

Out on a Limb: How to Litigate Against Dangerous Trees

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By Ivan Puchalt

Injuries from falling trees and tree branches have risen over the last 10 years due to drought, an aging urban tree population and deferred maintenance by public entities due to budget restrictions. After the 2008 economic crisis, many municipalities in California curtailed trimming and pruning programs as a part of budget cuts and have increasingly relied on untrained landowners to identify and report sick or dangerous trees. Some municipalities have reported an over 30% increase in tree failures. In more natural surroundings, the U.S. Forest Service estimates that 18.6 million trees died in 2018 as a result of drought and beetle infestation.

According to California's Western Tree Failure Database (WTFD), first established in 1987 to collect quantitative information on the mechanical failure of urban trees (trunk breaks, branch breaks and uprooting), 6,274 failure reports have been filed as of Jan. 2, 2020. The most commonly reported failures were among oak (23.4%), Pine (16.9%), eucalyptus (12.5%) and cypress (8.6%) trees.

Given this increased risk, a working knowledge of how to investigate and litigate tree cases, against both private and public entities, is increasingly useful.

The city of Los Angeles reports in its 2018 First Step Urban Forest Management Plan that "providing best practice maintenance levels has not been a high priority, despite the upward-trending, city-settled tree damage payouts that reached nearly \$4 million in 2017." Los Angeles spends roughly \$27 per year on a public space tree compared to Melbourne's \$61.33 and New York City's \$70.71 per tree.

When a tree owned by a public entity fails and causes injury, the entity can only be liable if it is established that the tree constituted a dangerous condition of public property under Government Code Section 835 and that the entity either created the dangerous condition or had notice of the dangerous condition for a long enough time to have protected against it. A public entity is equally liable where it exercises control over a privately owned tree, as may be the case for trees located in parkways between sidewalks and streets.

One way a public entity may "create" a dangerous condition is through improper pruning. For example, the entity may use the disfavored practice of "topping" of a tree which will cause weaker small branches to grow (epicormic growth). If those weaker branches later fail when unable to support their weight, the failure



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would be attributed to the improper pruning of an otherwise healthy tree.

Proving constructive notice is often more difficult. Where a branch fails due to causes such as a hidden cavity, a harmful fungus or unhealthy root structure, the defense will be that this was a hidden defect that precludes a finding of notice. A tree surgeon supervisor for the city of Los Angeles testified recently that, as of 2018, city trees were on an 18-year trim cycle and within those 18 years, inspections would generally only be performed upon request. If a tree is only being inspected every 18 years, there is little likelihood a relatively hidden defect would be uncovered absent the scrutiny of a trained arborist. A powerful counter to the head-in-the-ground "ostrich" defense of not inspecting

trees is to request a jury instruction on an inspection system under Government Code Section 835.2, subdivisions (b)(1) & (2). CACI 1104 provides: “In deciding whether [the defendant] should have discovered the dangerous condition, you may consider whether it had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition. In determining whether an inspection system is reasonable, jurors may consider the practicality and cost of the system and balance those factors against the likelihood and seriousness of the potential danger “If no such system existed.” Most arborists will agree that a reasonable inspection system involves inspecting trees on a one- to two-year basis, depending on factors such as species, age and whether the tree is in a high-impact zone where people or vehicles travel below it.

Several immunities may apply in cases against government entities. The Natural Condition Immunity (Cal. Gov’t Code Section 831.2) provides that a public entity is not “liable for an injury caused by a natural condition of any unimproved public property.” This immunity has been applied to a tree that was 86 feet tall and located 60 feet from a public campsite where it fell. (See *Alana M. v. State of California* (2016) 245 Cal. App. 4th 1482.) Neither the proximity to the campsite nor the fact that the tree was subject to the defendant’s tree hazard program warranted a finding that the tree was on “improved” public property for purposes of the immunity. However, one court has concluded that a triable issue of fact existed as to whether the tree was on “improved” land and not subject to the natural condition immunity where the tree was located within the boundary of a campsite and had deteriorating roots growing beneath the improved public part of

the campsite which contributed to the tree’s failure. (*County of San Mateo v. Superior Court* (2017) 13 Cal. App. 5th 724, 734-735.)

The trail immunity embodied in Cal. Gov’t Code Section 831.4 may also apply to trees located within a trail; however, the immunity was recently held not to apply where the base of a eucalyptus tree was located 25 feet from a paved trail where a pedestrian was injured. (See *Toeppe v. City of San Diego* (2017) 13 Cal. App. 5th 921.)

As to private landowners, “[t]he proper test to be applied ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ...” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) CACI 1001 provides various factors to consider in determining whether a private landowner has used reasonable care with respect to discovering tree hazards and remedying conditions that pose an unreasonable risk of harm. Because the primary issue in most tree cases will be notice, a discovery plan should seek to find out whether an arborist ever inspected trees on the subject property, whether recommendations were made or followed, whether other tree or branches had failed on the same property previously, the financial ability of HOAs and other larger landowners to perform periodic inspections and maintenance of trees and other tree failures on the property.

Tree species selection should also be considered, which gives rise to the inquiry whether it is ever reasonable to have a species such as eucalyptus, which has a propensity to drop limbs, grow in high traffic areas. According to certified arborist John Sevier, who has responded to hundreds of eucalyptus failure calls throughout his 47-year career, “I have never been called out for a limb that fell from a Chinese Elm tree.”

The first step in any tree case is to immediately send a preservation of evidence letter and to try to inspect the failed tree or tree branch with a certified arborist. This is crucial because the necessary evidence to prove why a tree failed, whether it be rot, fungus or a history of improper pruning, can often only be found in the fallen trunk or branches. It is common for municipalities to immediately remove fallen trees because they may pose a hazard or impediment to pedestrians, or to further trim trees below the point where a limb broke off. Tree parts will be shredded and hauled away and the evidence will be lost forever.

Google Maps is an extremely useful tool in understanding the historical shape and health of a tree. Street views and overhead views may reveal problems with disease, neglect, drainage, possible trenching in the root zone area or poor pruning. Google Maps and Google Earth have an invaluable feature that allows you to view historical photos in the same location. In one case my office reviewed, historic satellite photos revealed that a pine tree had been dead for five years before falling on an adjacent parked car and injuring the occupant. These images established notice because the landowner had years to remove the dead tree that loomed over a target zone.

No lawyer wants to sue Mother Nature or vilify our beloved trees. But compelling arguments can be made that we need the right trees in the right locations that are properly maintained so as not to needlessly endanger the public.

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