

Oklahoma Law Review

Volume 70 | Number 3

2018

Agriculture and Res Ipsa Loquitur

Chad G. Marzen

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Agriculture Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Chad G. Marzen, *Agriculture and Res Ipsa Loquitur*, 70 OKLA. L. REV. 679 (2018),
<https://digitalcommons.law.ou.edu/olr/vol70/iss3/4>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

AGRICULTURE AND RES IPSA LOQUITUR

CHAD G. MARZEN*

I. Introduction

Agricultural entities and businesses, like businesses and corporations in other fields, face a number of liability issues and concerns. Agricultural enterprises can encounter a number of liability risks, such as liability for the release of substances from the enterprises' lands (such as manure and chemicals) that harm the land or property of another,¹ liability for the escape of livestock that harms or damages the property of another,² and the emerging risk of agritourism liability.³ The liability risks and exposures

* Associate Professor of Legal Studies in Business, Florida State University, College of Business – Department of Risk Management/Insurance, Real Estate, and Legal Studies. The author can be reached at cmarzen@fsu.edu.

To Laura Elizabeth Grice – yours always.

1. *See, e.g.*, *Weber v. IMT Ins. Co.*, 462 N.W.2d 283 (Iowa 1990). The underlying facts of the *Weber* case involved the operators of a hog and crop operation who transported manure in manure spreaders on a public road in Wapello County, Iowa to fertilize their crops. *Id.* at 284. The operators allegedly left manure on the public road, which fell from the manure spreaders. *Id.* A neighboring farmer alleged the odors of the manure left his crop of sweet corn unmarketable. *Id.* The neighboring farmer filed a nuisance suit, and the operators of the hog and crop operation filed a declaratory judgment action seeking to compel its insurer to defend and indemnify them in the liability lawsuit. *Id.* at 284-85. The Iowa Supreme Court held that under the policy at issue, the manure fell within the definition of “waste material” and thus the pollution exclusion in the policy applied to manure as “waste material.” *Id.* at 286-87.

2. *See, e.g.*, *Schwerdt v. Myers*, 683 P.2d 547 (Or. 1984) (holding that simple negligence was the proper liability standard to apply in a case involving liability for property damage which allegedly occurred due to the escape of a livestock owner's cattle).

3. Several commentators have written on the emerging risk of agritourism liability. *See, e.g.*, Terence J. Centner, *Liability Concerns: Agritourism Operators Seek a Defense Against Damages Resulting from Inherent Risks*, 19 KAN. J.L. & PUB. POL'Y 102 (2009); Harrison M. Pittman, *The Arkansas Recreational-Use Statute: Past, Present, and Future Application for Arkansas Landowners and Recreational Users of Land*, 60 ARK. L. REV. 849 (2008); Elizabeth Dooley, Note, *Watch Where You're Steppin' Out Here: Why States Should Adopt Legislation to Promote the Diversified Farming Practice of Agritourism*, 15 DRAKE J. AGRIC. L. 455 (2010); Michael J. Lunn, Note, *Class Dismissed: Forty-Nine Years Later, Recreational Use Statutes Finally Align with Legislation's Original Intent*, 20 DRAKE J. AGRIC. L. 137 (2015).

faced by agricultural enterprises have highlighted the importance of adequate insurance coverage as a risk management tool for farmers.⁴

In a traditional negligence case, the plaintiff is typically required to prove four elements: that the defendant owed the plaintiff a duty, that the defendant breached the standard of care owed to the plaintiff, that actual and proximate cause are present, and that the plaintiff suffered damages.⁵ As the law of negligence has evolved, the doctrine of *res ipsa loquitur* was developed so that a plaintiff could prove negligence through inference.⁶ *Res ipsa loquitur* (“the thing speaks for itself”),⁷ then, has been applied by courts in cases where direct evidence of negligence may not actually exist.⁸ In essence, the doctrine allows the jury to make an inference that the defendant was negligent if the evidence “indicates (1) that the injury was probably the result of negligence, even though the exact nature of that negligence is unknown, and (2) that it was probably the defendant who was the negligent person.”⁹ The doctrine is typically applied in several particular fact patterns, including certain cases where a patient is injured through medical malpractice because a doctor or surgeon leaves a scalpel in

4. See, e.g., Harrison W. Scheider, *Today's Farms Need Specialized Environmental Coverage*, INS. J. (June 6, 2016), <http://www.insurancejournal.com/magazines/features/2016/06/06/410417.htm>.

