THE DUTY OF CARE IN RELATION TO ADJOINING LAND

SECTION 177 CONVEYANCING ACT 1919

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INTRODUCTION

1. Sydney's unique geology, comprising a range of material from loose sand and weathered sandstone to shale and reactive clays, throws up design and construction challenges. Heavy excavation works throughout the city and surrounds occasionally fail those challenges, giving rise to litigation between, typically, developers and others involved in the excavation works, and neighbouring land owners.

2. Prior to legislative amendments in 2000 pursuant to which section 177 of the Conveyancing Act 1919 (NSW) was introduced (**s177**), if a landowner, in the course of excavation, undermined the support for the neighbour's land, there was an "*actionable nuisance for which strict liability attaches without proof of any negligence*": ***Fennell v Robson Excavations Pty Ltd*** [1977] 2 NSWLR 486 at 493 per Glass JA.

3. The right in common law to bring an action in nuisance is abolished by s177, which substitutes a statutory duty of care *"not to do anything in relation to … the supporting land … that removes the support provided by the supporting land to any other land."*

4. Thet duty, and the qualifications thereto, have been considered in a handful of cases.

5. The object of this paper is to provide a short outline of the jurisprudence regarding the duty of care owed in respect of adjoining land that has built up around s177 of the *Conveyancing Act 1919* (NSW). In the course of that discussion, some of the issues thrown up by the application of the legislation to the factual circumstances that the courts have been required to address are considered.

Summary of s177's effects

6. A plain reading of the section, and the authorities that have construed it, leads to at least these conclusions:

   - s177 narrows the duty enquiry, in that it falls upon all who "do anything on or in relation to land";

   - a person may be in breach of the duty without having any direct or physical involvement in the works that saw support removed – for example, a developer may be liable for a loss of support caused by the works of excavation contractors;

- s177 does not extend to omissions, *per se*, but it may be possible to characterise an omission as involving the doing of something – for example, omitting to underpin the footings of an adjoining building undermined during excavation works while permitting excavation works to continue;

- s177 does not import strict liability – the standard remains one of reasonable care;

- s177 does not preclude the removal of support provided by a building or structure on the supporting land, unless that building or structure replaced support previously provided by the supporting land in its natural state;

- the references in s177 to the removal of support include any reduction in support;

- parties may contract out of or modify the duty of care; and

- nothing about s177 operates to exclude the causation considerations in s5D of the *Civil Liability Act 2002* (NSW).

SECTION 177 CONVEYANCING ACT

7. The section reads:

> **177 DUTY OF CARE IN RELATION TO SUPPORT FOR LAND**
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> (1) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.
>
> (2) Accordingly, a person has a duty of care not to do anything on or in relation to land (the "**supporting land**") that removes the support provided by the supporting land to any other land (the "**supported land**").
>
> (3) For the purposes of this section, "supporting land" includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.
>
> (4) The duty of care in relation to support for land does not extend to any support that is provided by a building or structure on the supporting land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaimed state formerly provided to the supported land.
>
> (5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.
>
> (6) Any such agreement:
>
> (a) has effect in relation to any agent of the person on whom the duty lies, and

(b) has effect in relation to any successor in title of the supported land if the agreement is embodied in a registered easement for removal of support relating to that land.

(7) The right to agree to the removal of the support provided by supporting land to supported land is a right of the kind that is capable of being created by an easement.

(8) Any right at common law to bring an action in nuisance in respect of the removal of the support provided by supporting land to supported land is abolished by this section.

(9) Any action in negligence that is commenced after the commencement of this section in relation to the removal of the support provided by supporting land to supported land may be wholly or partly based on something that was done before the commencement of this section. However, this subsection does not operate to extend any period of limitation under the Limitation Act 1969 .

(10) This section extends to land and dealings under the Real Property Act 1900 .

(11) This section does not apply in relation to any proceedings that were commenced before the commencement of this section.

(12) A reference in this section to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support.

