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Property–Lateral Support–Effect of an Act of God on Absolute Liability

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PROPERTY—LATERAL SUPPORT—EFFECT OF AN ACT OF GOD ON ABSOLUTE LIABILITY. *Urosevic v. Hayes*, 267 Ark. 739, 590 S.W.2d 77 (Ct. App. 1979).

The plaintiffs, Hayes and Keel, and the defendant, Urosevic, owned adjoining city lots in Hot Springs. The elevation of the plaintiffs' land was higher than the defendant's, and a retaining wall separated the two tracts. The retaining wall had been built by a previous owner of the defendant's lot, sometime before 1913, after he had excavated and lowered the grade of his property. Sometime later, previous owners of the plaintiffs' land had deposited dirt fill against the wall.

In 1978 the wall was struck by lightning and collapsed in several places, causing the plaintiffs' land to subside. The plaintiffs sued in equity to compel the defendant to restore the retaining wall. The chancellor found that an act of God had caused the wall to collapse and not the negligence of any party. The court decreed that the wall be restored and that the cost of restoration be divided equally between the plaintiffs and the defendant.

The defendant appealed and the plaintiffs cross-appealed. Each party contended that the other should bear the entire cost of replacing the wall.

The court of appeals, in its affirming opinion, noted that although the Arkansas Supreme Court had never ruled upon the issue of lateral support, the doctrine is well established at common law. After reciting general principles of the law of lateral support, the court concluded that the chancellor was warranted in balancing the equities and dividing the cost of restoration. *Urosevic v. Hayes*, 267 Ark. 739, 590 S.W.2d 77 (Ct. App. 1979).

The doctrine of lateral support is of ancient origin¹ and firmly

1. The doctrine of lateral support was first enunciated by the English courts in the early 17th century:

[I]f A be seized in fee of copyhold land next adjoining to the land of B, and A erects a new house upon his copyhold land, and some part of the house is erected upon the confines of his land next adjoining to the land of B, and B afterwards digs his land so near to the foundation of A's house, but no part of A's and, that thereby the foundation of the house and the house itself fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near the land of B, for he by his act cannot hinder B from making the best use of his land that he can. But it seems that a man who has land next adjoining to my land cannot dig

established.² According to common law, every landowner is entitled to lateral support³ of his soil in its natural condition from adjoining land.⁴ Every landowner is under a correlative duty to provide lateral support to his neighbor's land⁵ in its natural state.⁶ If a landowner excavates on his own property and causes his neighbor's land to crumble from its own weight, he is liable for damages to the neighbor's soil.⁷ This liability is absolute and does not depend upon a showing of negligence.⁸

his land so near my land that hereby my land shall go into his pit; and, therefore, if the action had been brought for this, it would lie.

Gilmore v. Driscoll, 122 Mass. 199, 201-02, 23 Am. Rep. 312, 314-15 (1877) (quoting *Wilde v. Minsterly*, 2 Rolle, Abr. 564 (1639)).

2. In *Warfel v. Vondersmith*, 376 Pa. 1, 3-4, 101 A.2d 736, 737 (1954) the court stated, "As far as the rights and obligations of one excavating on his own property are concerned the law is so well established as to require no citations of the multitude of authorities."

3. Lateral support refers to the support land receives from adjacent land. It is to be distinguished from subjacent support, the support the surface of the land receives from underlying strata. The right to subjacent support arises when one party owns the surface of the land and another owns the strata beneath it. *RESTATEMENT (SECOND) OF TORTS* §§ 817-821, Scope and Introductory Note (1979). The Arkansas Supreme Court has adopted the doctrine of subjacent support. *Western Coal & Mining Co. v. Young*, 188 Ark. 191, 65 S.W.2d 1074 (1933). In subjacent support cases, the court has discussed the doctrine of lateral support. *Paris Purity Coal Co. v. Pendergrass*, 193 Ark. 1031, 104 S.W.2d 455 (1937) (*dicta*). The decision in one ostensibly subjacent support case, *Western Coal & Mining Co. v. Randolph*, 191 Ark. 1115, 89 S.W.2d 741 (1936), may actually have been based on the doctrine of lateral support. The opinion does not make the basis of the decision clear, but the subsidence which injured the plaintiffs' land occurred on adjoining land. See *Gabrielson v. Central Serv. Co.*, 232 Iowa 483, 5 N.W.2d 834 (1942). The liability for removal of subjacent support, like that for the removal of lateral support, is absolute, *Western Coal & Mining Co. v. Young*, 188 Ark. 191, 65 S.W.2d 1074 (1933), and in other respects the doctrines are very similar. 5 R. POWELL, *THE LAW OF REAL PROPERTY* § 703 (rev. 1979). Subjacent support cases will be cited in conjunction with lateral support cases where the principles of each are identical.

