TREES & THE LAW

BY JULIAN DUNSTER

The reasonable person

The law requires a test of how most people would react to a hazard

The concept of 'reasonable' is a commonly used term in many contracts, legal documents and court decisions. Often the court is seeking to decide if one or more actions were reasonable in any one set of circumstances. The actions in question can be those of a private individual, a tree care company or its employees, or a government official making a determination about what can or cannot take place.

There are several legal definitions of the term reasonable. All encompass the concepts that the action taken must be fair, appropriate and similar in character to what any other person would do in the same or similar circumstances.

In some cases the actions taken can be established as reasonable by comparing them to a standard of care. For example, tree risk assessment in North America is largely defined by well-established training courses and accreditation such as the former Certified Tree Risk Assessor programme (TRACE), or the more recent Tree Risk Assessment Qualification (TRAQ) promulgated by the International Society of Arboriculture.

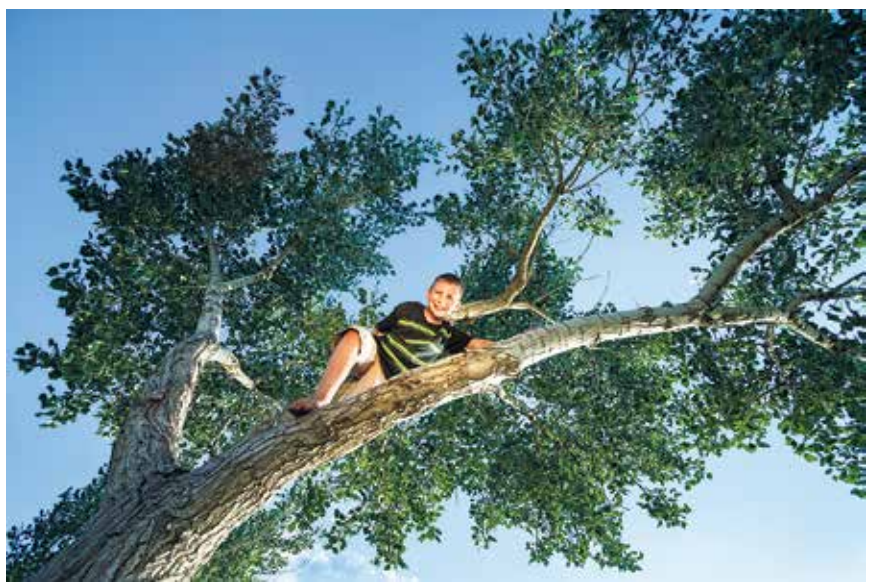
There are other, similar programmes in use by the US Forest Service, and all of them set out the process and goals of what risk assessment is supposed to encompass.

The standard of care determines what is or is not reasonable. Clearly, the average homeowner may have little or no knowledge of what to look for when dealing with tree risk, tree valuation or boundary locations. Reasonable behaviour for the homeowner will be different from the standards expected from certified arborists, tree care companies and other associated professionals such as surveyors, foresters, and engineers. The latter are expected to have and to properly apply, specialised training. Reasonable in that sense will be more technical, with the expectation that a more stringent understanding of what is required will have been used.

In the case of Freedman v. Cooper, 2015 ONSC 1373 a boundary tree was damaged in an ice storm. Mrs. Freedman was concerned about risk issues, and after obtaining opinions from several arborists, she applied to the City of Toronto for a removal permit and it was granted. Mr. Cooper did not want the tree removed and denied access to allow for its removal. In correspondence from the City it was noted that the permit had been issued because "...our assessment that no reasonable alternative to tree removal are [sic] possible...".

