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1994]

TRAINS, TRUCKS, TREES AND SHRUBS: VISION-BLOCKING
NATURAL VEGETATION AND A LANDOWNER'S
DUTY TO THOSE OFF THE PREMISES

JAMES T.R. JONES*

COURTS increasingly worry over what, if anything, landowners or other responsible people¹ must do to protect persons off their premises from injuries caused by natural conditions² existing on their property. All courts and commentators concur that these individuals must protect their neighbors from *artificial* conditions, including non-native vegetation.³ Many tribunals, however, hold

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1. See RESTATEMENT (SECOND) OF TORTS § 363(1) (1965) (listing possessors, vendors, lessors or other transferors as those possibly responsible for overgrown vegetation on their land). The Restatement defines the first of these as follows:

A possessor of land is

(a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id. § 328 E. In this article, phrases such as "landowner," "occupier," and "possessor" all refer to those who own or possess land in accordance with the meaning of sections 363(1) and 328 E.

2. See RESTATEMENT (SECOND) OF TORTS § 363 cmt. b (1965). The Restatement provides:

"Natural condition of the land" . . . [means] that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor. It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them. On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces.

Id.; see, e.g., *Hasapopoulos v. Murphy*, 689 S.W.2d 118, 119 (Mo. Ct. App. 1985) (defining natural condition as one not resulting from human activity); *Deberjeois v. Schneider*, 604 A.2d 210, 213-16 (N.J. Super. Ct. Law Div. 1991) (adopting Restatement definitions of natural condition); *Kolba v. Kuszner*, 599 A.2d 194, 199 (N.J. Super. Ct. Law Div. 1991) (same). *But see McGarr v. United States*, 736 F.2d 912, 915-16 (3d Cir. 1984) (rejecting Restatement's distinction between natural and artificial conditions). Unless indicated to the contrary, this article adopts the Restatement's definition of natural conditions.

3. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 364-71 (1965) (describing

(1263)

that possessors of land have no obligation to take reasonable precautions to protect innocent passersby from *natural* circumstances.⁴ Other courts strongly disagree and hold possessors of land liable in negligence when they do not act reasonably.⁵ The drafters of the *Restatement (Second) of Torts* took an intermediate position: landowners need to do nothing. However, the drafters created an exception where trees on a landowner's urban property endanger persons on adjacent public highways.⁶ Of course, this provision

how possessors will be liable to persons outside land for dangerous artificial conditions); 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.19 (2d ed. 1986 & Supp. 1991) (describing liability of occupier of land for injury to persons off-premises); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57 (5th ed. 1984 & Supp. 1988) (discussing duty owed by possessor of land to those outside premises); Richard F. May, *Adjoining and Abutting Landowners: Liability for Injuries to Persons or Property*, 1 WILLAMETTE L. REV. 413, 417-19 (1960) (noting that owner with artificial condition on land must exercise care commensurate with foreseeable danger involved); Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 HARV. L. REV. 772, 772 (1943) (stating that possessors of land with artificial alterations, such as buildings or other structures, are under duty of care to prevent those structures from becoming dangerous to persons outside premises).

4. *E.g.*, Evans v. Southern Holding Corp., 391 So. 2d 231, 232 (Fla. Dist. Ct. App. 1980) (refusing to impose liability for injuries resulting from natural conditions), *review denied*, 399 So. 2d 1142 (1981); Pyne v. Witmer, 512 N.E.2d 993, 997 (Ill. App. Ct. 1987) (finding no duty on landowner to remove foliage from property so that motorists approaching intersection could see other motorists), *aff'd on other grounds*, 543 N.E.2d 1304, 1308 (1989); Fritz v. Parkison, 397 N.W.2d 714, 717 (Iowa 1986) (holding that owner of land abutting curved highway owed motorists no duty to remove trees on owner's property where trees did not actually obscure traveled way); Krotz v. CSX Corp., 496 N.Y.S.2d 190, 190-91 (App. Div. 1985) (finding no common law duty on landowner to control vegetation on property for benefit of users of public highway).

5. *See, e.g.*, Swanberg v. O'Mectin, 203 Cal. Rptr. 701, 704 (Ct. App. 1984) (holding landowner liable for failure to use ordinary care in managing property); Harvey v. Hansen, 445 A.2d 1228, 1234-35 (Pa. Super. Ct. 1982) (imposing duty on property owners to remove or cut back foliage that obstructs vision of motorists); Hamric v. Kansas City S. Ry., 718 S.W.2d 916, 918 (Tex. Ct. App. 1986) (holding owner or occupier of property abutting highway liable for injuries caused by failure to exercise reasonable care).

6. *See* RESTATEMENT (SECOND) OF TORTS § 363 (1965). The Restatement provides:

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

Id. A comment explains the rationale behind the urban tree exception as follows: The rule stated in Subsection (2) [of Section 363, *supra*] is an exception which has developed as to trees near a public highway. It requires no more than reasonable care on the part of the possessor of the land to prevent an unreasonable risk of harm to those in the highway, arising from the condition of the trees. In an urban area, where traffic is relatively frequent, land is less heavily wooded, and acreage is small, reason-

does not address a landowner's responsibility in cases involving rural land,⁷ or even urban property when a hazardous natural condition other than a tree causes harm.

Overgrown vegetation often contributes to motor vehicle and other accidents. For example, in one recent case, a shaggy hedge obscured the sight of motorists approaching an intersection, leading to a fatal collision.⁸ In another case, a train struck and killed a driver at a railroad crossing when uncut bushes on the property abutting the intersection blocked the driver's view of the onrushing locomotive.⁹ In a third case, untrimmed trees, shrubs and brush contributed to a car-truck collision on an adjacent highway by blocking the drivers' vision as they approached a curve.¹⁰ Typically, the victims of such tragedies seek to hold the owners or occupiers of the land on which the vision-obscuring plants are located liable in negligence for the injuries or deaths that these conditions caused.¹¹ Such claimants can succeed if, but only if, the landowners have a "duty" to control their greenery.¹²

This Article will discuss "the intriguing and somewhat intricate problem of the liability of a landowner for failing to cut naturally growing vegetation."¹³ First, it will focus on the traditional holding,

able care for the protection of travelers on the highway may require the possessor to inspect all trees which may be in such dangerous condition as to endanger travelers. It will at least require him to take reasonable steps to prevent harm when he is in fact aware of the dangerous condition of the tree.

Id. § 363 cmt. e. In the course of adopting the Section 363 approach distinguishing urban from rural property, one court noted that "[w]hether the land is in an area of sufficient population density to invoke the [Section 363 urban duty] rule requires a factual consideration of such factors as land use and traffic patterns." *Valinet v. Eskew*, 574 N.E.2d 283, 285 (Ind. 1991).

7. A caveat to Section 363 does provide that: "The [American Law] Institute [adopter and promulgator of the Restatement] expresses no opinion as to whether the rule stated in Subsection (2) [of Section 363] may not apply to the possessor of land in a rural area." RESTATEMENT (SECOND) OF TORTS § 363 caveat (1965).

8. See *Pyne*, 512 N.E.2d at 995 (noting that hedge obscured approaching driver's view of other vehicles until within two car lengths of intersection).

9. See *Krotz v. CSX Corp.*, 496 N.Y.S.2d 190, 190 (App. Div. 1985) (finding that uncut bushes on property abutting intersection of highway and railroad right-of-way obstructed driver's view of oncoming train).

10. See *Fritz v. Parkinson*, 397 N.W.2d 714, 714 (Iowa 1986) (noting presence of overgrown vegetation on landowner's property on inside of curve in road).

11. For cases where the victims sought to hold the owners of land liable in negligence, see *supra* notes 8-10 and accompanying text.

12. For a discussion of the "duty" of a landowner, see *infra* notes 17-24 and accompanying text.

13. *Mispagel v. Missouri Highway & Transp. Comm'n*, 785 S.W.2d 279, 282 (Mo. 1990) (en banc). This Article focuses on the liability of private property owners and public entities who are sued in their capacity as landowners. It does not concern governmental liability for its failure to maintain safe and visually unob-

which some courts and commentators still favor, that there is “no duty” in natural condition cases.¹⁴ Next, it will describe the diverse ways various tribunals have found to impose a duty.¹⁵ Finally, this Article will explain the proper resolution of the duty dilemma, and conclude that courts should hold that all possessors and occupiers of property are obligated to act reasonably to safeguard those adjacent to their premises from harm caused by overgrown natural vegetation on their land.¹⁶

I. JUDICIAL APPROACHES TO CASES WHERE NATURAL VEGETATION ON LAND HARMS THOSE OFF THE PREMISES

Courts approach cases that feature victims who were injured by natural conditions on adjacent land in a variety of ways. Their ultimate inquiry is one of “duty”—did the landowner owe a duty to the injured party. This query is crucial because duty is an essential prerequisite to negligence.¹⁷ Thus, one who does not owe another a

structed roads. For more on this latter topic, see *Manufacturer's Nat'l Bank of Detroit v. Erie County Rd. Comm'n*, 587 N.E.2d 819, 822-23 (Ohio 1992) (holding that political subdivisions, such as townships, may be liable for breach of duty to keep public roadways free from nuisance); Annotation, *Governmental Liability for Failure to Reduce Vegetation Obscuring View at Railroad Crossing or at Street or Highway Intersection*, 22 A.L.R. 4th 624 (1983 & Supp. 1994) (analyzing state and federal cases that discuss governmental entities' potential liability for failure to reduce vegetation obscuring view at railroad crossings or other intersections).

14. For a discussion of the traditional holding imposing no duty in natural condition cases, see *infra* notes 25-74 and accompanying text.

15. For a discussion of the various rationales supporting the existence of a duty, see *infra* notes 75-137 and accompanying text.

16. For a discussion of the appropriate resolution of the “duty dilemma,” see *infra* notes 138-68 and accompanying text. This Article will not explore the public and/or private nuisance law-based claims which perhaps can be pursued by individuals who are injured by natural conditions on landowners' property while those victims are off the premises. For more on nuisance law-based claims, see RESTATEMENT (SECOND) OF TORTS §§ 821B, 821C, 821D, 821E, 840 (1979). As the Restatement itself points out, however, courts treat negligent nuisance claims essentially the same as claims involving ordinary negligence. See *id.* at ch. 13, topic 4, scope note, at 257 (noting that there is little difference between action brought under theory of negligence and one brought under theory of negligent public nuisance where possessor's conduct on land is merely negligent). Accordingly, this Article will cite relevant nuisance precedents on such issues as landowner liability for harm natural conditions on their property cause to persons off-premises. Counsel for injured travelers always should consider whether asserting a nuisance claim (or claims) in addition to an ordinary negligence claim might prove beneficial.

17. The elements of negligence are: (1) duty; (2) breach of duty; (3) causation (both in fact and proximate); and (4) actual injury. See KEETON ET AL., *supra* note 3, § 30 (defining prima facie elements of negligence); TERRENCE F. KIELY, MODERN TORT LIABILITY: RECOVERY IN THE '90s § 6.2 (1990) (same); see, e.g., *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986) (en banc) (defining negligence); *A.L. v. Commonwealth*, 521 N.E.2d 1017, 1020 (Mass. 1988) (listing elements which plaintiff must prove for negligence); *Millman v. County of Butler*, 458 N.W.2d 207,

duty to act reasonably is not liable to the other even when he or she carelessly harms that person.¹⁸ Conversely, one must act reasonably towards those to whom one owes a duty.

