

Tree damage could put you out on a limb

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Trees provide building materials, food, beauty, shade and pollen - at least for some of us. Falling trees and falling limbs provide a source of danger and sometimes litigation. Although trees have been around longer than we have, the law of trees is surprisingly sparse.

The common law - Under common law, a landowner has no responsibility to adjoining landowners for damage caused by trees in a natural state, regardless of their dangerous condition. The common law imposes no duty on a landowner to discover and remedy potential hazards arising from trees in a natural condition.

Self-help as a remedy - An important part of the common law rule is that the adjoining landowner may cut and trim branches and roots that intrude into his property from a tree or hedge on his neighbor's property. The adjoining property owner is not required to stand idly by while a neighbor's tree or hedge causes potential or actual harm. In the absence of any legal duty upon the tree owner, the adjoining property owner has self-help as a remedy.

Smith v. Holt - In 1939, the Virginia Supreme Court considered a complaint filed for an injunction and for monetary damages arising from the invasion of the adjoining property by the branches and roots of a hedge planted along the boundary line between two lots. Because the hedge was not "noxious" in nature and because the property owner was not suffering "sensible injury," the court ruled that the only relief available to the adjoining property owner was the self-help remedy of cutting and trimming intruding roots and branches to protect his property. The court observed that the result might have been different if the adjoining landowner had continued to suffer "sensible injury" after giving notice of that injury to the owner of the hedge.

Fancher v. Fagella - In 2007, the Virginia Supreme Court abandoned the "noxious" plant and "sensible injury" principles set forth in *Smith v. Holt*. The court held that an adjoining property owner could bring suit when encroaching tree roots and overhanging branches cause actual harm or pose an imminent danger of actual harm to the adjoining property owner. The court discussed the remedies that might be available to the adjoining property owner including, in appropriate cases, injunctive relief to compel the tree owner to protect his neighbor from injury and damage and the remedy of self-help described in *Smith*. The willingness of the court to permit the adjoining property owner to seek relief may have been influenced by the substantial damage incurred by the

adjoining property owner from a large sweet gum tree - damaged and displaced retaining wall, buckled patio, blocked water and sewer pipes, and impaired townhouse foundation, which could not be adequately remedied through the use of self-help.

Cline v. Dunlora South - This summer, the Virginia Supreme Court once again considered the potential liability of a tree owner. In this case, a tree located on private property fell onto a public highway and injured the passengers in a passing automobile. In a 4-3 decision, a majority of the court rejected the argument that principles of ordinary negligence should apply to natural conditions on the land. The court refused to extend the rule in the Fancher case to impose a general duty on landowners to inspect and cut down dead or decayed trees.

So, what about that tree in your backyard? The Virginia Supreme Court has not yet addressed the liability of the owner of a dead or decayed tree to an adjoining private property owner. Under the common law rule, the adjoining property owner will not have a remedy against the tree owner arising from damage caused by the death or decay of the tree. In the absence of any duty on the part of the tree owner, the only remedy available to the adjoining property owner may be a form of self-help - requesting permission to come onto the property of the tree owner and trim or remove the tree at the adjoining property owner's cost and expense.

In an appropriate case, however, the court may yet hold that, if a dead or decayed tree is causing actual harm or poses an imminent danger of actual harm to adjoining property, the owner of the adjoining property has the right to sue for injunctive relief to compel the tree owner to remove the dead or decayed tree or at least to sue for damages if the tree falls and causes personal injury or property damage to the adjoining property owner. The court may be more inclined to reach this result if the risk of injury or damage is great and the adjoining property owner notifies the owner of the tree about its dead or decayed condition.

Doesn't insurance cover all of this anyway? A complete review of insurance coverage is beyond the scope of this article, but four general principles should be noted.

* Liability insurance policies provide coverage for loss or damage caused by an accident or occurrence. As a general rule, insurance coverage will not be available for the cost of removal of a dead or decayed tree that has not yet caused injury or damage to either the tree owner or the adjoining property owner.

* As a general rule, the insurance policy of the property owner who incurs the injury or damage will cover the loss even if the injury or damage is caused by a tree owned by the adjoining landowner. Each property owner must look to his insurance, not that of his neighbor, to cover the loss.

* If a higher wind deductible or hurricane deductible is applicable, the property owner incurring the cost of removal and repair may have to bear more of the loss before insurance coverage comes into effect.

* Insurance policy coverages and exclusions can and do vary; it is always important to review the specific language in your insurance policy to determine what situations may be covered and what losses will be excluded.

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