

In the Shade of a Tree: Analyzing the Tree-related Legal Problem

By Steve Pihlaja and Lorrie Stromme

Trees provide shade, purify air, enhance quality of life, and inspire poetry, but they also may inspire lawsuits. Whether the tree is yours, your neighbor's, or your client's, it's prudent to know what sort of shadow it may cast.

The trees of our urban forests provide shelter, purify the air we breathe, increase property values, conserve energy, and enhance quality of life in our cities. Trees inspire strong emotional reactions in the people who live, work and recreate under their branches. Strong emotions coupled with competing interests often result in a trip to the lawyer's office. Sooner or later one of your clients will have a legal dilemma involving a tree. The purpose of this article is to provide you with a framework to analyze the problem.

The primary legal questions involve issues of nuisance, negligence, and trespass. But the analysis starts by identifying: *Whose tree is it?*

In general, the location of the tree trunk determines who owns the tree. A tree that stands solely on your client's property belongs to your client. Disputes arise when trees straddle a boundary line or when the branches of your client's tree encroach onto the neighbor's property. Jurisdictions differ on boundary trees. In some states, trees standing along a boundary line are the common property of the neighbors on either side of the boundary, and neither neighbor can remove the tree without the consent of the other. This includes the tree that starts out in one yard and grows into the boundary of the neighbor's yard.

In Minnesota, the mere presence of a tree trunk on the boundary line does not create a boundary tree or determine ownership. Instead, the court looks at the intention of the neighboring property owners. A tree is a boundary tree if it was planted jointly or treated as common property by agreement, acquiescence, or course of conduct.¹ For example, adjoining owners who split the costs of pruning and maintaining a boundary tree or hedge would probably be considered co-owners of the tree or hedge. So, when a broken limb or a tree disease becomes a problem, the co-owners share responsibility for fixing the problem.

Nuisance Trees: Encroaching Branches or Roots

Branches that overhang your client's property or tree roots that push up a sidewalk or clog a sewer are considered a nuisance. "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance."²

The leading Minnesota case on nuisance trees is *Holmberg v. Bergin*.³ In that case, a Minneapolis homeowner planted an elm tree within 15 inches of the property line. Over the course of 26 years, the tree grew to be 30 inches in diameter and 75 feet high. The trunk grew across the boundary line, pushing the fence out of alignment. The roots extended into the neighbors' yard and caused the sidewalk to tip toward the house, resulting in a drainage problem in the neighbors' basement. The *Holmberg* court found that the tree was not a co-owned boundary tree but was a nuisance, because the tree roots obstructed the neighbors' free use and enjoyment of their property. The neighbors sued for monetary damages and an injunction to prune the roots or remove the tree. Experts for both sides acknowledged that corrective action to restore the grade would damage the roots and either kill the tree or make it dangerously unstable. The court ordered the tree cut down, because the alternative -- severe root pruning -- would have weakened the tree or caused the tree to die, endangering the neighbor's home if the tree blew over in a windstorm. The court disallowed money damages, because the

neighbors had failed to take advantage of earlier opportunities to exercise self-help and remove the invading roots.

Using Self-Help. Property owners in every state have the right to use self-help to prune branches or roots of a neighbor's tree that encroach onto their property. Some states follow the Massachusetts Rule, where self-help is the exclusive remedy for encroaching branches or roots.⁴ Self-help is an alternative to going to court.

The rationale is that self-help prevents the wasteful, needless use of the judicial system and vexatious lawsuits.⁵ It's a tradeoff: your client fixes her problem at her own expense, instead of slogging through the expense and uncertainty of the court system.

Minnesota courts do not follow the Massachusetts Rule. In Minnesota, self-help is encouraged, with discretion, but it is not the exclusive remedy. Equitable remedies to abate the nuisance are available. "The law is clear that one cannot exercise his right to plant a tree in such a manner as to invade the rights of adjoining landowners. When one brings a foreign substance on his land, he must not permit it to injure his neighbor."⁶ When self-help is not practical or reasonable, your client can go to court for an injunction or other equitable remedies to have the nuisance abated.