Courts over the years have wrestled with such specialized questions of duty as: (1) when does one have a responsibility not to unintentionally inflict emotional distress on another;¹⁹ (2) when must one rescue another;²⁰ (3) when is one obliged not to cause

215 (Neb. 1990) (listing elements of negligence); *cf.* RESTATEMENT (SECOND) OF TORTS § 281 (1965) (listing elements necessary to prove negligence claim).

18. See KEETON ET AL., *supra* note 3, § 53 (discussing concept of duty); KIELY, *supra* note 17, §§ 6.1-3 (noting that determining existence of duty involves sum of several factors, including foreseeability of harm, degree of certainty and closeness of connection between defendant's conduct and plaintiff's injury).

19. See *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972) (holding that person who has witnessed negligent injury of another may recover damages for emotional distress from negligent party only if their physical safety was threatened or they were placed in "zone of danger"); *Sinn v. Burd*, 404 A.2d 672, 686 (Pa. 1979) (holding that recovery of damages for negligently caused mental trauma suffered by bystander of accident is not precluded merely because bystander was outside "zone of danger"); 3 HARPER ET AL., *supra* note 3, § 18.4 (discussing how generally there is no recovery for negligent emotional distress without some kind of bodily injury or sickness); KEETON ET AL., *supra* note 3, § 54, at 359-60 (stating that courts are reluctant to allow recovery for negligent emotional distress and recognizing controversy that surrounds issue of recovery for emotional distress); KIELY, *supra* note 17, §§ 3.1-14 (discussing theory of negligent infliction of emotional distress); Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 586-87 (1982) (discussing California tort law governing recovery for negligent infliction of emotional distress).

20. See *Stangle v. Fireman's Fund Ins. Co.*, 244 Cal. Rptr. 103, 104 (Ct. App. 1988) (finding that, absent special relationship, person is under no duty to take affirmative action to assist or protect another); *Union Pac. Ry. v. Cappier*, 72 P. 281, 282-83 (Kan. 1903) (holding that railway employees had no legal duty to care for wounded party after accident in which railway company was not at fault); *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898) (finding owner of land not liable for failure to warn trespasser of danger); *see also* RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1965) (recognizing that, except for certain special relationships, one does not have duty to act merely because action is necessary for another's aid or protection); KEETON ET AL., *supra* note 3, § 56, at 375 (noting that "the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life"); John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 872-927 (stating that there is generally no legal obligation to rescue another from impending peril and discussing proposals for change); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 217-344 (1908) (discussing moral aspects of duty to rescue); James T.R. Jones, *Battered Spouses' State Law Damage Actions Against the Unresponsive Police*, 23 RUTGERS L.J. 1, 32-40, 74-77 (1991) (discussing general common law rule of no duty to help others and noting its failure); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 882-94, 929-41 (1986) (discussing evolution of treatment of rescue in American law); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 424-45 (1985) (examining lack of duty to

injury to an unborn child;²¹ and most importantly for this Article, (4) when does the owner or occupier of land have a duty to safeguard the premises when another is on, or near, them.²² Where tribunals draw the line on duty, as well as when they adjudicate proximate cause,²³ can determine important policy con-

rescue and proposing statute that would impose duty to aid); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 257 (1980) (arguing for change of common law rule on duty to rescue).

21. See *Garrison v. Medical Ctr. of Del., Inc.*, 581 A.2d 288, 290 (Del. 1989) (holding that parents of child with genetic disorder had actionable common law claim against health care providers for negligence in performing prenatal chromosome study); *Procanik ex rel. Procanik v. Cillo*, 478 A.2d 755, 760 (N.J. 1984) (distinguishing between actions for "wrongful life" and "wrongful birth"); *Endresz v. Friedberg*, 248 N.E.2d 901, 906 (N.Y. 1969) (finding cause of action for emotional distress where negligence of third party resulted in stillbirth of child); see also 3 HARPER ET AL., *supra* note 3, § 18.3 (discussing strict general rule that disallows actions on behalf of children born with defects due to prenatal injuries); KEETON ET AL., *supra* note 3, § 55 (discussing duty in context of prenatal injuries); KIELY, *supra* note 17, §§ 6.4-6 (discussing modern duty issues that have arisen with respect to rights of unborn); Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 512 (1991) (proposing three remedial approaches for recognizing children's claims for negligent genetic counseling); Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1404-13 (examining current state of law governing injuries to unborn and analyzing underlying legal policies); cf. A Samuel Oddi, *The Tort of Interference with the Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L.J. 625, 637-64 (1986) (analyzing cases that deal with interference with right to die).

22. See *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (imposing duty on landowners to use reasonable care in management of their land); *Barmore v. Elmore*, 403 N.E.2d 1355, 1357 (Ill. App. Ct. 1980) (finding duty owed by owner of premises to invitee is greater than that owed to licensee); *Hayes v. Malkan*, 258 N.E.2d 695, 696 (N.Y. 1970) (finding landowner not liable for injury to traveler arising out of collision with pole on private property); *Pagelsdorf v. Safeco Ins. Co. of Am.*, 284 N.W.2d 55, 59 (Wis. 1979) (holding that landlord must exercise reasonable care towards tenants and others on premises with permission); see also 5 HARPER ET AL., *supra* note 3, at §§ 27.1-21 (discussing duties of owners and occupiers of land); KEETON ET AL., *supra* note 3, §§ 57-64 (same); JOSEPH A. PAGE, *THE LAW OF PREMISES LIABILITY* ch. 1-3 (2d ed. 1988) (examining liability of possessor of land to trespassers, licensees and invitees); Olin L. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 102-55 (1982) (discussing traditional tort liability of landlords and expansive change in duty owed by landlords that has occurred); Glenn A. McCleary, *The Possessor's Responsibilities as to Trees*, 29 MO. L. REV. 159, 159-60 (1964) (noting that landowners traditionally are not liable for harm caused by natural conditions on their land but that traditional rule has changed somewhat with regard to trees).

23. Proximate causation is a public policy-oriented doctrine. Under it, courts can absolve defendants even though their breaches of duty harmed others. Thus, it clearly is analogous with duty. See *Petition of Kinsman Transit Co.*, 388 F.2d 821, 824-25 (2d Cir. 1968) (exonerating vessel owner from liability because vessel's breaking loose, traveling downstream and crashing into bridge causing damage was held too tenuous and remote to permit recovery); *Kelly v. Gwinnell*, 476 A.2d 1219, 1224-25 (N.J. 1984) (holding that social host, who provided alcohol to guest knowing guest would soon drive, was liable for injuries inflicted on third party due to negligent operation of motor vehicle by guest); *Palsgraf v. Long Island R.R.*, 162

cerns.²⁴ As the following discussion demonstrates, courts making these decisions also resolve disputes about the off-premises liability of landowners.

A. *Traditional Rule That Landowners Have No Duty to Protect Those Off Their Premises From Harm Caused by Natural Vegetation on Their Land*

Traditionally, courts have ruled that landowners need not pay for the harm natural conditions of their land inflict on those off it because the landowners owe such persons no duty.²⁵ As the authors of the leading treatise explain:

The origin of this [rule] . . . lay in an early day when much land, in fact most, was unsettled or uncultivated, and the burden of inspecting it and putting it in safe condition would have been not only unduly onerous, but out of all proportion to any harm likely to result.²⁶

N.E. 99, 99-101 (N.Y. 1928) (holding that plaintiff could not recover where railroad guard pushed passenger aboard train and package containing fireworks fell and exploded, causing scale on platform many feet away to fall on and injure plaintiff); *see also* 3 HARPER ET AL., *supra* note 3, § 18.1, at 650 (noting that law uses proximate cause and duty to limit liability for negligence, but they “are often used in a confused and overlapping way”); 4 HARPER ET AL., *supra* note 3, §§ 20.1, 20.4-6 (discussing legal and proximate cause); KEETON ET AL., *supra* note 3, §§ 42-44 (discussing proximate cause, unforeseeable consequences and intervening causes); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 54-82 (1991) (analyzing history and modern theories of proximate cause); Jane Stapleton, *Law, Causation and Common Sense*, 8 OXFORD J. LEGAL STUD. 111, 112-14 (1988) (discussing common sense approach to causation); E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 11-22 (explaining and evaluating approaches to analysis of proximate cause).

24. *See* KEETON ET AL., *supra* note 3, § 53 (discussing policy concerns involved in proximate cause analysis); KIELY, *supra* note 17, §§ 6.1-3 (discussing need to examine current judicial analysis of duty question); Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 780-800 (1953) (discussing interests protected, and risks protected against, by scope of duty in negligence cases).

25. *See* FRANCIS H. BOHLEN, *STUDIES IN THE LAW OF TORTS* 47 & n.30 (1926) (stating that duty of care does not arise out of ownership alone); 5 HARPER ET AL., *supra* note 3, § 27.19, at 308-09 (stating that occupier’s duty to prevent injury to persons outside premises from natural conditions on land is limited and may not exist at all); KEETON ET AL., *supra* note 3, § 57 at 390 (recognizing traditional rule that landowner has “no affirmative duty to remedy conditions of purely natural origin upon his land”); May, *supra* note 3, at 417 (noting longstanding principle that landowner is under no duty to take affirmative action to remedy natural conditions on land); McCleary, *supra* note 22, at 159-60 (noting that landowner traditionally is not legally responsible for harm caused by natural conditions on land); Noel, *supra* note 3, at 772-73 (recognizing authority that states that landowner is under no duty to remedy natural conditions that threaten or cause harm).

26. KEETON ET AL., *supra* note 3, § 57, at 390; *accord* Noel, *supra* note 3, at 773; *see, e.g.*, *Evans v. Southern Holding Corp.*, 391 So. 2d 231, 233-43 (Fla. Dist. Ct.

App. 1980) (Schwartz, J., dissenting) (discussing basis of traditional rule regarding natural conditions on land but finding rule inapplicable in modern society), *review denied*, 399 So. 2d 1142 (1981); *Mahurin v. Lockhart*, 390 N.E.2d 523, 524 (Ill. App. Ct. 1979) (discussing development of traditional rule but finding it inapplicable in urban and developed areas); *Valinet v. Eskew*, 574 N.E.2d 283, 285 (Ind. 1991) (discussing origin of traditional rule shielding landowners from liability for harm caused by natural conditions on property to those off property); *Hensley v. Montgomery County*, 334 A.2d 542, 545 (Md. Ct. Spec. App. 1975) (same).

The rule regarding natural conditions is an offshoot of the traditional nonfeasance/misfeasance distinction in duty to act negligence cases. Under this dichotomy, there is a real difference "between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm." RESTATEMENT (SECOND) OF TORTS § 314 (1965); see KEETON ET AL., *supra* note 3, § 56, at 373 (noting distinction law recognizes between misfeasance and nonfeasance). Courts through the years have proved far less likely to hold the inactive party negligent than the one whose active carelessness harmed another. KEETON ET AL., *supra* note 3, § 56, at 373; see *Jones, supra* note 20, at 12 n.32 (noting that liability will more readily be imposed upon party who acts affirmatively than upon one who simply fails to protect another from risk created by some outside source). Professor Bohlen long ago observed about a landowner's liability to his or her neighbors:

No duty [to protect others] arose out of mere passive ownership. Today it is still true that no duty to take affirmative steps to protect others can arise save from a use of property by the owner for his own purposes. If for his purpose he erected a structure, he would be bound to maintain it in repair so that it should not injure those adjacent. Nor could, any more than now, [he or she] act upon his land or use his land in such a way as to cause injury to his neighbors. He was not bound to act at all; but if he did, he must act carefully.

BOHLEN, *supra* note 25, at 47.