4. *E.g.*, *Blake Constr. Co. v. United States*, 585 F.2d 998 (Ct. Cl. 1978); *Warfel v. Vondersmith*, 376 Pa. 1, 101 A.2d 736 (1954).

5. The duty is not confined to coterminous land, but extends to the area which naturally provides support for the soil in its natural condition. *E.g.*, *Puckett v. Sullivan*, 190 Cal. App. 2d 489, 12 Cal. Rptr. 55 (1961); *Home Brewing Co. v. Thomas Colliery Co.*, 274 Pa. 56, 117 A. 542 (1922); 3 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 752 (3d ed. 1939); Annot., 87 A.L.R.2d 711 (1963).

6. *E.g.*, *Braun v. Hamack*, 206 Minn. 572, 289 N.W. 553 (1940).

7. *E.g.*, *Northern Transp. Co. v. Chicago*, 99 U.S. 635 (1879); *Prete v. Cray*, 49 R.I. 209, 141 A. 609 (1928).

8. *E.g.*, *Spall v. Janota*, 406 N.E.2d 378 (Ind. App. 1980); *Crnkovich v. Scaletta*, 203 Neb. 22, 277 N.W.2d 416 (1979); *Bradley v. Valicenti*, 185 Pa. Super. Ct. 403, 138 A.2d 238 (1958); *Williams v. Southern Ry.*, 55 Tenn. App. 81, 396 S.W.2d 98 (1965). The duty to provide lateral support is non-delegable. If the landowner hires an independent contractor to make an excavation which withdraws the support of his neighbor's land, the landowner is liable if the damage is a necessary consequence of the work. *E.g.*, *Law v. Phillips*, 136 W. Va. 761, 68 S.E.2d 452 (1952); *RESTATEMENT (SECOND) OF TORTS* § 422A (1965); Annot., 33 A.L.R.2d 111 (1954).

The right to lateral support arises from the fact that real property "is in its natural state held together, connected and protected by natural forces which have existed from time immemorial."⁹ The right to lateral support is a natural right, an incident of ownership. It does not depend on words of grant.¹⁰ However, courts disagree about the nature of the right. The earlier view regards the right to lateral support as a natural easement, a right in the supporting land.¹¹ The later and more prevalent view does not regard the right as an easement, but as a right to the integrity of the supported land itself.¹² Although the two theories have widely divergent implications, neither has prevailed entirely.¹³

It is fundamental that every landowner has the right to use his land as he sees fit, as long as he does not injure the land of others.¹⁴ As an incident of ownership, the landowner has the right to excavate for a lawful purpose close to a boundary line.¹⁵ However, if subsidence of his neighbor's soil is threatened, the excavating owner must furnish artificial support, such as a retaining wall, to replace the natural support he removes.¹⁶

The cause of action for damages resulting from removal of lateral support does not accrue until the land subsides.¹⁷ A subsidence is any movement of the soil from its natural position. It may be called shifting, slipping, oozing, washing or eroding.¹⁸ At law, the measure of damages is generally held to be diminution in market

9. *Schaefer v. Hoffman*, 198 Wis. 233, 239, 223 N.W. 847, 849-50 (1929); *accord*, *Sime v. Jensen*, 213 Minn. 476, 7 N.W.2d 325 (1942).

10. *E.g.*, *Trowbridge v. True*, 52 Conn. 190, 52 Am. Rep. 579 (1884); *Hermanson v. Morrell*, 252 N.W.2d 884 (N.D. 1977).

11. RESTATEMENT (SECOND) OF TORTS §§ 817-821, Scope and Introductory Note (1979); *e.g.*, *Royal Indem. Co. v. Schneider*, 485 S.W.2d 452 (Mo. App. 1972).

12. RESTATEMENT, *supra* note 11; *Langdell, Classification of Rights and Wrongs*, 13 HARV. L. REV. 537, 664 (1900); Note, *The Changing Doctrine of Lateral Support*, 14 TEMP. L.Q. 243 (1939); *e.g.*, *Sargent v. Jaegeling*, 83 Cal. App. 485, 256 P. 1116 (1927); *Bradley v. Valicenti*, 185 Pa. Super. Ct. 403, 138 A.2d 238 (1958).

