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Comments: Lateral Support in Wisconsin

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LATERAL SUPPORT IN WISCONSIN

Recently the Wisconsin Supreme Court in the case of *Schmidt v. Chapman*[1] re-examined the law of lateral support in Wisconsin. The ensuing article will attempt to survey that law in light of its historical development and with a critical view to more recent case law. Consideration will be given to some of the practical problems which must be faced in this area and to the more important policy decisions which underlie them. Finally, an examination of the various methods for determining damages in lateral support cases and a discussion of the liability attaching to an independent contractor will be undertaken.

Common Law Theories

"The right of lateral support is the right which soil in its natural state has to support from land adjoining it."[2] The principle that the owner of land has the right to lateral support from the adjoining soil as a settled doctrine of common law was based on the theory that the right to lateral support was a natural one arising *ex jure naturae* and was an incident to the ownership of land. The right was, therefore, an absolute right which necessarily and naturally attached to the soil and passed with it.[3] It is questionable whether this principle is presently reflected in the policy of modern case law.[4]

According to the *Restatement of Torts*,[5] two conflicting legal theories as to the nature of the right to support have contributed to the present law. The earliest theory regards the right as a natural easement appurtenant to the supported land and subjecting the supporting land to a natural easement. As thus regarded the right is a right in the supporting land which becomes the servient estate, while the supported land is the dominant estate. An unqualified adoption of this theory would result in the following:

> (1) [T]he right would exist only as to the supported land itself and would not apply to support needed because of artificial structures on or any other alterations in the surrounding land;
> (2) the right would probably be violated by the mere removal of support; neither intention to cause harm nor negligence would be necessary to liability;
> (3) the right would probably be violated when the support is withdrawn; subsidence or other actual harm would not be necessary to liability;
> (4) prospective damages could be recovered once the right is violated;

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[1] 26 Wis. 2d 11, 131 N.W. 2d 689 (1964).
[2] 1 AM. JUR. (SECOND) *Adjoining Landowners* §37 (1962).
[3] *Ibid.*
[4] As discussed later in the article, the right to lateral support at present is probably more accurately said to be based on negligence law rather than a theory of natural right.
[5] RESTATEMENT, TORTS §817 (1939).

(5) the statute of limitations would begin to run once the support is removed.[6]

The other and later theory regarded the right as a right to the integrity of the supported land, a right invaded only by actual subsidence being caused by the removal of support. Results of this theory would be:

(1) [T]he right would exist in respect to the land in its natural or altered condition and to the artificial additions on it;
(2) the right would not be violated by mere removal of support; intention to cause harm or negligence would be necessary to liability;
(3) the right would not be violated when the support is withdrawn; subsidence or other actual harm would not be necessary to liability;
(4) prospective damages could not be recovered;
(5) the statute of limitations would not begin to run when the support is removed; it would not begin to run until subsidence or other actual harm happened.[7]

As the *Restatement* points out, neither of these views has unqualifiedly prevailed, with the result that the consequences of parts of both theories are intermingled in the present law.[8]

Distinction Between Improved and Unimproved Property

During the early 1600's the English courts first enunciated the doctrine that an adjoining landowner was under no obligation to support the added burden of a structure on the neighboring property though by his excavation such structure might be damaged. The general rule that the right of the owner of land in its natural state to the lateral support of the soil of the adjoining owner did not extend to buildings on his land was pronounced in *Wilde v. Ministerly.*[9] *Palmer v. Fleshees*[10] stated that the theory was based on the right of each owner to make the best advantage of his digging. Thus the English courts assumed that a determination could be made as to what quantum of support was required to hold up the land in its natural state and that the removal of this quantum of support would impose liability.

Conceivably, though not expressed as such, the courts which first made the distinction between improved and unimproved property were concerned with the practical necessities of the times when property was the measure of a man's wealth. It is not likely that the problem became acute until the development of urban areas since buildings commonly were not erected near boundary lines.

This continuing distinction between improved and unimproved property has been said to be made on the basis that the owner of a building

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[6] *Id.* at 185.
[7] *Id.* at 186.
[8] The application of these theories is discussed later.
[9] 2 Rolle Abr. 564 (1639).
[10] Sid. 167, 82 Eng. Rep. 1035 (1663).

ought to foresee the probable use of the adjoining land by his neighbor and that if he builds near his boundary line he assumes the risk of his position. A contrary rule "would put it in the power of the lot owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter."[11] But it is difficult to see how the owner of an office building constructed more than fifty years ago could foresee that the state would choose to build a freeway many feet below the natural level of the adjoining land. The present cost of protecting the building can be tremendous and may even exceed the cost of erection.

