39 B.C.L.R. 112, (sub nom. Chu v. North Vancouver) 21 C.C.L.T. 228, (sub nom. Cowan v. North Vancouver) [1982] 5 W.W.R. 736, 139 D.L.R. (3d) 201

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Chu v. Dawson

CHU and CHU v. DISTRICT OF NORTH VANCOUVER, CITY OF NORTH VANCOUVER, DAWSON and DAWSON; COWAN v. DISTRICT OF NORTH VANCOUVER, DAWSON and DAWSON

British Columbia Supreme Court

Meredith J.

Heard: May 3-6, 1982

Judgment: July 5, 1982

Docket: Vancouver Nos. C802048 and C802186

Counsel: J. D. Spears, for plaintiffs.

S. K. MacGregor, for defendant North Vancouver.

B. Butler, for defendants Dawson and Dawson.

Subject: Torts; Environmental

Environmental Law --- Common law actions -- Nuisance -- General.

Negligence --- Strict liability (Rule in Rylands v. Fletcher) -- Non-natural user of land.

Negligence -- Strict liability: Rule in Rylands v. Fletcher -- Principles applicable -- Owner of ravine lot having fill placed over lip of ravine -- Fill collapsing 11 years later and destroying houses below -- Placing of fill a non-natural use -- Foreseeability of harm irrelevant -- Lot owner liable.

Fill from excavation of a ravine lot was used to extend the lot over the lip of the ravine. Eleven years later, heavy rains caused the fill to collapse and start a landslide of fill and debris which demolished the plaintiffs' homes below. The plaintiffs claimed damages in negligence and nuisance against the municipality and the owner of the lot.

Held:

Action allowed against lot owner, dismissed against municipality; plaintiff J.C. awarded $31,500, plaintiff D.C. awarded $21,500.

The lot owner was not liable in negligence or nuisance because he did not know and could not possibly have foreseen that the fill was a danger to properties below. Nor was the wrong a continuing one. However, the lot owner was liable under the strict liability rule in Rylands v. Fletcher. There was a single escape from his land of soil placed not as found in nature and so as to benefit him. That the practice was common on ravine lots merely showed that the danger was not foreseen and foreseeability was not applicable to a rule of strict liability. As between innocent parties, the liability should fall upon the lot owner.

The plaintiffs were each entitled to what it would have cost to rebuild his home less the amount recovered from the Disaster

Relief Fund, to 20 per cent of the value of the land at the date of the slide as compensation for its diminished value as well as to moving costs and other actual losses not compensable from the Fund.

Cases considered:

Gertsen v. Metro Toronto (1973), 2 O.R. (2d) 560, 43 D.L.R. (3d) 504 (H.C.) -- considered

Madder v. A.E. McKenzie & Co. Ltd., 39 Man. R. 348, [1931] 1 W.W.R. 344, [1931] 2 D.L.R. 522, affirmed 40 Man. R. 24, [1931] 3 W.W.R. 540, [1932] 1 D.L.R. 129 (C.A.) -- applied

Overseas Tankship (U.K.) v. Miller S.S. Co. Pty., [1967] A.C. 617, (sub nom. The Wagon Mound (No. 2); Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. Pty.)) [1966] 2 All E.R. 709 (P.C.) -- applied

Rickards v. Lothian, [1913] A.C. 263 (P.C.) -- applied

Royal Anne Hotel Co. Ltd. v. Ashcroft; Saito v. Ashcroft, [1979] 2 W.W.R. 462, 8 C.C.L.T. 179, 9 M.P.L.R. 176, 95 D.L.R. (3d) 756 (B.C.C.A.) -- considered

Rylands v. Fletcher (1866), L.R. 1 Exch. 265, affirmed L.R. 3 H.L. 330 -- applied

Wilkins v. Leighton, [1932] 2 Ch. 106 -- considered

Authorities considered:

Linden, Canadian Tort Law, 1st ed. (1977), p. 453.

McGregor on Damages, 13th ed. (1972), p. 35.

Salmond on Torts, 16th ed. (1973), pp. 53, 322-23.

Action for damages in negligence and nuisance.

***Meredith J.*:**

1 In 1968 the defendant Dawson purchased from the defendant corporation a building lot in North Vancouver. The lot backed onto a steep ravine. In the course of the construction of a house on the lot, the fill from the excavation was distributed over the lip of the ravine, but within the boundaries of the lot, substantially extending the Dawsons' yard. Later, a swimming pool was constructed. The fill was used for the same purpose. In December 1979 torrential rains saturated the fill and probably undermined it. In the result, the material started an avalanche of the saturated fill and debris, substantially demolishing homes situated below and owned by the plaintiffs.

