FOCUS: MUNICIPAL LAW

Is My Tree Your Problem?

Joshua Brookstein

Trees on Long Island are a big deal. They are vital for our survival and essential to the character of our neighborhoods. Trees are also the source of contention. Disputes over the picking of overhanging fruit, impacts of sprawling branches and roots, the cleanup of leaves and related debris, and the time and costs associated therewith, are common issues that arise between neighbors.

So, if a neighbor complains about one of your trees, are you, as the tree owner, responsible for redressing their grievances? Or is your tree your neighbor's problem? What is the legal answer? What is the neighborly answer? Are they one in the same? How would Larry David handle this situation in an episode of Curb Your Enthusiasm?

Scenario 1: Harry and Larry are next door neighbors. Harry has a lemon tree whose trunk is located wholly on his property. The branches extend over Harry's property line into Larry's yard. From time-to-time lemons fall off the tree onto Larry's property which Larry keeps and enjoys. The lemon tree becomes ill and must be removed. The cost to remove the tree is $2,700 and Harry asks Larry to split the cost of removal.

Is Larry obligated to split the removal cost? Does the fact that Larry took the lemons or never complained about the encroaching tree matter? Was Larry even allowed to eat the lemons without Harry's permission? If Larry ultimately balks at the contribution request, is Harry stuck footing the entire bill? Check out Episode 113 of Curb Your Enthusiasm "Vertical Drop, Horizontal Tug" to see how Larry David handled the situation.

Scenario 2: Barry and Carry are neighbors. Following a rain and windstorm, Barry notices that a large branch has fallen onto his property. Barry looks up and determines that the invading branch came from Carry's tree. Barry asks Carry to remove the branch.

Does Carry have to bear the time and expense to remove the branch? Does it matter that the branch was hanging over Barry's property for years before it fell to the ground? Does it matter that the tree existed before either Barry or Carry bought their properties? Does it matter that a storm caused the branch to fall?

The first question in a tree dispute is usually a straightforward one. Who owns the tree? In New York, a tree is owned by the person upon whose property the trunk wholly resides, even if the branches or roots of the tree extend into a neighboring property. If the trunk straddles the property line of two landowners, they are co-owners and tenants-in-common of the tree. See *Dubois v. Beaver*[1] and *Hoffman v. Armstrong*.[2]

Once ownership is established, the next question is usually what can be done about the underlying complaint. This is also usually a straightforward question to answer. For example, fallen branches or leaves will need to be gathered and put into bags for garbage collection. Encroaching roots will need to be cut and removed from the property.

The next questions are often the difficult ones. Who *must* pay for the clean-up? Who *should* pay for the clean-up?

Under most circumstances, falling leaves and tree branches are the responsibility of the property owner upon which such leaves and branches lie. However, the fact that you don't own the offending tree does not render you powerless to mitigate how a problem tree impacts your property.

An aggrieved neighbor should first ask the tree owners to address the displeasing condition. If the tree owner fails to remedy the situation, the complaining neighbor can engage in self-help, or in other words, fix the condition themselves. This is known as the "right of self-help in the first instance."

Beware, while a complaining neighbor may resort to self-help, they must be sure not to injure the offending tree when doing so. See *Turner v. Coppola*.[3]

Take Care of Your Tree or I Will See You in Court! Well… Maybe.

In New York, courts have examined three general types of tree disputes: trespass, negligence, and nuisance.

Under a trespass theory, one's person or property must intrude on the property of another through an intentional or volitional act. In tree cases, unless a tree owner planted the tree with the intent for the tree to enter their neighbor's property, New York courts have generally ruled that the tree owner lacks the requisite intent to be held liable for trespass if the tree falls or naturally grows onto, into, under, or over the property of their neighbor. See, e.g., *Ivancic v. Olmstead*,[4] *1212 Ocean Ave. Housing Development Corp. v. Brunatti*,[5] *and Loggia v. Grobe*.[6]

Under a negligence theory, a complaining neighbor must demonstrate that the offending tree owner ignored a tree's obvious state of decay or damage, and the obvious potential that the tree might fall and cause foreseeable damage. See, e.g., *Ivancic v. Olmstead*,[7] *Gibson v. Denton*.[8] The duty of care required by a property owner over their trees is that the decay or damage to a tree must be readily observable by a reasonably diligent person in similar circumstances. The property owner does not have the duty to regularly inspect their trees for decay and damage.[9] Therefore, unless a tree is obviously decayed or damaged and at risk of falling, the landowner will likely not be held liable if one of their trees falls or naturally encroaches, in the case of roots or overhanging branches, into their neighbor's property.