(13) This section binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

Brief history behind the section

8. In 1991 the Attorney - General for New South Wales tasked the Law Reform Commission of New South Wales with inquiring into and reporting on

> *"whether any changes should be made to the laws relating to the rights of adjoining land owners to support from adjacent land, including any buildings or structures."*

The Commission's Report 84 (1997) *The Right to Support from Adjoining Land* recommended amending the Conveyancing Act to abolish a right to bring a common law action in nuisance in respect of a reduction in support for any land, and "to give effect to" [inter alia]

> *"Everyone [sic] must take reasonable care that they do not do or omit to do anything on or in relation to land which might cause loss or damage by removing support provided by that land to other land."*

9. Intriguingly, the Report records that the Attorney-General's reference followed receipt by the Commission of a memorandum from Justice Giles on behalf of the judges of the Commercial Division of the NSW Supreme Court "drawing attention to the unsatisfactory

state of the law relating to removal of support of land." In 1989, Justice Giles delivered his judgment in ***Pantelone v Alaquie*** reported at (1989) 18 NSWLR 119. More is said of *Pantelone* below.

10. The Law Reform Commission Report lamented[1] that the existing law as based on principles laid down in a 19th century English case ***Dalton v Henry Angus & Co Ltd*** (1881) 6 App Cas 740 (of which, more below) which principles were themselves

> *" … based on quite narrow proprietary rights, having little relevance to the reality of modern urban conditions, and were formulated prior to the Torrens system of land title registration and major developments this century in the law of negligence. The protection afforded by common law seems today to be narrow and arbitrary ..."*

11. The problem thrown up by the then state of the common law was captured in the following paragraphs of the Commission's Report[2]:

> *2.1 According to common law, the right to the support of land in its natural state is an incident of the land itself. It is a "natural right", not an easement or grant, evolving from a recognition that land in its natural state requires support from adjacent soil, and the notion that a landowner has a right to the enjoyment of his or her own property. This right does not, however, entitle the landowner to insist that the adjoining land remain in a natural state.*
>
> *2.2 Where the owner's land subsides due to excavation or other activity on the adjoining land, he or she can bring an action for damages in nuisance against the adjoining landowner, provided that the owner can establish that his or her land would have subsided without the weight of any building erected on the owner's land ...*

12. In the Second Reading Speech introducing the s177 bill[3], the Minister indicated that the new provision was not intended to constitute a code or to exclude any liability a defendant might otherwise have at common law, but rather

> *"… creates a duty of care so that every person must not do anything, or omit to do anything, on land that supports other land, so as to cause damage by removing the support provided to the supported land. As I explained previously, there is no such duty of care at present and therefore this reform cures an existing defect in the present law.*
>
> *Furthermore, this new duty of care is created as an addition to the common law of negligence. By the common law of negligence, I mean the general duty that each person must take reasonable care not do anything that might cause harm to anyone else. The common law of negligence is constantly evolving as decisions by courts are made that define the extent of the duty. Making the duty to support adjoining land part of the common law of negligence*

[1] At page 3
[2] Footnote references omitted, emphasis added
[3] Second Reading Speech for the Conveyancing Amendment (Law of Support) Bill 2000 (NSW) in the New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 5 April 2000 - emphasis added

ensures that the duty will remain in parity with the general duty of care that applies to all people, and will have the benefit of modifications made to that duty, as declared by the courts from time to time."

The rule in *Dalton v Angus*

13. The competing arguments surrounding whether the common law right of support for adjoining land extended to buildings erected thereon were canvased in the following passage from the decision of Fry J in the House of Lords' decision in ***Dalton v Henry Angus & Co*** (1880-81) LR 6 App Cas 740, at 772:

> *On principle it appears to me that it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors. Such a principle would prevent the owner of a house from ever acquiring a right to lateral support except by actual contract. An opposite view might be taken, for which also much reason could be given. The right of soil to support by adjoining soil is given by our law as a natural right, and it might well have been held that this natural right to support carried with it a right to the support of all those burdens which man is accustomed to lay upon the soil. On this principle, the right to support would arise as soon as the house was built, and would exist independently of the user, consent or contract. It might thus, it appear to me, be reasonable to hold that a house should never have the right of support, or that it should always have it. But I am unable to find any principle upon which to justify the acquisition of the right to support by a house independently of an express covenant or grant. For casting aside all technicalities, I think that the only principle upon which rights of a kind like the one in question can be acquired is that of acquiescence. But I further think that, as he who cannot prevent cannot acquiesce, and as the owner of the adjoining land cannot prevent his neighbour from erecting a house upon his own land, he can never be said to have acquiesced in the construction of that house, or in the burden that which thence results. Such are the conclusions to which I should be driven by the consideration of this question on principle. When I turn to the authorities of our law bearing on the subject, I find as it appears to me, that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and consequently, that the right is one that may be acquired independently of express covenant. All the efforts which I have made to fund some principle upon which to justify the authorities, have to my own mind entirely failed.*

14. In his separate speech in *Dalton v Angus* Lord Penzance observed (at 804) that:

> *[I]t is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground.*

15. Thus, there became known **the rule in *Dalton v Angus***, to the effect that there is no general right of support for improvements on land.