Thus, one who unreasonably left his or her property in its natural condition, altering nothing, was not liable for his or her nonfeasance to a neighbor injured by the natural condition, although that landowner could have been liable if his or her active *misfeasance* (such as unreasonably bringing animals or plants onto land, building a structure, etc.) harmed the neighbor. See *id.* at 47 (noting marked difference in liability at common law for consequences of misfeasance and nonfeasance); KEETON ET AL., *supra* note 3, § 57, at 390-91 (stating that landowners generally are liable only if they have altered conditions on their land); Noel, *supra* note 3, at 796 (recognizing argument that liability should not be imposed where landowner has not acted to create danger, but noting several instances where liability has been imposed on landowner despite fact landowner did not create danger). As the explanatory notes to the original *Restatement of Torts* pointed out:

A possessor is under no duty to make his land safe except in respect to such conditions as have resulted from an earlier human activity. *This may be due to a survival, often found where the rights and liabilities of the owners and possessors of land are concerned, of an early general theory that activity is essential to liability*, or it may be due to the concept that those who take possession of land or establish highways must bear those natural disadvantages which the location of the land or highway involves.

RESTATEMENT (SECOND) OF TORTS § 234 Explanatory Note, at 30 (Tentative Draft No. 4, 1929) (emphasis added).

In *Sprecher v. Adamson Cos.*, the California Supreme Court pointed to the traditional nonfeasance/misfeasance distinction as an additional rationale for the rule that landowners are not liable for harm natural conditions on the land cause to those off the premises. *Sprecher v. Adamson Cos.*, 636 P.2d 1121, 1125-26 (Cal. 1981) (en banc). For a more detailed on the nonfeasance/misfeasance distinction, see *infra* notes 80-85, 142-50 and accompanying text.

Thus, British and related courts long declined to award damages in negligence/nuisance cases involving harm caused by natural conditions to those off the land.²⁷ The English Court of Common Pleas may have been the first tribunal to deny recovery for an off-premises injury caused by a "natural" condition when it issued the late sixteenth century decision in *Boulston's Case*.²⁸ The court held that a landowner was not responsible for damage wild rabbits living on his land caused to the property of his neighbor.²⁹

A number of subsequent courts cited *Boulston's Case* as precedent that one has no duty to control natural conditions on his or her property.³⁰ Many courts found for landowners and against those situated nearby when, for example, large numbers of pheasants invaded the neighbors' property and consumed their crops;³¹ hordes of fecund rats ate the neighbor's grain;³² or, as in *Boulston's Case* itself, overly prolific rabbits damaged the neighbor's

For a thoughtful overview of the benefits of the nonfeasance/misfeasance distinction, see David W. Burcham, Note, *Sprecher v. Adamson Companies: Nonfeasance Immunity Slides by the California Supreme Court*, 16 LOY. L.A. L. REV. 625, 641-46 (1983). See generally Adler, *supra* note 20, at 878-86 (analyzing problems underlying distinction between misfeasance and nonfeasance).

27. For a discussion of the courts' practice of treating negligence and nuisance claims in essentially the same manner, see *supra* note 16.

28. 77 Eng. Rep. 216 (C.P. 1597).

29. *Id.* The actual basis for the decision in *Boulston's Case* is somewhat obscure. The defendant there had built "coney-boroughs," or rabbit burrows, on his land to attract the rabbits that later harmed his neighbor's property. *Id.* at 216-17. Thus, the rabbits arguably were not "naturally" on his property because he had encouraged their presence. See A.L. Goodhart, *Liability for Things Naturally on the Land*, 4 CAMBRIDGE L.J. 13, 20 (1930) (analyzing grounds for decision of non-liability and argument that rabbits were not naturally on land); Noel, *supra* note 3, at 782 & n.48 (noting that non-liability applies even though animals have been attracted to land by owner's activities so long as animals are *ferae naturae*). The court in *Boulston's Case* apparently ruled as it did because the defendant had no property rights in the rabbits and thus was not responsible for the harm they caused his neighbor. 77 Eng. Rep. at 217; see also Goodhart, *supra*, at 20. In his article, Professor Goodhart effectively challenged those who favored the "no liability for natural conditions" approach by critically reviewing the early precedents and demonstrating why many, like *Boulston's Case*, did not really support their arguments. Goodhart, *supra*, at 15-33.

Of course, *Boulston's Case* was not a true negligence decision because it predated the rise of negligence law by at least two centuries. See KEETON ET AL., *supra* note 3, § 28 (stating that negligence law only coalesced in early nineteenth century). Still, courts later deemed it a starting point when they faced the off-premises injury issue. For examples of courts that began their analysis of the duty owed to a neighbor with *Boulston's Case*, see *infra* note 30 and accompanying text.

30. See, e.g., *Seligman v. Docker*, [1949] 1 Ch. 53, 60-61 (1948) (beginning analysis of duty owed to persons off-premises with *Boulston's Case*); *Stearn v. Prentice Bros., Ltd.*, [1919] 1 K.B. 394, 396-97 (1918) (same); *Brady v. Warren*, [1900] 2 Ir. R. 632, 638, 644-45, 659 (Q.B.) (same).

31. *Seligman*, [1949] 1 Ch. at 53-54.

32. *Stearn*, [1919] 1 K.B. at 396.

fields.³³ Tribunals also extended the no liability principle to vegetable or inanimate natural conditions, exculpating defendants whose land contained large rocks which overhung and threatened their neighbors,³⁴ an excess of thistles whose seeds blew to germination and abundant destructive growth next door,³⁵ or many noxious prickly pears which broke down a protective fence and permitted wild native dogs to ravage an adjoining herd of sheep.³⁶ Lord Chief Justice Coleridge accurately summed up the view of British courts when he stated that: “[t]here can be no duty as between adjoining occupiers to [control] . . . the *natural growth* of the soil.”³⁷ All agreed that any “attempt to impose on an owner, who is using and enjoying his land in the ordinary manner of its use and reasonably, liability for damage sustained by the property of another through natural agencies [must fail].”³⁸

American courts early on adopted the British “no duty” approach to suits for damage natural conditions caused to adjoining property. They denied recovery, for example, in cases involving untrimmed vegetation that contributed to collisions³⁹ and injurious weeds which invaded a neighbor’s acreage.⁴⁰ American courts further held a landowner has no duty to manage sand naturally on his

33. *Hilton v. Green*, 175 Eng. Rep. 1302, 1304-05 (1862); *Brady*, [1900] 2 Ir. R. at 632.

34. *Pontardawe Rural Dist. Council v. Moore-Gwyn*, [1929] 1 Ch. 656 (1928).

35. *Giles v. Walker*, 24 Q.B. 656 (Eng. C.A. 1890). Some authorities correctly have noted that the thistles in *Giles* were not really natural conditions because they only grew after the landowner cultivated his property. *Id.* Thus, they most likely resulted from a natural *use* of the soil. Viewed in that light, *Giles* was even more expansive than a mere natural condition case would have been. Its holding apparently exculpates a landowner when either a natural condition *or* a natural use of the land harms a neighbor. See, e.g., Goodhart, *supra* note 29, at 15-16 (noting that thistles involved in *Giles* were not natural growth of soil in its natural condition); Noel, *supra* note 3, at 778-79 (stating rule that no liability exists in situations where alterations made to land are result of normal acts of husbandry).

36. *Sparke v. Osborne*, 7 C.L.R. 51 (1908) (Austl.).

37. *Giles*, 24 Q.B. at 657 (emphasis added).

38. *Pontardawe*, [1929] 1 Ch. at 658. Accord, e.g., *Sparke*, 7 C.L.R. at 59-60, 63, 70-71, 71-74, 75.

39. See, e.g., *McLaughlin v. Alton R.R.*, 278 Ill. App. 551, 557 (App. Ct. 1935) (denying recovery from landowner for injuries suffered in collision); *Bohm v. Racette*, 236 P. 811, 812-13 (Kan. 1925) (holding that owner of land adjoining highway is not liable to those injured in collision caused by hedges obstructing view).

40. See, e.g., *Langer v. Goode*, 131 N.W. 258, 258-59 (N.D. 1911) (finding landowner not liable for damage to neighbor’s property caused by wild mustard growing on landowner’s property); *Gulf, C. & Santa Fe Ry. Co. v. Oakes*, 58 S.W. 999, 1002 (Tex. 1900) (finding landowner not liable for damage to neighbor’s property caused by Bermuda grass growing on landowner’s property); *Vance v. Southern Kan. Ry.*, 152 S.W. 743, 745 (Tex. Civ. App. 1913) (finding landowner not liable for damage to neighbor’s property caused by Russian thistle growing on landowner’s property).

or her premises⁴¹ or to remove dead leaves and similar combustible natural materials which are lying on a forest floor.⁴² Additionally, the courts ruled that a landowner is not responsible when the stench from a naturally occurring, putrid and stagnant pond bothers those in the vicinity⁴³ or the natural flow or drainage of water from a landowner's property harms a neighbor.⁴⁴ All concurred that "a man does not become a wrongdoer by leaving his property in a state of nature."⁴⁵ Otherwise, courts feared economic ruin would befall landowners—if a duty were laid upon them, landowners would "become liable . . . to respond in damages that may sweep away the value of [their] whole [farms] . . . a jury influenced by sympathy for the injured party are [sic] so prone to find the accident the result of negligence upon the slightest pretext."⁴⁶

While many American jurisdictions no longer adopt this position, or at least not when the issue is overgrown vegetation that obstructs the view of drivers on public highways,⁴⁷ a number of jurisdictions still follow the traditional rule⁴⁸ or at least the rule as it

41. See, e.g., *Ettl v. Land & Loan Co.*, 5 A.2d 689, 691 (N.J. 1939) (stating general rule that owner of land in its natural condition is not liable for injury caused by extraordinary or ordinary forces of nature, so long as owner has not interfered with natural condition).

42. See, e.g., *Salmon v. Delaware, L. & W. R.R.*, 38 N.J.L. 5, 10-13 (N.J. 1875) (holding that person owning land contiguous to railway is not required to keep leaves, that fall from trees on property, from being carried by wind onto railway).

43. See, e.g., *Roberts v. Harrison*, 28 S.E. 995, 996 (Ga. 1897) (holding that owner is not liable when water accumulates on land from natural causes and not by any act of owner); *Barring v. Commonwealth*, 63 Ky. (1 Duv.) 95, 96-98 (1865) (holding owner of putrid pond that produced injurious odors not liable).

44. See, e.g., *Livezey v. Schmidt*, 29 S.W. 25, 25-26 (Ky. 1895) (holding that no right of action accrues for injury arising from natural flow or drainage of water); *Mohr v. Gault*, 10 Wis. 455, 455 (1860) (holding that obstruction of stream caused by washing down of its banks does not constitute nuisance unless such obstruction is attributable to acts or agency of man).

45. *Salmon*, 38 N.J.L. at 11.

46. *Zacharias v. Nesbitt*, 185 N.W. 295, 296 (Minn. 1921). Accord, e.g., *Chambers v. Whelen*, 44 F.2d 340, 341 (4th Cir. 1930) (applying West Virginia law).

47. For an analysis of decisions that adopt the view that landowners can be liable for injuries caused by natural conditions on their property to those off-premises, see *infra* notes 75-137 and accompanying text.