13. RESTATEMENT, *supra* note 11.

14. *E.g.*, *Spoo v. Garvin*, 236 Ky. 113, 32 S.W.2d 715 (1930).

15. *See Holden v. Carmean*, 178 Ark. 375, 10 S.W.2d 865 (1928), in which it was held that a landowner had the right to excavate his lot to the grade line of the street, even though it left a neighbor's lot ten feet higher than his lot. However, he was bound to exercise the highest degree of care in using explosives to excavate.

16. *E.g.*, *Carrig v. Andrews*, 127 Conn. 403, 17 A.2d 520 (1941); *Wahl v. Kelly*, 194 Wis. 559, 217 N.W. 307 (1928). For a general discussion see 5 R. POWELL, THE LAW OF REAL PROPERTY § 699 (rev. 1979); 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 752 (3d ed. 1939).

17. *E.g.*, *Western Coal & Mining Co. v. Randolph*, 191 Ark. 1115, 89 S.W.2d 741 (1936); *Sipple v. Fowler*, 151 Ga. App. 135, 259 S.E.2d 142 (1979).

18. *E.g.*, *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953); *Williams v. Southern Ry.*,

value of the property or cost of restoration, whichever is less.¹⁹ In equity, a mandatory injunction may be granted to compel restoration of wrongfully removed lateral support.²⁰

The right to lateral support is limited to the soil in its natural state and does not extend to artificial conditions, such as structures²¹ or fill material,²² on the land.²³ Since there is no absolute right of support for artificial conditions, the injured landowner must show that the excavator was negligent in order to recover damages for injury to artificial conditions on the land.²⁴ If the land would not have subsided but for the weight of the artificial conditions upon it,

55 Tenn. App. 81, 396 S.W.2d 98 (1965); RESTATEMENT (SECOND) OF TORTS § 817, Comment h (1979).

19. *E.g.*, *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953); *Williams v. Southern Ry.*, 55 Tenn. App. 81, 396 S.W.2d 98 (1965). The measure of damages for injury to real property in Arkansas is substantially in accordance with the general rule. *See Benton Gravel Co. v. Wright*, 206 Ark. 930, 175 S.W.2d 208 (1943); *Paris Purity Coal Co. v. Pendergrass*, 193 Ark. 1031, 104 S.W.2d 455 (1937). It has been held that the general rule regarding measure of damages must be varied where strict adherence would cause an inequitable result. *B.A. Mortgage Co. v. McCullough*, 590 S.W.2d 955 (Tex. Civ. App. 1979).

20. *E.g.*, *Graff v. Ryan*, 39 Del. Ch. 443, 166 A.2d 441 (1960); *Gorton v. Schofield*, 311 Mass. 352, 41 N.E.2d 12 (1942).

21. *E.g.*, *Tillson v. Consumers' Power Co.*, 269 Mich. 53, 256 N.W. 801 (1934); *St. Joseph Light & Power Co. v. Kaw Valley Tunneling, Inc.*, 589 S.W.2d 260 (Mo. 1979). A retaining wall is not considered an artificial condition or structure on the land for purposes of this discussion.

22. *E.g.*, *Sime v. Jensen*, 213 Minn. 476, 7 N.W.2d 325 (1942); *Jennemann v. Hertel*, 264 S.W.2d 911 (Mo. App. 1954); *Tortolano v. DiFilippo*, 115 R.I. 496, 349 A.2d 48 (1975). Some cases have recognized that with the passage of time and exposure to the elements, filled land may be considered land in its natural condition. *Biel v. Metropolitan Life Ins. Co.*, 15 Ill. App. 3d 410, 304 N.E.2d 449 (1973); *Bradley v. Valicenti*, 185 Pa. Super. Ct. 403, 138 A.2d 238 (1958). *Contra*, *Olson v. Mullen*, 244 Minn. 31, 68 N.W.2d 640 (1955); *Albert v. Wright*, 410 Pa. 383, 189 A.2d 753 (1963). In *Bay v. Hein*, 9 Wash. App. 774, 515 P.2d 536 (1973) the court said that a claim that filled land has become land in its natural condition is actually a claim to an enlarged duty of lateral support through prescription.

