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If a Tree Falls in a Roadway, Is Anyone Liable?: Proposing the Duty of Reasonable Care for Virginia's Road-Maintaining Entities

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If a Tree Falls in a Roadway, Is Anyone Liable?: Proposing the Duty of Reasonable Care for Virginia’s Road-Maintaining Entities[†]

Ian J. McElhaney*

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I. Introduction

“If a tree falls in the forest, and there’s nobody around to hear, does it make a sound?”¹ While the answer to that question is “yes,”² not all questions involving trees are so easily disposed.

The case of Matthew Cline presents an unfortunate example of such a question. Cline was traveling in Charlottesville, Virginia, “when a tree fell and crushed the roof, windshield and hood of the vehicle Cline was driving. Cline suffered severe and permanent injuries, including fractures of his cervical spine.”³ In the subsequent suit, Cline alleged that Dunlora, the owner of the tree

1. Jim Baggot, *Quantum Theory: If a Tree Falls in the Forest . . .*, OUPBLOG (Feb. 14, 2011), <https://blog.oup.com/2011/02/quantum/> (last visited Jan. 28, 2019) (on file with the Washington and Lee Law Review).

2. *See id.* (“[T]he answer depends on how we choose to interpret the use of the word ‘sound’. If by sound we mean . . . audio frequencies, then we might not hesitate to answer in the affirmative.”).

3. *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 15 (Va. 2012).

and land, was responsible on a theory of negligence.⁴ The Supreme Court of Virginia disagreed—the court found that the law did not “impose a duty upon landowners to protect individuals traveling on an adjoining public highway from natural conditions on the landowner’s property”⁵ Thus, a question of law remained unanswered: if a private landowner owes no duty with respect to trees adjacent to the roadway, who, if anyone, does?

Following this case, Cline asserted that liability fell to the Commonwealth of Virginia.⁶ The claim, however, was resolved on assumption-of-duty grounds⁷ and did not turn to the question of whether a road-maintaining entity⁸ has a duty to inspect for or cut down dangerous trees adjacent to the roadways it maintains. The question deserves an answer for safety’s sake in the Commonwealth. This Note calls for an answer in the affirmative: a road-maintaining entity should have a duty of reasonable care to remediate dangerous trees adjoining the roadways it maintains.⁹

4. *See id.* at 16 (“Cline argues that the circuit court erred in ruling that landowners in Virginia are not liable for personal injuries caused by trees that pose an imminent danger or cause actual harm to persons using an adjoining highway.”).

5. *Id.* at 18.

6. *See Cline v. Commonwealth*, No. 151037, 2016 WL 4721393, at *1 (Va. Sept. 8, 2016) (“Cline now pursues negligence and nuisance claims against the Commonwealth because the tree allegedly fell from the Commonwealth’s right-of-way on the Dunlora property.”). Dunlora, the defendant from the original case, made a similar argument. *See infra* notes 14, 18 (presenting Dunlora’s argument that the state is liable for roadway-adjacent hazards).

7. *See Cline*, 2016 WL 4721393, at *2 (“Based on the record before us, we cannot decide as a matter of law whether the Commonwealth assumed such a duty. This question must be decided by the factfinder on remand.”) (citation omitted).

8. *See Cline*, 726 S.E.2d at 18 n.6 (“The General Assembly has vested the Commissioner of Highways with the power to do all acts necessary for maintaining and preserving state roads. The duty of VDOT or any other entity responsible for maintaining the safety of the roadway presents a question not now before us.” (citation omitted)). The Virginia Department of Transportation (VDOT) is the best example of a road-maintaining entity, but for the purposes of this Note, a road-maintaining entity is any public or private entity charged with maintaining a travelled roadway. *See, e.g., infra* notes 87–89, 170 and accompanying text (considering private road-maintaining entities and providing examples of public municipal maintenance programs).

9. *See infra* Part III.B (arguing for the duty of reasonable care). While a later circuit court case unaffiliated with Cline has answered in the affirmative, the question remains open as a matter of binding precedent in the Commonwealth. *See Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014

Part II of this Note considers whether a duty for road-maintaining entities is tenable under Virginia law. The Part also explores the rationale for imposing differing liabilities between landowners and road-maintaining entities. Part III reviews the various duties other states use with respect to dangerous roadside trees and concludes that the duty of reasonable care is most appropriate for Virginia.

Sovereign immunity is a companion issue and is addressed in Part IV. The Part provides a brief overview of the policy arguments for sovereign immunity, before reviewing immunity's impact at the state, county, and municipal levels. The Part also addresses a government employee's entitlement to immunity, before considering a potential legislative solution to some of the present difficulties associated with sovereign immunity.

Finally, this Note reviews anticipated impacts in the world of litigation as a result of the duty of reasonable care,¹⁰ before addressing the legal and policy arguments of those who say the impact of such a duty would be negative.¹¹

II. Imposing a Duty on the Road-Maintaining Entity

In *Cline v. Dunlora South, LLC*,¹² the Supreme Court of Virginia declined to find that “a landowner owes a duty to protect travelers on an adjoining public roadway from natural conditions on his or her land.”¹³ Although the private landowner argued that the Virginia Department of Transportation (VDOT) was

WL 3891750, at *5 (July 19, 2014) (finding that the Virginia Department of Transportation had a duty of reasonable care to remediate a dangerous tree adjacent to the roadway).

10. See *infra* Part V.A–C (reviewing applicability with respect to gross negligence, assumption-of-duty, and other roadside hazards).

11. See *infra* Part V.D (answering the question, “why have a duty at all?”).

12. 726 S.E.2d 14 (Va. 2012).

13. *Id.* at 18. The court noted that “[t]he duty owed by adjoining property owners is to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.” *Id.* The court left open the possibility for liability on the basis of a landowner's positive act, but declined to impose a duty where “the allegations . . . are stated in terms of a failure to act” with respect to trees left in a natural condition adjacent to the roadway. *Id.*

responsible for the safety of travelers on the highway,¹⁴ the court declined to resolve the issue.¹⁵ Whether road-maintaining entities have a duty to protect travelers from dangerous trees adjacent to the roadway is a question that begs for an answer, but answering in the affirmative is contingent first on determining whether or not a road-maintaining entity can have any duties with respect to roadway maintenance. This Part first reviews whether such duties are tenable under Virginia law¹⁶ and then considers the justification for imposing a duty on the road-maintaining entity but not the private landowner.¹⁷

*A. Virginia Justifications for Imposing a Duty on the
Road-Maintaining Entity*

The court in *Cline* largely ignored Dunlora's arguments in favor of public liability,¹⁸ as they were unnecessary to resolve the case.¹⁹ The court did note, however, that "[t]he duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way."²⁰

14. *See id.* ("[Dunlora] also claims that it is the responsibility of VDOT to protect travelers on public roadways from injuries caused by dangerous instrumentalities immediately adjacent to the roadway."). This claim was made to absolve the private landowner of any duty, as Dunlora asserted that "the safety of the highway is a matter for the public authorities." Brief of Appellee at 12, *Cline v. Dunlora S., LLC*, 726 S.E.2d 14 (Va. 2012) (No. 110650), 2011 WL 9694959, at *11.

15. *See Cline*, 726 S.E.2d at 18 n.6 ("The duty of VDOT or any other entity responsible for maintaining the safety of the roadway presents a question not now before us."); *see also id.* at 21 n.6 (Lemons, J., dissenting) (same).

16. *Infra* Part II.A.

17. *Infra* Part II.B.

18. *See* Brief of Appellee at 8–19, *Cline v. Dunlora S., LLC*, 726 S.E.2d 14 (Va. 2012) (No. 110650), 2011 WL 9694959, at *7–18 (arguing for state liability with respect to dangerous conditions adjacent to the roadway as a component of Dunlora's non-liability claim).

19. *See Cline*, 726 S.E.2d at 18 n.6 ("The duty of VDOT or any other entity responsible for maintaining the safety of the roadway presents a question not now before us.").

20. *Cline*, 726 S.E.2d at 14, 18 (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927)).

The court also referenced VDOT's statutory authority for maintaining the roadways but offered no further analysis.²¹

Given road-maintaining entities' responsibility and authority for roadway maintenance, the court indicated that it may recognize a higher standard of liability for road-maintainers than for private landowners.²² Furthermore, it is evident that the road-maintaining entity would be responsible for roadway maintenance in and adjacent to the road because, as the court has found, highway safety considerations can extend beyond the bounds of the physical roadway.²³ A circuit court found that VDOT and the City of Norfolk had duties with respect to a dangerous tree adjacent to the roadway, post-*Cline*,²⁴ adding legitimacy to this

21. See *id.* at 18 n.6 (“The General Assembly has vested the Commissioner of Highways with the power to do all acts necessary for maintaining and preserving state roads.”); see also General Powers of Comm’r of Highways, VA. CODE ANN. § 33.2-223 (2018) (“[T]he Commissioner of Highways shall have the power to do all acts necessary or convenient for constructing, improving, maintaining, and preserving the . . . operation of the highways . . .”).

22. See *Cline*, 726 S.E.2d at 14 (contrasting, the court noted landowners have a lesser duty, “to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the [public entity that maintains the highway] has left it” (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927))).

23. See *Taylor v. City of Charlottesville*, 397 S.E.2d 832, 836 (Va. 1990)

[I]t is said here that the hazardous situation arose not from any condition in the streets themselves, but from a danger outside the streets. We do not think the rule is so limited as to exclude all danger arising beyond the limits of a street. The purpose of the rule is to provide safety to persons lawfully using the streets. The rule, indeed, would be but half discharged were it not held to make the municipality liable for dangers known to exist outside the street’s limit, but so near thereto as to endanger public travel thereon. It is as much the duty of a city to take steps to ward off and to prevent the known probability of injury to users of its streets as it is its duty to remove dangerous defects and obstructions within the streets themselves.

(quoting *Burson v. City of Bristol*, 10 S.E.2d 541, 545 (Va. 1940)).

24. See *Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014 WL 3891750, at *3–5 (July 19, 2014) (finding that the City of Norfolk had duties under its Charter, and that VDOT had the duty of reasonable care to maintain trees and other natural vegetation adjacent to the roadway). Notably, the claim against the Commonwealth and VDOT later failed on immunity grounds, as “[u]nder *Cline v. Dunlora*, a private landowner does not owe a duty to protect travelers on an adjoining public roadway from natural conditions on the landowner’s property. Thus, the Commonwealth, if a private person, would not be liable . . .” *Id.* at *5. This Note will discuss the impact of sovereign immunity at greater length. *Infra* Part IV.

possible duty.²⁵

B. Justification for Differing Liabilities Between Road-Maintaining Entities and Private Landowners

Although Virginia law leaves open the possibility for the imposition of a duty, the decision in *Cline* does little to explain why the road-maintaining entity should bear the burden of liability but leave the private landowner untouched.²⁶ An examination of law from other states, however, explains why such a distinction makes sense.

Private landowners and road-maintaining entities play different roles with respect to the roadway—this distinction is the reason for asymmetric liability. In *Ford v. South Carolina Department of Transportation*,²⁷ the South Carolina Court of Appeals found the Department of Transportation, rather than a private landowner, liable for injuries resulting from a motorist driving into a fallen tree.²⁸ “Necessity” dictated that the private rural landowner was not liable due to the disproportionate burden liability would impose.²⁹ Conversely, the court found that the Department of Transportation could be liable for a tree in

25. *But see infra* notes 222–242 and accompanying text (reviewing the Commonwealth’s opposition to a duty in Virginia). The Commonwealth’s position is that a duty should not be imposed as a matter of policy and law, which will be discussed later in this Note’s assessment of impact. *Infra* Part V.D.

26. *See supra* notes 20–24 and accompanying text (detailing the state of the law).

27. 492 S.E.2d 811 (S.C. Ct. App. 1997).

28. *See id.* at 812–13 (“Ford was driving south . . . when his car collided with a tree that had fallen across the road. Mr. Ford’s car continued through the limbs of the tree and then veered off to his left and down an embankment . . . Mr. Ford sustained severe head injuries and died as a result . . .”).

29. *See id.* at 814 (“The rule of non-liability for natural conditions remains to a considerable extent a necessity in rural communities, where the burden of inspecting and improving the land is likely to be entirely disproportionate not only to any threatened harm but even to the value of the land itself.”); *see also id.*

[A] landowner in a residential or urban area has a duty to others outside the property to prevent an unreasonable risk of harm from defective or unsound trees on the premises. Neither this court nor the supreme court, however, has extended this duty to an owner of trees of natural origin growing on rural, undeveloped land . . . We decline to extend the duty here.

proximity to the highway.³⁰ The court declared that liability stemmed from “the Department’s duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel.”³¹ Public responsibility gave the Department of Transportation a higher duty of care than the private landowners, “even [for] those obstructions originating on private property.”³²

Another justification is simply binary; if one party has a duty, the other does not, and vice versa. The Supreme Court of Minnesota remarked, “[t]he authorities chargeable with the maintenance of streets and highways generally have been held to the duty of protecting against dangers from falling trees and branches. This negatives such duty on abutters or servient fee owners.”³³ In other words, casting the burden on the road-maintaining entity suggests that the private landowner should not be burdened with a duplicative, overlapping duty.³⁴ This premise assumes that someone should be liable in order to give effect to safety concerns via tort law.³⁵

30. *See id.*

[T]he Department of Transportation can be held liable for damages caused by the fall of a tree standing within the limits of or in close proximity to a public highway. Liability depends on whether the Department knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity.

