

## Hazard Trees and Limbs on Public Property and Governmental Immunity

### *A Legal Perspective of Community Tree-risk Management*

#### *What is a “hazard tree?”*

A hazard tree is a tree with a defect, plus a target. An example is a rotten tree (a hazard) near a picnic table (the target). Trees with obvious defects can become problems, because they are likely to fail and cause property damage or human injury. Obvious tree defects include a dead tree limb, the unseasonable lack of leaves, visible decay, a hole or crack in the trunk, or a tree leaning dangerously to one side.<sup>1</sup>



#### *What does “duty to use reasonable care” mean?*

Every landowner has a duty to use reasonable care to manage his/her property in a way that does not cause harm to others or their property. Using reasonable care means to consider the foreseeable risks. With respect to trees, the duty is to make sure that unsound or “hazard” trees on one’s property do not fall onto adjoining property or into public rights-of-way.

For municipalities, the duty encompasses at least a duty to make periodic visual inspections of trees on public property. The inspections should be done by qualified people, *e.g.*, certified tree inspectors. There is also a duty to eliminate obvious dangers and do preventive maintenance. The municipality may be held liable for foreseeable harm that could have been prevented.

In a Minnesota court case, a 10-year-old boy ran across a grassy area on Ramsey County land towards his father’s car and was struck in the eye by a low-hanging branch. None of the branches extended over sidewalks or paths. The boy took a shortcut across the lawn, instead of using the sidewalk. The grounds superintendent testified that he never anticipated that the tree would pose a safety risk, because it was not near a sidewalk. In this case, the court ruled that Ramsey County was not negligent. The tree was in plain view, and the County had no notice that the tree posed an unreasonable risk to the public. The duty to use reasonable care does not extend to cases where the risk of harm is known or obvious to the visitor. The risk of harm from running into a tree branch is obvious, even to a child. The county was not obligated to make its landscapes “child-proof.”<sup>2</sup>

#### *What is a municipality’s tree inspector expected to know about hazard trees?*

Certified tree inspectors should be trained to identify hazard trees and certain types of tree diseases. In order to maintain their certification, they must have refresher courses. At a minimum, a tree inspector’s

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<sup>1</sup> For photographic examples of hazard trees, please see the U.S.D.A. Forest Service’s Hazard Tree web page: <http://www.na.fs.fed.us/spfo/hazard/index.htm>.

<sup>2</sup> *Sperr v. Ramsey County*, 429 N.W.2d 315 (Minn. App. 1988).

duty to inspect includes the ability to identify obvious tree defects. If the tree inspector finds a defect, s/he should follow the municipality's policy about addressing hazard trees.

*What is "governmental immunity" and when does it apply?*

A Minnesota state law provides that a municipality can be held liable for the negligence of its officers, agents, and employees, subject to specified dollar limits.<sup>3</sup> In a few limited circumstances, governmental entities (cities, townships, counties, etc.) are "immune" from negligence claims. Immunity is based on the separation of powers and is intended to prevent judges from second-guessing executive and legislative policy-making decisions. The trial judge decides if the governmental entity is entitled to immunity.

In analyzing the claim for immunity, the trial judge identifies the type of governmental conduct that is being challenged.<sup>4</sup> Only conduct of a policy-making (also called "discretionary") nature is entitled to immunity. "Policy-making" involves the balancing of social, political, safety, legal, or economic considerations.<sup>5</sup> Conduct that *implements* policy – rather than *makes* policy – is not entitled to immunity; conduct at the planning level is protected, while conduct at the operational level is not protected.<sup>6</sup> A city's policy to trim trees along high-traffic roads before trimming trees on low-traffic roads is an example of an action that gives the city immunity. In determining where or how to trim trees along roadways, the city has to make choices based on its budget and the number of workers it has. This type of decision-making involves using discretion and setting policy.

By contrast, the city would not be entitled to immunity if the workers it assigned to trim the trees did a negligent job that caused injury. Day-to-day operations or "ministerial actions" are not protected by governmental immunity,<sup>7</sup> and tree-trimming itself does not involve policy-making or using discretion. Basically, the court does not want to second-guess how city policy-makers prioritize resources, but the court will get involved if a government worker carries out day-to-day work in a negligent way.

In a 1998 court case in Minnesota, a large oak tree fell on a motorist during a severe thunderstorm. The fallen tree showed signs of decay. The city tree inspector had inspected the tree a few months earlier. The court found that the inspector failed to notice obvious signs of internal decay through a pruning wound that had a visible opening into a tree cavity. The city was held liable for the injury to the motorist.<sup>8</sup> Because the tree inspector's job required him to inspect trees regularly in his day-to-day routine and his decision required no planning or policy formulation, government immunity did not shield the city from liability.

