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December 14, 2002

Getting to the root of property damage

What happens when your neighbour's tree and tree roots damage your property? That's the question Trevor Johnson is facing in the backyard of his North York home.

A large maple tree is growing on his neighbour's property very close to the property line. Johnson purchased the house about six years ago and shortly afterward became concerned about the root structure of his neighbour's giant tree.

At that time, the roots of the tree were pushing Johnson's patio stones upward, and the girth of the tree was causing the fence between the properties to bow inward toward his property.

Since then, the problem has gotten progressively worse. The patio stones are much higher than they were in the past, and a four-foot concrete block wall surrounding the patio area is also buckling upward.

Johnson and his neighbour get along well, but he e-mailed me recently to ask if I could write about who bears the legal responsibility for any damage the tree might cause, or the costs of repair.

Every first-year law student learns about the case of Rylands vs. Fletcher, a decision of the British House of Lords in 1868. A water reservoir on Fletcher's property gave way and escaping water flooded the nearby coal mine being operated by Rylands.

In awarding damages to Rylands, the House of Lords ruled that a person who allows something on his or her land to escape onto a neighbour's property and cause harm will be responsible for the losses.

Another British court case, going back to 1815, established the rule that a landowner can cut away overhanging boughs of a neighbour's trees.

Later British cases established the rule that the owner of land on which a tree grows is liable in nuisance if the roots or branches encroach on adjoining land and cause damage.

Fast-forwarding to Canada in the 20th century, I came across a 1976 case involving damages caused by a neighbour's tree roots on Beemer Ave., in Mississauga.

Eugenie Mendez complained that the roots of 14 Lombardy poplar trees on the Palazzi property next door had ruined her lawn, rock garden and patio, and were threatening the septic tank, weeping tiles and foundations of her home. A tree expert from the Royal Botanical Gardens in Hamilton testified at the trial that poplar roots are aggressive, and can damage sidewalks, roads, septic tanks and weeping tiles.

The judge found that the Palazzi trees did in fact destroy the Mendez lawn and disrupted the patio. The court awarded the plaintiffs \$500 damages for nuisance, and partial court costs.

Judge A. H. Hollingworth went out of his way, however, to note in his judgment that the case was not to be construed as permitting recovery to everyone whose yard is disturbed by tree roots. "In these cases," he said, "so much depends on the particular facts...in evidence."

He did admit, however, that "it is the kind of case that should never have been litigated."

Despite the warning that it should not be referred to as a precedent, the Mendez case has been mentioned in two subsequent Canadian cases.

In a 1984 case involving willow roots on Humbervale Blvd., in Etobicoke, the plaintiffs were awarded \$2,760 plus costs. The following year, poplar trees were at the root of a court case in Winnipeg where the plaintiff won \$19,000 in damages.

With the legal rules clearly set out, how can Trevor Johnson and his neighbour solve their problem? Based on the Mendez vs. Palazzi case, the neighbour may well be liable for the damages.

How do they get rid of the offending maple tree roots? The simple answer, it seems, is to cut the tree down but that answer only applies in the former city of North York.

In the old cities of Scarborough and Etobicoke, and the pre-1998 boundaries of the City of Toronto, it is necessary to obtain a permit to remove, cut down or injure any tree with a diameter exceeding 30 cm (12 inches) on private property. The measurement is taken at 1.4 m (4 1/2 feet above ground level). Additional restrictions apply to smaller trees.

Even if the tree is diseased or dead, it may only be removed with a certificate from a certified arborist and the written approval of the Commissioner of Economic Development, Culture and Tourism. It might be cheaper to wait until the tree falls over and have the insurance company pay for the damage.

Who says we're not overgoverned?

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