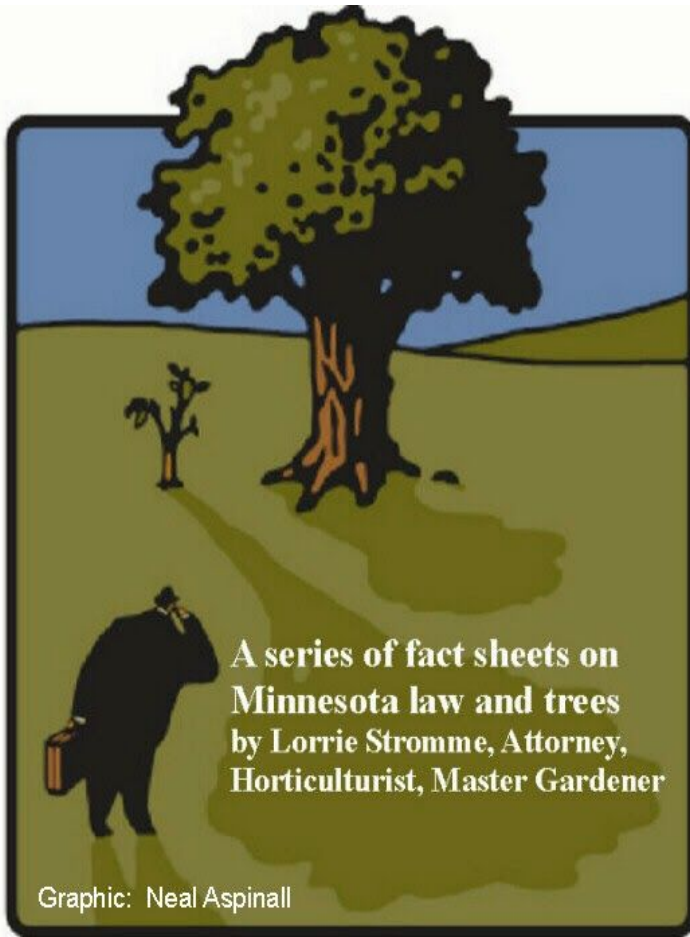




Trees and Minnesota Law

A Layperson's Guide



Damage Done to Trees: Consequences and Compensation

Get My Drift: Legal Aspects of Pesticide Drift

Hazard Trees and Limbs on Private Property

Hazard Trees and Limbs on Public Property and Governmental Immunity

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Note: These fact sheets pertain to the law in Minnesota at the time of their writing in the mid 2000s. The information they contain may not necessarily apply in other states, and they have not been updated since their initial publication. The information included in the fact sheets is intended to be educational, not legal advice. If you have a legal problem, consult a lawyer.

Damage Done to Trees: Consequences and Compensation



My neighbor cut down trees on my property. What are my legal rights?

Cutting down a tree on another's property without permission is trespass and carries a stiff penalty. A Minnesota statute provides that whoever *intentionally* cuts down a tree without the tree owner's permission can be assessed three times ("treble") the amount of monetary loss suffered by the tree owner.¹ If the tree damage is *unintentional*, then the tree owner's loss would not be

tripled. In one Minnesota court case, a driver had a heart attack while at the wheel and crashed into a grove of spruce trees. The driver was responsible for the cost of the damaged trees, but he was not ordered to pay three times the cost, because the damage was caused accidentally.²

How will I be compensated for damaged or improperly removed trees?

Try the direct approach first. Have a face-to-face discussion with your neighbor, the wrongdoer, and give him an opportunity to make an offer to compensate you for your loss. The reason to try to work it out is to avoid having to pay for lawyers, appraisers, and related legal costs. It may cost you more to prove the value of your trees than to recover your loss.

If you simply cannot come to terms with your neighbor, you will likely have to go to court. You can sue in Small Claims Court (called "Conciliation Court"), if your loss is \$7,500 or less. You should consult experts to establish the value of your tree or the decrease in your property value.

How do I find experts?

Start by calling a tree nursery or a tree-moving company (consult business directories). They can give you a value about the trees that they sell. If the tree diameter is greater than 3 inches, the nursery retailers will likely refer you to a tree appraiser. Professionals that appraise tree values or landscape damage usually charge \$75 to \$125 per hour for consultation time, driving time, and report-writing time.

How is the dollar value of a tree determined?

Tree-and landscape-appraisers use formulas to determine the dollar value of a tree. The factors that appraisers consider include the tree species, its size, its condition (health), its location/site, the tree's functional and aesthetic attributes, and its placement in the landscape (e.g., a single, mature tree in a yard; a tree in a grove; or a tree under a power line).

