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A Few Thoughts on "If a Tree Falls in a Roadway . . . "

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I. Introduction

I was interested, but dubious, when my student Ian McElhaney came to me with his incipient Note idea to write about trees. Devoting a semester to studying and writing about the tort-law treatment of trees falling on Virginia roads seemed a quixotic quest. It didn't seem like one of the burning legal issues of the day. Decidedly low-tech in an age where the internet and related technologies—or hot-button political or social issues—are all the rage. Nevertheless, Mr. McElhaney's original idea has taken root and flourished, and merits careful consideration.

As Mr. McElhaney carefully put his note together, it became clear to me that this seemingly small issue condensed into one focused pressure point a number of important issues—the purposes of law, the appropriate place of courts in the modernization of ancient legal principles, and the peculiar position of the Commonwealth of Virginia in all of this. The Note also had

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the advantage of having arisen organically from Mr. McElhaney's own legal experience with the issue of liability for fallen trees.

The result is a real contribution to the development of Virginia law on this issue—an issue well positioned to for Virginia Supreme Court review in the next few years. The crux of Mr. McElhaney's note is to examine the current state of Virginia law on liability for injuries caused by falling trees and to recommend that Virginia adopt a common-sense rule that general responsibility for maintaining a roadway encompasses a collateral duty to ensure that the roadway is reasonably safe from falling trees. The Note starts with the premise that the Virginia Supreme Court fairly recently, in 2012, addressed the issue of falling-tree liability. In *Cline v. Dunlora S., LLC*,[1] the Court hewed to the traditional (but increasingly antiquated) rule that a private landowner has no duty to inspect his property for rotting or otherwise unsafe trees at risk for falling on the roadway. A spirited dissent by now Chief Justice Lemons would have embraced the modern approach of imposing at least some sort of duty on such a landowner. In any event, both the dissent and the majority noted that the majority's refusal to budge from the traditional rule insulating landowners presaged no judgment on the separate issue of whether road maintainers might sometimes be liable for injuries caused by falling trees. Mr. McElhaney's Note takes up that challenge and argues that Virginia should adopt "road-maintainer negligence liability" for injuries caused by falling trees.[2] Along the way, he treats some salient issues of sovereign immunity, since "road-maintainers" tend to be government entities.

Because Mr. McElhaney's excellent note itself thoroughly canvasses the various potential approaches to liability for falling-tree injury and the existing law, I will confine my brief remarks to (1) the background legal context that got us to where we are on falling-tree liability; (2) how this peculiar issue fits into Virginia's general approach to the law; and (3) some thoughts on Mr. McElhaney's reasoning and ultimate conclusions in urging liability for road maintainers.

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1. 726 S.E.2d 14 (Va. 2012).

2. Ian J. McElhaney, Note, *If a Tree Falls in a Roadway, Is Anyone Liable? Proposing the Duty of Reasonable Care for Virginia's Road-Maintenance Entities*, 76 WASH. & LEE L. REV. 509 (2019).

I. Background of the Traditional Falling-Tree Rule

The traditional common law rule imposes no duty upon the owner of land to inspect and maintain trees on his property to protect those on the road from injury to person or property. This traditional rule flows logically from several broader doctrines long central to tort law. Yet all of these doctrines have—at least in most jurisdictions—narrowed significantly in the last several decades. The question is whether the immunity of private landowners should narrow along with them. These various doctrines undergirding the law against landowner tree-falling liability include (1) the general notion that the law should not impose liability for naturally-occurring events (what I will call the "Natural-Versus-Artificial-Conditions" Doctrine); (2) the so-called "No Duty" Rule, under which a person generally has no duty to rescue another either from natural conditions or from the negligence or other wrongdoing of a third party; (3) the general doctrine that landowners owe diminished duties in tort to those on their land (meaning that they were until recently largely exempt from the general duty of reasonable care imposed under the emerging law of negligence upon most human activity other than "landowning"); and (4) the general view that property ownership confers "rights" as against society, more than "responsibilities" toward society. I will briefly discuss the background and development of each of these doctrines in turn.

A. Natural versus Artificial

The traditional "no-liability-for-falling-trees rule" can be seen as one manifestation of the general reluctance to hold individuals accountable for natural events. For example, consider the so-called "Act of God defense" for inability to perform a contract: a humble individual cannot reasonably be held to account for what are regarded as the vicissitudes of nature or the hand of God. As applied to trees, the idea is that a landowner does nothing to disturb the natural course of nature simply by owning land containing trees. Thus, the landowner has no obligation to protect others from the natural process of trees decaying, rotting, and falling.