31. *Id.* The court also noted that “even though a *landowner* is not liable to persons travelling on adjacent highways for harm resulting from natural conditions on land, the *Department* has the privilege to enter the land and do what is necessary to remedy the harm . . .” *Id.*

32. *Id.*

33. *Zacharias v. Nesbitt*, 185 N.W. 295, 296 (Minn. 1921).

34. *See id.* (establishing a rule of binary liability between road-maintaining entities and private landowners).

35. *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1803–05 (1997) (recounting the development of deterrence as a primary theory of tort law over the decades). Tort law functions to deter negligent conduct via an economic mechanism, and entities subject to tort duties have a strong incentive to fulfill their obligations, lest they be subject to costs in the form of civil liability. *See* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1031 (2001) (“From an economic perspective, the law ought to encourage people to act efficiently.”). “Forcing people to take account of, or at least consider, all the costs of their proposed activity . . . will lead to

The binary justification can be reconciled with the position that liability should fall with the entity responsible for maintaining the roadway. The Fourth Circuit noted in *Chambers v. Whelen*³⁶ that while the state of West Virginia had imposed a statutory duty on road-maintainers to remove dead trees adjacent to the roadway, no such duty had been imposed on landowners—a binary conclusion.³⁷ The court then declared,

This statutory policy touches, we think, the real heart of the question. The inspection and removal of trees standing near a highway is, in substance, not a matter affecting the use of the abutting property, but a matter affecting the safety of the road. While, of course, it is the duty of abutting owners not to create or maintain upon their premises what may be a source of danger to travelers on the highway, it is the duty of the highway officials, and not the duty of abutting owners, to make the highway safe for the use of the public; and the duty of inspection would seem to rest upon those whose duty it is to make the highway safe.³⁸

As noted, Dunlora argued these points in *Cline*,³⁹ but the court did not address their merits. The court did recognize, however, the fundamental difference between a road-maintaining entity's

efficient investments in safety.” *Id.* Imposing a duty should “help to insure efficient investments in safety if it can force actors to take account of costs they would otherwise ignore because existing legal rules do not provide liability for those costs.” *Id.* at 1031–32; *see also id.* at 1032 (“[T]he threat of paying [accident] costs, is necessary to encourage efficient investments in safety.”). Although deterrence theory is not without critiques of its own, *see id.* at 1033 (noting that an issue with deterrence theory is that unless those injured pursue claims, the economic incentive to invest in safety is lessened), liability is required in order to make tort law an effective standard-bearer of safety. *See id.* at 1032 (“If legal rules do not force a person to take account of all the costs of a particular action [or inaction], then legal rules will not lead to efficient investments in safety.”). Innocent drivers should not bear the burden when road-maintaining entities are well-positioned to prevent the harm in the first place. *See infra* Part V.D (arguing that road-maintaining entities should bear liability in Virginia).

36. 44 F.2d 340 (4th Cir. 1930).

37. *See id.* at 341 (recounting West Virginia’s statutory scheme).

38. *Id.* at 342. The court’s decision was limited to rural areas, in a similar vein to *Ford*. *See id.* at 341 (limiting the question to “whether it is the duty of the owner to inspect trees growing naturally upon rural lands”).

39. *See* Brief of Appellee at 8–19, *Cline v. Dunlora S., LLC*, 726 S.E.2d 14 (Va. 2012) (No. 110650), 2011 WL 9694959, at *7–18 (emphasizing the road-maintaining entity’s statutory burden to maintain the safety of the roadway, and embracing the policy argument of *Whelen*).

responsibilities and a private landowner's, as well as the statutory burden on VDOT.⁴⁰ *Cline* represents a foundation: it establishes non-liability for the landowner while leaving open the possibility of imposing a duty upon the road-maintaining entity.⁴¹ Imposing that duty relies on recognizing a legal distinction between the two actors,⁴² and it appears that the court may be willing to do so.⁴³

40. See *supra* Part II.A (detailing *Cline*).

41. See *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 18 (Va. 2012)

It is well settled that public highways, whether they be in the country or in the city, belong, not partially but entirely, to the public at large, and that the supreme control over them is in the legislature. This plenary power over the streets to a certain extent is conferred by the legislature of the State upon the cities and towns thereof. . . . The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the [public entity that maintains the highway] has left it.

(alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927)).

42. See *supra* notes 26–32, 36–38 and accompanying text (exploring the legal differences between the roles of a private landowner and a road maintaining entity). If the two roles were not legally distinct, *Cline* would control the outcome of a claim against a road-maintaining entity either on the merits, or as a function of sovereign immunity. See *infra* notes 126–134 (demonstrating how conflating the two roles is fatal to a claim through sovereign immunity); *Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014 WL 3891750, at *2 (July 19, 2014) (“In support of their Demurrer, [both the Commonwealth and the City of Norfolk have] cited *Cline* . . . and asserted that the Plaintiff’s cause of action is precluded because there is ‘no legal duty to maintain any natural condition on land adjacent to a roadway.’”).

43 See *Cline*, 726 S.E.2d at 18 (“The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous” (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927))). Perhaps to solidify the distinction, both the majority and dissent made clear that *Cline* does not control for the purposes of road-maintaining entity liability. See *id.* at 18 n.6 (“The duty of VDOT or any other entity responsible for maintaining the safety of the roadway presents a question not now before us.”); see also *id.* at 21 n.6 (Lemons, J., dissenting) (same). Given that three Justices voted in favor of liability for the private landowner and that the majority opinion accepts a duty for road-maintaining entities to perform positive acts with respect the roadway, it appears that the court can rule in favor of liability for a road-maintaining entity. See *id.* at 18 (identifying that a road-maintaining entity has a positive duty to act); see also *id.* at 18–21 (Lemons, J., dissenting) (presenting the dissent in favor of landowner duty from Justice Lemons, joined by Justices Mims and Powell).

III. How to Define the Scope of Duty

Although a duty imposed on the road-maintaining entity is tenable, the work does not stop there; it remains to define the scope of such a duty. Just as now-Chief Justice Lemons noted in his dissent in *Cline* with respect to private landowners,⁴⁴ a variety of duties have developed in response to road-maintaining entity liability. This Part considers these approaches before identifying the best duty for Virginia.

A. Reviewing Out-of-State Duties for Road-Maintaining Entities

Many jurisdictions—regardless of whether they impose duties on private landowners or road-maintaining entities—adopt duty distinctions based upon a tree’s location.⁴⁵ For example, the “urban/rural” distinction posits that road-maintaining entities have diminished duties of inspection with respect to trees located in rural areas.⁴⁶ The rationale for the distinction appears to be born of practicality; the law hesitates to impose a duty on an entity that is “unreasonable in comparison with the risk.”⁴⁷ The doctrine can be imprecise, however, as it can be difficult to determine whether land is urban or rural.⁴⁸

Other states focus more narrowly on the character and usage of the road and surrounding land in question. In *Hensley v. Montgomery County*,⁴⁹ a Maryland court found that as a matter of law, the duty of inspection required consideration of “the use of the

44. See *Cline*, 726 S.E.2d at 20 (Lemons, J., dissenting) (“Despite the influence of the Restatement, across the jurisdictions addressing the liability of landowners resulting from trees falling on public highways, multiple approaches have developed.”).

45. See *id.* (Lemons, J., dissenting) (discussing the “urban/rural” distinction for purposes of landowner duties across a number of jurisdictions).

46. See *Commonwealth v. Callebs*, 381 S.W.2d 623, 624 (Ky. 1964) (finding that because an area was “not truly urban in character,” the law did not require the Department of Highways to inspect for dangerous trees).

47. *Id.*

48. See *id.* at 624 (“Although the area may have been within the city limits of Barboursville, it was not truly urban in character, and in the near vicinity there were wooded hillsides along the road.”).

49. 334 A.2d 542 (Md. Ct. Spec. App. 1975).

road or population pressures of the countryside.”⁵⁰ The court reasoned that imposing a strict duty of inspection was inappropriate because “[s]uch a duty would be far too great a burden on the taxpayer when balanced against the purpose to be served. There are still some natural dangers from which we cannot rely upon the government for protection.”⁵¹ This line of reasoning has also taken root in federal law.⁵² The advantage of such a methodology is that an entity is not responsible for areas that experience less traffic even if they are contained in the bounds of an otherwise urban area.⁵³ The drawback is that beyond an internal determination of which areas are so populous as to require inspection, a road-maintaining entity has no way to know definitely, prior to court inquiry, where it must inspect for dangerous trees.⁵⁴ Furthermore, the character of a roadway and its accompanying surroundings is subject to change, which can make the job of determining where to inspect even more difficult.⁵⁵

Perhaps as a means of curing doubt or promoting safety, some states impose a duty to inspect regardless of the land or

50. *Id.* at 547.

51. *Id.*

52. *See Husovsky v. United States*, 590 F.2d 944, 950 (D.C. Cir. 1978)

[T]he appropriate level of inspection and maintenance of a particular roadway depends not only on the expense and burden of various maintenance programs, but also on the characteristics of the surrounding land and the roadway itself, including the type and extent of dangers posed thereto. For instance, a seldom travelled roadway in a national forest in a rural area would require fewer inspections and a different type of maintenance than would a heavily travelled thoroughfare in an urban area.

(citations omitted).

53. *See Callebs*, 381 S.W.2d at 624 (“Although the area may have been within the city limits of Barbourville, it was not *truly* urban in character” (emphasis added)).

54. *See Husovsky*, 590 F.2d at 950 (“Thus, we think it necessary first to examine the particular situation presented in the case at bar in order to determine the level of inspection and care which the District was obligated to provide.”).

55. *See Hensley*, 334 A.2d at 547 (“Landowners would face nebulous potential liability dependent rather upon the acts of others . . . than upon their own actions. With the easy accessibility to open country provided by modern ways of transportation an owner would be hard put to know what duties were imposed upon him by that ownership.”).

road's character.⁵⁶ This methodology can place a great burden on the road-maintaining entity, however. As New York applies the duty, entities face near-strict liability for injuries resulting from trees falling into the roadway, provided the tree is visibly decayed.⁵⁷

Simply adopting one of the location-based duties is not enough to define the full scope of a road-maintaining entity's duty.⁵⁸ The entity must also know, beyond the locations it is responsible for, the extent to which it must inspect those areas for dangerous trees.⁵⁹

The burden of inspection can be great if the road-maintaining entity must perform walk-around inspections (by physically walking around trees to inspect for danger) adjacent to the roadway.⁶⁰ Generally, windshield inspections (by inspecting trees from a vehicle driving on the roadway) are "consistent with . . . practices adopted by public entities charged with monitoring trees abutting . . . highways or other public

56. See *Jones v. State*, 227 N.Y.S.2d 297, 299 (N.Y. Ct. Cl. 1962) ("It is well established that the State is under a duty to make a reasonable inspection of trees along its highways, and to trim and remove such trees or portions thereof which constitute a danger to users of State highways."); *Mitchell v. State*, 193 So.3d 152,

157. (La. Ct. App. 2016) ("The state's duty with respect to its roadways is to keep the road and its shoulders in a reasonably safe condition The state's duty is to inspect for dead trees and remove them within a reasonable time.").

57. See *Brown v. State*, 58 N.Y.S.2d 691, 692–93 (N.Y. Ct. Cl. 1945)

The highway patrolmen were bound to perform their duties in a careful and diligent manner, and had they done so in the present instance, would have noticed the decayed condition of this large elm tree and of its imminent danger to those using the highway. The failure of the State's employees to protect the public from such potential danger and to give due and adequate warning thereof constitutes negligence. The mere happening of the accident outside of the patrol period . . . is no defense to this claim where the hazardous condition existed and the State had knowledge, actual or constructive, of the same for many years.

(citations omitted).