Wisconsin first adopted the common law rule in the 1899 case of *Laycock v. Parker*[12] where, in an action by contractors against the owners of a lot on which they built pursuant to contract, the court held that lateral support from a neighbor's soil, as a right, applies only to soil in its natural condition not burdened with buildings.

However, some twenty years later the court was presented with a claim that the excavator went beyond his duty to support. In *Hickman v. Welleauer*[13] the court found that defendant, who had undertaken with the contractor to underpin and support plaintiff's building, had an obligation to use reasonable and proper methods with reasonable skill and care. Judicial notice was taken of the methods usually employed by excavators in providing support. Defendant's breach of duty with respect to the method of underpinning resulted in his liability for plaintiff's consequential damages when the building listed. The holding of the court was thus based on negligence rather than upon the natural right of plaintiff to lateral support. The court specifically rejected plaintiff's theory that the duty to support his building was shifted to defendant as a result of the city building code. They held that only an express declaration of the legislature could alter the property rights here involved; that is, only a statutory declaration could alter the judge-made rule. Thus the excavator, who may not have breached his common law duty in terms of quantum of support he had removed, nevertheless became liable for negligence when, in *exceeding* his duty by underpinning, he did so in a negligent manner.

Thus in *Christensen v. Mann*,[14] which followed *Hickman*, the court again looked at the manner of underpining, finding it here to be the proper measure for the protection of the building. It was held that the "degree of care which must be exercised must be commensurate with apparent or actual damage."[15] Here the contractor who did the excavat-

[11] Northern Transp. Co. v. Chicago, 99 U.S. 635 (1879).
[12] 103 Wis. 161, 79 N.W. 349 (1899).
[13] 169 Wis. 18, 171 N.W. 635 (1919).
[14] 187 Wis. 567, 204 N.W. 499 (1925).
[15] *Id.* at 576, 204 N.W. at 502.

ing sued the building owner for the cost of support and the defendant answered that the cost should be borne by the excavator. The court concluded that defendant-owner Mann could not appropriate to himself the right of lateral support to his building. After the owners had given proper notice and they and their contractors had exercised reasonable care, they had performed their full duty, which would have immunized them from any claim for consequential damages resulting to the Mann property.

When thus analyzed, *Christensen* is only a case discussing the reasonableness of the method of underpinning where the excavator undertakes to support the added weight of his neighbor's building. But after reaffirming the common law distinction, the court goes on to note that in excavating ordinary care must be used:

> So that the general proposition may be laid down that the degree of care required in each particular case depends largely upon the particular facts and circumstances and the physical conditions existing in each case. When, however, the requirements applicable to a particular case have been properly met by the excavator, then he is immune from a claim for damages by the owner of an adjoining building, who under such circumstances is required to afford and maintain proper protection for his own building.[16]

Thus the court seems to add to the common law idea a requirement that despite the fact that his excavation process would not of itself violate his common law duty to supply a quantum of support to keep the land in its natural state, he must exercise ordinary care as well.

Clearly then, the presence of a building on the adjoining premises does not in and of itself relieve the excavator of the duty of support. The cause of action in *Wahl v. Kelly*[17] alleged that defendants removed the lateral support and the land of plaintiff caved in and exposed his basement to the elements. The court refused to sustain the demurrer because there was nothing in the complaint from which it could be inferred that the cave-in was due to the added weight of plaintiff's building.

These cases were cited by the court in *Schmidt v. Chapman*[18] wherein it was stated:

> The landowner whose property is threatened by the planned excavation owes a duty to protect the buildings that have been constructed on his own land by taking reasonable measures to protect his own land and buildings as against the intended excavation and as against the collapse of his land and improvements due to the excavating on the adjoining property.[19]

[16] *Id.* at 577, 204 N.W. at 502.
[17] 194 Wis. 559, 217 N.W. 307 (1928).
[18] 26 Wis. 2d 11, 131 N.W. 2d 689 (1964).
[19] *Id.* at 22, 131 N.W. 2d at 695.