23. Otherwise a landowner by building upon his land thus increasing the downward and lateral pressure could impair his neighbor's right to use his land, resulting in the rights of the prior occupant becoming much greater than those of the later occupant. *Northern Transp. Co. v. Chicago*, 99 U.S. 635 (1879); *accord*, *Hermanson v. Morrell*, 252 N.W.2d 884 (N.D. 1977). However, it has been stated that even where an artificial condition adds no weight to the land, as where the weight of a building is offset by a large cellar, the landowner may not claim the right to lateral support for the building because the soil is not in its natural condition. The distinction is that soil is flexible and will accommodate itself to movements of the earth, whereas a building is rigid and will crack. *Home Brewing Co. v. Thomas Colliery Co.*, 274 Pa. 56, 117 A. 542 (1922). Similarly, the majority of courts hold that the right to lateral support for buildings or other artificial conditions on the land cannot be acquired by prescription. *E.g.*, *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581 (1885); *Bay v. Hein*, 9 Wash. App. 774, 515 P.2d 536 (1973). *Contra*, *Royal Indem. Co. v. Schneider*, 485 S.W.2d 452 (Mo. App. 1972) (the right to support for buildings may be acquired by grant, contract, or prescription).

24. *E.g.*, *Blake Constr. Co. v. United States*, 585 F.2d 998 (Ct. Cl. 1978); *Albert v.*

the excavator will not be liable for damages either to the land or to the structures in the absence of negligence.²⁵ However, if the land subsides due solely to its own weight, and not due to the presence of structures on the land, the authorities are divided. The "American" rule is that the landowner may recover for the damage to his soil, but not for damage to artificial conditions in the absence of negligence.²⁶ The "English" rule is that the landowner may recover for all damages proximately caused by the withdrawal of support for his land in its natural state, including damages to structures.²⁷ Thus, in most cases involving injury to structures,²⁸ the test will be "whether

Wright, 410 Pa. 383, 189 A.2d 753 (1963). For a thoughtful analysis of negligence in this context, see *Spall v. Janota*, 406 N.E.2d 378 (Ind. App. 1980).

25. *E.g.*, *Covell v. Sioux City*, 224 Iowa 1060, 277 N.W. 447 (1938); *Braun v. Hamack*, 206 Minn. 572, 289 N.W. 553 (1940); *Wahl v. Kelly*, 194 Wis. 559, 217 N.W. 307 (1928); 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 416 (repl. 1961).

26. *E.g.*, *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312 (1877). Arkansas appears to follow this rule. See *Paris Purity Coal Co. v. Pendergrass*, 193 Ark. 1031, 104 S.W.2d 455 (1937); *Western Coal & Mining Co. v. Randolph*, 191 Ark. 1115, 89 S.W.2d 741 (1936).

27. *E.g.*, *Williams v. Anderson Constr. Co.*, 105 F. Supp. 497 (D. Alaska 1952); *Williams v. Southern Ry.*, 55 Tenn. App. 81, 396 S.W.2d 98 (1965). In *Prete v. Cray*, 49 R.I. 209, 141 A. 609, 612 (1928), the court stated:

[A] landowner by building upon his land has not thereby lost his right to have his soil supported, and, when that right is invaded by his neighbor, and his land sinks, he is entitled to compensation for the direct results of such breach of duty, including any injury to buildings upon his land, when such injury is due to an interference with the lateral support of the soil, and cannot be ascribed to the weight and pressure of the buildings upon the land.

Professor Powell views the basic common-law relationship as insufficient in a modern urban society and approves the English rule as a judicial attempt to adapt the common law to modern needs. 5 R. POWELL, THE LAW OF REAL PROPERTY § 701 (rev. 1979).

28. The rights and duties regarding lateral support may be altered by state statute or municipal ordinance. 5 R. POWELL, THE LAW OF REAL PROPERTY § 702 (rev. 1979). ARK. STAT. ANN. § 19-2819 (1968) provides:

If the owner or possessor of any lot or land in any city or incorporated town in this State shall dig, or cause to be dug, any cellar, pit, vault, or excavation, to a greater depth than twelve [12] feet below the curb of the street on which said lot or land abuts, or, if there be no curb, below the surface of the adjoining lots, and shall, by such excavation, cause any damage to any wall, house, or other building, upon the lots adjoining thereto, the said owner or possessor shall be liable, in a civil action, to the party injured, to the full amount of the damage aforesaid; provided, however, that such owner or possessor may dig, or cause to be dug, any such cellar, pit or excavation, to the full depth of any foundation walls of any building upon the adjoining lots, and to the full depth of twelve [12] feet below the grade of the street whereon such lot abuts, established by the corporation authority, without incurring the liability prescribed by this section.

