An Agricultural Law Research Article

Res Ipsa Loquitor and the Great Cattle Caper: Inferred Negligence in Escaped Livestock-Automobile Collisions after *Roberts v. Weber & Sons, Co. 248 Neb. 243, 533 N.W.2d 664 (1995)*

by

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Originally published in NEBRASKA LAW REVIEW
75 NEB. L. REV. 308 (1996)

Note

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I. INTRODUCTION

The state of Nebraska has recently joined a number of other states[1] in holding that the doctrine of inferred negligence, res ipsa loquitur, is applicable to cases where livestock escape from their enclosure onto the public roads and collide with automobiles.[2] While the vast majority of automobile-animal collisions in Nebraska involve deer,[3] there are annually more than 350 collisions between cattle and automobiles.[4] In 1990-1994, a total of 1,852 collisions between cattle and cars were reported.[5] Four resulted in human fatalities.[6] The minimum cumulative total of damages was $926,000.00, but this number is clearly low.[7] The real costs of such collisions will never be known.

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1. *See, e.g.*, Mercer v. Byrons, 200 F.2d 284 (1st Cir. 1952)(applying Massachusetts law); O'Conner v. Black, 326 P.2d 376 (Idaho 1958); Moss v. Bonne Terre Farms & Cattle Co., 10 S.W.2d 338 (Mo. App. 1928); Mitchell v. Ridgway, 421 P.2d 778 (N.M. 1966); Loeffler v. Rogers, 523 N.Y.S.2d 660 (1988); Watzig v. Tobin, 642 P.2d 651 (Or. 1982); Scanlan v. Smith, 404 P.2d 776 (Wash. 1965). *See generally* James L. Rigelhaupt, Jr., Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431, 466-70 (1986)(reviewing case law which allows res ipsa instruction in car-cattle collision cases).
2. Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995).
3. There are approximately 3000 deer-car collisions annually. Telephone Interview with Sam Prieb, Analyst, Nebraska Department of Roads, Highway Safety Division (October 10, 1995).
4. Letter from Sam Prieb, Analyst, Nebraska Department of Roads, Highway Safety Division (October 20, 1995) (on file at UNL Law Library). Reportable collisions are those which give rise to $500.00 or more in property damages—to either the automobile, the animal, or other property involved. Obviously, the numbers are higher than reported here, including accidents where damage amounted to less than $500.00, where the authorities never knew about the accident, or where the animal was a horse, hog, or other domestic animal rather than a cow. *Id.*
5. *Id.*
6. In addition, 271 injuries were reported with those accidents. *Id.*
7. This total is the number of accidents multiplied by $500.00, the minimum amount of damage per accident. The amount of actual damages, when considering the actual amount of property damage and, in particular, the loss of life, is *much* higher.

The holding in *Roberts v. Weber & Sons, Co.* increases the likelihood of collecting damages from such collisions. In a state with approximately 6,100,000 cattle,[8] almost 10,000 miles[9] of state highways, and 63,000 miles[10] of rural roads, the invocation of res ipsa loquitur may have significant results for those livestock owners unlucky enough to have their animals' eyes glow in the headlights of oncoming traffic. Moreover, *Roberts* was the culmination of a line of cases in which the Nebraska Supreme Court was forced to deal with an issue it apparently wanted to avoid.

A. Statement of Purpose

This Note will review the doctrine of res ipsa loquitur in general and then trace the development of Nebraska law concerning res ipsa. Then, it will recount the case law involving escaped livestock and automobile collisions which forms the legal background for the decision in *Roberts v. Weber & Sons, Co.*[11] Next, this Note will analyze the decision in *Roberts* in the Nebraska Court of Appeals and the Nebraska Supreme Court. Finally, this Note will offer some insight into the scope of the decision in *Roberts* for attorneys and litigants similarly situated to the plaintiffs and defendants in *Roberts*.

II. BACKGROUND

A. An Overview of Res Ipsa Loquitur: "The Thing Speaks For Itself"

The success of any negligence action hinges on what the parties can prove, or deny, at trial.[12] The burden of proof in negligence actions rests appropriately with the plaintiff. But what if the evidence, or lack thereof, does not conclusively establish the defendant's negligence?

The landmark case of *Byrne v. Boadle*,[13] a favorite of tort instructors, first established the doctrine of res ipsa loquitur in the common law. Res ipsa loquitur, or "the thing speaks for itself," was coined by Baron Pollack during the course of the trial. The court concluded that "[t]here are certain cases [in] which it may be said res ipsa loquitur."[14] In *Boadle,* the plaintiff was injured by a barrel which fell out of a win-

8. NEBRASKA AGRIC. STATISTICS SERV., NEB. DEPT. OF AGRIC., 1993-94 NEB. AGRIC. STATISTICS 88 (Oct. 1994).
9. NEBRASKA DEPT. OF ROADS, 1995 SELECTED TRANSP. STATISTICS FOR 1994 30 (July).
10. *Id.*
11. 248 Neb. 243, 533 N.W.2d 664 (1995).
12. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 246 (5th ed. 1990).
13. 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863).
14. *Id.*

dow in the defendant's business establishment.[15] The court found for the plaintiff, despite the fact that there was no specific evidence of the defendant's negligence. Simply put, the court decided that a barrel does not fall out of a window in the absence of negligence, and since the defendant was in exclusive control of the barrel, negligence could be inferred.[16]

Chief Justice Erle, in *Scott v. London & St. Katherine Docks Co.*,[17] most famously pronounced the doctrine as,

> where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.[18]

More recently, Dean Prosser stated the elements of res ipsa loquitur as,

> (1) The event must be of a kind which ordinarily does not occur in the absence of negligence;
>
> (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.[19]

The *Restatement (Second) of Torts* takes a somewhat broader view of the doctrine:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
>
> (2) It is the function of the court to determine whether the inference may be reasonably drawn by the jury, or whether it must be necessarily drawn.
>
> (3) It is the function of the jury to determine whether the inference is to be drawn in a case where different conclusions may be reasonably reached.[20]

The doctrine of res ipsa loquitur is a tool which allows fact finders to infer the defendant's negligence. The other elements of negligence—duty, causation, and damages—must be proven, of course. But res ipsa allows the jury to consider whether the defendant was negligent based on circumstantial evidence when specific evidence of

15. *Id.*
16. *Id.*
17. 3 H. & C. 596, 159 Eng. Rep. 665 (1865).
18. *Id.*
19. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 244 (5th ed. 1984).
20. RESTATEMENT (SECOND) OF TORTS § 328.

negligence is absent.[21] The doctrine of res ipsa usually does not necessitate a finding of negligence by the jury,[22] a point which led to much of the confusion analyzed later in this Note. Prosser notes that a minority of jurisdictions have held that res ipsa shifts the burden of proof to the defendant, or creates a presumption of negligence on the part of the defendant which must be rebutted.[23] The question of whether res ipsa invokes a presumption, instead of a simple inference of negligence, clouds the decisions of the court of appeals and supreme court in *Roberts*. However, as one court pointed out, the doctrine is not "particularly mysterious" and perhaps the Latin has served to perplex rather than to engender understanding.[24] Nevertheless, the doctrine has been a subject of "considerable" confusion for the courts.[25]