A construction contractor damaged or removed trees on my property. What are my legal rights? The leading Minnesota court case on this subject involves a church whose road

¹ Minn. Stat. §541.04

² *Pluntz v. Farmington Ford-Mercury, Inc.*, 470 N.W. 2d 892 (Minn. App. 1991).

contractor piled soil over the roots of some trees on church property.³ The trees' roots were smothered, and the trees died. The church sued the contractor. The trees in this case were ornamental, provided shade, and acted as a screen and sound barrier to nearby highway traffic. The church was compensated for the "reasonable and practical replacement cost" of the destroyed trees. An expert calculated the value, which included the retail cost of the replacement trees, planting costs, and tax. The replacement planting of trees would, over time, approximate the previous condition of the church's site. If the trees had been small, ill-formed, and not particularly desirable as ornamental trees, their value would not be as great, and the way to determine the value of the loss would be the difference in the value of the real estate before and after the damage was done.⁴

Am I entitled to punitive damages?

No. You cannot collect both treble damages and punitive damages for trespass to your trees.⁵ The purpose of punitive damages is to punish and deter conduct that is malicious or willfully indifferent to the rights of others.⁶ Treble damages are the equivalent of punitive damages.

Are there any criminal penalties?

A person who intentionally cuts down another's tree without permission or damages property can be charged with criminal trespass or criminal damage to property.⁷ A city attorney or county attorney determines if criminal charges are warranted, and if so, prosecutes the case. The wrongdoer, if convicted, faces penalties ranging from paying a fine to imprisonment, depending on the value of the property destroyed.

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³ *Rector v. McCrossan*, 235 N.W.2d 609 (1975)

⁴ *Baillon v. Carl Bolander & Sons Co.* 235 N.W.2d 613 (1975),

⁵ *Johnson v. Jensen*, 446 N.W.2d 664, 666 (Minn. 1989)

⁶ Minn. Stat. §549.20

⁷ Minn. Stat. §609.605, subd. 1(b)(5) and Minn. Stat. §609.595



Get My Drift Legal Aspects of Pesticide Drift

Every year, nearly 5 billion tons of pesticides are intentionally applied to the American landscape.¹ Responsible pesticide use is critical to avoid adverse environmental impacts. At the neighbor-to-neighbor level, the issue can become contentious when pesticides drift from one neighbor's yard to another. The following answers address homeowners' most commonly asked questions about pesticide drift.

1. What is a pesticide?

Federal law defines a pesticide as any substance intended for "preventing, destroying, repelling, or mitigating any pest," and substances intended for use as a plant growth regulator, defoliant, or desiccant.² The word-ending "cide" means "killer." The term "pesticide" is a general term and includes insecticides (killer of insect pests), herbicides (weed control), fungicides (fungi control), rodenticides (mice/rat control), etc.

2. What is pesticide drift?

Pesticide drift is the movement of pesticides through the air, away from the area where they were applied. It's somewhat analogous to secondhand smoke. Cigarette smoke drifts away from the smoker and can be inhaled by nearby non-smokers as secondhand smoke. Similarly, a herbicide sprayed on a plant or tree can drift away from its target and land on non-targeted plants. Drift becomes a problem when the herbicide or other pesticide has an unintended impact or causes damage. An example is 2,4-D, a herbicide used to control dandelions and other broadleaf weeds. Some lawn-care products (e.g., Ortho Weed-B-Gon and Scotts Turf Builder with Plus 2 Weed Control) contain 2,4-D. The granular form of 2,4-D can turn into a gas and drift away from the place where it was applied, harming plants sensitive to 2-4-D, like grapes, tomatoes, and lilacs.³



Graphic: www.nda.agric.za

3. How can pesticide drift be prevented?

Preventing spray drift is the responsibility of the person applying the pesticides. (Applicators include private citizens, farmer/growers, commercial applicators, and non-commercial applicators.) Using common sense is the best means of prevention. Mix and apply pesticides only when winds are calm (less than 10 mph). Most important, read the label on the pesticide before using it, and follow the directions. The label is the law. All of the label directions are the *legal* requirements for using the pesticide safely and effectively. Pesticides must be applied correctly to avoid collateral damage. Pesticide labels are not an easy read; they take some time to review and understand. But it's time well spent ... to use pesticides responsibly and to stay on the right side of the law. Pesticide labels can be found the internet, if the label attached to the product is hard to read.⁴

Pesticides can be used only on the sites, plants, or crops listed on the label. The label also specifies the application rate and method, storage and disposal information, protective clothing to wear while using the pesticide, and environmental hazards (e.g., "toxic to bees").

4. Will the vegetables and fruits in my garden be safe to eat?

¹ Timothy Kiely, David Donaldson & Arthur Grube, Ph.D., *Pesticide Industry Sales and Usage: 2000 and 2001 Market Estimates*, at 10 (Biological and Economic Analysis Division, Office of Pesticide Programs, Office of Prevention, Pesticides, and Toxic Substances, U.S. Environmental Protection Agency, May 2004.).

