

Hazard tree liability in the United States: Uncertain risks for owners and professionals

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Abstract: The liability United States (U.S.) tree owners face from hazardous trees on their private properties has and continues to undergo a transformation. The traditional common law legal test focused upon whether a tree owner had acted to create a hazardous condition on the property. The modern trend is towards a test that imposes greater responsibility and greater uncertainty on tree owners and arborists. Abandoning the natural/artificial distinction, the modern test, adopted in half the U.S. jurisdictions, imposes general principles of negligence on tree owners. This paper discusses the U.S. legal context for hazardous trees, particularly the impacts on individual tree owners. It closes by addressing various practical means to minimize the risks associated with the modern legal standards, both for susceptible tree owners, and for professionals assessing the subject property.

Key words: hazard trees, liability, tree owner, inspection, arborist, duty

Introduction

In the United States (U.S.), the treatment of the dangers posed to members of the public and to other private tree owners by structurally-deficient trees or tree limbs has been undergoing a legal evolution of sorts over the last four decades. The direction in which the trend appears to be proceeding raises the stakes for tree owners. Whereas immunity from legal liability may have previously existed, such liability can now more easily result from a tree owner's actions or failure to act. The responsibilities of individual tree owners have increased in many states, and nothing suggests that the trend will abate. The U.S. is unique among democratic nations in its citizenry's heightened use of litigation as a policy tool (Kagan 2001). An unfortunate byproduct of this undue reliance on adversarial legalism is the variability and unpredictability of legal decisions and their effects. As such, fluctuations in the duties affecting tree owners and arborists are spasmodic and often times unforeseen. Rarely will a

state legislature address such issues, leaving the courts to define the limits of legal liability of tree owners. This set of conditions warrants paying close, or perhaps closer attention, to the condition of one's trees more than ever before. In this paper, we examine and describe the U.S. legal trend towards greater liability for hazardous trees, and suggest how best to protect against lawsuits. Furthermore, we identify and discuss practical means for safeguarding against the risks identified previously. Two key publications from Europe were used to provide an international context for the U.S. situation described in this paper.

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Liability for hazardous trees

The “early” rule

Legal questions, such as responsibility and liability for hazardous trees, are dealt with by each individual state within the United States. As such, while there was and is no uniform code or model for establishing hazardous tree liability in the U.S., in applying common legal principles courts in the respective states have reached similar legal conclusions.

At one time in the U.S., the typical legal rule pertaining to natural conditions or objects on one’s real property held that if a particular object injured another person, so long as the injury was not the result of the tree owner’s interference with or manipulation of the natural object, no liability accrued to the tree owner (Bailey 1987). The theory was simple, elegant, and in many ways, commonsensical. When a tree owner did not act to create a hazardous condition on his or her property, the law did not hold the tree owner responsible for subsequent accidents. Essentially the law would not impose liability for *nonfeasance*, or the tree owner’s failure to act to remedy a natural hazard. An example of nonfeasance would include the utter failure to inspect the trees on one’s property for signs of disease or defect. Were personal or property damages to result from the failure of such a tree, the tree owner would suffer no legal responsibility. Only in cases where the tree owner had in some way acted to create or increase the risk of harm- *malfeasance*- would liability attach to the tree owner. Removing a portion of a stand of trees, thus leaving the remainder susceptible to wind throw could be an example where an intervening human act created a precarious situation. This is the example Lonsdale (1999) uses in a brief review of the United Kingdom’s law pertinent to tree failure. This principle has historically been labeled the “common law rule” for harm from natural conditions, such as trees (American Law Institute 1977). The rule distinguished clearly between natural and artificial conditions on one’s property, and provided predictable boundaries for the tree owner’s responsibilities regarding potential hazards. This rule equally provided an easily applied test for courts faced with such disputes. Hazard trees, unless suffering from some tree owner induced artifice, did not expose the tree owner to legal liability for injuries associated with that tree.