B. Res Ipsa Loquitur in Nebraska

One of the early Nebraska cases to affirm the doctrine of res ipsa was *Miratsky v. Beseda*.[26] The elements of res ipsa were defined by the court:

> Where the thing which caused the injury complained of is shown to be [1] under the management of defendant or his servants and [2] the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, [3] in the absence of explanation by defendant, that the accident arose from want of care.[27]

In *Miratsky*, the plaintiffs alleged negligence, supported only by the doctrine of res ipsa loquitur, for injuries suffered when the bleachers erected by the defendant collapsed while the plaintiffs were seated on them.[28] The defendant corporation, Katolicka Sokol, erected the bleachers for a gymnastics exhibition.[29] Katolicka sponsored the event and charged admission, but the exhibition was held on the grounds belonging to defendant Beseda.[30] The court held the facts sufficient to invoke res ipsa.[31] The bleachers were under the management and control of the defendant Katolicka Sokol, and the collapse of the bleachers by itself affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a lack of

21. KEETON ET AL., *supra* note 19, at 257.
22. *Id.* at 258.
23. *Id.* at 250-60.
24. Watzig v. Tobin, 642 P.2d 651, 653 (Or. 1982).
25. KEETON ET AL., *supra* note 19, at 244.
26. 139 Neb. 229, 297 N.W. 94 (1941).
27. *Id.* at 231, 297 N.W. at 95. Note that this does not differ significantly from the definition pronounced by Chief Justice Erle in Scott v. Lundon & St. Katherine Docks Co., 3 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863).
28. Miratsky v. Beseda, 139 Neb. 229, 230, 297 N.W. 94, 95 (1941).
29. *Id.*
30. *Id.*
31. *Id.* at 231, 297 N.W. at 95.

due care.[32] The court remanded for trial the case against Katolicka but upheld the dismissal against Beseda because he did not have the necessary control and management for res ipsa to be invoked.[33]

The court in *McCall v. St. Joseph's Hospital*,[34] a medical negligence case, stated the rule of res ipsa as "the accident and the resulting injuries are such that in the ordinary course of things the accident does not happen if those who have the exclusive management or control of the instrumentality or agency, proximately causing such accident, or injures, use proper care."[35] The court quoted the *Maratsky* elements of res ipsa.[36]

Stated plainly, the doctrine of res ipsa allows an inference of negligence when proof of such is absent, but the "event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent."[37] Res ipsa is not a matter of substantive law, but rather, as a form of circumstantial evidence, it is a procedural matter.[38] As a procedural matter the res ipsa instruction allows the jury to infer negligence, but does not compel it.[39] The jury is free is find negligence or not. Res ipsa circumvents the usual rule that the mere occurrence of an accident does not mean that someone was negligent. Moreover, the plaintiff is not required to eliminate with certainty all other possible causes of the accident.[40]

The doctrine of res ipsa loquitur has been explicitly applied in a variety of different factual circumstances in Nebraska, for example, mice in Coke bottles,[41] falling bar stools,[42] medical negligence,[43] malfunctioning Ferris wheels,[44] rolling cars,[45] backed-up sewers,[46] malfunctioning automatic doors,[47] falling light bulbs,[48] and natural gas explosions.[49]

32. *Id.* at 232, 297 N.W. at 96.
33. *Id.*
34. 184 Neb. 1, 3-4, 165 N.W.2d. 85, 88 (1969).
35. *Id.* at 3-4 n.35, 165 N.W.2d. at 88 n.35.
36. *Id.*
37. Brown v. Scrivner, Inc., 241 Neb. 286, 289, 488 N.W.2d 17, 18 (1992). *See* Anderson v. Service Merchandise Co., 240 Neb. 873, 880, 485 N.W.2d 170, 175 (1992); KEETON ET AL., *supra* note 19, at 244.
38. KEETON ET AL., *supra* note 19, at 244 n.20.
39. *Id.* at 258.
40. Anderson v. Service Merchandise Co., 240 Neb. 873, 880, 485 N.W.2d 170, 176 (1992).
41. Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961).
42. Nownes v. Hillside Lounge, Inc., 179 Neb. 157, 137 N.W.2d 361 (1965).
43. McCall v. St. Joseph's Hosp., 184 Neb. 1, 165 N.W.2d 85 (1969).
44. Fynbu v. Strain, 190 Neb. 719, 211 N.W.2d 917 (1973).
45. Beatty v. Davis, 224 Neb. 663, 400 N.W.2d 850 (1987).
46. Maly v. Arbor Manor, Inc., 225 Neb. 276, 404 N.W.2d 419 (1987).
47. Brown v. Scrivner, Inc., 241 Neb. 286, 488 N.W.2d 17 (1992).
48. Anderson v. Service Merchandise Co., 240 Neb. 873, 485 N.W.2d 170 (1992).
49. Harvey v. Metropolitan Utils., 246 Neb. 780, 523 N.W.2d 372 (1994).

C. Negligence in Escaped Animal Cases in Nebraska

Despite the predominantly rural nature of Nebraska, relatively few cases involving escaped animals colliding with traffic have reached the appellate courts.[50] While the number of cases is low, the numbers of collisions certainly is not.[51] In light of *Roberts*, the number of cases in which litigation follows the highway slaughter of an unfortunate steer may increase.[52]

1. Traill v. Ostermeier: *Automobiles Hit the Highways (and then Some Hogs)*

The first escaped livestock-automobile collision case to reach the Nebraska Supreme Court, *Traill v. Ostermeier*,[53] involved a collision between a car driven by the plaintiff's son and three hogs owned by the defendant. The suit was brought in Hall County where a jury found for the plaintiff in the amount of $395.00.[54] The defendant appealed to the supreme court.[55] The plaintiff alleged that the defendant knew that his hogs were on the highway and failed to take reasonable care in restraining them and rounding them up.[56] The defendant argued that it was not unlawful for livestock to be on the public highway and that the owner of animals straying onto the highway should not be liable for the collision because such a collision is not one which could be reasonably anticipated.[57]

The supreme court rejected this antiquated argument and found that the defendant was negligent in not more effectively fencing in his hogs and allowing them onto the highway.[58] The defendant had removed three strands of barbed wire from the hog fence in order to facilitate the passage of his cows over the fence.[59] As a result, a number of hogs escaped, and the defendant rounded up all but three.[60] These

50. Roberts v. Weber & Sons Co., 248 Neb. 243, 533 N.W.2d 664 (1995); Dizco, Inc. v. Kenton, 210 Neb. 141, 313 N.W.2d 268 (1981); Countryman v. Ronspies, 180 Neb. 76, 141 N.W.2d 425 (1966); Traill v. Ostermeier, 140 Neb. 432, 300 N.W. 375 (1941); Woods *ex rel.* Mitchell v. Shallenberger, 4 NCA 605, 93 NCA No. 34 (1993)(not designated for publication in permanent reporter). *See also* Nuclear Corp. of Am. v. Lang, 337 F. Supp. 914 (D. Neb. 1972), *aff'd*, 480 F.2d 990 (8th Cir. 1973) (applying Nebraska law to a case in which a truck collided with heifer).

