TREES

Irene DelBono

The following are some of the laws and cases. This may not accurately reflect what may apply in all circumstances, but rather, is some general guidance given us by the courts' rulings on specific cases.

In general, an abutter has the right to cut a tree's branches and roots back to the property line (or line of a CR), so long as it does not kill the tree. Before an abutter takes "self help" action, it is advisable to affirmatively determine the boundaries of the property by obtaining a survey or locating existing boundary markers, as there are penalties for "willfully" trespassing on property of another or cutting portions of trees not located on your property. Willfulness includes ignoring facts or obvious signs that should have been taken into consideration (such as cutting back beyond a boundary fence, or stone walls that indicate a potential boundary line). It is important to remember that a case can be civil, in which you obtain money damages, or criminal, which result in fines or imprisonment, but no compensation to the owner of the tree. It is a crime to threaten criminal action in trying to obtain damages, so it is important to consult an attorney or other advisor if you are contemplating asserting a criminal action or you may find yourself being charged with a crime.

Encroaching roots:

In Michalson v. Nutting, 275 Mass. 232 (1931) the plaintiffs complained that the roots of an abutter's tree were encroaching on their land, had penetrated and clogged their sewer and drain pipes, and had penetrated their cellar, "causing the cement to crack and crumble and threatening seriously to injure the foundation of the dwelling." The plaintiffs had given notice at the first sign of the problems with the clogging of the sewer to the abutters, requesting they remove the tree roots, but the abutters did nothing. The court ruled that the abutters were not liable.

The court found that the law of Massachusetts is that owners may cover their entire property with a thick forest, and the abutters have no recourse for the having their property shaded by the forest.

"We see no distinction in principle between damage done by shade, and damage caused by overhanging branches or invading roots...Their growth naturally and reasonably will be accompanied by the extension of boughs and the penetration of roots over and into adjoining property of others. As was said in Countryman v. Lighthill, 24 Hun. 405, 407: "it would be intolerable to give an action in the case of an innoxious tree whenever its growing branches extend so far as to pass beyond the boundary line and overhang a neighbor's soil." It would be equally intolerable where roots penetrate the neighbor's soil."

The court went on to say that the abutters are not without a remedy.

"His right to cut off the intruding boughs and roots is well recognized. Bliss v. Ball, supra. Harndon v. Stultz, 124 Iowa, 440. Robinson v. Clapp, 65 Conn. 365. Countryman v. Lighthill, supra. Hickey v. Michigan Central Railroad, 96 Mich. 498. Tanner v. Wallbrunn, 77 Mo. App. 262. Lemmon v. Webb, [1895] A. C. 1. See Skinner v. Wilder, 38 Vt. 115. His remedy is in his own hands. The common sense of the common law has recognized that it is wiser to leave the individual to protect himself if harm results to him from this exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious."

Tree straddling boundary line:

What if a tree is on the boundary line, and the trunk straddles both properties? In Levine v. Black, 312 Mass. 242 (1942), the plaintiffs sought an injunction to restrain the defendants from cutting down such a tree.

"Where the trunk of a tree stands wholly on the land of one proprietor, he has been deemed the owner of the entire tree, Lyman v. Hale, 11 Conn. 177, Hoffman v. Armstrong, 48 N. Y. 201, Skinner v. Wilder, 38 Vt. 115, Holder v. Coates, M. & M. 112, though there is no doubt of the right of the adjoining proprietor to cut off limbs and roots which invade his premises. Michalson v. Nutting, 275 Mass. 232, 234. Lemmon v. Webb, [1895] A. C. 1. But where, as in the present case, the trunk stands across the boundary line more difficult questions arise. It has generally been said that

