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Glenn A. McCleary  
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## THE POSSESSOR'S RESPONSIBILITIES AS TO TREES

GLENN A. McCLEARY\*

The Dutch elm disease, killing hundreds of elm trees in every community of any size in various areas of the United States, has created new importance to the problem of liability from damage to persons or property resulting from trees. Where the injury occurs on a street or sidewalk, the question of liability looms large to municipalities, and is likewise of special concern to owners or occupants of abutting property. The possessor is also concerned where the damage is caused by a fall of limbs onto adjoining property.

If the tree was planted by the possessor or his predecessors, or has been artificially preserved from decay which would have destroyed it before the accident occurs, modern principles of negligence or nuisance are applicable. He has helped to create the condition which now constitutes dangers to others. However, where the tree is of natural growth, principles based on fault are somewhat difficult to impose on the possessor since he has done nothing to create the danger. A possessor of land normally is not required to change the natural conditions existing upon his land, or be legally responsible, even where there are foreseeable risks to persons and property upon adjacent lands or to persons traveling upon adjacent highways.<sup>1</sup> He did not do anything to create the danger; usually no duty is imposed to act affirmatively for the protection of others. Early principles of liability were founded in activities which resulted in harm and, since he has done nothing to create the danger, he may remain inactive regardless of the need of others for protection. It has been assumed in the law that those who take possession of land, or establish highways, accept the natural disadvantages from adjoining property, whether it be from boulders sliding

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\*Professor of Law, University of Missouri.

1. Restatement, Torts § 363. Comment *b* (1934): "‘natural condition of land’ is used to indicate that the condition of land has not been changed by any act of any human being. . . ." Traditionally the common law imposed no obligation to take affirmative steps to protect others. Possession or ownership of land alone created no affirmative obligations. See BOHLEN, *STUDIES IN TORTS* 47 (1926).

down a hillside or from noxious weeds, infested swamps, harmful indigenous animals or the natural flow of surface water.<sup>2</sup>

However, in the area of injuries to persons or to their property while using streets and highways from the fall of trees, there has been some development within the past thirty years in the law of liability of possessors. When the *Restatement of Torts* was published in 1934, the advisors could find no American case which expressly held or implied that there was liability for failure to exercise reasonable care to cut down a decayed natural tree or to cut off a branch within the possessor's land so close to its boundaries that its fall would likely injure persons using the adjacent land or traveling the adjacent highway.<sup>3</sup> For this reason, a caveat to Section 363 covering liability for natural conditions was added:

The Institute expresses no opinion as to whether a possessor of land who permits trees not planted by himself or his predecessors to remain on a part of the land near a public highway is or is not under a duty to exercise reasonable care to prevent their condition

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2. Quoting from 1 WOOD, NUISANCE 116 (1883), it was held in *Roberts v. Harrison*, 101 Ga. 773, 28 S.E. 995 (1897): "Where water collects in low, marshy places, and, by reason of becoming stagnant, emits gases that are destructive to the health, and lives even, of the community, this is not a nuisance in a legal sense; and the owner of the land is not bound to drain it, nor can he be subjected to action of indictment therefor. The reason is that, in order to create a legal nuisance, the act of man must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense."

Indigenous animals: *Stearn v. Prentice Bros.*, [1919] 1 K. B. 394 (rats); *Brady v. Warren*, [1900] 2 Ir. Rep. 632 (rabbits and deer). The British cases are discussed by Goodhart, *Liability for Things Naturally on the Land*, 4 CAMBRIDGE L.J. 13, at 19 (1930).

Rocks breaking from a natural formation and falling to do damage: *Pontardawe Rural District Council v. Moore-Gwyn*, [1929] 1 Ch. 656.

For cases holding that the possessor is not liable for the growth and spread of weeds on his property, for the reason that they were the natural growth of the soil, even though cultivation of the soil may make it possible for the weeds to grow: *Giles v. Walker*, [1890] 24 Q.B.D. 656 (thistles); *Harndon v. Stultz*, 124 Iowa 734, 100 N.W. 851 (cocklebur); *Langer v. Goode*, 21 N.D. 462, 131 N.W. 258 (1911) (wild mustard); *Sparke v. Osborne*, 7 Commw. L. R. 51 (Austr. 1908) (prickly pear); and annotation in 83 A.L.R.2d 936, at 939 (1962).