² See 7 U.S.C. § 136 (u)

³ Herzfeld, D, B. Jarvis, *The Considerate Gardener's Guide to Pesticides, Part 2. Yard & Garden Line News*, September 1, 2003. <http://www.extension.umn.edu/yardandgarden/YGLN-Sept0103.html>

⁴ See, for example: <http://www.cdms.net/manuf/default.asp>.

If a pesticide that drifts onto your vegetables or fruit is not labeled for use on vegetables or fruit, do not eat them. Pesticides that are labeled as safe to use on particular vegetables and fruits identify “safe” levels of pesticide residue for the food-plants listed on the label. But there is no sure way to know if a pesticide labeled for use on a non-food plant has a “safe” level of pesticide residue for a non-target plant. For example, a lawn herbicide can be used on turf, but the label does not identify a safe level of herbicide residue on fruits and vegetables, because they are non-target plants. If you are uncertain, don’t eat the affected fruit and vegetables.

5. *What can I do if my neighbor uses a pesticide that damages my plants or property?*

In Minnesota, it is illegal to apply a pesticide that strays onto the adjacent property and causes damage.⁵ In fact, pesticide drift is illegal even if there is no damage. “A person may not direct a pesticide onto property beyond the boundaries of the target site,” according to the law.⁶

Taking your case to court for the loss of garden plants is not a good option. Most of the cases that have ended up in court involve aerial spraying of acreage (crops or forests) and significant monetary losses. The “garden variety” dispute between neighbors is usually not taken through the trial and appeal process, because of the financial realities of paying for lawyers, expert witnesses, scientific analysis, and other litigation costs. The challenge is proving what pesticide did the damage and the connection between the pesticide that drifted off-target and the damage done. Scientific analysis for pesticide residue is costly (usually several hundred dollars.) The University of Minnesota Extension Service no longer has a clinic or other means to diagnose pesticide drift or herbicide damage in home landscapes. The Minnesota Department of Agriculture (MDA) oversees pesticide use in the state. But the MDA investigates complaints only when it suspects that there is a violation of the law. Priority is given to investigations involving injury/damage to humans, animals, food/feed products, and the environment. The MDA receives complaints at 651-296-6121. The complaint process is explained online at <http://www.mda.state.mn.us/appd/pesticides/complaints.htm>.

“My experience has taught me that by far the best way to resolve or prevent drift disputes is for the two parties to discuss the situation as adults in an open and respectful manner.” Associate Professor Dean Herzfeld, coordinator of the Pesticide Applicator Training Program in Minnesota.

The recommended option is to try the neighborly approach. “My experience has taught me that by far the best way to resolve or prevent drift disputes is for the two parties to discuss the situation as adults in an open and respectful manner,” maintains Dean Herzfeld, a University of Minnesota Associate Professor and Extension Educator in the Plant Pathology Department, and the Coordinator for the Pesticide Applicator Training Program in Minnesota. Speak to your neighbors in a friendly, tactful way and explain your concerns about the impact that their pesticide use has had on you, your health, your garden, or your pets. Try to negotiate a solution that satisfies both of you. Find out what pest problems your neighbors are having and provide constructive information about nontoxic, pest-control methods. For instance, if your neighbors use a product containing 2,4-D to control dandelions and it drifts onto your tomato plants, you could provide information about corn gluten meal, an organic alternative for control of dandelions and other broadleaf weeds.⁷

Take a tip from the experts: Use the neighborly approach to deal with your drift disputes and preserve harmony in your neighborhood.

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⁵ “A person may not apply a pesticide resulting in damage to adjacent property.” Minnesota Statutes §18B.07, Subd. 2.3 (b).

⁶ Id.

⁷ U of MN information on corn gluten meal: <http://www.extension.umn.edu/extensionnews/2004/gluten.html>

Hazard Trees and Limbs on Private Property



What is a “hazard tree?”

A hazard tree is a tree with a defect, plus a target. An example is a dead tree branch (a hazard) by a house (the target).

How can I identify a hazard tree?

Examples of obvious 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.¹ Trees with obvious defects can become problems, because they can fail and cause property damage or human injury.

Who is responsible for damage caused by a hazard tree?

A tree owner is generally responsible for damage caused by a hazard tree. A tree owner is not expected to be a tree expert, but s/he is expected to recognize obvious symptoms of a problem. The reason for concern is that pre-existing defects can predispose a tree to failure. However, some defects are not obvious to the non-expert. If the defect is *not* obvious, the tree owner probably will not be held responsible if the tree fails.



If your neighbor’s tree falls and injures you or your property, your neighbor is responsible for the damage done IF the tree defect was obvious and the neighbor failed to correct the problem. However, if the tree defect was not evident, then your neighbor will likely not be responsible for the damage. The reason is that your neighbor cannot be held legally responsible for a problem of which he had no notice or opportunity to fix. If there is a question about the tree’s condition, consult a tree-care expert. Look for a “certified arborist” in the Yellow Pages under “tree companies.” Some communities hire tree inspectors who are trained to identify hazard trees and diseased trees in both public spaces and private yards.