48. For cases applying the traditional rule, see *supra* notes 39-44 and accompanying text. Of course, if a natural condition physically encroaches into adjoining space owned by the public, such as a right-of-way by a public road, it protrudes beyond the property of its owner. As a result, he or she may be held liable for an intrusion, such as obscuring a traffic sign or signal, regardless of the traditional rule of no liability for a natural condition that is located solely on his or her land. See, e.g., *Armas v. Metropolitan Dade County*, 429 So. 2d 59, 60-61 (Fla. Dist. Ct. App. 1983) (holding that city had duty to remove foliage obstructing motorists' view of stop sign); *Morales v. Costa*, 427 So. 2d 297, 298 (Fla. Dist. Ct. App. 1983) (holding that users of public right-of-way have right to expect it will not be unreasonably obstructed); *Manufacturer's Nat'l Bank of Detroit v. Erie County Rd.*

is set forth in the non-proviso portion of the *Restatement*.⁴⁹ For example, Illinois courts often have ruled that landowners have no duty to insure that plants on their property do not block motorists' vision.⁵⁰ *Esworthy v. Norfolk & Western Railway Co.*⁵¹ is representative of the Illinois approach.

In *Esworthy*, several defendants with property adjacent to the intersection of a road and a railway line had trees on their premises which blocked the view of any motorists who approached the crossing.⁵² The special administrator of the estate of an individual who was killed when his car collided with a train at the crossing alleged he died because the trees obstructed his view of the oncoming locomotive.⁵³ The Appellate Court of Illinois denied recovery against the property owners because they had no obligation to the deceased driver.⁵⁴ As the Illinois Supreme Court observed a few years later in another case, "landowners do not owe a duty to maintain their property in such a way that it does not obstruct the view of travelers on an adjacent highway."⁵⁵

Other courts have ruled similarly. Florida tribunals repeatedly have employed the "no duty" approach. In *Stevens v. Liberty Mutual Insurance Co.*,⁵⁶ the court summed up Florida's position: "[T]here

Comm'n, 587 N.E.2d 819, 824-25 (Ohio 1992) (holding landowner liable where crops grew in highway right-of-way and obstructed driver's vision). *But see* Sullivan v. Silver Palm Properties, Inc., 558 So. 2d 409, 410-11 (Fla. 1990) (holding that landowner did not have duty to prevent subterranean root growth of trees located adjacent to public right-of-way).

49. For a discussion of the rule as it is set forth in the *Restatement*, see *supra* notes 6-7 and accompanying text.

50. See, e.g., *Ziembra v. Mierzwa*, 566 N.E.2d 1365, 1367-69 (Ill. 1991) (holding landowner did not have duty to warn passing bicyclist of driveway hidden by plants on his property); *Esworthy v. Norfolk & W. Ry.*, 520 N.E.2d 1044, 1046 (Ill. App. Ct. 1988) (holding that owners of property adjoining railroad crossing did not owe duty to motorists to keep property free from foliage where view of tracks and crossing signals were visible to motorists); *Pyne v. Witmer*, 512 N.E.2d 993, 997 (Ill. App. Ct. 1987) (holding that landowners had no duty to remove foliage from their property so motorists approaching intersection could see other approaching motorists), *aff'd on other grounds*, 543 N.E.2d 1304 (1989); *Nichols ex rel. Nichols v. Sitko*, 510 N.E.2d 971, 974 (Ill. App. Ct. 1987) (holding that failure of property owner to trim weeds on property to reasonable height did not render owner liable for injuries sustained by minibike rider struck by car whose driver's vision was impaired by foliage); *cf. Manning v. Hazekamp*, 569 N.E.2d 1168, 1172-74 (Ill. App. Ct. 1991) (finding no duty to place stop sign where motorists' vision not impaired by parked cars); *Cross v. Moehring*, 544 N.E.2d 1259, 1260-61 (Ill. App. Ct. 1989) (finding no duty to remove advertising sign that obstructs view at intersection).

51. 520 N.E.2d at 1044.

52. *Id.* at 1045.

53. *Id.* at 1045-46.

54. *Id.* at 1046.

55. *Ziembra v. Mierzwa*, 566 N.E.2d 1365, 1368 (Ill. 1991).

56. 415 So. 2d 51 (Fla. Dist. Ct. App. 1982).

is no common law duty on a landowner to maintain his property in a condition so that a motorist approaching a public highway intersection can see other approaching motorists."⁵⁷ The ruling was predicated on the view that the landowner should not have to watch out for vegetation that might block the driver's vision, but that the motorist should watch out for the natural obstruction.⁵⁸ Arizona courts also have employed the traditional doctrine,⁵⁹ as have courts in New York,⁶⁰ Iowa,⁶¹ Louisiana,⁶² Missouri⁶³ and other states.⁶⁴

In *Fritz v. Parkison*,⁶⁵ the Iowa Supreme Court listed many of the concerns that led it to find no duty in natural condition cases. First, the court noted Iowa's policy of keeping highways free from obstructions and hazards, but held that visually obstructive vegetation is not sufficiently dangerous to fall under this policy.⁶⁶ Next,

57. *Id.* at 52; *accord, e.g.*, *Pedigo v. Smith*, 395 So. 2d 615, 617 (Fla. Dist. Ct. App. 1981) (holding that absent ordinance, landowner has no duty to maintain property so that motorists have clear view of traffic); *Evans v. Southern Holding Corp.*, 391 So. 2d 231, 232-33 (Fla. Dist. Ct. App. 1980) (same), *review denied*, 399 So. 2d 1142 (1981).

58. *See Pedigo*, 395 So. 2d at 616-17 (stating that motorists should have observed bush and controlled their vehicles as situation required); *Evans*, 391 So. 2d at 232 ("Obstruction of view when motoring on a highway must be observed by all motorists. Every user of the highway is required to exercise reasonable care for his own safety and protection." (quoting *Bassett v. Edwards*, 30 So. 2d 374, 376 (Fla. 1947))).

59. *See Coburn v. City of Tucson*, 691 P.2d 1078, 1080-81 (Ariz. 1984) (stating that landowner has no duty to use land so as to protect travelers); *Boyle v. City of Phoenix*, 563 P.2d 905, 906-07 (Ariz. 1977) (same); *Rodgers v. Ray*, 457 P.2d 281, 283-84 (Ariz. Ct. App. 1969) (same); *see also Beals v. State*, 721 P.2d 1154, 1158-59 (Ariz. Ct. App. 1986) (finding state not liable to riparian landowners for permitting vegetation to grow and cause flooding).

60. *See Barnes v. Stone-Quinn*, 606 N.Y.S.2d 485, 486 (App. Div. 1993) (finding landowner has no common law duty to control vegetation on property for benefit of motorists); *Scattareggia v. Niagara Mohawk Power Corp.*, 510 N.Y.S.2d 455, 458 (Sup. Ct. 1986) (same); *Krotz v. CSX Corp.*, 496 N.Y.S.2d 190, 191 (App. Div. 1985) (same).

61. *See Fritz v. Parkison*, 397 N.W.2d 714, 717 (Iowa 1986) (finding landowner owed no duty to motorist where landowner planted trees but trees did not obstruct traveled way); *cf. Shaw v. Soo Line R.R.*, 463 N.W.2d 51, 56 (Iowa 1990) (following *Fritz* and holding landowners not liable to motorists where parked trailers did not obstruct roadway).

62. *See Sierra-Melendez v. Brown*, 410 So. 2d 258, 261 (La. Ct. App. 1982) (holding that, absent statute, landowner bordering roadway owes no duty to motorists).

63. *See Hasapopoulos v. Murphy*, 689 S.W.2d 118, 121-22 (Mo. Ct. App. 1985) (finding landowner not liable for damage to neighbor's property from natural growth of healthy trees).

64. *See, e.g., Melnick v. CSX Corp.*, 540 A.2d 1133, 1138 (Md. 1988) (finding landowner not liable for damage to neighbor's building where landowner allowed vegetation to encroach on neighbor's land, but neighbor had self-help remedy).

65. 397 N.W.2d 714, 715-16 (Iowa 1986).

66. *Id.*

the court referred to “a well-established state goal to encourage the growth and cultivation of trees and discourage their wanton destruction.”⁶⁷ The court feared that a strict rule that readily holds landowners liable for their overgrown vegetation might lead them to cut down their trees whether or not the trees violated the law.⁶⁸ It believed that such actions, in turn, certainly could work against the pro-tree policy.⁶⁹ Third, the court looked at who most easily can prevent the accidents to which overgrown vegetation contributes, and concluded that motorists more readily can do so by taking proper precautions.⁷⁰ The landowner, on the other hand, “[o]rdinarily . . . would have no expertise in determining what does or does not constitute sufficient visibility or in concluding what steps would be required to select offending trees.”⁷¹ Finally, the court noted the usual distinctions between natural and artificial conditions and rural and urban property, and held that they weigh in favor of the traditional “no duty” for natural conditions rule.⁷² Viewing all these considerations in concert, the court believed they justified the finding that the landowner had no duty.⁷³ Other courts also have raised the issues of unfair and excessive litigation and/or judicial economy as additional support to justify their nonliability decisions.⁷⁴

Thus, courts in a number of jurisdictions have agreed that landowners are not liable for the harm natural conditions on their property cause to their neighbors or those traveling on the adjoining highway. When they consider whether to impose a duty in such cases, the courts conclude that the cost to property owners that would result from the imposition of a duty is excessive and would cause landowners to take socially undesirable precautions. These

67. *Id.* at 716.

68. *Id.*; accord *Hasapopoulos v. Murphy*, 689 S.W.2d 118, 121 (Mo. Ct. App. 1985). The *Hasapopoulos* court stated: “Possible exposure [of landowners] to liability would warrant the uprooting of trees and shrubbery in proximity to boundary lines resulting in non-aesthetic barrenness.” *Id.* at 121.

69. *Fritz*, 397 N.W.2d at 716.

70. *Id.*

71. *Id.*

72. *Id.* at 716-17.

73. *Id.* at 717.

74. See *Evans v. Southern Holding Corp.*, 391 So. 2d 231, 232-33 (Fla. Dist. Ct. App. 1980) (finding landowner liable would give motorist in every collision case right to litigate before jury whether landowner used property reasonably), *review denied*, 399 So. 2d 1142 (1981); see also *Sanem v. Home Ins. Co.*, 350 N.W.2d 89, 93-94 (Wis. 1984) (expressing concern that allowing recovery would lead to future fraudulent claims).

courts accordingly hold that the traditional no liability approach is best.

B. *Modern Rule That Landowners Have a Duty to Protect Those Off Their Premises from Harm Caused by Natural Vegetation on Their Land*

Several jurisdictions have abandoned the non-proviso portion of the *Restatement* and the traditional “no duty” for natural conditions rule. Such rulings are illustrated by the California Supreme Court’s 1981 decision in *Sprecher v. Adamson Cos.*⁷⁵ There, the court wrestled with “the present validity of the old common law rule which immunized a possessor of land from liability for injury caused by a natural condition of his land to person or property not on his land.”⁷⁶

In *Sprecher*, the defendants owned land that contained a naturally occurring, periodically active landslide. The landslide had existed since at least the early 1900’s and the defendants had done nothing to affect it.⁷⁷ In 1978, heavy spring rains activated the slide, which then damaged the plaintiff’s home. When he filed suit, the trial court invoked the traditional “no duty” rule and dismissed his claim.⁷⁸ The California Supreme Court, in an opinion written by Chief Justice Rose Bird, rejected that line of authority and reversed and remanded the case.⁷⁹

Chief Justice Bird reviewed the natural condition rule in *Sprecher* and found it sorely wanting. She noted that it was based, at least in part, on the ancient distinction between misfeasance and nonfeasance and the “no duty to act” rule which traditionally applied in nonfeasance cases, unless a special relationship existed between the plaintiff and defendant.⁸⁰ She spurned this approach,

75. 636 P.2d 1121 (Cal. 1981) (en banc). For more details about *Sprecher*, see John Benham, Note, *Tort Liability: California Abolishes the Landowner’s Immunity for Harm Caused by Natural Conditions: Sprecher v. Adamson Companies*, 1983 S. III. U. L.J. 247; Richard A. Bentley, Note, *Torts—Liability Without Fault—The Beginning of the End of Immunity From Landowner’s Liability for Natural Conditions on His Land—Sprecher v. Adamson Cos.*, 5 WHITTIER L. REV. 105 (1983); Leonora M. Bova, Comment, *California Sidewalks: A Comprehensive Scheme for Determining Municipal and Abutter Liabilities*, 31 SANTA CLARA L. REV. 463, 483-85 (1991). See generally Burcham, *supra* note 26.

