

Premises Liability and Your Trees

Although trees add tremendous value to the landscape, if they are not monitored and cared for properly, they can become a legal liability.

By Peter S. Beering, Esq. and Judson R. Scott, RCA #392

Premises Liability and You

Many property owners don't realize that part of their legal duty to maintain their premises in a safe, hazard-free condition includes their trees.



It seems obvious that this tree is hazardous; however, it was left along a roadway after an expansion project without an inspection.

A properly performed inspection of trees and implementation of a maintenance program can lessen the property owner's exposure to expensive negligence lawsuits, reduce hazardous conditions and preserve the landscape's value.

This article outlines the responsibilities for property owners and professionals. In this article professional is a broad category that includes almost anyone associated with managing a property in a "profes-

sional" capacity, such as property management firms, construction superintendents, developers, certain municipal and state agencies, parks departments, and farm and landscape management firms.

Construction & Development Projects

It is hard to imagine a home, municipality, community park, school campus or a construction project that doesn't include trees, shrubs and other plants. These "softscapes" add significant aesthetic and financial value to a project. Although trees add tremendous value to the landscape, if they are not monitored and cared for properly, they can become a legal liability.



Construction can damage trees.

When property is under development, most of the focus is on infrastructure for

the owner, developer, architects, project managers, landscape designers, municipal planners and parks directors. The roads, utilities and amenities must be built. Often overlooked, however, are the existing trees and other plants. To the untrained eye, a tree may appear to be fine. Yet, many trees have suffered damage from lightning, wind, construction activity, insects, disease and even vandalism.

It is not uncommon for a healthy-looking tree to be a dangerous tree—one waiting for the right combination of wind, rain, ice or other circumstance to cause a tragedy. It is imperative to protect these existing trees and plants during development to ensure their health and vigor so that they do not become a liability due to damages sustained during construction. A potential, long-term problem can be lessened by spending time drawing up a tree protection plan during construction projects.

As a development progresses, hazardous trees are sometimes left standing. Trees are retained for various reasons, such as a call by zoning officials to "preserve trees," a public outcry "to keep the beautiful tree," a desire of an owner to "keep the budget down," or out of ignorance regarding tree structure, biology and the law. The result is that far too often project managers and property owners keep trees that present a potential for harm without realizing the possible consequences.

Rulings from Across the Country

Pennsylvania: In *Barker v. Brown*, 340 A2d. 566 (PA. 1975), the court ruled that a landowner has a duty to make a visual inspection of trees and would be liable if he knew or should have known of the dangers.



Trees that lean and those too close to the road must be inspected.

North Carolina: In *Rowe v. McGee*, 168 S.E.2d 77 (Ct. App. N.C. 1969) the court directed that a landowner be held responsible for a private nuisance if he knew of a tree's condition.

Iowa: In *Meyers v. Delaney*, 529 N.W.2d. 288 1995 the court stated that one who maintains their trees owes a duty to avoid injuring persons on adjoining properties, but there is no duty to constantly and consistently check all trees for nonvisible decay. Further, the tree owner had to have actual or constructive notice of the defect.

Kansas: In *Pierce v. Casady*, 11Kan. App.2d 23 (Ct. App. Kan. 1985) the court ruled that a landowner may force a tree owner to abate a nuisance if the tree branches do harm or create imminent dangers.

District of Columbia: In *Dudley v. Meadowbrook Inc.*, 166A.2d 743 (Muni. Ct. App. D.C. 1961) the court stated that a landowner has a duty to have his trees inspected by an expert because trees do not ordinarily fall of their own weight without some external force.

Louisiana: *Caskey v. Merrick Construction Co.*, SO.2d WL 163206 (La. App. Cir.) 41,622 (La. App. Cir. 1/24/07) a verdict was upheld that the duty of inspection by a superintendent on a construction site does not require inspection for all trees that have a potential to fall, even if they might have been damaged; only dead trees.



Inspect all cavities and holes!

