TREES & THE LAW

BY JULIAN DUNSTER

Roadside trees

What is your liability?

There are over a million kilometres of road in Canada, and alongside many of them, there are trees within the defined right of way. There have been several very high-profile roadside tree court cases that clarified the standard of care debate in Canada. To understand these it is important to understand how the standard of care is treated.

An important case, especially for all levels of government outside of Quebec, is *Anns v. Merton London Borough Council*, 1978, which has nothing to do with trees but everything to do with duty of care. A block of flats in London, England was built by contractors with the local authority approving the design plans and construction work as it progressed. The flats were sold and occupied. Later on, the building started to crack due to inadequate foundations. At issue was whether or not the local authority did or should have known that the design was incorrect and whether or not they owed a duty of care to the subsequent owners. It was decided that they did owe a duty of care to ensure that the design and construction met accepted standards, and in this case, they failed to do so.

In Canada, *Anns* was adopted and clarified by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, 1984; *Brown v. British Columbia (Minister of Transportation and Highways)*, 1994; and later by *Cooper v. Hobart*, 2001. These cases are important because they determine if and how a duty of care exists. In *Kamloops*, the Supreme Court of Canada following the principles in *Anns*, held that municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers." This is elucidated in Brown as follows:

The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions. True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

The difference is significant. For any level of government, policy decisions are immune from liability unless they are made in bad faith or are so irrational or unreasonable as to not be a proper exercise of discretion.

Operational decisions are not immune from liability and are subject to the standard of care of reasonableness. (*Craxton v. District of North Vancouver*, 2006). The principle underlying *Anns* was later tested in the case of *Just v. R.*, 1985. A rock, loosened by a tree root, fell onto a car, killing one occupant and injuring the other. This case was appealed, and eventually went to the Supreme Court of Canada where a new trial was ordered. *Just* is considered a test case on several fronts.

The prevailing ruling is that public authorities have a duty of care to take reasonable steps to ensure the safety of people using the highways. But, and it is has proven to be a very important caveat, there may be no duty of care attached to a public authority when, although an incident has occurred, the duty is limited as a result of a policy decision (decisions which involve or are dictated by financial, economic, social or political factors or constraints).

Dead or dying trees alongside roads are now very commonplace. How should a provincial or municipal authority respond?

For example, if the responsible authority has made a policy decision to inspect highways for hazardous or high risk trees, and within the limits of budget and staff time this has been undertaken, then any new incident arising from an area that has not yet been inspected might be exempt from liability so long as the policy has been fulfilled. The courts have ruled that the general problem was recognised and a programme was underway to address it, but had been constrained by time and money. However, if it can be shown that the incident involved an area already inspected (operational activities arising as a result of a policy decision), then the court case will hinge on what was inspected, how well, and with what degree of rigour. If the inspection process (the implementation stage of a policy decision) was flawed, then it may be possible to show negligence and liability may follow.

Establishing that a duty of care exists is a first step in proving negligence, but by itself it is not enough to prove liability. Once it has been proven that a person has a duty of care, that person is then responsible for meeting the standard of care. That is done by examining if the actions taken (errors of commission) or neglected (errors of omission) conform to what was expected. If not, for whatever reason, then the defendant has fallen short of the expected standards.

Municipal authorities should also be sure they know where their land is and be sure to have a well-defined system of inspection, recording and follow up actions to manage the identified risk issues.

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards. (Ryan v. Victoria (City), 1999)

