Mississippi Forestry Commission

TREES & THE LAW

What Liability Does a Landowner Have?

Trees & the Law – What Liability Does a Landowner Have? [1]

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Liability is an inescapable reality in the modern world. From the dining room table to the corporate boardroom, liability concern is a force that drives decisions and demands to be reckoned with, even for things as benign and natural as trees. It can compel action as easily as it can impede it, and no one is immune to its far-reaching consequences. Simply uttering the word "liability" is likely to raise hairs, and the mere thought of it can keep even the most sophisticated business owners up at night.

But in today's ever-changing legal landscape, the question must be asked whether most leaders and managers truly understand what liability is? For the average citizen, a practical concept of liability can be difficult to nail down; but it does not have to be this way. Liability, at its core, is largely a study of duties, and understanding them can allow decision-makers to focus less on unnecessary fears and more on developing reasoned strategies for managing risk.

Tree-related issues occupy a special shelf in the study of liability. From developers dealing with tree conservation laws to homeowners with an old shade tree, understanding the legal implications of tree care and ownership can be critical in today's litigious society. A tree that falls in the forest may not make a sound, but a tree that falls on a busy street can make a veritable din of disastrous legal consequences. Fortunately, an understanding of tree-related liability in Mississippi does not require a law degree. The concepts are relatively straightforward, and even a basic knowledge of the law around tree-related liability can enable anyone—arborist, city planner, or average suburbanite—to enjoy a tree without perpetually living in the shade of its potential litigation.

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[1] The material provided herein is intended only for general informational purposes. This paper is not intended to convey specific legal advice, and should not be relied on as such. Readers are encouraged to specifically retain and seek the counsel of a qualified attorney to determine what potential liabilities may apply to their individual circumstances.

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So, What Exactly Is Liability?

Black's Law Dictionary defines "liability" as "[t]he state of being bound or obliged in law or justice to do, pay, or make good something." Put simply, liability entails having a legal responsibility. If that responsibility is breached and results in an injury, the responsible party may have to pay. But the law does not impose legal responsibility for every injury, nor does it require payment to be made to every plaintiff who alleges harm. On the contrary, a party's liability for causing or contributing to an injury usually hinges on whether the party acted with negligence.

Negligence is a common-law concept, but its elements are similar in every jurisdiction. To establish a claim of negligence under Mississippi law, a plaintiff must prove four elements: "(1) duty, (2) breach of duty, (3) causation, and (4) injury."[3] In other words, to be found negligent—and therefore liable—a person must owe a duty to another and fail to perform that duty in a way that causes harm to the other.

How Does a Tree Owner Become Liable for Negligence?

The liability of landowners—whether fee owners, tenants, or other interest holders—for trees on their property has long been addressed by common law principles of negligence. A determination of negligence requires first asking whether a duty is owed and then, if so, what exactly that duty entails. As the Mississippi Supreme Court has held, "before one can be found negligent, he must owe a duty to the injured party."[4]

To determine whether such a duty exists, Mississippi courts first examine the status of the injured party to decide whether that person is a "trespasser," a "licensee" or an "invitee."[5]

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[3] *Patterson v. Liberty Associates, L.P.*, 910 So.2d 1014, 1019 (Miss. 2004). *See also Davis v. Christian Bhd. Homes of Jackson, Mississippi, Inc.* 957 So.2d 390, 398 (Miss. Ct. App. 2007).
[4] C*entury 21 Deep South Properties Ltd. v. Corson*, 612 So.2d 359, 368 (Miss. 1992).
[5] As the Mississippi Supreme Court has stated, "the duty owed by a defendant to a plaintiff depends on their relationship to one another." Skelton By and Through Roden v. Twin County Rural Elec. Ass'n, 611 So.2d 931, 936 (Miss. 1992).

Trespassers are those who enter land with no right to do so, and a landowner owes them no duty other than to avoid willful and wanton injury.[6] Licensees and invitees, on the other hand, enter land with the owner's consent, and must be treated with a higher degree of care. A landowner owes a **licensee** (typically a person invited onto property for social reasons) a duty to abstain from negligently subjecting the licensee to unusual dangers.[7] If a landowner knows of a dangerous condition, he is not required to remedy the condition, but must warn the licensee of its presence. A landowner owes an **invitee** (typically a person invited onto property for a business purpose) a duty to "keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view."[8] A landowner hosting an invitee must therefore perform a reasonable inspection of property to find hidden dangers, which must then be remedied or else brought to the attention of the invitee. These standards apply to all landowners generally, including with equal force to tree owners.

Therefore, as a general proposition, landowners in municipal areas are held to a duty of common prudence for maintaining trees in such a way as to prevent injury. If the landowner has actual or constructive knowledge of a tree defect, he must exercise reasonable care to prevent harm from the falling of the tree or its branches.[9] Failure to do so can result in a landowner being found liable should a tree fall and injure a third party or their property. An important distinction to this duty exists at common law for the owner of rural land, who is not required to remedy natural conditions and who need not ensure that trees are safe or will not fall into a public highway.[10]

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[6] Where the trespasser is a child, Mississippi courts may apply a heightened "attractive nuisance" standard if conditions are such that they would entice a child to trespass. This is particularly true when the dangerous condition is one that may cause a child to trespass, would likely injure the child, presents little benefit to the landowner compared to the risk to the child, and is of such nature that reasonable care would require its elimination. *See Skelton By and Through Roden v. Twin County Rural Elec. Ass'n*, 611 So.2d 931, 935 (Miss. 1992) (holding that a tree did *not* constitute an attractive nuisance because it was naturally occurring and did not itself attract injured party to premises).