Indiana: *Valinet v. Eskew*, 574 N.E.2d 283 (Ind. 1991). The Indiana Supreme Court found that a "possessor of land in an urban area was subject to liability, to persons... for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway."

The court further held that a landowner had a "duty... to perform periodic inspections to be sure that the premises do not endanger those using the highway."

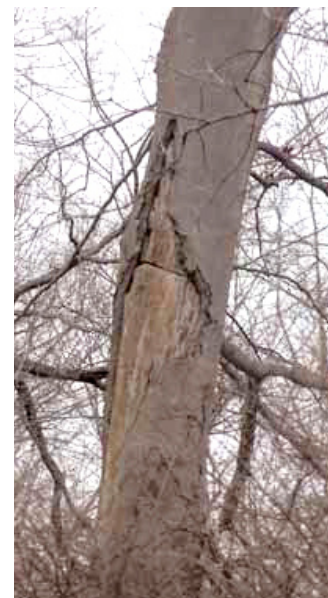
Property owners, developers and managers should know what the law says about trees and liability in their state. A lack of knowledge is not a defense in many states in a lawsuit.

Note: Thank you to Lew Bloch for court cases cited from *Tree Law Cases in the USA 2000*.

Trees and Negligence

Who is Considered Negligent?

A property owner may be considered negligent if he or she has a tree that falls and harms a person or damages property. Generally, the tree has to cause injury or damage for negligence to be claimed. Often, courts take into consideration whether the property owner was acting as a "reasonable man" in the care of his trees. That "reasonable man" standard of care may be different for different people and jurisdictions. Inspection and maintenance of trees might be considered reasonable for a property owner. However, professionals may be held to a higher standard of knowledge if a hazardous tree goes undetected.



A property owner drove by this tree for years without recognizing the large horizontal crack that presented a risk of harm to passersby.

Whose Duty Is It?

Many states have recognized that, indeed, property owners have an expressed duty to inspect and maintain their trees. Attorneys have extended that responsibility to developers, builders, property managers and other professionals who have agreed to “act in a property owner’s stead,” as they have included professionals in law suits. Although some management development and construction agreements cover these matters, many do not. If you are acting as an agent for the property owner, make sure your contract defines responsibilities regarding tree inspections. Without a contract, professionals and others acting in the property owner’s stead may take on this “duty to inspect” responsibility unknowingly or inadvertently and open themselves up to exposure to liability lawsuits.

Property Owners and Professionals Need to Work With a Consulting Arborist

Property owners and professionals should work with a consulting arborist to develop an annual inspection and maintenance plan for the trees that will alert the property owner to structurally unstable trees and set forth how they will be dealt with! This forward-looking planning can avoid weeks of time that may be required after a disaster.

In many states, property owners and sometimes those acting in their stead have a legal duty to protect visitors, workers and passersby, including pedestrians and motorists, from hazardous conditions. Out of recognition of this duty, property owners and managers remove snow and ice, repair fences, fix sidewalks and make sure there are no line-of-sight conflicts that impede the safe flow of automotive and pedestrian traffic. Pro-

professionals should know this duty may extend to trees and their care.

What the Laws Say About Trees and Negligence

Trees have caused legal problems for centuries. Every budding lawyer studies the 1466 “Thorns Case” concerning property damage caused by trimming procedures. In the past when a tree fell and caused harm, it was considered an act of God. As the law has evolved, property owners have been found to be liable for injuries and damage caused by their trees. Courts across the nation have found that property owners have a duty to inspect, maintain, and in some cases, remove limbs or trees if they are hazardous or impede line-of-sight. This has been a natural progression of cases and state statutes that deal with premises liability and the duties owed to invitees, guests and the public regarding any foreseeable problems from trees.

2010 Annual Conference Exhibitor and Sponsorship Opportunities NOW Available!

You won’t want to miss this once-a-year opportunity to reach your target market! At the 2010 ASCA Annual Conference, you will find the best in arboriculture, the members of the American Society of Consulting Arborists. This year’s conference returns to the East Coast, where you’ll want to be sure you renew your connections and make new ones! To find out the many ways you can access this primary market, [click here](#).