Natural flow of surface water: *Livezey v. Schmidt*, 96 Ky. 441, 29 S.W. 25 (1895).

"The rule of non-liability for natural conditions was obviously a practical necessity in the early cases, when land was very largely in a primitive state." PROSSER, *TORTS*, 431 (2d ed. 1955).

3. See RESTATEMENT, *TORTS* § 233, Comment (Tent. Draft, 1929). A study of the English cases up to 1930, by Professor Goodhart, *Liability for Things Naturally on the Land*, 4 CAMB. L. J. 12, at 18 (1930), found no decision in which the question of liability of an occupier for a tree growing naturally on his land had been considered, for most boundary trees in England, he observed, have been planted.

becoming such as to involve a grave risk of causing serious bodily harm to those who use the highway and the burden of making them safe is not excessive as compared to the risk involved in their dangerous condition.

Twenty-six years later, in the proposed revision of the *Restatement*,<sup>4</sup> Section 363, reaffirmed in its position that a possessor is not liable for physical harm caused to others by a natural condition of the land, but an exception is expressly made that "A possessor of land is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway." The advisory council apparently considered that recent decisions justified the taking of a definite position in the matter.

Furthermore, comment (e) to this section draws a distinction between urban areas and rural areas in the matter of a duty to inspect all trees which may be in a condition as to endanger travelers:

In an urban area, where traffic is relatively more frequent, land is less heavily wooded, and acreage is smaller, reasonable care for the protection of travelers on the highway may require the possessor to inspect all trees which may be in such dangerous condition as to endanger travelers. In a rural area the burden of making an inspection of all trees near the highway is normally out of all proportion to the possible risks involved, particularly where the land is wooded and acreage is large. In such cases the possessor is under no duty to inspect all of his trees. But when he has notice, or reason to know, that a particular tree may be dangerous, he will then be under a duty to examine it, or to take reasonable steps to remove the danger.

Do these suppositions of fact justify one rule of law as to natural growth trees for urban occupiers and a different rule of law for rural possessors? How would the advisors classify suburban occupiers? The proposed revision does not attempt to define the two forms of occupiers according to location, yet this should be done before one can advise as to liability where the trees become dangerous to travelers.

Thus, it seems desirable to examine this change in the law as we knew it thirty years ago as it pertains to trees. There may be other natural conditions in urban and rural areas which endanger travelers on the highway,

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4. RESTATEMENT (SECOND), TORTS § 363 (Tent. Draft No. 5, 1960).

or others outside the land. Responsibility for bushes, shrubbery, and other natural growth may, in urban development, be the next step, but the advisors state that as yet there are no decisions imposing liability.

At no place in the proposed revision enlarging the possessor's liability as to natural growth trees is there a balancing of interest to any extent. Comment (f) to Section 363 does touch upon it in a very vague way: "With continued urban development, it also is possible that there may be other natural conditions for which the possessor of land in a city may be subject to liability if he fails to exercise reasonable care for the protection of others, where the burden of making the condition safe is not excessive in comparison with the risk created by the dangerous condition." No consideration is given to other values: esthetic considerations and property values enhanced by nature, the depreciation of these values due to liability or by the necessity for insurance coverage, the costs involved in inspection and removal, the protection owed to travelers on a public highway or street by governmental units as sufficient protection, and the further diminishing of the values surrounding home ownership in favor of the socialization of land. Where public authorities build the road or street under eminent domain, or if the road is dedicated with trees already matured or growing, or if it is agricultural land upon which trees are likely to grow, the dedication is with these conditions and the responsibility should rest with the public authorities. Those who are responsible for the maintenance of highways, without much difficulty or expense, could inspect for decayed trees and remove them. Municipal authorities in the care of streets and sidewalks do this where it is their duty to keep the streets safe for travel.<sup>5</sup>

#### I. OWNERSHIP OF TREES: RIGHTS OF ADJOINING PROPRIETORS WHERE THERE IS ENCROACHMENT

A more complete appreciation of the rights and obligations in the matter of trees depends upon an examination of the law as it pertains to the ownership of trees as between adjoining proprietors, particularly where there is encroachment across boundary lines. It is well-settled law, where the base of the tree is entirely on the land of the owner, the whole tree belongs to him, and the fact that boughs extend over the land of another does not give the latter any ownership of the overhanging branches or of

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5. The annotated cases are cited in footnote 35, *infra*.