Your client's guidelines for self-help include:

- Prune only up to the boundary line -- at your client's own expense.
- Don't trespass. Get permission to enter onto the neighbor's property to do the pruning, unless the encroaching branches or roots threaten to cause imminent harm to your client's property.
- Don't cut down a tree whose trunk is located on the neighbor's property, even if the branches stray onto your client's property.
- Maintain, don't destroy. Don't jeopardize the health of the tree or cause foreseeable injury. For example, pruning an oak tree from April through

September could make the tree vulnerable to oak wilt, a virulent disease. Or pruning a tree's roots could destabilize the tree and cause it to topple over.

- Advise your client to seek the opinion of a certified arborist, a specialist in the care of individual trees, about the tree's condition. Look in the Yellow Pages under "tree service," and look for the arborist's membership in professional organizations, such as the Minnesota Society of Arboriculture (MSA), the International Society of Arboriculture (ISA), or the National Arborist Association (NAA).

The trend in tree law is toward the California Rule or "self-help nice." Minnesota courts have not expressly adopted the California Rule, but it appears to be a natural outgrowth of *Holmgren v. Bergin, supra*. In appropriate circumstances, a neighbor who is being injured by a nuisance may protect himself by unilaterally abating the nuisance. However, the abater must act in a reasonable manner at reasonable time, and must avoid causing foreseeable injury to the tree. A showing of malice on the part of the abater evidences a strong indication that the self-help was unreasonable.⁷

Leaves Happen. Another area of contention is tree debris: leaves, acorns, fallen fruit, branches, sap. There is not a Minnesota case directly on point. However, other jurisdictions have recognized that the natural growth of trees includes shade, invading roots, leaves, and overhanging boughs,⁸ and that liability is reasonable when there is "sensible damage,"⁹ such as a damaged roof, not mere debris from a healthy tree. Your client, who is sick and tired of sweeping the apple blossoms off his driveway after they have fallen from his neighbor's tree, probably has no cause of action. Going to court to have the neighbor ordered to pick up fallen debris is not practical or economical, and is probably why there is not much precedent on this issue.

Fruit of the Neighbor's Tree. Neighbors may disagree as to who has the right to the apples or other fruit growing on an encroaching tree branch. The rule of thumb is that if the tree trunk stands in a neighbor's yard, all of the fruit wherever it is hanging belongs

to the neighbor.¹⁰ Picking the fruit may not be so simple. Ownership of the fruit does not give the neighbor any right to trespass onto your client's property to retrieve the fruit. Courts would probably weigh the right to keep trespassers out of your client's yard against the tree owner's right to harvest the fruit of her tree. The orchard owner whose livelihood depends upon the harvest probably has a stronger claim than an urban gardener.

The law is also unclear on the issue of fallen fruit. As a practical matter, it would not be worthwhile for a neighbor to sue your client for keeping fallen fruit, because it would have nominal value. The courts would probably hold the tree owner responsible for making advance arrangements to harvest the fruit if it had sufficient value to bother with. Your client is probably safe to keep the fallen fruit if his neighbor says nothing about it. As with most neighbor disputes, the best counsel you can give is to encourage communication and neighborliness.

Negligence: Hazard Trees and Limbs

The trend across the country is to hold tree owners legally responsible for damage caused by unsound or "hazard trees."¹¹ A hazard tree is a tree with a defect plus a target, such as a sidewalk, a car, or a house in the path of an unstable or decaying tree.

Minnesota cases involving negligence in tree law tend to fall into two categories: damage caused *by* trees or damage done *to* trees. Foreseeability is the common thread that runs through both types of claims. In both instances, courts will look at what should have been obvious to the tree owner about the tree's condition.

Damage Your Client's Tree Causes. If a neighbor's tree is unsound and threatens your client's property, the neighbor may be liable for any damage that occurs. The test is whether the tree owner knew or should have known that damage was likely. A tree owner is not expected to be a tree expert, but she is expected to recognize obvious

symptoms of a problem, such as the unseasonal lack of leaves, a dead limb, visible decay, or a tree leaning dangerously to one side. If the potential for damage is foreseeable and if the tree owner fails to take corrective action, the courts will likely hold the owner legally responsible for damage caused to people or property.

