

5-24-2019

## In Search of a Unified Theory of the Duties Flowing from Property Ownership in Virginia: A Response to McElhaney's *If a Tree Falls*

E. Kyle McNew

*MichieHamlett Attorneys at Law*

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [State and Local Government Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

E. Kyle McNew, *In Search of a Unified Theory of the Duties Flowing from Property Ownership in Virginia: A Response to McElhaney's If a Tree Falls*, 76 Wash. & Lee L. Rev. 555 (2019), <https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss1/13>

This Student Notes Colloquium is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# In Search of a Unified Theory of the Duties Flowing from Property Ownership in Virginia: A Response to McElhaney's *If a Tree Falls*

E. Kyle McNew\*

## Table of Contents

I. The Problem with <i>Cline I</i> , and Why <i>Cline II</i> Isn't an Answer .....	555
II. Virginia Comes out of the Trees, into the Forest. ....	557
III. The Tie That Binds .....	559

What kind of case was *Cline v. Dunlora South, LLC*?<sup>1</sup> The answer depends on how you set your zoom. At, say, 10x it looks like a silly case about a freak accident where a tree happens to fall onto a road at the exact time a car is passing underneath. So viewed, you might predict that *Cline* would end up as one of those cases that collects dust in the dark corners of the tort doctrine, only to be cited when the next freak tree accident case comes along. But at, say, 5x, maybe it was not just a case about trees. Maybe it was a case about any natural condition on one's property that somehow causes damage to a driver on an adjoining roadway; so, maybe it will be relevant in future cases involving rocks and water, as well as trees. But at the widest aperture, maybe *Cline I* was not just a case about natural conditions on one's land, and maybe it was not just a case about the relationship between property and adjoining roadways. Instead, maybe it was about any condition on one's land that somehow causes damage somewhere else. If so, maybe *Cline I*

---

\* Mr. McNew is a partner at MichieHamlett PLLC in Charlottesville, Virginia, where his practice focuses on appellate advocacy and personal injury. Special thanks to Ian McElhaney for the invitation to participate in this Symposium.

1. 726 S.E.2d 14 (Va. 2012) [hereinafter *Cline I*].

will turn out to be one of the principal cases in modern Virginia tort doctrine dealing with the legal duties arising from land ownership.

*Cline I* started off in the trial court at the 10x zoom. The briefing and argument focused primarily upon the landowner's duty with respect to trees and vegetation. By the time the case got to the Supreme Court of Virginia, the zoom had widened to around the 5x mark. Though the Court initially framed the question presented as being "whether the common law tort principles of this Commonwealth allow for the recovery of personal injury damages sustained due to a tree falling from private land onto a vehicle traveling on a public highway,"<sup>2</sup> the rest of the opinion speaks in more general terms about "natural conditions"<sup>3</sup> that affect travelers on adjoining roadways. In the years since the *Cline I* opinion was issued, however, it has taken on a much wider application to cases that involve neither natural conditions nor injury to travelers on adjoining roadways.

In his Note, Mr. McElhaney concludes that the Court got it right in *Cline I*—that the landowner owes no duty to protect travelers on adjoining roadways from natural conditions on the landowner's property—because the Court also got it right in *Cline II*<sup>4</sup> when it held that the Commonwealth of Virginia may have that duty instead.<sup>5</sup> At the 10x zoom, that is certainly a defensible position. If the case is just about natural conditions and roads, then there is intuitive appeal in saying that they are the Commonwealth's roads and it is the Commonwealth's job to make them safe for travel, which includes remediating dangerous conditions on adjoining property. It also makes perfect sense from a policy standpoint to say that the Commonwealth should shoulder that burden. I disagree, however, that either of these are reasons to suggest that the Court got it right in *Cline I*, primarily because that conclusion is premised upon viewing the case with too tight of a lens. Rather, the question—and thus the answer—should have

---

2. *Id.* at 15.

3. *Id.* at 18.

4. *Cline v. Commonwealth*, No. 151037, 2016 WL 4721393 (Va. Sept. 8, 2016) [hereinafter *Cline II*].

5. Ian J. McElhaney, Note, *If a Tree Falls in a Roadway, Is Anyone Liable?: Proposing the Duty of Reasonable Care for Virginia's Road-Maintaining Entities*, 76 WASH. & LEE L. REV. 507, 552 (2019).

been framed more broadly so as to provide guidance for a broader range of fact patterns.