16. The rule was described by Macready AsJ in ***Piling v Prynew; Nymeth v Prynew*** [2008] NSWSC 118 (at [41]) thus:

> *… If an individual built upon their property, and in doing* [so] *added unnatural weight to those lands, they could not recover if their neighbour in excavating adjoining property removed support for that land and caused damage to the buildings so situated. This is because, although neighbours were obligated to provide support for each other, their obligations did not extend to supporting the additional weight that buildings placed on contiguous, yet separately owned lands: Pantelone v Alaquie (1989) 18 NSWLR 119 at 129 per Giles J.*

17. Criticisms of the rule can be found in many cases, including the High Court's decision in ***Stoneman v Lyons*** (1975) 133 CLR 550, where Stephens J (at 567) saw the rule as "*clearly ill-adapted to conditions in modern cities*". In *Piling v Prinew* Macready AsJ (at [42]) cited the following example from a Singaporean decision[4] bearing out the "unfair and somewhat absurd results" that the rule can bring about:

> *If my neighbour's land is in its natural state, I may not remove the soil on my land without providing alternative support for his land; but if my neighbour expends money and effort in building a bungalow on his land, then I may excavate with impunity, even though his bungalow might crumble to the ground. Yet my liberty to ignore the support required by his house is not perpetual, but lasts only for 20 years, at which time any indolence in pursuing my right to remove my soil is transformed into a positive right of support [that is, an easement of support] in respect of his dwelling.*

18. However, whether in recognition that it was apt to give rise to such anomalies, or otherwise, qualifications to the rule in *Dalton v Angus* have been held to exist, as was recognised by Giles J in ***Pantelone v Alaquie*** (1989) 18 NSWLR 119[5]:

> *There is a natural right in an owner of land to have his land supported by the land of an adjoining owner, but there is no natural right in that owner to have the additional weight of buildings on his land supported by the land of the adjoining owner. …. <u>But if the support is withdrawn so as to cause the land to subside and the subsidence was not caused by the additional weight of the buildings, the owner of the land is entitled to recover, in addition to damages for the subsidence of the land, damages for the injury to the building although he had no acquired right of support in respect of the building</u> …*

19. Subsequent to the decision in ***Pantelone***, the Law Reform Commission Report[6] described the rule as

[4] ***Xpress Print Pte Ltd v Monocrafts Pte Ltd*** [2000] 3 SLR 545 per Yong Pung How CJ
[5] At p129 – cited authorities omitted
[6] At [2.3]

"subject to the qualification that where land subsides due to loss of support, and not from the additional weight of buildings thereon, the landowner is entitled to recover damages for injury to the building in addition to damages for land subsidence."

The passage correctly cites three authorities as supporting that proposition:

- ***Brown v Robins*** (1859) 4 H & N 186; 157 ER 809;
- ***Stroyan v Knowles*** (1861) 6 H & N 454; and
- ***Public Trustee v Hermann*** (1968) 88 WN (Pt 1) (NSW) 442.

20. In ***Llavero v Shearer*** [2014] NSWSC 1336, Young AJA (at [37]) said that the qualification (which he also described as a "proviso") was "well supported by authorities", citing the three cases above, and in addition, the passage from *Pantalone* extracted above.

SECTION 177's EFFECT

21. Macready AsJ observed in *Piling v Prynew* (at [55]) that:

"As is apparent from the second reading speeches and clauses 4.7, 4.8 and clause 4.10 of the Law Reform Commission report, the clear intention of Parliament was to abolish the rule in Dalton v Henry Angus and provide for compensation for the damage caused by removal of support for land and buildings on neighbouring properties. The criticism of the rule in Dalton v Henry Angus prompted this report. It seems therefore that to the extent that the provision is ambiguous and having regard to the purpose and underlying object of the Act, one would construe reference to the 'support for land' as including support for land and the buildings erected upon it."