under these circumstances both parties own the whole tree as tenants in common. Blalock v. Atwood, 154 Ky. 394, 399. Luke v. Scott, 98 Ind. App. 15. Musch v. Burkhart, 83 Iowa, 301. Lennon v. Terrall, 260 Mich. 100. Griffin v. Bixby, 12 N. H. 454. Dubois v. Beaver, 25 N. Y. 123. Robins v. Roberts, 80 Utah, 409. In other cases, in an attempt at a more exact application of the ordinary principles of real estate law, it has been held that each party has title to only that part of the tree on his side of the line but has a right to prevent his neighbor from so dealing with his part as unreasonably to injure or destroy the whole. [Page 244] Robinson v. Clapp, 65 Conn. 365; S. C. 67 Conn. 538. Weisel v. Hobbs, 138 Neb. 656. Relyea v. Beaver, 34 Barb. S. C. 547. Even under the latter view it is difficult to see why either owner should have any less right to cut off branches and roots than he would have if the trunk stood entirely upon the other's land."

Obligation to remove diseased or dangerous trees or limbs:

An owner of the land has an obligation to remove diseased or dangerous trees (or limbs) that threaten to cause harm. Should your tree cause harm, you may be required to show that the trees were checked for good health and were not obviously diseased or decayed. Signs of disease or decay might include an excessive number of dead or dying limbs, holes or splits in the tree, leakage, or failure of portions of the tree to leaf out.

Twomey v. Commonwealth, 444 Mass. 58 (2005). Where, from the trunk of a sound and healthy tree about fifty years of age standing in a sidewalk within the limits of a public way and within six inches from the roadway, a limb, also sound and healthy and three feet six inches in circumference where it leaves the trunk, protrudes over the roadway seven feet above the, surface of the ground, such limb may be found to be a defect in the way within the provisions of St. 1917, c. 344, Part IV, s. 24.

In Kurtigian v. Worcester, 348 Mass. 284 (1965), the City was liable for injury resulting from a limb being blown from a decayed tree on which it held an unforeclosed tax title.

Valvoline Oil Company vs. Inhabitants of Winthrop, 235 Mass. 515 (1920). Under the provisions of St. 1915, c. 145, s. 5, if a tree is a source of danger to travelers on the highway, it is the duty of the town officials to order the tree warden to trim or to cut down the tree and of the tree warden to carry out the order.

Failure of town officials to order the tree warden to cause the removal of a limb of a public shade tree which overhung the travelled portion of a highway and was a potential danger and an obstruction to the traveling public, will render the town liable for damages resulting from travel upon the highway.

No obligation to act if tree is healthy:

If there has never been any problem with the trees - no loss of branches other than the normal occasional storm damage, no outward signs of decay, apparently healthy leaf-out - the owner of the tree is not required to have the tree inspected and is not "on notice" that there is a problem that could cause damage which should be addressed.
In Ponte v. Dasilva, 388 Mass. 1008 (1983) (rescript opinion), an abutter had complained for several years to the owner of a large willow tree of overhanging branches, falling leaves, sap and branches which clogged their gutters, swimming pool filter, dirtied their cars and cluttered their driveway. The abutter then claimed that she fell on the debris, which grew progressively worse. The debris was due to the natural characteristics of the tree, which was not diseased. The court ruled:

"The failure of a landowner to prevent the blowing or dropping of leaves, branches, and sap from a healthy tree onto a neighbor's property is not unreasonable and cannot be the basis of a finding of negligence or private nuisance. Of course, a neighbor has the right to remove so much of the tree as overhangs his property.[3] Michalson v. Nutting, 275 Mass. 232, 233-234 (1931). To impose liability for injuries sustained as a result of debris from a healthy tree on property adjoining the site of the accident would be to ignore reality, and would be unworkable. No case has been brought to our attention in which liability has been imposed in such circumstances."