In this case there was a strip of property upon which the excavator trespassed in causing removal of support to plaintiff's building.[20] The court held that, irrespective of the trespass, the failure of the plaintiffs Schmidts to use available means to protect the building "was, as a matter of law, a substantial factor in causing the collapse of the wall."[21] The contractor was also held to be causally negligent pursuant to jury finding.

The real distinction made by the courts seems to be based upon a determination of who should bear the burden—the excavating owner while he is improving his property or the adjoining owner after he has improved his property. The burden almost universally falls on the latter. However, where negligence on the part of the excavator can be found through his failure to give notice, improper excavation, or negligent assumption of underpinning, then the burden shifts.

As in the *Schmidt* case, where both parties are found to be causally negligent, the question arises as to whether the court is following the natural right theory. Under such a theory the excavator has an absolute duty to provide a quantum of support to the adjoining land in its natural state. Failure to do so makes him liable to the owner for the consequential damages resulting from his breach of duty. But the obligation of the adjoining owner to support his building is also in a sense an absolute duty. Thus, as stated by Justice Currie in his concurring opinion,[22] the liability seems to depend not on the breach of absolute duty, but rather on comparative negligence.

Practically the courts must still decide how the weight of a building affects the quantum of support which must be displaced before the natural support is removed. This will be especially difficult in downtown metropolitan areas where there is little soil as such remaining and the topography may bear little relationship to what it was naturally.

Statutory Liability

Some states, which do not by statute, ordinance, or case law require that notice of intent to excavate be given, have provided other statutory liabilities on the excavator for the protection of the adjoining land owner. These statutes fall into three general categories, the first being statutes which impose absolute liability. The effect of these statutes was that where the depth of the excavation exceeded statutory limits, the excavator was, independently of negligence, liable for an injury caused by the excavation to an adjoining building.[23] The second type of statute or ordinance imposed upon persons excavating to a certain depth

[20] The legal problem here is discussed under the non-coterminous tract heading.
[21] 26 Wis. 2d at 23, 131 N.W. 2d at 696.
[22] *Id.* at 27, 131 N.W. 2d at 698.
[23] Foss-Schneider Brewing Co. v. Ulland, 97 Ohio St. 210, 119 N.E. 454 (1918).

an absolute duty to protect the adjoining building.[24] By the third type of statute which required protection of adjoining land, the liability of the excavator was made to depend on whether or not he exercised proper care. The statute requiring support of land was construed to exclude buildings, due to the statutory definition of land.[25]

Notice of Intent to Excavate Requirements

Another indication of the role of negligence as at least one standard to be applied to lateral support lies in the duty to give notice.

> The obligation to give notice . . . seems to rest upon the recognized proposition that a party in possession of fixed property must take care that it is so used and managed that other persons shall not be injured, whether it is managed by his own servants or contractors or their servants.[26]

In requiring that notice of intent to excavate be given to the adjoining landowner, the courts have adopted the theory that the trouble caused the excavator is little compared to that of the adjoining owner who, without notice, may not have sufficient time to protect his property adequately. It has been held that giving notice is more than mere neighborly courtesy because it involves the right of one man to assert his right regardless of the injury he may cause to his neighbor without such warning.[27]

The duty to notify the adjoining owner of the proposed excavation has been affirmed in nine states, including Wisconsin,[28] in addition to the requirement being included in dicta in other jurisdictions.[29] In *Hickman v. Welleauer*[30] the Wisconsin court said:

> In the absence of actual knowledge by the plaintiff of the defendant's intended excavation so near plaintiff's building that damage thereto might be anticipated, it was incumbent upon defendant to give reasonable notice of such intention that plaintiff might have an opportunity to protect and support his building.[31]

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[24] Hirschberg v. Flusser, 91 N.J.L. 66, 102 Atl. 353 (1917), *aff'd*, 92 N.J.L. 515, 105 Atl. 893 (1918).

[25] Hannecker v. Lepper, 205 S.D. 371, 107 N.W. 202 (1906).

[26] 1 AM. JUR. (SECOND) *Adjoining Landowners* §51 (1962).

[27] Schultz v. Beyers, 53 N.J.L. 442, 22 Atl. 514 (1891).

