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Volume 8 | Number 19 Article 1

10-3-1997

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Recommended Citation
Harl, Neil (1997) "RES IPSA Loquitur For Animals on the Highway?," *Agricultural Law Digest*: Vol. 8 : No. 19 , Article 1.
Available at: http://lib.dr.iastate.edu/aglawdigest/vol8/iss19/1

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Agricultural Law Digest

An Agricultural Law Press Publication | Volume 8, No. 19 | October 3, 1997
Editor: Robert P. Achenbach, Jr. | Contributing Editor Dr. Neil E. Harl, Esq. | ISSN 1051-2780

RES IPSA LOQUITUR FOR ANIMALS ON THE HIGHWAY?

— by Neil E. Harl*

A continuing liability problem since the advent of motorized transportation early in this century for those raising livestock has been who bears responsibility for the damages caused when a vehicle strikes a farm or ranch animal on the highway.[1] The doctrine of negligence is, of course, central to determinations of liability.[2] However, in recent cases the question has been raised as to whether the doctrine of res ipsa loquitur may be applied to cases involving farm or ranch animals on the highway.[3] The answer to the question is of substantial importance to parties to livestock liability cases.

The Doctrine

The concept or doctrine[4] of res ipsa loquitur means, essentially, that the instrumentality or transaction "speaks for itself."[5] Thus, the facts and circumstances surrounding an accident causing injury or damage may be such as to raise a presumption, or at least permit an inference, of negligence on the part of the defendant.[6] In most jurisdictions,[7] if it is shown that the instrumentality causing the injury or damage in question was under the exclusive control or management of the defendant, the accident was not due to any voluntary action on the part of the plaintiff and it is shown that in the ordinary course of events the injury or damage would not have happened had due care been utilized, a presumption or inference is raised that, in the absence of an explanation by the defendant, the injury or damage was attributable to a failure to meet the requisite standard of care.[8] Stated differently, the event causing the injury or damage was probably the result of the defendant's negligence in the absence of credible evidence to the contrary.[9] If there is direct evidence of the precise cause of an event causing injury or damages, there may be no basis for invoking the doctrine of res ipsa loquitur.[10]

Should the Doctrine Apply to Livestock?

The question of whether the doctrine of res ipsa loquitur should apply to accidents involving farm or ranch animals on the highway has divided the courts.[11]

• In the 1995 case of *Fisel v. Wynns*,[12] the plaintiff's pickup truck struck a black cow standing on the roadway. The cow had strayed onto the county road through an open gate. After striking the cow, the plaintiff got out of her pickup and was struck by a vehicle approaching from the opposite direction.

At trial, there was evidence that the defendant's land was fenced but a gate was found open following the accident. Testimony indicated that the latch could only be manipulated by human hands. The defendant remembered using and closing the gate the preceding day. There had been no visitors after the gate was closed and latched, there was no showing that cattle had escaped on prior occasions and there was no testimony that there had been trespassers in the past.

The plaintiff argued that changing conditions have altered public policy since a 1973 case had been decided requiring a showing of at least negligence to establish liability against a livestock owner in such situations[13] under a state statute.[14]

The court in *Fisel v. Wynns*[15] reaffirmed its earlier belief[16] that the state legislature chose to require a showing of negligence and declined to ease the burden on the plaintiff on policy grounds.[17]

• In the same year, 1995, the Nebraska Supreme Court considered a similar case.[18] In the facts of *Roberts v. Weber & Sons, Co.*,[19] a trucker hauling a semi-trailer load of salt popped over a railroad overpass and plowed into a herd of cattle on the highway, striking four of the animals.

Evidence at trial indicated the animals had been confined in a feedyard which was fenced with two-inch pipe. The defendant's testimony was that the animals may have pressed up against a gate, breaking a hinge and allowing the cattle to escape. There was testimony that the fence was secure the day before the accident.

The trial court submitted the issue of res ipsa loquitur to the jury which returned a verdict in favor of the trucker for damages. The Nebraska Court of Appeal reversed, holding that the doctrine of res ipsa loquitur should not be applied to situations of animals on the highway which had escaped from a pen.[20]

The Nebraska Supreme Court said that it was an error on the part of the Court of Appeals to hold that the

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doctrine was inapplicable to all escaped livestock cases. Rather, the Supreme Court stated that whether the doctrine should be invoked should properly depend upon whether the requirements of the doctrine were met— (1) whether "the occurrence was one which would not, in the ordinary course of things, happen in the absence of negligence," (2) whether the instrumentality was under the exclusive control and management of the defendant and (3) whether there was an explanation by the defendant of how the animals came to be on the highway. The Nebraska Supreme Court stated that the first two conditions were met and the third was a question of fact for the jury and the jury did not believe the defendant's explanation. Therefore, the doctrine was properly invoked.