76. *Sprecher*, 636 P.2d at 1121.

77. *Id.* at 1122.

78. *Id.* at 1121-22.

79. *Id.* at 1130.

80. *Id.* at 1125-26. For a discussion of special relationships between plaintiffs and defendants that create a duty to act, see *supra* note 20 and accompanying text.

analogizing to *Rowland v. Christian*⁸¹ and the modern decisions that hold landowners to a duty of ordinary care towards those who come onto their premises, regardless of whether they could be classified as trespassers, licensees, or invitees.⁸² The *Sprecher* court concluded that “the traditional characterization of a defendant’s failure to take affirmative steps to prevent a natural condition from causing harm as nonactionable nonfeasance conflicts sharply with modern perceptions of the obligations which flow from the possession of land.”⁸³ The court decided there was no reason to distinguish between artificial and natural conditions, and thus no reason to immunize landowners from liability for harm caused by the latter but not the former.⁸⁴ Chief Justice Bird noted that if the traditional rule survived, landowners anomalously would have no duty towards those *off* their premises even though under *Rowland* they owed one to all who came *onto* their premises.⁸⁵

Finally, the *Sprecher* court held that the no duty for natural conditions rule “bears little relationship to the major factors which should determine whether immunity should be given the possessor of land for harm done by a natural condition of the land.”⁸⁶ The court determined that the difficulty in obtaining insurance which a property owner might experience when attempting to purchase coverage against harm caused by natural conditions on the land did not warrant maintaining the traditional rule.⁸⁷ Thus, the court con-

81. 443 P.2d 561 (Cal. 1968). In *Rowland*, the California Supreme Court held that the proper test to determine the liability of a landowner is whether, in the management of the property, the landowner acted as a reasonable person in view of the probability of injury to others. *Id.* at 564-66. The court specifically rejected the trespasser/licensee/invitee distinction. *Id.*

82. *Sprecher*, 636 P.2d at 1126. The court stated that “[m]odern cases recognize that after *Rowland*, the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises” *Id.*

83. *Id.* at 1127; see Adler, *supra* note 20, at 909-10 (noting abandonment of misfeasance/nonfeasance distinction by *Sprecher* court).

84. *Sprecher*, 636 P.2d at 1127-28.

85. *Id.* at 1128.

86. *Id.* The *Sprecher* court further elaborated:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, and the extent of the burden to the defendant and the consequence to the community of imposing a duty to exercise care have little, if any, relationship to the natural, as opposed to artificial, origin of the condition causing harm.

Id.

87. *Id.*

cluded that “[t]he distinction between artificial and natural conditions should be rejected.”⁸⁸ While the landowner still only will be liable if the claimant proves he or she acted unreasonably, at least at the outset, the landowner has some duty to act.⁸⁹ The court remanded *Sprecher* for a jury to resolve whether the defendants acted negligently.⁹⁰

The *Sprecher* decision significantly influenced vision-blocking vegetation cases. In one typical action after *Sprecher*, bushy shrubbery contributed to an intersection collision.⁹¹ Citing *Sprecher*, the court found the landowner had a duty, that included inspecting the bushes at issue, irrespective of the usual natural/artificial condition distinction.⁹²

*Harvey v. Hansen*⁹³ featured yet another intersection collision caused, at least in part, by overgrown vegetation. A trial judge granted the landowner summary judgment after assuming the plants were natural, but the Superior Court of Pennsylvania reversed.⁹⁴ The court addressed the natural/artificial condition dichotomy in the following words:

The “natural condition” standard for imposing or not imposing liability creates the anomalous situation of imposing liability on a landowner who improves and maintains his property while precluding liability of a neighboring landowner who allows the “natural condition” of his property to run wild. Under this analysis, landowner A may plant hedges or bushes around the perimeter of his property and if they are allowed to become too thick or too tall so as to obstruct a motorist’s vision of an intersection, he will be held liable. Land-

88. *Id.*

89. *Id.* at 1128-29. For a discussion of duty as a prerequisite to negligence, see *supra* notes 17-18 and accompanying text.

90. *Sprecher*, 636 P.2d at 1130. Justice Richardson expressed considerable doubt that any jury could find the *Sprecher* defendants negligent because of the landslide condition on their land. *Id.* (Richardson, J., concurring).

91. *Swanberg v. O’Mectin*, 203 Cal. Rptr. 701 (Ct. App. 1984).

92. *Id.* at 704; see also *Hamric v. Kansas City S. Ry.*, 718 S.W.2d 916, 918 (Tex. Ct. App. 1986) (“[T]he owner or occupier of premises abutting a highway has a duty to exercise reasonable care not to jeopardize or endanger the safety of motorist[s] using the highway as a means of passage . . . the owner or occupier is liable for injuries that proximately resulted from his negligent acts in this respect.”).

93. 445 A.2d 1228 (Pa. Super. Ct. 1982). In *Harvey*, the defendant owned land located at an intersection where an accident took place. *Id.* at 1229. The plaintiff claimed that the defendant’s trees and shrubs obstructed her lateral view as she tried to cross the intersection. *Id.*

94. *Id.* at 1231.

owner B, on the other hand, may neglect his property, allowing it to be overrun and overgrown with weeds, plants, grasses and other *natural foliage*, to an equal or greater detriment to passing motorists, but with no liability to himself. The distinction appears to be arbitrary at best.⁹⁵

Accordingly, the court repudiated the prior Pennsylvania case that had recognized the distinction.⁹⁶ At least one later tribunal has acknowledged *Harvey's* disavowal of the traditional rule.⁹⁷

When viewed together, decisions like *Sprecher*, *Harvey* and their progeny represent a significant new approach to the duty analysis regarding natural conditions and a repudiation of the traditional no duty for natural conditions rule. Courts which adopt this view hold careless landowners responsible for any harm things on their property cause to those outside it. To do otherwise, such tribunals feel, would be a miscarriage of justice. A third group of jurisdictions take one of several intermediate positions between the traditional and modern duty rules.

C. *Intermediate Judicial Positions on Whether Landowners Have a Duty to Protect Those Off Their Premises from Harm Caused by Natural Vegetation on Their Land*

Various tribunals have assumed one of several stances somewhere between the absolute extremes of "no duty" and "always a duty" in natural condition cases. The principal alternative approach follows the *Restatement*⁹⁸ and requires landowners to use reasonable care to safeguard travelers against dangerous trees along roads in urban areas, even though possessors would owe no duty if their property were in rural areas.⁹⁹ Courts distinguish between urban and rural trees because the reasons that justify the traditional

95. *Id.* (emphasis in original).

96. *Id.* at 1234. The court repudiated the case of *Haldeman v. Mercer*, 30 Pa. D. & C.2d 435 (1963), which had adopted the natural/artificial distinction. *Id.*; see also *Barker v. Brown*, 340 A.2d 566, 569 (Pa. Super. Ct. 1975) (rejecting natural/artificial distinction in residential, but not rural, areas).

97. See *McGarr v. United States*, 736 F.2d 912, 914-17 (3d Cir. 1984) (applying Pennsylvania law and discussing *Harvey* in detail); see also *Okkerse v. Howe*, 593 A.2d 431, 434-35 (Pa. Super. Ct. 1991) (citing *Harvey* and warning landowners to cut back foliage that obstructs drivers at intersections).

98. For a discussion and the text of the *Restatement*, see *supra* notes 6-7 and accompanying text.

99. See generally KEETON ET AL., *supra* note 3, § 57, at 391 (discussing *Restatement* rule that urban landowners owe duty to travelers while rural landowners do not); McCleary, *supra* note 22, at 160-62, 171-72 (discussing landowner liability to highway users for injuries caused by falling trees); Noel, *supra* note 3, at 789-91 (discussing landowners' duty to protect highway travelers from falling trees).

no duty rule are not present in the urban setting.¹⁰⁰ As one tribunal has stated:

The traditional rule of non-liability developed at a time when land was mostly unsettled and uncultivated. The landowner, unable to keep a daily account of and remedy all of the dangerous conditions arising out of purely natural causes, was therefore shielded from liability out of necessity. While there are many reasons to continue the traditional rule in regions that are largely rural, there is little or no reason to apply it in urban and other developed areas. In urban centers, it would not be unduly burdensome for a small property owner to inspect his property and take reasonable precautions against dangerous natural conditions [A] landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on the premises¹⁰¹

Thus, for reasons of economics and simple practicality, various jurisdictions decline to divorce urban landowners from responsibility for their roadside trees,¹⁰² or even sometimes for those that are *not*

100. For a discussion of the reasons supporting the traditional rule, see *supra* note 26 and accompanying text.

101. *Mahurin v. Lockhart*, 390 N.E.2d 523, 524-25 (Ill. App. Ct. 1979) (citation omitted); see also *Chandler v. Larson*, 500 N.E.2d 584, 587-88 (Ill. App. Ct. 1986) (following *Mahurin* rationale and finding urban landowner owed adjoining landowner duty of reasonable care); *Bandy v. Bosie*, 477 N.E.2d 840, 841 (Ill. App. Ct. 1985) (discussing *Mahurin* and distinction between rural and urban settings).

102. See, e.g., *Husovsky v. United States*, 590 F.2d 944, 950 (D.C. Cir. 1978) (finding that level of maintenance and inspection depends on characteristics of roadway and land; heavily traveled urban areas may require more attention); *Bookhultz v. Maryland Midland Ry.*, 688 F. Supp. 1061, 1063 (D. Md. 1988) ("[T]he cases . . . impose a burden of inspection on urban tree-owners, either because they are more reasonably to be expected to see their trees on a regular basis, or because the heightened danger to unsuspecting urbanites (as compared to rural passersby) requires such higher duty as a matter of public policy. . . . An urban dweller, responsible for only a few trees, which he can easily and regularly inspect, has the duty to use reasonable care, under ordinary negligence standards, for the safety of others. This puts the urban landowner on constructive notice of dangerous tree conditions, because constructive notice involves notions of reasonable inspection naturally concurrent with the exercise of reasonable care."); *Valinet v. Eskew*, 574 N.E.2d 283, 285-86 (Ind. 1991) (adopting approach that urban landowners owe duty to motorists to inspect trees because risk of harm to highway users is greater than burden of inspection on landowners); *Hensley v. Montgomery County*, 334 A.2d 542, 545 (Md. Ct. Spec. App. 1975) ("To those who dwell in urban areas with one or two trees in their yard at most, the onus of inspection is modest. The farmer, the developer or the landed gentry who owns large and sometimes sprawling tracts of woodland adjacent to or through which a road has been built, may

adjacent to a highway.¹⁰³ Moreover, according to leading commentators, courts ought to extend the *Restatement* exception to urban natural conditions in general, rather than merely to urban trees.¹⁰⁴

Although most tribunals have held *rural* landowners have no duty to protect travelers from their trees,¹⁰⁵ a few have extended

find the task of inspecting for trees dead, dying or decayed so potentially onerous as to make property ownership an untenable burden."); *Langen v. Rushton*, 360 N.W.2d 270, 273 (Mich. Ct. App. 1984) (imposing duty on shopping center owner to maintain parking area to protect safety of those travelling on public roads nearby); *Heckert v. Patrick*, 473 N.E.2d 1204, 1208 (Ohio 1984) (finding landowner not liable for motorist's injuries where landowner had neither actual nor constructive notice of defective tree); *Estate of Durham v. City of Amherst*, 554 N.E.2d 945, 949 (Ohio Ct. App. 1988) ("[A] landowner in an urban area has a duty to exercise reasonable care to prevent an unreasonable risk of harm to others from decaying, defective, or unsound trees of which such landowner has actual or constructive notice."); *Israel v. Carolina Bar-B-Que, Inc.*, 356 S.E.2d 123, 127 (S.C. Ct. App. 1986) ("[A] landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on his premises, including trees of purely natural origin."), *cert. denied*, 360 S.E.2d 824 (1987).