5. See, e.g., David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671 (2007).

6. Alan W. Stewart, Note, *Are We Allowing the Thing to Speak for Itself? Linnear v. CenterPoint Energy and Res Ipsa Loquitur in Louisiana*, 71 LA. L. REV. 1091, 1091 (2011) (stating that in cases involving *res ipsa loquitur*, “[t]he fact finder infers negligence based on his experience that such accidents do not occur in the absence of negligence.”).

7. Several commentators have discussed various applications of the *res ipsa loquitur* doctrine in the past several years. See, e.g., William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013); Dorothy Duffy & Marrielle B. Van Rossum, *Of Surgical Sponges and Flour Barrels, and Why Medical Experts Are Needed Even With a Res Ipsa Loquitur Instruction*, 7 DREXEL L. REV. 309 (2015); Aaron D. Twerski, *Negligence Per Se and Res Ipsa Loquitur: Kissing Cousins*, 44 WAKE FOREST L. REV. 997 (2009); Andrew R. Loeffler, Comment, *It Is Now Safe to Move About the Cabin: Revisiting Air Carrier Liability for Passenger Injuries Due to Turbulence Using a Res Ipsa Loquitur Theory of Negligence*, 30 N. ILL. U. L. REV. 445 (2010); Daniel J. Pylman, Note, *Res Ipsa Loquitur in the Restatement (Third) of Torts: Liability Based Upon Naked Statistics Rather Than Real Evidence*, 84 CHI.-KENT L. REV. 907 (2010); G. Gregg Webb, Note, *The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur*, 59 STAN. L. REV. 1065 (2007).

8. See Stewart, *supra* note 6 at 1095 (“The most important requirement for the use of *res ipsa loquitur* is the lack of direct evidence to explain the injury . . .”).

9. DAN B. DOBBS, THE LAW OF TORTS § 154 (West Group, 2000).

a person's body following a procedure or surgery¹⁰ and cases involving a stationary or contained object that moves or escapes to cause injury.¹¹

Res ipsa loquitur also appears in cases involving agricultural interests. This Article is intended to contribute to the literature concerning the relationship between agricultural law and tort liability by examining cases involving the application of res ipsa loquitur to cases involving agriculture. Part II of the Article examines cases of res ipsa loquitur and crop and barn fires. Part III of this Article examines liability claims concerning applicability of the doctrine to situations involving the application of pesticides, herbicides, and other potentially harmful chemicals. Finally, Part IV examines cases involving escaped livestock and res ipsa loquitur. In sum, analyzing cases involving agriculture and res ipsa loquitur reveals that courts vary on whether it is appropriate to apply the doctrine depending upon the type of fact pattern in the case.

II. Res Ipsa Loquitur and Crop and Barn Fires

Several cases discussing the application of the res ipsa loquitur doctrine involve damages incurred to crops or barns in situations where vehicles are nearby. The majority of courts in these cases have held that the res ipsa loquitur doctrine should not apply. For example, in *Emigh v. Andrews*, a fire started on the land on which a truck hauling wheat from the plaintiffs' wheat fields in Kansas was operating.¹² The plaintiffs in the case stated that the typical method of hauling wheat away was through trucks, and when trucks are being operated in a careful manner, fires do not result.¹³

The Supreme Court of Kansas emphasized that the phrase res ipsa loquitur means that the "thing speaks for itself," which means that the *thing* or *instrumentality*—not the *accident*—speaks for itself.¹⁴ The *Emigh* court examined the plaintiffs' petition closely and noted that it did not allege that the truck involved actually started the fire and only raised a *presumption* of

10. See *Ripley v. Lanzer*, 215 P.3d 1020 (Wash. Ct. App. 2009) (permitting application of res ipsa loquitur in case involving knee surgery in which the doctor allegedly left a scalpel blade in the plaintiff's knee); *City of Somerset v. Hart*, 549 S.W.2d 814 (Ky. 1977) (allowing application of res ipsa loquitur in case involving scalpel blade left near plaintiff's bladder following medical operation to remove kidney stones).

11. See *Anderson v. Serv. Merch. Co.*, 485 N.W.2d 170 (Neb. 1992) (permitting application of res ipsa loquitur in case involving customer in store who was hit by a falling light fixture on the store's premises).

12. 191 P.2d 901, 902 (Kan. 1948).