the fruit growing thereon.<sup>6</sup> Where the roots extend under the ground of an adjoining proprietor it has been contended that the proprietor from whose land a tree draws a portion of its support should have some benefit in return. But to attempt to determine the proportion of nourishment the tree draws from his land has been recognized to be impracticable, and creates insurmountable difficulties in trying to apply principles of co-ownership in the entire tree which may vary from year to year as the tree progresses in growth.<sup>7</sup>

Since the owner of the tree has not done anything directly to invade the possession of an adjoining proprietor by the overhanging boughs or by the protrusion of roots there is no liability for trespass, and this is true whether the tree is a natural tree or one planted where the inevitable result will be the entering of another's land. In either situation entry was an act of nature.<sup>8</sup> Where it was assumed that the occupier's title extended to the center of the street or highway, it was held that the occupier had a sufficient property interest in the trees growing in the highway to permit him to maintain an action against any person, except the highway officials, who may wrongfully injure or destroy the trees.<sup>9</sup>

However, the adjoining proprietor is not without some recourse, as it has never been suggested in case law that an interest by prescription may be acquired by the overhanging boughs or the extended roots.<sup>10</sup> It is well

6. *Lyman v. Hale*, 11 Conn. 177 (1836) (conversion to use fruit from branches overhanging the defendant's premises); *Grandona v. Lovdal*, 78 Cal. 611, 21 Pac. 366 (1889); *Skinner v. Wilder*, 38 Vt. 115 (1865) (the title to the fruit depends on the title to the tree); cf. *Hoffman v. Armstrong*, 46 Barb. (N.Y.) 337 (1866). If the fruit on an overhanging tree falls to the ground, the owner of the tree would seem privileged to enter to gather it to save the fruit from decay, see *Hoffman v. Armstrong*, *supra*, where the plaintiff was picking the fruit from a line fence. Attempting to prevent her constituted assault and battery; but see *Mills v. Brooker*, [1919] 1 K. B. 355. Where governmental authority removes trees from street or highway, the profits in them belong to the owner of the tree. See annotation in 9 A.L.R. 1269 (1920).

7. *Lyman v. Hale*, *supra* note 6 (an excellent discussion of the problem).

8. *Lemon v. Webb*, [1894] 3 Ch. 1, [1895] A. C. 1; *Reed v. Smith*, [1914] 19 B. C. 139, 17 D.L.F. 92 (a decayed natural tree on defendant's land fell onto plaintiff's house); but see *dictum contra* where roots protruded from an noxious tree in *Smith v. Holt*, 174 Va. 213, 5 S.E.2d 492 (1939).

9. *Butler v. Zeiss*, 63 Cal. App. 73, 218 Pac. 54 (1923). Cf. *Rentfro v. Wheelock Bros., Inc.*, 364 S.W.2d 55 (K.C. Mo. App. 1962).

10. This was contended by the plaintiff in his action against the defendant for cutting off the boughs of the plaintiff's tree which overhung the land of defendant, but all the judges in *Lemmon v. Webb*, [1894] 3 Ch. 1, in separate opinions, agreed that a prescriptive right could not be acquired by nature's growth. *Lindley, L. J.*, at page 12 said: "According to our law the owner of a tree which gradually grows over his neighbor's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches grad-

settled that the adjoining proprietor has the right to remove up to the boundary such portions of the branches of a tree as extend over his property,<sup>11</sup> and there is the same right to remove encroaching roots.<sup>12</sup> Although there are a few cases in which a court of equity has required the owner of the tree to cut off the overhanging limbs or prevent the roots from entering the adjoining property on a nuisance theory, self-help has usually been considered sufficient relief. In the Massachusetts case of *Michalson v. Nutting*,<sup>13</sup> it was alleged that the roots of a planted tree were clogging a sewer and disturbing the foundation of a building, yet the court denied equitable relief, leaving the individual to protect himself. The court feared

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ually grow . . . it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty. . . ." GALE, EASEMENTS 461 (6th ed. 1888), says "There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbor's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it."