The common law often distinguished between natural conditions (as to which there was a lesser duty or no duty at all to protect others) and so-called artificial (or manmade) conditions. For example, the classic torts case *of Rylands v. Fletcher*[3] imposed liability upon a landowner for flooding a mineshaft—a manmade structure—on his land and thus injuring an adjacent landowner's property. The case is a watershed in the development of strict liability. Lord Cairns relied heavily upon the Natural-Versus-Artificial-Conditions Doctrine:

> The D might lawfully have used [the land] for any purpose in which it might, in the ordinary course of the enjoyment of the land, be used, and if, in what I may term *the natural use* of that land, there had been any accumulation of water, and if, by the operation of *the laws of nature* that accumulation of water had passed off onto the Plaintiff's land, the plaintiff *could not have complained* that the result had taken place."[4]

In other words, it is a plaintiff's own job to protect himself against natural processes; it isn't his neighbor's job to do it for him. On the other hand, according to Lord Cairn's if—as was the case in *Rylands*—the defendants had "not stopped at the natural use of their close [a fancy word for land]" and had instead used it for a so-called *"non-natural use"* then the D did so "at his peril."[5]

Another example of this natural/unnatural distinction is the so-called "attractive nuisance" doctrine, which holds that certain conditions on property that are attractive to children supersede the normal trespasser-unfriendly rules for landowner liability discussed below.[6] This exception is said to apply only to artificial conditions on the land—not to naturally occurring attractive nuisances. Once again, the law gives the landowner a pass with respect to what can be described as naturally occurring conditions: accordingly, liability might hinge on whether a child dies in a swimming pool (artificial—liability) as opposed to a native lake (natural-no liability).

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3. Rylands v. Fletcher [1868] UKHL 1 LRE & I App. (HL) 330 (appeal taken from Eng.) (UK).

4. *Id.*

5. *Id.*

6. RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1979).

B. The No Duty Rule

One of the leading torts professors in the country—indeed one of the leading legal polymaths of his generation—is Richard Epstein of the University of Chicago. In his hornbook *Torts*, Professor Epstein writes: "The basic rationale for this rule—by which he means the no-liability-for-falling-trees rule—"stems from the general proposition that individuals do not owe affirmative duties of care to strangers."[7] Epstein, following his customary law-and-economics approach, explains the traditional rule in economic terms: "The economic logic behind this position seems quite strong. Natural events come in all shapes and sizes. The costs of predicting and controlling those events are quite high and the gains from taking precautions are generally quite low."[8] In other words, the traditional no-liability-for-trees rule is a sort of shadow companion to the general no-duty rule—that we don't generally have a duty to come to the rescue of others. Importantly, Professor Epstein—unlike the Virginia Supreme Court—uses the tree-rule as a "limit" on the traditional no-duty rule. His hornbook embraces the modern position that it does sometimes make economic sense to impose a duty on landowners to take precautionary measures for basic tree safety/integrity inspection. Specifically, he uses his same trademarked law-and-economics approach to endorse the emerging tendency of courts (in states other than Virginia) to impose inspection duties upon landlords in well-trafficked or urban locales. The idea is that the cost-benefit ration changes in densely populated urban settings where tree falls are more likely to inflict in jury: The traditional rule, by contrast, developed in an historical context where most land was rural, where landowners owned vast tracts of forest, and where it was impractical and inefficient to impose expensive inspection and repair duties on landowners.

C. The Tri-partite Duties of a Landowner for Injuries on the Land

As every first-year torts student no doubt recalls, the traditional common law was very slow to apply negligence standard to landowners when persons were injured on the land.

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7. RICHARD A. EPSTEIN, TORTS (1999).
8. *Id.*

Instead, something approaching the reasonable standard of care was requires only with respect to business invitees. Most persons on the land of others—licensees and trespassers—were not entitled to "reasonable care" and enjoyed a much lower standard of care.[9] Perhaps it is no surprise, then, that the law also imposed a low standard with respect to protecting those not on the land from hazards emanating from the land—such as falling trees. But the clear nationwide trend in the law—initiated by the California Supreme Court in *Rowland v. Christian*,[10] and now the majority position—is to impose either a generalized standard of reasonable care for landowners, or (at a minimum) require reasonable care for both licensees and invitees.[11]

D. The Rights/Obligations Distinction

The traditional approach to "property" law in the United States is that it gives the owners of property "rights" as to their property as against the rest of the world—the quintessential "bundle of sticks," including such rights as the ability to use, transfer, exclude, and destroy. In recent years, however, scholars (and a few courts) have started to stress the obligations of property owners.[12] And the law obviously imposes some such obligations—for example, pollution clean-up under CERCLA, property taxes, substantial limitation of rights in deference to the "public interest" without just compensation, etc. Some identify a national paradigm shift away from the concept of property as primarily a bundle of rights in favor of a more of balanced approach that supplements the concept of rights with community-oriented, stewardship, responsibilities and obligations. In that context, one might think that it's only a matter of time before either the courts

9. *See, e.g.*, DOBBS, THE LAW OF TORTS 591–608 (2000).