[28] Moore v. Anderson, 5 Boyce 479, 94 Atl. 771 (Del. 1915); People *ex rel.* Barlow v. Canal Bd., 2 Thomp. & C. 275 (N.Y. 1873); Davis v. Summerfield, 131 N.C. 352, 42 S.E. 818 (1902); Beard v. Murphy, 37 Vt. 99, 86 A. Dec. 693 (1864); Knapp v. Siegley, 120 Wash. 478, 206 Pac. 13 (1922); Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910); Christensen v. Mann, 187 Wis. 567, 207 N.W. 499 (1925); Stockgrowers' Bank v. Gray, 24 Wyo. 18, 154 Pac. 593 (1916).

[29] Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1891); Wenn v. Abeles, 35 Kan. 92, 10 Pac. 443 (1886); Flanagan Bros Mfg. Co. v. Levine, 142 Mo. App. 242, 125 S.W. 1172 (1910); Tunstall v. Christian 80 Va. 9, 56 Am. Rep. 581 (1885).

[30] 169 Wis. 18, 171 N.W. 635 (1919).

[31] *Id.* at 22, 171 N.W. at 637.

The court later affirmed this doctrine in *Christensen v. Mann*[32] and stated that a failure to give such notice, in the absence of actual knowledge on the part of the neighbor, would be negligence.

There are jurisdictions wherein notice of intent to excavate is specifically required by municipal ordinance[33] or by state statute.[34]

Illustrating the extent of notice required is the case of *Drott Tractor Co. v. Kehrein*[35] wherein plaintiff sued for damages to a retaining wall caused by the caving in of an adjacent trench which defendant contractor was digging for city water pipes. Here the court held that the notice to adjoining land owners should give full knowledge of the intended excavation in time to enable the adjoining land owner to take necessary measures to protect his property.[36]

Non-Coterminous Tract Problem

Another demonstration of liability not based upon traditional common law rule arises where there is an intervening parcel of land. As put by the court in *Schmidt v. Chapman*[37] the question is:

> Does the excavator have any different duty to the owners of the property on which a building is located where in his excavating he trespasses onto an intervening strip (owned by a third party) adjoining the property on which the building is situated?[38]

The excavator's vendor had retained a 5.75 foot strip between defendant's land and that of plaintiff building owner; hence, the properties were not adjoining. The resultant harm, said the court, was necessarily due to negligence for which the excavator was held liable. This finding is in agreement with *Puckett v. Sullivan*[39] wherein the court, presented with a similar fact situation, held that the fact that plaintiff's land did not have a common boundary with the area of excavation would not deprive him of the right to recover for damage to his property caused by negligence:

> The right to lateral support is not defeated by the fact that there are intervening parcels owned by other parties. The excavator is an adjoining owner within the meaning of the rule, if his exca-

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[32] 187 Wis. 567, 204 N.W. 499 (1925).

[33] MILWAUKEE, WIS., CODE OF ORDINANCES §18-4 (1951), provides: "When the owner of any lot or plot of land or the city in making improvements is about to excavate or cause an excavation to be made, which excavation in any way affects any building or structure on an adjoining lot, a notice shall be given to all owners of adjoining lots at least 10 days prior to commencing the excavation. Such notice shall describe the intent and character of the excavation work about to be done, and the adjoining owners shall thereafter be given a reasonable opportunity to protect their property at their own expense in compliance with the regulations of this code."

[34] Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209 (1893).

[35] 275 Wis. 320, 81 N.W. 2d 349 (1957).

[36] *Accord*, S. H. Kress & Co. v. Reaves, 85 F. 2d 915 (4th Cir. 1936).

[37] 26 Wis. 2d 11, 131 N.W. 2d 689 (1964).

[38] *Id.* at 21, 131 N.W. 2d at 694.

[39] 190 Cal. App. 2d 489, 12 Cal. Rptr. 55 (1961).

vation results in a taking away of the lateral support of the complainant's property.[40]

The basis of liability in all cases where the injury has been caused to a non-coterminous property has been negligence. According to the *Restatement* view,[41] the risk of harm through negligence from the withdrawal of support or the manner of the particular operation need only be very slight in order that the excavator be found liable.

In such cases, it would appear that liability for injury is not based upon theories of easement rights but rather solely on the law of negligence. If regarded as an easement, the right to support here would have to be an easement in gross rather than an easement appurtenant, because no part of the parcels involved actually shared a common boundary. It appears that the court has here leaned toward the second theory advanced by the *Restatement*[42] by again requiring that negligence be found as a basis of liability. Once negligence is present and actual harm results, liability attaches to both the land and the alteration thereon. This may be true even though the common law duty to supply so much support has itself not been breached and the additional weight of the building contributed to the damage.