13. *Id.*

14. *Id.* at 903.

the truck causing it.¹⁵ The *Emigh* court stated that the inference of negligence which occurs in a res ipsa case “cannot be drawn from a mere presumption.”¹⁶ Finally, the *Emigh* court also discussed prior cases which noted that fires are common occurrences and in a number of instances occur without any fault of the defendant.¹⁷ Therefore, res ipsa loquitur did not apply.¹⁸

In *National Union Fire Insurance Co. v. Elliott*, the Supreme Court of Oklahoma reached a finding similar to the finding of the *Emigh* court in a case involving a fire which destroyed standing grain.¹⁹ The defendant in the case was involved in the custom harvest of a wheat crop near standing grain that was ultimately destroyed by a fire.²⁰ A truck was seen by the defendant on fire in the wheat field.²¹ Just like the *Emigh* court, the Supreme Court of Oklahoma also focused closely on the petition and found that there was no evidence to directly support the allegation that the truck caused the fire.²² In upholding the trial court’s demurrers, the *Elliott* court noted that the plaintiffs’ case still rested on conjecture.²³

Proof also was an issue in *Hamilton v. Smith*, a case decided by the Supreme Court of Colorado, in which the plaintiff’s wheat crop was allegedly destroyed by the negligent operation of a truck in a wheat field.²⁴ In *Hamilton*, the Supreme Court of Colorado remarked that although the plaintiffs had produced evidence that the truck had started the fire, the matter still rested on “conjecture;” thus, res ipsa loquitur did not apply.²⁵

Finally, evidentiary concerns were also present in *Ballow v. Monroe*.²⁶ In *Ballow*, a wheat farmer filed suit against an adjoining farmer who allegedly caused a fire while swathing his field.²⁷ The plaintiff testified that fires could happen in a wheat field even when one exercises reasonable care and

15. *Id.* at 904.

16. *Id.*

17. *Id.* at 904-05.

18. *Id.* at 905.

19. 1956 OK 182, ¶ 13, 298 P.2d 448, 451.

20. *Id.* ¶ 2, 298 P.2d at 449.

21. *Id.*

22. *Id.* ¶ 12, 298 P.2d at 451.

23. *Id.* ¶ 13, 298 P.2d at 451.

24. 428 P.2d 706 (Colo. 1967).

25. *Id.* at 708 (“The res ipsa loquitur doctrine does not apply where on proof of the occurrence alone, without more, the matter still rests on conjecture, or the accident is just as reasonably attributable to other causes as to the negligence of the defendant.”).

26. 699 P.2d 719 (Utah 1985).

27. *Id.* at 721.

that fires cannot be avoided when swathing.²⁸ The Supreme Court of Utah noted that despite the fact that this testimony was relevant to the defendant's duty to take precautions to prevent the fire from spreading, it was not applicable to res ipsa loquitur.²⁹

Courts also may not apply the doctrine of res ipsa loquitur when some fault is attributable to the plaintiff. For example, the underlying facts of *Thurman v. Johnson* indicate that in a situation where the plaintiff may have contributed to a particular fire event, res ipsa loquitur may not apply.³⁰ In *Thurman*, a defendant arrived at the plaintiff's barn with a truck to purchase twenty bushels of oats.³¹ The plaintiff gave directions to the defendant to park the truck in a rut close to the edge of the barn, in which the truck became stuck.³² The truck soon caught fire, and the plaintiff's barn and its contents were destroyed.³³ In holding that res ipsa loquitur did not apply, the Missouri Court of Appeals found that the plaintiff gave directions to the defendant regarding where to park and "knew or should have known even more certainly than defendant about the rut in which the truck stalled."³⁴ The *Thurman* court also noted that the plaintiff knew more information about the rut, "which was at least a contributing cause of the accident," and therefore at least some fault could be attributed to the plaintiff.³⁵

Courts have also denied the application of res ipsa loquitur in cases where the item that actually started the fire was not in the control of the defendant at the time of the incident. For example, in *Anderton v. Downs*, a wheat crop was lost due to a truck catching on fire.³⁶ The defendant verbally informed the plaintiff's employees that they were allowed to move the truck onto the wheat field as required to transport the wheat from the fields to a grain elevator.³⁷ In finding that res ipsa loquitur did not apply, the Missouri Court of Appeals emphasized that the evidence revealed that, at the time of the fire, the defendant was not in control of the truck.³⁸ Because the doctrine requires that the item causing the damage or injury be

28. *Id.* at 723.