10. 443 P.2d 561 (Cal. 1969).

11. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959) ("Through this semantic morass the common law has moved, unevenly and with hesitation, towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances.").

12. JOSEPH WILLIAM SINGER, ENTITLEMENT 18 (2000); Alexander, *The Social Obligation Norm in American Property Law*, 95 CORNELL L. REV. 745 (2000).

or perhaps the legislature undo the traditional "no-duty-for-falling-trees" doctrine.

The shift in all of these doctrines that undergirded the traditional rule that a landowner has no liability for, or duty with respect to, trees that fall from his land on to adjacent roadways suggests that the time is now ripe to reconsider and replace the ancient rule. As the Note observes, many jurisdictions have done just that. Virginia has not.

II. Placing the Issue in the Constellation of Virginia Law

Having taught a number of law school classes at a Virginia-based law school, my ineluctable conclusion is that Virginia courts tend to move very slowly and conservatively. For example, on the issue of landowner liability in tort for conditions on their land,[13] Virginia is one of the minority of states that still hews to the traditional tri-partite rule that landowners owe a reduced duty of care (or none at all) to persons injured on their land.[14]

As noted above, in 2012, the Virginia Supreme Court affirmed in *Dunlora* the traditional rule that a landowner has no duty to protect motorists on adjacent roads from falling trees on his land. But even in this respect, Virginia extends protection to landowners well beyond other states that retain the traditional rule. Other states recognizing the traditional approach apply it as a "no-duty-to-inspect" rule. The notion is that a landowner need not undergo the expense of regularly checking to make sure that his trees are not a danger to passing motorists. But these states generally hold that "[i]f the landowner actually knows that a tree has become a danger to those on the highway, he is obliged to use reasonable care to deal with the risk. . . ."[15] Not so in Virginia. *Dunlora* suggests that even if a landowner knows full well that he has a rotten tree that is likely to collapse on the road with the next

13. *Supra* Part II.C.

14. *See* RGR, LLC v. Settle, 764 S.E.2d 8, 33 (Va. 2014) (noting the desire to limit the burden placed on a landowner regarding reasonable care given to trespassers).

15. Dobbs, *supra* note 9, at 589.

stiff wind gust, he has absolutely no tort duty to do anything about it.[16]

And there are other areas in tort where Virginia law lags most of the nation. For example, Virginia is one of only four states in the nation that still totally precludes a contributorily-negligent plaintiff from recovering even a dime in tort against a negligent tortfeasor.[17] Virginia is also one of a handful of states that still applies the full-fledged traditional assumption of risk doctrine in tort.[18] Moreover, Virginia is one of the only states in the country that still applies the concept of charitable immunity in tort.[19] And it's not just tort law. In property law, Virginia is one of about only fifteen states that still recognizes the old-fashioned tenancy by the entirety (and also one of the still-smaller number of states permitting that estate to fully insulate property from creditors of just one spouse).[20]

Virginia is one of only eight states in the nation that still apply the largely-defunct eighty-five-year-old *First Restatement of Conflict of Laws* (note that the *Second Restatement* was completed some 50 years ago, and the reporters are busily working on a Third). Virginia thus employs the largely discredited notion of so-called "vested rights."[21] This approach—inspired by "natural law" thinking—was popular in the late nineteenth century and

16. Cline v. Dunlora South, LLC, 726 S.E.2d 14, 17–18 (Va. 2012).

17. Rascher v. Friend, 689 S.E.2d 661, 664–65 (Va. 2010).

18. Nelson v. Great E. Resort Mgmt., Inc., 574 S.E.2d 277, 280 (Va. 2003) ("[T]he doctrine of assumption of risk that operates to bar recovery by an injured party where the nature and extent of the risk were fully appreciated and the risk was voluntarily incurred by that party. Assumption of risk is an affirmative defense in Virginia.") (internal citation omitted).

19. Ola v. YMCA of S. Hampton Roads, Inc., 621 S.E.2d 70, 72 (Va. 2005) ("The doctrine of charitable immunity 'is firmly embedded in the law of this Commonwealth and has become a part of the general public policy of the State.'" (quoting Memorial Hosp., Inc. v. Oakes, 108 S.E.2d 388, 396 (Va. 1959))).

20. Evans v. Evans, 772 S.E.2d 576, 580 (Va. 2015) ("[C]onsistent with this restriction on alienability, no creditor of only one spouse can attach property held by both spouses as tenants by the entirety.").