EXHIBIT & SPONSORSHIP OPPORTUNITIES

reach your target market

2010 ASCA Annual Conference
December 5-8, 2010
Amelia Island Plantation | Amelia Island, Florida

ascA AMERICAN SOCIETY of CONSULTING ARBORISTS | Co-sponsored by the Florida Chapter ISA



This tree looked healthy to the untrained eye; however it had a cavity in the trunk and was toppled in a wind storm.

- Schools and playgrounds
- Roadways and parking lots
- College campuses
- Utility right of ways
- Golf courses
- Mature trees near a shelter
- Athletic fields
- Trail systems and walkways



A professional arborist may be required to remove hazardous limbs.



Any discoloration or aberrant growth should be inspected.

Routine Inspection

Who will perform the “routine inspection” the law requires? Theoretically, the required inspection can be performed by anyone. However, there are many problems more difficult than those highlighted in this document that only a specifically trained arborist can identify.

An arborist can be of assistance because there have been a number of instances where even highly trained professionals have missed defects in trees that later caused injury. Also, a professional should be knowledgeable about municipal ordinances and state case law as they relate to responsibility for trees on private and public properties.

As property owners perform their duty, they must ensure the inspector with whom they contract has knowledge of visual tree assessment, structural analysis of trees, tree biology and habits of particular species. The trees must be evaluated for their location, condition, size, likelihood of failure target and risk of harm.

Among those sites requiring special attention are:

- Adjacent residences
- Public parks

Manage the Risks in Your World

So what should a community, developer, planner, parks director or other property owners and professionals do? The following steps will help manage risk from dangerous trees:

1. Develop a tree inspection and management policy.
2. Put the plan in writing and document efforts to alleviate known hazards.
3. Work with your attorney to understand the legal requirements in your state.
4. Ask your insurance agent about your tree coverage. Request a discount when you develop and implement your tree plan, which lessens the carrier’s exposure.
5. Work with a Consulting Arborist. This professional should be trained in Visual Tree Assessment and hazard tree recognition and be a member of one or more of the national arboricultural associations.

Explanation of Visual Tree Assessment

Visual Tree Assessment encompasses visual and physical assessment for each tree. Typically, the tree is identified, described, and, sometimes photographed. Findings of the assessment are noted with recommended next steps, such as maintenance, follow-up, monitoring or no action. Areas to be assessed for overall tree health and safety factors are:

1. The ground around the root flare (area where the roots are growing underground).
2. The root flare itself (sometimes looks like an “elephant’s foot”).
3. The bole or trunk of the tree (also sometimes called the stem).
4. The limb junctions (where limbs branch off of the trunk).
5. The scaffold branches (big limbs which make up the crown of the tree).
6. The branches (attached to scaffold branches).
7. Twigs and fruit that could cause slip and fall accidents.
8. Miscellaneous hazards, such as thorns, low hanging branches and line-of-sight conflicts that impede the safe flow of traffic.



When in doubt, get out of the vehicle for a closer look.

Red Flags—A Visual Tree

Assessment looks for:

1. Obviously rotted, dead or decayed limbs, trunks or roots
2. Large holes in trunk
3. Broken limbs
4. Lightning damage
5. Storm damage
6. Insect infestation
7. Wind damage
8. Improper trimming or aberrant growth
9. Trees too close to the road
10. Line-of-sight obstructed by vegetation

Get It in Writing

Whether you are a developer, landscape management firm, professional arborist, property management firm, farm manager or groundskeeper, your contract with the property owner should set out what your duties are regarding tree inspections and the notification process. Clients may not realize the danger a tree may present. Many people believe that if a tree has foliage, it is healthy. Consulting arborists and other qualified professionals often feel a responsibility to educate their clients about the frequently unseen interior decay in trees, and how they can stand in a weakened state, ready to be felled by

wind, rain or ice storms. As professional arborists they should inform their clients about trees that may present a danger to people or property.



This tree near a sidewalk endangers passersby.