Determination of Damages

When inadequate support is maintained by the excavator for land in its natural state and as a result thereof both the land and building of the neighbor are damaged, the courts have several views as to what should be included in the amount of damages. The English courts and a number of American courts, including Wisconsin's,[43] charge the excavator with both injuries to the land and consequential damages to the building. Probably a majority of American courts[44] hold the excavator liable for injuries to the land only, and not to the building. The remaining courts have held that, absent negligence, damages are not recoverable for either the land or the building, since the building destroyed the natural state and absolved the excavator from any liability.[45]

The courts also differ as to the measure of damages which should be adopted for loss of, or interference with, lateral support. However, since the peculiarities of the particular case govern, the real conflicts are few, as the courts look at the reasonableness of applying a given measure of damages.[46]

The measure of damages approved in a number of lateral support cases is the diminution of the "market value" or the "value" of the

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[40] THOMPSON, REAL PROPERTY §605, at 219 (1961).
[41] RESTATEMENT, TORTS §819, at 204 (1939).
[42] *Id.* at 186.
[43] Wahl v. Kelly, *supra* note 17.
[44] 4-A AMERICAN LAW OF PROPERTY 116-17 (1954).
[45] *Ibid.*
[46] Annot., 36 A.L.R. 2d 1241 (1954).

plaintiff's land or premises by reason of the disturbance resulting from withdrawal of the support. The Wisconsin court applied this measure in *Hickman v. Welleauer.*[47] Some courts have held that whether this measure will be extended to cover damages, if any, to structures or other improvements will depend on whether negligence or some other basis of liability has been shown.[48]

In the *Hickman* case, the court referred to the second measure of damages, the cost of repair or restoration. This is frequently the proper measure of damages in instances in which the injury sustained are small and full repair or restoration can easily be made.[49] Courts have also considered this to be the proper measure where the amount involved is less than the diminution in value and where there will be compensation for the damage done.[50]

The *Schmidt* case[51] gives rise to an additional problem in the area of determination of damages. In the retrial, the court will have to make a division of damages based on comparative negligence of the owner in failing to take available means to protect his property and the contractor's negligence in supervision of the excavation. Clearly the court here abandons the idea of strict liability for not supplying a given quantum of support and permits the finder of fact to apply a test of reasonableness.

Independent Contractor Liability

There are two aspects to this problem—the liability of the contractor for his own acts and the liability of his employer for the contractor's acts with respect to the removal of support.

An independent contractor has been held to be liable to the adjoining landowner for damages caused to his land by loss of lateral support, regardless of his manner of removal of the soil, where there is no issue of negligence present.[52] The contractor has been held liable for the negligent and unskillful manner in which he conducted the excavation. In *Laycock v. Parker*[53] the court held that the contractor was liable for injury due to his negligent acts not necessarily incident to the contract or plan of work, and that he was liable directly to the injured party.

Negligence was the basis of the court's finding of liability on the part of the contractor in the *Schmidt* case.[54] Here the landowner, Chapman, had given the surveys of the lot on which he wished to have con-

[47] 169 Wis. 18, 171 N.W. 635 (1919).
[48] Mullan v. Hacker, 187 Md. 261, 49 A. 2d 640 (1946); Hamilton Building Co. v. Rapid Transit Subway Constr. Co., 190 App. Div. 363, 180 N.Y.S. 70 (1920).
[49] Stimmel v. Brown, 12 Del. 219, 30 Atl. 996 (1885).
[50] Meyer v. Rosendal, 84 Kan. 302, 113 Pac. 1043 (1911).
[51] Schmidt v. Chapman, *supra* note 37.
[52] 1 Am. Jur. (Second) *Adjoining Landowners* §45 (1962).
[53] 103 Wis. 161, 79 N.W. 349 (1899).
[54] Schmidt v. Chapman, *supra* note 37.

structed an office building and parking lot to Hersh, the general contractor. Hersh's supervisor did not measure the lot, but assumed the lot went to a particular point on the Schmidts' boundary. Therefore, the facts permitted an inference that Hersh was negligent in ascertaining the precise limits of the Chapman property and hence, said the court, was negligent in its supervision of the excavation.