11. The cases are annotated in 18 A.L.R. 655, at 658 (1922); 76 A.L.R. 1111, at 1112 (1932); 128 A.L.R. 1221 (1940). It has been held that no notice is required to the owner of the tree before cutting the overhanging boughs. *Hickey v. Michigan Cent. R. R.*, 96 Mich., 498, 55 N.W. 989 (1893); but see *Lemon v. Webb*, [1894] 3 Ch. 1 (1895) App. Cas. 1, where we must justify a trespass on the land of the owner of the tree for the purpose of cutting boughs or roots projecting into his own land without previous notice. In this case it was observed that better relationships between neighbors will be promoted if notice is given before cutting in order that the owner have the opportunity of removing the encroachment himself. Where the tree or shrubbery is on the common boundary line, the cases are not agreed as to the removal of roots and branches. A more troublesome problem is whether the trunk of a tree on a common border, or portion thereof, may be removed where damages are suffered or threatened. See the few cases on this issue in 64 A.L.R. 2d 668 (1959). Neither of the owners of the common property has a right to damage or destroy the tree without the consent or permission of the other; however, where one of the common owners is making a reasonable use of his property in excavating on his own lot to build a residence, resulting injury to the common tree which cuts and exposes the roots, causing the tree to die, gives rise to no cause of action. *Higdon v. Henderson*, 304 P.2d 1001 (Okla. 1956).

12. *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939 (1895); *Michalson v. Nutting*, 275 Mass. 232, 175 N.E. 490 (1931).

13. 275 Mass. 232, 175 N.E. 490 (1931). *But see Shevlin v. Johnson*, 56 Cal. App. 563, 205 Pac. 1087 (1922), where the roots of eucalyptus and cottonwood trees on the land extended laterally and upward into the adjoining land of the plaintiff, injuring vines, trees, and crops. A judgment was affirmed which required that the possessor of the trees remove the trees entirely, or construct a trench or build barriers sufficient to prevent the roots of both types of trees and the shoots and sprouts of the cottonwood trees from entering plaintiff's land. The roots of a eucalyptus tree, withdrawing moisture and food constituents required for the growing of crops thereon, constituted a nuisance.

vexatious suits, especially where the owner of the tree was using his property in a reasonable way.<sup>14</sup>

Where it is a planted tree, the possessor has been held liable for substantial harm done by overhanging branches or projecting roots to the adjoining proprietor.<sup>15</sup> In some cases it is not clearly stated whether the tree was planted or natural growth, but other facts in these cases support an implication that the tree was planted. However, in *Sterling v. Weinstein*,<sup>16</sup> where the branches of the overhanging tree fell onto plaintiff's building and on a number of occasions stopped up the gutters, resulting in water from the gutters overflowing on the wall and causing plaintiff to expend money to have the gutters cleaned and the wall waterproofed, the court refused to draw a distinction between natural and planted trees:

From a practical viewpoint it is difficult to place liability on one who plants a desirable and attractive tree on his land, and deny liability against another who permits a scrubby and unattractive tree or natural growth to exist on his land. . . . The distinction between purely natural conditions and conditions which in some degree are the result of man's activity may be practical and even necessary in rural areas, but in our opinion such distinction cannot reasonably be made in our jurisdiction which is almost entirely urban.<sup>17</sup>

The court was further impressed with the reasoning in *Michalson v. Nutting*, where it was said: "The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if

14. Deprivation of light and air by reason of height of planted shrubbery, and the alleged rotting of parts of the house and fence by the branches and foliage gave no right to abate. *Granberry v. Jones*, 188 Tenn. 26, 216 S.W.2d 721 (1949); and see *Tanner v. Walbrunn*, 77 Mo. App. 262 (1898), holding that an injunction would not lie to compel the removal of trees because the roots extended into a neighbor's soil. There was no basement under the house and the roots had grown under the stone foundation. There was no showing that damage did or could result to the foundation wall. The court said that this extraordinary relief should not be granted, except where the right thereto is clear and the necessity therefor imperative. Cases based on nuisance statutes seem to find nuisance where the damage consists of litter and clogging of gutters. *Bonde v. Bishop*, 112 Cal. App. 201, 245 P.2d 617 (1952); *Mead v. Vincent*, 199 Okla. 508, 187 P.2d 994 (1917) (roots clogging sewer). *Mattos v. Mattos*, 162 Cal. App.2d 44, 328 P.2d 269 (1958) (litter on grazing land).

15. The annotation on the right to damages where trees, shrubbery, or other vegetation encroach across the boundary line in 18 A.L.R. 655, at 662 (1922), cites a number of cases in England and the United States granting damages. However, in these cases the trees or shrubs seem to have been planted.

16. 75 A.2d 144 (Mun. Ct. App. Dist. of Columbia 1950).

