JANUARY 1998, NRPA LAW REVIEW

DANGEROUS TREES POSE A FORESEEABLE RISK OF INJURY

As illustrated by the following description of reported court decisions, a landowner may be liable for negligence where injury is caused by a dangerous tree on the premises. Within this context, diseased or defective trees in heavily used areas are more likely to be considered dangerous, unlike the open and obvious natural risks generally associated with normal, healthy trees.

MONITOR TREES IN HEAVY USE AREAS

In the case of *Feely v. City of St. Louis*, 898 S.W.2d 708 (Mo.App. 1995), Brendan Feely, age 6, was killed by a defective tree in defendant's city park. At the time of the incident, Feely was leaving a summer camp program sponsored by the defendant city. Feely and another child were picked up by a van which parked along a curb near the day camp. As the van was leaving, a large branch fell from a nearby oak tree and crushed the rear section of the van trapping and killing Feely. The following testimony indicated that the city did not regularly inspect or maintain the trees in its city parks:

> Two foremen with the City's Forestry Department testified that the Forestry Department did not have any routine or preventive maintenance program for trees in City parks. They stated trees were scheduled to be removed based on referrals they received either from park keepers or citizens, not from the Forestry Department; and the dead or decaying trees were generally not removed from the parks until the winter months when crews were not busy servicing the City's streets. According to one of the park keepers, inspections of trees were done only when there was nothing else to do, and trees were only written up if they were ninety percent dead.

In this particular instance, the tree which killed Feely was located less than one hundred yards from the city's department of forestry and was alongside a driveway used daily by parents to pick up their children from camp. Moreover, the following testimony by an urban forester employed by the city indicated there was evidence that this particular tree was not necessarily healthy:

> [D]uring the summers of 1988-90 the city hired college students to effectuate a "reforestification" plan under which every dead tree in the city's parks was to be replaced with a new one. The forms filled out by the college students graded the condition of the tree in question as "fair," the equivalent of a school grade of "C." However, the City made no follow-up on the tree's condition.

The city's urban forester further admitted that "the ground inspection he did of the tree after its limb broke off indicated the possibility of decay in the upper portion of the tree."

Plaintiff's expert witness, a professional arborist, also testified that "the outward appearance of the tree, viewed from street level, indicated it had problems which would have been evident for some time" prior to the accident. In particular, plaintiff's expert noted that "[t]he die back and yellowing of leaves at the crown of the tree indicated a problem with the tree's roots, and the large fruiting mushrooms at its base indicated a problem with decay."

The jury returned a verdict in favor of Feely and the trial court entered judgment accordingly. The city appealed. On appeal, the city argued that Feely had "failed to establish that the City could have, through reasonable care, discovered the defective condition of the tree so as to take remedial action because the tree had the outward appearance of being healthy."

For the city to be liable for negligence, the appeals court noted that plaintiff had to establish that "the property was in dangerous condition at the time of the injury." In addition, plaintiff had to prove that "the injury directly resulted from the dangerous condition" and the dangerous condition "created a reasonably foreseeable risk of harm of the kind of injury which was incurred." Further, plaintiff had to establish that "either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition, or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition." As defined by the appeals court, "[a] city has constructive knowledge of a dangerous condition if the dangerous condition is of such nature that, even though not obvious and notorious, it has existed for such a length of time that the city in the exercise of ordinary care could and should have discovered and remedied it."

The specific issue on appeal was, therefore, "whether the city could have, in the exercise of reasonable care, discovered the condition of the limb that fell because there was evidence that the limb had been in a rotted condition for some time, and that the rotted condition could have been detected from the street."

> [A]lthough it was improbable that a falling limb would injure someone on a city street, this did not relieve the city of liability as it must guard against all sources of danger that threaten the safety of persons on its streets.

Applying these principles to the facts of the case, the appeals court concluded that "the jury could have reasonably found the tree's decaying condition should have been reasonably apparent to the City." Specifically, the appeals court noted that "the tree was located less than one hundred yards from the Department of Forestry near a street and picnic area,." Moreover, the appeals court noted that there were signs that the tree was in poor condition, including: die back of the crown, dead wood throughout,

and fruity bodies at the base, were visible from the street." In the opinion of the appeals court, "[a] safe forestry program must at least have a system of preventive maintenance which monitors trees in heavily trafficked areas." The appeals court, therefore, affirmed the judgment of the trial court in favor of plaintiff.

