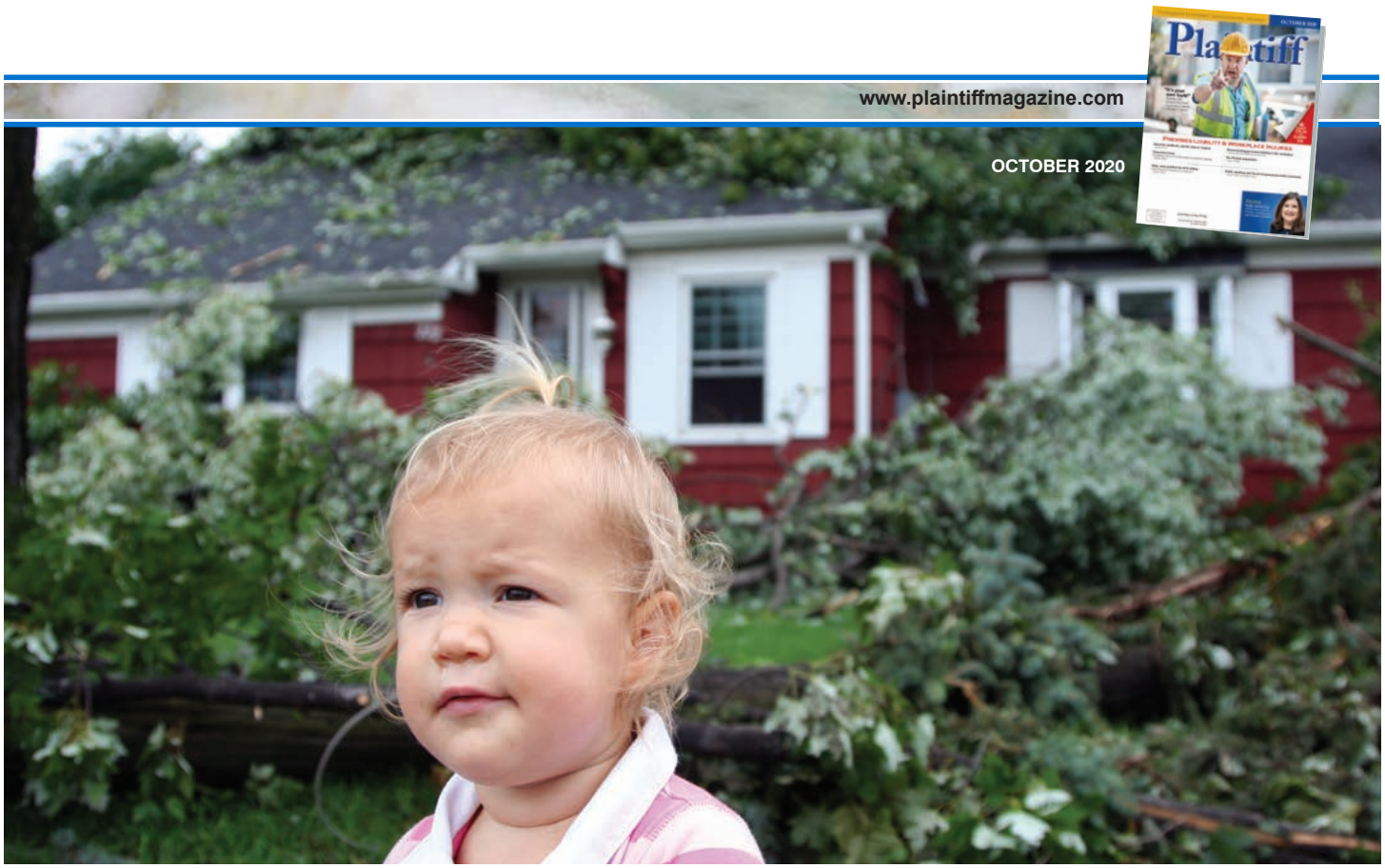

Hazardous trees

For injuries from a falling tree or branch, you need to navigate around the immunities to establish liability

By Jeremy Cloyd

California's street tree population is a growing multi-billion-dollar public asset according to a 2015 US Forest Service study. Tree managers do not always fund the maintenance needed to keep this public benefit in good condition, which leads to hazardous trees and public liability. San Francisco's Bureau of Urban Forestry recently found that inadequate funding raised concerns about the long-term health and future of the City's trees.

Poor tree management results in death and disability every year. Two of the top ten personal-injury settlements in 2018 were on behalf of people catastrophically injured by hazardous trees. While arborists may say there is no such thing as a safe tree, owners manage risk and liability by making maintenance decisions based upon a hazard evaluation. The factors that go into this evaluation include the size of the part of the tree likely to fail, the likelihood of failure, and the likelihood that a failure will result in injury.