*I. The Problem with Cline I, and Why Cline II Isn't an Answer*

The central holding of *Cline I* is 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.”<sup>6</sup> There were no allegations in the plaintiff’s complaint to suggest that the landowner “engaged in any affirmative act that caused the property adjoining the highway to be different than in its natural state or different from the condition in which it was left when the road was built.”<sup>7</sup> Instead, this was just an old tree that became visibly dead and eventually fell—as old trees are wont to do—and so the landowner owed no duty to the driver on whom the tree fell.

There are several bases to criticize the *Cline I* majority’s analysis and conclusion. Many of them are just problems translating the doctrinal bases of the decision into actual practice. It may make some rhetorical sense to distinguish between dangers arising from nature versus dangers arising from man, and thus not make man liable for the progress of nature, but there are some bugs in the execution. As such, they are not worthy of focus in this Response. Rather, for purposes of this writing, the major problem with *Cline I* is that it did not go far enough and did not close the loop.

There was no real debate about whether the dangers posed by dead trees near public roads were a problem. There are enough cases involving fallen trees and injured drivers from across the country that it was hard to argue that this was just a freak incident with no real risk of recurrence. The question, then, is whose job is it to fix the problem? In *Cline I*, the Court conspicuously noted prior case law to the effect that roads are public, and so it is the public entity—what Mr. McElhaney refers to as the “road-maintaining entity”<sup>8</sup>—that has the duty to “perform a

---

6. *Cline I*, 726 S.E.2d at 18.

7. *Id.*

8. See McElhaney, *supra* note 5, at 509.

positive act in the preparation and preservation of a sufficient traveled way.”<sup>9</sup> So that strongly suggested that the answer to the “whose job” question was, in fact, the road-maintaining entity. But yet, in the figurative very next breath, the Court stated that while the Commonwealth has the power to do all acts necessary to preserve the roadways, “[t]he duty of VDOT or any other entity responsible for maintaining the safety of the roadway presents a question not now before us.”<sup>10</sup>

So, when the dust had settled in *Cline I*, the Court had ruled that it was not the private landowner’s job to address the danger emanating from its land, but did not close the loop and say that it was instead the Commonwealth’s job. That is a significant gap. Courts should not be in the business of excusing one actor’s failure on the grounds that it might be someone else’s job to act unless they are actually going to say that it is someone else’s job. Moreover, if it was intended that the *Cline I* analysis fit within a larger doctrinal canon, then the analysis must account for other fact patterns where a danger originating from an owner’s property injures someone who is not on that property. It is not always going to be trees and adjoining roads. It may be trees and adjoining land, or a man-made condition impacting an adjoining roadway. There are many different fact patterns that could involve a danger originating from one place injuring people located somewhere else. So, unless the Court is willing to say that in every situation it will be the job of the entity that owns the place where the injury occurs to use reasonable care to prevent the injury, the decision in *Cline I* seems short-sighted.

One would assume that the Court would close the loop in *Cline II* by confirming that the Commonwealth did in fact have a duty to take reasonable care to mitigate roadside dangers. One would be wrong. *Cline II* was the case against the Commonwealth.<sup>11</sup> In response, the Commonwealth took the position that it too owed no duty to Mr. Cline, and that in any event there was no legally

---

9. *Cline I*, 726 S.E.2d at 18 (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927)). This echoed arguments made by Dunlora in its briefing that the Court did not need to impose a duty on the adjoining landowner because the Commonwealth already had a duty to mitigate dangerous conditions along its roads.

10. *Id.* at 18 n.6.

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

enforceable duty because of the Commonwealth's sovereign immunity. Given the Court's nod toward the Commonwealth's obligation to maintain the road in *Cline I*, it should have been a *fait accompli* that the Court would reject the Commonwealth's position in *Cline II*. But instead, the Court decided that it need not decide whether the Commonwealth owed such a duty in the first instance.<sup>12</sup> Instead, because the plaintiff had alleged that the Commonwealth had, in fact, inspected the trees along the roadway in question, the Court ruled that, under the facts alleged, the Commonwealth had assumed a duty in this particular circumstance.<sup>13</sup> The Court thus avoided having to confront the question of whether, in light of the existence of sovereign immunity, it actually could impose such a duty on the Commonwealth *ab initio*.