The general rule appears to be that the employer is liable for damages to adjoining land in its natural state caused by excavation work done by an independent contractor on the employer's land if the damage resulted as the necessary consequence of the excavation itself.[55] The Wisconsin court in *Wahl v. Kelly*[56] held that the landowner had a personal obligation, which was a nondelegable duty, to preserve his neighbor's support. He could not avoid liability by hiring an independent contractor. But where it is the negligent method of excavation which causes liability, rather than the simple removal of support, then only the negligent excavator, if he is an independent contractor, may be liable. Thus *Schmidt* does not change the rule that the owner is liable for removing the quantum of support required by the common law. Here, since Chapman had given Hersh, as principal contractor, complete control of the project, Chapman was relieved of liability for the negligence itself and its results. This holding again tends away from a theory of absolute duty of support and toward a theory which looks at the method used in the actual excavation process. The landowner is able to relieve himself of his duty where the contractor in fact controls the excavation procedure.

Acts which will cause the employer-owner to still be liable irrespective of the manner in which the excavation proceeds include: (1) negligence of the employer in contracting with an incompetent contractor; (2) interference with the contractor's work where the employer-owner retains the right of supervisory control of working operations; (3) furnishing of defective plans by the owner; and (4) failure of the employer-owner to remedy a defect created by the contractor which he might have discovered and remedied.[57] Further, the employer is held accountable where the injury caused by the contractor's negligence is readily foreseeable from the nature of the work.[58]

Practical Problems[59]

The law of lateral support tends to be a practical problem today, specifically in those areas where buildings exist without basements or

[55] Laycock v. Parker, *supra* note 12.
[56] 194 Wis. 559, 217 N.W. 307 (1928).
[57] Annot., 33 A.L.R. 2d 111 (1954).
[58] *Ibid.*
[59] This aspect of the article is based on a conversation with a Milwaukee building inspector.

where pilings do not make lateral support less necessary from a practical point of view. In downtown metropolitan areas many of the buildings are constructed on "piles," which has the effect of removing to some extent the problem of shifting and settling buildings caused by neighboring excavations. Due to zoning laws, buildings in residential areas are usually erected at such a distance from boundary or lot lines that there tends to be little damage resulting from neighboring excavations.

The solution of the owner of improved premises when he learns of an intended excavation which may cause damage to his premises is either to contract with his own contractor or to hire the contractor of the excavator to protect his property at the same time he is excavating. When the former method is chosen, the adjoining landowner has his contractor work in conjunction with the contractor employed by the excavator. However, the excavator is under no obligation to delay his construction because the contractor of the landowner decided to take time off and failed to return in time to protect his premises. The excavator owes no duty, after having given notice, to protect the landowner's structure.[60]

Note also that if the excavator undertakes to underpin the neighboring structure, he assumes the position of using reasonable and proper methods of work with reasonable skill and care.[61] It is the general rule that where a contractual or statutory obligation exists, the excavator cannot recover expenses which were incurred in protecting adjoining premises, because in such cases he is a volunteer.[62]

The role of the building inspector in such situations seems uncommonly negligible in that he only sees that the rule of law with respect to notice is followed. He does not have a part in the contract between the adjoining landowner and the contractor hired to protect his premises, nor apparently does he evaluate the plans or supervise their excavation.

Conclusion

The policy of the law in the area of lateral support has been to favor development of land by distinguishing between improved and unimproved property. This distinction, in theory, favors the excavating owner by placing the burden of support on the owner of such improvements. The notice requirements and, to some extent, the growing use of negligence concepts are efforts to give some measure of protection to the first to improve property.

However, the fine distinctions seem to break down and their applications seem to be arbitrary where the cost of support to one's build-

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[60] Schaefer v. Hoffman, 198 Wis. 233, 223 N.W. 847 (1929).
[61] Hickman v. Welleauer, *supra* note 13.
[62] 1 AM. JUR. (SECOND) *Adjoining Landowners* §54, at 729 (1962).

ing because of neighboring excavation may be prohibitive. Some more equitable division of cost is desirable.

The law of negligence, which is involved intimately with the law of lateral support, may have the effect of tempering the harsh rules. It seems that courts are willing to find some negligence on the part of the excavator in numerous instances. In so doing, as in *Schmidt,* the court is at least providing for a sharing of costs after damage has occurred on the basis of comparative negligence. Whether this type of arrangement for cost division can be put into effect prior to the commencement of excavation and damage remains to be seen. Only after the court has reviewed numerous cases applying a test of ordinary care would it be possible to say with much certainty precisely what the rights and obligations now are under the lateral support law in Wisconsin.

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