Damages for wrongful cutting:

The traditional measure of damages was either the value as lumber, or the reduction in value of the property due to the cutting. Recent cases have held, however, that if the trees were "special" or provided some special benefit (such as a view) then the owner can opt for replacement cost value. This often results in a higher measure of damages:

Larabee v. Potvin Lumber Company, Inc., 390 Mass. 636 (1983). “The amount of damages provided by G. L. c. 242, Section 7, for the wrongful cutting of trees is "three times the amount of the damages assessed therefor."[6] The statute does not prescribe how the damages shall be measured. One measure is the value of the timber which has been wrongfully cut. Another is the diminution in the value of the property as a result of the cutting. Davenport v. Haskell, 293 Mass. 454 (1936). The plaintiff can opt for either measure. Lawrence v. O'Neill, 317 Mass. 393, 397 (1944).

Ritter v. Bergmann 72 Mass. App. Ct. 296, July 31, 2008. The Bergmanns cut down & damaged trees and excavated a substantial area of the Ritters’ property. The judge found the Bergmanns’ claim that they thought the land was theirs not credible, because they had done a survey and the knew they had built their house very close to the lot line, and so knew where the lot line was, and therefore had “engaged in the tree removal and excavation activities "willfully, and without the Bergmanns' having good reason to believe that the land was theirs or that their activities were otherwise lawfully authorized."

The court found the measure of damages was the cost to the Plaintiff to restore her land “to a reasonable approximation of its former condition. He found that one area affected consisted of approximately 4,000 square feet of land north of the Bergmanns' driveway that formerly had been heavily wooded with mature trees and saplings. The Bergmanns, intending there to construct a swimming pool and poolhouse, had cleared it of "many trees" -- all of the trees had been removed from an approximately 800 square foot excavated area, and outside of the excavation many trees were either cut down or heavily damaged, including a white pine 25.5 inches in diameter. The judge found that another affected area within lot 11 located south of the Bergmanns' driveway (approximately 1,100 square feet in size) also had been, prior to the tree clearing activities carried out by the Bergmanns, a heavily wooded area, with a combination of evergreens and hardwoods. The judge determined the "restoration" and "replacement cost" damages to be $43,594. This amount included costs associated with site preparation, individual selection and planting of the trees, and a one-year warranty on each tree.”

“Given his finding that the Bergmanns had, in the language of c. 242, § 7, acted "wilfully" and "without license," in cutting down or destroying the trees, the judge awarded Ritter treble damages under that statute. . . . Palmer v. Davidson, 211 Mass. 556, 558 (1912) ("if [defendant] intentionally cut down these trees he cut them down wilfully within the meaning of the statute. . . . [The jury] were [correctly] instructed that the word 'wilfully is used in the sense here of one going upon the land of another and doing it consciously, doing it intentionally,' 'in contradistinction to casual and involuntary'").”

“[W]e begin our discussion by observing that the decision in the Glavin case does not require that there be a personal reason to support utilizing restoration cost as a measure of damages. That case stands for the broader proposition that where "the value of the timber cut is negligible, or the diminution in value of the property owing to the cutting is minimal or nonexistent," Glavin v. Eckman, supra at 318, a different measure of damages may be needed to compensate the plaintiff and to deter the wrongful cutting:

"[T]o limit damages to these measures would encourage, rather than deter, wrongdoers from engaging in self-help in circumstances such as when an ocean or other view is desired. The timber wrongfully removed may amount to no more than a single tree; and its removal may even improve, not diminish, the market value of the property. Yet the wrongful cutting may represent a significant loss to the property owner and a significant gain to the wrongdoer even where the value of the timber cut is negligible, or the diminution in value of the property owing to the cutting is minimal or nonexistent. So to limit the damages would permit a wrongdoer to rest assured that the cost of his improved view would be no more than treble the value of the timber cut even where the change wrought to his neighbor's property by the wrongful cutting, as here, is significant. The statute does not so confine a property owner's redress for the wrongdoing of an overreaching neighbor." Ibid.