What can I do if I disagree with a tree inspector about the condition of my tree?

If a tree inspector or housing inspector has condemned your tree as a hazard tree or diseased, you can ask the inspector to identify the defect and explain why it is a hazard. If you disagree, contact a certified arborist and get a second opinion. If the arborist agrees that the tree inspector made an error about your tree’s condition, give the tree inspector a copy of your arborist’s written opinion. In the case of diseased trees, a lab test can be done to confirm the presence of a disease.

What should I do if my neighbor doesn’t deal with a hazard tree that threatens my property?

Talk to your neighbor! Ask her to view the situation as you see it from your side of the boundary line. Ask her to fix the problem. You’re putting the neighbor on notice that a defect exists. Write a letter to your neighbor, describing the problem (make sure that you keep a copy). Document the problem with photos. Consult a tree-care expert, an arborist.

¹ 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>.

Try mediation. As a last resort, you can sue. Small-claims court deals with claimed losses up to \$7,500.

Can I go onto my neighbor's property to cut down a hazard tree or limb?

No! Cutting down a tree on another person's property without permission is trespass and carries a stiff penalty. In Minnesota, whoever intentionally cuts down a tree without the owner's permission can be assessed three times ("treble") the amount of monetary loss suffered by the tree owner.² *Tip:* Don't engage in stealth tree-cutting when your neighbor has gone on vacation. You're setting yourself up to pay three times your neighbor's loss.

Who is responsible for cleaning up fallen branches or a fallen tree?

If your neighbor's tree or branches have fallen into your yard, they have become a nuisance³, preventing you from the comfortable use and enjoyment of your property. Your neighbor has an obligation to "abate" or remove the nuisance, regardless of whether your neighbor knew that his/her tree had an obvious defect.

When can my neighbor claim that the tree failed because of 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. Your neighbor 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 your neighbor from responsibility.

What role does insurance play?

Bear in mind that insurance is a contract between you and your insurance company. Your insurance company can issue you a check, but cannot give you legal advice about your liability with respect to your neighbor. If your neighbor sues you, YOU are the one in court, not your insurance company. Talk to a lawyer about your legal responsibilities, not your insurance agent.

There are two basic types of insurance: casualty-loss insurance and liability insurance. Casualty insurance covers the loss you have suffered from fire, theft, hail, vandalism, and other calamities. It is often subject to a cap, such as \$500 for removal of tree debris. Liability insurance covers a loss suffered by someone else, for which you can be held legally responsible. For example, if someone slips on your icy steps and breaks his neck, your insurance policy provides coverage.

Where should I go to seek legal help, if needed or if the neighborly approach doesn't work?

Look in the Yellow Pages under "Attorneys/Real Estate or Real Property Law." Also, look in the Gray Pages of the phone directory for Lawyer Referral and Information Service. This service's attorneys often provide a half-hour free consultation to people referred to them.

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² Minn. Stat. §561.04

³ "Anything which is ...an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance." Minnesota Statute §561.01



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.¹

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.”²

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 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.

¹ 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>.

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

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.³ 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.⁴ 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.⁵ 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.⁶ 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,⁷ 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.⁸ 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.⁹ 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 would not shield the tree owner from responsibility. Many tree failures are the result of a combination of factors, both mortal and divine.

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

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

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

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

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

⁷ 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.

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

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

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).¹⁰ 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, unless the tree was 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."¹¹ 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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¹⁰ *Soltis-McNeal v. Erickson and the City of White Bear Lake*, unpublished opinion, No. C3-97-11370 (Minn. App. 1997).

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

Nuisance Trees: Encroaching Branches and Tree Roots



Tensions mount when a boundary tree becomes a nuisance to a neighbor on one side of the boundary and not the other. The best advice is to try to work out the problem in a neighborly way, instead of taking your case to court. This fact sheet answers some of the most common legal questions about trees that have become a nuisance, based on the law in Minnesota. Watch for “Tips” as you read.

What is a nuisance tree?

A Minnesota statute defines a nuisance as follows: “Anything which is ... an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance.”¹ In the context of neighbors and their trees, the branches from your neighbor’s tree that rub against your roof or the roots that push up your sidewalk are considered a nuisance. What about your neighbor’s tree that leans far into your yard and prevents your use of a corner of your yard? If that tree interferes with the free use and enjoyment of your own property, then the tree has become a nuisance.

What is a boundary tree?

Courts sometimes use a more complex definition,² but for most purposes, a boundary tree is one that is either planted on the boundary line between two lots or a tree whose branches, trunk, or roots have crossed a boundary.

Who owns a boundary tree?