As the “early rule” was set in common law (not codified in statute), varying to some extent by individual state, it is no particular surprise that the rule has undergone modification in a substantial number of jurisdictions over the last 40 years (including the States of Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa,

Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Washington and Wisconsin), and we suspect, will likewise be modified in more jurisdictions in the future. While the aforementioned natural/artificial distinction applied to rural lands, an exception has evolved providing a heightened degree of responsibility for urban tree owners (American Law Institute 1963; American Law Institute 1977). The basis for that limited exception, however, now faces expansion beyond the historic urban /rural dichotomy.

A New York case from 1896 serves as an early illustration of the foundations for that expansion. In *Gibson v. Denton* (4 A.D. 198, 38 N.Y.S 554 [1896]), the court was reluctant to release from liability a property owner responsible for a decaying tree on her property, reasoning that the tree owner would certainly bear responsibility for harm caused by a decaying building located on her property. While a naturally occurring tree and an artificially occurring building are obviously not synonymous, the court nonetheless concluded that a landowner should not be permitted to indulge in otherwise negligent behavior, particularly when the failure to act could prevent harm from an object exclusively controlled by that landowner. The distinction between natural and artificial, once the fundamental legal and factual question when assessing hazard tree liability, began blending into one class of activity, with liability more focused upon tree owner responsibility, rather than on the mechanism of how the tree became “hazardous.”

The modern rule

This “discovery” by the *Gibson* court has arguably served as the subsequent legal foundation for court decisions in 25 states and the District of Columbia. This transition, however, did not occur suddenly, but rather has evolved slowly and at an unpredictable pace over the last century. The fragmented system of individual state courts ensures that such legal questions will typically not receive contemporaneous treatment in the U.S. This lack of predictability and the historical legislative reluctance to codify liability guarantee that tree owners and arborists in the remaining 25 states face uncertain duties.

Although the transition from the early to the modern rule in the U.S. has occurred slowly and unpredictably, it has not fluctuated to the same degree as in Germany. Beginning with a 1965 Supreme Federal Court of Germany (SFC) decision, the person responsible for traffic safety as it relates to tree failure was first afforded a measure of protection, when the SFC noted that, “A street tree certainly cannot be required to be absolutely

free of imperfections and dangers” (Mattheck & Breloer 1998 p. 142). However, from 1987 to 1992, the courts had placed increasingly stringent requirements on the same persons who are responsible for tree inspections. The courts then adopted what Mattheck & Breloer (1998) call, “... a more realistic approach” to ensuring traffic safety, including a relaxation of the stringent measures adopted between 1987–1992. While the German courts have taken a 360-degree course in less than 40 years, half of the states in the U.S. still have not adopted a legal precedent set over 105 years ago.

Courts in each of the “modern” U.S. jurisdictions, however, have ruled in falling tree and tree-related cases that tree owners owe a duty to both passersby and other property owners to prevent harm to them from patently dangerous objects on their properties (Schiffres & Skojec 2002). Abandoning the natural/artificial dichotomy, the courts have relied instead upon the common law legal principle of *negligence*, as do courts in the United Kingdom (U.K.) (Lonsdale 1999) and Germany (Mattheck & Breloer 1998). This trend suggests that an increasing number of states will be examining and likely adopting this more “modern” approach to hazard tree liability. In those states where the modern approach has not yet been adopted, it is more likely that a precedent-setting case simply has not been reported, or a case has lacked the facts necessary to address the specific question of hazardous trees, rather than that a state court has deliberately or intentionally chosen to retain the “early” rule. It is merely a matter of time before courts in the remaining states have the opportunity to specifically review hazard tree liability. When that time comes, it is unlikely that many states will knowingly choose to retain the “early” rule, as courts have recognized a “trend” (*Sprecher v. Adamson Companies*, 30 Cal.3d 358, 372, 636 P.2d 1121, 1128 [1981]) or “evolution” (*Lewis v. Krussel*, 101 Wash.App. 178, 186, 2 P.3d 486, 491 [2000]) away from the common law distinctions and the tree owner protections of the “early” rule (Fig. 1).

