Raising the Bar for Tree Safety: Part One

By Marty Shaw, RCA #470

Background

On the morning of December 29, 2009, a New Jersey boy named Noah Asid, a 4th grader on winter break from Hampstead Elementary School in Hampstead, Maryland, was struck by and later died from severe head injuries he received as a result of a tree failure at a government-owned children's camp in Carroll County, Maryland. Noah Asid was only 9 years old. The episode was recounted widely in the news, and almost two years later, in December 2011, an article appeared in the *Baltimore Sun* reporting that the family had filed a lawsuit. This article was posted on the ASCA LinkedIn discussion page, where it sparked a lively debate among group members. Coincidentally, in October 2011, I was retained in a remarkably similar case. This one involved the death of a 12-year-old Texas boy who was struck by a dead tree at a private children's camp in December 2010.

In the Maryland case, the *Baltimore Sun* article reported that Noah Asid was walking with other visitors of Hashawha Environmental Center when he was struck in the head, causing severe injuries and subsequent death. In the Texas case, 6th grader Mathius Berhanu was attending an outdoor orienteering class at Sky Ranch in Van, Texas, when he was struck in the head by a tree top from a dead pine tree that broke off and fell during a gust of wind. He died later from his injuries.

No one disputes the tragedy of these two cases. We can sense the emotional toll on parents and other family members. Long to heal will be the emotional scars of the dozens of children who witnessed their friends being killed. We feel for the youth counselors and administrators who must re-live the agonizing moments of those terrible days.

Naturally, the sensational aspect of cases like these could easily cause us to jump at one of many rash conclusions about who was at fault and why. Were these tragedies the result of poor public policy regarding tree safety or was it just a momentary lack of judgment by a group of young camp counselors? Was this an "act of God" or was this an act of "willful neglect" and "wanton disregard for human life"? Juries may have to decide

Construction damage.

A mom and her children (park visitors) narrowly escaped death when this long-dead tree failed.

This tree died just weeks after construction began. The dead tree was still looming overhead a year later.

the truth about such questions in cases just like these. Assignments like this are just the type for which ASCA members are called upon to inform the courts. Who, if anyone, was at fault and why?

To examine these questions satisfactorily, we must set our emotions aside and look at the cases with independent objectivity. In the Texas case, evidence showed that the focal tree had been dead for 14 to 18 months prior to the tree failure that killed Mathias Berhanu. In fact, the camp leaders testified that they had inspected the area just a few months earlier and saw that the pine tree was dead but took no action. The camp manager decided to leave the dead tree standing as an environmental education prop for the children who would be orienteering in the nearby outdoor classroom. That outdoor classroom was well within the fall radius of the tree.

The *Baltimore Sun* article cited a report produced by the Maryland Department of Natural Resources that said there was decay in the tree and that the tree had been dead for some time before it fell. The article did not say that the camp knew the tree was dead or that the tree appeared to be dead before it fell. It also did not say exactly what the camp's tree safety policy was regarding the removal of dead trees. The article did, however, indicate that the lawsuit accused Carroll County of being "more interested in protecting its buildings than it was in protecting Noah Asid and the other children."

The *Baltimore Sun* article also indicated that youth counselors at the Hashawha Environmental Center took the young campers for a walk outside during a National Weather Service high-wind advisory, putting the children at risk. Noah Asid and the other kids were walking along a paved path near the dead and decaying tree. The fact that the pathway was sometimes occupied by children and

Live ivy obscured this dead tree for many years before it fell.

This dead tree was ignored for many months before it fell and damaged the cedar roof of this building.

This dead tree had a vine growing on it, making it seem partially alive. The tree landed on an out building and smaller tree, causing considerable damage.

staff was well known. The *Baltimore Sun* article infers that the camp's tree safety policy encompassed removing dead trees near buildings but not near pathways.

Likewise, camp counselors at Sky Ranch took the young children in their care into a wooded area containing dead trees and had them sit in an outdoor classroom during a National Weather Service high-wind advisory. The Sky Ranch tree safety policy did not call for mitigation of dead trees standing where they could fall on children. Their policy (stated at deposition) was that dead trees were not capable of catastrophic failure.

When news of the Maryland tragedy first reached the LinkedIn ASCA discussion group, interest in the topic erupted with many postings and generated much debate. This flurry of bantered opinion and commentary has piqued the interest of both ASCA members and non-members ever since. The first online discussion, back in 2011, revolved around tree safety and a recreational land owner's duty to act responsibly. In 2014, another posting about a child who was killed by a falling tree in a backyard zip-line incident reignited the online debate, and the topics of discussion expanded to include recreational use standards, acts of God, tree failure predictability, resource allocation, Tree Risk Assessment Qualification (TRAQ), A300 Risk Assessment Standards, and other important issues.

Tree Owner Duties and Responsibilities

According to the book *Arboriculture & The Law* (Merullo and Valentine), past case laws prescribe that tree owners have a duty to care for their trees in such a way as to prevent damage, injury, and/or the loss of life. A tree owner has the reasonable duty to inspect his or her trees in order to detect obvious hazards and dangerous conditions. Most of the time, a paid children's camp or a municipality will have the resources to train at least one staff member on how to recognize obvious tree hazards, or they can simply pay a Consulting Arborist to do a cursory inspection. Generally, the responsible entity will have a qualified individual do a periodic Level One visual drive-by inspection of their trees perhaps once every year or two. This, however, is just the minimum tree safety policy for a municipality or a private children's camp; much more can, and perhaps should, be done to ensure tree safety for guests, visitors, and employees of children's camps.