Under a nuisance theory, an aggrieved neighbor must demonstrate that the tree owner caused an interference with the use and enjoyment of the complaining neighbor's land, and that such interference amounted to an injury or "sensible damage". A natural act, such as the growth of a healthy tree, or an "act of God," such as a storm, which causes a tree limb or its leaves to land on a neighbor's land has generally been found not to rise to the level of real, sensible damage. A complaining neighbor's only remedy is that of self-help. See, e.g., *Turner v. Coppola*.[10]

In *Turner*, the Court held, "… one whose land is intruded upon by tree branches and leaves, which are not poisonous or inherently injurious to the extent of sensible or substantial damages, or of reasonable foreseeability, has no cause of action against adjoining landowners of such trees, but may protect herself therefrom by reasonable cutting of branches to the extent that they invade her property and no more."[11] How would Harry, Larry, Barry, and Carry fare under New York law?

Harry and Larry

Larry may refuse to contribute to the removal of Harry's lemon tree. If Larry, for whatever reason, be it a dislike of the appearance, taste, or shape of Harry's lemons, or for any other reason that causes Larry to be annoyed at the presence of the lemons on his property, could request that Harry trim back the branches of the tree to mitigate any disturbance to his property. If Harry refuses to remedy the situation to Larry's satisfaction, Larry may engage in self-help and trim the tree himself. The cost in doing so, however, will fall solely on Larry. Larry must also be sure not to injure the tree in the process.

However, assuming that the tree remains, and that Larry wants the lemons, he is not legally entitled to keep them even though they fell onto his property. "A person upon whose land a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another." *Hoffman v. Armstrong*.[12] Harry has two choices. He may either elect to abandon the fruit or elect to retrieve the fruit and remedy any damage caused to Larry's property. In *Sheldon v. Sherman*, the Court of Appeals opined that "[o]ne whose property is borne upon the lands of another by inevitable accident, without his fault or negligence, may elect to either abandon the property, in which case he is not liable to the owner of such lands for any injury occasioned by it; or to reclaim it, in which latter case he must make good to such owner the damages so occasioned.[13]

Barry and Carry

Carry would be obligated to remove the branch if Barry established either that (a) Carry planted the tree with the intent that the branch would fall into Barry's yard and cause injury to the property (trespass), (b) that the offending tree

was decayed, and that Carry knew of the decayed state of the tree, and knew of the foreseeable likelihood that the branch would fall and cause injury to Barry's property (negligence), or (c) that the offending branch deprived Barry of the use of his property and caused a real "sensible" damage to Barry's property (nuisance).

Here, Barry would have difficulty establishing any of the three causes of action recognized by New York courts. The subject tree was planted long before either Barry or Carry purchased their properties, there is no evidence that the subject tree was decayed and that Carry knew of any such decay, and there is no evidence that the offending branch deprived Barry of the use of his property and caused sensible damage.

No case or statute in New York delivers a clear rule on how to be a good neighbor. Some may argue that Larry should chip in to remove the lemon tree. Some may argue that Barry should have just removed the branch without saying a word to Carry. At the end of the day, unless someone moves, you must live next to your neighbor, and positive relationships foster happy places to live. So, if you encounter a tree dispute, proceed neighborly.

1. 25 N.Y. 123, 126-27 (1862).
2. 48 NY 201, 203 (1872).
3. *1212 Ocean Ave. Housing Development Corp. v. Brunatti*, 102 Misc. 2d 1043, 1046 (Supr. Ct. Nassau Cnty. 1980), *aff'd* 78 A.D.2d 781 (2d Dept. 1980).
4. 66 N.Y.2d 349, 352 (1985).
5. 50 A.D.3d 1110, 1112 (2d Dept. 2008).
6. 128 Misc. 2d 973, 974 (Suffolk Cnty. District Ct. 1985).
7. 66 N.Y.2d 349, 350-51 (1985).
8. 4 A.D. 198, 201 (3d Dept. 1896).
9. 66 N.Y.2d 349, 350-51 (1985).
10. 102 Misc. 2d 1043, 1046 (Supr. Ct. Nassau Cnty. 1980), *aff'd* 78 A.D.2d 781 (2d Dept. 1980).
11. *Id* at 1047.
12. 48 NY 201, 204 (1872).
13. 42 N.Y. 484, 484 (1870).

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