



# Tree Talk

## By Judson R Scott, Vine & Branch Inc, Arboricultural and Horticultural Consulting

Last column suggested bringing a Consulting Arborist onto the development team to assist with planning for the woodland features on the site. The first thing this arborist should do is to perform an inventory of the property to determine the species, condition, and location of the trees.

After the inventory is complete the first step is to remove the trees, which were deemed hazardous. As the Arborist performed the inventory he/she should have assessed the trees for condition. Any trees which were rated as dead or hazardous and that presented a potential to hit a roadway or other populated area should be immediately removed.

To understand the importance of this step you must realize that developers and builders may be exposed to expensive negligence lawsuits. Property owners in Indiana have a state-mandated "duty to inspect their trees".

Developers and builders may take on this duty once they assume responsibility for the property being developed.

It is very important for clients who may own the property to know if the developers or builder will assume the property owners duty to inspect trees on the property.

This article will look at an Indiana law that defines negligence and trees.



**A Hazardous Tree**

### Indiana Supreme Court Ruling

In a 1991 Supreme Court of the State of Indiana decision<sup>1</sup> it was determined

that the "possessor of land in an urban area is subject to liability, to persons using a public highway, 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."

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

For developers and building professionals with clients who may have potentially hazardous trees endangering a highway, there is much potential for catastrophic lawsuits. Professionals should take serious notice if there is a tree that threatens "unreasonable risk of harm to a public highway". Developers and builders need to know that they or their clients may be liable for any harm that the tree may cause if it falls. Property owners have a "duty" to provide a "routine inspection to be sure that the premises do not endanger those using the highway".

Given the current trend toward litigation it is not advisable to take any chances with the law.<sup>2</sup> **The question remains: can building professionals or their clients perform the "routine inspection" that law requires?** Do they understand tree biology and tree characteristics well enough to recognize an "unreasonable risk"? Are clients expecting professionals to perform this duty even though the professionals do not own the land? Has the client actually asked for advice concerning their trees or has the professional accepted this "duty" inadvertently?

Professionals, especially when unqualified, should be careful not to accept the client's duty to inspect their trees. Inspections should be performed by an expert who, at the very least, is a Certified Arborist trained in Tree Risk Evaluation.

Professionals should have a company attorney write a contract so that it is clear who intends to perform "this duty to inspect" the trees in the first place. The contract should be explicit as to:

- How this task will be performed
- How often it will be performed
- Who will perform it

### **Questions Arising from the 1991 Court Case**

The case in 1991 was a case pertaining to trees that endangered the highway. One question that arises is whether these same arguments could be made for trees that endanger the general public but which are not endangering the highway?

Consider trees that present "risk of harm" to:

- A neighbor's house
- Public parks
- Schools
- Playgrounds
- Sidewalks
- Parking lots
- Golfers on a golf course
- Mature trees near a club house or pool during a lightning storm
- Crowds at sporting events
- Walkers along a local trail system

One argument that often comes up for golf and recreation areas is that people "play (use our facility) at their own risk". This may be true, but how well will this hold up in court? Another thought: while people play at their own risk at the facility, does that relieve them of risk caused by trees on a property neighboring the recreation area? In most cases the cost of litigation would be greater than the cost of curing the problem.

Another argument is that the falling of a tree or limb is an "Act of God". This argument has not held up in courts across the country when the property has been "altered" (through development) and therefore "human agency" is involved in the liability.<sup>3</sup>

It is my opinion that it is definitely not worth the risk to ignore dead trees that may endanger the general public. I also suggest that live trees be inspected for weaknesses that would cause the trees to present a "risk of harm".

## **Exploring "negligence"**

### **What is negligence?**

*Negligence:* "The failure to use such care as a reasonably prudent person would use under similar circumstances".<sup>4</sup> What often must be decided in a courtroom is what action would a "reasonably prudent person" take?

It is a professional's duty to inform their clients about their trees so that they can make decisions as reasonably prudent persons. Clients often do not realize the danger a tree may present. Many people believe that if a tree has foliage it is healthy. It is important to understand that decay in trees can leave the tree in a weakened state, causing them to fall.