51. *See* Prieb letter, *supra* note 4.

52. The approval of res ipsa loquitur for collisions with escaped livestock may well increase the chances of success for plaintiffs, insurance companies, and the plaintiff's bar in cases where collisions cause extensive personal or property damage.

53. 140 Neb. 432, 300 N.W. 375 (1941).

54. *Id.* at 435, 300 N.W. at 376.

55. *Id.*

56. *Id.* at 433-34, 300 N.W. at 376.

57. *Id.* at 437, 300 N.W. at 377.

58. *Id.* at 440-41, 300 N.W. at 378-79.

59. *Id.* at 437-38, 300 N.W. at 377.

60. *Id.*

three were the animals with which the plaintiff collided. The 1941 decision rejected the defendant's argument about the likelihood of autos and animals colliding on the public highway, stating,

> In these days of general travel by motor vehicle, we see no room for saying, as a matter of law, that the presence of a hog at large upon the highway does not suggest danger of collision with traveling vehicles. . . . As a matter of public policy (those who allow their animals to run on the highway) must be deemed with reference thereto to have anticipated the natural consequences of the negligence they permit themselves to commit, and necessarily assume full responsibility for their lack of due care.[61]

The court affirmed for the plaintiff. In doing so, it pushed the duty of domestic animal owners to highway travellers into the age of automobiles.

2. Countryman v. Ronspies: *Cars and Cows Collide in the Courts*

In *Countryman v. Ronspies*,[62] the supreme court affirmed a jury decision against the defendant-livestock owner in a cow-automobile collision case. The defendant appealed, alleging that the trial court erred in failing to direct a verdict.[63] The supreme court held that where reasonable minds could differ as to whether or not the acts of negligence charged were proved the case had to be submitted to the jury.[64]

In *Countryman*, the evidence was controverted. The defendants disputed the testimony offered by the plaintiff and by disinterested witnesses.[65] The defendants flatly denied that they had any knowledge of their cattle ever being out of the fence.[66] However, a passerby claimed to have stopped at the defendants' residence to inform them that roan cattle, the color of the defendant's animals, had been outside the fence the morning of the accident.[67] The defendant also contradicted the testimony of another witness who claimed to have hit one of the defendant's cattle several years prior to the accident at bar.[68] The court concluded, speaking indirectly to the issue of this Note, that "(a)n inference may be drawn, largely from testimony of disinterested witnesses, that defendant's cattle were out; that he knew, or should have known about it; and that he made no effort to round them up and

61. *Id.* at 438-39, 300 N.W. at 378.
62. 180 Neb. 76, 141 N.W.2d 425 (1966).
63. *Id.* at 77, 141 N.W.2d at 427.
64. *Id.* at 78, 141 N.W.2d at 427.
65. *Id.* at 78-81, 141 N.W.2d at 427-30.
66. *Id.* at 79, 141 N.W.2d at 428.
67. *Id.*
68. *Id.* at 80-81, 141 N.W.2d at 428-29.

confine them."[69] Thus, the trial court did not error in failing to direct a verdict.

3. Dizco, Inc. v. Kenton*: Cattle Owners Owe Ordinary Care*

In *Dizco, Inc. v. Kenton*[70] the court affirmed the rule established in *Traill* that owners of domestic animals owe a duty of ordinary care to highway travellers.[71] The facts of *Dizco* are similar to the facts of *Roberts* (and all of the animal/automobile collision cases). A tractor-trailer collided with a horse that had escaped from a nearby pasture late at night.[72] The plaintiff appealed the decision of the lower court, which had rejected the plaintiff's proposed jury instruction. The proposed instruction stated that a livestock owner has a "duty to exercise high care to confine (livestock) to prevent them from being unattended upon a public arterial highway . . . . It is her duty to exercise a high degree of care to round them up and confine them (if she knows or in the exercise of reasonable care, should know that the animals are on a public highway)."[73] The lower court refused these instructions and instead offered the following instructions (which the supreme court adopted as a rule of law),

> The owner of domestic animals has the duty to exercise ordinary care to confine his livestock to prevent them from being unattended upon the public highway. The principal test is whether or not he should reasonably have foreseen that any of his livestock would be upon the highway and the occurrence of such an accident; and if the owner knows, or in the exercise of ordinary diligence, should have known that any of this livestock were unattended upon the highway, it is his duty to exercise ordinary care to round them up and confine them.[74]

The ordinary care standard adopted by the court has been consistently applied by the Nebraska courts in escaped livestock-automobile collision cases.[75]

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69. *Id.* at 80, 141 N.W.2d at 428. There was no res ipsa issue in this case, but the language of the court clearly implies that the fact finder could infer from the evidence that the defendant failed to use due care in confining or rounding up his cattle. That is the essence of res ipsa; although here there was evidence from witnesses as to the defendant's specific negligence, whereas in a res ipsa situation the record is typically devoid of such evidence.

70. 210 Neb. 141, 313 N.W.2d 268 (1981).

71. *But see* Neb. Rev. Stat. § 54-401 (1989). Strict liability is imposed on livestock owners whose animals enter public streets, highways and right-of-ways. Owners of such livestock are liable for all damages not a result of the negligent or willful conduct of the person claiming the damages. *Id.*

72. Dizco, Inc. v. Kenton, 210 Neb. 141, 143, 313 N.W.2d 268, 270 (1981).

73. *Id.* at 142, 313 N.W.2d at 270.

74. *Id.*

75. *See* Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995); Woods *ex rel.* Mitchell v. Shallenberger, 4 NCA 605, 93 NCA No. 34 (1993)(not designated for publication in permanent reporter).