“... Here, the damage to the Ritters that resulted from the cutting down of trees on the lot adjacent to their home was not only the potential loss in the value of the land that they hoped to sell, but the loss of their own privacy -- regardless of whether lot 11 was sold or retained. As the judge found, the Ritters "hope to sell [l]ot 11, and the buyer will almost certainly build a residence upon it. Privacy, and shielding from neighboring homes, is not only a present concern to the Ritters, but will be even more of a concern in connection with that sale. Every bit of shielding is valuable, and its loss in any part of the lot -- particularly in the area near a neighboring home (e.g., the Bergmanns') -- is significant. . . . The buyers of Lot 11 may wish to site their house, or an accessory structure, in such a way that the loss of tree coverage in

[the affected areas] removes a material degree of privacy that would otherwise be there."(11) This finding is amply supported by the evidence."

"...Based on the evidence, the judge concluded that "the Bergmanns' testimony regarding lot 11's allegedly de minimis loss in fair market value from their cutting and clearing is unrealistic and not a fair measure of the damage they have caused," and that the cost of restoration was reasonably necessary in light of the damage inflicted, and was "also well in proportion to the true damage suffered." The judge's conclusion was correct in light of the decision in Glavin, stating that market value is one way of measuring damages but "does not in all cases afford a correct measure of indemnity." Glavin v. Eckman, 66 Mass. App. Ct. at 318, quoting from Trinity Church v. John Hancock Mut. Life. Ins. Co., 399 Mass. 43, 48 (1987). Replacement or restoration costs are also appropriate "where diminution in market value is unavailable or unsatisfactory as a measure of damages." Ibid. The judge did not abuse his broad discretion in considering evidence other than that of fair market value in determining the amount of damages."

"When applying a restoration cost measure of damages, a test of reasonableness is imposed." Glavin v. Eckman, supra at 319. We do not agree with the defendants that the damages award was "unreasonable, given the relatively small amount of encroachment, the 2.5 multiplier applied to the base cost of the trees and the trebling of damages." The judge was within his discretion to credit Ritter's expert that "the 'installed cost' for the replacement trees is 2.5 times their wholesale price, and that such pricing . . . is standard in the industry." The judge's finding that the cost of restoration was reasonably necessary was amply supported by the evidence. As to the trebling of damages, this "'ineluctably flows from the plain language of the statute' . . . , and does not render the damages unreasonable." Id. at 322, quoting from Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 608 (2007)."

Glavin v. Eckman, 71 Mass. App. Ct. 313, the measure of damages for wrongful tree cutting is restoration costs, not diminution in fair value of the real estate.

Criminal Charges – be very careful lest you be charged with malicious prosecution or abuse of process.

Jenkins v. Ellis, Appellate Division, Southern District, (App. Div. No. 07-ADMS-40012) (May 21, 2008). Barrett, J. Appeal from a judgment entered by Lynch, J., in Barnstable District Court.

A criminal complaint issued against Jenkins as a result of a dispute with Ellis, who had cut down trees in a drainage ditch. Jenkins then sued Ellis and the jury awarded him $35,000.00 in damages for malicious prosecution, $30,000.00 for abuse of process, and $10,000.00 for trespass. The verdict is affirmed on appeal.

Ellis claimed an exemption for malicious prosecution and abuse of process because "he did no more than report the ditch incident to a police officer who then used his independent judgment to seek a criminal complaint." The exemption, however, is dependent upon the providing truthful information.

"[T]he jury in this case … believe[d] … that no assault had occurred and that Ellis concocted the criminal episode to gain an advantage in the property dispute. Such a finding by the jury … support[s] the maintenance of both the malicious prosecution and abuse of process claims. ...

"Ellis also seeks to reduce the $10,000.00 award on the trespass count on the ground that the only evidence of damages was the $6,500.00 value of the trees he cut down. One who is wronged by a trespasser, however, may recover damages in addition to the cost of restoring the land. ...

"…Jenkins testified that he uses the drainage ditch to control the water level of the bog, which is critical to a successful cranberry crop. He also testified that, to function properly, the ditch has to be clear of any trace of debris, and that the trees Ellis cut down had served not only to screen out debris, but also to stabilize the banks of the ditch with their root systems. Thus, the jury could have found that Ellis's removal of the trees caused damage to Jenkins beyond the mere cost of restoring the trees."