In an unpublished opinion, the Minnesota Court of Appeals found that a landowner was not liable in a personal injury case where the landowner's tree did not pose an obvious danger.¹² In that case, a tree trimmer was injured when a decaying branch broke. Liability was not imposed, because the branch appeared to be sturdy and showed no signs of decay. In another case, a landowner was found to owe no duty to protect a pedestrian from a low-hanging branch that was clearly visible.¹³

What's Entropy Got to Do With It? A Georgia case that reaches the same conclusion about foreseeable danger is worth quoting. Taking judicial notice of the Second Law of Thermodynamics, the court said,

This law tells us that all in the universe, trees, human beings, plants, animals, buildings, and all else are headed downward from complexity to simplicity toward decay, deterioration, decadence, and death. Everything heads towards decay; for example, a tree decaying, which is an increase of entropy, or uselessness. We are specifically limiting liability to patent, visible decay, and not the normal, usual, latent, micro-nonvisible, accumulative decay. In other words, there is no duty to consistently and constantly check all pine trees for non-visible rot, as the manifestation of decay must be visible, apparent, and patent so that one could be aware that high winds might combine with visible rot and cause damage.¹⁴

Damage Done To Trees. In a leading Minnesota case on negligent damage to trees arose when a church hired a road contractor to expand a parking area. The contractor piled soil over the roots of a grove of oak trees, smothering the trees.¹⁵ In finding

negligence, the court held that the contractor knew or should have known the consequences of mounding soil over tree roots. This case also set a new standard for awarding damages in negligence cases.

Damages. In deciding how to compensate a property owner for damaged trees, Minnesota courts have distinguished between ornamental trees and standing timber or ill-formed trees. If trees that are ill-formed or serve merely to prevent erosion or curtail noise are injured, the courts have based damages on diminution in land value, *i.e.*, the difference in the land value before the injury and afterward. If trees are primarily ornamental or shade trees, the court has said that the jury may consider replacement cost, to the extent that the cost is reasonable and practical, as an alternative measure of damages. "Reasonable and practical" replacement cost has been defined as:

The cost to replace the number, size, and species of trees destroyed to the extent that: 1) replacement serves to substantially restore the character and quality of the property appropriate for the owner's enjoyment and intended use and 2) the cost of replacement is not greatly disproportionate to the resulting restoration of the owner's enjoyment and intended use of the property.¹⁶

Act of God. A frequently heard excuse is that damage caused by a fallen tree was an act of God. Not every tree that falls over in a strong wind and causes damage is the result of an act of God.¹⁷ To qualify as an act of God in negligence cases, all of the following elements are needed: 1) the accident must have happened from a force of nature that was both unexpected and unforeseeable; 2) that force must have been the sole cause of the accident; and 3) the accident could not have been prevented by using reasonable care.¹⁸ A bolt of lightning is an act of God, if it is the sole cause of an injury. However, a person is liable if his own prior negligence combined with the act of God to cause the injury.

Trespass and Wrongful Tree Removal

Trespass to trees is a tort recognized separate from trespass to land and carries a heavy penalty. Cutting a tree on someone else's land without her permission is a trespass to the tree.¹⁹ The penalty for intentional, wrongful tree removal is treble damages. In Minnesota, a landowner whose trees were bulldozed and buried on his land without his permission was awarded both treble damages for the trespass to his trees and punitive damages for the trespass to his land.²⁰

An example of involuntary or casual trespass to the tree is illustrated in a Minnesota court case where a driver had a heart attack and drove into a grove of Colorado Spruce trees.²¹ Although the tree damage or "trespass" was not malicious, it occurred without the permission of the trees' owner and the court awarded him single damages. There are also penalties for criminal trespass and criminal damage to property.²²

Utility Company Pruning. A common urban sight is the row of trees under a power line cut in a deep v-shape. You may have a client who wants to sue a utility company for its tree-trimming techniques or its removal of a tree. Your case assessment should weigh aesthetics against the utility company's duty to meet public demand to prevent power failures caused by fallen tree limbs during storms.