58. See *supra* notes 45–55 and accompanying text (reviewing location-based duties).

59. See *Husovsky*, 590 F.2d at 950 (discussing "the appropriate level of inspection and maintenance").

60. See *Commonwealth v. Callebs*, 381 S.W.2d 623, 624 (Ky. 1964) (considering whether the scope of inspection includes "a walk-around inspection of each tree near the highway").

landscapes.”⁶¹ Imposing a walk-around duty as opposed to a windshield-inspection duty places a significant, impractical burden on the road-maintaining entity.⁶²

Given that courts tend to weigh the balance of safety versus practicality of implementation,⁶³ it is reassuring to note that when a duty to inspect is imposed, the tree’s appearance can instead define the scope.⁶⁴ Liability tends to focus on whether, by reasonable inspection, the road-maintaining entity would have discovered a tree’s defective condition.⁶⁵ Even New York excuses liability when reasonable inspection would fail to reveal a tree’s rotting condition.⁶⁶

In a related vein, the duty to inspect can be limited to notice of danger as well. As the Court of Appeals of Kentucky explained, “the state has a duty to inspect a tree on a public right-of-way when it receives actual notice [of the tree’s] unsafe condition [T]here is a difference between the state’s general

61. *Baudouin v. N.J. Tpk. Auth.*, No. L-01368-10, L-10198-10, 2017 WL 1548708, at *6 (N.J. Super. Ct. App. Div. May 1, 2017).

62. *See id.* (giving an example of an expert who, “kn[e]w of no utility or highway department that expends the time and resources necessary to perform a 360 degree walk-around of every tree that could possibly impact a roadway”); *see also id.* at *9 (observing that a walk-around inspection is unreasonable given the Turnpike Authority’s total area and number of trees).

63. *See Hensley v. Montgomery County*, 334 A.2d 542, 547 (Md. Ct. Spec. App. 1975) (“Such a duty would be far too great a burden on the taxpayer when balanced against the purpose to be served. There are still some natural dangers from which we cannot rely upon the government for protection.”).

64. *See Caskey v. Merrick Const. Co.*, 949 So.2d 560, 563 (La. Ct. App. 2007) (“There is no duty requiring DOTD inspectors to walk around all sides of the tree and check it for damage, particularly when the tree is otherwise green and healthy.”).

65. *See Carter v. Ga. Power Co.*, 418 S.E.2d 379, 380 (Ga. Ct. App. 1992) (“[A] city has no duty to check limbs overhanging a public road for non-visible rot.”). Reasonable inspection may also be related to an authority’s discretion for where and how to implement safety programs. *See Merando v. United States*, 517 F.3d 160, 168–74 (3d Cir. 2008) (reviewing discretionary decisions related to a windshield inspection program in Federal Tort Claims Act litigation). Discretion will be discussed later with respect to sovereign immunity. *Infra* Parts IV.B–C.

66. *Compare Mosher v. State*, 77 N.Y.S.2d 643, 646–47 (N.Y. Ct. Cl. 1948) (declining to impose liability where the evidence failed to show that a highway inspection would have revealed the tree’s dangerous condition), *with* *Messinger v. State*, 51 N.Y.S.2d 506, 507 (N.Y. Ct. Cl. 1944) (finding liability where the highway patrol should have noticed tree’s defective condition if they had performed “their duties in a diligent and thorough manner”).

duty to inspect, which there is none, and . . . its receipt of actual notice of a dangerous condition.”⁶⁷

Instead of imposing bright line rules for where and how to inspect for dangerous trees, an alternate theory of duty is that of generalized reasonable care.⁶⁸ As the Court of Appeals of South Carolina articulates,

In South Carolina, as elsewhere, a public authority, such as the Department, is liable for damages caused by the fall of a tree standing within the limits of or in close proximity to its highway, provided the public authority had notice, or in the exercise of reasonable care should have been informed, that the condition of the tree was such as to make it hazardous to persons or property in the immediate vicinity.⁶⁹

The duty considers the weight of the evidence to determine actual or constructive notice that would lead to liability.⁷⁰

An issue that impacts all of the duties previously discussed is the ability of a road-maintaining entity to enter private land and inspect or remedy dangerous trees. The Second Restatement of Torts addresses the issue by allowing public authorities to enter private land to remediate dangerous conditions adjacent to the highway but does not address entities’ tort liability for those conditions.⁷¹ Some courts have found that authorities own both the privilege and a duty to inspect for and remove dangerous trees that

67. *Comm. of Ky., Transp. Cabinet, Dept. of Highways v. Mechels*, No. 2010-CA-002279-MR, 2012 WL 333491, at *3 (Ky. Ct. App. Feb 3, 2012).

68. *See Marsh v. S.C. Dep’t of Highways & Pub. Transp.*, 380 S.E.2d 867, 868 (S.C. Ct. App. 1989) (recognizing a duty of reasonable care).

69. *Id.*

70. *See id.* at 869 (“This evidence, in our view, sufficiently establishes that the Department in the exercise of reasonable care should have known of the defective condition of the tree in question and of the danger it represented to persons and property alike on Highway 41.”). Relevant evidence can include the physical appearance of the tree and the maintenance routines of the entity. *See id.* (reviewing evidence).

71. RESTATEMENT (SECOND) OF TORTS § 363 cmt. c (AM. LAW. INST. 1965)

The fact that a possessor of land is not subject to liability for natural conditions . . . does not preclude the existence of a privilege on the part of the authorities charged with the maintenance of the highway . . . to enter the land and do such acts as are necessary for the termination of the dangers which its natural condition involves.

are located on private property adjacent to the roadway.⁷² This is not a unanimous proposition, however.⁷³

B. The Duty of Reasonable Care is the Best Duty for Virginia's Road-Maintaining Entities

The above review is certainly non-exhaustive but does represent prevailing trends of law with respect to a road-maintaining entity's duties for trees adjacent to the roadway.⁷⁴ These doctrines serve to inform what duty would be most appropriate in Virginia.

For the reasons set forth below, it seems apparent that the most appropriate duty for road-maintaining entities is the

72. See, e.g., *Husovsky v. United States*, 590 F.2d 944, 947–48, 951–52 (D.C. Cir. 1978) (finding that the District of Columbia and the United States owed a duty with respect to a tree located outside of the right-of-way of the road they jointly maintained); *Barron v. City of Natchez*, 90 So.2d 673, 677 (Miss. 1956) (finding that a municipality is liable for dangerous conditions adjacent to the highway that may cause injury to travelers); *City of Hattiesburg v. Hillman*, 76 So.2d 368, 370 (Miss. 1954) (“[W]hile the title to trees standing in the neutral ground is vested in the adjacent property owner, beyond doubt a municipality, in the exercise of reasonable care . . . has the right and is under the duty to remove them, if they are dangerous.”); *Brown v. State*, 58 N.Y.S.2d 691, 692 (N.Y. Ct. Cl. 1945) (“The fact that the trunks of the trees were located outside the highway right of way is of no consequence”); *Messinger v. State*, 51 N.Y.S.2d 506, 507 (N.Y. Ct. Cl. 1944) (“We hold that the State is liable for allowing a condition to exist which should have been observed The fact that the trunks of the trees were outside of the highway right of way is no defense”); *Inabinett v. State Highway Dep’t*, 12 S.E.2d 848, 851 (S.C. 1941) (finding that if a road-maintaining entity knows of a dangerous condition on private land adjacent to the highway, “it is its duty to enter upon the land and remove the danger”).

73. See *Ortiz v. Jesus People, U.S.A.*, 939 N.E.2d 555, 565 (Ill. App. Ct. 2010) (“Here, the court properly ruled that the City did not owe a duty to maintain or prevent injury from a tree on defendant’s private property.”); *Estate of Durham v. City of Amherst*, 554 N.E.2d 945, 947–48 (Ohio Ct. App. 1988) (considering a tree’s location on private property adjacent to the roadway, “[a]ppellant has failed to persuade a majority of this court that the city of Dayton possesses a duty with respect to property adjacent to the roadway”); *Bowman v. Town of Granite Falls*, 204 S.E.2d 239, 240 (N.C. Ct. App. 1974) (“The tree was in the area left by the land developer for street purposes, but that part had not been accepted and was still private property over which the city had no control and to which it owed no duty.”).

74. See *supra* Part III.A (reviewing the imposition of duties on road-maintaining entities).

standard of reasonable care, exemplified by South Carolina.⁷⁵ To review, a road-maintaining entity would have a “duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel.”⁷⁶ Liability would hinge “on whether the [road-maintaining entity] knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity.”⁷⁷ This duty does not impose a strict duty to inspect for dangerous trees; rather, determining if the duty to the public is fulfilled depends in each case on a fact-based inquiry.⁷⁸ The duty, as in South Carolina, would extend to dangerous conditions on private property.⁷⁹

A number of reasons suggest that this duty is most appropriate for Virginia. First, the South Carolina scheme operates concurrently with reduced liability for landowners.⁸⁰ Although the scheme is not an exact analogue, the rationale for the distinction is pertinent: because a road-maintaining entity is responsible for a roadway’s safety, it follows that the entity has “a higher duty of care than [do private landowners], to discover and remedy potential obstructions, even those obstructions originating on private property.”⁸¹ As mentioned above, the Supreme Court of Virginia has embraced this distinction, as well as the idea that dangerous conditions for which public authorities can be liable may extend beyond the bounds of the physical roadway.⁸²

75. See *Ford v. S.C. Dept. of Transp.*, 492 S.E.2d 811, 814 (S.C. Ct. App. 1997) (applying the duty of reasonable care).

76. *Id.*

77. *Id.*

78. See *id.* at 815 (“[W]e hold further inquiry into the facts is necessary to determine whether or not the Department, had it adequately performed its duty to the public, would have had notice of the potential hazard and the opportunity to remedy the hazard.”).

79. See *id.* at 814 (“Moreover, even though a *landowner* is not liable to persons travelling on adjacent highways for harm resulting from natural conditions of the land, the *Department* has the privilege to enter the land and do what is necessary to remedy the harm resulting from such natural conditions.”).

80. See *supra* notes 28–32 and accompanying text (discussing differing liabilities of landowners and road-maintaining entities).

81. *Ford*, 492 S.E.2d at 814; see also Part II.B (reviewing policy rationale for separate liabilities).

82. See *supra* Part II (reviewing Virginia’s treatment of the distinction between private landowners and road-maintaining entities); see also *Cline v.*

Second, the Supreme Court of Virginia has noted the legislative decision to place road-maintenance responsibilities in the hands of the state road-maintaining entity as opposed to another actor.⁸³ This emphasis can be extended to other levels of government as well—counties can adopt road responsibilities with the creation of sanitary districts.⁸⁴ Municipal entities may do so as well through charters or other ordinances.⁸⁵ Statutory evidence largely supports the conclusion that road-maintaining entities are the actors assigned responsibility—and the liability—as a matter of legislative policy.⁸⁶

Although these legislative decisions do not speak to private road-maintaining entity liability,⁸⁷ these actors are functionally similar to public entities.⁸⁸ Both the court and the legislature

Dunlora S., LLC, 726 S.E.2d 14, 18 (Va. 2012)

The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature

(alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927)); *Taylor v. City of Charlottesville*, 397 S.E.2d 832, 836 (Va. 1990) (“The rule is to provide safety to persons lawfully using the streets. The rule, indeed, would be but half discharged were it not held to make the municipality liable for dangers known to exist outside the street’s limit, but so near thereto as to endanger public travel thereon.”).

83. See *Cline*, 726 S.E.2d at 18 n.6 (“The General Assembly has vested the Commissioner of Highways with the power to do all acts necessary for maintaining and preserving state roads.”); see also General Powers of Comm’r of Highways, VA. CODE ANN. § 33.2-223 (2018) (“[T]he Commissioner of Highways shall have the power to do all acts necessary or convenient for constructing, improving, maintaining, and preserving the . . . operation of the highways . . .”).

84. See Certain Additional Powers of Governing Body, VA. CODE ANN. § 21-118.4(a) (2017) (“[W]hen an ordinance has been adopted creating a sanitary district in such county, . . . the . . . governing body . . . shall have the following powers and duties . . . [t]o construct, reconstruct, maintain, alter, improve, add to, and operate . . . streets . . . for the use and benefit of the public in such sanitary district . . .” (emphasis added)).

85. See *Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12-4019, 2014 WL 3891750, at *3 (July 19, 2014) (“Thus, the Norfolk City Charter imposes a duty on the City to prevent obstructions to Northampton Boulevard, and maintain trees upon public grounds bordering the roadway . . .”).

86. See *supra* notes 84–85 (compiling statutes).

87. See *supra* notes 84–85 (presenting statutes and judicial categorizations).

88. See *supra* Part II.B (discussing the role of the road-maintaining entity as one of maintenance and safety); *infra* Part V.D (exploring the road-maintaining

suggest that the duty lies with the entity in charge of the preservation of the roadway,⁸⁹ so there is little reason to develop a separate duty based on private or public designation.