The Arkansas court apparently has not been confronted with litigation concerning this statute. However, a nearly identical Ohio statute, OHIO REV. CODE ANN. §§ 723.49-.50 (Page 1976), has been construed as amplifying the common-law rule of lateral support to create absolute liability for removal of support for structures where the excavation is deeper than

an artificial condition created on the plaintiffs' land contributed to the injury, or whether the subsidence would have occurred even if the land had remained in its natural state."²⁹

A present owner of land is not liable for damages caused by an excavation made by his predecessor in title where the excavator did not provide artificial support to replace the natural support he removed.³⁰ Thus, where a landowner has excavated, mere change of title will not relieve him of liability.³¹ Normally a landowner is under no obligation to refurnish lateral support removed by a previous owner.³²

In *Spoov v. Garvin*,³³ a previous owner of the plaintiff's lot had excavated and left a perpendicular dirt embankment along the boundary line. When the defendant acquired the adjoining lot, he graded and piled loose dirt along the top of the embankment. The flow of surface water caused the embankment to crumble, and soil fell on the plaintiff's land. The plaintiff brought suit in equity to compel the defendant to take steps to prevent damage to her lot. The defendant counterclaimed to compel the plaintiff to restore lateral support to his lot. The court concluded that neither party was entitled to relief. The plaintiff could not recover because the excavation on her lot was the major cause of the damage to her land. The defendant could not recover because the plaintiff was not liable for acts of the former owner of her lot. The court stated that where the natural conditions of both lots have been completely altered, "the rights of the parties must be determined by equitable princi-

the statutory limit. *Davis v. Sap*, 20 Ohio App. 180, 152 N.E. 758 (1922) (citing *Belden v. Franklin*, 8 Ohio C.C. (n.s.) 159 (1906)).

29. *Gladin v. Von Engeln*, 195 Colo. 88, 92, 575 P.2d 418, 421 (1978).

30. *E.g.*, *Frederick v. Burg*, 148 F. Supp. 673 (W.D. Pa. 1957) (applying Pennsylvania law); *Gladin v. Von Engeln*, 195 Colo. 88, 575 P.2d 418 (1978); *Paul v. Bailey*, 109 Ga. App. 712, 137 S.E.2d 337 (1964); *First Nat'l Bank & Trust Co. of Rockford v. Universal Mortgage & Realty Trust*, 38 Ill. App. 3d 345, 347 N.E.2d 198 (1976); *Spoov v. Garvin*, 236 Ky. 113, 32 S.W.2d 715 (1930); *McKamy v. Bonanza Sirloin Pit, Inc.*, 195 Neb. 325, 237 N.W.2d 865 (1976); *Noonan v. Pardee*, 200 Pa. 474, 50 A. 255 (1901); *RESTATEMENT (SECOND) OF TORTS* § 817(1), Comment j (1979); *cf.* *Knapp v. Cirillo*, 133 N.Y.S.2d 356 (Sup. Ct. 1954) (a tenant is not liable for removal of lateral support by his landlord).

31. *E.g.*, *Sipple v. Fowler*, 151 Ga. App. 135, 259 S.E.2d 142 (1979).

32. *Frederick v. Burg*, 148 F. Supp. 673 (W.D. Pa. 1957) (applying Pennsylvania law). However, where the present owner takes possession knowing there is an artificial condition on the land which is unreasonably dangerous to persons or property outside the land and fails to remedy the situation after a reasonable period of time, he may be compelled to refurnish lateral support under a nuisance theory. *Gladin v. Von Engeln*, 195 Colo. 88, 575 P.2d 418 (1978); *see* *RESTATEMENT (SECOND) OF TORTS* § 366 (1965).

33. 236 Ky. 113, 32 S.W.2d 715 (1930).

ples, and not by [the] rules of the common law."³⁴ Thus, each neighbor had the duty to remedy the condition of the embankment so as to avoid injury to either.