21. Holland v. Bd. of Supervisors, 441 S.E.2d 20, 21–22 (discussing whether the plaintiff "identif[ied] a significant official governmental act that would permit [him] to conduct a use on [his] property that otherwise would not have been allowed" to prove he had a vested right); *Vested-rights Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("identify a significant official governmental act that would permit the landowner to conduct a use on its property that otherwise would not have been allowed.").

early twentieth centuries, and was already beginning to fall out of fashion in many jurisdictions by the time the First Restatement went to print nearly a century ago. It has been abandoned by virtually all other states for a good half century.

When it comes to procedure, Virginia is one of the only states in the country that does not permit class actions. In addition, it modernized its summary judgment rules to permit the use of affidavits—something the Federal Rules of Civil Procedure have permitted for more than seventy-five years—only a few years ago.

On the issue of collateral estoppel (or issue preclusion), the Commonwealth still applies the old-fashioned issue preclusion rule that demands privity and rejects offensive, non-mutual use of collateral estoppel. The United States Supreme Court rejected that approach for federal law purposes in the *Blonder Tongue*[22] case nearly half a century ago and only a handful states still join Virginia in applying the traditional approach.[23]

All this is not to say that Virginia's positions on all these issues are necessarily wrong—although good arguments could be made that many of them are. Much could be said for the virtues of awaiting legislative action before altering time-tested doctrines and rules, even if the legislature—seemingly in deference to the judiciary—shows no sign of action. But the larger point is that Virginia moves quite slowly—even more so than most other states—in changing long-established legal rules. So, it is unlikely that the Supreme Court will revisit its decision to retain the traditional no-liability-for-falling-trees-rule anytime soon. And thus, the Note is right to look elsewhere for a potential duty to make the roads safe from falling trees.

III. The Arguments for Imposing a Duty on Road Maintainers

My final remarks will focus on Mr. McElhaney's proposed solution to the above problems by taking up the hint in *Dunlora* and imposing liability—not on landowners—but on "road-maintaining" entities (normally government). At the outset, I note one minor disagreement with the argument in the Note. The

22. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971).

23. *See id.* at 349–50 (stating that mutuality estoppel is antiquated and no longer relevant in American society).

Note suggests that liability should be imposed upon the road maintainers because *Dunlora* refused to impose liability upon landowners, thus "leav[ing] the road-maintaining entity as the only entity potentially liable for injuries resulting from treefalls in the roadway."[24]. This argument seems to put the cart before the horse and assume that someone must be liable in tort to any motorist injured by a falling tree. Of course, the other possibility is that no one is liable to such injured motorists and that they will have to bear the costs of their own injuries. Many injuries suffered by persons in our society do not result in tort liability for anyone; it's simply a misnomer to imply that the mere fact of injury demands a defendant somewhere who can pay.

More broadly, however, the Note's arguments for imposing liability upon road maintainers is strong. The Note urges that observe how this deals with the two principal rationales for the traditional approach of no-liability for landowners. First, this approach neatly circumvents the no-duty rule. It's plausible to characterize the non-liability of a landowner (who is after all just owning land but not engaging in a dangerous activity) as a function of the no-duty-to rescue rule: he simply failed to "come to the rescue" of motorists that endangered by rotting trees. But it's not plausible similarly to characterize the road-builder/road maintainer as a non-actor that the law is trying to conscript to come to the rescue. On the contrary, the road-maintainer is undeniably involved in an activity—providing and maintaining roads. Imposing a duty to inspect for dangerous trees is thus just one way of insisting that one engaged in providing and maintaining roads do so with reasonable care for the safety of motorists. In this respect, demanding reasonable tree inspection is no different in principle from demanding reasonable guardrails, reasonable pothole repair, reasonable bridges, and reasonably-operating stoplights. As the Virginia Supreme Court noted in *Dunlora*, "[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."[25]

In the same way, shifting liability to the state deals with the second rationale for the traditional no-liability-for-falling-trees

24. McElhaney, *supra* note 2, at 549.

25. *Dunlora*, 726 S.E.2d at 18.

rule—the distinction between natural and artificial conditions. When we look at the road builder/maintainer, the issue is whether the artificial condition—the road—is safe. The focus need not be on the "natural" condition of a rotting tree. The "artificial condition" of the roadway introduced into the natural environment imposes a duty to guard against dangers to those on the roadway from falling trees.

So taking up *Dunlora*'s suggestion of government liability and running with it was an excellent idea. The problem is that—like many good ideas—it introduced another potential Pandora's Box of problems, specifically this associated with governmental immunity in tort. But I will not belabor those here, as Mr. McElhaney has addressed them in his Note. Indeed, the morass of Virginia governmental immunity law—resulting in widely varied standards for state, county and municipal liability and hard-to-reconcile decisions on the distinction between sovereign and commercial activities—is due for a revamping of its own that extends far beyond the falling-tree doctrine. We'll leave that for another day.