[7] *Lucas v. Buddy Jones Ford Lincoln Mercury, Inc*. 518 So.2d 646, 647 (Miss. 1988).

[8] *Corley v. Evans*, 835 So.2d 30, 37 (Miss. 2003).

[9] S*ee Mizell v. Cauthen*, 251 Miss. 418, 426 (Miss. 1964).

[10] Planted trees, however, are not viewed as natural conditions, and as such they require even rural landowners to act reasonably concerning their maintenance.

Are There Any Exceptions to Liability for Tree Owners for Negligence?

For trees situated on property used for recreation, liability may be reduced by "Recreational User Statutes."[11] This exception to common law liability is intended to encourage landowners to make land and water areas available to the public for use. Under Mississippi's statute, a landowner may allow the public to use their land (including property, waters, trees, and buildings) for a wide variety of outdoor activities without the fears of liability otherwise due to an invitee or licensee. Covered uses include hunting, fishing, swimming, boating, camping, picnicking, pleasure driving, water skiing, and visiting sites of interest. A cooperating landowner is presumed not to give the public any assurance that the property is safe. Consequently, the landowner does not incur a duty of care to the person or persons entering the land and will not be liable for personal injury or property damage caused by trees situated therein. However, injuries caused maliciously or intentionally are not covered by the recreational user exception, and a landowner who inflicts such harm will find no protection under the statute.

Another exception to landowner liability is found in the case of tree-related injuries attributable to "natural causes." Mississippi courts do not impose liability on a tree owner for harm caused by an act of God.[12] Such acts are generally defined as some inevitable accident "due directly and exclusively to natural causes without human intervention, which could not have been prevented by the exercise of reasonable care and foresight."[13] Potential acts of God could include lightning, extraordinary winds, and floods.

A final exception exists where dangers are open and obvious. Courts have also held that a landowner is under no duty to warn persons of dangers that are open and obvious.[14] However, recent decisions have also held that whether a hazard is open and obvious is in most circumstances a question of fact for a jury to decide. That means costly litigation may be required for a dismissal in reliance on this principle.

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[11] Mississippi's recreational user statute was adopted in 1986 and codified at MISS. CODE ANN. § 89-2-21, et. seq.
[12] *Mizell v. Cauthen*, 251 Miss. 418, 426 (Miss. 1964).
[13] *City of Hattiesburg v. Hillman*, 222 Miss. 443, 450, 76 So. 2d 368, 370 (1954), *citing* C.J.S., Negligence, § 21(b).
[14] *See Mayfield v. The Hairbender*, 903 So. 2d 733, 737–38 (Miss. 2005).

What About Neighbors?

Disputes frequently arise between neighbors regarding the ownership and responsibility of "boundary-line trees," so named because they are located on the common boundary line of adjoining properties, are owned by both landowners as tenants in common. Other trees not located directly on the boundary may still be considered jointly owned if both owners have—either by agreement of by conduct—treated the tree as common property. Generally, neither owner may cut a boundary line tree without the consent of the other; even the portions of such a tree located on the landowner's own property may not be cut if the cutting would injure the rest of the tree. A landowner's use of a boundary line tree must be reasonable, however, and will be balanced against the harm it causes to a neighbor. Where an adjacent landowner has sustained actual damage that is likely to continue, he or she may take reasonable action to eradicate the damage—including pruning and cutting the tree's roots or its branches.

A similar point of contention involves trees with trunks located solely on one property but whose roots or branches create a nuisance on neighboring land. In such cases, the adjoining property owner enjoys an absolute right to cut the offending limbs or roots up to the property line.[15] For example, in *Buckingham v. Elliot*,[16] the Mississippi Supreme Court heard a dispute where the roots of an ornamental shade tree were ruining a well located on adjacent property. Unwilling to distinguish between spreading roots and overhanging branches, the court held that either intrusion can form a nuisance which may be abated by the injured property owner—either directly by cutting the tree back or indirectly by receiving damages.

Liability Concerns When Cutting or Pruning

Should a landowner contract with a third party to have trees on his property cut, he has a general duty to ensure the safety of the workplace. This means that the landowner has a duty not to put the tree cutter into a place of known danger.[17] This duty can be tempered, however, taking into account the fact-specific knowledge of the contracting or supervising party. In *Green*

[15] This is based upon the theory that a landowner owns the ground below and the air above the property line and has the legal right to possess both.
[16] 62 Miss 296 (Miss. 1884).
[17] *Green Lumber Co. v. Sullivan*, 208 Miss. 651, 657 (Miss. 1950)

Lumber Co. v. Sullivan,[18] for example, the plaintiff was injured by a limb which fell from the top of a tree he was helping to saw down for his employer. Despite its duty to ensure workplace safety, the employer was not held liable for its failure to anticipate the dangerous condition because it could not have been observed from ground level. Similarly, in *Hathorn v. Hailey*,[19] the court held that a landowner with no tree-cutting expertise who had hired a competent and experienced timber cutter was not liable for the timber cutter's death. The landowner in that case (a layperson) was not bound to warn the timber cutter (a person presumably in possession of timber-cutting knowledge) of inherently dangerous conditions, and its failure to do so was accordingly deemed non-negligent.