However, where the previous owner excavates and erects a retaining wall to replace the natural support he removed, the duty to maintain the wall has been held to devolve on the excavator's successors in interest. In *Foster v. Brown*,³⁵ a Canadian case, the defendant's predecessor in title had excavated and built a retaining wall of wooden planks on his own land to provide lateral support for the plaintiff's land. The defendant allowed the wall to decay, and the plaintiff's land subsided. The court held the defendant liable on the theory that a present owner who allows a retaining wall built by a previous owner to deteriorate and injure his neighbor is in the same position as an owner who permits a dangerous condition not created by him, such as an open excavation, to remain on his land. The former should be held liable just as the latter is. A prime consideration in *Foster* was that if the rule were otherwise, a landowner might excavate and erect a solid retaining wall, and many years later a subsequent owner could allow the wall to decay so that his neighbor's land subsided. The original owner would be held liable, while "the man whose failure to keep up the retaining wall was the effective cause of the injury would go scot-free, and that too where the subsidence would not have occurred if the retaining wall had been kept in repair."³⁶

Relying on *Foster*, the court in *Gorton v. Schofield*³⁷ affirmed a decree ordering the defendant to restore artificial support to the plaintiff's land. Prior to 1876, a previous owner of the defendant's land had excavated and built a retaining wall on his property to provide lateral support for the plaintiff's land. A few years later a stable was built against the wall. In 1938, a year after the stable was torn down, the wall weakened and the plaintiff's land subsided. The court discussed the absolute duty of lateral support and concluded that "the burden of providing lateral support to the plaintiff's land in its natural condition is one of continued support running against the servient land."³⁸ Similarly, in *Sager v. O'Connell*,³⁹ the court held that failure to maintain a bulkhead erected by a previous own-

34. *Id.* at 116, 32 S.W.2d at 716.

35. 48 Ont. L.R. 1, 10 B.R.C. 918 (1920).

36. *Id.* at 5-6, 10 B.R.C. at 923.

37. 311 Mass. 352, 41 N.E.2d 12 (1942).

38. *Id.* at 358, 41 N.E.2d at 15.

39. 67 Cal. App. 2d 27, 153 P.2d 569 (1944).

er is negligence for which a subsequent owner may be held liable.⁴⁰

The Restatement (Second) of Torts summarizes the case law by providing that "[o]ne who withdraws the naturally necessary lateral support of land in another's possession or support that has been substituted for the naturally necessary support, is subject to liability for a subsidence of the land of the other that was naturally dependent upon the support withdrawn."⁴¹ Thus, the original excavator who removes the support and does not replace it with artificial support remains liable even if he transfers the land to another.⁴² If the original excavator does furnish artificial support, the subsequent owner is liable if he withdraws it⁴³ either intentionally or by allowing the artificial support to deteriorate.⁴⁴ The Restatement rule thus subjects the "actor" who withdraws support to liability.⁴⁵

There is a dearth of authority on the effect of an act of God⁴⁶ upon the absolute liability for withdrawal of naturally necessary lateral support.⁴⁷ Dicta in the cases suggest an exception to absolute liability where an act of God intervenes between withdrawal of sup-

40. *But cf.* Lyons v. Walsh, 92 Conn. 18, 101 A. 488 (1917), in which the wall was built on the claimant's land by a previous owner of adjoining land. The court held that the claimant, not the excavator's successor in interest, had the duty to maintain the wall: "The wall became as much a part of the realty upon which it was built as the earth had been which it replaced, and with the same incidents and burdens of ownership as attach to every part of the land on which it stands." *Id.* at 22, 101 A. at 489.

41. RESTATEMENT (SECOND) OF TORTS § 817(1) (1979).

42. *Id.*, § 817, Comment j.

43. *Id.*, Comment k.

44. *E.g.*, Sager v. O'Connell, 67 Cal. App. 2d 27, 153 P.2d 569 (1944).

45. RESTATEMENT (SECOND) OF TORTS § 817, Comments j, k (1979).

46. An act of God is defined as "An act occasioned exclusively by violence of nature without the interference of any human agency." BLACK'S LAW DICTIONARY 31 (5th ed. 1979). A bolt of lightning is an act of God. Mays v. Missouri & N.A. Ry., 168 Ark. 908, 271 S.W. 977 (1925).