Generally, the location of the trunk determines who owns the tree. A tree trunk that stands solely in your yard is your tree. As the tree owner, you can decide to coddle your tree or cut it down, even if your neighbor protest that removing your tree will expose his once-shaded patio to the blazing sun. *Tip:* If you and your neighbor are co-owners of a true boundary-line tree, then you cannot cut down the tree without your neighbor’s consent, and vice-versa. You and your neighbor share the tree-care expenses and responsibilities equally.

How do I determine where the boundary line is?

A survey is the best way to determine the boundary lines of a lot. Look for surveyor stakes or boundary markers. A plat map and legal descriptions help, too. Often neighbors know where the boundary is between their lots. *Tip:* Talk to your neighbor, if you have any doubt about the location of the boundary line.

What can I do if the roots or branches from my neighbor’s tree encroach into my yard?

If the roots or branches have encroached into your yard and become a nuisance, you have the right to fix or “abate” the nuisance, but there are limits. Here are some guidelines:

- Trim overhanging branches up to the boundary line – at your own expense. This right is called “self-help.” [See “What is self-help?” below]
- Trim, but don’t harm the health of the tree or destroy it. For example, cutting off too much of the canopy could jeopardize the tree’s capacity to photosynthesize. Cutting too much of the root system could cause the tree to become unstable and topple over. And pruning an oak between April and September could make the tree vulnerable to oak wilt, a fatal disease. It doesn’t matter that the tree may look funny after trimming it. The

¹ Minn. Stat. §561.01

² See, e.g., *Holmberg v. Bergin*, 285 Minn. 250, 172 N.W.2d 739 (1969).

courts look at whether or not you are harming the tree's health. If you don't know what may harm a tree, consult a tree expert before cutting.

- To find a tree expert or 'arborist,' look in the Yellow Pages under 'tree service,' 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) .
- Don't trespass onto your neighbor's property to trim a tree or shrub. And technically, that means don't even lean over the property line to make the pruning cut, unless you have the neighbor's consent.
- Don't cut down a tree whose trunk is on the boundary line, unless you have the express consent of the owner on the other side of the boundary line.
- *Tip:* Chat before you chop. Even though you are not legally obligated to do so, talk to your neighbor before you do major trimming on your neighbor's tree. It's the neighborly thing to do.

What is self-help?

Property owners in every state have the right to trim the branches or roots of a neighbor's tree that encroach onto their property, up to the property line, at their own expense. This right is called "self-help." Self-help is an alternative to going to court. The rationale is that self-help prevents the wasteful use of the court system to resolve comparatively minor disputes. It's a trade-off: you have the right to cut and remove the encroaching branches or roots of your neighbor's tree, right away, at your own expense (*i.e.*, use self-help), instead of having to hire a lawyer, start a lawsuit, and wait for the courts to sort it out. Using self-help saves you time and money, and keeps the courts from settling disputes between neighbors. In Minnesota, you have the option of using self-help OR going to court, when using self-help is not practical or reasonable. In most other states, self-help is the exclusive remedy.

What are the consequences of trespassing to cut down my neighbor's tree?

Cutting down a tree on another person's property without permission is trespass and carries a stiff penalty. In Minnesota, whoever intentionally cuts down a tree without the owner's permission can be assessed three times ("treble") the amount of monetary loss suffered by the tree owner.³ *Tip:* Don't engage in stealth tree-cutting when your neighbor has gone on vacation. You're setting yourself up to pay three times your neighbor's loss.

What can I do about leaves, twigs, sap, fruit, and other debris from my neighbor's tree?

Leaves, twigs, sap, acorns, etc., are naturally occurring tree debris and do not generally constitute a nuisance. There are no court cases in Minnesota that directly deal with this issue. However, courts in other states have recognized that tree owners are liable for "sensible damage" caused by their trees, such as a damaged roof, but not mere debris from a healthy tree. Going to court to have a neighbor ordered to pick up fallen debris is not practical or economical.

Who owns the fruit on the branches of my neighbor's tree that hang into my yard?

The rule of thumb is that the fruit on the overhanging branches belongs to the tree owner. Picking the fruit may not be so simple. Ownership of the fruit does not give your neighbor any right to trespass onto your property to pick the fruit. The law in Minnesota on this subject is not clear cut. Courts would probably weigh your right to keep trespassers out of your yard against the owner's right to harvest the fruit. The balance may tip in favor of your neighbor, if she owns an orchard and depends on the fruit for her livelihood. The law is also unclear on the issue of

³ Minn. Stat. §561.04

fallen fruit. Once it has fallen, the fruit's value diminishes. It has become, for all practical purposes, "tree debris." You should be able to use or dispose of the fruit, if your neighbor says nothing about wanting it.

Help! My neighbor cut down her tree ... and took the shade in my back yard with it. What recourse do I have? None. If the tree trunk was in your neighbor's yard, it's her tree. She has the right to cut it down, even for the heck of it, and even if doing so exposes your prize-winning hosta garden to all-day sun.