2 The plaintiffs' claims as set forth in the statements of claim allege damages in negligence and nuisance. In my view, neither negligence nor nuisance has been established as against either the corporation or the Dawsons. However, I do consider that the Dawsons are liable nevertheless under the common-law rule invoking strict liability. The liability arises because the fill, moved by the contractors for the Dawsons over the lip of the ravine, created a hazard, though an undetected hazard, of damage to others if the fill "escaped" out of their land. I conclude that, as between innocent parties, the liabilities must in law fall upon the defendants rather than the plaintiffs. Therefore the plaintiffs will succeed in this action, as against the Dawsons. The action must be dismissed as against the district.

39 B.C.L.R. 112, (sub nom. Chu v. North Vancouver) 21 C.C.L.T. 228, (sub nom. Cowan v. North Vancouver) [1982] 5 W.W.R. 736, 139 D.L.R. (3d) 201

Strict Liability

3 The doctrine of strict liability has its foundation in the case of *Rylands v. Fletcher* (1866), L.R. 1 Exch. 265, affirmed by L.R. 3 H.L. 330. It may be useful to be reminded of several passages from the judgment of Blackburn J. in that case, at pp. 279-80:

> The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more ...
>
> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

The reasons for the rule are stated thus [p. 280]:

> The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

4 The application of the principle has been much complicated by the apparent qualification to the principle by Lord Cairns on the appeal to the House of Lords:

> ... if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, -- and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then the consequence of that, in my opinion, the

defendants would be liable ...

5 The question of what may be considered "natural" or "non-natural" is of special significance in that case. But before referring to that aspect of the matter, I would like to emphasize what I believe to be an important distinction between the tort calling for strict liability on the one hand and nuisance and negligence on the other.

Strict liability results from a tort separate and distinct from nuisance and negligence

6 Salmond on Torts, 16th ed. (1973), contains this comment at p. 322:

> **Relationship to other torts**
>
> *(i) Nuisance*
>
> Undoubtedly a great many cases in which the rule in *Rylands v. Fletcher* is applied involve nuisance situations, but nuisance is not only different in its historical origin, but in its legal character and many of its incidents and applications. First, the plaintiff in a *Rylands v. Fletcher* case need not be the occupier of adjoining, or indeed any, land, as he must be in nuisance. Secondly, the essence of the *Rylands v. Fletcher* principle is that compensation is given for a single disastrous escape: in nuisance the plaintiff must usually establish some state of affairs. Thirdly, in *Rylands v. Fletcher* cases there has to be a "thing" which is "likely to do mischief if it escapes". This is not so in nuisance. Fourthly, many nuisances, e.g. noise and obstruction of light, are outside the rule in *Rylands v. Fletcher*. Winfield well said that nuisance and the rule in *Rylands v. Fletcher* "are related to one another as intersecting circles, not as the segment of a circle to the circle itself." In short, the basic difference between nuisance and *Rylands v. Fletcher* is that the former is a wrong to occupation of land, whereas the latter is a wrong arising *from* occupation of land.
>
> Winfield in "Nuisance as a Tort" (1930) 4 Camb L.J. 189, 195.

7 Further, nuisance involves a foreseeable injury. In *Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. Pty.*, [1967] A.C. 617 at 640, (sub nom. *The Wagon Mound (No. 2); Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. Pty. Ltd.)* [1966] 2 All E.R. 709 (P.C.):

> It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damage in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. In their Lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)*, [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.), applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable.

8 The "state of affairs" referred to in the foregoing extract from Salmond as explained at p. 53 of the same volume is "commonly a continuing wrong -- that is to say, it consists in the establishment or maintenance of some state of affairs which continuously or repeatedly causes the escape of noxious things onto the plaintiffs' land ..." The text further states however that a single wrongful escape may be capable of classification as a nuisance.