Utility companies have easements across property in order to provide electricity. Courts recognize the right of utility companies to trim or remove trees within their easement, as long as the work is reasonable and necessary to construct, use, operate, or maintain power lines in the easement area.²³ However, the utility company has a duty to remove power line obstructions in a way that causes the least damage to the property the power lines cross.

In a recent Minnesota case,²⁴ the Supreme Court confirmed that a property owner has an interest in the trees on city land in front of her property and standing to sue the utility company that removed a boulevard tree. However, the Court also found that this right is subordinate to a utility's right to trim or remove the trees to keep power lines clear. The Court of Appeals decision that preceded the Supreme Court case should be mandatory

reading for any "budding" tree lawyer, if only to brush up on clever tree puns, such as: "stumped by the dismissal," "out on such a limb," "sapping the meaning," "fell on wooden ears," and "rooted in the common law."

In conclusion, even if you don't think of yourself as a tree-hugger, you'll be acting in your client's best interests and protecting our urban trees by giving the following advice:

"Work it out with your neighbor, or chat before you chop."

Notes

- 1 Holmberg v. Bergin, 172 N.W.2d 739 (Minn. 1969).
- 2 Minn. Stat. §561.01
- 3 Holmberg v. Bergin, *supra*.
- 4 Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931)
- 5 Richmond v. General Engineering Enterprises Co., 454 So. 2d 16 (Fla App D3, 1984).
- 6 Holmberg v. Bergin, 172 N.W.2d at 744.
- 7 Booska v. Patel, 24 Cal. App. 4th 1787, 30 Cal. Rptr. 2d 241 (1994).
- 8 Michalson v. Nutting, *supra*, 175 N.E. at 490.
- 9 Smith v. Holt, 174 Va. 213, 5 S.E.2d 492 (1939)
- 10 See, e.g., Skinner v. Wilder, 38 Vt. 115 (1865).
- 11 "Hazard tree" is a term of art used by arborists and tree scientists.
- 12 Allison v. Olson and Mauer, filed December 12, 2000, C0-00-942 (unpublished).
<http://www.lawlibrary.state.mn.us/archive/ctapun/0012/942.htm>
- 13 Sperr by Sperr v. Ramsey County, 429 N.W.2d 317 (Minn. App. 1988).
- 14 Cornett v. Agee, 143 Ga. App. 55, 237 S.E.2d 522, 524 (1977).
- 15 Rector v. McCrossan, 235 N.W.2d 609 (1975)
- 16 Guide for Plant Appraisal, 8th Ed. 1992.
- 17 Swanson v. LaFontaine, 238 Minn. 460, 57 N.W.2d 262 (1953)
- 18 VandenBroucke v. Lyon County, 301 Minn. 300, 222 N.W.2d 792 (1974).
- 19 Minn. Stat. §561.04
- 20 Muelstedt v. City of Lino Lakes, 473 N.W.2d 892 (Minn. App. 1991; cf Johnson v. Jensen, 446 N.W.2d 664 (Minn. 1989).
- 21 Pluntz v. Farmington Ford-Mercury, Inc., 470 N.W.2d 709 (Minn. App. 1991).
- 22 See, e.g., Minn. Stat. §609.605, subd. 1(b)(5) and Minn. Stat. §609.595.
- 23 Minn. Stat. §222.37.
- 24 Miller-Lagro v. Northern States Power Company (1998) , 582 N.W.2d 550 (Minn. 1998), citing Minn. Stat. §561.04.

Steve Pihlaja is a solo practitioner in Minneapolis, practicing in the areas of criminal defense and civil litigation. He is a 1979 graduate of William Mitchell College of Law.

Lorrie Stromme is a lawyer, tree care advisor/master gardener, president of the Minnesota Shade Tree Advisory Committee, and a Hennepin County planner. She is a 1981 graduate of William Mitchell College of Law.