BIFURCATED TREE DANGEROUS

Similarly, in the case of *Middaugh v. United States*, 293 F.Supp. 977 (1968), plaintiff's decedent, Stephen Athan, was killed by a falling tree. The incident occurred on July 2, 1966 when a lodge pole pine tree in a designated campsite at Yellowstone National Park fell on Athan's tent. A National Park Service (NPS) ranger had directed Athan to the campsite. Within moments after erecting his tent, the tree collapsed on the tent fatally injuring Athan. The tree was approximately 300 years old and stood about 50 feet from Athan's campsite. Prior to the time the tree fell, it was immediately adjoined by a smaller twin tree. A twin, or bifurcated, tree such as this one is suspect as being dangerous.

After the accident, the NPS ranger in charge of the campground observed a "cat face" (i.e., wound or injury to the tree resulting in an opening or depression in the tree) at the base of the tree which had fallen.

> Failure of this tree was a collapse as distinguished from a rupture. In the case of a collapse, the tree falls because of weakness and does not need the application of severe external forces which cause a rupture. Examination of the tree... showed the occurrence of a rust canker affecting the same side of the tree and facing in the same direction in which it fell, the open part of the canker extending 50" above the ground. The canker, which appeared to have been present at least 75 years, resulted in a flattening of the affected portion. Beneath the canker was the opening, or "cat face", extending into the tree through what would normally have been the heartwood, which hole contained rot, insect chewings and related material. Approximately 70% of the tree had rotted away...
>
> The basal hole in the tree was clearly visible and should have been discovered by routine inspection of the campground for hazardous trees leading to further inspection and investigation and removal thereof because of its hazardous condition.

The ranger admitted this condition was clearly visible when he inspected the scene of the accident. The ranger further testified that if he had observed the "cat face" on this tree prior to the accident, he would have investigated further into the condition of the tree. If he had discovered the tree's decayed condition, the ranger in charge stated further that he would have had this hazardous tree removed. The

ranger, however, did not know whether any other government employee had inspected this tree.

Although it was the admitted policy of the National Park Service to inspect all campgrounds for dead and diseased trees and to remove those which might constitute a hazard to campers, the ranger in charge did not inspect the tree in question at any time prior to its collapse. A seasonal ranger stationed at the campground drove through the campground on the morning of the accident. This seasonal ranger did not inspect the tree which fell but examined it after the collapse and testified that he was surprised at the interior condition of the tree at the point of collapse as opposed to its exterior. This seasonal ranger was a mathematics teacher by profession who had worked at the campground for three summers. Regarding his background as a ranger, however, he admitted: "I haven't had much experience".

Based upon this evidence, the court held as follows that negligence on the part of the defendant United States had caused the death of Athan:

> The United States of America failed to provide a safe place for the decedent to camp in that the opening near the base of the tree was clearly visible to the officials of the National Park Service had they looked, and a further examination of the tree would have disclosed that the trunk of the tree was in an advanced state of decay...
>
> Stephen Athan, was an invitee in Yellowstone National Park to whom the United States owed the duty to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger. The Government, as landowner, is required to have a superior knowledge of dangers which would not be obvious to the invitee if such dangers are discoverable in the exercise of due care...
>
> The collapse of the tree which killed the decedent was not due to an Act of God, which is an injury due directly and exclusively to natural causes without human intervention which could not have been prevented by exercise of reasonable care and foresight. The Government, as owner and proprietor of Yellowstone National Park, was charged with the duty to inspect and to guard against injury to invitees drawn thereto since the tree was under the exclusive custody, control and management of the proprietor.

LOW HANGING BRANCH OBVIOUS

In contrast, the tree in the case of *Sperr by Sperr v. Ramsey County*, 429 N.W.2d 315 (Minn. App. 1988) was not unreasonably dangerous because its branches posed an obvious risk of injury. In this particular case, plaintiff Speer was injured while leaving an ice skating rink owned and operated by defendant county. While running to his father’s car, Speer cut across a grassy area and was struck in

the eye by a low-hanging tree branch Speer testified that he never saw the tree branch, because it was hard to see and "blended in with the sky and background and everything." Plaintiff admitted, however, that he and his friends could have walked to his father's car by a different route than the one they followed, and that if they had done so, they would not have passed near the tree that caused his injury.