17. *Id.* at 147.



harm results to him from this exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious." By dictum it was pointed out that these cases did not involve noxious trees.<sup>18</sup>

An occasional English case, using language unnecessary to the decision, makes unclear whether this same result should follow where the tree is of natural growth.<sup>19</sup> The authorities relied on in these occasional decisions involve planted trees, which prevents any broader application.<sup>20</sup>

## II. TREES OVERHANGING RURAL ROADS AND HIGHWAYS

The policy, formulated in the feudal period, of recognizing the dominion of the occupant of land to use it as he pleases comes into conflict with the interests of the public in using and enjoying public streets and highways, where damage is caused to users of the highway by the fall of a limb or tree due to natural processes of decay. The responsibilities of ownership of

18. 275 Mass. 232, 175 N.E. 490 (1931).

19. *Davey v. Harrow Corp.*, [1957] 2 All. E. R. 305 (roots); *Smith v. Giddy*, [1904] 2 K.B. 448 (overhanging branches).

20. *Smith v. Giddy*, *supra* note 19, distinctly decided on the authority of *Crowhurst v. Amersham Burial Bd.*, [1878] 4 Ex. D. 5, which involves a planted yew tree, the branches of which extended over the boundary. Plaintiff's horse ate some of the leaves which were poisonous to animals.

In *Sparke v. Osborne*, 7 Commw. L.R. 51 (Austr. 1908), where the branches of a noxious weed known as prickly pear overhung the plaintiff's fence, it was felt that the authority of *Smith v. Giddy* should be restricted to the bounds of the decision in the *Crowhurst* case on which it was based. In the opinion by O'Connor, J., at p. 68, it is said: "It is to be noted, however, that in *Smith v. Giddy*, the question of fact, which was treated in the former case [*Crowhurst*] as one of the most important factors in the decision, was not raised, namely, whether the trees causing the injury had or had not been originally brought on the land by the defendant or his predecessors in title. It may be that, having regard to the nature of the trees, both parties took it for granted that the defendant or his predecessors in title were responsible for bringing the trees on his land, or had dealt with them in such a way as to adopt them for purposes of use or ornament in the occupation of the premises. On that assumption the case may be supported as an application of the principles laid down in *Crowhurst v. Amersham Burial Board*. But, unless that is assumed, the decision cannot be supported on any principle known to the British law." At least *Smith v. Giddy* is not clear as to whether it was a natural growth tree or a planted tree, and the case, although often cited in the English decisions, cannot be considered an authority either way.

It is asserted in *Davey v. Harrow Corp.*, [1957] 2 All. E. R. 305, that *Noble v. Harrison*, [1926] 2 K.B. 332, held there was no difference between trees planted and trees self-sown. However, in the latter decision, the court had before it a case involving injuries to a vehicle in a street caused by the falling of a branch of a beech tree growing on the defendant's land and, therefore, a different situation from the one under discussion where the alleged injury from trees encroaching across a boundary line. Injuries to persons or property in the street from trees is a separate problem to be discussed *infra*.

trees should increase with the magnitude of the risk to the members of the public using the public ways. Another element in balancing these factors is the extent of the burden, if responsibility is placed on the owner or occupant. Balancing these factors, some of the cases make a distinction between lands in rural areas and those in urban areas. Where forest lands are adjacent to little-used rural roads, the burden of inspection to discover defective trees on the occupier's land which may be dangerous to users of the road would seem to be out of proportion to the possible risks involved.

In *Lemon v. Edwards*,<sup>21</sup> an action by a motorist for injuries sustained when a tree fell on her automobile, a directed verdict was sustained for the owner on the ground that the owner of densely wooded land along a little-used road had no duty to inspect trees. There the tree in question stood among other trees some fifteen feet off the roadway. There was little use of the road other than by persons occupying camps on the shores of a lake. The court reasoned that "at least with respect to forest lands adjacent to little-used roads in sparsely settled areas there is a sound basis for not imposing upon the landowner a duty of inspection to determine whether, through natural processes of decay, trees on the land have become dangerous to users of the road. The basis is that such a duty would be an unreasonable burden in comparison with the risk involved." While the facts do not state, it seemed to be assumed that this was a natural-growth tree.