9 Salmond, at 322-23, distinguishes negligence as follows:

(iii) Negligence

> Other writers have regarded the rule in *Rylands v. Fletcher* as a branch of the law of negligence. But it is perfectly clear that a man may be liable under the rule even though neither he nor anyone else has been guilty of any negligence in allowing the escape. It is equally clear that he may be liable though he has done no unlawful act in introducing the dangerous thing onto his land. In practice the importance of the distinction can be seen from the fact that if the plaintiff states his claim on the principle of *Rylands v. Fletcther* he need only plead the escape; whereas if he states his claim in negligence he must plead and prove negligence. Nevertheless, it may be possible to regard these cases as a special instance of negligence, where the law exacts a degree of diligence so high as to amount practically to a guarantee of safety. The principle behind all these cases is that if a man takes a risk, which he ought not to take without also taking upon his own shoulders the consequences of that risk he must pay for any damage that ensues.

10 The plaintiffs must rely upon the case of *Royal Anne Hotel Co. Ltd. v. Ashcroft; Saito v. Ashcroft*, [1979] 2 W.W.R. 462, 8 C.C.L.T. 179, 9 M.P.L.R. 176, 95 D.L.R. (3d) 756. In that case the Court of Appeal of this province seems to have applied the doctrine of strict liability to what was found by the court to have been a nuisance. There a sewer operated by the defendant backed into the premises of the plaintiff, causing considerable damage. The sewer was properly constructed. I infer from the judgment that the defendant could not reasonably have foreseen the blockage which caused the back-up. Much of the discussion in the judgment had to do with whether or not the municipality was excused because the maintenance of the sewer was the performance of a public duty. That defence did not prevail. However, this passage appears from the judgment of McIntyre J.A. for the court at p. 467:

> In my opinion the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

11 The defendant was held liable. On the face of it, it seems to me that the Court of Appeal was applying the doctrine of strict liability to what was held to be a nuisance situation, although the event causing the damage was not necessarily foreseeable. I take this to be an application of the doctrine of strict liability.

12 I conclude the discussion on this aspect of the case by stressing that I hold the Dawsons strictly liable in the present case despite the fact, as I find, that they did not know and could not have reasonably foreseen that the fill, situated as it was, posed a danger to the properties below.

Natural or non-natural use

13 In *Rickards v. Lothian*, [1913] A.C. 263 at 280 (P.C.), where water escaped from a lavatory, Lord Moulton modified the rule in *Rylands v. Fletcher* in these words:

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land ...

14 In the present case it is suggested that, because a great many people situated much as were the Dawsons extended their yards with fill in much the same way as the Dawsons, the Dawsons were merely making an "ordinary use" of their land. Though the use may have been ordinary, it certainly was, at the same time, "a special use bringing with it increased danger to others". The ordinary use made of the fill by the Dawsons and others was precisely because none perceived the hazard that

the fill posed. If I were to hold in this case that the liability of the Dawsons should be measured by the use customarily made of fill in the area, I would be importing the concept of foreseeability into a situation where no such concept is applicable.

15 In *Madder v. A.E. McKenzie & Co. Ltd.*, 39 Man. R. 348, [1931] 1 W.W.R. 344, [1931] 2 D.L.R. 522, affirmed 40 Man. R. 24, [1931] 3 W.W.R. 540, [1932] 1 D.L.R 129, (C.A.), the defendants stored grain in the upper floor of a warehouse. The floor collapsed to the detriment of the tenants below. Dysart J. at 349-50 said:

> Moreover, this case, notwithstanding strong contention to the contrary, cannot fall within the "exception" to the *Rylands v. Fletcher* rule based on "natural user". The storing of bagged oats may, in this warehouse, have been a "natural" user, but not more so than the storing of water in the Fletcher reservoir. The distinction between "natural" and "non natural" user, first introduced by Lord Cairns, has never been comprehensively defined. "Natural" user has been variously referred to as "usual," "common," "ordinary," "proper," but these terms are all of only general assistance. *Salmond on Torts*, 7 ed., 1928, at p. 346, states that the distinction "converts a rigid into a flexible rule, and enables the Court by determining what is or is not natural user to give effect to its own views of social and economic needs." It also adds that while the distinction has found wide favour, and is supported by many *dicta*, it has been accepted as a basis for decision in "only two decided cases," one at least of which might well have gone off on another ground. The two cases referred to are *Sutton & Ash v. Card*, [1886] W.N. 120, and Stearn v. Prentice Bros. Ltd., [1919] 1 K.B. 394 (Div. Ct.).

16 Dysart J. held that the defendant did not come under the "natural user" exception to *Rylands v. Fletcher*.

17 I cite the case as having features in common with the case at bar. The case is useful as drawing attention to the fact that the courts have not gone out of their way to find exceptions to the strict liability rule on the basis of natural use.

