TREES & THE LAW

BY JULIAN DUNSTER

Understanding Occupiers' Liability

Occupiers' liability refers to the duty of care owed by the landowner, leaseholder or "occupier," to people who visit the land either by invitation or trespass. It is an issue of concern to many in the tree service industry, but perhaps especially to grounds managers.

Many areas have specific Occupiers' Liability Acts to cover these situations. The liability aspect arises when accidents occur as a result of dangerous conditions on site. Depending on jurisdiction, there may be some variations in how the duty of care is interpreted. There are two broad levels of care commonly seen. One covers people who have been invited to enter the land or have express or implied permission to be there, (for example public parks, schools, playgrounds or estates), or have a legal right to enter the land such as police, firefighters or metre readers.

A second level of care, usually less stringent, covers trespassers: people who have not been invited and have no right to be there. However, if trespass becomes common and no steps are taken to prevent it from re-occurring, it may be seen as a licence to enter the property, and a higher level of duty might prevail.

The occupier is expected to take reasonable care to ensure that visitors will be reasonably safe when they come onto the premises. Typically, this is simpler to ensure for invited guests than for trespassers who might wander around to places which are less safe and not intended to be visited. Children are not expected to be as alert or aware as adults; so provisions to make an area reasonably safe for children are often more stringent.

Occupiers are not normally liable for negligence caused by other people working on the land although the occupier does have a duty to ensure that such people are properly qualified and skilled to undertake the work they are doing, and that they are properly supervised as the work proceeds.

Trees on property pose their own set of issues when it comes to dealing with occupiers' liability, and there are cases of interest for landowners. In Whitney v. The University College of the Cariboo (2004 BCSC 1110) a student claimed compensation as a result of tripping and falling while walking through a forested area between a parking lot and campus buildings. The trail was a shortcut, not a designated pathway, but still obvious as a commonly used informal trail. No inspection or maintenance was undertaken on this and similar trails, and there were no signs telling users to stay out, or be aware of possible dangers. However, the forest area was not entirely wild or unused. Trees in wire baskets had been moved into the area pending transplanting to their final location. The student tripped on one of the wires and suffered injuries which lasted several years. She had to abandon skiing and mountain biking and retained a large scar.

In cross examination it was agreed that the wire was quite visible, but it was less clear as to whether or not the student would have seen it had she been taking more care. It was admitted she was looking ahead when walking, not looking down. The defendant agreed that the wire would be a hazard to anyone walking on the trail and not looking carefully.

Should the college have recognised that the informal and unmaintained trail was a hazard and should they have posted warning signs? The college argued that it was not important that she tripped over the wire. It could have been a root or a fallen branch. The trail was clearly not maintained, and therefore users would be expected to realise that there would be risks. Alternatively, should the student have used common sense and recognised that this was an informal trail, not likely to be risk free, and that utilizing the existing pedestrian pathways would be more sensible?

The college argued that it had met the standard of care required by providing a network of well maintained pathways. The court agreed that the college did not have a duty of care to maintain the undeveloped areas and the trails through them to the same standard of the designated pathways. But, the planting of the trees in wire baskets meant that a "non-natural" object had now been introduced into the natural area. The college had a duty of care to ensure that the

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wires did not create a hazard, especially when it was clear that these informal trails were in active use. The student also had some responsibility and was found partly negligent for the accident. Ultimately, the court found a shared level of responsibility and damages were split on a 50 per cent basis.

Similar issues arise in Paquette v. School District No. 36 (Surrey) 2014 BCSC 205. In this case a student used a cherry tree to climb onto the roof of the school. He was seen and in his attempts to get down he took a different route, fell and was injured. The plaintiff sued, arguing that the school board should accept between 60-75 per cent liability as they should have known the tree gave access to the roof. The B.C. Occupiers' Liability Act at section 3(1) states:

3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

The court accepted the principle that the occupier cannot be expected to be held to a standard of perfection; they are not an insurer against all possible risks of harm. The key issue was not ". . . whether anything at all could have been done to prevent injury, but whether the defendant's actions were reasonable in all the circumstances." Further, the "general class or nature of the harm suffered in the circumstances must have been reasonably foreseeable although the exact type of injury suffered need not have been foreseen."

The defendant argued that they were unaware the cherry tree was used to gain access to the roof. But, they were aware that there had been unauthorised people on the roof on past occasions, and acknowledged that a tree could be used to get access to the roof. The court concluded that the tree was a reasonably foreseeable means of roof access, and by extension, a foreseeable way in which children might fall from the roof and be injured. The defendant could not prove that they had a system of monitoring possible access points to the roof, and what effort was made seemed to be "reactive and ad hoc."

The court noted that it would be hard to be perfect and prevent all roof access, but even so, the tree was an obvious access point and, "a reasonable person would foresee that the cherry tree (or any other tree in similar proximity to the school roof) might be used by kids to climb onto the roof. As such, the defendant is liable for not taking reasonable actions to prevent children accessing the school roof via the cherry tree." The school board was found 75 per cent liable for the injuries suffered by the student.

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.*