• In the latest case, also in Nebraska,[21] the doctrine of res ipsa loquitur was invoked with the jury returning a verdict for the plaintiff in excess of $1 million. The case involved a collision of a car with a steer that had apparently escaped from a pasture and wondered onto a state highway.

Conclusion

Aside from the fact that leadership in the application of the doctrine of res ipsa loquitur has come from Nebraska, an important livestock-producing state, the broader issue is the range of consequences expected to flow from the Nebraska decision if followed in other jurisdictions. Certainly it will affect— (1) the level of insurance carried by livestock farmers and ranchers; (2) the cost of such coverage, in all likelihood; (3) the attention given to fences and gates, in terms of construction, maintenance and monitoring; and (4) the preparation of cases for trial.

FOOTNOTES

[1] See generally 2 Harl, *Agricultural Law,* Ch. 3 (1997); McEowen and Harl, *Principles of Agricultural Law* § 11.09[1] (1997).

[2] See, e.g., Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277 (1926). See also, Prosser, *Law of Torts* § 39 (4th ed. 1971); Prosser, *Selected Topics on the Law of Torts*, Ch. 6 (1953).

[3] E.g., Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995); Fisel v. Wynns, 667 So. 2d 761 (Fla. 1995).

[4] See Prosser, *Law of Torts* § 39 (4th ed. 1971), for a discussion of whether the concept is, indeed, a "doctrine."

[5] See, e.g., Blue Stem Feed Yards, Inc. v. Craft, 191 Kan. 605, 383 P.2d 540 (1963).

[6] E.g., Roberts v. Weber & Sons Co., 248 Neb. 243, 533 N.W.2d 664 (1995).

[7] Michigan, Pennsylvania and South Carolina do not allow a res ipsa loquitur pleading. See 57B *Am Jur. 2d* § 1819 (1989).

[8] E.g., Sweeney v. Erving, 228 U.S. 233 (1913).

[9] E.g., Barger v. Chelpon, 60 S.D. 66, 243 N.W. 97 (1932).

[10] Gray v. Baltimore & Ohio R. Co., 24 F.2d 671 (7th Cir. 1928).

[11] See n. 3 *supra*.

[12] 667 So. 2d 761 (Fla. 1995).

[13] See Selby v. Bullock, 287 So.2d 18 (Fla. 1973).

[14] Fla. Stat. §§ 588.14, 588.15 (1971).

[15] See n. 12 *supra*.

[16] See Selby v. Bullock, n. 13 *supra*.

[17] Fisel v. Wynns, n. 12 *supra*.

[18] Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995).

[19] *Id*.

[20] See 248 Neb. 243, 246, 533 N.W.2d 664, 667 (1995).

[21] Landkamer v. Sherbeck, No. 3528-63-97 (Dist. Ct. for Custer County, Neb., 1997).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ANIMALS

HORSES. The plaintiff was a riding student of one defendant and was injured while riding a horse owned by the other defendant. The plaintiff alleged that the defendants were negligent in allowing the plaintiff to ride their horse in an unknown area with hunter-jumper tack instead of dressage tack. During a maneuver, the horse bucked and threw the plaintiff and then kicked the plaintiff. The defendants argued that the plaintiff assumed the risk of being thrown and kicked. The court found that, before the plaintiff got on the horse, the plaintiff was aware of the wrong tack being used and still rode the horse. The court also found that the plaintiff was an experienced rider, well aware of the risks involved in riding horses. The court held that the plaintiff had assumed the risk of the injury suffered and dismissed the suit. **Young v. Brandt, 485 S.E.2d 519 (Ga. Ct. App. 1997)**.

BANKRUPTCY

FEDERAL TAXATION-*ALM* § 13.03[7].*

AUTOMATIC STAY. The debtor filed for Chapter 13 and served notice of the filing on the IRS. After notice was served, the IRS served a levy on the debtor's bank account. The debtor informed the IRS about the bankruptcy filing but the IRS refused to return the levied funds. As a result of the levy, the debtor was unable to make mortgage payments and incurred legal fees charged by the mortgagee and legal fees to defend against the mortgagee and to bring the current suit