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## Trees: A primer on how to beat the “Act of God” defense

HOW TO OVERCOME THE “ACT OF GOD” DEFENSE WHEN STORMS TOPPLE TREES

Our storm-battered state is reeling from floods, high winds, and intense snowfall this winter, leaving many roads and highways with downed trees. On October 24, 2021, the Department of Public Works reported that 700 large branches and trees fell throughout San Francisco in a single day. This same day saw a record-breaking 4.02 inches of rain, and 25-mph wind gusts were common throughout the city.

In cases where trees fall and injure someone during extreme weather events, the defense invariably claims, “This storm was an Act of God – hundreds of healthy trees fell that day. Plaintiff wants you to believe that they were *all* in a dangerous condition....”

Indeed, every tree that succumbs to the rain and wind does not represent a viable liability claim. However, among the fallen trees, some will have been preventable, and it is the plaintiff’s

attorney’s job to evaluate which is which and to be able to explain why it is not an “Act of God” when a dangerous tree happens to fall in extreme weather. Here are some tools to help as you forge through the branches and bramble surrounding your own fallen-tree cases.

### **Liability overview for trees on public and private property**

When a tree owned by a public entity falls and causes injury, the entity can only be liable if it is established that the tree constituted a dangerous condition of public property under Government Code section 835 and that the entity either (1) created the dangerous condition or (2) had notice of the dangerous condition for a long enough time to have protected against it. A public entity is equally liable where it exercises control over a privately owned tree, as may be the case for trees

located in parkways between sidewalks and streets.

One way a public entity may “create” a dangerous condition is through improper pruning. For example, the entity may use the disfavored practice of “topping” of a tree, the method of removing whole tops of trees or large branches and/or trunks from treetops, which will cause weaker small branches to grow (epicormic growth). If those weaker branches later fail when unable to support their weight, the failure may be attributed to the improper pruning of an otherwise healthy tree.

Proving constructive notice is often more complex. If a branch fails due to causes such as a hidden cavity, a harmful fungus, or an unhealthy root structure, the defense will argue that this was a hidden defect that precludes a finding of notice. A tree surgeon supervisor for the city of Los Angeles recently testified that,

as of 2018, city trees were on an 18-year trim cycle. Within those 18 years, inspections would generally only be performed upon request.

If a tree is only being inspected every 18 years, there is little likelihood that a relatively hidden defect would be uncovered absent the scrutiny of a trained arborist. A powerful counter to the “ostrich” defense of not inspecting trees is to request jury instruction on an inspection system under Government Code section 835.2, subdivisions (b)(1) & (2). CACI 1104 provides:

In deciding whether [Defendant] should have discovered the dangerous condition, you may consider whether it had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition. In determining whether an inspection system is reasonable, jurors may consider the practicality and cost of the system and balance those factors against the likelihood and seriousness of the potential danger if no such system existed.

Most arborists will agree that a reasonable inspection system involves inspecting trees on a one- to two-year basis, depending on factors such as species, age, and whether the tree is in a high-impact zone where people or vehicles travel below it. Applying CACI 1104, a government entity cannot easily defend a case based on a lack of notice that a tree was in a dangerous condition, where arguably they would have observed the defect had they done proper periodic inspections.

Often the best way to prove what “a reasonable [inspection] system would have revealed” under CACI 1104 is by using historic Google Street View photographs that may depict readily observable problems with trees, such as a heavy lean, unbalanced limb structure, brown branches, an unhealthy crown, irregularly shaped trunk, or weak limb structure. Suppose the jury is shown photographs of the tree before it failed, and an arborist explains the defects that would have been observable at the time. In that case, the trier of fact may

reasonably conclude that the city would have seen the same thing and remedied the danger had they only had a reasonable inspection system.

As to private landowners, “[t]he proper test to be applied . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . .” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119.)

Where a landowner’s tree falls into another property or a public area, a duty of care is owed to persons outside the property as well. “[A] landowner’s duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner.’ Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner’s property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.” (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1159, internal citations omitted.)

Trees located in parkways between the sidewalk and street are often simultaneously controlled by both a public entity and a private landowner, both of which would have a duty of care to maintain the tree in a safe condition. “[P]roperty owners are liable for injuries on land they own, possess, or control.’ But . . . the phrase ‘own, possess, or control’ is stated in the alternative. A defendant need not own, possess and control property to be held liable; control alone is sufficient.” (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162.)

### **Why do so many trees fall in severe weather events?**

When the ground around a tree becomes soft and saturated with water, there is a greater likelihood of uprooting, especially with gusty winds. For this reason, it is not uncommon for a tree to stay upright throughout a significant rain event, only to be toppled over under windy conditions in the following days when the ground is still wet.

In the case of trees uprooting, the cause is often a problem with the tree’s root system. One problem may be root rot, a root-decaying disease caused by several types of fungus, which typically occurs when there is too much moisture in the root zone.