An example of this transition can be found in a relatively recent case from the state of South Carolina (*Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 356 S.E.2d 123 [1987]). In the *Israel* case, a decayed tree limb fell onto an adjoining property owner’s land, striking and destroying an occupied automobile and injuring its occupant. The tree owner argued that the law did not impose any duty of inspection on a tree whose limbs happened to overhang an adjoining business property. The court did not agree, determining that while that may have been the prior rule, the modern rule requires the exercise of reasonable care to prevent dangerous trees from causing such injuries. While the decision lacks sufficient detail to fully understand the court’s determi-

nation, it appears that the court accepted evidence that the decay would have been detectable had the tree owner exercised reasonable care (by presumably inspecting the tree) during his 15 visits per week to his property.

Negligence

While lawsuits against tree owners may incorporate such terms as *trespass* and *nuisance*, *negligence* is the fundamental legal principle at work. Negligence is a long-lived legal concept that is largely consistent regardless of the specific manner in which the laws of each state address hazard trees. Negligence can be broken into three distinct components. To recover for injuries or damages caused by a falling tree or portion of a tree, an injured party must demonstrate that (1) a tree owner had some duty to prevent the harm, (2) the tree owner breached that duty, and (3) the breach was the cause of the injured party’s harm. In other words, what were a tree owner’s legal responsibilities for trees located on her property, did he or she fail to meet those responsibilities, and did that failure result in the tree harming another person or property?

The typical, but still interesting and debatable question for legal and arboricultural professionals, has historically been: when does a duty exist. Or, when does a tree owner have the obligation to be aware of dangers to others posed by trees on his or her property, and to rectify any such dangers? As discussed earlier, no duty previously existed for “natural” conditions on one’s property. In the absence of such a duty, negligence could not accrue. A lawsuit based against such a tree owner in those states where the “early” rule is still applied would be frivolous and ultimately unsuccessful. The modern trend, however, is to establish in law a duty on the part of the tree owner to identify and ame-

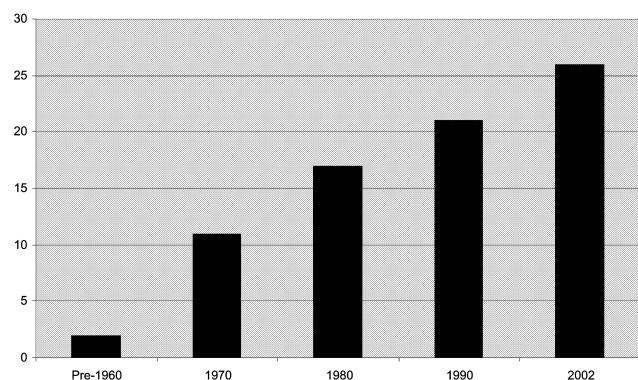


Fig. 1. Total number of states applying the modern rule by decade.

liorate dangerous or hazardous conditions on the property, regardless of any notions of natural or artificial (*Lewis v. Krussel*, 101 Wash.App. 178, 186, 2 P.3d 486, 491 [2000]). The modern threshold test is merely, was the dangerous object under the control or supervision of the tree owner? If so, further inquiry is necessary to determine if and what the tree owner's obligation to remedy a hazardous tree may have been.

But how does a court assess whether the tree in question was in fact hazardous or dangerous, and additionally, whether the tree owner's legal duty to ameliorate the hazard was triggered? The legal principle at work essentially states that if a tree owner had actual or constructive knowledge of a hazard, he or she is duty-bound to address the danger posed by the tree (*Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d. 72, *motion denied* 67 N.Y.2d 754, 490 N.E.2d 1229, *cert. denied* 476 U.S. 1117, 90 L.Ed.2d 658, 106 S.Ct. 1975]).

Actual knowledge is as it sounds, if a tree owner is actually aware of a defect or risk posed by a tree, remedial action is warranted, even required. *Constructive knowledge* of a hazard means that a prudent or reasonable person would or should have been aware of the specific hazard, though the actual person in question was not aware of the specific hazard. While constructive knowledge may appear to imply that tree inspections may be necessary to detect potential hazards, a tree owner's duty to actively and regularly inspect trees for defect has not been well established (*Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d. 72, *motion denied* 67 N.Y.2d 754, 490 N.E.2d 1229, *cert. denied* 476 U.S. 1117, 90 L.Ed.2d 658, 106 S.Ct. 1975]). What is required, however, is that a tree owner must act as a reasonable person would have acted in the same circumstances. Failure to act in response to patent defects in a tree which a tree owner observed or could have readily observed will likely constitute a breach of the tree owner's duty (American Law Institute 1977).