What is the best way to resolve disputes about trees between neighbors?
The best approach is to try to work out the dispute with your neighbor.

Where should I go to seek legal help, if needed or if the neighborly approach doesn't work?
Look in the Yellow Pages under "Attorneys/Real Estate or Real Property Law." Also, look in the Gray Pages of the phone directory for Lawyer Referral and Information Service. This service's attorneys often provide a half-hour free consultation to people referred to them.

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Insurance Coverage and Damage Caused by Trees

When a tree limb falls off or a tree is blown over and causes damage, you have three options: file an insurance claim, take an income tax deduction for a casualty loss¹, or file a lawsuit seeking compensation for the loss.² This fact sheet deals with insurance.

What does insurance cover?

Most insurance covers two things: damage that you experience (casualty) and damage for which you are responsible (liability).

What is casualty insurance and what does it cover?

When it comes to residential landscape plants (trees, shrubs, lawns, etc.), casualty insurance generally covers losses caused by fire, lightning, theft, hail, vandalism, or other calamities. Landscape losses caused by wind, a tornado, or hurricane may not be covered, except to cover the cost to remove a fallen tree from a house or other structure and have the tree debris hauled away. The insurance policy often puts a cap on this type of loss. For example, the insurer may agree only to pay up to \$500 for the removal of the debris from a tree that has fallen. Check your insurance policy for the details of your coverage.

What if my insurance does not cover the loss?

The general rule is that losses not compensated by insurance or other means can be deducted as a casualty loss on a person's federal income taxes.³ The Internal Revenue Service defines a casualty loss as "the damage, destruction, or loss of property resulting from an identifiable event that is sudden, unexpected, or unusual." If the loss is caused by progressive deterioration, the loss does not qualify. Landscape plants (trees, shrubs, and other plants) that are damaged or destroyed by a disease, termites, or other insect pests generally do not qualify as a casualty loss, because the damage is progressive rather than sudden.

If, however, the cause is unexpected and unusual, the Tax Court has allowed a tax deduction. In one instance, the Tax Court found that that a black oak tree attacked by two-lined chestnut borer insect died suddenly – within a few weeks – and constituted a casualty loss.⁴ The taxpayers in that case were allowed to deduct the amount of the diminished value of their property resulting from the loss of the tree. By contrast, termite damage does not qualify as a casualty loss, because it is not sudden.⁵

¹ IRS Publication 547, entitled "Casualties, Disasters, and Thefts." See also, 26 U.S.C. 165(c)(3).

² *Guide for Plant Appraisal*, 8th Edition, Savoy, IL: International Society of Arboriculture (1992).

³ Internal Revenue Code, Section 165.

⁴ *McKean v. Commissioner*, T.C. Memo 1981-670, 42 T.M.C. (CCH) 1709 (1981).

⁵ Rev. Rul. 63-232.

What is liability insurance and what does it cover?

Liability insurance covers loss or damage suffered by someone else for which you can be held legally responsible. For example, if a guest slips and injures herself on your home's ice-covered steps, you could be held responsible (liable) for the injury that your guest suffered.

Does insurance determine who is responsible for losses caused by failed trees?

No. A common misconception, even among insurance professionals, is that insurance coverage determines liability. Responsibility for damages (liability) is determined by legislatures enacting laws or by courts deciding cases. An insurance policy is simply a contract to reimburse an individual for losses suffered or caused. For example, if you have a tree in your yard that you know presents a hazard, you will be liable under the law for damage that your tree causes when it falls on a passerby or on your neighbor's property.

Insurance may cover all or portions of the loss, regardless of who is responsible or liable under the law. Your neighbor's casualty insurance may pay for the damage to his property caused by your tree. If the person who is hurt by the falling tree has a medical insurance policy, that policy will pay for medical treatment. Since you are liable for all of the damages, your liability insurance will likely cover most, if not all, of the losses. Often people rely on insurance to cover their losses, without considering who is legally responsible. However, there are always limitations on what insurance companies pay. If you have legal liability, you will be responsible to pay what insurance does not cover.

What should I do if my property is damaged by my neighbor's fallen tree, and my neighbor insists that I can recover only from my own insurance company?

If you have questions about your liability, you should contact a lawyer and not simply take the word of an insurance agent. After all, if you get sued, it will be you – not your insurance agent – who has to go to court, attend depositions, take the witness stand, and endure all of the stresses that accompany litigation. Courts decide disputes based on the law, not on insurance coverage.

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Tree-trimming and Utility Companies

What is a utility easement?

An easement is the right to use part of another's property for a particular reason. Utility companies have easements across strips of land in order to construct and maintain overhead or underground power lines. The property owner owns the land, but the utility company has a right to enter the strip of land designated as a utility easement. Tree limbs can break during storms and take down power lines. The utility easement allows utility companies to trim trees and branches near power lines to avoid power outages. Xcel Energy, for example, spends more than \$20 million on its year-round tree-trimming program in the upper Midwest, trimming trees along more than 8,500 miles of power lines to assist in its efforts to provide reliable and safe electric service.¹

What rights does a utility company have to trim trees in my yard or next to my property?