4. Nuclear Corp. of America v. Lang: *Nebraska Law in the Federal Courts*

The facts of *Nuclear Corp. of America v. Lang*[76] are strikingly similar to the facts of *Roberts*. The plaintiff was driving his truck, a tractor-trailer rig, on a rural section of U.S. Highway 81 near Norfolk.[77] At approximately 12:50 a.m., a heifer owned by the defendant allegedly ran in front of the rig, which was unable to avoid colliding with the animal despite applying the brakes.[78] The animal apparently became trapped underneath the front right fender of the rig, causing the tractor and its load to tip over and come to rest in the defendant's feedlot.[79] The driver was killed in the accident and the rig and its cargo were destroyed.[80] The plaintiff alleged negligence on the part of the defendant in allowing the cow to escape and wander freely upon the highway.[81]

The defendant alleged that the plaintiff's driver was the sole proximate cause of the accident, causing the truck to crash into the feedlot and kill the heifer in question.[82] The relevant evidence, including tire marks and cattle hair and hide on both the highway and on the fender of the truck, led the district court, sitting without a jury, to conclude that the heifer had indeed been on the highway when the collision occurred.[83] The evidence that the animal belonged to the defendant was uncontroverted.[84]

The Federal District Court for Nebraska found that the plaintiff's evidence was sufficient to create a strong presumption or inference of negligence on the part of the defendant.[85] The fact that the cow was on the highway, the evidence that a gate leading to the highway had been open at the time of the accident, that animal tracks were found leading out of the gate, and testimony from one of the plaintiff's employees that the fence was in poor repair led the court to invoke res ipsa and find for the plaintiff.[86] The court found this evidence created a strong presumption, "virtually compell[ing]" an inference of negligence.[87]

The Eighth Circuit, while affirming the lower court, explained a pitfall in the doctrine of res ipsa which the lower court fell victim to in

76. 337 F. Supp. 914 (D. Neb. 1972), *aff'd*, 480 F.2d 990 (8th Cir. 1973).
77. *Id.* at 915.
78. *Id.*
79. *Id.* at 916.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 917.
84. *Id.*
85. *Id.* at 919.
86. *Id.* at 920.
87. *Id.*

providing an alternative holding of negligence in addition to the res ipsa finding.[88] The district court separated the res ipsa-type of circumstantial evidence from the ordinary circumstantial evidence used to prove specific acts of negligence.[89] The Eighth Circuit held that these two "types" of circumstantial evidence should be used together; evidence introduced to prove specific acts of negligence does not deprive the plaintiff of res ipsa loquitur.[90]

The court held that there was no question that the accident was caused by an instrumentality within the exclusive control of the defendant or that the plaintiff had not contributed to the accident.[91] The only question was whether this was the kind of accident which does not happen in the absence of negligence.[92] And, if so, do the logical inferences created by the facts tend to show that the only reasonable conclusion is that the accident occurred because of the defendant's negligence.[93] The Eighth Circuit found that the lower court invoked the res ipsa doctrine to conclude that cattle do not normally escape from their pens in the absence of negligence.[94] In reaching this conclusion, the court noted that the district court had interpreted Nebraska law to say that livestock owners had a high duty of care towards highway travellers, thus further compelling an inference of negligence.[95]

88. Nuclear Corp. of Am. v. Lang, 480 F.2d 990, 992 (8th Cir. 1973). The district court held that the defendant was negligent in leaving the livestock unattended for twelve hours and for his failure to securely latch the gate which led to the highway. Nuclear Corp. of Am. v. Lang, 377 F. Supp. 914, 919 (D. Neb. 1972).

89. Nuclear Corp. of Am. v. King, 480 F.2d 990, 992 (8th Cir. 1973).

90. *Id.* This conclusion has been rejected by the Nebraska courts. The allegation of specific acts of negligence cannot be made in the alternative when using the res ipsa doctrine, although the plaintiff does not lose the benefits of the doctrine by introducing evidence of specific negligence that does not establish the precise cause of the injury. *See* Beatty v. Davis, 224 Neb. 663, 400 N.W.2d 850 (1987); McVaney v. Baird, 237 Neb. 451, 466 N.W.2d 499 (1981); 1 STUART M. SPEISER, THE NEGLIGENCE CASE, RES IPSA LOQUITUR § 6:47 (1973); Frederic Kauffman, *Res Ipsa Loquitur—An Analysis of Its Application and Procedural Effects in Nebraska*, 41 NEB. L. REV. 747 (1962).

91. Nuclear Corp. of Am. v. Lang, 480 F.2d 990, 993 (1973).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* The district court interpreted *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W. 375 (1941), as dictating a high degree of care, as opposed to an ordinary care standard as later clarified by the court in *Dizco, Inc. v. Kenton*, 210 Neb. 141, 313 N.W.2d 268 (1981). This misinterpretation compelled the Nebraska Court of Appeals to reject the holding in *Lang* as unpersuasive in the two subsequent car-cow collisions cases. *See* Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995); Woods *ex rel.* Mitchell v. Shallenberger, 4 NCA 605, 93 NCA No. 34 (Neb. App. 1993) (not designated for publication in permanent reporter).

III. ANALYSIS: TWO STRIKES AND YOU'RE OUT: THE COURT OF APPEALS, THE SUPREME COURT, *WOODS* AND *ROBERTS*

A. *Woods ex rel. Mitchell v. Shallenberger*: The Court of Appeals Takes Strike One

In 1993 the Nebraska Court of Appeals first heard a case in which an escaped cow collided with a automobile.[96] The fact pattern of *Woods* is by now familiar to both the reader and author of this Note.

The plaintiffs, Carolyn Mitchell and her son, Bradley Woods, were driving their vehicle on a country road at approximately 8:30 p.m. on April 9, 1989 in Otoe County when they collided with a calf owned by the defendant.[97] The plaintiff testified that she travelled this road frequently and often saw cattle outside the fence, reportedly dark-red and similar in appearance to the defendant's breed of cattle.[98] The cattle were kept in a dry lot surrounded by two fences, one electric and one composed of board and barbed wire.[99] The electric fence was two strands of charged wire, approximately 18 inches apart.[100] The bottom wire was approximately two feet off the ground.[101] The second fence, made of board, ranged from four to seven feet in height.[102] Sections were also made up of five-strand barbed wire fencing.[103] The defendant Joy Shallenberger checked the electric charge on the fence daily and visually inspected the second fence routinely; he denied that the cattle had ever been outside of the fence.[104] The co-defendant Don Shallenberger, who owned cattle which were kept with cattle belonging to his father, was also responsible for ensuring the cattle were properly cared for and confined.[105] The testimony of other witnesses, including a rural mail carrier and the plaintiff's daughter, son-in-law, and another couple living near the defendant's home, indicated that the defendant's cattle had previously been outside the fence.[106] The defendant testified that after the collision, he had checked the charge on the electric fence and found it to be on, and further examined the fencing and could not determine how the calf that the plaintiff hit escaped.[107]

96. Woods *ex rel.* Mitchell v. Shallenberger, 4 NCA 605, 93 NCA No. 34 (1993) (not designated for publication in permanent reporter).
97. *Id.* at 607.
98. *Id.* at 607-08.
99. *Id.* at 607.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 608.
105. *Id.*
106. *Id.*
107. *Id.* at 607.