103. See, e.g., *Cornett v. Agee*, 237 S.E.2d 522, 523 (Ga. Ct. App. 1977) (finding urban landowner liable for damage caused by tree striking neighbor's property where landowner had notice of tree's defective condition); *Mahurin*, 390 N.E.2d at 524 ("The American Law Institute [in *RESTATEMENT (SECOND) OF TORTS* § 363 & cmt. e (1965)] recognized the reasons for different treatment in urban and rural areas, but did not extend the greater duty that possessors of urban property owe to persons using the highways to adjoining landowners. We, however, believe there is no reason to so restrict the landowner's duty . . ."). See generally Noel, *supra* note 3, at 786-88 (discussing landowner liability for harm on adjacent land).

104. See *KEETON ET AL.*, *supra* note 3, § 57, at 391. As this preeminent treatise explains:

The tree cases may suggest that the ordinary rules as to negligence should apply generally to natural conditions, at least in urban and residential areas, so that the inquiry would focus upon such factors as the nature of the locality, the seriousness of the danger, and the ease with which it may be prevented, in the light of all the circumstances.

Id.; see also *Chambers v. Whelen*, 44 F.2d 340, 341 (4th Cir. 1930) (applying West Virginia law) ("[I]f the duty be held to exist with regard to trees, it must exist also with regard to other natural objects . . .").

105. See, e.g., *O'Brien v. United States*, 275 F.2d 696, 698 (9th Cir. 1960) (construing Oregon law to support view of non-liability of rural landowner for travelers' injuries); *Chambers*, 44 F.2d at 341 (applying West Virginia law to find that highway officials and not rural landowners are liable); *Lemon v. Edwards*, 344 S.W.2d 822, 823 (Ky. 1961) ("[T]here is a sound basis for not imposing upon the [rural] landowner a duty of inspection to determine whether, through natural processes of decay, trees on the land have become dangerous to users of the road. The basis is that such a duty would be an unreasonable burden in comparison with the risk involved."); *Zacharias v. Nesbitt*, 185 N.W. 295, 296 (Minn. 1921) (declaring that travelers assume risk of falling trees on rural highways); *Hay v. Norwalk Lodge No. 730*, 109 N.E.2d 481, 485 (Ohio Ct. App. 1951) ("[I]t is unreasonable to require the owner of rural land to inspect his property with regard to naturally arising defects because of the burden thereby imposed upon the owner of large and unsettled tracts of land."); *Albin v. National Bank of Commerce*, 375 P.2d 487, 490-91 (Wash. 1962) (en banc) (finding that, absent knowledge of hazardous condition,

liability that far. Thus, in *Medeiros v. Honomu Sugar Co.*,¹⁰⁶ an early decision of the Supreme Court of Hawaii, a motorist recovered damages from a corporate landowner when an aged eucalyptus tree on its rural sugar plantation fell on his vehicle as he drove on an adjacent public highway. The court imposed a duty on the defendant despite the rural nature of the property in question.¹⁰⁷ In *Taylor v. Olsen*,¹⁰⁸ the Oregon Supreme Court considerably expanded a landowner's duty when it similarly held a landowner could be liable for a tree that fell on a vehicle on a rural road. It ruled that, as a matter of fairness, a court cannot automatically deny victims recovery on all but the rare occasions when the *Restatement* creates a duty.¹⁰⁹

Other tribunals have expanded the duty of landowners in falling tree cases beyond the limits of the *Restatement* by requiring them to act reasonably regardless of the nature of the land where the trees are located.¹¹⁰ Finally, Ohio courts have ruled that the possessors of property need not inspect their rural trees, but "an owner having knowledge of a patently defective condition of a tree which may result in injury to a traveler on a highway must exercise reasonable care to prevent harm from the falling of such tree or its

rural landowner had no duty to inspect so long as forest was in its natural condition).

106. 21 Haw. 155, 158-59 (1912). The court found that the landowner could be held liable if he knew or should have known of the hazardous condition present on his land, regardless of whether the condition was naturally caused. *Id.*

107. *Id.*; accord *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981) (finding tree owner liable for damage tree caused to neighbor's property); *Abbinett v. Fox*, 703 P.2d 177, 181 (N.M. Ct. App. 1985) (adopting Hawaii view expressed in *Whitesell* because it balances landowner's ability to use property as landowner desires with requirement that landowner exercise due care towards others).

108. 578 P.2d 779 (Or. 1978).

109. *Id.* at 782-83. As the *Taylor* court indicated, "the great variety of intermediate patterns of land use, road use, traffic density, and preservation of natural stands of trees in urban and suburban settings prevents a simple 'urban-rural' classification." *Id.* at 782. But see *Siegel v. Portland Gen. Elec. Co.*, 717 P.2d 1245, 1250 (Or. Ct. App.) (analogizing to tree cases and finding that, absent knowledge human activity was occurring near pole, defendant had no duty to inspect wire on pole), *review denied*, 723 P.2d 325 (1986).

110. See, e.g., *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743, 744 (D.C. 1961) (holding landowner liable for damage caused to neighbor's property by tree near his apartment building and paved parking lot); *Rowe v. McGee*, 168 S.E.2d 77, 80 (N.C. Ct. App. 1969) (finding that where landowner knew tree was dangerous there was duty to remove it); *Falco v. Bryn Mawr Trust Co.*, 10 Pa. D. & C. 115, 115 (Pa.C.P. Montgomery County 1927) (finding landowner liable for fallen tree that stood in front of his land but within limits of state highway); see also *Albin v. National Bank of Commerce*, 375 P.2d 487, 491 (Wash. 1962) (en banc) (finding landowner not liable if forest was in natural condition, but liable if logging operation on land caused danger about which landowner should have known).

branches on a person lawfully using the highway.”¹¹¹

In sum, numerous jurisdictions have moved beyond the traditional no duty rule, yet have not gone so far as to hold landowners liable for all injuries natural conditions on their property cause to those off their premises. Some follow the *Restatement* approach and say possessors are responsible only when urban trees are the culprits. Others say the duty extends to rural trees, or perhaps even natural conditions in general. A final group of tribunals circumvent the traditional rule by employing the well-known doctrine of statutory negligence to generate a duty for both urban and rural landowners regardless of the type of natural vegetation that is involved.

D. *Use of Statutory Negligence Doctrine to Establish That Landowners Have a Duty to Protect Those Off Their Premises From Harm Caused by Natural Vegetation on Their Land*

Many courts hold that certain statutes and other related enactments, including municipal ordinances and administrative regulations,¹¹² can establish the negligence standard of care.¹¹³ When someone violates such a law, courts may find that this person also

111. *Hay v. Norwalk Lodge No. 730*, 109 N.E.2d 481, 486 (Ohio Ct. App. 1951); *accord Heckert v. Patrick*, 473 N.E.2d 1204, 1207-08 (Ohio 1984) (noting lesser standard of care exists for rural landowner than urban landowner and that knowledge of defect is prerequisite to duty of reasonable care); *Nationwide Ins. Co. v. Jordan*, 639 N.E.2d 536, 537 (Ohio Hamilton County Mun. Ct. 1994) (noting that in order “to recover upon a theory of negligence arising out of a tree’s falling, the evidence must establish that the defendant had actual or constructive notice of a patent danger that the tree would fall”). As the *Hay* court elaborated:

If the danger [from the defective tree] is apparent, which a person can see with his own eyes, and he fails to do so with the result that injury results to a traveler on the way, the owner is responsible because in the management of his property he has not acted as a reasonably prudent landowner would act.

Hay, 109 N.E.2d at 486.

112. See KEETON ET AL., *supra* note 3, § 36, at 220 & nn.3-4 (noting that municipal ordinances and administrative regulations may establish standard of care required of reasonable person).

113. See, e.g., KEETON ET AL., *supra* note 3, § 36, at 220-21 (noting that statutes can establish negligence standard of care despite fact that most such legislation is penal in character); RESTATEMENT (SECOND) OF TORTS §§ 285(a)-(b), 286 (1965) (stating that legislation can establish negligence standard of care). In outlining when courts should find that a duty has been established by legislative pronouncement, the RESTATEMENT (SECOND) OF TORTS provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

has breached a duty of care.¹¹⁴ The violation is labelled statutory negligence, and may provide an injured plaintiff with evidence of fault.¹¹⁵ In the alternative, the wrongdoer may be deemed conclusively negligent—negligent per se—because of the violation.¹¹⁶ Thus, judicial construction effectively creates a special relationship between individuals the legislature orders to behave in a certain way and those benefitted by that designation. Various tribunals have considered whether the statutory negligence doctrine creates a duty between landowners and those off the premises when natural conditions on the land, that exist in violation of a statute, injure those off the premises.

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

RESTATEMENT (SECOND) OF TORTS § 286. Numerous courts have employed this basic test when determining whether the provision in question creates a duty. For a further discussion of negligence resulting from the violation of a statute, see *infra* note 116 and accompanying text.

114. Once tribunals find such a duty, they determine the effect of this duty by following the RESTATEMENT (SECOND) OF TORTS. The Restatement specifies:

(1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.

(2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.

RESTATEMENT (SECOND) OF TORTS § 288B. Thus, under either standard, the statutory authority may impose a duty, and accordingly, a special relationship.

For further discussion of whether a particular statute creates such a responsibility, as well as the effect of a finding that it does, see *Crown v. Raymond*, 764 P.2d 1146, 1148-49 (Ariz. Ct. App. 1988) (holding that violation of statute prohibiting sale of firearms to minors constitutes negligence per se); *Sanchez v. Galey*, 733 P.2d 1234, 1242-43 (Idaho 1986) (concluding that violations of Occupational Safety and Health regulations constitute negligence per se); *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920) (holding that failure to display lights, as required by highway law, represents negligence, not mere evidence of negligence).

115. See, e.g., *Nehring v. LaCounte*, 712 P.2d 1329, 1333 (Mont. 1986) (noting that statutory violation, though not negligence per se, is relevant for fixing negligence standard).

116. See, e.g., *Thelen ex rel. Thelen v. St. Cloud Hosp.*, 379 N.W.2d 189, 192-94 (Minn. Ct. App. 1985) (holding that violation of Vulnerable Adult Act imposes absolute liability for damages); *McRee v. Raney*, 493 So. 2d 1299, 1300 (Miss. 1986) (concluding that violation of statute that causes injury to members of protected class constitutes negligence); *KEETON ET AL.*, *supra* note 3, § 36, at 229-30 (noting that in cases of per se negligence from violation of statute, court takes over standard of conduct prescribed by legislature).

In this Article, the concept of statutory negligence refers to judicial applications of both the evidence of negligence and negligence per se approaches. When a court concludes that a landowner is per se negligent, its holding is considerably worse for the landowner than if the court merely ruled that the landowner's violation of the law would serve as evidence of negligence.