22. However, a different view was taken by Young AJA in *Llavero v Shearer*, where his Honour (at [35]) described s177 as "odd" for its failure to make clear

"whether the statutory duty to support adjoining land is, as at common law, the duty to support that land in its natural state, or also to support buildings on it."

His Honour later wrote (emphasis added):

[38] Strangely enough, neither s 177 nor the Law Reform Commission's Report actually abolishes the rule in Dalton v Angus. The Law Reform Commission does not appear to have sought to abolish this natural right of property or to have affected it. All it really did was to streamline the law, remove some of the historical anomalies, abolish the cause of action in nuisance and allow one in negligence.

23. With respect, his Honour's construction of what was sought by the Law Reform Commission is difficult to reconcile with the plain words used in the Report, which (at [4.6]) described

as one of the objectives of the proposed law reform "the abolition of the rule in *Dalton v Henry Angus & Co*". The Report (at [4.8]) explained the intention thus (emphasis added):

> *The suggested reform is intended to replace the common law right to support as an incident to land, with an obligation on the person to take reasonable care that he or she does not do or omit to do anything to land which might cause loss or damage by removing support provided by that land to other land. For this purpose, the supporting land includes the natural surface of the land, the subsoil, subterranean water, and reclaimed land, but does not include man-made structures on that land, except to the extent that those structures replace the support provided by the supporting land in its natural state. With respect to buildings it is not intended to create rights for support where none presently exist, except in so far as such rights would exist but for the rule in Dalton v Angus. Therefore, if a building is supported by a building erected on adjoining land, without a registered easement for support, the owner of the supported building will not be able to claim compensation if the supporting building is demolished, altered or not properly maintained. If, however, a building receives support from adjoining land, and the excavation or other use of that land results in a loss of actual or potential support which is reasonably foreseeable, the owner of the building may claim compensation for loss or damage from the person whose act or omission causes the loss of support.*

24. The effect of s177 was recently explained by Justice Stevenson in ***The Owners – Strata Plan 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liq) (No 2)*** [2019] NSWSC 440 (at [277] – emphasis added):

> *Section 177 does not, on its face, purport to or abrogate any existing common law duty of care in negligence. Rather, in a case where support for land has been removed, it imports the common law of negligence to replace the strict liability of nuisance, so that the duty imposed is an obligation to take reasonable care: Piling Contractors (Qld) Pty Ltd v Prynew Pty Ltd; Nemeth v Prynew Pty Ltd [2008] NSWSC 118 at [48]; Llavero v Shearer [2014] NSWSC 1336 at [38]; Lym International Pty Ltd v Marcolongo [2011] NSWCA 303 at [198].*

25. That construction must, with respect, be correct. It is a construction that was applied by the New South Wales Court of Appeal in ***Lym International Pty Ltd v Marcolongo*** [2011] NSWCA 303 where, at [198], Campbell JA, with whom Basten JA and Sackar J agreed, said (emphasis added):

> *There is some peculiarity in the wording of section 177(2) Conveyancing Act in that it imposes "a duty of care not to do anything on or in relation to land ... that removes the support provided by the supporting land to any other land...". It is apparent, from the wording of s 177(1) that this is intended to be a duty of care of the type known in "the common law of negligence". Such a duty is always one to take reasonable care. Thus, the duty that s 177(2) imposes is a duty to take reasonable care "not to do anything on or in relation to land ... that removes the support provided by the supporting land to any other land...".*

26. ***Marcolongo*** sheds further light on the effect of s177. In that case, the Northern Beaches home of the plaintiff, Mrs Marcolongo, was damaged as a result of excavation and sheet piling works performed by the defendant shoring / sheet piling contractor (MSP), arranged by the defendant developer Lym. The primary judge found that both defendants were in breach of the duty of care and apportioned responsibility 75% to MSP and 25% to Lym. The basis for finding MSP liable was the primary judge's finding that the sheet piling was installed in a negligent manner, such as to have caused a loss of support for Mrs Marcolongo's property.