The plaintiff filed suit in the District Court for Otoe County against Joy Shallenberger and his son Don Shallenberger.[108] The plaintiff's initial petition both alleged specific acts of negligence and invoked the doctrine of res ipsa loquitur; it was later amended to include only the res ipsa claim.[109] The defendant Joy Shallenberger filed an answer denying negligence and alleging contributory negligence.[110] The lower court granted Joy Shallenberger's motion for summary judgement and denied the plaintiff's motion for a default judgement against Don Shallenberger, who failed to answer.[111] The plaintiff appealed, alleging as error the trial court's granting of the motion for summary judgement and the failure to apply the doctrine of res ipsa loquitur.[112]

The court of appeals held that because there was no question as to whether the calf, the cause of the accident, was an instrumentality in the exclusive control of the defendant, the only question "be[came] whether the accident [wa]s of a kind that ordinarily does not occur in the absence of a defendant's negligence."[113] Quoting *McCall v. St. Joseph's Hospital*,[114] the court held that three situations may give rise to an inference of negligence and sustain an action for res ipsa,

> (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects . . . in [a patient's] body . . . ; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.[115]

The court held that it was "clear" that the first and third elements were inapplicable, and determined that the second element was the only one appropriate for examination.[116] This question was asked by the court: whether "the general experience and observation of mankind teaches that cows do not escape from a fenced-in field and appear on a highway without negligence?"[117]

Distinguishing *Lang*, the court cited *Traill*, *Countryman*, and *Dizco* for guidance on this issue of first impression.[118] The court con-

108. *Id.* at 606.
109. *Id.* at 608.
110. *Id.* The issue of contributory negligence did not reach the court of appeals. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 611.
114. 184 Neb. 1, 165 N.W.2d 85 (1969).
115. Woods *ex rel.* Mitchell v. Shallenberger, 4 NCA 605, 611, 93 NCA No. 34 (1993) (not designated for publication in permanent reporter).
116. *Id.* at 611.
117. *Id.*
118. *Id.* at 612-13. The court held that the Eighth Circuit was not binding authority; moreover, the Nebraska Supreme Court's decision in *Dizco* firmly rejected a high standard of care for livestock owners to highway travellers. *Id.* Going a virtually inexplicable step further, the Nebraska Court of Appeals indicated that the decision in *Lang* was inapplicable because, based on the Nebraska Supreme Court

cluded that res ipsa loquitur was inapplicable as a matter of law when an animal escapes from a lot or an enclosure because it is not such a departure from the ordinary course of events as to necessarily raise an inference of negligence.[119]

The *Woods* decision, not approved for publication in the permanent law reports and thus of limited precedential value, is not so limited as a prediction of how the court will act in the future. In fact, the Nebraska Court of Appeals followed the *Woods* decision closely in the *Roberts* opinion. The *Woods* decision was denied on Petition for Review by the supreme court, despite the apparent misunderstanding of the court of appeals regarding the applicability of the res ipsa doctrine in escaped livestock cases. *Roberts* granted the court of appeals another opportunity to fully explain res ipsa in car-cow collisions cases, with facts seemingly identical to *Woods*. Yet, the slight difference in facts, which rests primarily on the type of fence material used, was enough for the supreme court to overrule the court of appeals and keep the holding of *Roberts* narrowly defined.

B. *Roberts v. Weber & Son, Co.*: Strike Two

1. Facts

The facts of *Roberts v. Weber & Sons, Co.*[120] are similar to other cases nationwide.[121] Thomas Roberts, an independent tractor-trailer operator doing business as Tom Roberts Trucking, was hauling a load of feed salt from Hutchinson, Kansas to Fort Dodge, Iowa on October 23, 1991.[122] Eastbound on U.S. Highway 6, the plaintiff had just passed over a railroad overpass and onto a flat stretch.[123] At approximately 1:41 a.m. on a moonlit night, the plaintiff encountered more than 100 cattle on the highway in front on his rig.[124] The cattle had escaped from the defendant's feedlot adjacent to the highway.[125] The feedlot accommodates approximately 2,000 cattle.[126] The defendant used two and five-eights inch oil pipe fencing set in concrete to contain the animals.[127]

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escaped livestock cases, "reasonable minds can differ on whether there was negligence when a domestic animal escapes its confines." *Id.*

119. *Id.* This holding demonstrates the court of appeals misunderstanding of the doctrine of res ipsa loquitur, which is treated below.
120. 248 Neb. 243, 533 N.W.2d 664 (1995).
121. *See supra* note 1, and accompanying text.
122. Brief for Appellant at 4, Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995)(No. A-93-353).
123. *Id.*
124. Brief for Appellee at 5, Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995)(No. A-93-353).
125. *Id.*
126. *Id.*
127. *Id.*

The plaintiff engaged the brakes of the semi but was unable to avoid colliding with four of the cattle.[128] All four were either killed immediately or had to be destroyed as a result of the collision.[129] The plaintiff sustained damages to his vehicle as well as "down time" damages.[130] The plaintiff did not suffer personal injury.[131]

The cause and method of the cattle's escape were the controverted facts throughout. The defendant claimed that the cattle by force of sheer weight[132] pushed against an unused gate and caused the top hinge to break and escaped by climbing over or through the gate.[133] The unused gate was apparently found leaning with a broken hinge the morning following the accident.[134] The functional gate to the pen was reported closed and no other breaches in the integrity of the fence were found.[135] The defendant further noted that the type of fence used was the most expensive and secure available, and that as large animals, cattle simply have the ability to break out of even the most secure confines.[136]

The plaintiff alleged that it was the defendant's negligence which was the cause of the escape.[137] Unable to prove the specific act of the defendant which fell below the standard of due care, the plaintiff relied on the doctrine of res ipsa loquitur to infer negligence.[138]

2. Trial Court

The plaintiff brought suit in the District Court for Saline County, alleging, in an amended petition, negligence on the part of Weber & Sons, Co. and praying for damages for property damage to his semi, towing charges, and down time.[139] Roberts alleged res ipsa loquitur as the sole basis for showing negligence on the part of Weber.[140] The jury returned a verdict for Roberts in the amount of $18,125.71 after the trial court submitted a res ipsa instruction to the jury.[141]

128. Brief for Appellant at 4, Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995) (No. A-93-353). Roberts did not, however, "lock up" his brakes to avoid the collision. *Id.*
129. *Id.*
130. Brief of Appellee at 5, Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995) (No. A-93-353).
131. *Id.*
132. The cattle weighed up to 1,100 pounds a piece. Brief for Appellee at 5, Roberts v. Weber & Sons, Co., 248 Neb. 243, 533 N.W.2d 664 (1995)(No. A-93-353).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 7.
137. Roberts v. Weber & Sons, Co., 248 Neb. 243, 245, 533 N.W.2d 664, 666-67 (1995).
138. *Id.*
139. *Id.* at 245, 533 N.W.2d at 666.
140. *Id.* at 245, 533 N.W.2d at 666-67.
141. *Id.*

3. Court of Appeals

Weber appealed to the court of appeals, which reversed the verdict and dismissed the case in a memorandum opinion.[142] The court of appeals held that res ipsa was inapplicable to cases where cattle escape onto the public highway and cause accidents based on the ordinary care standard of *Dizco*.[143] Attempting to speak to the first element of res ipsa, the court held that the appearance of escaped cows on the highway is not so unusual that it would ordinarily not occur in the absence of negligence.[144] Moreover, as a matter of law, the doctrine of res ipsa loquitur cannot be used to infer that an owner of livestock was negligent since reasonable minds could differ as to whether cattle can escape from their pens and appear on the highway in the absence of negligence.[145] Since the duty to highway travellers is only one of due care, and reasonable minds could differ about whether due care will always keep animals inside fences, the doctrine cannot be used, the court apparently reasoned.

