Rights of Adjoining Landowners

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ably exposed to danger. (*Sweeney v. Colony etc. R. Co.*, 10 Allen (Mass.) 368 87 Am. D. 664, *Morgan v. Budlong*, 162 Wis. 578 156 N. W. 958). The plaintiff then has the duty to prove that the defendant was guilty of ordinary negligence, in order to recover. The plaintiff relied entirely on the existence of the spot on the floor. It is not sufficient for plaintiff to show the oil was there; she must go further, and show its presence under circumstances sufficient to charge defendant with responsibility therefor (*Mond v. Erion* 223 App. Div. 526 228 N. Y. S. 533 35). Hence the plaintiff can not recover. The court has again gone on record to the effect that the defendant is not an insurer against accident to persons entering its store for the purpose of making purchases or otherwise.

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*Schaefer v. Hoffman*, 198 Wis. 233, was an action to recover damages caused by the collapse of plaintiff's garage, due to excavation on an adjoining lot owned by the defendant. Both parties were informed on their rights and duties as adjoining landowners, and accordingly, the defendant gave plaintiff notice of his intention to excavate, and plaintiff thereupon employed one Stoltz, a contractor, to protect his building. Defendant contractor assured plaintiff that there was no need to worry, and that he would care for plaintiff's interest excavation, and as a result was not on hand to protect plaintiff's if anything should happen. Stoltz was out of the city at the time of building. Defendant's contractor, also defendant in this case, started excavation, and in the course of the work, dug below the bottom of plaintiff's foundation causing the garage to collapse. The court below changed the jury's answer to the special verdict to read that the defendant contractor was not guilty of want of ordinary care in excavating. Upon appeal by the plaintiff the supreme court held that plaintiff could not recover.

The party excavating is legally bound to protect the adjoining lot in its natural condition from damages resulting from removal of lateral support. This is an absolute duty (*Hickman v. Wellauer*, 169-Wis. 18), and is a duty that defendant cannot delegate, since defendant cannot avoid liability for failure to so protect land in its natural condition by entering into a contract with an independent contractor for performance of work (*Wahl v. Kelly*, 94 Wis. 539.)

However, where the adjoining land is burdened with the weight of an artificial structure, such additional weight of an artificial structure, such additional weight must be cared for by the owner of the land on which the structure is located, provided the adjoining owner gives timely notice of his intention to excavate. Thus in *Schaffer v. Hoff-
man, supra, where the defendant contractor had promised plaintiff to care for his building, and assured plaintiff that there was no danger, the court held that such promises and assurances by the contractor would not be binding on the defendant owner, since the latter owed no duty to care for plaintiff's building, having given notice. Thus the arrangement between defendant contractor and plaintiff was not within the contractor's scope of employment. The plaintiff has an absolute duty to care for his building, for the court declared in this case that plaintiff's hiring a contractor to protect his building does not excuse him from his absolute duty which he assumed in law after receiving defendant's notice.

It is to be noted, however, that there are certain general duties imposed upon the defendant: First, the defendant cannot, of course, excavate beyond the lot line, and into the plaintiff's soil; and Second, that defendant must use reasonable care in excavating. Such reasonable care, as defined in *Christensen v. Mann*, 187 Wis. 567, depends largely upon the facts and circumstances of the particular case. Thus, the degree of care necessary in digging in hard clay would be less than that required in digging in loose sandy soil. Although no rule applicable to all cases can be laid down, this much is well settled, however: First, the degree of care exercised by defendant must be commensurate with the actual or apparent danger involved; and Second, the defendant cannot proceed with violent methods, or use antiquated, disapproved and dangerous machinery that will unnecessarily endanger his neighbor's building. Thus, heavy blasting or projecting heavy article against the adjoining wall are unreasonable, and if the doing of such things is the proximate cause of the injury, the defendant will be liable in spite of notice to plaintiff of his intention to excavate (*Walker v. Stosnider*, 67 W. Va. 39; *Christensen v. Mann*, 187 Wis. 567).

Generally then, the owner may excavate up to his lot line, even though in so doing he will endanger the adjoining building, provided he has given the adjoining owner notice. The excavating owner of land will not be liable for damages where notice is given, except for the loss that would have resulted if there had been no buildings on the land, i.e., the damage to the land itself, but not for the building, provided, of course, the excavating owner was not actuated by an improper motive.

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