approach
 7. How to discern the important from the irrelevant
 8. How to assess the sequence of events documented and show their relevance to the thread of causality
 9. How to describe the process used to arrive at your opinions and evidence based conclusion
- Finally, you have to clearly understand the ethics and profes-

allows others, who have never seen the site, to clearly see the same thing and to derive their own opinions.

Mastering these steps may help to avoid time consuming and costly disputes later on. Learning how to effectively document evidence should be an integral part of everyday practice.

For arborists wishing to learn more, the book is available at www.dunster.ca and will be available through other outlets in the coming months.

Dunster, J.A. 2014.
Documenting Evidence: Practical Guidance for Arborists. Victoria: Dunster & Associates Environmental Consultants Ltd.
ISBN 978-0-9937133-0-9
With a foreword by Nelda Matheny.