47. It perhaps would be possible to address the question by analogy to the doctrine of Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330, [1861-73] All E.R. Rep. 1 (1868). The court in *Rylands* suggested that absolute liability would not be imposed if the damage was caused by an act of God. The weight of authority in America supports this exception. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 79, at 520-22 (4th ed. 1971); Annot., 169 A.L.R. 517 (1947). The exception applies only where the act of God would have produced the injury independent of the defendant's actions. *E.g.*, Trotter v. Callens, 89 N.M. 19, 546 P.2d 867 (Ct. App.), *cert. denied*, 89 N.M. 207, 549 P.2d 285 (1976); *cf.* Dye v. Burdick, 262 Ark. 124, 553 S.W.2d 833 (1977) (in which the court sets forth the identical requirement for relief from liability for negligence). However, the character of the doctrine of lateral support with its emphasis on property rights could militate against such an analogy. *But cf.* Rouse v. Gravelworks, Ltd., [1940] 1 K.B. 489 (in which the doctrine of lateral support and the doctrine of Rylands v. Fletcher are inseparably intertwined in the decision). For an excellent discussion of the history of the adoption of the rule of Rylands v. Fletcher in Arkansas, *see generally* North Little Rock Transp. Co. v. Finkbeiner, 243 Ark. 596, 420 S.W.2d 874 (1967) (opinion by Henry Woods, Special Justice).

port and subsidence.⁴⁸ The Restatement is vague on the issue: “[I]f . . . the subsidence is brought about [after the support was withdrawn] by the intervention of . . . an act of God, the actor is not subject to liability unless his conduct has substantially contributed to the result. While the cases do not make it clear, it may well be that he is not liable unless his conduct was negligent.”⁴⁹

In the leading case on the effect of an act of God on the duty to provide lateral support, *Carrig v. Andrews*,⁵⁰ the defendant's sea wall and shore land were swept away in a hurricane, removing support for the plaintiff's adjoining land. The court held that there is no duty to refurnish lateral support where the natural support was removed by an act of God, and hence no liability.⁵¹ The act of God in this case was the sole cause of the damage to the plaintiff's land, not an intervening cause, since the defendant had made no excavation on his land.

The issue of an intervening act of God was touched upon in *Foss-Schneider Brewing Co. v. Ulland*.⁵² In this case the plaintiff and defendant owned adjoining city lots. Defendant had excavated below the statutory level⁵³ and erected a building with a deep cellar. During an unprecedented flood the cellar filled with water, the walls of the cellar cracked, and the defendant pumped out the water. The foundations of the plaintiff's adjoining building cracked. The plaintiff brought suit for negligence and on appeal raised the issue of the defendant's strict liability for damage to buildings where the defendant had excavated deeper than the statutory level. The court refused to hold the defendant liable, stating that the flood, not the cellar, caused the damage. The court noted that even if the cellar had been no deeper than the statutory level, the plaintiff's property would still have been damaged. This appears to be a case of an intervening act of God relieving absolute liability for withdrawal of lateral support. However, its relevance to a case involving land in its natural state is debatable because it involved both damage to structures and a statute which modified the common-law doctrine.

In deciding *Urosevic*, the principal case, the court of appeals

48. *E.g.*, *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953); *Carlin v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722 (1882).

49. RESTATEMENT (SECOND) OF TORTS § 417, Comment m (1979).

50. 127 Conn. 403, 17 A.2d 520 (1941). *See generally* Annot., 132 A.L.R. 997 (1941).

51. *Carrig v. Andrews*, 127 Conn. 403, 17 A.2d 520 (1941).

52. 97 Ohio St. 210, 119 N.E. 454 (1918).

53. OHIO REV. CODE ANN. §§ 723.49-.50 (Page 1976).

recognized the common-law doctrine of lateral support.⁵⁴ The court stated that land is held subject to the right of an adjoining owner to the integrity of his soil.⁵⁵ A landowner may excavate upon his land, but owes a continuing duty to protect the lateral support of his neighbor's property.⁵⁶ He must furnish artificial support if necessary.⁵⁷ Citing *Gorton*⁵⁸ and *Lyons*,⁵⁹ the court reasoned that the duty to provide such artificial support devolves on subsequent owners of excavated land.⁶⁰ The duty is absolute and does not depend upon a showing of negligence.⁶¹

Exploring the issue of causation, the court noted that although lightning struck the retaining wall, the plaintiffs' land would not have subsided but for the excavation previously made on the defendant's land.⁶² Moreover, from the chancellor's finding that the fill previously placed on the plaintiffs' land had created additional pressure on the retaining wall, the court concluded that the fill was a contributing factor in causing the wall to collapse.⁶³ Since the wall had to be replaced to prevent continuing damage to both parties' property, the court held that the chancellor was justified in fashioning an equitable remedy appropriate to the circumstances.⁶⁴ The division of the cost of restoration between the parties was thus upheld as a balancing of the equities in the case.⁶⁵

Urosevic is significant because the court, confronted with a unique fact situation, may have created far-reaching precedent in the law of lateral support. The decision was indisputably just. This wall had stood for at least seventy-five years. It fell down when lightning hit it. The situation which led to the accident was created many years before either party acquired his lot. No one was at fault, but the wall had to be replaced to prevent continuing damage to all of the parties' property. Someone had to pay for the restoration. Given this situation, it was equitable to divide the cost of restoration among all who would benefit by it.