18 I should mention that the year following the *Madder* decision Luxmoore J. in *Wilkins v. Leighton*, [1932] 2 Ch. 106, held that the construction of a house on a property was a natural use. He thus absolved the defendant from liability where the soil pressures, due to construction, brought about the collapse of a retaining wall on a neighbouring property. Perhaps the case would have been differently decided had the house itself invaded the neighbour's land. (And reverting again to the matter of foreseeability as a constituent element in nuisance, I cite this short passage from the judgment at p. 114: "To make the occupier liable the plaintiff must prove that he had knowledge of the existence of the nuisance. In the present case there is no evidence to show that the defendant knew of the existence of any nuisance ..." In that case the occupier was the owner as well.)

19 It seems that whether the use is to be characterized as natural or non-natural may depend upon the purpose of the use. In referring to the case of *Gertsen v. Metro Toronto* (1973), 2 O.R. (2d) 560, 43 D.L.R. (3d) 504 (H.C.), Linden, in Canadian Tort Law, 1st ed. (1977), says at p. 453:

> In deciding whether the garbage fill was a natural or non-natural use of land, Mr. Justice Lerner stressed that the purpose was "selfish and self-serving" and not justifiable on any overriding public welfare theory ...

I accept the authority of this statement, although I have difficulty in perceiving the connection between natural or unnatural use on the one hand and purpose on the other.

20 I conclude that the placement of the fill was non-natural, because:

21 1. The fill was not as found in nature,

39 B.C.L.R. 112, (sub nom. Chu v. North Vancouver) 21 C.C.L.T. 228, (sub nom. Cowan v. North Vancouver) [1982] 5 W.W.R. 736, 139 D.L.R. (3d) 201

22 2. The Dawsons redistributed the fill and created the hazard for their own benefit, and

23 3. The Court of Appeal in the *Royal Anne* case seems to have pronounced a policy favouring this conclusion.

Damages

24 I think the general principles by which I must be guided are referred to in this passage from McGregor on Damages, 13th ed. (1972), p. 35:

> Where the plaintiff's goods have been damaged, the basic pecuniary loss is the diminution in their value which is normally measured by the reasonable cost of repair, and generally without making any deduction from the damages on account of the fact that after repair the goods are in better condition than they were before the tort. On the other hand, the basic pecuniary loss is the market value of the goods where they have been destroyed or misappropriated. Where it is land that has been damaged, the basic pecuniary loss is again the diminution in value and this may, if the circumstances warrant, be measured by the cost of replacement or repair, sometimes allowing only a partial or limited reinstatement, sometimes deducting the amount by which the land as repaired is more valuable than it was in its condition before the tort, but sometimes not.

25 Thus damages must be based upon either the cost of repair (the rebuilding of the houses) or the replacement of the homes together with the land upon which they were situated. There are several factors which introduce difficulty.

26 In the first place, the plaintiffs were compensated by the Disaster Relief Fund, a fund instituted by the provincial government. The compensation was as of grace, not as of right. The plaintiffs were paid the estimated cost to rebuild their homes but not including contractors' profit and overhead. The Chus received from the fund the sum of $97,162 on 19th September 1980. The Cowans received the sum of $79,785 on 12th May 1980. The fund did not pay profit and overhead because neither of the plaintiffs had decided (nor did they later decide) to rebuild their houses. Their reasons may or may not have been connected with the slide. Had the plaintiffs decided to rebuild, the probability is that they would have been reimbursed for the required profit and overhead. In the case of the Chus the profit and overhead would have amounted to $14,902, and in the case of the Cowans $14,122. Not only did the plaintiffs decide not to rebuild -- neither purchased property to replace that which they had lost.

27 The calculation of damages is further complicated by the volatile market conditions prevailing after the slide (but having nothing to do with the slide itself). Market prices accelerated dramatically, reaching a peak in February-March 1981. Thereafter the market collapsed, declining as much as 40 to 50 per cent (evidence of Mr. Pirrie). Both plaintiffs in fact sold their lots, then vacant but largely rehabilitated, when the market was on the upswing. Such was the market surge that the proceeds of the sale of the lots, taken along with the receipts from the Disaster Relief Fund, were well in excess of the value of the properties with houses as of the date of the slide. While the proceeds from the sale of lots together with the receipts from the fund would not have been sufficient to purchase replacement properties while the market was on the upswing, properties could have been purchased with the proceeds later when the market declined. Even then neither of the plaintiffs decided to replace. On this basis it may be argued that neither of the plaintiffs had suffered any financial loss arising from the destruction of their homes.