A number of states, counties, municipalities and other governmental units have provisions mandating that possessors of land properly maintain vegetation (and other natural or artificial conditions) on their premises so that it does not obscure the vision of motorists on adjoining highways. Some courts have construed such laws broadly, ruling that they can create statutory negligence liability. Thus, individuals who violate these laws must compensate those who are harmed as a result of the violation. For example, a Louisiana tribunal employed a state statute to impose a duty on a landowner to keep an overgrown vacant lot free of vision-obscuring weeds.¹¹⁷

Several Arizona courts have acted similarly.¹¹⁸ In *Hall v. Mertz*, a bushy oleander hedge blocked a driver's vision at an intersection, contributing to a bicycle/automobile collision.¹¹⁹ A municipal ordinance prohibited landowners from maintaining anything on their property that interfered with traffic visibility.¹²⁰ The landowner in *Hall* admitted that her hedge violated this ordinance.¹²¹ The *Hall* court examined the ordinance and concluded that it met both of the principal criteria necessary for establishing statutory negligence.¹²² This conclusion was supported by two facts: (1) "the purpose of the ordinance was to prevent accidents at intersections, and specifically, the type of accident which occurred in this case,"¹²³ and (2) the nine year old bicyclist/plaintiff belonged to the class of individuals (those harmed in intersection collisions caused by hindered visibility) that the Tucson City Council intended the ordi-

117. *Savarese v. Bye*, 398 So. 2d 1276, 1279 (La. Ct. App. 1981).

118. *See, e.g., Johnson v. Maricopa County*, 730 P.2d 862, 864-66 (Ariz. Ct. App. 1986) (holding that county ordinance created legal duty on landowners not to erect fences in manner which obstructed motorists' view); *Slavin v. City of Tucson*, 495 P.2d 141, 144 (Ariz. Ct. App. 1972) (holding that municipal ordinance created duty on landowner not to erect fence obstructing visibility of traffic); *Hall v. Mertz*, 480 P.2d 361, 363-64 (Ariz. Ct. App. 1971) (holding that landowner has duty under city ordinance to maintain hedge at height and density that does not interfere with traffic visibility); *cf. Boyle v. City of Phoenix*, 563 P.2d 905, 906 (Ariz. 1977) (en banc) (holding that "in the absence of a statute, a highway authority is not liable for personal injuries because it has allowed the view of an intersection to be obscured by weeds or bushes which have grown up in a portion of the street or along its boundary" (emphasis added)); *Guy v. State*, 438 A.2d 1250, 1255 (Del. Super. Ct. 1981) (using criminal statute to establish standard of conduct in public nuisance action).

119. *Hall*, 480 P.2d at 361-62.

120. *Id.* at 362.

121. *Id.* at 362 n.1.

122. *Id.* at 363. For a discussion of the criteria necessary for a finding of statutory negligence, see *supra* note 113.

123. *Hall*, 480 P.2d at 364.

nance to protect.¹²⁴ Accordingly, the landowner had a duty under the statutory negligence doctrine (here she was negligent per se) even though she lacked a duty under the traditional no duty rule that was incorporated in Arizona negligence law.¹²⁵ Some Illinois tribunals have reached this same result.¹²⁶

Other jurisdictions have examined the statutory negligence doctrine in the overgrown vegetation cases more conservatively, concluding that the doctrine's two criteria were not met. Thus, various Illinois plaintiffs, arguing for the application of statutory negligence, have lost when courts decided that the laws to which they pointed failed to satisfy the statutory negligence rule's two basic criteria.¹²⁷ This same approach has been followed by some tribunals in other states, such as Florida¹²⁸ and Louisiana.¹²⁹

The statutory negligence doctrine also was rejected in *Wells v. Chicago & North Western Transportation Co.*,¹³⁰ where the Wisconsin Supreme Court exhaustively studied a statute that required landowners whose property abuts a railroad/highway intersection to trim trees and cut brush to avoid visual obstructions for travelers on the thoroughfare. In *Wells*, a pickup truck and a train collided when uncut or untrimmed brush or trees obscured the pickup driver's view.¹³¹ The driver alleged that the owners of the property

124. *Id.*

125. For cases applying the traditional no duty rule under Arizona negligence law, see *supra* note 59 and accompanying text.

126. See, e.g., *First Nat'l Bank v. City of Aurora*, 373 N.E.2d 1326, 1331 (Ill. 1978) (holding that municipality's own ordinance creating duty negates municipality's immunity from suit); *O'Neil v. Krupp*, 589 N.E.2d 185, 187 (Ill. App. Ct. 1992) (holding that ordinance requiring landowners to trim hedges and foliage so as to maintain clear visibility in intersections establishes landowner's duty of care).

127. See, e.g., *Pyne v. Witmer*, 512 N.E.2d 993, 996-97 (Ill. App. Ct. 1987) (holding that statute imposed no duty on landowners because statute was not intended to protect against injury from foliage not planted in right-of-way of highway), *aff'd on other grounds*, 543 N.E.2d 1304 (1989); *Nichols ex rel. Nichols v. Sitko*, 510 N.E.2d 971, 974 (Ill. App. Ct. 1987) (concluding that violation of ordinance was not negligence because ordinance was intended to benefit municipality at large, not particular classes).

128. See, e.g., *Stevens v. Liberty Mut. Ins. Co.*, 415 So. 2d 51, 52 (Fla. Dist. Ct. App. 1982) (holding that landowner has no duty to maintain property so that approaching motorists can see other approaching motorists when motorists are not within class ordinance protects); *Pedigo v. Smith*, 395 So. 2d 615, 615-16 (Fla. Dist. Ct. App. 1981) (holding that municipal ordinance was not violated when integral part of ordinance was police notification to landowner of obstruction and no such notification was alleged).

129. See *Wright v. Travelers Ins. Co.*, 288 So. 2d 374, 376 (La. Ct. App. 1974) (holding that landowner's violation of vegetation statute is not negligence per se because statute did not relate to traffic safety).

130. 296 N.W.2d 559, 560-67 (Wis. 1980).

131. *Id.* at 559.

had a duty to control the vegetation under the statutory negligence doctrine.¹³² After the court acknowledged its usual adherence to that doctrine,¹³³ it reviewed the law's 1889 legislative history¹³⁴ and concluded that "[t]he legislature imposed a duty on the abutting landowner to help secure the public right of unobstructed passage on the highway, not to protect any particular traveler from harm or to grant each traveler the right to maintain a tort action for damages for a violation."¹³⁵ Based on this narrow reading of the scope of the legislative intent, the *Wells* court rejected the statutory negligence argument.¹³⁶ Thus, the plaintiff's claim failed because the defendant/possessor owed him no duty.¹³⁷

In conclusion, the motorist harmed by overgrown vegetation may, but not necessarily will, benefit from the statutory negligence doctrine. Counsel must research the history of the statute in question thoroughly and argue the statutory negligence doctrine compellingly, because courts often are reluctant to derive a duty from a statute.

II. PROPER APPROACH TO CASES WHERE NATURAL VEGETATION ON LAND HARMS THOSE OFF THE PREMISES

Courts adopt a variety of approaches when determining whether landowners have a duty to protect those off their premises from natural conditions, including overgrown vegetation, on their property. These approaches range from holding that landowners have no duty,¹³⁸ to saying that they always have such a duty,¹³⁹ to

132. *Id.*

133. *Id.* at 560-61.

134. *Id.* at 563-65.

135. *Id.* at 565. The *Wells* court further elaborated:

We do not think the legislative purpose or intent was to allocate the economic burden of railroad accidents to the landowner in addition to or in lieu of imposing the burden on the railroad which operates the trains, on the municipality which builds and maintains the highways, and on the highway traveler who has an obligation to use due care, and more specifically, to look and listen.

Id. *But see* Walker v. Bignell, 301 N.W.2d 447, 454-56 (Wis. 1981) (concluding that statute which required municipality to trim certain roadside vegetation generated statutory negligence liability).

136. *Wells*, 296 N.W.2d at 565.

137. *Id.* at 565-66.

138. For a discussion of the traditional no duty approach, see *supra* notes 25-74 and accompanying text.

139. For a discussion of the approach of courts that *always* find a duty exists, see *supra* notes 75-97 and accompanying text.

taking a position somewhere in between.¹⁴⁰ Certain courts even generate a duty from the statutory negligence doctrine.¹⁴¹ Most courts should be far more generous both to landowners' neighbors and to travelers on public thoroughfares that are adjacent to landowners' property, and much less concerned about the rights of landowners. A proper approach to this problem should balance the competing interests more precisely.

The landowner's exemption from liability for natural conditions was an offshoot of the doctrine that one only is liable for his or her misfeasance, and not for mere nonfeasance.¹⁴² This contrast between nonfeasance and misfeasance remains viable in many jurisdictions. Therefore, one who unreasonably fails to take precautions to safeguard others from, for example, natural dangers on his or her land is not liable for his or her carelessness because courts say the landowner did not create the dangerous condition and thus had no duty to act in the first place. On the other hand, if one carelessly creates and/or maintains a dangerous artificial condition, he or she may be liable in negligence for this misfeasance. As many have observed, such disparate treatment between misfeasance and nonfeasance is not really justified.¹⁴³ While the distinction has en-

140. For a discussion of the intermediate approaches that courts take, see *supra* notes 98-111 and accompanying text.

141. For a discussion of the duty created by the statutory negligence doctrine, see *supra* notes 112-37 and accompanying text.

142. For a general discussion of the nonfeasance/misfeasance distinction, see *supra* note 26.

143. KEETON ET AL., *supra* note 3, § 56, at 374-75. Many courts that purport to excuse landowner nonfeasance do not actually do so in all cases. A landowner has a duty to protect those off his or her property from artificial conditions on it even though a prior possessor of the property created the condition and the present owner did nothing about it. This inaction, or nonfeasance, does not shield the landowner from liability. See, e.g., *Sprecher v. Adamson Cos.*, 636 P.2d 1121, 1127-28 (Cal. 1981) (en banc) (holding that right to control land is sufficient basis to impose duty to act); *Benham*, *supra* note 75, at 256 (noting that landowner can be liable for harm occurring due to artificial condition on premises even though landowner played no part in creating condition). For further discussion of a landowner's duty to act when artificial conditions on land create a hazard, see *supra* note 3 and accompanying text.

The explanation for this facially inconsistent result may be that in the case of a natural condition, no past or present landowner ever assumed any responsibility for a condition that was naturally on the land (perhaps for centuries). See *Burcham*, *supra* note 26, at 640-41 (noting that new landowner must assume previously existing duty to be liable in negligence for failing to meet duty). In the case of an artificial condition, however, some former owner of the land assumed a duty by placing, allowing to be placed, or not acting to remove the artificial condition. *Id.* at 640. This affirmative action, for which later possessors assume responsibility when they take possession of the property, clearly is misfeasance rather than nonfeasance. *Id.* Nonfeasance in an artificial condition case seems nearly impossible because, by definition, *someone* had to create the artificial condition in question.

dured in many jurisdictions in nonfeasance situations,¹⁴⁴ some courts have begun serious attacks upon it.¹⁴⁵ They do so obliquely by creating exceptions to the nonfeasance "no liability" rule or more directly by abolishing it outright.¹⁴⁶

In *Sprecher v. Adamson Cos.*,¹⁴⁷ the California Supreme Court attacked the common law rule of no liability for injuries caused by natural conditions/nonfeasance to those off-premises head-on and declared it invalid.¹⁴⁸ The *Sprecher* court focused on possession of land as the key to duty.¹⁴⁹ The court ruled that the possessor of land has a duty to act reasonably regardless of whether a natural or artificial condition on the land harms another or whether the possessor of the property is guilty of misfeasance or mere nonfeasance.¹⁵⁰ In so doing, the *Sprecher* court made a number of valid points. All landowners should owe the same duty to all persons, on or off the premises, harmed by conditions on the land, regardless of whether those conditions are natural or artificial.¹⁵¹ This stan-

The landowner either created the condition, had someone else do so, or failed to remove the condition despite having a duty to do so. Whichever occurred, this is misfeasance. *Id.* at 640-41.