Establishing a breach of the standard of care expected will vary depending on the circumstances and the person involved. In general, a homeowner or member of the public will face a lower standard of care because they are not expected to know and understand technical issues (the so called ordinary person). Instead, they rely on advice of professionals with qualifications and experience; for tree issues that will be Registered Professional foresters, licensed surveyors, certified arborists, or arborists that are Tree Risk Assessment Qualified, for example. That transfers the onus to understand what is or is not foreseeable to the professional. They assume the duty to undertake the assignment to established professional standards, and communicate their findings back to the client in a clear and timely manner, which is in effect a duty to warn the client. The form of communication must be understandable, such that the client is clearly informed of the identified risk(s) and the extent of any danger. The information presented should not be neutralised or tempered by what the client wants to hear, but rather, it should be factual and reasonable with regard to the circumstances of each investigation and its particular site. Of course, if the client ignores the advice given, and subsequently encounters what could have been an avoidable problem, the breach of standard of care is likely to be theirs, not the professional's. For anyone acting in a professional capacity, simply having expertise or qualifications and working to the best of their ability, may be insufficient. They are held to a higher standard of care than the layperson, and the way in which their work is conducted should conform to generally accepted practices and standards within their profession. Similarly, one or more people undertaking work on one property, that might affect a tree located on another property, have a duty of care to consider the outcomes of any actions they undertake.

The standard of care for government agencies is also modified in light of *Anns* and subsequent interpretations. Referring again to *Just*, 1989, the Supreme Court noted:

The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

That does not absolve government agencies from exercising due diligence or performing work to an accepted standard of care. But it does recognise that there may be circumstances where it was not possible to attain what would be desirable as a result of other factors; a defence not available to the private citizen or corporate body.

Taking all this into account, how should the liability of trees alongside roads be treated? In the past decade there have been massive changes in tree health and condition resulting from new pests, such as the emerald ash borer in Eastern Canada. Climate change and prolonged periods of drought are killing many trees in Western Canada. Dead or dying trees alongside

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roads are now very commonplace. How should a provincial or municipal authority respond? Clearly, they have an easy way out of liability if a successful policy defence can be proven. They knew of the problem but were constrained by time and money restrictions. Equally clearly, it would be an impossible task to expect every tree alongside every road to be assessed and managed over time. That would require a standard of perfection — a standard that might be nice to have but is never likely to occur in all such circumstances. But, balancing that, it seems entirely possible that completely ignoring large amounts of dead trees alongside the main arterial routes might then attract a charge of reckless endangerment of the travelling public.

Where does that leave those responsible? A successful policy defence requires a well thought out policy that acknowledges the issues and specifies how they will be addressed. Provincial highway agencies may want to have at least a periodical drive by risk assessment in place on the major routes (Level 1 risk assessment). Municipal authorities have a smaller land base and may wish to adopt formal training and inspection procedures such as the International Society of Arboriculture Tree Risk Assessment Qualification (TRAQ). Again, that could be a drive by approach, although in the busier downtown city areas, it is more likely to require ground based visual assessment of each tree (Level 2 risk assessment). Municipal authorities should also be sure they know where their land is and be sure to have a well-defined system of inspection, recording and follow up actions to manage the identified risk issues.

Of course, none of that helps if no action was taken after the risk issues are identified. The risk manager, that is, the person who owns or has responsibility for one or more trees, has to decide how best to proceed as a matter of due diligence. The usual options are as follows:

i) Do nothing because they feel the risk is just too small to bother with.

That immediately raises the question, how do you know the risk is too small? Was there an inventory of the possible problems that revealed nothing of consequence? Was this a gut feeling based on experience? Was it simply a lack of time to investigate the issue?

ii) Commission a survey of the problems, evaluate the identified risk issues and recommendations, and proceed to abate these as time and money permits. That would be a more usual approach and if all steps met the standard of care expected, negligence should be harder if not impossible to prove. There will be times when political interference, and / or public outcry delays removal of identified hazards. That may create issues of negligence, since the owner of the risk has been informed of it but is now choosing — or has perhaps been forced – to delay abatement until other due process concerns have been dealt with.

iii) Adopt a very risk-averse approach, assess all trees at short inspections intervals, and remove anything that might be seen as problematic.
That too is not entirely uncommon in practice, and many trees are removed well before they might need to be simply because a risk management department does not want to have to worry about the issue.

In summary, if you are responsible for roadside trees, you have to do something. That may be as simple as ensuring there is a well written policy in place. You cannot ignore the issue, which is likely to become increasingly important as climate change triggers more pests, more diseases, more droughts, more storms and more claims.

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. This article is extracted from Trees and the Law in Canada. *www.treelaw.info.*