This article discusses evaluating liability for injuries caused by hazardous trees in the context of these factors and the likely legal claims and defenses.

Early investigation

Early investigation is especially important in hazardous tree cases because municipalities are likely to quickly clean up fallen trees and branches. Evidence of rot and disease, pruning history, and fractures can end up in the woodchipper or compost heap before it can be preserved. Basic information about the size and the shape of the hazardous part of the tree may be important and not obtainable from other sources once lost. When contacted about a tree injury, immediately go to the scene. Preserve evidence through photographs, sampling, and preservation letters.

Hire an arborist to inspect the scene too. Arborists have trained eyes and experience to look for signs indicating the tree was hazardous. An arborist will also help collect and sample evidence and can refer you to consult subspecialty experts if needed.

A basic understanding of tree evaluation principles will help you identify the important facts, circumstances, and history when conducting your investigation and also help you establish the rules for your case. Consider reading up on the evaluation of tree hazards. "A Photographic Guide to the Evaluation of Hazard Trees in Urban Areas" by Nelda P. Matheny and James R. Clark is an accessible and helpful text.

Some investigation can be done from your office. Request records of maintenance history, permits, work orders, evaluations, and complaints from applicable municipalities under the California Public Records Act (Gov. Code, § 6250 et seq). Historical photos showing changes to the tree and the surrounding area over time may be available from

Google Earth and aerial imagery archives such as UC Santa Barbara's collection. In one recent case, historical photographs helped pinpoint the date when roadway trenching likely damaged a tree's root structure.

"Dangerous condition of public property"

Claims for injuries caused by public trees on state or local government property are governed by California Government Code section 835, subdivision (a). Section 835(a) says a public entity is liable for a "dangerous condition" that "created a reasonably foreseeable risk of the kind of injury which was incurred." The plaintiff must also prove either (1) a public employee created the dangerous condition or (2) the public entity had enough "actual or constructive notice of the dangerous condition" to do something about it.

Whether a tree is a dangerous condition depends on the circumstances bearing on the likelihood of a failure, the size of the failure, and the likelihood of injury if a failure occurs. Courts must consider surrounding circumstances and relevant factors in determining whether a dangerous condition may exist. (Gov. Code, § 830.2; *Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 271). The scope of your evaluation should therefore be broad. What about the size of the failure made it dangerous? Was it an abnormally large branch over a park bench? What evidence is there that this tree part was likely to fail? Were their signs of old cracks or decay? Were there other branch failures indicating a systemic problem? What about the location of the tree contributed to the hazard? Is it located in an area where people congregate or is it in the middle of a forest?

These questions are also relevant to the public entity's notice under section 835(a). Actual notice may be established by the observations of a single public employee. In *Smith v. San Mateo County* (1934) 62 Cal.App.2d 122, 128 "…at least one employee of the defendant county… observed that this was a spike-topped tree which indicated, according to his testimony, that it was an undernourished, dying and "dangerous" tree. *Smith* also held that the existence of the condition "which should have been known and seen" for many years was sufficient to show constructive knowledge. (*Id*. at 128.) The greater the number of indications that the tree posed a hazard to the public will increase the likelihood that the tree owner had notice.

Public records regarding the tree's maintenance and complaint history can be particularly helpful in establishing notice. In one recent case, public records showed a park manager pleaded with maintenance crews years before plaintiff's injury: "These trees are dangerous. Please help." Finding such an express admission may be uncommon, but maintenance records should at a minimum help identify those persons who were in a position to identify indications that the tree was hazardous.

Immunity for natural conditions of unimproved property

Under Government Code section 831.2 public entities are not liable for "an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." Public entities will claim that an injury-causing tree is both "natural" and growing on "unimproved property."

The natural conditions immunity should not generally apply to trees in public places. The immunity was designed to allow the public to use "property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the State." (*County of San Mateo v. Superior Court* (2017) 13 Cal.App.5th 724, 731, citing *Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 832-833.) "The Supreme Court has directed courts to apply the natural condition immunity 'in accordance with [this] expressed purpose and refuse to apply it when application would not further the expressed purpose.'" (*Id.* at 832.)

Defendant must establish the dangerous condition was both a "natural condition" and located on "unimproved property" for immunity to apply. Do not assume a tree is a "natural condition." The "planting of real property for landscaping purposes" constitutes a "work of improvement" under Civil Code section 8050. Whether the tree was planted, native, irrigated, and pruned are all relevant to show the tree was not "natural" but rather an "improvement." (See e.g., *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 177 [judicial notice that tree was native].) These are details that should be documented during your early inspection.