27. More problematic, however, was the position of the developer, Lym. The primary judge found that it too was in breach of the duty of care, not because of any positive act on its part that directly caused the loss of support, but because it permitted MSP to adopt a shoring system (namely, sheet piling) different to that which was called up in the construction certificate (contiguous piling). The primary judge held that the developer's breach lay in "choosing to go outside the conditions" imposed by the construction certificate. The finding was shortly expressed[7]:

> "[The Developer] was aware, or at least must be taken to have been aware, of the conditions of the development consent and the certification for the construction of No. 5. [The Developer] chose (even if via Modern Demolition) to construct No. 5 in contravention of the conditions. The conditions relating to the use of a contiguous pile wall concerned the maintenance of the support provided by No. 5 to No. 7. In other words, the contiguous pile wall was required as a substitute to the support provided by the ground beneath No. 5. By choosing to go outside the conditions relating to this support, [the Developer] did something *'in relation to land ... that removes the support provided by the supporting land ...'."*

28. That reasoning might, with respect, have greater force were it the case that the shoring system that was substituted, sheet piling, was inherently unsuitable for the purpose, or was a notoriously less reliable solution than contiguous piling. However, as Lym submitted on appeal[8], the evidence was not to that effect. In short, the evidence supported the conclusion that the two alternative shoring systems were just that, alternatives, such that either could be safely deployed in the circumstances, and that it would not be negligent, *per se*, to adopt sheet piling in preference to the specified contiguous piling. Here, as the primary judge found, the sheet piling was rendered an inadequate solution by MSP's negligently performed preparation work, in which temporary piles that were a necessary precursor to the installation of the sheet piling were poorly installed. That, combined with the high frequency vibration involved in installing the sheet piling, saw the system fail and caused the damage to Mrs Marcolongo's house.

29. The principal issue ventilated on appeal, then, was whether, in such circumstances, Lym's acquiescence in the decision to substitute sheet piling for the specified contiguous piling could constitute "doing something" in relation to the supporting land. The primary judge

[7] Reproduced at [203] of the NSWCA decision in *Marclongo*
[8] See especially the judgment of the NSWCA at [207]

found it did, and the Court of Appeal concurred. Justice Campbell's reasoning pays setting out here:

> *[209] Even though the decision to use sheet piling was made with a view to providing support for the neighbouring land, the judge was right, in my view, in concluding that the Developer had done something in relation to land that removed the support. The inquiry that s 177(2) calls for is:*
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> *(i) whether the defendant has done anything on or in relation to land;*
>
> *(ii) if "yes" to (i), has what the defendant did in fact removed the support, and*
>
> *(iii) if "yes" to (ii), did the defendant exercise reasonable care in doing that particular thing.*
>
> *[210] In my view, the judge was right in concluding that permitting the sheet piling system to be used was "doing something" in relation to land. It involved the Developer making rudimentary enquiries, and then giving its approval for the adoption of that system. When it was a system to be used on the land, that giving of approval was clearly "in relation to" the land.*
>
> *[211] Even though it can be accepted that the purpose of the Developer in using the sheet piling system was endeavouring to support the neighbouring land, that does not answer the question whether permitting the use of the sheet piling system was something that "removed the support provided by the supporting land …". The characterisation of the adoption of the sheet piling system should be carried out bearing in mind the function that the sheet piling system had in the overall building job. Making the excavation would inevitably remove the support that the excavated earth had provided to the adjacent land. The sheet piling system was intended to provide an alternative means of support for the adjacent land. However, it should be understood as an integral part of an activity that removes support from the adjacent land. That is exactly how the judge treated it — the contiguous pile wall had been intended as "a substitute for the support provided by the ground beneath No 5" , and the Developer had chosen to alter that substitute means of providing support.*
>
> *[212] In my view, the judge was right in deciding that the Developer's decision to use sheet piling was made without exercising reasonable care.*

30. The 3 stage inquiry called up in *Marcolongo* provides a useful guide for practitioners in determining whether a claim under s177 should be brought or can be defended, as the case may be. It should also assist in the preparation of expert evidence on the questions.