Third, the duty of reasonable care has garnered support in a lower Virginia court. In *Zook v. City of Norfolk*,⁹⁰ the circuit court imposed a duty of reasonable care on the Commonwealth—and a similar duty on the City of Norfolk—to maintain trees and other vegetation adjacent to the roadway.⁹¹ The opinion referenced *Cline*, statutory authority, and out-of-state law (including a positive citation to South Carolina’s duty scheme).⁹² Although circuit court opinions are not binding authority,⁹³ it is persuasive that one Virginia court interprets *Cline* to be consistent with imposing a duty of reasonable care on road-maintaining entities.⁹⁴

Finally, Justice Lemons supported the duty of reasonable care for landowners in his dissent to *Cline*, which Justices Mims and Powell joined.⁹⁵ His theory of the case did not win the day, but combining his methodology of out-of-state review with the majority’s treatment of public entities lends support to this Note’s argument to establish the duty of reasonable care for road-maintaining entities.⁹⁶

entity’s ability to promote safety in Virginia); *see also infra* notes 121–123 and accompanying text (explaining the functional similarities in the context of sovereign immunity).

89. *See supra* notes 82–86 and accompanying text (reviewing justifications for road-maintaining entity liability generally). Private liability is significant in the context of the Virginia Tort Claims Act, which will be discussed when considering the Commonwealth’s sovereign immunity. *Infra* Part IV.B.1.

90. 87 Va. Cir. 47, No. CL12–4019, 2014 WL 3891750 (July 19, 2014).

91. *See id.* at *3, 5 (applying the duty of reasonable care to VDOT and the City of Norfolk).

92. *See id.* at *2–5 (basing the decision on the authorities mentioned in-text).

93. *See Burkholder v. McGraw*, 63 Va. Cir. 537, No. CH03000393, 2003 WL 23146217, at *2 n.3 (Dec. 31, 2003) (“While circuit court opinions do not have the force of binding precedents, they can have . . . great persuasive authority.”).

94. *See Zook*, 2014 WL 3891750, at *3 (specifically noting consistency with *Cline* before determining that “Plaintiff has alleged a sufficient cause of action for negligence against the City”).

95. *See Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 20–21 (Va. 2012) (Lemons, J., dissenting) (“Considering the various approaches to liability arising from trees adjacent to roadways in concert with . . . longstanding negligence principles . . . we should recognize a general duty of reasonable care applicable in all such cases.”).

96. *See Cline*, 726 S.E.2d at 19–21 (Lemons, J., dissenting) (reviewing

Justice Lemons' rationale also informs why the South Carolinian duty of reasonable care is most appropriate. He explicitly rejected the duty to inspect for dangerous trees⁹⁷ and noted that "it is unreasonable to impose the same expectations upon the owners of . . . rural . . . or forested tracts of land as that imposed upon the owner of a single lot in an unforested urban area"⁹⁸ For the issue of constructive notice, he called for a fact-based inquiry, relying on factors such as "the character of the land, the nature and frequency of the landowner's use, the outward appearance of the tree, and whether persons noticed and notified the owner of the condition of the tree."⁹⁹ His opinion shows a concern for flexibility and reasonableness with respect to liability; the general duty of reasonable care South Carolina imposes addresses these same concerns.¹⁰⁰ Issues relating to a tree's location and outward appearance, as well as issues concerning the frequency of motorist travel through the surrounding area are not unique to private landowner liability.¹⁰¹ They should be given the same respect when liability is imposed on road-maintaining entities instead.

The Supreme Court of Virginia has yet to see a case that demands a ruling on a road-maintaining entity's duty with respect to trees adjacent to the roadway. If, and when, a duty is imposed,

out-of-state cases to find a proper liability rule); *id.* at 18 ("The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous" (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927))).

97. See *Cline*, 726 S.E.2d at 21 (Lemons, J., dissenting) ("We should decline to impose a duty to inspect trees for defects").

98. *Id.*

99. *Id.*

100. See *supra* notes 75–79 and accompanying text (reviewing the South Carolinian regime). South Carolina also operates under a similar sovereign immunity waiver as Virginia does, demonstrating that the duty is workable under a similar statutory regime. See *infra* notes 166–167 and accompanying text (comparing the two immunity waiver statutes). Sovereign immunity is the focus of the next Part. *Infra* Part IV.

101. See *Cline*, 726 S.E.2d at 20 (Lemons, J., dissenting) (reviewing issues relating to imposing liability and out-of-state approaches to duty); *supra* Part III.A (reviewing out-of-state duties and their efforts to grapple with the same issues).

however, the duty of reasonable care seems to best comport with existing Virginia law.¹⁰²

IV. Sovereign Immunity and its Relationship to Road-Maintaining Entities

Even if a duty of reasonable care exists, immunity principles potentially mute its force. This Part first explores the conceptual background of sovereign immunity, and then assesses how the doctrine may impact the tort duty this Note advocates.¹⁰³

A. A Brief Review of Sovereign Immunity in Virginia

In Virginia, “the doctrine of sovereign immunity is ‘alive and well’”¹⁰⁴ In function, sovereign immunity is simple—it bars claims against the state in tort.¹⁰⁵ The Supreme Court of Virginia catalogs a non-exhaustive list of reasons for the doctrine:

protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing

102. See *supra* notes 80–96 (reviewing rationale specific to Virginia). For some of these arguments in the context of appellate litigation, see Brief of Appellee at 8–19, *Cline v. Dunlora S., LLC*, 726 S.E.2d 14 (Va. 2012) (No. 110650), 2011 WL 9694959, at *7–18 (detailing rationale for state liability with respect to dangerous conditions adjacent to the roadway).

103. *Infra* Parts IV.A–D. Although similar to sovereign immunity, this Note will not discuss the public-duty doctrine. The public-duty doctrine bars negligence claims against public officials if the duty was owed to the public, as opposed to a particular individual. See *Commonwealth v. Burns*, 639 S.E.2d 276, 278 (Va. 2007) (describing the public duty doctrine). The Supreme Court of Virginia has limited the doctrine to “cases when a public official owed a duty to control the behavior of a third party, and the third party committed acts of assaultive criminal behavior upon another.” *Id.* This limitation exists expressly due to sovereign immunity: “We hold that the expansion of the public duty doctrine is unnecessary because Virginia’s sovereign immunity doctrine provides sufficient protection to . . . employees in the discharge of their public duties.” *Id.* at 279. As such, this Note will focus on sovereign immunity.

104. *Messina v. Burden*, 321 S.E.2d 657, 660 (Va. 1984).

105. See *id.* (“One of the most often repeated explanations for the rule of state immunity from suits in tort is the necessity to protect the public purse.”).

citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.¹⁰⁶

Immunity is not limited to public bodies themselves; the doctrine can also protect public employees.¹⁰⁷ “The reason for this is plain: the State can act only through individuals.”¹⁰⁸ Thus, tort liability must be reconciled with sovereign immunity for the liability to have any teeth.¹⁰⁹

B. A Public Entity’s Sovereign Immunity in Virginia

Sovereign immunity’s protection in Virginia is different depending on the type of governmental entity at issue. The Part now considers sovereign immunity as it affects the Commonwealth,¹¹⁰ counties of the Commonwealth,¹¹¹ and municipalities within the Commonwealth.¹¹²

1. The Commonwealth of Virginia’s Immunity Under the Virginia Tort Claims Act

For the Commonwealth, “[i]n the absence of statute, an action of tort for injuries from defective highways cannot be maintained against the state.”¹¹³ The Virginia Tort Claims Act (VTCA)¹¹⁴

106. *Id.*

107. *See id.* at 660–61 (“Given the several purposes of the doctrine, it follows that in order to fulfill those purposes the protection afforded by the doctrine cannot be limited solely to the sovereign.”).

108. *Id.* at 661.

109. *See Whitley v. Commonwealth*, 538 S.E.2d 296, 302 (Va. 2000) (“A plea of sovereign immunity is a defensive plea presenting distinct issues of fact, which, if proved, create a bar to the plaintiff’s right of recovery.”); *see also Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014 WL 3891750, at *5–6 (July 19, 2014) (granting the Commonwealth’s plea of sovereign immunity in tort action involving a falling tree).

110. *Infra* Part IV.B.1.

111. *Infra* Part IV.B.2.

112. *Infra* Part IV.B.3.

113. *Mann v. Cty. Bd.*, 98 S.E.2d 515, 518 (Va. 1957).

114. Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3 (2014).

expressly waives the Commonwealth's immunity in certain cases.¹¹⁵ The VTCA reads:

[T]he Commonwealth shall be liable for claims for money . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, *if a private person*, would be liable to the claimant for such damage, loss, injury, or death.¹¹⁶

Per the statutory waiver, the Commonwealth may be liable in tort only if a private person would be liable in an identical action.¹¹⁷ In addition, the VTCA provides a number of exceptions to the waiver, the exception most relevant to this discussion being “[a]ny claim based upon . . . the legislative function of any agency subject to the provisions of this article.”¹¹⁸

The critical aspects of the statute are thus: the Commonwealth may be liable in tort only if, (1) the private-person clause is met; and (2) if the action falls outside of the statutory exceptions to the immunity waiver.¹¹⁹

The private-person clause presents two challenges of its own with respect to the application of a duty of reasonable care: first, a private person charged with maintaining the roadway must be

115. *See id.* (waiving immunity).

116. *Id.* (emphasis added). The Supreme Court of Virginia maintains that because the statute is a “derogation of the common law, its waiver of immunity must be strictly construed.” *Maddox v. Commonwealth*, 594 S.E.2d 567, 569 (Va. 2004). The statute does not waive immunity for agencies of the Commonwealth (such as VDOT); actions arising from a state agency's negligence must be brought against the Commonwealth. *See The Rector & Visitors of the Univ. of Va. v. Carter*, 591 S.E.2d 76, 78 (2004) (“As an agency of the Commonwealth, UVA is entitled to sovereign immunity under the common law absent an express . . . provision to the contrary The [VTCA's] waiver of the Commonwealth's immunity would make the Commonwealth both a property party, and given UVA's immunity, a necessary party . . .”).

117. *See* VA. CODE ANN. § 8.01-195.3 (waiving immunity). Damages are limited to \$100,000, or to “the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs.” *Id.*

118. VA. CODE ANN. § 8.01-195.3(2).

119. *See* VA. CODE ANN. § 8.01-195.3 (waiving immunity in instances where a private actor would be liable in tort, and providing a number of exceptions to liability).

liable for negligent maintenance and, second, a government road-maintaining entity must not occupy the same role as the private landowner in *Cline*.¹²⁰ Each will be discussed in turn.

This Note has previously discussed the proposition that a private individual in the role of a road-maintaining entity could be subject to the same legal duties as proposed for public entities.¹²¹ It bears repeating that when a private individual undertakes the role of a road-maintaining entity, he works to fulfill the same role that a public entity would: “the preparation and preservation of a sufficient traveled way.”¹²² If he did so negligently, the asserted duty of reasonable care should apply.¹²³ The Supreme Court of Virginia relies on case law to determine the appropriate standard of care for private individuals in the context of VTCA litigation,¹²⁴ so the observations made by this Note can serve as the primary justification for a duty applied to all road-maintaining entities.¹²⁵

As a second prong, a road-maintaining entity—regardless of land ownership—is different than a private landowner who does not maintain a road.¹²⁶ In *Zook*, the court expressly invoked the private-person aspect of the statute in order to grant the Commonwealth immunity for the situation where a tree located on Commonwealth property fell into the roadway and injured a traveler.¹²⁷ Applying the VTCA, the court stated:

120. See *supra* notes 115–29 and accompanying text (detailing the VTCA); see also *infra* notes 127–130 (presenting the *Zook* treatment of *Cline*).

121. See *supra* notes 87–89 and accompanying text (reviewing proposition that duty could apply to private entities).

122. *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 18 (Va. 2012).

123. See, e.g., *Bragg v. United States*, 741 S.E.2d 90, 100 (W. Va. 2013) (considering the private-person clause in context of the Federal Tort Claims Act through assessing whether or not a private person would be liable for the negligent inspection of a worksite).

124. See *Commonwealth v. Coolidge*, 379 S.E.2d 338, 340 (Va. 1989) (“We construe Code § 8.01-195.3 as a limited waiver of governmental immunity from tort claims, not as a legislative definition of the Commonwealth’s duty of care to those with claims against it. We believe the legislature intended existing case law to govern the appropriate standard of care.”).

125. See *supra* Parts II–III, V.D (outlining reasons for the imposition of a duty of reasonable care for road-maintaining entities as a matter of law and policy).

126. See *Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014 WL 3891750, at *5 (July 19, 2014) (declaring that under *Cline*, a private person would not be liable as to justify Commonwealth immunity).