The question for tree owners then becomes: "How far do I have to go to ensure the safety of my trees?" Must a tree owner conduct a comprehensive Level Two inventory and in-depth testing and analysis of every tree that is owned" Or, is training of seasonal maintenance staff members on how to recognize the most obvious tree hazards sufficient? Is a visual drive-by analysis each year the reasonable minimum, or is getting by with doing inspections every once in a great while adequate? How much risk is acceptable and how much is not acceptable? In every tragic case, a jury may have to decide whether or not a tree owner has acted reasonably and who, if anyone, is to blame.

Reasonableness

Tree inspections are perhaps one of the most commonly misunderstood elements of a tree owner's duty. The key word is reasonableness. In determining what is reasonable, a jury will often find that a tree owner must, at the very least, put eyes on their trees periodically. Essentially, the owner must know what a tree looks like before it falls. If a tree owner fails to regularly inspect the conditions of their trees, a jury may find that the owner has caused a hidden danger to exist. Failing to inspect trees may very well lead to a determination that a tree owner was unreasonable in the execution of their duty, especially if a visible and important tree defect goes ignored and unattended. If a jury finds that a hidden tree danger existed before an incident, the owner of the tree could still be found liable. Like many other safety obligations, visitors, guests, and employees of children's camps have the right to move around the camp's improved areas freely without having to worry if hidden dangers exist. That means the camp owners and managers have an obligation to take reasonable steps of regularly inspecting their property for hidden dangers, and must take reasonable actions to mitigate the hidden dangers they find. This includes hidden dangers from trees that could cause damage, injury, or death.

If a tree has a deep-green, fully-leafed canopy with no dead twigs or branches, and the potential for decay inside the trunk is not indicated or completely obscured, then perhaps there is no reason to suspect that a tree has a hidden hazard. On the other hand, if a tree clearly exhibits signs that it is dead and decayed, or has only brown or no leaves (when like trees are fully leafed), then the tree may be clearly and visibly hazardous. In the two fatality cases we have before us, the dead trees should have been identified as hazardous because of their close proximity to the path and the outdoor classroom where children were frequently escorted, and because the dead trees were of a size that could cause harm.

The reality is that most often, tree failure pattern indicators (that are part of a hazardous condition) will fall somewhere between two extremes—those trees with many visibly identifiable defects and those with little or no visibly identifiable defects. What is reasonable when the defects that can cause failure are obscured from visual inspection? And, what if decay is not clearly discernable by tapping on the trunk with a mallet? The lack of clarity can make determining fault much more difficult. That is where the judgment and experience of experts comes into play. It is only through expert judgment that the magnitude of truth be

revealed. It is only through the careful examination of these two cases that we may give hope and meaning for the loss of Mathius and Noah. By creating awareness and promoting prevention through tree safety, perhaps we can repay the debt we owe to their memory and to the needless loss suffered by their families, friends, camp counselors, and all others who have been affected by these two tragedies.

The important questions about tree safety policies, how often inspections should occur, and to what depth and detail a tree inspection should be performed ought to be of paramount concern to any tree owner. Heart-rending circumstances like those of the two young boys may certainly influence the court of public trust. However, legal judgments of whether or not a tree owner has met their duty of care may be evaluated on many things. The scope and depth of a tree owner's tree safety policy and how well a tree owner has executed that policy may be the primary consideration when a jury ponders a tree owner's duty of care. Or, perhaps the main factor in a court's judgment will be the overshadowing influence of a horrific context that outweighs all other factors. There is no way to know with certainty what will have been the pivotal focus when a legal decision is handed down by the courts.

The tree safety policies that a tree owner ultimately adopts are also swayed by many factors, not the least of which are the resources available to inspect and examine tree defects that may pose risk to people and property. Also, the number of resources that is available to mitigate those risks is an important consideration. The obligatory duty of care that tree owners face includes both inspecting for hidden dangers (within reason) and taking of reasonable actions when the hidden dangers are found.

Tree experts cannot presumptively and authoritatively answer the question of which tree safety policy is reasonable and which is not. As tree experts, we are not qualified to make those kinds of legal judgments. Nor are we privy to every budgetary constraint that a tree owner may face. As tree consultants, we can only make recommendations based on what we know about our clients, what we know to be true of the past, and what the potential outcome may be if a tree owner acts in one way or another. Only the tree owner can answer the question: "How much risk am I willing take?"

Since the tree owner bears the burden to prove that they acted reasonably when something goes horribly wrong, the owner must decide how much risk they are willing to live with, and what resources they are willing to commit to tree safety. This often comes down to a matter of budget priorities and resource allocation. At times, there is simply not enough money or will to meet the task at hand until a tragedy results in a multimillion dollar lawsuit. As we have recently seen in New York, Chicago, Los Angeles, and even small towns like Savannah, Georgia, when a large settlement occurs due to a tree failure, tree safety policies rapidly change. The best advice that we Consulting Arborists can offer is enlightened specificity as to what the risks are. We must make recommendations to clients using our experienced judgment, based on the best information that is currently available. In the end, our client recommendations must be to do the most that can be done with the resources that are available.

In the next two parts of this series, I will briefly discuss the topics as they were presented by discussion participants and examine how the new A300 Tree Risk Assessment Standards are changing the way that we look at tree hazards. I will also examine how social media is impacting the exchange of ideas and how it is creating a higher degree of professionalism in the field of arboricultural consulting.

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