*What constitutes an "act of God"?*

An act of God is a force of nature that is both the sole cause of damage and unexpected or unforeseeable. For example, a tree downed by lightning is an act of God, if lightning is the sole cause of the tree's falling and if the tree did not already have an obvious defect.<sup>9</sup> The tree owner is not responsible if the tree's failure is solely caused by act of God. However, if the tree had an obvious defect before the tree fell during a windstorm, then the "act of God" defense will not shield the tree owner from responsibility. Many tree failures are the result of a combination of factors, both mortal and divine.

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<sup>3</sup> Minn. Stat. §466.02 and §466.04 (1996) in the Minnesota Tort Claims Act

<sup>4</sup> *Angell v. Hennepin County Reg'l Rail Auth.*, 578 N.W.2d 343, 346-47 (Minn. 1998).

<sup>5</sup> *Nusbaum v. Blue Earth County*, 422 N.W.2d 38, 43-44 (Minn. App. 1992).

<sup>6</sup> *McEwen v. Burlington N. R.R. Co.*, 494 N.W.2d 313, 316-17, (Minn. App. 1993), *review denied* (Minn. Feb. 25, 1993).

<sup>7</sup> There is a three-prong test for determining immunity: 1) Government policy controls the conduct of the employee; 2) The government exercised its discretion in adopting the policy; and 3) The employee is not negligent in carrying out the policy.

<sup>8</sup> *Elfstrand v. City of Brooklyn Center*, unpublished opinion, C1-98-1029 (Minn. App. 1998)

<sup>9</sup> *VandenBroucke v. Lyon County*, 301 Minn. 300, 222 N.W.2d 792 (1974).

*What is the duty of care with respect to trees that block intersections?*

The following Minnesota court case provides a good example of a city's duty of care with respect to tree-trimming in intersections:

A young passenger in a car was killed when hit by a truck in an uncontrolled, T-shaped intersection in a residential area. Tree branches on private property may have obscured the drivers' views. The city has a zoning ordinance that requires property owners to keep tree limbs to be at least 8 feet about grade within the public right-of-way. The limbs in question were not within the sight-triangle area. The city trims trees located within the corner sight triangles for traffic visibility. The city also trims trees outside the sight triangles, but usually only if needed to protect the city's mowing and snow-plowing equipment, if the tree is dead, if the tree interferes with pedestrian or bicycle traffic, or if the tree interferes with a street light. The city does not routinely monitor or trim trees outside sight triangles, but may do so if the need is brought to its attention. Prior to the accident, the city had not received any complaints about the tree.

In this case, the city was not liable (*i.e.*, it had immunity).<sup>10</sup> The city had adopted a policy about tree trimming: the city did not have resources to trim all of the trees it would have liked; the city gave priority to trimming in sight triangles, instead of trimming outside of sight triangles; and the city considered the desires of private property owners with respect to trimming privately owned trees by the right-of-way. The city's zoning ordinance left the city room for discretion about how to enforce it. The city exercised its discretion, based on numerous policy considerations and determined that it would not trim trees outside of sight triangles for traffic visibility purposed, unless the tree is brought to its attention as a dangerous condition. Because the city followed its tree-trimming policy, it was immune from liability.

*What should a municipality do to limit its risk?*

A municipality should develop a risk-reduction policy, review and update the policy regularly, and follow it. Conduct a tree inventory. Establish priorities for maintenance and monitoring. Inspect public trees on a regular basis and document the inspections. Fix what you find: eliminate hazards. Act ethically. Don't rely on government immunity as a defense; use your good judgment.

*Is there a difference between trees in rural areas and trees in urban areas?*

The distinction between rural trees and urban trees is increasingly blurred as urban areas sprawl out into "rural" and suburban areas and as traffic increases in those areas. In urban areas, property owners have a duty to inspect and will be liable for failing to correct defects or remove an unsound tree. The "rural rule" is that the property owner in rural wooded areas does not have a duty to inspect to make sure that every tree is safe and will not fall over onto a public road. However, if the property owner has actual knowledge that a tree is dangerous, s/he will be held liable if s/he fails to take care of the problem tree.

The rationale for this rule is that a rural property owner would have an impractical burden of examining each tree on acres of wooded areas that border roads, compared to the urban property owner's burden of having to inspect only one or a few trees. The risk of harm is balanced against the property owner's burden of inspection. Minnesota currently follows the 'rural rule.'<sup>11</sup> However, the appellate courts have not visited this issue since 1921. Courts in other jurisdictions are divided between the rural rule and the urban rule.

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<sup>10</sup> *Soltis-McNeal v. Erickson and the City of White Bear Lake*, unpublished opinion, No. C3-97-11370 (Minn. App. 1997).

<sup>11</sup> *Zacharias v. Nesbitt et al.*, 150 Minn. 369, 185 N.W. 295 (1921).