31. Justice Campbell emphasised (at [215]) that it was "highly relevant that the decision to adopt sheet piling involved a departure from the construction certificate." His Honour explained:

> *Section 76A EPA Act has the effect that the Developer was prohibited from carrying out development on its land unless that development was carried out in accordance with the development consent. Section 80(12) EPA Act provided that if a construction certificate was issued, that certificate and any approved plans and specifications issued with respect to it, are taken to form part of the relevant development consent (other than for a purpose not presently relevant). The manifest purpose of the construction certificate requiring contiguous pile support of the excavation was to protect the neighbouring properties. Departing from a course of conduct that the law requires to protect the property of others is in itself evidence of a failure to take reasonable care: Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 459 per Mason J; Pusell v Grabham [1963] NSWR 172.*

Omissions?

32. *Marcolongo* arguably demonstrates that s177's requirement that a person *"not … doing anything on or in relation to land …"* will be broadly construed, and certainly will apply even where the person had no direct, physical involvement in the mechanisms that saw support removed. Accordingly, it would be prudent for practitioners dealing with claims brought under s177 to recognise that there may be parties caught by the provision whose participation in the works involved no physical presence at the site. Design engineers, for example, come to mind.

33. The wide construction of s177 seen in the Court of Appeal's reasoning in *Marcolongo* might be contrasted with the more narrow approach taken in *Piling v Prynew*, which was one of the earliest decisions on the provision. There it was held that the words creating the statutory duty of care "not to do anything on or in relation to land …" did not admit of a construction that the duty could be breached by acts of *omission.* Macready AsJ referred (at [59]) to a submission by the defendants in that case that their failure to "fill the hole" before embarking on the further excavation that led to the loss of support was an *omission* on their part, and was not caught by the section. His Honour had earlier (at [57]) quoted from a leading text on land law in which the author opined that s177(2)

> *makes it clear that, despite the width of subs (1), the duty of care under the section does not extend to omissions. A person is liable for acts of commission, such as excavating a hole, but not for omissions to act, such as failing to prevent a loss of support from occurring.*

34. Macready AsJ (at [64]) concurred with the defendants' submission that there could be no breach of the s177 duty where there was only a failure to do something, acknowledging in effect that a failing to act would not, as a matter of plain construction, amount to a breach of duty.

35. However, his Honour then took the practical approach of examining the conduct said to comprise the mere *omission* to see whether it in fact betrayed a failure of *commission*:

> *[65] Evidence of the steps that should have been taken to fill the gap were to the effect that it should have been filled every ½ to 1 metre as the excavation proceeded. The first and second defendants' characterisation of their own act as one of omission completely overlooks what in fact was happening on the site. What was happening was that excavation was proceeding in a manner, which, having regard to the existence of the hole was improper in the circumstances.*
>
> *[66] Section 177(2) states that "a person has a duty of care not to do anything on or in relation to the land … that removes the support." Accordingly, the defendants owed the plaintiffs a duty of care not to excavate the land at no 44 in a manner that removed the support provided by no 44 to no 46. The act that gives rise to liability under s 177 was the improper excavation of land at no 44.*
>
> *[67] An interpretation of s 177 that allows the removal of support for adjoining land by classifying such acts, as omissions would be contrary to the intention of Parliament.*
>
> *[68] For example, if an owner had sought to excavate this site without any piling it is plain that the building next door would collapse into the exposed hole. Is the owner making such an excavation to escape liability because his mistake is categorised as failing to have a proper piling wall? Certainly the answer would be "no" as what he did was to excavate with complete disregard for the consequences because of the manner of the excavation.*

36. The draft bill recommended by the Law Reform Commission and annexed to its Report[9] extended the duty to require that a person not "omit to do anything", but that was not adopted in the provision as enacted, and s177 does not catch failures to do something to prevent the undermining of support for the neighbouring property. However, it is likely that, in many situations where a defendant seeks to portray its 'sin' as one of mere omission, it will nevertheless be possible to identify some act of commission that contravened the duty, in the manner seen in Macready AsJ's example in *Piling v Prynew.*

Conclusion

37. It is submitted that a plain reading of s177, and the jurisprudence that has developed around it, supports the conclusions that are set out in paragraph 6 above. Those conclusions might guide practitioners in determining whether, and by what evidence, a breach of the statutory duty can be made out. They might also assist in determining whether any particular project participants are legitimate defendants to a claim brought pursuant to s177.

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[9] Appendix B to the NSW Law Reform Commission Report 84 (1997)