The further consideration was made in *Chambers v. Whelan*,<sup>22</sup> if a duty is to be imposed on the occupant or owner to inspect trees, "it must be held to exist also with regard to other natural objects which may endanger travelers along public highways, such as rocks, cliffs, and boulders, the inspection and removal of which in a mountainous country would impose an intolerable burden upon the landowner." In this case the tree stood on a large tract of land about two miles from a small town and within twenty feet of a public highway. It was approximately seven feet in circumference at the base, approximately forty feet in height, and had been dead for ten or more years. It was alleged that it was rotten and decayed to an extent that a large portion had sloughed off, leaving it hollow with a large opening in the trunk. The court distinguished the factual situation from that of a city or suburban dweller who plants or maintains trees

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21. 344 S.W.2d 822 (Ky. 1961).

22. 44 F.2d 340, 341 (4th Cir. 1930) ("In the early days of the Republic, the mere suggestion that it was the duty to inspect trees on rural lands would have excited ridicule."); *Zacharias v. Nesbitt*, 150 Minn. 369, 185 N.W. 295 (1921).

overhanging a highway, or from that of one who, with knowledge of the dangerous condition, maintains the tree on his property when it is liable to fall. It was held that no duty was owed to inspect trees growing naturally on rural lands, to determine whether they have become dangerous through natural processes of decay, because of their proximity to a highway.<sup>23</sup>

Another factor which seems to have some bearing in these decisions is the responsibility of the public authorities for the safety of the highways, even though there may be no liability because of it being considered a governmental function.<sup>24</sup>

Other decisions impose a duty to inspect trees along a rural highway if there is a foreseeable risk of injury, although actual knowledge of the danger is not present. In *Brandywine Hundred Realty Co. v. Cotillo*,<sup>25</sup> the tree stood on the defendant's suburban forest land about 10 feet from the highway. The tree had been dead for four years but there was no other exterior evidence of decay. The trial court submitted the case to the jury and a verdict was found for the plaintiff. On appeal, the question was whether the trial court should have given binding instructions for the defendant. The court held that the negligence of the occupier was for the jury. The trial court had instructed the jury as follows:

The condition of the tree in question was the result of natural causes; still, if such condition was known or by the exercise of ordinary care could have been known by the defendant, then it became the duty of the defendant to exercise reasonable care and diligence to prevent the tree from falling and injuring those who might have occasion to use the public highway.<sup>26</sup>

The duty to inspect in that case for dangers due to defective conditions existing in the tree must be limited to the fact that the tree had been dead for four years, since there was no exterior evidence of decay otherwise.

Where the danger is apparent, so that the owner may see with his own eyes, the foreseeable risk to persons using the highway is more clearly established and a duty to inspect is recognized. However, this does not

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23. *Hay v. Norwalk Lodge*, 92 Ohio App. 14, 109 N.E.2d 481 (1951); *but cf. Medeiros v. Honomu Sugar Co.*, 21 Hawaii 155 (1912), where the tree near a public highway fell from natural causes was placed in the same category as a building or other artificial structure abutting on a highway or street, if the defective condition could have been known by ordinary care.

24. See cases cited *supra* notes 19 and 20; *O'Brien v. United States*, 166 F. Supp. 231 (D. Ore. 1958).

25. 55 F.2d 231 (3d Cir. 1932).

26. *Ibid.*

mean that there is a duty to inspect growing trees adjacent to the highway to ascertain whether or not there are defects which may result in injury to travelers on the highway, but a duty arises only where the owner has knowledge of a patently defective condition of a tree which may result in injury. This does not seem too great a burden on owners of land as it is only when injury to the tree or decay interferes with natural processes that responsibility arises.

In *Hay v. Norwalk Lodge No. 730, B.P.O.E.*,<sup>27</sup> the allegations of the plaintiff were that the tree had been struck by lightning, extensively damaging and weakening it, and that the damage was visible and apparent to the owners for several years. On demurrer to the petition it was held to state a cause of action in negligence. In reviewing the decisions pertaining to the liability of owners of land abutting on a public highway for injuries resulting from falling trees, the court declared the applicable law to be

that in the absence of knowledge of a defective condition of a branch of a tree which in the course of natural events is likely to fall and injure a person on the highway, no liability attaches to the owner of the tree. On the other hand, where the owner has knowledge of the dangerous condition of the tree or its branches, it is his duty to exercise reasonable care to prevent the fall of the tree or its branches in the highway.<sup>28</sup>