Roots may also be damaged from construction. Tree roots will typically extend one to 2.5 times farther than a tree’s canopy radius in their natural and unmolested state. When building or trenching for landscaping is performed within this vicinity, roots can be easily damaged. When the root system is struggling from construction damage or compaction from heavy construction equipment, it is much more likely to give way in a storm event.

In addition, the size and shape of a tree can make it susceptible to falling in extreme weather. For example, if a tree is 100 feet tall and most of its canopy is near the top, the canopy can catch the wind like a sail and then act as a lever to exert incredible force on the bottom of the tree, pulling and tearing roots out of the soggy ground. Trees with shallow root systems are particularly prone to uproot, such as the blue gum eucalyptus tree, since most of their roots are in the top six inches of the soil. Further, suppose the tree is grown in a grass lawn with regular shallow watering from sprinklers. In that case, the risk is even more significant because the roots will seek the water at the surface and grow even shallower than they would in the dry climate, increasing the danger of tree failure.

In the example of a eucalyptus tree, most species are native to arid regions of Australia; when grown in the lawns of Southern California, they grow taller with the constant irrigation than they do in their natural state, but with shallower roots, making them more susceptible to fail in rain and wind. Thus, even a completely healthy Blue Gum Eucalyptus might pose an unreasonable risk of harm if it is tall, top-heavy, and growing in turf with shallow roots that are prone to failure. Often a storm will foreseeably create the conditions necessary for the

otherwise healthy tree to topple over. When that happens, it is not always an Act of God. Instead, it is often a poor choice of tree species given a set of conditions that make it an accident waiting to happen.

### Overcoming the “Act of God” defense

The “Act of God” defense is not found in any jury instruction nor a technical defense, but it will be argued to the jury in every storm-related case. While this defense may be appealing at first blush, if the tree which struck your client – i.e., the only tree that matters – was in a dangerous condition such that the property owner knew or should have known it posed an unreasonable risk of harm, the defense should not receive a get-out-of-jail-free card simply because the tree’s failure coincided with a storm. Overcoming the Act of God defense will involve engaging a weather expert and focusing on the individual tree’s history instead of one day of bad weather.

### Battle of the weather experts

Many trees live 80 to 100 years or more, and therefore it is foreseeable that these trees will live through one or more 50-year storms in their lifespan. Even a 50-year storm event, by definition, is going to happen about once every 50 years. In one case handled by my office, extremely heavy rain followed by 60-mph winds toppled hundreds of trees in the San Diego area. The plaintiff’s weather expert was able to show that even though this storm was unusual for the San Diego area, storms with comparable precipitation and wind gusts had happened several other times in the history of the 90-year-old palm tree which had fallen. Even though such a storm is unusual, it is nevertheless foreseeable and should be considered when assessing risk.

### Sample wind measurements

Weather data is available from various sources, ranging from official weather stations to weather enthusiasts that contribute their weather data to

groups such as Weather Underground. The defense weather expert will often rely on the locations which measure wind where the readings are highest, supporting the defense’s theme that supposedly unpredictable hurricane-force winds brought the subject tree down. The highest wind readings will occur at higher elevations and in more open areas such as airports, which lack buildings and other trees to act as windbreakers. In one case where a tall eucalyptus tree fell in a large storm in San Diego, the defense weather expert relied on wind measurements from the local airport, from a mountainous region where hurricane-force wind gusts were recorded, as well as wind measurements of 98 mph taken at an altitude of 18,000 feet! These measurements did not accurately reflect the wind that existed at the suburban condominium complex near sea level, where winds would have been relatively calmer at the subject incident. A motion in limine may be brought to exclude measurements at unrelated locations, especially up in the jet stream at 18,000 feet. In this case, the plaintiff’s weather expert relied on measurements taken in the same neighborhood as the subject tree, which, however, presented an additional hurdle because they were not official weather stations.

While data from official weather stations which come from certified government publications might be introduced into evidence with a request for judicial notice, keep in mind that if your weather expert relies on other non-official weather locations that are closer to the subject incident – and therefore are more relevant – it may be necessary to depose the individuals operating those non-official stations to lay the proper foundation for the equipment and methodology used to take the measurements.

The weather experts should also be using wind measurements as close in time as possible to when the subject incident occurred.

### Motions in limine to exclude evidence of other tree failures

Another way to neutralize the argument that the tree that injured your clients was one of hundreds of trees that fell in the same storm is to exclude evidence of other tree failures altogether via a motion in limine.

Evidence Code section 350 states that “[n]o evidence is admissible except relevant evidence.” “Relevant evidence” is “[e]vidence... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) Arguably, unfounded statistics about other dissimilar trees do not prove or disprove any disputed fact about the actual tree that fell on the plaintiff.