Evidence indicated that the tree was not very far from the driveway area or the road, and some of the tree branches appeared to hang less than four feet from the ground. None of the tree branches, however, appeared to encroach on any sidewalks or paths.

The building superintendent at the ice rink arena testified that "the County had no established procedure for trimming the branches of the trees surrounding the arena." Furthermore, he testified that he had never heard of any similar accidents involving trees near the arena. He also stated that he had "never anticipated that the tree in question would pose a safety risk because it was not near any sidewalk areas." The maintenance worker who regularly mowed the lawn near the offending tree also testified. He testified that "he knew that there was some danger to persons mowing of being struck by low-hanging tree branches, and that he sometimes trimmed the branches to avoid running into them while mowing the grass."

The trial court directed a verdict in favor of the defendant county. Sperr appealed. As noted by the appeals court, the county had a legal duty to use "reasonable care to protect its business invitees from injury." On the other hand, the court acknowledged that "the duty to use reasonable care does not extend to cases where the risk of harm is obvious to the visitor." As noted by the appeals court, "foreseeability of injury is another factor that might be considered in determining whether Ramsey County owed a legal duty to Sperr."

> Negligence cannot be shown by the mere fact that an unfortunate accident occurred. Property owners have a duty to guard, not against all possible consequences, but only against those which are reasonably to be anticipated in the normal course of events.

Applying this principle to the facts of the case, the appeals court concluded that "the evidence presented at trial indicates that Ramsey County has no reasonable basis to anticipate that its business invitees might be injured by the offending tree."

> No sidewalks or pathways lead to the tree. Ramsey County could not reasonably anticipate that children would, in the normal course of events, run into the branches. There is evidence to indicate that maintenance personnel sometimes trimmed the tree's branches so that they would not interfere with mowing the grass. The fact that Ramsey County personnel sometimes trimmed the tree's branches does not give rise to a legal

> duty to trim the branches so that they would pose no possible danger to children. Society has not recognized a general duty on landowners to trim tree branches so that children do not run into them. While the owner of premises may owe more duty to a child than to an adult coming on the premises, yet he is not bound to guard every stairway, cellarway, retaining wall, shed, tree and open window on the premises.
>
> The tree is obvious and the possibility of injury from running into its branches is apparent. The County could not foresee that reasonable people would be running into the tree branches. The County thus has no duty to prevent Sperr from running into it, or to maintain the tree in such a way that he would not be injured by running through the tree branches. Ramsey County was not negligent as a matter of law.

The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Ramsey County.

EXPOSED TREE ROOT OBVIOUS RISK

Similarly, in the case of *Burns v. Addison Golf Club, Inc*, 514 N.E.2d 68 (Ill. App. 2 Dist. 1987), the court found an exposed tree root on defendant's golf course did not support plaintiff's negligence action because it was a natural condition which presented an obvious risk of injury. Plaintiff Burns was injured when she tripped on the exposed root of the tree. In her complaint, Burns alleged that Addison was negligent "in permitting the tree roots to remain exposed by failing to remove or cover them and to level out the rough and uneven terrain."

In response to these allegations, Addison contended that "it owed no duty to Burns to safeguard her against tripping over the exposed root of a tree which was a natural condition of the golf course premises." The trial court agreed and granted summary judgment to Addison. Burns appealed.

According to the appeals court, the following legal standard was applicable to Addison: "The common law duty of care to be considered provides that the owner of business premises has a duty to his invitees to exercise ordinary care in the use and maintenance of his property and to warn of dangerous latent [i.e. hidden] conditions."

Despite plaintiff's evidence that the roots of the tree were exposed by "months of drought and foot traffic," the appeals court held that the exposed tree root in this particular instance was an obvious natural condition, rather than a latent or hidden defect on the premises:

> It has been held that where a tree and its roots did not itself create an unreasonable risk

> of harm and defendant did nothing to maintain the tree and roots so as to create an unreasonable risk of harm, defendant owed no duty to the plaintiff who was injured when she fell against the tree.
>
> We consider that the circumstances presented in this case are akin to those where a person slips on ice, snow, or water. The law is well settled in Illinois that no liability is incurred for injuries resulting from a fall on snow or ice which has accumulated as a consequence of natural causes where the accumulation or condition is not aggravated by the owner of the premises.

The appeals court, therefore, affirmed the summary judgment of the trial court in favor of defendant Addison Golf Club.