Liability of Municipalities for Hazard Trees and Rights of Way

There are a number of Mississippi cases where cities or counties are found liable for hazard trees or dangers arising out of trees in rights of way. A local governmental entity should exercise reasonable care in keeping its streets safe for users. In *Meridian City Lines v. Baker*,[20] the City was found to be negligent in permitting a tree (referred to as a traffic hazard) to extend 2.7 feet into the traveled portion of a public street. Similarly, in *City of Hattiesburg v. Hillman*,[21] the court found Hattiesburg liable for injury to and death of a child when the city failed in its duty to remove dangerous trees located in the neutral ground (between the improved street and the street right of way line). That tree had been dead for two years and its poor condition presented an obvious danger.

However, a local government will not be liable for damages or injuries from falling trees in every case. In *City of West Point v. Barry*,[22] slight leaning of an apparently sound tree was not sufficient evidence of danger to require its removal by the city, particularly since that tree fell as the "result of an unprecedented sleet and ice storm".

[18] 208 Miss. 651 (Miss. 1950).
[19] 487 So.2d 1342 (Miss. 1986).
[20] 39 So.2d 541 (Miss. 1949).
[21] 76 So2d 368, 222 Miss. 443 (Miss. 1954).
[22] 67 So.2d 729 (Miss. 1953).

Each case will turn on its facts. Claims against local governments for liability for trees should be made under the Mississippi Torts Claim Act.[23]

Liability for Violations of Tree Ordinances

Some local governments include tree ordinances within their zoning ordinances. Tree ordinances may include street ordinances (planting in or near rights of way), tree protection ordinances (protecting designated trees), view ordinances (protecting certain views or requiring buffers) and landscaping ordinances (requiring certain minimum landscaping including trees). A property owner should determine if tree ordinances govern any planned cutting or planting tree activity.

Local governments adopt zoning ordinances pursuant to a comprehensive plan.[24] Often the comprehensive plan and zoning ordinances are adopted or needed by local governments following the recommendations of the local planning commission following a public hearing.[25] Violations of zoning laws may be enforced by local authorities through an appropriate action or proceeding.[26]

Liability for Violations of Subdivision Covenants

Many subdivisions are developed using protective and restrictive covenants filed as separate instruments in the land records of the county where the property is located. Covenants may also be included within deeds.[27] They may be enforced by judicial action against any person who holds title to property subject to duly adopted and recorded covenants.[28]

Some covenants contain restrictions on trees that can be cut or planted. Others require approval of landscaping plans including trees by an architectural review committee or other group. A property owner should consult applicable covenants prior to cutting or planting trees.

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[23] Miss. Code Ann. §11-46-1 *et seq.*
[24] Miss. Code Ann. §17-1-9 (1972).
[25] Miss. Code Ann. §17-1-11(3) (1972).
[26] Miss. Code Ann. §17-1-19 (1972).
[27] Jeffrey Jackson and Mary Miller *et al.*, 7 Encyclopedia of Mississippi Law, § 60:67 (2nd ed. 2018).
[28] *Id* at §60:71.

What are Some Practical Steps to Lessen the Risk of Tree-Related Liability?

Trees are everywhere, and the liability associated with their ownership can seem as tangled and widespread as their branches. Whether you are a tree-removal specialist or an everyday citizen looking to avoid litigation, a knowledge of tree-related liability is crucial to maintaining peace of mind. While nothing can eliminate the risks of liability altogether, taking a few simple steps can help ensure that landowners and their trees stay free and clear of lawsuits:

- First, become aware of any hazard trees. Hazard trees are typically those with a structural defect that could cause the tree or a portion thereof to fall on someone of something of value. The continued and habitual presence of targets (people, vehicles, and structures) within falling distance of the tree make this assessment particularly important. Be cognizant of where the relevant land and trees are located. If in municipal areas, there may be a higher likelihood of harm and also higher duties.
- Second, be proactive in tree care and maintenance. Many common hazards may be largely avoided through proper care. Being intentional in the care of your trees through routine insect and disease control, and appropriate arboricultural care such as watering, fertilizing, aerating, and particularly pruning, can improve tree health which reduces the likelihood of tree damage and/or injury.
- Finally, if unsure whether a particular tree or group of trees is safe, have an inspection performed by a well-trained professional, preferably an International Society of Arboriculture (ISA) Certified Arborist. Good inspections should assess wood decay, cracks, branch unions, cankers, root problems, and tree architecture, and can provide landowners with a reasoned basis for decision making.

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