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. The utility company tries to remove power-line obstructions in a way that minimizes damage to the property the power lines cross.

A common complaint is that utility-pruning can be unsightly. Tall trees are sometimes pruned to remove the inner branches that touch power lines, resulting in a deep v-shape in the tree's crown. The power line goes through the v-shaped area. Even if the result is not aesthetically pleasing, however, the pruning is balanced, and the tree can survive.

Can I object to the removal a tree in a utility easement?

In a recent court case,² the Minnesota Supreme Court confirmed that property owners have an interest in the trees on city land in front of their property and standing to sue the utility company that removed a boulevard tree. So, you can object to the tree's removal. However, the Court also said that your right to object is subordinate to a utility company's right to trim or remove trees to keep power lines clear. The utility company can remove a tree "if the removal was reasonable and necessary to construct, use, operate, or maintain its power lines."³

What should I do if the tree on my property is touching a power line?

An electrical power company will respond to emergency requests to trim trees or limbs that interfere with power lines or pose a safety hazard. However, electrical power companies will generally not trim trees along power lines from utility poles to houses, unless there is a safety hazard. The power company will de-energize power lines if their customers hire professional tree-service contractors to trim the tree limbs. Call Xcel Energy's 24-hour customer service line at 1-800-895-4999 to schedule an appointment for de-energizing the line to your house.

¹ www.xcelenergy.com

² *Miller-Lagro v. Northern States Power Company*, 582 N.W.2d 550 (Minn. 1998)

³ *Id.* at 552.

Can I plant a tree near power lines?

Before planting a tree in your yard, look up. Are there utility lines overhead or close by? If so, select a variety of tree that will not grow so tall that it will touch utility lines, or the power company may insist on its removal. Or find a location in your yard without overhead utility lines. In either case, do a little research about the tree you want and find out how tall and wide the tree will be at its maturity. A good resource is “The Right Tree” brochure.⁴ Also, remember to call Gopher State One (1-800-252-1166 or 651-454-0002) at least three working days before you dig, to find out where buried utility lines are located in your yard.

My tree fell and took down a power line. Am I responsible for my neighbors’ losses as a result of the power outage? When is the utility company liable?

You are not responsible for your neighbors’ losses unless you had a special relationship with them⁵. In law, this relationship is called a “duty.” A duty can be intentionally created, such as when you invite someone on to your property or agree to be the caretaker of another’s property. A duty can also be created by circumstances, like a duty to eliminate a danger, such as a rotten tree on your property that could fall onto an abutting busy city sidewalk. However, if there is no duty, there is no liability for negligence.

An example that illustrates this duty is a court case involving a power outage that resulted in the death of a number of pigs on a hog farm⁶. In that case, the limbs of a willow tree fell onto a power line and caused a power outage. The tree-owner’s neighbor operated a hog farm. The power outage left the hog farmer’s barn without ventilation, resulting in the death of many pigs. The hog farmer sued his neighbor and the power company. The court ruled that the tree-owner had no duty to protect the hog farmer, because there was no special relationship where the hog farmer had entrusted his safety to the tree-owner.

The court also ruled that the power company was not liable to the hog farmer. The power company had a Rate Tariff which provided that the company would not be responsible for any loss or damage caused by a power outage unless the company had committed gross negligence, which is defined as “very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected.”⁷

To avoid potential conflicts with neighbors or utility companies, manage your trees in a responsible way: plant the right tree in the right place, and hire an arborist to remove hazardous limbs before they cause liability issues.

⁴ *The Right Tree* is a free brochure available by calling Xcel Energy at 1-800-895-4999. It is also available online at www.mnpower.com/treebook/.

⁵ See, e.g., *Donaldson v. Young Women’s Christian Ass’n*, 539 N.W.2d 789, 792 (Minn. 1995). Examples of special relationships include trains or buses and their passengers; innkeepers and their lodgers, etc.

⁶ *Timmerman v. Manguson v. Northern States Power Company*, an unpublished opinion of the Minnesota Court of Appeals, C6-95-2565, May 21, 1996.

⁷ *State v. Bolsinger*, 221 Minn. 154, 159, 21 N.W.2d 480, 485 (1946), quoting *Altman v. Aronson*, 121 N.E. 505, 506 (1919).



Knowing Too Much: Does your advanced tree-care training make you a 24/7 Good Samaritan?

Tree-care professionals with training in risk assessment or the Electrical Hazards Awareness Program (EHAP) are sometimes concerned that they may be responsible for not taking action when they observe a tree hazard. Some feel that their advanced training has made them round-the-clock Good Samaritans with respect to every piece of property they enter, regardless of the reason for entry. Breathe a bit easier and read on.