Although Lonsdale (1999) does not cite specific cases, he suggests that in the U.K., a tree owner may be liable even in the case of trespassers who are injured by a hazard tree. He contends that if the tree owner were aware of regular trespassing on the property (actual knowledge), the tree owner should take adequate precautions (such as fences) to prevent trespass.

Courts of law must sift through the factual circumstances surrounding the injurious event to assess the type and extent of the warning signs which may have triggered actual or constructive notice of a hazard. Courts have previously considered such factors as the age of the tree, a detectable lean, discolored foliage, barren branches, and withered or dead leaves (Schiffres & Skojec 2002). Of course, there is no assurance of a predictable formula that any particular state court will

apply to any given set of facts. A court will likely address the facts holistically, attempting to assess whether the tree owner had actual knowledge of the defects or signs of disease, or that the signs were such that the tree owner should have been aware of them. In adopting the increased responsibility of the "modern" rule, courts have sacrificed the predictability of the "early" rule. This is not to say that understanding certain overt, external indicators of defect will not be useful for tree owners, and possibly to a reviewing court in assessing negligence.

The case of *Toomey v. State of Connecticut* (1994 WL 75815 [Conn. Super]) illustrates the problems associated with tree owner foreknowledge of defects or hazards. *Toomey* dealt directly with competing evidence of what should and could have alerted the state to the presence of a roadside hazard tree whose failure killed two people and grievously injured a third. The court noted that the sheer weight of the limbs (5–10 tons), the roadside location of the tree, a v-shaped crotch, the age of the tree, callus growth, the particular tree species (red maple), extensive defoliation, and the presence of a pruning cut should have put the state arborist responsible for that section of road on notice that the tree warranted closer scrutiny and possibly even removal. It remains unclear, however, what the duty of an average tree owner would be under like circumstances. The *Toomey* court reached its conclusion after the testimony of two arboricultural experts and a state field arborist. Individual landowners will seldom have access to such resources.

The question of hazard tree liability is further complicated by the manner in which the locations of offending trees has been historically treated. Trees falling and injuring persons in rural or urban settings has classically produced differing liabilities. For example, a treatise on the state of the law distinguishes between the duties of rural and urban tree owners (American Law Institute 1963). While urban tree owners have historically been held to a higher standard of care, particularly with public highways adjacent to their property, the legal effects of the proximity of a public highway to a rural tree owner have not been conclusively settled (American Law Institute 1963). The modern trend, however, has tended to discard these geographic distinctions. Relying upon general principles of negligence, courts are unconcerned with where the offending tree was located. It is reasonable to expect that the historic distinctions regarding the locale of hazard trees will continue to erode as more jurisdictions encounter the opportunity for adopting the modern rule. In each decade since 1960 at least four states have adopted the modern rule (Fig. 1). Nothing suggests a change in that trend.

Summary

The relative security of the “early rule” has been discarded by half of the U.S. jurisdictions. Further, there is no evidence suggesting that any jurisdiction has explicitly considered the modern approach, and subsequently rejected it in favor of the “early” rule. Consequently, in those jurisdictions where the “early rule” has been discarded, tree owners, insurers, and tree care professionals must be particularly wary of the new legal responsibilities. And in those jurisdictions that still abide by the “early rule,” the looming court case that may alter that standard could occur at any time. It behooves tree owners to avoid behavior that might provide the facts and circumstances for adopting the modern rule at their expense.