The trial judge ordered that the tree be removed as it was damaged and unstable enough to constitute a nuisance to the Freedman property. *"Nuisance is a common law tort, and it is a form of strict liability that is not concerned with fault or misconduct. Rather, it is a social ordering law based on imposing responsibility or legal liability when an owner's use of his or her property unreasonably interferes with the use and enjoyment of land by others. Generally speaking, whether the landowner's unreasonable use was intentional, negligent or innocent is of no consequence if the harm can be categorized as a nuisance. What is unreasonable reflects the ordinary usages of people living in society, and determining unreasonableness involves balancing competing rights of landowners."*

In R. (ex rel. Scheuermann) v. Gross, 2015 ONCJ 254 one of the issues dealt with a tree removal permit for a boundary tree. The permit had been issued due to a determination that the Norway Maple was hazardous, and if it was not removed expeditiously, the applicant, Mr. Gross, would be liable for any ensuing damages. The Norway Maple was a boundary tree, but prior to its removal the applicant failed to notify the neighbours who also owned the tree, even though the paperwork issued specifically noted that the neighbours should be notified.



In a court case involving a teenager who fell from a tree located on public property, the question of reasonable care was key in the judge's decision.

The judge noted *"In these circumstances, a reasonable person who knew that he was not on speaking terms with his neighbours who were co-owners of the tree in dispute, would have sent at least one registered letter, if not more, ..."*

"Furthermore; I find that a reasonable person would not have waited three and a half years before taking down an imminently hazardous tree that the Confirmation of Exemption stated must be removed immediately, noting that a failure to do so would result in the issuance of an emergency order by Municipal Licencing & Standards staff. I understand that Dr. Gross had many things on his plate during that time, nevertheless, the wait of three and half years seems to me to be unreasonable."

The standard of care employed by municipal officials can be questioned. In Eric Winters and The Corporation of Haldimand County, 2013 ONSC 4096 a teenager climbed into a tree located in a municipal park. He fell and was seriously injured. One of the issues arising was whether or not parks staff had met a standard of care required under the Occupier's Liability Act. The judge noted *"The standard is one of reasonableness. That is not necessarily the same thing as being obliged to do whatever perfect hindsight would indicate might have avoided the injuries in first instance."*

Evidence presented at trial revealed that the tree had been used by generations of teenagers, and there had been no complaints and no reports of other injuries. Park officials visited the site weekly but had never seen anyone climbing the tree, nor was the teenager's mother aware of the activity even though she regularly visited the park. As was noted by the judge, *"I consider that practice to constitute reasonable monitoring of the park and its use in the prevailing circumstances. The standard for the municipality ought not to be higher than that of the reasonably prudent parent, which Ms. Winters appears to have been."*

It was suggested that the limb in question could easily have been removed without damaging the rest of the tree, but was that a reasonable thing to expect? The judge disagreed. *"I do not consider it unreasonable for the County to have left the trunk or limb in place. Given the state of knowledge that existed prior to Eric's accident, it was no more unreasonable to leave the tree as it was than it was to leave any other horizontal surface from which one might be injured by falling. I have already determined that the County's monitoring of the tree's usage was reasonable in the circumstances. It is not reasonable to expect an occupier to eliminate all possible risks."*

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Later it was noted that *"The question, of course, is whether it would have been reasonable to call upon the County to pass a by-law prohibiting tree climbing in the park, put signs in place to that end and then patrol for compliance. In the circumstances of this case, I am not prepared to find that such was required here. The County does not have limitless resources. It ought not to be obliged to manifestly forbid all activities which, with hindsight, might prove to be dangerous. There has to be a reasonable limit to such prohibitions on human activity."*

The case was appealed (Winters v. Haldimand (County), 2015 ONCA 98) but dismissed on the basis that the standard of care used was reasonable in the circumstances.

In all these and other examples, the test of reasonable hinges on the particular circumstances. For arborists, municipal staff, and tree care companies, knowing the standard of care expected is critical if their actions are to be accepted as reasonable.

Julian Dunster is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice please consult a lawyer. Additional case law can be found in the book Arboriculture and the Law in Canada. Copies are available from Julian Dunster. jd@dunster.ca www.dunster.ca Julian Dunster also maintains an extensive data base of Canadian case law involving trees. Please contact him for more information.