A Good Samaritan is an individual who, out of the kindness of his heart, assists others who are downtrodden or injured.¹ The first Good Samaritan statute was passed in 1959 in California. Since then, every state has enacted some form of the law. The purpose of Good Samaritan laws is to encourage prompt, voluntary assistance in emergencies and to remove the fear of liability for trying to help. A classic case of an emergency is coming upon a roadside personal-injury crash scene.

In Minnesota, there are two parts to the Good Samaritan law. First, Minnesota's Good Samaritan law provides immunity from liability to a person who gives reasonable assistance at the scene of an emergency.² If the injured person is unintentionally harmed by your attempts to help and sues you, the Good Samaritan law protects you from liability and payment of monetary damages. Second, Minnesota is one of only three states (Rhode Island and Vermont are the other two) that have created a statutory duty to render assistance to a person who is exposed to or has suffered grave physical harm at the scene of an emergency.³ For example, if you come upon a person injured in a car crash, you have a duty to do something to help. It can be as simple as calling 911 for an ambulance.

What does this mean for tree-care professionals? The immunity part of the Good Samaritan law “does not apply to a person rendering emergency care, advice, or assistance during the course of regular employment, and receiving compensation or expecting to receive compensation for rendering the care, advice, or assistance.”⁴ If you respond to a tree emergency in the course of your employment, follow the risk-assessment procedures and policies of your employer. If you are sued for negligence, you may have other defenses, but the Good Samaritan shield does not apply, because you are on the job.

¹ *Gust v. Minn. Dep't of Natural Res.*, 486 N.W.2d 7 (Minn. App. 1992)

² Minn. Stat. §604A, subd. 2 (a), provides: “A person who, without compensation or the expectation of compensation, renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance, unless that person acts in a willful and wanton or reckless manner in providing the care, advice, or assistance. This subdivision does not apply to a person rendering emergency care, advice, or assistance during the course of regular employment, and receiving compensation or expecting to receive compensation for rendering the care, advice, or assistance.”

³ Minn. Stat. §604A.01, subd. 1, provides: “A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.”

⁴ Minn. Stat. §604A, subd. 2(a)

What about the second part of the Good Samaritan law that requires people to give assistance in emergency situations? Everyone in Minnesota has an obligation to give reasonable assistance at the scene of an emergency, regardless of background or employment status. An emergency is defined as a “situation which has suddenly and unexpectedly arisen and which requires speedy action.”⁵ The suddenness or unexpectedness of a situation makes it an emergency. There are no Minnesota appellate court cases dealing with the applicability of the Good Samaritan law to tree emergencies. So, there is no binding legal authority on this subject. But a likely scenario for a tree emergency would be a tree that falls suddenly and injures someone. Any passerby would have an obligation to try to give assistance in that situation.

The Good Samaritan law applies to *present* or *existing* emergencies, *not future* emergencies, according to the Minnesota Appellate Court.⁶ The scenario above about the tree that suddenly fell is a *present or existing* emergency. Trees with defects or other problems are risks that should be properly managed, but they are not *existing* emergencies, unless a tree’s failure is imminent. Arborists are no more expected to be able to predict emergencies than anyone else. If you come upon a genuine emergency (involving trees or otherwise), render assistance, as required by law.

If you come upon a tree that could fail some time in the future but hasn’t yet failed, don’t panic. You are not legally obligated to act to protect another person from a potential danger, unless you have a special relationship with the other person.⁷ A “special relationship” exists between an innkeeper and a guest, a bus company and a passenger, a hospital and a patient, etc. In those situations, the person in need of protection is vulnerable or dependent. A business/customer relationship is not a special relationship.⁸

Although you have no legal obligation to correct every tree problem you observe, your conscience will probably prompt you to report a dangerous tree to the property owner or appropriate governmental agency. You will feel better knowing that you have done what you could to protect the public by putting the tree owner on notice of the problem. You do not have the right to enter a person’s property and cut down a hazardous limb or a tree without permission, even if your intent is to do a good deed by fixing a tree defect. Entering a person’s property without permission is trespass. Cutting down a tree without the tree owner’s permission carries a stiff penalty. A state law provides that whoever intentionally cuts down a tree without the owner’s permission can be assessed three times (“treble”) the amount of damages awarded in court.⁹

Bottom line: Rely on your professional training, good judgment, and common sense. You were trained to be a tree-care specialist, not a guardian angel.

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⁵ *Id.*, 486 N.W.2d at 9.

⁶ *Johnson v. Thompson Motors of Wykoff, Inc.*, No. C1-99-666 (Minn. Ct. App. Feb. 2, 2000)

⁷ *Donaldson v. Young Women’s Christian Ass’n*, 539 N.W.2d 789, 792 (Minn. 1995).

⁸ *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 164, 168 (Minn. 1989).

⁹ Minn. Stat. §561.04.