144. See Jones, *supra* note 20, at 74-75 ("Despite the almost universal condemnation of this rule, courts continue to religiously enforce it.")

145. See KEETON ET AL., *supra* note 3, § 56, at 373-74 (noting courts' attack upon misfeasance/nonfeasance distinction).

146. See *id.* (stating methods courts employ to avoid misfeasance/nonfeasance distinction); see also *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 53 A. 807 (N.H. 1902) (classifying failure to supply heat for building as mismanagement of boiler so as to avoid nonfeasance stigma).

147. 636 P.2d 1121 (Cal. 1981) (en banc). For further discussion of this case, see *supra* notes 75-90 and accompanying text.

148. For a discussion of the *Sprecher* court's critical analysis of the no liability rule, see *supra* notes 80-89 and accompanying text.

149. *Sprecher*, 636 P.2d at 1127 & n.8.

150. *Id.* at 1127-29. At one point, the *Sprecher* court suggested that a landowner's failure to make a dangerous natural condition safe for neighbors or passersby might not be nonfeasance at all. *Id.* Instead, the court implied that the failure to act might be misfeasance because by possessing the land the owner precluded others, who might have taken appropriate precautions, from having it and making the condition safe. *Id.* at 1127 n.8. As the *Sprecher* court explained:

It can be argued that by virtue of taking possession of a tract of land, and thus preventing another from doing so, a possessor "hides the rope" that others might toss to those outside the premises. That is, his possession of land, having on it a dangerous condition, forestalls its possession by another who might abate the condition. So viewed, any unreasonable failure to abate would constitute misfeasance. But it would be misfeasance whether the dangerous condition was a natural or an artificial one.

Id. While ingenious, it is uncertain whether the original rationale for the natural/artificial and nonfeasance/misfeasance classifications ought to be manipulated in this fashion. For criticism of the reasoning employed by the *Sprecher* court, see *infra* note 164.

151. *Sprecher*, 636 P.2d at 1128.

dard promotes uniformity of treatment and result.¹⁵² California already had replaced the traditional trifurcated test for liability for injuries incurred *on* the premises with one uniform standard of duty which applies in all on-premises situations.¹⁵³ Thus, *Sprecher* finally unified the standard of duty in all cases involving injuries to individuals, either on or off of realty, regardless of whether the means of injury are artificial or natural.¹⁵⁴ In post-*Sprecher* California, the possessor of land has a duty to act reasonably under the circumstances; no longer can a landowner act carelessly but not be liable in negligence because he or she owed the victim no duty of care.¹⁵⁵

The reasons some courts articulate for opposing a result like that in *Sprecher* are not convincing. Disaster will not result from holding landowners responsible for natural conditions on their land, as experience in California has proven. *Sprecher* does not hold anyone automatically liable in natural condition cases; rather, it imposes a duty and thereby requires a landowner to act reasonably.¹⁵⁶ If it is reasonable to do nothing, that is precisely what a landowner can do with impunity.¹⁵⁷ People have a duty to act reasonably during most of their daily activities—the landowner does not need preferred status for special protection. Insurance is available to protect unreasonable landowners from their negligence, just as it protects landowners in cases involving artificial conditions on their land or in any other situation where a duty clearly exists.¹⁵⁸ In light of this, it seems unlikely that the wholesale felling of healthy trees would result from courts imposing a duty of reasonableness on landowners.¹⁵⁹ Such has not been reported in jurisdictions that hold landowners responsible for their trees.

152. *Id.* at 1128-29.

153. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (holding landowner subject to reasonable person standard irrespective of plaintiff's status as trespasser, licensee or invitee); Benham, *supra* note 75, at 257-58 (noting that other states have adopted *Rowland*, but its acceptance is far from universal).

154. *Sprecher*, 636 P.2d at 1128.

155. *Id.*

156. For further discussion of the duty imposed by the *Sprecher* court, see *supra* note 86 and accompanying text.

157. This point was reflected in Justice Richardson's concurring opinion in *Sprecher*, where he expressed considerable doubt as to whether any jury could find the defendants negligent because of their failure to act. *Sprecher*, 636 P.2d at 1130 (Richardson, J., concurring).

158. For a discussion of the landowner's duty to protect persons off-premises from danger caused by artificial conditions on the land, see *supra* note 3 and accompanying text.

159. For the Iowa Supreme Court's contrary view, see text accompanying notes 67-68.

The rural/urban distinction drawn by some courts in natural condition duty cases is unnecessary.¹⁶⁰ Even if a duty exists in rural settings, what is reasonable in an urban setting may not be reasonable in a rural one. Thus, due to the nature of reasonableness, the rural landowner may not be held to as strict a standard as the urban landowner.¹⁶¹ Such a result protects both the rural landowner from an unduly onerous standard of care and the passerby from the carelessness of a landowner whom the no duty rule would immunize from all responsibility for lack of care. Moreover, no good reason exists for treating urban or rural trees differently from other natural conditions.¹⁶² A landowner should have to act just as reasonably towards natural shrubbery, ponds, or landslides as towards trees.¹⁶³

As appealing as the California approach to nonfeasance/misfeasance landowner liability cases may be, implementing the uniform standard produces some transitional problems.¹⁶⁴ In states

160. For a discussion of the rural/urban distinction drawn by some courts, see *supra* notes 98-104 and accompanying text.

161. A jury might consider various reasons why a rural landowner need not do as much as an urban landowner. Special considerations in the rural setting might include the difficulty in inspecting a large tract of rural land as opposed to a small urban lot and the greater cost of maintaining a large rural estate as compared with a suburban yard. See KEETON ET AL., *supra* note 3, § 57, at 391 (discussing rule that rural landowners have no duty to inspect trees for dangerous conditions while urban landowners do have such duty). The *Sprecher* court listed some of the factors that a jury should consider in deciding whether a given landowner acted reasonably when dealing with conditions on the land:

The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct.

Sprecher, 636 P.2d at 1128-29.

162. See KEETON ET AL., *supra* note 3, § 57, at 391 (advocating extension of duty to all urban natural conditions, not just trees).

163. Of course, less may be expected of the owner of a condition like a pond or landslide because the landowner may not be able to make it safe without expending unreasonable amounts that far exceed the cost of trimming or removing a tree. For a discussion of the factors that a jury should consider in determining the reasonableness of a landowner's action/failure to act, see *supra* note 161. Again, the reasonableness test is the key. *Sprecher*, 636 P.2d at 1128.

164. The *Sprecher* court's attempt to transform a landowner's nonfeasance into misfeasance by finding that the landowner's possession made it impossible for some other, more careful or responsible, possessor of the land to fix a dangerous natural condition is questionable. For a discussion of the *Sprecher* court's reasoning, see *supra* note 150. As Professor Burcham pointed out, such behavior simply is not misfeasance. Burcham, *supra* note 26, at 637. The landowner did not create the risk at issue, he or she merely failed to take action to remedy it. *Id.* Such stretching of the law of misfeasance is unfair. *Id.* at 635-37. A court should either uphold or deny nonfeasance liability per se. Courts should not try to avoid it through strained characterizations of facts and the meaning of nonfeasance.

retaining the trespasser/licensee/invitee categories in on-premises injury cases, the *Sprecher* approach will promote, not eliminate, disparity in result.¹⁶⁵ A court applying the *Sprecher* rule will create a duty in off-premises natural condition cases when none may exist in an on-premises case because the victim is a trespasser or licensee to whom the landowner owes no duty. This represents the reverse of the problem that the California Supreme Court faced in *Sprecher*. In such a situation, application of *Sprecher* results in the law governing landowners' duty to others being inconsistent depending on whether the victim was on or off the land. The result in a premises liability action should not vary merely because the victim was on rather than off the defendant's acreage. Therefore, no state should adopt the *Sprecher* approach until it also holds that landowners owe a duty of reasonable care to anyone *on* their land.

While universal adoption of a duty to act reasonably in natural condition off-premises liability cases will resolve the issue in most situations, the statutory negligence doctrine still remains valuable.¹⁶⁶ For example, in negligence per se jurisdictions, when a court finds that a landowner has violated the relevant vegetation-trimming provision, the landowner will be *conclusively* guilty of negligence and the plaintiff's course will be smooth.¹⁶⁷ Even where violation of a statute is only evidence of negligence, the statutory negligence doctrine will provide a streamlined method of proving a landowner acted unreasonably, which may preclude the need for more complex proof.¹⁶⁸ Hence, counsel always should consider the availability and usefulness of the statutory negligence doctrine.

III. CONCLUSION

For centuries, landowners have enjoyed a preferred status in the law of negligence because they often had no duty to act reasonably with regard to their land. Courts have distinguished among those injured while on the premises according to their status as trespasser, licensee or invitee and off the premises by whether they

165. See, e.g., Benham, *supra* note 75, at 258 (contending that categorization of entrants on premises is aberration from general duty to prevent harm to others in one's activities).

166. Of course, statutory negligence could prove invaluable in a jurisdiction that did not adopt the *Sprecher*-duty position. For further discussion of the statutory negligence doctrine, see *supra* notes 112-37 and accompanying text.

167. For a discussion of negligence per se resulting from the violation of a statute, see *supra* note 116 and accompanying text.

168. This might obviate pursuing other avenues of proof. For a discussion of some of the factors that courts consider in determining the reasonableness of a landowner's action/failure to act, see *supra* note 161.

were injured by a natural or artificial condition of the land. Those persons unlucky enough to be harmed off the premises by a natural condition received nothing under the common law, because the landowner owed them no duty to act reasonably.¹⁶⁹ Some jurisdictions retain this archaic rule and thus refuse to compensate victims whose injuries resulted from accidents caused by vision-obscuring vegetation.

Other jurisdictions have recognized the fundamental unfairness of the common law and endeavored to get around it in various ways, including distinguishing between rural and urban land or between trees and other natural conditions.¹⁷⁰ The preferable approach is taken by the jurisdictions that recognize that landowners are like other tortfeasors, and thus have a duty to act reasonably, regardless of the type of condition on their property that causes an injury.¹⁷¹ These jurisdictions do so by realizing that liability is by no means automatic, because an injured person must prove that the landowner acted unreasonably in order to prevail. This determination of reasonableness depends on various factors, including the location of the land in question.¹⁷² The modern approach fairly places a duty of care on the landowner while requiring the injured passerby to prove that the landowner was careless. The traditional no duty rule has outlived its usefulness, and should be replaced by a rule that treats all landowners the same regardless of the type of condition on their property that harms those off the premises.

169. For a discussion of the traditional no duty rule, see *supra* notes 25-74 and accompanying text.

170. For a discussion of the courts' use of the urban/rural distinction, as well as distinguishing between trees and other natural conditions, see *supra* notes 98-111 and accompanying text.

171. For a discussion of the modern rule that landowners have a duty to act reasonably under all circumstances, see *supra* notes 75-97 and accompanying text.

172. For a discussion of some of the factors that courts consider in determining the reasonableness of a landowner's action/failure to act, see *supra* note 161.