In *O'Brien v. United States*,<sup>29</sup> the fact that the tree was dead and apparently had been dead for some time, and that the Forest Service employees obviously knew that some of the trees on this particular tract were dead, did not show knowledge of the danger. After noting the conflict in the decisions which have just been discussed, the court preferred to follow those cases holding no duty of inspection for defects to those using the highway across which the dead tree fell. A factor not present in the previous cases weighed heavily in the decision, namely that the economy of Oregon was largely dependent upon the lumber industry, and the burden of inspection of trees in commercial and noncommercial forests of that state would be "unthinkable." The court also attempted to distinguish the cases

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27. 92 Ohio App. 14, 109 N.E.2d 481 (1951) (a common tree standing on the boundary line between adjoining owners).

28. 109 N.E.2d 481, at 485.

29. 166 F. Supp. 231 (D. Ore. 1958); and see *Albon v. National Bank of Commerce*, 375 P.2d 413 (Wash. 1962), where a natural growth tree left standing following a logging operation may have created a dangerous condition on the land.

where a duty to inspect has been held on the ground that the highway was little used at the time of the accident, although no facts were stated as to the extent of its use.

Assuming a court adheres to the view that a duty is owed where the dangerous condition is apparent, a further problem is what facts will show this knowledge. In the *Hay* case the allegations were that the tree had been struck by lightning, extensively damaging it. This was thought to show knowledge. In *Brandywine*, the tree had been dead for four years but there was no other evidence of decay. In *O'Brien*, it was said that a dead tree is not necessarily a dangerous tree. In *Brown v. Harrison*,<sup>30</sup> a horse chestnut tree appeared not to be a normal, healthy tree, in that the top branches failed to possess the normal foliage of a healthy tree of that variety, but instead seemed to be dying. The bottom of the tree apparently still showed some signs of life. The English Court affirmed the finding of the trial court that the danger was apparent to the ordinary layman if he chose to notice it. In *Medeiros v. Honomu Sugar Co.*<sup>31</sup> the evidence of the plaintiff tended to show the tree was from forty to fifty feet in height and about two feet in diameter; that it was an old eucalyptus tree; that it was leaning a little towards the highway; that it was "kind of rotten" and some of the foliage was dry; that some of the roots were exposed; and that there was a hollow under the trunk of the tree and also a hollow in the tree itself. A verdict for the plaintiff was affirmed.

Difficulties are inherent in determining whether the defect was known, or by the exercise of ordinary care could have been known, where the dangerous condition is due to natural processes of decay. In *Plesko v. City of Milwaukee*,<sup>32</sup> the trunk of an elm tree which fell into the street had a diameter of two feet eight inches. The stump remaining was about six and a half feet high on the side nearest the sidewalk and about three feet high on the side nearest the curb. Because of interior decay, the stump was a hollow shell with about three inches of bark and sapwood forming its outer circumference. A janitor of the abutting building who had mowed the grass between the sidewalk and the curb and was familiar with the tree, testified that he had observed a large hole on the side of the tree nearest the sidewalk. The hole extended upward about two and a half feet from the base of

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30. 177 L.T.R. (n.s.) 281 (C.A. 1947).

31. 21 Hawaii 155 (1912).

32. 120 N.W.2d 130 (Wis. 1963).

the tree. Sawdust-like material came out of the hole from time to time and a few years earlier the city firemen had extinguished a fire in this hole. Decayed material from the interior of the tree continued to come out of this hole, accumulating at times in such quantities that the sidewalk had to be swept. The evidence was held ample to support the jury's finding of negligence in the abutting proprietor. A high wind averaging thirty-five to thirty-seven miles an hour with gusts reaching forty-six to fifty-two miles per hour was held not an intervening force to supersede the negligence of the possessor as a legal cause of the accident.

On the other hand, where an elm tree 120 to 130 years old was felled by an ordinary gust of wind, injuring persons driving along the highway, and it was discovered for the first time that disease had attacked the roots, causing them to rot, the occupier of the property was held not liable to the persons injured, either on the ground of negligence or nuisance, where there was nothing in the appearance of the tree to indicate that it was likely to be blown over. It was not shown that the defendants either knew or ought to have known of the danger.<sup>33</sup>

### III. TREES OVERHANGING STREETS AND HIGHWAYS IN URBAN AREAS

The responsibility of abutting proprietors in urban areas for damages sustained by those using the public ways is more uniformly established in the cases. The commentary to Section 363 of the *Restatement*<sup>34</sup> justifies these cases on the ground that "In an urban area, where traffic is relatively more frequent, land is less heavily wooded, and acreage is smaller, reasonable care for the protection of travelers on the highway may require the possessor to inspect all trees which may be in such condition as to endanger travelers." The commentary then compares the burden of making an inspection of trees near a highway in urban areas with the burden in rural areas.