127. See *id.* at *2, *5 (detailing facts and granting the Commonwealth’s plea

Under *Cline v. Dunlora*, a private landowner does not owe a duty to protect travelers on an adjoining public roadway from natural conditions on the landowner's property. Thus, the Commonwealth, if a private person, would not be liable to the Plaintiff. Given that the Commonwealth has not waived their sovereign immunity, the Court will grant the Commonwealth's Special Plea of Sovereign Immunity.¹²⁸

This private-person application is particularly relevant to the immunity question, given that the Commonwealth can own right-of-way properties adjacent to the roadway.¹²⁹

Zook used the *Cline* rule, "a private landowner does not owe a duty to protect travelers on an adjoining public roadway from natural conditions on the landowner's property,"¹³⁰ to immunize the Commonwealth by conflating road-maintaining entities and private landowners. This rule, however, says nothing with respect to a road-maintaining entity's liability,¹³¹ so it was inappropriate to grant immunity by way of analogy. *Cline* was clear that "[t]he duty of VDOT or any other entity responsible for maintaining the safety of the roadway presents a question not now before us."¹³² The holding is relevant only to the situation where a private landowner abuts a roadway that he does not maintain.¹³³ *Cline* does not preclude imposing a duty on a road-maintaining entity that owns land adjacent to the road it maintains, due to the fundamental

of sovereign immunity).

128. *Id.* at *5.

129. See VA. CODE ANN. § 33.2-1001(A) (2014) ("The Commissioner of Highways is vested with the power to acquire . . . such lands . . . [and] rights-of-way . . . deemed necessary for the construction, reconstruction, alteration, maintenance, and repair of the public highways of the Commonwealth . . .").

130. *Zook*, 2014 WL 3891750, at *5.

131. See, e.g., *Shenk v. Spangler*, 46 Va. Cir. 277, No. 10925, 10926, 1998 WL 34180215, at *4 (July 31, 1998) (granting immunity because private persons are not responsible for training or determining who drives a police cruiser). The VTCA will waive immunity unless the duty of reasonable care is rejected, or if government road maintenance is considered a legally distinct act from private road maintenance. See *id.* ("Because of the unique nature of the activity engaged in by the Commonwealth in determining to whom to supply law enforcement vehicles, this is not an activity for which a private person could be liable, so the Commonwealth has not waived its immunity for this governmental activity.")

132. *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 18 n.6 (Va. 2012) (emphasis added).

133. See *id.* at 18 (finding that landowners do not owe a duty to protect travelers on an adjoining roadway).

difference the case recognizes between a landowner and a road-maintaining entity's responsibility with respect to roadway safety.¹³⁴ Basing the standard on land ownership while ignoring responsibility for the roadway actually creates a poor result—the Commonwealth would have been liable for the injury in *Zook* but for the fact that it happened to own the land from which the tree fell.¹³⁵

Even if the private-person clause is satisfied, a plaintiff must still address the VTCA exception “for any act or omission in the exercise of the legislative function of an agency of the Commonwealth.”¹³⁶ The Supreme Court of Virginia has used the distinction between the governmental and proprietary functions of municipalities as the basis for concluding whether an act is legislative in character.¹³⁷ The court, however, generally looks at whether or not the Commonwealth must “determine whether public funds should be expended” as a test for resolving the issue.¹³⁸ This is a fact-dependent analysis, but the Supreme Court of Virginia has found using this test that “[t]he decision not to remove [a] tree” adjacent to the roadway was not a legislative function, and in that case declined to grant the Commonwealth immunity.¹³⁹ Without engaging in any hypotheticals, it is evident

134. *See id.* (“The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous . . .” (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927))). For example, if Dunlora was the road-maintaining entity as well as the abutting landowner in the original *Cline* case, it would have been liable in its road-maintaining entity capacity, but not in its capacity as a private landowner. *See supra* notes 130–134 and accompanying text (drawing a distinction between the two roles); *see also supra* Part II.B (reviewing policy reasons for differing liabilities between the two roles).

135. *See Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014 WL 3891750, at *4–5 (July 19, 2014) (finding the Commonwealth liable under a duty of reasonable care, but granting sovereign immunity on the basis of land ownership).

136. *Maddox v. Commonwealth*, 594 S.E.2d 567, 569 (Va. 2004); *see also* Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3 (2007) (listing exceptions).

137. *See Maddox*, 594 S.E.2d at 570 (using municipal case law rationale to resolve the legislative function question). This distinction will be discussed in greater detail in the context of municipal immunity. *Infra* Part IV.B.3.

138. *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393, at *2 (Va. Sept. 8, 2016).

139. *Id.*

that tree maintenance can fall outside the scope of a legislative function and defeat a claim of sovereign immunity, based on prior rulings.¹⁴⁰

2. A County's Absolute Immunity in Tort

The VTCA neither applies to nor limits county sovereign immunity.¹⁴¹ The sovereign immunity of counties is thus equivalent to that of the Commonwealth—waivable only by statute.¹⁴² The statute must furthermore explicitly waive county immunity—waiver by implication is insufficient.¹⁴³ Although counties may be held liable in contract, they have yet to be stripped of sovereign immunity in tort.¹⁴⁴ Thus, absent legislative action, counties will not be liable for failing to properly maintain roadways, even if Virginia adopts the duty of reasonable care for road-maintaining entities.¹⁴⁵

140. See *Vivian v. Honda Motor Co.*, 64 Va. Cir. 297, No. 205401, 2004 WL 835985, at *2 (Mar. 31, 2004) (determining that while a negligent-maintenance-of-the-roadway claim was permissible, negligent planning or design fell within the legislative-function exception).

141. Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3 (2014) (“[N]or shall any provision of this article be applicable to any county . . . or be so construed as to remove or in any way diminish the sovereign immunity of any county . . . in the Commonwealth.”).

142. See *Mann v. County Bd.*, 98 S.E.2d 515, 518 (Va. 1957) (“[I]n the absence of . . . statutory provisions imposing liability, . . . a county is not liable for personal injuries caused by the negligence of its officers, agents or employees. . . . [N]o liability is incurred by a county for injuries resulting from negligent construction, maintenance or operation of its streets, roads and highways.”). The Supreme Court of Virginia affirmed that counties share Commonwealth immunity post-VTCA. See *Messina v. Burden*, 321 S.E.2d 657, 664 (Va. 1984) (citing *Mann* for the principle of county immunity); see also Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3 (2014) (“Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982 . . .”).

143. See *Seabolt v. County of Albemarle*, 724 S.E.2d 715, 718 (Va. 2012) (demanding explicit waiver of immunity by statute in order for a county to be liable in tort).

144. See *id.* (reviewing county liability in contract, and immunity in tort).

145. See *supra* notes 141–144 and accompanying text (explaining the state of county immunity in the Commonwealth).

3. *Cities and Municipalities in Virginia: A Governmental or Proprietary Distinction*

Municipal corporations, like towns and cities, enjoy a lessened degree of immunity; while governmental acts are protected, proprietary acts are not.¹⁴⁶ Governmental actions are those that entail “the exercise of an entity’s political, discretionary, or legislative authority” and are performed “exclusively for the public welfare.”¹⁴⁷ In contrast, proprietary functions are those that “are performed primarily for the benefit of the municipality” and are unprotected “[i]f the function is a ministerial act and involves no discretion.”¹⁴⁸ The maintenance function of a municipality falls under the proprietary category, and is thus unprotected.¹⁴⁹

In order for the proposed duty to defeat sovereign immunity, tree removal adjacent to the roadway must be categorized as a proprietary function.¹⁵⁰ *Burnson v. City of Bristol*¹⁵¹ provides resolution in the affirmative:

In this State, we have long determined the liability or non-liability of a city for acts committed by it according to whether the act was done in its governmental or proprietary character. If the act be done in carrying out a governmental function, the city is not liable; if it be done in the exercise of some power of a private, proprietary or ministerial nature, the

146. See *City of Chesapeake v. Cunningham*, 604 S.E.2d 420, 426–27 (Va. 2004) (“Sovereign immunity protects municipalities from tort liability arising from the exercise of governmental functions. There is no municipal immunity, however, in the exercise of proprietary functions.” (citations omitted)). The VTCA is inapplicable to these state actors. See Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3 (2014) (“[N]or shall any provision of this article be applicable to any . . . city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any . . . city or town . . .”).

147. *Cunningham*, 604 S.E.2d at 426.

148. *Id.*

149. See *id.* at 427 (collecting cases for the rule that routine maintenance is proprietary, specifically with respect to maintaining sidewalks, streets, and sewers). The distinction can prove to be challenging, however, as “[a]lthough the principles for differentiating governmental and proprietary functions are easily recited,” the Supreme Court of Virginia notes that the “application of these principles ‘has occasioned much difficulty.’” *Carter v. Chesterfield Cty. Health Comm’n*, 527 S.E.2d 783, 785 (Va. 2000).

150. See *Cunningham*, 604 S.E.2d at 426 (reviewing immunity in the context of municipalities).

151. 10 S.E.2d 541 (Va. 1940).

city is liable. . . . In the instant case, the application of the general principle is not difficult. This court has consistently held that the duty of a city to keep and maintain its streets in repair and in a safe condition for travel, free from defects and obstructions, is a ministerial duty. But it is said here that the hazardous situation arose not from any condition in the streets themselves, but from a danger outside the streets. We do not think the rule is so limited as to exclude all danger arising beyond the limits of a street. The purpose of the rule is to provide safety to persons lawfully using the streets. The rule, indeed, would be but half discharged were it not held to make the municipality liable for dangers known to exist outside the street's limit, but so near thereto as to endanger public travel thereon. It is as much the duty of a city to take steps to ward off and to prevent the known probability of injury to users of its streets as it is its duty to remove dangerous defects and obstructions within the streets themselves.¹⁵²

The court found not only that keeping streets in a safe condition was a proprietary function but also that the principle and liability extended to dangers beyond the roadway as well.¹⁵³

Although tree removal adjacent to the roadway can be a proprietary function under *Burnson*, that by itself may not defeat immunity. If the governmental and proprietary functions collide in a negligence action, the governmental function will override and grant immunity.¹⁵⁴ Thus, if a municipality's failure to create and deploy a maintenance system (that would have otherwise given the municipality constructive or actual notice of a tree's dangerous condition) formed the basis of a suit, it is conceivable that sovereign immunity would be granted.¹⁵⁵ In the alternative, if the

152. *Id.* at 545 (emphasis added) (citations omitted).

153. *See id.* (establishing the rule that roadway maintenance is proprietary, and that the responsibility is not to be taken so literally such that liability would stop at the curb).

154. *See Woods v. Town of Marion*, 425 S.E.2d 487, 489 (Va. 1993) (declining to grant immunity in the case of two alleged ministerial acts because immunity was only applicable if one of the acts was governmental).

155. *See City of Chesapeake v. Cunningham*, 604 S.E.2d 420, 426–27 (Va. 2004) (explaining that planning or provision of services is governmental and entitled to immunity). For an example of such a program, see *Landscape Management*, CITY NORFOLK, <https://www.norfolk.gov/index.aspx?nid=1224> (last visited Jan. 28, 2019) (detailing city's tree removal program for city owned trees, "[t]he main priority of the city's tree management is public safety, therefore those trees posing an immediate safety concern are prioritized first" using a rating scale) (on file with the Washington and Lee Law Review).

municipality did implement such a maintenance program it would be liable only if the maintenance was performed negligently.¹⁵⁶

C. Employees Have Limited Immunity

Employees of a public body have a somewhat lessened standard of immunity compared to governmental entities. Employees at each level of government discussed above enjoy sovereign immunity on a case-by-case basis.¹⁵⁷ In an effort to determine whether or not an employee is entitled to immunity, the Supreme Court of Virginia devised a four-part test, looking at: “1. the nature of the function performed by the employee; 2. the extent of the state’s interest and involvement in the function; 3. the degree of control and direction exercised by the state over the employee; and 4. whether the act complained of involved the use of judgment and discretion.”¹⁵⁸ This is a fact-dependent analysis, reliant on the individual job of the employee and the form of alleged negligence.¹⁵⁹

Conceivably, an employee would be immune from suit if he were a supervisor in charge of directing road crews that might

156. *See, e.g.*, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393, at *2 (Va. Sept. 8, 2016)

Cline alleges that the Commonwealth was negligent in failing to remove the tree that injured him after it assumed a duty to remediate dangerous conditions existing in its right-of-way. More specifically, Cline asserts that its employee, Mayo, “noticed the tree and the dangerous condition presented by it,” but “mistakenly believed the tree was not located within the Commonwealth’s right of way” and “chose not to have it removed.”

See also Cunningham, 604 S.E.2d at 427 (“[R]outine maintenance . . . is proprietary.”).

157. *See Lohr v. Larsen*, 431 S.E.2d 642, 645 (Va. 1993) (asserting employee immunity for discretionary acts within the scope of employment, but holding employees liable for ministerial acts); *Messina v. Burden*, 321 S.E.2d 657, 663 (Va. 1984) (describing factors to be considered for determining employee entitlement to immunity); *see also McBride v. Bennett*, 764 S.E.2d 44, 46 (Va. 2014) (applying the four-part immunity test to the case of a municipal employee’s simple negligence).