Sometimes, property owners say “don’t tell me about it” because they think that if a hazard is not identified, then they are not liable. However, courts repeatedly have found property owners have a duty to inspect and maintain their premises, and “not knowing” is not an adequate defense. Regardless of whether a problem is documented, in many states, the duty still exists to inspect and to maintain the trees.

Once identified, the Consulting Arborists and professionals should document the potentially hazardous trees in writing and the client should sign the report in acknowledgement of its receipt. Both parties should keep copies of the contract and reports on file.

Conclusion

Although property owners and the professionals acting in their stead may not

Continued on page 23

ASCA membership renewal time is here!

Your membership renewal invoice was emailed to you on July 1. We want to be sure you don’t miss a minute of ASCA benefits such as **ASCA’s Referral Directory, The Arboricultural Consultant, online webinars, the ASCA listserv and all the ways ASCA is your resource.** You can renew your membership and update your CEUs at the same time! It’s all online—go to www.asca-consultants.org. If you have any questions, contact headquarters at asca@mgmtsol.com.

Q & A continued

In risk-assessing trees, there are tests we know about, but there are also unknown variables of the dynamic system. There are problems with trees that will not show up unless the tree has an x-ray, root crown excavation, visual assessment and psychic intervention. I tell people this so that they do not expect too much from it. I also remind them that it is not a clean bill of health. Risk assessment is an opinion from a qualified professional, and it is valuable for that reason. If it is construed as more than this, its value goes down.

—John E. O’Shea

All tree faults may not be readily discernable and within some assignments, “visual assessment from the ground,” or “trunk evaluation without boring,” or “no root excavation,” may limit your contractual risk. But you will still be required to perform within a “standard of care” and how that is interpreted may be up to a judge, arbitrator or jury. You are best to include these qualifications in the contract itself, maybe as an attachment. Put every limitation and qualification you can in your contract... sooner or later it will pay big dividends.

—Donald H. Godi, RCA #444

ASCA has endorsed an Arborist’s Disclaimer Statement that covers this. It is a good idea to incorporate it or similar language into a contract, but it can be used independently. Getting a signed copy for your records is a good idea, but as with all disclaimers, they can be argued. It informs your client of limitations, but everything else you say or write also bears on the situation.

—Russell E. Carlson, RCA #354

Premises Liability and Your Trees continued from page 10

know about visual tree inspection, tree structure, botany, effects of construction on trees, laws on negligence, risk or duty, their ignorance is not an arguable defense. It is the opening to a nightmare!

Insurance files and court dockets are full of catastrophes that were either preventable or could have been mitigated. Among them are claims that involve damaged, distressed, diseased or improperly maintained trees. Property owners and possibly those acting in their stead have a duty to maintain their trees and to manage foreseeable risks. 🌿



Trees and shrubs should not be allowed to obstruct the view of a roadway.

Peter S. Beering, Esq. is an internationally recognized expert in emergency preparedness, planning, response, counterterrorism, arson and bombings. A principal in the Indianapolis Terrorism Response Group and Organizational Strategic Solutions, he delivers services in strategic risk management, threat assessment, emergency response planning, crisis communications and training. He can be reached at Beering Enterprises, Inc., (888) 343-1701, pbeering@lquest.net, www.beering.biz.

Jud Scott is a past president of ASCA and president of Vine & Branch, Inc. He has recently set up Jud Scott Consulting Arborist LLC to provide Consulting Arborist services to various market segments, including commercial and industrial developers, architectural and engineering firms, government agencies, historic properties, golf courses and high-end residential clients. He can be reached at (317) 815-3788, or Treeconsultant@aol.com, www.judscott-consultingarborist.com

Reprinted with permission from Tree Care Industry Magazine, May 2007 www.tcia.org

Upcoming Events

2010 Annual Conference
December 5–8
Amelia Island Plantation
Amelia Island, Florida

2011 Consulting Academy
February 14–17
Omni Severin Hotel
Indianapolis, Indiana

Webinars

Anytime you want! Go to: [ASCA Webinars anytime!](#)