4. Supreme Court

Roberts successfully appealed to the supreme court, which reversed the court of appeals decision.[146] Noting that the case presented an issue of first impression in Nebraska, the court examined the holding of the Eighth Circuit in *Lang*. The court distinguished the *Lang*

> The model jury instructions for res ipsa loquitur are as follows: BURDEN OF PROOF—RES IPSA LOQUITUR. The plaintiff in this case is relying on a legal doctrine known as res ipsa loquitur. In order for this doctrine to apply, the plaintiff has the burden of proving each of the following propositions by a preponderance of the evidence:
> 1. That the accident (occurrence) was proximately caused by an agent or instrumentality in the control of the defendant; and
> 2. That in the normal course of events the accident (occurrence) would not have occurred in the absence of negligence.
> If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the instrumentality while it was under his control. But if, on the other hand, you find that either of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of others in his management of the instrumentality, then you must find that the defendant was not negligent.
> If you find that the defendant was negligent, then you should determine the damages to plaintiff proximately caused by defendant's negligence and render your verdict for the plaintiff in the amount of such damages. If you find that the defendant was not negligent, then your verdict should be for the defendant. NEBRASKA S. CT. COMM. ON PATTERN JURY INSTRUCTIONS, NEBRASKA JURY INSTRUCTIONS 57 (1969).

142. Roberts v. Weber & Sons, Co., No. A-93-353, mem. op. (Neb. App. 1993) (on file with UNL Law Library).
143. *Id.* at 7.
144. *Id.*
145. *Id.*
146. Roberts v. Weber & Sons Co., 248 Neb. 243, 533 N.W.2d 664 (1995).

holding because the Eighth Circuit relied upon the higher standard of care.[147] The court also held the court of appeals holding, that because reasonable minds could differ as to whether a domestic animal could escape its confines without negligence, res ipsa is inapplicable, was in error.[148] The court dismissed this holding of the court of appeals in a single sentence.[149]

The court then attacked the alternative holding of the court of appeals that cattle and other domestic animals may escape from adequately constructed pens even without the presence of negligence and therefore their presence on public highways is not so unusual that it would ordinarily result in the absence of negligence.[150] In surprisingly short fashion, the court observed that while other jurisdictions are split on the issue, in Nebraska the rule is that res ipsa is applicable to escaped animal cases.[151] The court further emphasized that because the doctrine of res ipsa is a procedural doctrine, it "merely provides an evidentiary presumption which allows the jury to infer negligence on the part of the defendant."[152] Since res ipsa is applicable to "certain" escaped livestock cases (such as the present case), the facts of each case should dictate whether the issue of negligence should go to the jury under res ipsa.[153]

In analyzing *Roberts*, the court examined the facts under each element of res ipsa.[154] Under the first element, whether the thing which occurred would not happen in the absence of negligence, the court held that since the pens in this case were state-of-the-art, and were inspected daily, it is unlikely that the cattle could have escaped without negligence.[155] The court therefore held that the first element was satisfied. The court then noted that the second element, exclusive control of the instrumentality by the defendant, had been conceded by Weber.[156] Finally, the court held that the third element, absence of explanation by Weber as to how the cattle escaped, raised sufficiently a question of fact for the jury to decide: namely, whether the explanation by Weber of how the cattle escaped was credible.[157] Weber had provided an explanation of how the cattle escaped. However, the court held, since the jury found for the plaintiff, the jury obviously rejected

147. *Id.* at 248, 533 N.W.2d at 668.
148. *Id.*
149. *Id.*
150. *Id.* at 249, 533 N.W.2d at 668.
151. *Id.* at 249-50, 533 N.W.2d at 668-69.
152. *Id.*
153. *Id.*
154. *Id.* at 250-51, 533 N.W.2d at 669.
155. *Id.*
156. *Id.*
157. *Id.*

Weber's explanation.[158] Because the court cannot ordinarily interfere with a jury's verdict where the evidence is conflicting unless the verdict is clearly wrong, the court reversed the appeals court and affirmed the holding of the trial court.[159]

C. How the Court of Appeals Ran Over Res Ipsa

In its opinion, the Supreme Court did little more than conclude that the court of appeals was incorrect. However, an in-depth analysis reveals a misunderstanding in the court of appeals decision concerning the application of res ipsa. The analysis of the court of appeals decision in *Roberts* is by default an analysis of the decision in *Woods*. Although *Woods* is not mentioned in the *Roberts* decision, the court relied heavily on, if not explicitly copied, the *Woods* opinion.

The court of appeals' analysis in *Roberts* started with the proposition that negligence must be proven by the plaintiff and that res ipsa is an exception to the general rule that negligence cannot be presumed by the mere fact that an accident happened.[160] The problems of the opinion begin here. The supreme court, like most courts, tends to use the terms presumption and inference rather interchangeably.[161] However, the court seemed to mean that if the res ipsa doctrine applies it allows a permissible *inference* of negligence, which then becomes a question of fact for the jury, but generally res ipsa does not, in and of itself, mean that negligence is *presumed*.[162]

The court in its analysis assumed that the question to be answered was whether the accident was of a kind that ordinarily does not occur in the absence of a defendant's negligence.[163] The court used the escaped animals cases outlined in this Note as a "guidepost" for deter-

158. *Id.*
159. *Id.*
160. Roberts v. Weber & Sons Co., No. A-93-353 mem. op. at 3 (Neb. App. 1995)(on file with UNL Law Library).
161. An inference allows the jury to find negligence in the absence of evidence under res ipsa. A presumption compels such a finding, with the possibility of rebuttal by the plaintiff. Normally, the res ipsa doctrine does not (and should not) shift the burden of proof. *See id.* at 6; KEETON ET AL., *supra* note 19, at 244.
162. The court stated that "If res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder." Roberts v. Weber & Sons, Co., No. A-93-353 mem. op. at 4 (Neb. App. 1995) (on file with UNL Law Library). *See* Frederic Kauffman, *Res Ipsa Loquitur—An Analysis of Its Application and Procedural Effects in Nebraska*, 41 NEB. L. REV. 747, 756-58 (concluding that while the Nebraska courts tend to use the term presumption, what they actually mean is the doctrine raises the inference). *See also* W. PAGE KEETON, ET AL., PROSSER AND KEATON THE LAW OF TORTS § 39 at 244 (5th ed. 1984)(concluding that most jurisdictions adopt the inference of negligence meaning of res ipsa rather than an interpretation which acts to shift the burden of proof).
163. Roberts v. Weber & Sons, Co., No. A-93-353 mem. op. at 4 (Neb. App. 1995)(on file with UNL Law Library).