158. *Messina*, 321 S.E.2d at 663.

159. *See id.* at 664 (applying the four-part test). For a more detailed application, see *Pike v. Hagaman*, 787 S.E.2d 89, 92–94 (Va. 2016) (providing detailed analysis and application of the four-part test in the context of medical negligence).

discover and cut down dangerous trees due to the discretion involved.¹⁶⁰ On the other hand, an employee would likely not be granted immunity if his job entailed inspecting a specific stretch of roadway for dangerous trees, had actual or constructive notice of a tree's dangerous condition during an inspection, and subsequently failed to act.¹⁶¹ In many ways these results mirror the discussion regarding municipal corporations, granting immunity only where discretion exists.¹⁶² An employee's immunity is important in the context of this Note because a plaintiff might sue an employee in order to bypass a public entity's sovereign immunity.¹⁶³

D. Limiting Sovereign Immunity's Impact by Statute

Although the present state of sovereign immunity presents some difficulties,¹⁶⁴ there is still a mode of recourse. A statutory

160. See *Stanfield v. Peregoy*, 429 S.E.2d 11, 13 (Va. 1993) (finding that a snow plow operator enjoyed immunity because he used discretion to decide what streets needed to be plowed, how to plow and salt the streets, and "to undertake the plowing and salting at all").

161. See *Habib v. Blanchard*, 25 Va. Cir. 451, No. 99371, 1991 WL 835292, at *2 (Nov. 13, 1991) (denying immunity to employees who had actual notice of a defective road condition on the shoulder and failed to order repairs because "the actions . . . involved no discretion on their part. Their responsibility was clearly ministerial in nature").

162. *Supra* Part IV.B.3.

163. See *supra* Part IV.B.2 (exemplifying the difficulty of suing counties in tort). Many public entities provide civil liability insurance for their employees, which plaintiffs can use as a means of recovery if the public entity is immune from suit in tort. See, e.g., FAIRFAX COUNTY, 2016 FAIRFAX COUNTY LINES OF BUSINESS: COUNTY INSURANCE 1449 (2016), <https://www.fairfaxcounty.gov/budget/sites/budget/files/assets/documents/fy2016/lobs/60000.pdf> (describing County risk management for claims arising from public official liability); GREG KAMPTNER, THE ALBEMARLE COUNTY LAND USE LAW HANDBOOK § 31-500 (2018), http://www.albemarle.org/upload/images/Forms_Center/Departments/County_Atorney/Forms/LUchapter31-liability.pdf (listing employee insurance coverage policies for those employees "acting in an authorized governmental or proprietary capacity and within the course and scope of employment or authorization"). Furthermore, the VTCA can limit a plaintiff's damages, so alternate recovery may be preferable. See Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3 (2014) ("[A]mount recoverable by any claimant shall not exceed . . . \$100,000 . . . or . . . the maximum limits of any liability policy maintained to insure against such negligence or other tort . . . whichever is greater . . .").

164. See, e.g., *supra* notes 141–145, 149 and accompanying text (identifying challenges relating to a county's immunity in tort, and the difficulty of

waiver could make an exception to immunity for negligent maintenance of the roadway.¹⁶⁵ South Carolina operates under a similar immunity waiver as Virginia does with the VTCA,¹⁶⁶ yet carves out a specific exception for negligent roadway maintenance.¹⁶⁷ Such a waiver in Virginia would solve the issue of immunity blocking claims, as it places liability directly in the hands of the entity responsible for roadway maintenance.¹⁶⁸ This form of waiver would also solve two larger issues with respect to immunity: the present absolute immunity of counties¹⁶⁹ and the disincentive for municipalities to establish maintenance programs that would potentially expose them to liability (by removing immunity considerations from the decision to establish a maintenance program; substituting with liability premised upon negligence coupled with actual or constructive notice).¹⁷⁰ This is not to say that a statutory waiver is required to give effect to the duty of reasonable care under the present state of the law—only

determining whether an act is governmental or proprietary for purposes of municipal immunity).

165. See, e.g., *supra* Part IV.B.1–2 (reviewing statutory waiver and lack thereof in the context of the Commonwealth and counties).

166. See South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-40 (1986) (“The State, an agency, a political subdivision, and a governmental entity are all liable for their torts in the same manner and to the same extent as a private individual under like circumstances . . .”).

167. See South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-60(15) (2010) (“Governmental entities responsible for maintaining highways . . . are not liable for loss arising out of a defect . . . caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.”).

168. See *id.* (waiving immunity for the governmental entity in the event of negligent roadway maintenance).

169. See *supra* Part IV.B.2 (reviewing county immunity).

170. See *supra* notes 154–156 and accompanying text (presenting hypotheticals for municipal liability); *supra* note 167 and accompanying text (providing the South Carolinian statute for functional purposes). In spite of this apparent disincentive, there are examples of such programs in use. See, e.g., *Landscape Management*, *supra* note 155 (presenting the City of Norfolk’s maintenance program); *Landscape Management*, CITY OF VA. BEACH, <https://www.vbgov.com/government/departments/parks-recreation/parks-trails/Pages/landscape-management.aspx> (last visited Jan. 28, 2019) (noting that “[t]he Landscape Management Division is responsible for all landscaping and grounds maintenance of City . . . roadways,” including services such as “[h]azardous tree assessment and removal”) (on file with the Washington & Lee Law Review).

that one is necessary to give the duty uniform effect across Virginia's levels of government.¹⁷¹

Sovereign immunity limits the duty this Note proposes by immunizing certain governmental bodies, employees, and discretionary activities from liability¹⁷² but is certainly not fatal to the duty's application.¹⁷³ This is not unexpected or unwelcome; sovereign immunity is a vital aspect of maintaining uninterrupted effective governance.¹⁷⁴ In true cases of negligence, however, it is reassuring to note that sovereign immunity in its present state may not serve as an uncompromising bar to a plaintiff's potential recovery (excluding actions against counties).¹⁷⁵

V. Impact of Tort Liability for Road-Maintaining Entities

This Part focuses on the anticipated impacts of the proposed duty of reasonable care with respect to roadway-adjacent trees for road-maintaining entities. Beyond the obvious goal of increasing safety for motorists on the roadway, this Part examines the impact the duty of reasonable care might have on gross negligence¹⁷⁶ and assumption-of-duty claims¹⁷⁷ arising out of negligent maintenance of the roadway. In addition, this Part will consider the applicability of the duty of reasonable care to situations involving roadway-adjacent hazards other than trees.¹⁷⁸ Finally, this Part will consider the question those who anticipate negative impacts propose: why have the duty of reasonable care at all?¹⁷⁹

171. See *supra* Part IV.B–C (reviewing the differing levels of immunity across Virginia's public bodies).

172. See *supra* Part IV.B–C (reviewing sovereign immunity's impact on tort liability).

173. See *supra* Part IV.B–C (reviewing the various applications of sovereign immunity).

174. See *supra* Part IV.A (detailing justifications for sovereign immunity).

175. See *supra* Part IV.B–C (presenting various forms of liability under sovereign immunity).

176. *Infra* Part V.A.

177. *Infra* Part V.B.

178. *Infra* Part V.C.

179. *Infra* Part V.D.

A. More Gross Negligence Claims May Be Resolved as a Matter of Law

At present, plaintiffs have an incentive to allege gross negligence in actions against employees of public entities for negligent maintenance of the roadway. This is because per the Supreme Court of Virginia, an “employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected” by sovereign immunity.¹⁸⁰ By the court’s own admission, the difficult case is when a claim of simple negligence is met with a sovereign immunity defense.¹⁸¹

Gross negligence counts against employees are incentivized for a couple of reasons. The biggest, as previously stated, is that sovereign immunity does not protect grossly negligent acts.¹⁸² Using gross negligence as the vehicle for a claim can side-step this potential bar to recovery.¹⁸³ A second possible incentive stems from how gross negligence claims are treated; generally, they are decided as a matter of fact, not law, which plaintiffs may prefer.¹⁸⁴ Although a court may dismiss a gross negligence claim as a matter of law “when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established,”¹⁸⁵ a

180. *James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980). Plaintiffs may wish to name employees to avoid employer sovereign immunity, access employee insurance policies, or avoid the VTCA damage cap. *See supra* note 163 and accompanying text (discussing these incentives).

181. *See James*, 282 S.E.2d at 869 (“The difficulty in application comes when a state employee is charged with simple negligence . . . and then claims the immunity of the state.”).

182. *See id.* (describing how a grossly negligent act operates as a “loss . . . of . . . immunity”).

183. *See supra* notes 180–182 and accompanying text (describing the gross negligence and sovereign immunity interaction); *see also supra* Part IV (reviewing the sovereign immunity doctrine).

184. *See Elliot v. Carter*, 791 S.E.2d 730, 732 (Va. 2016) (“Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury.”). Attorneys can hope to empanel a sympathetic jury which may be more favorable to the plaintiff. *See John Wilinski, When Will Jurors Find the Plaintiff Sympathetic?* LITIG. INSIGHTS (Jan. 6, 2015), <http://litigationinsights.com/case-strategies/jurors-find-plaintiff-sympathetic/> (last visited Jan. 28, 2019) (reviewing situations that will trigger juror sympathy, such as a plaintiff’s permanent injury or death) (on file with the Washington & Lee Law Review).

185. *Elliot*, 791 S.E.2d at 732. In Virginia, gross negligence is defined as, “a

gross negligence claim in effect puts a case on the track for a jury decision.¹⁸⁶ To be frank, failing to plead good faith gross negligence effectually throws away an opportunity to maintain a case if sovereign immunity bars a simple negligence claim.¹⁸⁷

While beneficial for plaintiffs, reliance on gross negligence as a vehicle for avoiding sovereign immunity actually harms the doctrine. Sovereign immunity is a doctrine that courts must grapple with—not avoid—in order to fulfill its stated purpose of ensuring uninterrupted public function without fear of vexatious litigation.¹⁸⁸ There is also the practical drawback of prolonging litigation by shifting a case towards fact-finding, and away from pre-trial resolution.¹⁸⁹

degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person.” *Id.* Several acts of negligence that, by themselves, would not constitute gross negligence can combine to become gross negligence; however, the gross negligence standard is less than “willful, wanton, and reckless conduct.” *Id.* The key feature of gross negligence is indifference; as such, “a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care.” *Id.* See also *Altizer v. County of Tazewell*, 75 Va. Cir. 5, No. CL07-123, 2008 WL 6744119, at *2 (Jan. 22, 2008) (“Ordinarily, gross negligence is an issue to be resolved by the jury, however, it becomes a question of law when the court must determine if the facts, as pled, are sufficient to determine whether the protection of sovereign immunity may be set aside.”).

186. See, e.g., *Koppel v. Morgan*, 41 Va. Cir. 130, No. 152179, 1996 WL 1065633, at *2 (Nov. 5, 1996) (“The Virginia Supreme Court has recently declared the determination of gross negligence to be an issue of fact properly decided by a jury.”). A public entity can qualify for sovereign immunity with respect to simple negligence, but a proper gross negligence claim is a jury question and may continue on. See *Burns v. Gagnon*, 727 S.E.2d 634, 646–47 (Va. 2012) (sending case back for jury finding with respect to employee’s gross negligence, despite granting immunity for simple negligence); *Cleaves-McClellan v. Shaw*, 93 Va. Cir. 459, No. CL15-1918, 2016 WL 9076186, at *8–10 (June 30, 2016) (granting immunity for simple negligence but sustaining action for gross negligence).

187. See, e.g., *Cleaves-McClellan*, 2016 WL 9076186, at *8–10 (demonstrating how a gross negligence claim can continue a case in spite of sovereign immunity).

188. See *Messina v. Burden*, 321 S.E.2d 657, 660 (Va. 1984) (“[T]he doctrine of sovereign immunity is ‘alive and well’ in Virginia.”); *City of Chesapeake v. Cunningham*, 604 S.E.2d 420, 426 (Va. 2004) (“Sovereign immunity is a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.”); See also *Messina*, 321 S.E.2d at 660–61 (reviewing numerous purposes for sovereign immunity). For a more detailed sovereign immunity review, see *supra* Part IV.A (explaining sovereign immunity rationale).