Professionals should inform their clients about trees that may present a danger to the general public. Many times this means informing clients about a tree that the client did not even know was a problem. It is in everyone's best interest to make known to a client any potentially hazardous situation on his or her property.

With potentially hazardous trees it would be a good idea to put your findings in writing and have the client sign a copy, especially if they do not plan to alleviate the hazardous situation. Give clients notice in writing, have them sign it and keep a copy on file.

### **Who is considered negligent?**

A property owner can be considered negligent if he or she has a tree that fails and causes harm to a person or damage to property. Generally the tree has to cause injury or damage for negligence to be claimed. Again, it has to be determined if the person was acting as a "reasonable man" would in the care of his trees.

Also if a professional does not inform his or her clients of a potentially hazardous tree and the tree fails and causes damage, **the professional may be considered negligent!** The downfall of this whole argument is that any tree at any given time (given the right or wrong circumstances) may fail. Professionals need to continue their training so that they are more qualified to predict which trees are statistically more likely to fail.

### **What are the potential costs of litigation and what is the potential for financial losses if found negligent?**

An approximate cost of a bench trial is \$25,000- 35,000 or higher.

An approximate cost of a jury trial is \$35,000-75,000 or higher.

The average settlement cost of a negligence case can range from \$300,000 to \$1,000,000 plus. Remember the McDonalds coffee case?

### **Final thought for Professional Developers and Builders.**

During the 1991 case, the landowner's testimony that "he had not noticed the condition of the tree" was impeached because he was a real estate developer.<sup>5</sup> Be careful! Professional "knowledge" can be used to hold property owners to a higher standard of reasonable care.

If a professional does not own the land, he or she should not accept the responsibility for someone else's "duty to inspect". Make contracts clear as to trees and the risks they present.

Do not simply assume a tree will not pose potential threat of damage just because it "looks OK". Cover all the bases and have it evaluated by an Arborist!

### **Suggested reading**

- *Arboriculture and the Law*, by Victor Merullo and Michael Valentine
- *Tree Law Cases in the USA*, by Lew Bloch, Bloch Consulting Group, Potomac, and MD.2000. ISBN 0-9704772-0-1
- *Arboriculture and the Law in Canada*, Dunster, J.A. and Murray, S.M. 1997. Savoy: International Society of Arboriculture. It is specific to Canada apart from Chapter 10, which is applicable elsewhere.

Suggested study material for hazard trees

- *A Photographic Guide to the Evaluation of Hazard Trees in Urban Areas*. Matheny, Nelda and Clark, Jim. ISA Press. 1994
- *Arboriculture: Integrated Management of Landscape Trees, Shrubs, and Vines*. Harris, Richard. Prentice Hall: Upper Saddle River, NJ. 1999.
- *Pirone's Tree Maintenance*, Hartman, John, and Pirone, Thomas. Oxford University. 2000.
- *A New Tree Biology*, Shigos, Alex. Shigo and Trees Association: Durham, NH.1989.

## **Footnotes**

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<sup>1</sup> Court case: Valinet V. Eskew, copy by West Group 2000 No claim to U.S. Original works.

<sup>2</sup> Limitation acknowledged, Vine & Branch Inc. is not an Attorney group so any legal advice should be sought from your Attorney. We just represent our opinion and understanding as it may pertain to you.

<sup>3</sup> Act of God- An act occasioned exclusively by violence of nature without the interference of any human agency. Thoughts taken from Arboriculture & The Law, Merullo, Victor, Valentine , Michael, International Society of Arboriculture, Savoy IL 1992

<sup>4</sup> Arboriculture & The Law, Merullo, Victor, Valentine , Michael, International Society of Arboriculture, Savoy IL 1992

<sup>5</sup> Valinet V. Eskew-ibid

Definitions are from Arboriculture & the Law.

## **Note on the Author**

Judson R Scott is a Registered Consulting Arborist (RCA) with the American Society of Consulting Arborists. As a RCA he advises Attorneys, Builders, Land Developers, Golf Course Superintendants, Architects, Engineers, Insurance Companies, as well as homeowners concerning their trees and landscapes. He can be reached at Vine & Branch INC. 317-846-1424 or by email at [Treeconsultant@aol.com](mailto:Treeconsultant@aol.com). Comments are welcomed!

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