

ARE YOU A CANDIDATE FOR A LAWSUIT?

By Randall S. Stamen

Perhaps a better title for this article would be: "Are You Negligent?" Why? Because a majority of lawsuits against arborists includes a claim that the arborist negligently rendered arboriculture services.

A case in which I was recently involved immediately comes to mind. An arborist was hired by a homeowner to prune a *Eucalyptus globulus*. Unfortunately, the arborist topped the tree and removed at least 50 percent of its foliage. Several months later, the tree died. The homeowner sued the arborist on several theories of law, including negligence.

One way to prevent someone from suing you, alleging that you were negligent, is to understand what negligence is. This is best accomplished by breaking negligence down into five elements. All five elements must be present to determine that an arborist negligently rendered arboriculture services.

Duty: An arborist owes a duty to his or her client to render arboriculture services in a reasonably prudent manner. In California, this duty is set forth in an instruction, which a judge reads to the jury before the jury begins deliberations in an arboriculture case. The instruction is contained in the California Book of Approved Jury Instructions ("BAJI"). It states:

In performing professional services for a client, an (arborist) has the duty to have that degree of learning and skill ordinarily possessed by reputable (arborists) practicing in the same or a similar locality under similar circumstances.

It is a further duty to use the care and skill ordinarily used in like cases by reputable members of the same profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and best judgment in the exercise of professional skill and in the application of learning, in an effort to accomplish the purpose for which the professional was employed.

A failure to fulfill any such duty is "negligence."

In simple terms, an arborist must act as an ordinary, reasonable, prudent arborist would under similar circumstances in the same locality. This is referred to as the "standard of care" an arborist must exercise.

To establish how an ordinary, reasonable, prudent arborist would have acted under similar circumstances in the same locality, attorneys consult books and trade publications (such as

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Arbor Age) and retain other arborists as expert witnesses. The attorney might present the arboriculture books and trade publications to the judge or jury. An attorney also might have the expert witness arborist testify as to what an ordinary, reasonable, prudent arborist may have done under similar circumstances in the same locality.

Breach of Duty:

If the arborist failed to render arboriculture services as an ordinary, reasonable, prudent arborist would have, the arborist may be deemed to have breached the duty he or she owed the client. For example, it is currently the practice of prudent arborists to prune branches just beyond the branch bark ridge. An arborist who flush cuts has breached his or her duty to render arboriculture services as an ordinary, reasonable, prudent arborist.

Actual Cause:

An arborist's actions or inactions must have actually caused the accusing client to suffer personal injury or property damage. In other words, but for the arborist's actions or inactions, would the client have been damaged? If the answer is no, the actual cause element of negligence is satisfied.

Apply the "but for" test to the following situation and determine for yourself whether the arborist was the actual cause of the client's property damage. An arborist tops a tree. Several years later, a neighbor who is angry at the arborist cuts three-quarters of the way through the trunk of the tree at the tree's base. The tree later snaps at the site of the cut and damages the owner's house. "But for" the arborist topping the tree, would the tree have fallen. The answer is yes, and therefore, the arborist was not the actual cause of the client's property damage.

Proximate Cause:

In very rare circumstances, the injuries that a client suffers as a result of the actions of an arborist are so unforeseeable that the arborist will not be held liable. In legal terms, the arborist is not the "proximate cause" of the client's injuries.

Tests exist to determine if an arborist is the proximate cause of a client's injuries. The tests vary from state to state. Most focus on whether the client's injury was a reasonably foreseeable result of the arborist's actions. There are very few types of injuries which are not reasonably foreseeable results of one's actions. For example, courts have held that it is foreseeable that an injured person may receive faulty medical care and be further injured or even die. Therefore, an arborist may be liable for injuries that a client sustains as a result of faulty emergency medical treatment.

The proximate cause element of negligence is rarely an issue in light of what injuries have been held to be foreseeable results of one's actions.

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The following example illustrates this: An arborist tops a tree for a homeowner. Several growing seasons later, one of the weakly attached branches that grew as a result of the topping falls and injures the homeowner. While rushing to the hospital, the ambulance in which the homeowner is riding is involved in a traffic accident and the homeowner is further injured.

In this example, the arborist is the actual cause of the homeowner's injuries. In other words, but for the arborist having topped the tree, the homeowner would not have been injured while riding in the ambulance.

To determine whether the arborist is the "proximate cause" of the homeowner's injuries, ask yourself, "Is it reasonably foreseeable that a topped tree may injure a person and that the injured person may be involved in a traffic accident while being rushed to the hospital?" If the answer is yes, the traffic accident will not supersede the arborist's negligence and the arborist is the proximate cause of the homeowner's injuries.

Damages:

A person or entity does not ordinarily sue an arborist for negligence unless he or she sustained property damage or personal injury as a result of the negligence. The property damage or personal injury is referred to as damages.

Ordinarily, the purpose of a lawsuit is to compensate the client for his or her damages. A lawsuit is not usually filed unless a client's damages are substantial enough to justify the attorney's fees and other expenses associated with prosecuting a lawsuit. In simple terms, the pot of gold at the end of the litigation rainbow is sometimes too small to chase.

Topping:

You might have noticed that I have mentioned the practice of topping several times in this article. This stems from the fact that a majority of cases in which I am involved concern trees that were topped. I advise all arborists to refrain from the practice of topping trees, even if a client requests it. Should the client become aware of the damage done by topping, or should the tree die or ever drop a weakly-attached branch, the arborist will be the first person blamed and the first person sued.

The dangers of topping and the damage caused are becoming well known to the general public. In fact, the California Legislature recently enacted a law, Government Code section 53067, which discusses the evils of topping and strongly discourages the practice. Section 53067 states:

"Topping is the practice of cutting back large-diameter branches of a mature tree to stubs and is a particularly destructive pruning practice. It is stressful to mature trees and may result in reduced vigor, decline, or even death of trees. In addition, new branches that form below the

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cuts are only weakly attached to the tree and are in danger of splitting out. Topped trees require constant maintenance to prevent this from happening and it is often impossible to restore the structure of the tree crown after topping. Unfortunately, many people believe that topping is a proper way to prune a tree, and this destructive practice is prevalent in some communities."

Each year, American arborists incur millions of dollars in legal fees to prove that one or more of the negligence elements discussed above was not satisfied. To avoid becoming one of these arborists, always act as an ordinary, reasonable, prudent arborist. Do not be a candidate for a lawsuit.

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