189. See *Tomlin v. McKenzie*, 468 S.E.2d 882, 884 (Va. 1996) (“The defensive

The Supreme Court of Virginia emphasizes sovereign immunity's importance but notes that determining which actors are entitled to sovereign immunity presents a difficult, fact-sensitive task for courts.¹⁹⁰ A way to ensure sovereign immunity's strength is to build precedent for what types of acts and actors deserve immunity (which gross negligence claims can preclude by avoiding immunity analysis); this is particularly necessary because there is no bright-line rule to determine entitlement to immunity.¹⁹¹

Although the proposed duty of reasonable care may not decrease the amount of gross negligence pleadings outright, it can still provide a benefit to the immunity doctrine by articulating a concrete standard of care.¹⁹² If there is a clearly delineated standard of care, it will be easier to determine on the facts of a given case whether an act was grossly negligent, or even negligent at all (both for potential plaintiffs and for courts considering pleadings).¹⁹³ Thus, more of those cases that reach courts may be resolved as a matter of immunity or law in the pleadings stage, rather than as a matter of fact by a jury,¹⁹⁴ thereby promoting the

plea in bar shortens the litigation by reducing it to a distinct issue of fact, which, if proven, creates a bar to the plaintiff's right of recovery." A sovereign immunity claim is often rooted in a plea-in-bar, which as previously stated is designed to shorten litigation. *See, e.g.,* Hawthorne v. VanMarter, 692 S.E.2d 226, 233–34 (Va. 2010) (reviewing sovereign immunity plea-in-bar); Cunningham v. Rossman, 80 Va. Cir. 543, No. CL10-014, 2010 WL 7373694, at *1 (July 12, 2010) (considering sovereign immunity plea-in-bar). In a plea-in-bar, "[t]he existence of sovereign immunity is a question of law that is reviewed de novo." *Cunningham*, 604 S.E.2d at 426. Although an inadequate gross negligence claim can be resolved as a matter of law, the nature of a gross negligence claim steers towards fact-finding. *See supra* notes 184–186 and accompanying text (detailing treatment of gross negligence as a matter of fact and law).

190. *See Messina*, 321 S.E.2d at 662 ("Deciding which government employees are entitled to immunity requires line-drawing. Yet, given the continued vitality of the doctrine, the Court must engage in this difficult task.").

191. *See Pike v. Hagaman*, 787 S.E.2d 89, 92 (Va. 2016) ("[W]e declined to impose a bright line rule to determine whether an allegedly negligent state employee is protected by the shield of sovereign immunity. We developed a list of four non-exclusive factors to assess whether a plea of sovereign immunity should be sustained." (citation omitted)); *see also supra* Part IV.B.3 (discussing the challenges of determining immunity with respect to municipal corporations).

192. *See supra* Part III.B (proposing the duty of reasonable care).

193. *See supra* note 185 (defining gross negligence in Virginia).

194. *See supra* notes 185–186 and accompanying text (describing how gross negligence can shift from a question of fact to law).

efficient use of judicial resources and sovereign immunity's doctrinal strength.

B. Assumption-of-Duty Claims Will Be Limited

Establishing a duty of reasonable care has the potential to reach beyond claims of simple negligence and gross negligence. This is readily apparent with respect to the assumption-of-duty doctrine, as exemplified in *Cline v. Commonwealth (Cline II)*.¹⁹⁵ In *Cline II*, the court considered the Commonwealth's liability for the injuries at issue in *Cline*.¹⁹⁶ Rather than decide the case on VTCA grounds or traditional negligence grounds, the court remanded the case for the factfinder to determine if the Commonwealth had assumed a duty to inspect and remediate dangerous trees on the property adjacent to the roadway.¹⁹⁷

Accepting the Restatement assumption-of-duty doctrine, the court found that the Commonwealth could be liable only if:

[It] undertook to inspect trees on the [property adjacent to the roadway] for the purpose of remediating any dangerous conditions created by trees and then either: (1) the Commonwealth's failure to exercise reasonable care in performing this undertaking increased the risk of the harm; or (2) the Commonwealth undertook to perform a duty owed by another to Cline; or (3) Cline's harm was suffered by his reliance upon the Commonwealth's undertaking.¹⁹⁸

195. No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016).

196. *See id.* at *1 (detailing injuries resulting from a tree falling on a motorist in the roadway); *see also supra* notes 12–15 (reviewing the *Cline* case).

197. *See Cline*, 2016 WL 4721393, at *2 (“Based on the record before us, we cannot decide as a matter of law whether the Commonwealth assumed . . . a duty. This question must be decided by the factfinder on remand.”) (citations omitted).

198. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW. INST. 1965)). Some might argue that assumption-of-duty renders the duty of reasonable care redundant, as the Supreme Court of Virginia found assumption-of-duty dispositive in *Cline II*. *See id.* (remanding on assumption-of-duty grounds). This was based on the specific circumstances of the case, however; Cline alleged that a Commonwealth employee entered the Dunlora property to inspect for and remove dangerous trees, noticed the tree at issue, but failed to act because the employee believed it was not in the Commonwealth's right-of-way. *See id.* (“These allegations are sufficient to give rise to a cause of action against the Commonwealth on a theory it assumed a duty by undertaking the inspection and

Although assumption-of-duty cases cannot be resolved as a matter of law,¹⁹⁹ imposing a duty of reasonable care carries some implications for such a pleading moving forward. First, it limits the overall need for crafting an assumption-of-duty pleading, given that a road-maintaining entity will already be subject to the duty of reasonable care as a matter of law (regardless of any voluntary assumptions of responsibility).²⁰⁰ Second, in cases where it is pled, it will be limited to increasing the scope of the owed duty.²⁰¹ This may make the fact-finder's job easier, as the assumption-of-duty claim will only be viable if the facts show that "the defendant by his conduct assumed a duty," distinct and beyond the scope of the duty of reasonable care.²⁰²

C. The Duty of Reasonable Care is Applicable to Other Natural Roadside Hazards

The proposed duty is not limited to dangerous trees adjacent to the roadway. Motorists must contend with far more, including

remediation of dangerous conditions on the right-of-way." Assumption-of-duty relies on some positive act to create a duty even if one did not exist previously. *See id.* (describing assumption-of-duty). This Note is concerned with prompting road-maintaining entities to act as a result of a pre-existing duty. *See supra* note 35 and accompanying text (referencing deterrence theory). Assumption-of-duty is incapable of achieving this goal, as it is dependent on the road-maintaining entity voluntarily taking some action that it was otherwise not required to take under law. *See, e.g., Cline*, 2016 WL 4721393, at *2 (providing an example of alleged action by a Commonwealth employee that could give rise to an assumed duty).

199. *See Burns v. Gagnon*, 727 S.E.2d 634, 643 (Va. 2012) ("But when the issue is not whether the law recognizes a duty, but rather whether the defendant by his conduct assumed a duty, the existence of that duty is a question for the fact-finder.").

200. *See id.* ("[W]hether a defendant owes a plaintiff a duty in tort is generally a question of law."); *see also supra* Part III.B (proposing a duty of reasonable care for road-maintaining entities).

201. *See, e.g., Cline*, 2016 WL 4721393, at *2 (considering the duty to inspect for dangerous trees). For instance, a claim might allege that a road-maintaining entity assumed a duty beyond reasonable care, such as the duty to use walk-around inspections, or a duty that would discover dangerous trees—even those not openly dangerous from the roadway. *See supra* Part III.A (reviewing examples of tort duties for road-maintaining entities beyond the duty of reasonable care).

202. *Burns*, 727 S.E.2d at 643.

falling boulders²⁰³ and hidden drop-offs.²⁰⁴ Motorists are not the only individuals at risk—passersby on sidewalks are susceptible to injury as well.²⁰⁵ This Note does not take a position with respect to dangerous man-made instrumentalities adjacent to the roadway, as *Cline* concerned facts relating to a natural condition adjacent to the roadway.²⁰⁶ Provided the natural danger presents the same issues seen in the present discussion,²⁰⁷ there is little reason why the duty of reasonable care should be limited strictly to dangerous trees adjacent to the roadway.²⁰⁸

203. See *Commonwealth v. Callebs*, 381 S.W.2d 623, 624 (Ky. 1964) (referencing jurisprudence finding that the Department of Highways did not have a duty to closely inspect for loose boulders, when boulder appeared to be imbedded in the cliff-face).

204. See *Taylor v. City of Charlottesville*, 397 S.E.2d 832, 834 (Va. 1990) (reviewing death resulting from a hidden drop adjacent to the roadway, where city failed to provide for better lighting, guardrails, or other means to mitigate risk of cars driving off of the drop at night).

205. See *City of Norfolk v. Travis*, 140 S.E. 641, 642 (Va. 1927) (considering dangerous fence near the roadway which caused an injury to an individual on the sidewalk).

206. See *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393, at *1 (Va. Sept. 8, 2016) (“In *Cline* . . . we held that a private landowner owes no duty to protect motorists on adjoining public highways from natural conditions on the landowner’s property.”). The case, however, hints that for a private landowner, erecting a dangerous man-made instrumentality is a breach of duty. See *Cline v. Dunlora South, LLC*, 726 S.E.2d 14, 18 (Va. 2012) (“The duty owed by adjoining property owners is to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.”). The Commonwealth similarly concedes that road-maintaining entity liability extends to man-made instrumentalities adjacent to the roadway. See *infra* notes 230–41 and accompanying text (explaining the Commonwealth’s position against liability for natural conditions adjacent to the roadway).

207. See *supra* Parts II–III (identifying policy justifications for imposing a duty of reasonable care on the entity that maintains the roadway).

208. See *General Powers of Comm’r of Highways*, VA. CODE ANN. § 33.2-223 (2018) (“[T]he Commissioner of Highways shall have the power to do all acts necessary or convenient for constructing, improving, maintaining, and preserving the . . . operation of the highways . . .”). State statutory responsibility is broad with respect to maintaining safety, and counties can assume particular responsibilities beyond the roadway, including sidewalks and other areas. See *Certain Additional Powers of Governing Body*, VA. CODE ANN. § 21-118.4 (2017) (“[W]hen an ordinance has been adopted creating a sanitary district in such county, . . . the . . . governing body . . . shall have the following powers and duties . . . [t]o construct, reconstruct, maintain, alter, improve, add to, and operate . . . sidewalks, curbs, gutters, . . . for the use and benefit of the public in such sanitary district . . .” (emphasis added)).

D. Why Have a Duty?: Considering the Commonwealth's Claim of Negative Impact

There is a critique to imposing a duty on road-maintaining entities, best posed as the question: why have a duty at all? Denying liability is not a foreign concept, as “[t]here are still some natural dangers from which we cannot rely upon the government for protection.”²⁰⁹ The entire notion of sovereign immunity functions to make the government immune from claims in tort, or at the very least make such claims difficult or rare.²¹⁰ Given the fact that the Supreme Court of Virginia explicitly found that “a private landowner owes no duty to protect motorists on adjoining public highways from natural conditions on the landowner’s property,”²¹¹ it can be argued that neither the government or road-maintaining entities should be responsible.²¹²

This critique is met by reality. Dangerous trees adjacent to the roadway present real risks to motorists if left unchecked.²¹³ The

209. *Hensley v. Montgomery County*, 334 A.2d 542, 547 (Md. Ct. Spec. App. 1975).

210. *See supra* Part IV (reviewing the sovereign immunity doctrine and its challenges).

211. *Cline*, 2016 WL 4721393, at *1.

212. *See, e.g.*, Brief of Appellee at 10–11, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *10–11 (asserting that the Commonwealth owed no duty with respect to a dangerous tree adjacent to the roadway).

213. *See Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 15 (Va. 2012) (“[A] tree fell and crushed the roof, windshield and hood of the vehicle Cline was driving. Cline suffered severe and permanent injuries, including fractures of his cervical spine.”); John Ramsey, *Tree That Fell on Car, Killing Driver, May Have Been Weakened by Lightning*, RICHMOND-TIMES DISPATCH (Jul. 12, 2015), http://www.richmond.com/news/local/ashland/tree-that-fell-on-car-killing-driver-may-have-been/article_fe788fe0-7e1e-5d87-bdb8-48ec3d314cb0.html (last visited Jan. 28, 2019) (“A tree that fell on two cars . . . killing a Doswell woman, had apparently been struck by lightning and weakened over time . . .”) (on file with the Washington and Lee Law Review); Justin Jouvenal, *Tree That Crushed Driver Was Decayed*, WASH. POST (Jul. 18, 2012), https://www.washingtonpost.com/local/crime/tree-that-crushed-driver-was-decayed/2012/07/18/gJQAb2OiuW_story.html?utm_term=.cc22af1832d6 (last visited Jan. 28, 2019) (“The massive oak that fell and killed a driver in Great Falls . . . was . . . destined to fall, according to a state arborist . . . VDOT officials said the tree was in their right of way . . . [A]n arborist who lives in Great Falls . . . said the tree had obvious signs of decay and ‘should have been taken down.’”) (on file with the Washington and Lee Law Review).

chief inspiration for this Note and proposed duty is therefore a simple one—to increase roadway safety by ensuring, when reasonably possible, that dangerous trees are removed from the roadside before they can injure motorists.²¹⁴

The safety argument supporting road-maintainer liability could be applied to landowner liability.²¹⁵ Why single out the road-maintaining entity? This question is addressed in Part II, but in short, the road-maintaining entity is in the best position for preventing the harm.²¹⁶ By definition, the road-maintaining entity is charged with maintaining the roadway—and “[t]he [actor] in the best position to prevent the harm is the logical [actor] to hold accountable for the harm.”²¹⁷ In agreement with this principle, *Cline* noted that “[t]he duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way.”²¹⁸ As the injuries at issue here are principally a matter of roadway safety, the liability should fall to the entity responsible for the roadway.²¹⁹ Finally, as a matter of practicality, *Cline* leaves the road-maintaining entity as the only entity potentially liable for injuries resulting from tree falls in the roadway—a binary distinction which has seen some use in this area of law.²²⁰ As such, road-maintaining entities are the

214. See *Ford v. S.C. Dept. of Transp.*, 492 S.E.2d 811, 814 (S.C. Ct. App. 1997) (finding that liability hinges on “whether the [road-maintaining entity] knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity”). Deterrence theory is the primary enforcement mechanism. See *supra* note 35 and accompanying text (providing an overview of deterrence theory for the position that someone should be liable for injuries resulting from roadway-adjacent trees).