mining whether "the general experience and observation of mankind teaches that cows do not escape from fenced-in pens and appear on a highway without negligence."[164] The court of appeals concluded that *Dizco*, *Countryman*, and *Traill* established that reasonable minds could differ as to whether animals escape from fenced-in enclosures in the absence of negligence.[165] Thus, it was possible for a cow to escape its confines in the absence of negligence. The first element of res ipsa, which states that the thing alleged must be the kind of occurrence which does not happen in the absence of negligence, can never be met.[166] The requirements of res ipsa loquitur, therefore, can never be met and the doctrine is inapplicable as a matter of law.[167]

Here the court of appeals erred, though its syllogism appears sound. In fact, a better reading of the escaped animal cases suggests that when the evidence of negligence is conflicting, the question should be submitted to a fact-finder. It is an overreaching conclusion to find that the escaped animal cases establish, as a matter of law, that animals appear on the highway so regularly that negligence can never be inferred. Certainly non-negligent escapes happen, for example when a tree branch knocks down a fence, or a thunderstorm frightens herd animals into a stampede. However, the evidence as a whole must adduce such a finding. Evidence to the contrary lends weight to the proposition that the defendant was negligent in allowing the animals to escape. As the supreme court stated in *Countryman*,

> An inference may be drawn, largely from testimony of disinterested witnesses, that defendant's cattle were out; that he knew, or should have known about it; and that he made no effort to round them up and confine them. There was evidence from which reasonable minds might draw different conclusions as to whether or not defendant was negligent, ...[168]

While it would be equally overreaching to suggest that domestic animals never escape in the absence of negligence, the proper conclusion from the escaped animal cases is that the facts should drive any conclusions about negligence, whether within the confines of res ipsa or general negligence.

In *Roberts*, the cattle were in the most secure pens available.[169] The chances of their escape were much less than the hogs in *Traill* which had a suspect section of fence to escape through. Moreover, there was no evidence that the cattle were regularly outside the fence

164. *Id.* at 5.
165. *Id.* at 6-7.
166. *Id.* at 7.
167. *Id.*
168. Countryman v. Ronspies, 180 Neb. 76, 80, 141 N.W.2d 425, 428 (1966). The inference under res ipsa may be drawn based on the absence of evidence by the defendant and the exclusive control by the defendant of the instrumentality which caused the accident or occurrence.
169. Roberts v. Weber & Sons Co, 248 Neb. 243, 250, 533 N.W.2d 664, 669 (1995).

as in *Countryman*. Nor was there evidence of any acts of nature or other uncontrollable factors which prompted the cattle to leave their confines. These differences necessitate different findings about negligence.

In *Roberts*, the defendant offered evidence about how the cattle escaped; it is possible that the cattle escaped just as the defendant suggested. Evidence of this type should be considered by the trial judge to determine whether res ipsa applies. In this instance, the evidence provided by the defendant relates to the third element of res ipsa. Of course, even if the defendant was not negligent in allowing the cattle to escape because the animals broke open a gate, negligence could still be inferred. For example, the defendant's negligent act could have been using a gate in place of a permanent section of fence.[170] Nevertheless, where res ipsa applies, this evidence is to be accepted or rejected by a fact finder. At the trial level the jury found the defendant's explanation lacked credibility. Had the fencing been different, as in *Woods*, the conclusion might have been different.

In *Woods*, the fencing apparently was not as secure as the oil pipe fence set in concrete used in the Weber feedlots. A mix of electric, barbed wire, and board fence kept the cattle penned in *Woods*. This type of fence is much more likely to facilitate an escape, in the absence of negligence, than the oil pipe fence in *Roberts*. For example, a tree branch falling on the oil pipe fence would not likely have any effect on the integrity of the enclosure, but could on lesser material. The question of whether the escape was caused by negligence, however, could be inferred in either case. The res ipsa doctrine is a procedural matter; it does not compel a finding of negligence but merely indicates that the facts will allow such an inference. This basic assumption was impliedly abandoned by the court of appeals in both *Woods* and *Roberts* as indicated by the disallowance of the res ipsa instruction as a matter of law. Perhaps the court feared that by allowing res ipsa at all it would *require*, instead of *allow*, a finding of negligence. If so, this would demonstrate a basic misunderstanding of the concept.[171]

D. How the Supreme Court Tried to Rope Res Ipsa

If the Nebraska Court of Appeals reached an overbroad conclusion in both *Woods* and *Roberts*, then the Nebraska Supreme Court's re-

170. Or the negligent act could have been allowing the hinge to rust or weaken, putting too many cattle into one pen, putting the feed bins along the gate which was broken, and so on. When res ipsa applies, the specific act of negligence does not need to be alleged and, in fact, it cannot be. *See* sources cited *supra* note 90.

171. There is a belief, of course, that if a plaintiff can just reach the jury the plaintiff will prevail. Nevertheless, this cannot be the basis for excluding res ipsa as a matter of law. To do so would swallow the entire doctrine and render the jury system a sham.

sponse went in the opposite direction. The supreme court's holding in *Roberts* is so limited as to, potentially, be of almost no use to the lower courts which must address the question of whether to allow res ipsa in car-cow collision cases. The court's opinion concluded, "[t]he Court of Appeals erred in holding that res ipsa loquitur is inapplicable to all escaped livestock cases. There are certain factual situations, as evidenced by the case at bar, wherein livestock ordinarily would not escape onto a public highway in the absence of some negligence."[172] While this appears to respond to the generality of the court of appeals decision, it does little to ameliorate the confusion.

The length of the court's opinion is indicative of the depth of the analysis. The court relies on the facts of the case to avoid any serious analysis of the elements of res ipsa. The facts of *Roberts* reach the extreme. The fence was state-of-the-art, thus the cattle would not likely have escaped in the absence of negligence as the first res ipsa element instructs. The cattle were undoubtedly in the exclusive control of the defendant, satisfying element two. The evidence about how the cattle escaped appeared to the court to be controverted, so the question was properly put to the jury.

The oil pipe fence cemented into the ground certainly leaves room for an inference of negligence under the res ipsa doctrine. The court gives little guidance, however, for factual situations that are not cemented so solidly into the ground. For example, what of the facts of *Woods*, a case legally "on-all-fours" with *Roberts*.[173] The plaintiff in *Woods* petitioned the supreme court for review, but to no avail.[174] The type of fencing in *Woods* does not fall so neatly into the Court's analysis as the two and five-eights inch cemented oil pipe used at the Weber feedlot. Yet, because of cost, barbed wire or electrically charged fence is far more common than the oil pipe fence used in *Roberts*. The court's opinion offers little to a situation where, for example, there are cattle owned by several different people which escape from a single strand electrical fence pasture that appears unbroken after the accident. Or, where the barbed wire fence is forty years old, the cattle are young and frisky (and more likely to jump a fence), or a tree branch knocks down the fence on the opposite side of the pasture from the road. In these situations, the trial judge (and litigants) will still be left to their own discretion.