28 However, I hold that the plaintiffs are entitled to an amount equal to what it would have cost to actually replace their homes, regardless of market conditions later prevailing. They lost their houses and were entitled to be reimbursed for the cost of reconstruction. The Dawsons must make up the shortfall not paid by the provincial government. Had the plaintiffs actually decided to rebuild, they would have then been free to keep the properties or to sell them in the markets prevailing from time

to time after the slide.

29 The Chus say that they should be paid in addition $36,000 for loss of value of their lot. This amount was assessed by Mr. Lee, an appraiser. Mr. Lee's conclusion is not based on personal observation but by theoretical calculation of what the Chus should have received for their acre of land against the sum of $129,000 they actually received in February 1981. He says the land would have sold for $165,000 had it not been damaged; on my calculation the Chus received about 20 per cent less.

30 Mr. Lee's appraisal is singularly unconvincing. He advances no reasons for reaching his conclusion. But I think it can be safely concluded that the Chus did in fact suffer a loss on account of damage to their property.

31 The reduction of 20 per cent of the value of the land as to the date of the slide (Lee's appraisal $85,000) amounts to $17,000. The Chus place the value of the lost landscaping at $5,000. With considerable hesitation arising out of uncertainty, I award a total of $12,000 under this head for diminution of value including the loss of landscaping.

32 I award the Chus in addition, the amounts agreed upon by the parties. They will have as well the following amounts which were disputed at trial:

33 (a) $1,000 for the report of Robinson Dames & Weir, without which the Chus could not have mitigated their damage as they did;

34 (b) $650 for the extra costs of moving and storage. I am sure that these extra costs were in fact incurred. They are not unreasonable;

35 (c) $600 for pictures in the basement.

36 In summary, then, I award the Chus a sum made up as follows:

(a) Loss of home	$14,902
(b) Damage to property	12,000
(c) Agreed losses	2,375
(d) Contested losses	2,250
Total:	$31,527

37 The Cowan claim was advanced on the basis that Mr. Cowan should be entitled to the cost of replacement of the property at prices prevailing on 1st October 1980, the date the lot was sold. Because land values were escalating rapidly in this period, the cost of replacement exceeded the proceeds of the sale and receipts from the fund by $31,515. The claim on this basis is inconsistent with the cost of "repair". For the reasons given, I hold the latter to be the appropriate measure, even if the Cowans could be said to have been justified, notionally, in deferring the replacement of the property to October 1980. I repeat that Mr. Cowan did not replace the property in October 1980 or at any other time and, in any event, he could have replaced the property after the boom for less than he received.

38 I will deal with other items claimed by Mr. Cowan but disputed by the defendants:

39 (a) $104 -- rockwall, fence, and asphalt driveway. I disallow this amount as I believe that if properly compensable, it would have been recovered from the fund.

40 (b) $600 -- solid maple chest. I conclude that this item should be allowed. Mr. Cowan accepted less so as to simply finalize matters with the fund.

41 (c) $1,258 -- coins, medals, rings, watches, etc. I find that this sum is recoverable, even though some of the items belong to Mr. Cowan's son. Mr. Cowan was, or is, under obligation to reimburse his son.

42 (d) $1,086 -- extra moving and rental. This sum I hold to be recoverable. It covers the costs of the move from Lonsdale to Horseshoe Bay, where the Cowans settled more or less permanently, and for rental to that date.

43 (e) $1,047 -- stove, fridge, dishwasher. Mr. Cowan was not compensated for these items because no replacement actually took place. I think account should be taken of depreciation and award the Cowans under this head the sum of $800.

44 In summary, Mr. Cowan will recover:

(a) Cost of repair		$14,122
(b) Agreed losses		3,600
(c) Contested items		3,744

	Total:	$21,466

45 The plaintiffs will therefore have judgment as I have said. The case against the defendant district is dismissed.

46 Inasmuch as the plaintiffs have been kept out of their money since the date of the loss they will be entitled to prejudgment interest at prevailing rates from the date of the loss on the sums of the aforesaid.

47 The plaintiffs will be entitled to their costs of the action. The district will be entitled in turn to their costs against the plaintiffs. I can see no basis here for an order against the Dawsons to indemnify the plaintiffs for those costs.

Action allowed.

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