215. See *supra* notes 35, 213–214 (presenting safety concerns and deterrence theory).

216. See *supra* Part II.B (reviewing justifications for imposing a duty of reasonable care on the road-maintaining entity).

217. Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2211 (2000).

218. *Cline*, 726 S.E.2d at 18 (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927)). Conversely, private landowners have no affirmative duty to act. See *id.* (“The duty owed by adjoining property owners is to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.”).

219. See *supra* Part II.B (discussing in detail the justification for differing liabilities between road-maintaining entities and landowners).

220. See *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393, at *1 (Va. Sept. 8, 2016) (“In *Cline* . . . we held that a private landowner owes no duty to protect motorists on adjoining public highways from natural conditions on the

only actors that, in Virginia, can have the requisite liability-driven motivation to effect change and enhance roadway safety.²²¹

The Commonwealth of Virginia advocated against a roadway-adjacent maintenance duty in *Cline II*. It asserted that a heightened duty on the Commonwealth would “create a scenario in which a private person, having no duty or liability, would have no incentive to remedy a natural condition adjacent to the roadway. This scenario would create even more danger to the public.”²²² The Commonwealth’s argument rests on the premise that notwithstanding the absence of a legal duty, landowners will still remedy dangerous trees on their lands, but that this altruism will somehow disappear if another entity is made responsible.²²³ Given that damages are often necessary to compel a change in behavior,²²⁴ any real incentive for landowners vanished with *Cline*.²²⁵ Following the Commonwealth’s argument to its logical conclusion, furthermore, leads to a poor result.²²⁶ A situation can arise where a road-maintaining entity and a private landowner have actual notice of a tree’s dangerous condition, and both may choose not to act without fear of liability; in spite of the tree being located adjacent to the entity’s roadway and on the landowner’s private property.²²⁷ Should that tree fall into the roadway and

landowner’s property.”); *supra* note 33 and accompanying text (presenting the binary distinction).

221. See *supra* note 35 and accompanying text (describing tort law’s deterrent effect and its ability to promote investments in safety); see also *infra* notes 222–229 (discussing motivations to remedy dangerous trees).

222. Brief of Appellee at 16, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *16.

223. See Brief of Appellee at 16, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *16 (presenting the Commonwealth’s argument).

224. See *Hamilton Dev. Co. v. Broad Rock Club, Inc.*, 445 S.E.2d 140, 144 (Va. 1994) (awarding punitive damages for trespass); *id.* (Whiting, J., concurring in part and dissenting in part) (remarking that “the purpose of punitive damages is to ‘punish the defendant for [its] conduct and to serve as a warning to others not to engage in similar activity’”); see also *supra* note 35 and accompanying text (reviewing tort law’s deterrent effect as a function of economics).

225. See *Cline*, 2016 WL 4721393, at *1 (“[A] private landowner owes no duty to protect motorists on adjoining public highways from natural conditions on the landowner’s property.”).

226. See *supra* notes 222–223 and accompanying text (presenting the Commonwealth’s logic-based argument).

227. See, e.g., *Cline*, 2016 WL 4721393, at *1 (“*Cline* now pursues negligence

cause injury, the innocent motorist, having had no control over the tree, nor the ability to respond to or remedy the dangerous condition, would bear the entire burden of loss.²²⁸ This is an unacceptable outcome. In order to achieve the Commonwealth's articulated desire to increase safety and incentivize remedying dangerous conditions, the only viable course of action is to place responsibility in the hands of road-maintaining entities, including the Commonwealth.²²⁹

As a means of supplementing policy with law, the Commonwealth argued that the law does not impose a duty with respect to natural conditions because "while a municipality may have a duty to the traveled portion of the roadway, it owes no duty to inspect and remedy the portion of its right-of-way left in a state of nature."²³⁰ The Commonwealth further argued that when it has a duty with respect to dangers beyond the bounds of the roadway, the duty is limited strictly to "defective instrumentalities" and does not apply to natural conditions.²³¹ The Supreme Court of Virginia did not see fit to address these claims,²³² but this Note will attempt to do so.

First, the assertion is too limited with respect to the idea that liability is limited to man-made instrumentalities as a matter of law and policy.²³³ The Commonwealth's argument relies on a single

and nuisance claims against the Commonwealth because the tree allegedly fell from the Commonwealth's right-of-way on the Dunlora property.").

228. See *supra* notes 35, 217 and accompanying text (supporting the argument that innocent motorists should not bear the burden of loss because "[t]he [actor] in the best position to prevent the harm is the logical [actor] to hold accountable for the harm").

229. See *supra* notes 35, 222 and accompanying text (recounting the deterrent effect in tort law and the Commonwealth's emphasis on protecting motorists).

230. Brief of Appellee at 12, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *12 (citing *City of Norfolk v. Travis*, 140 S.E. 641 (Va. 1927)).

231. See Brief of Appellee at 13, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *13 (claiming that natural conditions adjacent to the roadway are exempt from Commonwealth tort liability).

232. See *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393, at *2–3 (Va. Sept. 8, 2016) (resolving case on assumption-of-duty grounds).

233. See Brief of Appellee at 13, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *13 (arguing that liability only extends to man-made dangers).

statement in a 1927 case: “[C]ities in the exercise of governmental discretion may lay out part of the platted street for public use and leave the remaining exterior limits unused and in a state of nature without obligation to the public”²³⁴ The Commonwealth fails, however, to give due weight to developments in the almost century since. In *Taylor v. City of Charlottesville*,²³⁵ the Supreme Court of Virginia found that a steep drop into a creek adjacent to the roadway constituted a defective instrumentality, thereby representing an actionable danger.²³⁶ Beyond the fact that a land feature—a steep drop into a creek—is more akin to a dangerous tree adjacent to the roadway than a man-made instrumentality (the case was not clear whether the drop or creek was man-made or natural),²³⁷ as the court stated, “[t]he rule, indeed, would be but half discharged were it not held to make the municipality liable for dangers known to exist outside the street’s limit, but so near thereto as to endanger public travel thereon.”²³⁸ It follows that the rule would be “half-discharged” if real dangers were ignored simply because a tree was a natural condition adjacent to the roadway, but nevertheless “endangered public travel thereon.”²³⁹ The *Taylor* court saw no need to address whether the steep drop was entirely man-made or natural; rather, the principle focused on whether there was a danger to travelers in the roadway—thus, danger is the source of duty.²⁴⁰ Danger does not lie in imposing a duty, as the

234. *City of Norfolk v. Travis*, 140 S.E. 641, 644 (Va. 1927); *see also id.* at 12, *12 (citing this language).

235. 397 S.E.2d 832 (Va. 1990).

236. *See id.* at 836 (“We do not think the rule is so limited as to exclude all danger arising beyond the limits of a street. The *purpose of the rule is to provide safety* to persons lawfully using the streets.” (quoting *Burson v. City of Bristol*, 10 S.E.2d 541, 545 (1940) (emphasis added))).

237. *See* Brief of Appellee at 13, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *13 (describing the *Taylor* case as concerning an instrumentality); *Taylor*, 397 S.E.2d at 834 (describing the ditch as a “steep precipice descending into Meadow Creek”).

238. *Taylor*, 397 S.E.2d at 836 (quoting *Burson v. City of Bristol*, 10 S.E.2d 541, 545 (1940)).

239. *Id.* *See also id.* (“In the present case, the alleged condition at the terminus of [the road] is ‘dangerous and hazardous in itself’ and imperils the safety of . . . the street. Furthermore, the dangerous condition is located adjacent to the street. . . . [T]he motion . . . effectively alleges a public nuisance.”).

240. *See Taylor*, 397 S.E.2d at 836 (articulating the need to remediate dangerous conditions adjacent to the roadway for the purpose of public safety).

Commonwealth argues.²⁴¹ The “danger to the public”²⁴² is in continuing to fail to do so.

Second, a number of out-of-state cases assisted in forming the original non-liability for natural conditions rule.²⁴³ This Note has shown that there is a trend in the law supporting liability in the opposite direction,²⁴⁴ so it is worth reassessing given the rule’s origin. Notwithstanding Virginia’s own legal developments,²⁴⁵ a review of out-of-state duties suggests that natural dangers adjacent to the roadway are a source of liability for road-maintaining entities.²⁴⁶

Finally, the Commonwealth’s arguments have already lost at the circuit level. *Zook* was clear: “Based on the footnote in *Cline* . . . VDOT had the duty to exercise reasonable care to remove the . . . tree . . . and the duty of reasonable care ‘to maintain the natural vegetation on the property’ adjacent to [the roadway].”²⁴⁷

But see Brief of Appellee at 13, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *13 (“In fact, in *Cline* I, this Court stated that it has ‘never recognized that principles of ordinary negligence apply to natural conditions on land.’”). The more appropriate question is whether ordinary principles of negligence apply to negligent maintenance of the roadway, including roadway-adjacent dangers. *See Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 18 (Va. 2012) (“The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way.” (alteration added in *Cline*) (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927))); *Taylor*, 397 S.E.2d at 836 (extending liability to dangerous conditions beyond the roadway).

241. *See supra* notes 222–223 and accompanying text (presenting the Commonwealth’s argument that imposing a duty on the state will increase the risk of danger to travelers).

242. Brief of Appellee at 16, *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) (No. 151037), 2015 WL 12752886, at *16.

243. *See City of Norfolk v. Travis*, 140 S.E. 641, 642 (Va. 1927) (compiling cases to establish non-liability for injuries resulting from natural conditions adjacent to the roadway).

244. *See supra* Part III.A (describing various duties with respect to trees adjacent to the roadway); *see also Cline*, 726 S.E.2d at 20–21 (Lemons, J., dissenting) (reviewing out-of-state duties with respect to a landowner’s liability for injuries resulting from trees falling into the roadway).

245. *See supra* notes 235–240 and accompanying text (reviewing Virginia law for the position that a road-maintaining entity can be liable for negligent maintenance of natural roadway-adjacent dangers).

246. *See supra* Part III.A (reviewing out-of-state treatment of natural roadway-adjacent dangers, and finding support for liability).

247. *Zook v. City of Norfolk*, 87 Va. Cir. 47, No. CL12–4019, 2014 WL

The tide flows against the non-liability position,²⁴⁸ and towards a duty of reasonable care.²⁴⁹

VI. Conclusion

Reducing the risk of trees falling on motorists in the roadway is a worthwhile and achievable goal for the Commonwealth. Although the Supreme Court of Virginia found in *Cline* that private landowners are not required to participate in this change for the better, road-maintaining entities can, and should, be required to do so by remedying dangerous trees adjacent to roadways. Road-maintaining entities are appropriate for this task, as they are the entities in charge of roadway safety.

The Supreme Court of Virginia should adopt a duty of reasonable care for road-maintaining entities. This duty ensures that when a tree is visibly decayed, someone will have the legal incentive to do something about it. Innocent motorists, furthermore, will not be left to bear the burden should a negligently maintained tree cause injury. For the sake of safety in the Commonwealth, it is time to put this legal uncertainty to rest, and recognize the duty of reasonable care.

3891750, at *5 (July 19, 2014).

248. See Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 HARV. L. REV. 772, 791 (1943) (explaining, for landowners, “[i]t is clear that the prevailing rule of nonliability for natural trees has received a distinctly limited application with reference to trees which endanger persons or property on the public highway.”). To borrow the author’s language and apply it to this Note’s focus, “[w]ith the great increase of travel in modern times, and the growing tendency to protect travelers, the imposition . . . of the burden of due care in removing [dangerous trees] . . . would seem to be justified in view of the grave harm threatened to users of the highways.” *Id.*

249. See *Zook*, 2014 WL 3891750, at *3–5 (finding that the City of Norfolk and the Commonwealth of Virginia had the duty of reasonable care to remedy dangerous trees adjacent to the roadway).