

## Reduce Your Liability By Understanding Your Duty of Care

When a plaintiff or defendant attorney contacts me, they ask me questions whether a landscape, maintenance or tree care contractor owed their client a “duty of care” and did their actions “satisfy the standard” of care expected within the industry.

Duty of care is the responsibility or legal obligation of a person or organization to avoid acts or omissions (which can reasonably be foreseen) to be likely to cause harm to others.<sup>1</sup> Therefore you, as a landscape construction, maintenance, or tree service contractor, have a legal obligation to avoid acts or omissions that are likely to cause harm to others.

The duty of care extends to your actions or lack of action that would cause harm to your client or their property, perhaps even extending to adjacent properties and utilities. Attorneys assume a landscape contractor has a duty of care to properly install and maintain a landscape project or a tree care company knows how to safely and aesthetically prune a tree. What both the plaintiff and defendant attorney are trying to establish is whether industry standards of care for landscape, maintenance or tree care were violated or satisfied by the contractor. If the contractor is found to have failed in satisfying the standard of care, they may be found liable for damages in a court of law.

From a liability viewpoint, you, your company and employees are expected to render services with the ordinary skill and care that would be used by other reasonably competent contractors within the landscape or arboriculture industry under similar circumstances. Licensed contractors should understand their client hired them for their expertise and professionalism. The client is reliant upon the contractor to provide a product and service that conforms to industry standards. It is incumbent upon the contractor to satisfy all contractual obligations and satisfy the industry standard of care, or face a possible lawsuit.

### What Does this Mean for Landscape and Arboriculture Care Contractors?

In most of the landscape and arboriculture lawsuits I served on as an expert, they tended to be construction defect or personal injury cases. In all instances the contractor was assumed to have a duty of care to their client. My job was to determine whether they satisfied the standard of care expected of a landscape or tree care contractor.

Landscape and tree care contractors may be particularly vulnerable to legal challenges they most likely never contemplated. For instance, if a person suffers personal injury by tripping over a pop up head sprinkler head that failed to retract, who is responsible? Was the maintenance contractor aware of the problem and report it to the client? A pedestrian slips on a wet sidewalk adjacent to a leaking irrigation valve, is that the maintenance contractor’s fault? Should a maintenance contractor be concerned about a tree limb that is not part of their scope of work, even though a limb appears decayed or presents a dangerous condition? A palm tree worker notices signs of Fusarium disease in a Canary

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<sup>1</sup> Businessdictionary.com

Island date palm they are pruning, should they stop work and report the problem to the client or keep on pruning? These are situations that occur daily, the person encountering the situation could be a field worker who might not recognize the problem or does not bother to report it to their superior. Yet it is these types of unaddressed situations that result in lawsuits.

Successful contractors utilize industry approved written contracts. The contract defines the scope of work or assignment and services provided. It provides minimum specifications required to meet the clients' expectations. When a problem occurs, both parties look to the contract to see whether it was the contractor's responsibility. Contractors should be aware that a service excluded in the contract does not mean they should ignore an unsafe condition. The contractor is assumed to be the professional with the industry knowledge and training. The client relies upon the contractors' duty of care as a landscape or tree care professional.

While a maintenance contract might exclude irrigation mainline or control valve repairs, it would be unwise for a contractor to ignore a dangerous condition created by a mainline break or leaking valve. If you proceed with pruning a Fusarium infected palm tree, you might well be held accountable for the subsequent death of the tree, regardless of the fact you had a valid contract. If you or your workers have knowledge of an unsafe situation, landscape, irrigation, grading, drainage, plant disease, injury, trip or slip hazard, tree leans, dead branches etc., it should be brought to the client's immediate attention, regardless of the contract status. If you or any of your employees know of a site condition, not reporting the problem to your client is an omission and possibly failure to meet your duty of care as a contractor.

Landscape and tree care contractors frequently encounter changing site conditions. The field crews are usually the first to see or run into a problem. Whether they are trained to identify and encouraged to report potentially unsafe field conditions, landscape and tree defects or hazards, is an important aspect contractors should consider. The guy pushing the lawnmower might notice a problem but fail to report it because he didn't think it was his responsibility or worse, might think the employer will blame him for the repair.

My job as a landscape contractor and certified arborist expert witness is to determine whether a contractor satisfied or failed to meet the industry standard of care. Did the professional meet their legal obligation to avoid an act or an omission that caused harm to others. Regardless of whether the work is included in the contract or is extra, it would be prudent to bring needed repairs to the attention of the client.

By bringing a site condition or needed repair to the client's attention, the contractor satisfies their duty of care to avoid an act of omission by not reporting the problem. It becomes the client's responsibility to act on the information provided by their contractor. While this might seem a reasonable and simple procedure, it appears problematic to the landscape and tree care industry. Far too often contractors proceed with the work regardless of site conditions or obstacles, usually at their own risk and peril.

I often wonder why I can usually locate many landscape, irrigation, and tree issues during a site inspection that were ignored or not acted upon by the contractor, owner or client that later resulted in a lawsuit. I realize I am paid as an expert to possess the ability to discern issues a layman might not recognize or understand. However, most issues I perceive should also be recognizable by a competent landscape or tree care contractor. Why haven't they protected themselves by taking action when they became aware of the problem?

## An Ounce of Prevention is Worth a Pound of Cure

Perhaps contractors do not consider the legal implications of their profession until they are involved in a lawsuit. Having been an owner of a full service landscape-contracting firm, I recognize the difficulties encountered by other contractors; it was and still is a demanding profession. When younger, I rarely considered possible legal complications arising from any contract work my company performed and was fortunate to not encounter legal problems. Now as a consultant, I see hard working contractors getting into legal trouble that could have been easily avoided had they implemented the a few simple procedures. Here are some suggestions.

1. Always use a written contract, preferably one standard to the industry.
2. Define the scope of work or assignment.
3. Define what is not included in the contract.
4. Train and encourage your employees to report any and all unsafe, dangerous or change in site conditions or needed repairs, regardless of whether it is within your contract.
5. Ensure a competent employee trained to identify potential hazards conducts monthly or weekly site inspections.
6. Document unsafe field conditions and needed repairs, regardless if included in your contract. (Pictures are excellent).
7. Stop work immediately if you notice an issue or problem, document and notify client.
8. Report the condition to your client in a timely manner. If the repair work is extra to the contract, provide a change order for the work.
9. Follow up with your client on your report and or change order. Document the client response or lack thereof.

A contractor showing he or she documented and reported a needed repair to their client demonstrates pro-active care that satisfies the industry standard of care. It becomes the client responsibility to authorize the contractor to fix the problem or not. If an accident occurs, the contractor has a record of their pro-active management they had previously notified their client of the problem.

In summary, contractors have a duty of care to avoid acts or omissions that might harm others and a professional responsibility to satisfy their industry standard of care. Regardless if a site condition or needed repair is included within their contract, the contractor might be held liable in a lawsuit if they failed to act or not inform their client of a needed repair, dangerous or unsafe site condition they were aware of.



Contractors can minimize their legal exposure to lawsuits in a number of ways. Train and encourage field personnel to report field problems and needed repairs. Provide weekly or monthly inspection by knowledgeable personnel trained to identify defects and site risks. Develop written and photographic documentation and any required contract change order addressing the repair and communicate the information to the client in a timely manner. Follow up with the client on how to proceed.