Means for safeguarding against the risks

Reasonable precautions

As U.S. jurisdictions appear to be turning away from the historical and relatively predictable means of assigning tree owner liability for hazardous trees, the new paradigm suggests greater scrutiny by tree owners and their professional agents. In this section we review the fundamentals of tree risk assessment, including the importance of conducting systematic assessments. We also suggest that professionals would do well to help educate tree owners about tree risk assessment, to reduce the risk of tree failure, related damage, and potential liability. A rudimentary understanding of tree defects and how to perform tree inspections is important for tree owners, given the dual legal standard of actual or constructive knowledge of a hazard. Professionals should note that 1) as risk of tree owner liability increases, so too may the responsibilities of arborists asked to visit the property (Ryan 1989); 2) greater knowledge of trees may raise the standard of care to which arborists and urban foresters will be held, potentially broadening liability (Anderson 1987). The latter statement holds true in the U.K. (Lonsdale 1999) and in Germany (Mattheck & Breloer 1998).

Tree risk

A hazard tree is one that has both a defect that may cause it to break apart or blow over prematurely and a target that could be damaged if the tree were to fail. A tree that has dead branches overhanging a sidewalk or street is a hazard because the dead branches may break off, striking a car or pedestrian. Without a potential target, a tree cannot be considered hazardous. Targets include houses, cars, outdoor decks, and, of course, people. Tree defects have been reviewed widely in the lit-

erature, including several monographs (Matheny & Clark 1994; Mattheck & Breloer 1998; Lonsdale 1999) and textbook chapters (Lilly 2001; Harris et al. 2003).

Arborists and urban foresters who assess tree risk must consider four factors, preferably by using a standard evaluation form, like that produced by the International Society of Arboriculture (ISA) (Matheny & Clark 1994). The factors are 1) probability of failure, 2) size of defective part that would fail, 3) value of target, and 4) likelihood that target would be struck by the failed tree or tree part. A systematic evaluation of each factor is necessary to maintain consistency and objectivity within and among evaluators. It also reduces the likelihood of overlooking defects as it guides an inspector through an evaluation of each part of the tree, including roots, trunk, and branches. Finally, using a form creates a permanent record of the assessment and the evaluator’s recommended action, which may be useful in legal proceedings (Anderson 1987).

Tree evaluation is similarly systematic in Europe. Lonsdale (1999) notes that the degree of hazard is based on factors 1, 2, and 4 listed in the previous paragraph. Similarly, Mattheck & Breloer (1998) suggest that the, “kind and extent of the measures required for civic safety...” depend on tree condition, tree location, and the kind of traffic. The utility and importance of recording inspections is also emphasized in the U.K. although Lonsdale (1999) questions the merits of assigning a numerical risk factor, as they can vary considerably between assessors.

The probability of failure is related to the severity of a structural defect present on the tree, local environmental factors such as wind exposure and soil texture, and species characteristics such as poor branch attachments and inherently weak wood. In California, U.S., a Tree Failure Report Program has collected thousands of reports on failed trees, allowing for species profiles to be created (Edberg et al. 1994; Edberg & Berry 1999). In a less formal way, arborists gather local knowledge about trees and use it to assess tree risk for a particular species. Recent studies have helped to clarify tree risk associated with some tree defects (Brudi & van Wassenar 2002; Gilman 2002; Kane 2002). There have also been numerous advances in tools used to detect trees defects like decay (Nicolotti & Miglietta 1998; Dolwin et al. 1999; Nicolotti et al. 2003). However, there is still much work to be done in assessing the probability of failure, leaving an arborist or urban forester to rely in large part on his or her experience.

The size of a defective part is relatively easily measured, and is obviously important because larger branches and trees can cause greater damage than small ones. However, courts in the U.S. have not gone so far as the comments of one judge in the U.K.: “... a tree planted at a roadside may by its very size be judged to

have become dangerous in the sense that in a high wind it, or part of it, may fall across the road to the danger of traffic.” (Lonsdale 1999 p. 20). In contrast, we present the Regional High Court in Cologne, Germany, “The fact that the branch extended over the road and was relatively large did not of itself entail an obligation to remove it.” This appears to be a more realistic approach, especially considering that German courts recognize both the ecological needs for trees and the fact that some tree failures may be unpredictable (Mattheck & Breloer 1998).

In evaluating targets, both the value and probability of impact are important. For example, a highly-defective, large tree on a remote hiking trail may potentially impact the most valuable target (a human life) once a day for the time it takes that person to walk by the tree (1 minute out of 1440 minutes each day). On the other hand, the same tree on a city street, adjacent to a street light, has a much higher likelihood of impacting the target (the street light), even though the target is not nearly as valuable.