Further, Evidence Code section 352 provides that the court may “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury.” The “prejudice” factor in section 352 applies to evidence “which uniquely tends to evoke an emotional bias against [a party] as an individual and which has very little effect on the issue.” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

According to Evidence Code section 352, it is highly prejudicial to allow jurors to speculate that the tree that fell on a plaintiff was an Act of God simply because other trees fell during the same storm. Yet, the evidence has no probative value where there is no evidence regarding:

1. The location of the other fallen trees.
2. When the other trees fell.
3. Whether they were actual trees that fell or only limbs.
4. Whether people called multiple times to report the same tree, making the total number of fallen trees unreliable.
5. The species of the other trees.
6. The age of the other trees.
7. Whether those other trees were sick

or otherwise vulnerable to a windstorm for other unknown reasons.

It will also be unknown whether the other trees were exposed to similar wind and precipitation levels because, for example, a tree at the top of a hill or canyon will have likely had to endure higher winds. In short, without information about the other fallen trees, there is little probative value to comparing those failures with the subject tree. Therefore, evidence of other fallen trees should be excluded.

Furthermore, evidence of other tree failures reported during a storm will likely contain multiple levels of hearsay. Hearsay is formally defined as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Because the reports of other fallen trees and limbs will be offered for the truth of the matter asserted, and since no witnesses will appear at trial to testify with personal knowledge about each of those other three failures, the reports and the statements contained therein would be properly excluded as hearsay.

Finally, the defense weather expert or arborist should not be allowed to rely on reports of other downed trees, because that is exactly the kind of case-specific hearsay an expert is not allowed to rely on under *People v. Sanchez* (2016) 63 Cal.4th 665. “When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert’s opinion, the statements are hearsay.” (*Id.* at 686.)

Google Maps is an extremely useful tool in understanding a tree’s historical shape and health. Street views and overhead views may reveal disease, neglect, drainage, possible trenching in the root zone area, or poor pruning. Google Maps and Google Earth have an invaluable feature that allows you to view historical photos in the exact location. In one case involving a pine tree in a rural area north of Sacramento, historical satellite photos revealed that the tree had been dead with no green leaves for five

years before falling on an adjacent parked car and injuring the occupant. Those images established notice because the landowner had years to observe and remove the dead tree. It was unreasonable not to do so because the dead tree loomed over an adjacent parking lot with people and cars within its strike zone.

### Discovery strategies

In cases involving a weakened root system which contributed to a tree uprooting, relevant discovery might include the history of construction in the area, any sprinkler watering schedules, tell-tale signs of overwatering such as a prevalence of mushrooms growing under the tree, and photographs of the tree’s root ball after it became uprooted. It is critical to go to the scene of any tree incident as soon as possible, preferably with an arborist, to take photographs of the tree or limbs before they are removed and shredded. Fallen branches may show evidence of disease, which can be confirmed with laboratory testing, but that critical evidence is lost forever once the tree is removed. Alternatively, if a branch breaks and injures someone, the juncture where the branch broke must be examined because it will usually offer clues into the failure mechanism. Often, after a branch fails on a city tree, trimmers will come out within days and trim the tree below the failure point, destroying crucial evidence.

For private landowners, discovery should include communications with arborists who trimmed or inspected trees on the property, any tree risk assessments performed that may have identified hazards, and complaints to public entities that may share in the maintenance of trees located in parkways. For larger complexes with property management companies and homeowners’ associations, pertinent discovery will include the history of tree trimming, tree inspection, HOA minutes, HOA budgets, and expenditures. For example, an HOA annual budget might reveal there is no budget to hire an arborist to assess the trees or to perform necessary maintenance, yet at the same

time, the HOA allocated \$100,000 to order new deck chairs.

For public entities, tree trimming may be performed by the city or county or contracted to third parties. Relevant discovery will include:

- Tree inspection records.
- Tree maintenance records.
- Records of similar tree failures.
- Citizen complaints about tree hazards in the immediate area or related to the subject tree.

### Wrong tree, wrong location

People love trees, which presents an additional challenge to litigating tree cases. This is especially true in cases where your arborist has formed an opinion that the tree’s species, age, and location combined pose an unreasonable risk of harm in an otherwise healthy tree.

Rather than attack the tree, the issue is perhaps better presented as “it was the wrong tree for the wrong location.” Certified arborists are trained to perform “tree risk assessments,” which includes reviewing factors such as the species of the tree, whether it is in a high target zone with pedestrian traffic, and whether there are any visible defects in the tree, such as whether it is leaning or showing signs of disease. It may be that having a grove of eucalyptus trees in a non-irrigated area with little foot traffic is perfectly reasonable. But allowing trees to grow over 100 feet tall next to an irrigated lawn encourages a shallow root system in a high target area where hundreds of people and cars pass every day. If you have the wrong tree in the wrong location and then it is brought down by a storm, there may be liability even if the tree lacks other indicia of risk for failure.

The wrath of Mother Nature is unpredictable; that’s why it’s critical to know when trees are in danger and have them inspected regularly. For those who ignore the risks and warning signs, it’s not a safe bet to blame it on God.

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