54. *Urosevic v. Hayes*, 267 Ark. 739, 590 S.W.2d 77 (Ct. App. 1979).

55. *Id.* at 741, 590 S.W.2d at 79.

56. *Id.*

57. *Id.*

58. *Gorton v. Schofield*, 311 Mass. 352, 41 N.E.2d 12 (1942).

59. *Lyons v. Walsh*, 92 Conn. 18, 101 A. 488 (1917).

60. *Urosevic v. Hayes*, 267 Ark. 739, 741, 590 S.W.2d 77, 79 (Ct. App. 1979).

61. *Id.* at 742, 590 S.W.2d at 79.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

However, the court of appeals in *Urosevic* attempted to justify its decision by using the common-law principles of lateral support. In fact, these principles are inapplicable to the facts presented, and the court should have followed the lead of *Spoos v. Garvin*⁶⁶ and declared outright that its decision was based solely upon equitable principles. In view of the court's finding that the fill, which was an artificial condition on the plaintiffs' land, contributed to the collapse of the wall, firmly established legal principles would relieve the defendant of liability unless he was negligent.⁶⁷ However, the defendant was not negligent. There was no finding that he intentionally removed or failed to maintain the wall, as required by *Gorton*⁶⁸ and *Sager*.⁶⁹ Even if he had interfered with the artificial support, under negligence principles the act of God may well have relieved him from liability.⁷⁰

The court in *Urosevic* impliedly held that a landowner who makes an excavation and erects adequate artificial support for his neighbor's land is not relieved from liability when the support is withdrawn by an intervening act of God. As previously discussed, no court has ever gone this far, and this proposition is contrary to the position taken by the Restatement. Moreover, the court implied that a successor in title to such a landowner is not relieved from liability when the artificial support is destroyed by an act of God. The court's opinion could very well raise doubts about the effect of an act of God in other strict or absolute liability cases.⁷¹

The court's reasoning that "but for" the excavation made by the defendant's predecessor in title, the subsidence would not have occurred, is an attempt to establish liability in terms of causation. However, the question here is not one of cause in fact, but one of the extent of liability. This is a question of proximate cause and as such is essentially a policy decision.

Much of the difficulty encountered in cases such as *Urosevic* results from the practice of discussing "absolute liability" in terms of "absolute duty." The court in *Urosevic* did this, referring to a

66. 236 Ky. 113, 32 S.W.2d 715 (1930).

67. The defendant did not bring any counterclaim, so the court did not discuss any theories under which the plaintiffs might be liable.

68. *Gorton v. Schofield*, 311 Mass. 352, 41 N.E.2d 12 (1942).

69. *Sager v. O'Connell*, 67 Cal. App. 2d 27, 153 P.2d 569 (1944).

70. The defendant would be relieved of liability if his negligence in no way contributed to the injury. *E.g.*, *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980); *Dye v. Burdick*, 262 Ark. 124, 553 S.W.2d 833 (1977).

71. *E.g.*, it might be contended that the court has removed the act of God exception of the doctrine of *Rylands v. Fletcher* from Arkansas law.

duty to maintain artificial support that devolves on subsequent owners of excavated land, the breach of which results in absolute liability. However, absolute liability cannot be discussed logically in terms of duty. As Professor Fowler V. Harper has pointed out,⁷² if the defendant cannot prevent injury by taking reasonable precautions, he owes a duty either to refrain from the conduct altogether or to perform the impossible. The former proposition is untenable because a landowner has the right to excavate upon his own property, subject to his duty to provide lateral support for adjoining property. The latter proposition is untenable because it is not intelligible to state the law in terms of duties impossible to perform.

The tenets of the law of lateral support are quite limited. This must be remembered if courts are not to impose inappropriate burdens on innocent property owners. Where the accepted principles of the law of lateral support provide no guidance, as in the principal case, courts should refrain from making strained extensions of the law to achieve equitable results. Decisions in such cases should be expressly founded on equitable considerations.

Frances Shane Fendler

72. Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932).