Whereas *Cline I* decided the issue for all tree-falling-in-road cases, *Cline II* was limited to the facts of this particular case. Thus, even after *Cline II*, there is no Virginia authority for the proposition that anyone has the duty in the first instance to mitigate roadside dangers. That is a bad state of affairs for Virginia drivers, and it is born from the Court's reticence to actually close the loop. It also provides no guidance for other fact patterns where a danger originates from one place and injures someone somewhere else.

## II. Virginia Comes Out of the Trees, Into the Forest.

Since *Cline I*, the Supreme Court of Virginia has confronted two other situations when a danger originated from an owner's property but injured someone somewhere else. In both situations, the Court ruled (correctly) that it was the duty of the owner from whose property the danger originated to mitigate the danger. In *RGR, LLC v. Settle*,<sup>14</sup> the owner of a lumber yard had placed a

---

12. *Id.* at \*1 ("We have not decided, and need not do so in this case, whether an easement holder owes a duty to a third party injured by a dangerous condition arising from property over which an easement runs.").

13. *See id.* at \*2 (noting that *Cline*'s "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 remediation of dangerous conditions on the right-of-way").

14. 764 S.E.2d 8, 12 (Va. 2014).

stack of lumber at the edge of its property in a way that obstructed the view of drivers on an adjoining private roadway as they crossed a railroad track. When a train killed a driver trying to cross the tracks, the driver's estate sued the lumber yard, claiming that the lumber yard had created the danger—the view obstruction—that caused the incident to happen. The lumber yard responded much like the defendant in *Cline I*, by claiming it owed no duty to prevent injury that did not occur on its property, even if the danger originated from its property.<sup>15</sup> Instead, according to the lumber yard, the duty rested with the railroad to make sure that its tracks and right-of-way were clear of obstruction. Indeed, there were striking similarities between these facts and those in *Cline I*: a driver on a roadway was injured by a danger originating from adjoining property. The only difference was the danger—tree versus stack of lumber. This, according to the Court, made all the difference. Distinguishing *Cline I* on the basis that the danger there was a natural condition, the Court ruled that the lumber yard did have a duty to those off its premises because the danger was man-made rather than nature-made.<sup>16</sup>

*Quisenberry v. Huntington Ingalls, Inc.*<sup>17</sup> also involved a situation in which a danger originating from one place injured someone somewhere else, and again the question is whether the premises owner owed a duty to the injured party.<sup>18</sup> However, unlike *Cline I* and *RGR*, the injured person was not someone driving on an adjoining roadway. The injured person was not even someone anywhere close to the defendant's property. Instead, the defendant was a shipyard that had used asbestos on its premises, which had then traveled off-premises on the body and clothes of shipyard employees. When those employees went home, their family members were exposed to asbestos, and some of them, like Mrs. Quisenberry, ended up contracting a deadly cancer that is caused by asbestos exposure. Just like the defendants in *Cline I* and *RGR*, the shipyard argued that it had no duty to those who were strangers to its business and who were not injured on its premises. And just as it did in *RGR*, the Court rejected this

---

15. *Id.*

16. *Id.* at 17–18.

17. 818 S.E.2d 805 (Va. 2018).

18. *Id.* at 807.

argument. Because the danger was man-made rather than naturally occurring, the Court ruled that the owner of the premises, the shipyard, owed a duty to prevent that danger from injuring people off-premises, even if those people were miles and miles away.<sup>19</sup>

### *III. The Tie That Binds*

*RGR* and *Quisenberry* isolate the damage caused by the *Cline* decisions by maintaining and enforcing the distinction between naturally occurring dangers and man-made dangers. But taken together, these three cases also demonstrate that there are numerous fact patterns in which a danger originating from one place injures someone somewhere else, and that the only constant throughout all of these fact patterns is the originating landowner. There will not always be someone else whose job it might be to mitigate the danger, or against whom a court can enforce that duty. And that is why it is not sufficient to say that, in the tree versus road situation, the duty should fall on the road-maintaining entity. As a policy matter, it makes perfect sense. But as a legal matter, courts might not be able or willing to enforce that duty against the road-maintaining entity. Instead, rather than allocating the burden on the basis of a distinction between whether a danger is man-made or naturally occurring, the better, more consistent approach would be to place the burden on the landowner in all circumstances to prevent dangers that originate on the landowner's own property. That is the only way to have doctrinal consistency, and to ensure that there will always be someone responsible for preventing reasonably foreseeable harm.

---

19. *Id.* at 814.