It is questionable whether this generalization as to the relative burdens of inspection between urban and rural areas in this country is sound. In rural areas, the highway commissions in the performance of their duties have widened roads to the extent that the risks from falling limbs and trees have been greatly lessened; in urban areas, beautification and the

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33. *Caminer v. Northern & London Investment Trust, Ltd.*, [1949] 2 K.B. 64, 11 A.L.R.2d 617 (1950).

34. *RESTATEMENT, TORTS* (Tent. Draft No. 5, 1960).

promotion of esthetic values in many parts of the country have encouraged the growth of trees along the streets and highways to an extent of creating a considerable burden to the possessor of inspection. In fact, land in many urban areas is more heavily wooded along streets and highways than in the rural areas, resulting in increased property values.

Therefore, it would seem that the justification for an exception to the general principle that a possessor owes no duty to others outside the land as to natural conditions, should be based not so much on the burden of placing the risk on the possessor as on the magnitude of the risk to those using the streets and roads in urban areas. Where the tree is planted, the risk should be assumed by the possessor, and the decisions are clear.<sup>35</sup> Where, however, the tree was not planted but of natural origin, a duty of inspection as to foreseeable risks is not too great a burden on the possessor of land when compared with the magnitude of the risk to the public. Differing from adjoining owners, who may use self help in protecting himself from the risk of a natural growth extending into or above his land, the individual members of the public cannot use similar self-help measures.

Where the injury results from the fall of trees into the street, the theory of liability is usually nuisance if the facts show that the possessor of the land on which the tree stood knew of its dangerous condition or where the condition had existed for such length of time that, by the exercise of ordinary care, the possessor ought to have discovered the danger and to have removed it.<sup>36</sup>

Contentions are sometimes made that, by virtue of city ordinances, the control over trees bordering streets has been taken over by the city and the abutting owner no longer has any responsibility to remove a tree which has become a hazard even if its dangerous condition is known, or in the exercise of ordinary care should have been known to the abutting proprietor.

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35. RESTATEMENT, TORTS § 840 (1939). The leading authority is *Weller v. McCormick*, 52 N.J.L. 470, 19 Atl. 1101 (1890) (planted by a predecessor in title). The evidence tended to show that the limb which fell and part of the trunk was rotten, that the limb was dead for some time before the accident, and that defendants has been in possession through one season of foliage and part of another. This evidence made a submissible case of negligence.

36. *Brown v. Milwaukee Terminal Ry.*, 199 Wis. 575, 227 N.W. 385 (1929), noted in 14 MINN. L. REV. 431 (1930), observing that no importance was apparently attached whether it was a planted or a natural growth; *Plesko v. Allied Inv. Co.*, 12 Wis.2d 168, 107 N.W.2d 201 (1961); *Falco v. Bryn Mawr Trust Co.*, 10 Pa. D. & C. 115 (1927) (lessor liable where the tree was in a dangerous condition at the date of the lease).

However, these ordinances usually are considered to be regulatory only and do not exclude the proprietor from dominion over the property bordering the street where the trees stand. More commonly, these ordinances regulate the planting, maintenance and removal of trees by the abutting owner; other types of ordinances provide for similar activity by the city at public expense.<sup>37</sup> Where such trees constitute defects in the street, the municipality may also be liable.<sup>38</sup>

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37. See *Brown v. Milwaukee Terminal Ry.*, and *Plesko v. Allied Inv. Co.*, *supra* note 36. In the latter decision the court concluded that, unless an abutting owner be excluded by law or ordinance from removing a dangerous tree from the area between the sidewalk and the curb, he still has dominion over the tree with power to remove it at any time. Also, see dictum in *Chambers v. Whelen*, 44 F.2d 340 (4th Cir. 1930).

38. The cases are collected in an annotation in 19 A.L.R. 1021 (1922); 49 A.L.R. 840 (1927); 72 A.L.R. 615 (1931); 11 A.L.R.2d 626 (1950); 14 A.L.R.2d 186 (1950); 54 A.L.R.2d 1195 (1957).