172. Roberts v. Weber & Sons, Co., 248 Neb. 243, 251, 533 N.W.2d 664, 669 (1995).
173. Sorry. That was just too obvious to pass up.
174. For a discussion of the reasons why the court refused to hear *Woods* see *supra* note 186 and accompanying text.

E. The Udder Story: Oregon Shows Where the Middle Ground Lies

A better analysis can be found in an Oregon Supreme Court case, *Watzig v. Tobin*.[175] The *Watzig* facts and procedural history are nearly identical to *Roberts*. Late at night, the plaintiff collided with an escaped cow and sued under the doctrine of res ipsa.[176] The defendants admitted to owning the cow, but asserted that the fence was adequate and all gates were shut prior to the escape and accident.[177] After a jury verdict in favor of the plaintiff, the Oregon Court of Appeals held that res ipsa was inapplicable because the doctrine is only proper where no conclusion can be drawn from the fact that a cow escaped other than from the owner's negligence.[178] Since a cow could escape from even the most secure confines, the court reasoned, the mere presence of the animal on the road was not enough to raise an inference of negligence.[179] This conclusion is identical to the Nebraska Court of Appeals decision in *Woods* and *Roberts*. It suggests the same basic misunderstanding of the doctrine. Res ipsa allows an inference of negligence, but does not mandate such a finding. Furthermore, the test is whether the negligence is the most likely cause of the accident, not necessarily the only cause.[180] The Oregon high court reversed the appeals court, asserting that,

> The conclusion which must be drawn to render the doctrine [of res ipsa] applicable is not whether a cow can escape such an enclosure, but rather whether a jury could reasonably find, under the evidence, that it is more probable than not that the escape of the cows would not normally occur in the absence of negligence and that the negligence was that of the defendants.[181]

The court stated that while res ipsa does not apply to every escaped cow case, the determination should be driven by the question of whether the jury could reasonably conclude, under the particular factual scenario, that the animals could not have escaped in the absence of negligence.[182] The court further noted that the test of when the plaintiff gets to the jury is whether there is a rational basis for concluding that it was more probable than not that the defendant's failure to exercise ordinary care was the cause of the accident.[183]

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175. 642 P.2d 651 (Or. 1982).
176. *Id.* at 653.
177. *Id.*
178. *Id.*
179. *Id.*
180. "All that is needed is evidence from which a reasonable person can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not." KEETON ET AL., *supra* note 164, at 248.
181. Watzig v. Tobin, 642 P.2d 651, 655 (Or. 1982).
182. *Id.* at 656.
183. *Id.* at 655 (quoting 2 HARPER & JAMES, TORTS § 15.2, 879 (1956)). *See* KEETON ET AL., *supra* note 19.

Ultimately, this decision must be made by the court on the basis of past experience and good judgment.

F. Taking the Bull By the Horns . . . , Why Did the Court Reject the Opportunity in *Woods*?

While this case may affect individual owners of livestock whose animals escape their confines and find their way to the highway, the actions of the Nebraska Supreme Court in dealing with this issue deserve broader attention. The Nebraska Court of Appeals, prior to 1993, had never dealt with the issue of whether a res ipsa instruction can reach the jury in a case where escaped livestock collides with an automobile. Within the past three years, however, two such cases advanced to the Nebraska Court of Appeals.[184] The court of appeals, to its credit, analyzed the two cases in the same fashion, which was appropriate since the factual patterns were nearly identical. The supreme court, however, found the holding of the court of appeals in *Roberts* incorrect and overruled the lower court. Yet, the court had previously (less than two years before) rejected the opportunity to correct the identical reasoning of the court of appeals in *Woods*. Why?

It is clear that the supreme court had no inclination to deal with the great cattle caper. Perhaps the issue was not important enough. Certainly the issue is not the most critical in Nebraska jurisprudence. But if the issue was not important, why did the court take *Roberts*? It could have allowed the issue to stand as decided by the court of appeals. The issue of whether res ipsa applies to escaped animal-automobile collision cases is split in the country.[185] Nevertheless, the court took *Roberts*, but limited the holding to conclude only that the court of appeals had erred in barring res ipsa. The supreme court offered little substance to the issue. Clearly, the court could have gone further than it did explaining the confusing doctrine. Unfortunately, why it declined will not be divined here. Suffice to let the court's holding clarify that res ipsa is applicable to car-cow crash cases in Nebraska. While res ipsa and escaped cattle is not the most critical area of law in the state, for those run the more than six million head of

184. Woods *ex rel.* Mitchell v. Shallenberger, 4 NCA 605, 93 NCA No. 34 (1993)(not designated for publication in permanent reporter); Roberts v. Weber & Sons, Co., No. A-93-353 mem. op. (1995)(on file with UNL Law Library).

185. *See generally* Roberts v. Weber & Sons, Co., 248 Neb. 243, 249, 533 N.W.2d 664, 668-69 (1995)(observing the nearly equal split in jurisdictions holding whether res ipsa loquitur is applicable to escaped animal-automobile collision cases); James L. Rigelhaupt, Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431 (1986)(citing cases on both sides of the issue of whether res ipsa applies to car-escaped cattle collisions, including treatment of those states with common law solutions and those with statutes that control the issue).

cattle in this state, the issue is only a open gate, downed fence, or broken hinge away.

IV. CONCLUSION

The saga of automobiles and escaped cattle will continue beyond the decision in *Roberts*.[186] No doubt *Roberts* will play a role in the pre-litigation and trial work for those plaintiffs who seek damages after a collision with an escaped animal, and for those defendants who seek to deny them. For this reason the impact of *Roberts* will be felt strongly by some. However, *Roberts* adds little to the law of negligence and res ipsa loquitur in Nebraska. The broadest reading of the court's narrow holding will only construe that res ipsa should be applied to the facts of each case—not exactly a new understanding of the doctrine which has caused so much judicial consternation. Nevertheless, the decision places Nebraska solidly on the side of those states which will allow plaintiffs to invoke inferred negligence after a late night driver notices, a little too late, the glow of eyes in the highway ahead.

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186. Those who question the significance or impact of this decision should be reminded that this factual scenario, or one similar to it, arises hundreds of times a year. While the number of cases reaching the appellate courts is low, the implications of the Roberts decision are very real to those who hit livestock on the highway and for those who keep such animals near roads. Evidence of this is demonstrated by Hand v. Starr, 250 Neb. 377 (1996), a car-cow collision case that the Nebraska Supreme Court has ruled on since this Note was submitted for publication. Although not a res ipsa case, it serves as yet another example of the impact that late night bovine collisions have had on the Nebraska appellate system.