Actual or constructive knowledge

Tree owners are not expected to have the expertise of a certified arborist in evaluating tree risk, but there are common defects and situations for which a tree owner may be held responsible as a “reasonable person” in the eyes of the law. Nor are private citizens and lay persons held to the same level of knowledge as practitioners in the U.K. (Lonsdale 1999) and Germany (Mattheck & Breloer 1998), but private citizens are expected to enlist experts to inspect trees when it is reasonable to do so. Arborists and urban foresters should make tree owners, whether private citizens or a municipality, more aware of common tree defects to reduce the risk of damage from tree failure and subsequent legal consequences. They should also introduce tree owners to the utility of systematically inspecting trees for risk. Systematic inspection, as noted above, greatly diminishes the chance of overlooking an obvious defect, whether a professional or a homeowner inspects a tree. Information for tree owners on identifying tree defects and how to evaluate tree risk systematically is available through several outlets. The USDA Forest Service publishes a pamphlet on hazard tree recognition for homeowners (USDA 1996), as does the University of California (Costello et al. 1999) and the Massachusetts Department of Environmental Management (Kane & Ryan 2001). Internet searches for key words like “hazard trees” reveal many pages that can provide information to tree owners.

Given the variety of factors that affect tree risk, Lonsdale (1999) does not stipulate a standard inspection time frame for tree owners in the U.K. Rather, he

suggests they implement a written safety policy and note the need for regular inspections. Recognizing that tree location influences the frequency of inspection, Mattheck & Breloer (1998) suggest that annual inspections are a good starting point and should be written into the technical standard in Germany. We acknowledge the importance of location and other variables that affect tree risk and that in some situations the cost of inspection will similarly affect practical implementation of inspections. For private tree owners, however, where practicable, we recommend that they should inspect their trees twice annually: when the leaves are on the tree (spring and summer) and, for deciduous species, when the leaves are off the trees (late fall and winter). Tree owners should also inspect their trees after severe wind events and storms. This is important because strong winds frequently cause tree damage such as broken branches, and cracks in the trunk. Checking trees immediately following storms will help reduce the risk of defects becoming more severe and subsequently causing personal injury or property damage. Arborists and urban foresters should view tree owner education as a useful tool for mitigating tree risk and protecting tree owners from potential litigation.

Conclusions

The risk of legal liability for tree owners has been steadily increasing in many jurisdictions in the U.S. Unpredictability in how courts in the U.S. may apply the actual and constructive knowledge tests warrants conservative approaches. Court cases will not be decided based upon any model law, and the actual standards applied will vary by state. While lacking certainty, this approach does provide an important role for professional arborists. Courts often rely on the professional opinions of consulting arborists to determine the nature of the hazard. Arborists must recognize that this potential role as expert witnesses is interrelated with their roles as professionals trying to prevent tree owners from becoming the victims of lawsuits. If potential targets are routinely exposed to questionable trees on a tree owner’s property, increased inspection is warranted to assure that when and if the trees become a hazard. Mitigation can preempt litigation.

In Germany, Mattheck & Breloer (1998) suggest that expert witnesses were largely responsible for the heightened responsibility the courts placed on arborists from 1987–1992. They caution, however, that the expert testimony often related to tree defects that, while they caused tree failure, were undetectable prior to such failure. This example should caution arborists in the U.S. to remember that some tree failures are not predictable. This is especially true for trees in which no external signs of imminent risk are obvious.

Importantly, the greater the scope of the tree owner's duty to prevent harm to others, the greater the potential duty of arborists to ensure the safety of the tree owner's property. Precious little law exists on this topic, again presenting the specter of unpredictability. Without case law to provide guidance, any particular instance may provide the facts and occasion for a precedent-setting lawsuit. The best interim safeguard is to establish the arborist's responsibilities and scope of work in a comprehensive written contract. The prudent or "reasonable" tree owner should be encouraged and willing to have a professional assessment of the subject property particularly in a high target setting. When that option is unavailable or declined, arborists should mind the fact that until the legal dust settles, risks abound for both client and professional.

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