

ORDINANCES

The Roots of Liability

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A story[1] out of San Jose caught my eye the other day, first as a father, then as a homeowner, and then, inevitably, as a local government attorney. Mateo Ortiz, a toddler, was killed when a rotted ten-ton tree collapsed on top of the parked truck he was sitting in. The tree had been planted by the City decades ago, on a strip of land between the public street and a sidewalk. The City retained a right-of-way on this slice of land and claimed that the landowner was liable; however, many San Jose citizens feel this was the City's liability.[2] Who's right?

At common law, it starts with a determination of whether the private land is considered urban or rural. If there is no law on liability, a private landowner may be liable in an urban setting, but is not generally liable in a rural setting.[3] Restatement (Second) of Torts § 363 says:

> (1) [N]either a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.
> (2) A 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.

Take *Hensley v. Montgomery County*,[4] where a decayed tree on rural land fell on a car driven by Hensley, seriously injuring him. When he sued for damages, the court responded:

> To those who dwell in urban areas with one or two trees in their yard at most, the onus of inspection is modest. The farmer, the developer, or the landed gentry who owns large and sometimes sprawling tracts of woodland adjacent to or through which a road has been built, may find the task of inspecting for trees dead, dying or decayed so potentially onerous as to make property ownership an untenable burden.

The situation is not always so clear, as shown in *Milligan v. City of Laguna Beach*.[5] A decayed tree on city property fell on a house, on private land, located adjacent to the city property. The plaintiff sued to recover damages due to the city's alleged negligent maintenance of trees. Laguna Beach responded by pointing to a state tort statute, similar to Restatement (Second) of Torts § 363, that "[n]either a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property."

The City wanted to rely on this "natural condition" immunity, but the California Supreme Court disagreed, stating immunity could be granted in a situation "when the decayed tree limb falls on the user of the governmental property, [but] it is not applicable when the limb injures adjacent property or persons on adjacent property."[6]

What happens when a private tree is located on private land, on a parcel that is subject to a municipal right-of-way? States have gone different ways, and liability will be determined by your state law and the facts.

In *Estate of Durham v. City of Amherst*,[7] a court found no municipal liability for a fallen tree originally located on a private lot with a municipal right-of-way. The only responsibility the municipality had in relation to the tree was to maintain the utility lines. The landowner was the party responsible for the "reasonable care relative to the tree, including inspection to make sure it [was] safe."[8] An old case, *Blackwell v. Hill*,[9] placed liability on the municipality, on not the landowner, when a child tripped over a small fallen tree on a sidewalk located adjacent to a public street. The court directed the jury to find municipal liability if it found there was constructive notice of the fallen tree, reasoning that, since the municipality had a duty to keep its streets reasonably safe, the duty also extended to sidewalks of such streets.

The above examples are situations where there was no local law in place that addressed the duty or liability of a landowner. In San Jose's case, while the City had maintained the tree for years "as a courtesy,"[10] the local ordinance put the responsibility for tree maintenance on the property owner:

> The owner of a lot fronting on or adjacent to any portion of a street shall maintain and replace, if necessary, any trees … along said street or within the street right-of-way adjacent to his or her property. … [I]f any property owner fails to maintain any adjacent trees … and any person suffers damage or injury to person or property, the property owner shall be liable for all damages or injuries caused by the failure of the owner to maintain these areas. [11]

While jurisdictions may vary, general common-law principles relating to ownership of property may not be applicable when, as a legitimate exercise

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of the tendering process. Central to "participating in this RFP" was participating in a contest among those eligible to participate. The process actually followed by the Province, involving non-eligible bidders, was not the process called for by "this RFP," and being part of that other process was not, in any meaningful sense, "participating in this RFP."

The dissenting four justices felt that the Province's conduct, while in breach of its contractual obligations, still fell within the terms of the exclusion compensation clause. The clause was clear and unambiguous, and no legal ground or rule of law permitted a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation here. The misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Glenn Walsh, the chairman of Tercon at the time the lawsuit was filed, was quoted as saying: "We were poorly treated, and the [C]ourt has agreed there was some underhandedness by the ministry…. I think it's unfortunate, though, that the [C]ourt went on to accept the validity of the exclusion clauses." (Jeff Gray, *Highway case may pave way for lawsuits*, Globe and Mail, Feb. 23, 2010.) ML

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of police power, a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair sidewalks, and imposes liability, with respect to third parties, for damages and injuries resulting from a breach of that duty,[12] as was the case in San Jose.

The bottom line is that, if your municipality is considering cutting its tree maintenance budget, these cases show that it is important to cover all your bases. Make sure to check your existing ordinance on tree maintenance and see what adjacent landowners are responsible for. If your ordinance says something like "property owners of a lot fronting or adjacent to a street are required to maintain and replace trees along such street," this only imposes a duty on the landowner, not liability for damages to a third party who has been injured by the tree. With just the statement above, the costs for removing or maintaining a tree could be charged to the landowner, but it will not relieve the city of its duty to exercise reasonable diligence.[13] In addition, it is crucial that your city provide adequate (or better yet, ample) notice to landowner on their new/renewed responsibilities and liabilities.

1. Tracy Seipel & Denis C. Theriault, *San Jose family grieves for toddler, but law says falling tree was homeowners' responsibility*, www.mercurynews.com, Jan. 25, 2010, at http://www.mercurynews.com/top-stories/ci_14266915.
2. An informal online poll conducted by the local newspaper, asking if the City or the property owner should bear liability, almost 1200 out of 1300 voters said the City should be liable. *See* http://forums.mercurynews.com/poll/who-should-be-responsible-for-maintaining-park-strip-trees-in-san-jose.
3. *But see*, Heckert v. Patrick, 473 N.E.2d 1204 (Ohio 1984), which stated that "an owner having knowledge, actual or constructive, of a patently defective condition of a tree which may result in injury to a traveler must exercise reasonable care to prevent harm to a person lawfully using the highway from the falling of such tree or its branches."
4. Hensley v. Montgomery County, 334 A.2d. 542 (Md. 1975); *see also* May v. George, 910 N.E.2d 818 (Ind. Ct. App. 2009).
5. 670 P.2d 1121 (Cal. 1983).
6. *Id.* at 1124.
7. 554 N.E.2d 945 (Ohio Ct. App. 1988).
8. *Id.* at 948.
76 Mo. App. 46 (Mo. App. 1898).
10. Id.
11. San Jose, Cal., Code § 13.28.190 (2009).
12. See Gangemi v. City of New York, 827 N.Y.S.2d 498 (N.Y. Gen. Term 2006).
13. See, e.g., Woods v. City of Palatka, 63 So.2d 636 (Fla. 1953). ML

Cases

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laws that are in place to either promote transparency, or the other interests served by the legislation. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, 2010 WL 144074 (U.S. Jan. 15, 2010) (No. 09-559). ML

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