The second element, "unimproved public property," is not clearly defined, but indicates a "physical change" in the condition of the property. (*Eben v. State of California* (1982) 130 Cal.App.3d 416, 421.) You should look for, photograph, and map improvements around the tree like landscaping, irrigation systems, electrical, paths, benches and any other amenities that distinguish the property from a land untouched by human development.

Be sure to also read *Alana M. v. State of California*, 245 Cal.App.4th 1482, 1489 and its holdings regarding (1) which property is relevant when the injury and tree are in different locations; and (2) whether only improvements with a causal relationship to the injury are relevant. But also read *County of San Mateo*, *supra*, 13 Cal.App.5th at 724 which questions *Alana*'s reasoning and holdings in light of other precedent.

Recreational trail immunity

Government Code section 831.4 provides the government with immunity against liability for injuries caused by a condition of a recreational trail. Public entities have asserted this immunity in hazardous tree cases when the injured party happens to be on or near any type of walking surface.

The Court of Appeal in *Toeppe v. City of San Diego* (2017) 13 Cal.App.5th 921,

930-31 limited recreational trail immunity to cases where plaintiff's injury was actually caused by a condition of a trail itself. In *Toeppe*, the defendant argued that because the plaintiff was walking on a trail when a branch fell and injured her, the recreational trail immunity applied. The Court disagreed because there were "no allegations that she was harmed based on a condition of the trail." (*Id.* at 931.) Be careful when framing allegations that location of a trail increased the risk of harm of a hazardous tree.

Federal immunity for discretionary acts

The federal government claims sovereign immunity for discretionary acts "involv[ing] an element of judgment or choice." (*Berkovitz v. United States*, (1988) 486 U.S. 531, 536.) The United States may claim policy reasons justified not mitigating or warning of a hazardous tree and therefore immunity applies.

Kim v. United States, 940 F.3d 484 (9th Cir. 2019) – and the underlying trial court ruling – is required reading when drafting a complaint relating to a hazardous tree on federal land. In *Kim*, the Court reversed the dismissal of negligence claims brought by the families of two boys killed by a branch that fell on them while sleeping in their campsite. Plaintiffs alleged that Park officials knew the tree was dangerous but failed to either warn or mitigate the hazard as required by the park's own rules. The Court held that once the park undertook to evaluate tree hazards it was required to do so in accordance with park rules. And although the Court recognized the park may have discretion in how to mitigate the risk, Plaintiffs' allegations that the park did nothing allowed the negligence claims to survive under the Federal Tort Claims Act.

Claims against private landowners

Private landowners owe a duty of reasonable care to warn against or repair hazardous conditions of property under *Rowland v. Christian* (1968) 69 Cal.2d 108, 119. An individual's duty to use care with trees has been applied to various scenarios including: the failure to control trees' "natural propensity to drop their limbs" (*Coates v. Chinn* (1958) 51 Cal.2d 304, 309); the failure to protect an adjacent property owner from falling branches (*Garcia v. Paramount Citrus Assn., Inc.* (2008) 164 Cal.App.4th 1448); and foreseeable harm resulting from damaging tree roots coming on to one's property (*Booska v. Patel* (1994) 24 Cal.App.4th 1786).

If your client was injured on private property opened to the public for a recreational purpose (such as a private campground or trail) you must be aware of the Recreational Use Immunity and exceptions set forth in Civil Code section 846.

Claims against contractors

Your investigation may identify third-party contractors that contributed to or omitted to correct a tree hazard. Potential defendants include: tree-pruning companies whose work fell below the standard of care; arborists who failed to identify a clear and present danger; and construction or utility companies whose work caused damage leading to a failure. Public records such as work permits, contracts, and maintenance history may identify such companies and their role and relationship to a tree hazard.

Third-party contractors will argue they had no relationship with the plaintiff and owed plaintiff no duty of care. Whether such a defendant "will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650*:* See also *Lichtman v. Siemens Indus. Inc.* (2017) 16 Cal.App.5th 914, 922.) These factors are of course similar to the questions regarding the degree of hazard discussed above.

Third-party contractors may also have liability for negligently undertaking a responsibility. Liability may exist if (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied. (*Paz v. State of California* (2000) 22 Cal.4th 550, 553.)

Conclusion

Evaluating tree hazard cases can be difficult because of the tension between the public benefits that trees provide and the potential liabilities they carry when not properly maintained. Pursuing a case requires a thorough investigation and identification of the factors that would require a tree manager to mitigate or warn. A strong, focused inquiry into the issues outlined above will help resolve these issues and allow you to reach a fair resolution for your client.

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