29. *Id.*

30. 330 S.W.2d 179 (Mo. Ct. App. 1959).

31. *Id.* at 180.

32. *Id.*

33. *Id.*

34. *Id.* at 182.

35. *Id.*

36. 459 S.W.2d 101, 102 (Mo. Ct. App. 1970).

37. *Id.*

38. *Id.* at 103.

under the control of the defendant at the time of the injury, *res ipsa loquitur* did not apply.³⁹

Most recently, the Nebraska Court of Appeals also refused to apply *res ipsa loquitur* in a 2015 case involving a fire in a wheat field.⁴⁰ In *Lamprecht v. Schluntz*, the court surveyed prior cases throughout the country involving field fires allegedly started by trucks, tractors, and farm equipment and reaffirmed the majority rule that the simple occurrence of a fire does not rise to the level of inference of negligence necessary for the application of *res ipsa loquitur*.⁴¹ The *Lamprecht* court examined the evidence submitted by the plaintiff and noted that the only evidence supporting some degree of culpability was one witness who claimed to see a “flash” underneath a tractor and “burnt wire” that was found under the same tractor.⁴² The Nebraska Court of Appeals concluded that “even though a fire in a wheatfield may not ordinarily happen, such an occurrence is not so unusual as to justify an inference of negligence based upon an alleged lack of due care by the owner and/or operator of a tractor or other equipment being used to harvest the wheat.”⁴³

While the clear majority of courts do not apply the *res ipsa loquitur* doctrine in cases involving crop or barn fires, at least two courts have ruled that *res ipsa loquitur* did apply. In *Roddiscraft, Inc. v. Skelton Logging Co.*, the plaintiff suffered a loss of timber following a fire allegedly started by a tractor engaged in logging operations on an adjacent property.⁴⁴ The *Roddiscraft* court examined all three elements of *res ipsa loquitur*⁴⁵ and found all three were present.⁴⁶ The court found that, based on both common knowledge and the expert testimony supplied by the plaintiffs, a forest fire does not ordinarily occur absent an act of negligence, and that a reasonable jury could draw an inference of negligence on the part of the defendant.⁴⁷

39. *Id.* at 103-04.

40. *Lamprecht v. Schluntz*, 870 N.W.2d 646 (Neb. Ct. App. 2015).

41. *Id.* at 656.

42. *Id.*

43. *Id.*

44. 28 Cal. Rptr. 277, 280-81 (Ct. App. 1963).

45. *Id.* at 282-83; *see also* *McLaughlin Freight Lines, Inc. v. Gentrup*, 798 N.W.2d 386, 389 (Neb. 2011) (“(1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.”).

46. *Roddiscraft, Inc.*, 28 Cal. Rptr at 290.

47. *Id.* at 285.

The *Roddiscraft* court also noted that the evidence indicated that there was no question the tractor was under the control of defendant—no third persons were in the area, and it was likely that the accident was caused by defendant’s employees.⁴⁸ In addition, the plaintiffs produced evidence that it was impossible for any action of the plaintiffs to have caused the fire.⁴⁹ A key fact distinguishing *Roddiscraft* from the previously discussed cases is that the defendant had violated a statute.⁵⁰ The exhaust stack on at least one of the defendant’s tractors did not have a spark arrester as required by California law.⁵¹ Therefore, the California Court of Appeals found that the trial court had committed error in not allowing a *res ipsa loquitur* theory to be submitted to the jury.⁵²

The Supreme Court of California also found the doctrine of *res ipsa loquitur* applicable in *Seeley v. Combs*.⁵³ In the case, the defendant hauled hay from a field with a truck and stacked the baled hay in a barn.⁵⁴ Unlike the Missouri Court of Appeals in *Thurman*, however, the *Seeley* court held that while bales of hay are loaded and unloaded in a barn from a truck, a fire would not occur absent someone’s negligence.⁵⁵ In addition, the court found that the truck and hay were under the control of the defendant at the time of the fire and that the plaintiffs had taken no actions contributing to the fire, satisfying all of the requisite elements of *res ipsa loquitur*.⁵⁶

III. Res Ipsa Loquitur, Pesticides, Herbicides and Other Harmful Chemicals

In contrast to the cases involving crop and barn fires, the majority of courts that have examined fact patterns involving agricultural damage due to improper applications of pesticides or the drift of pesticides or chemicals from neighboring farms have applied the *res ipsa loquitur* doctrine.

Two decisions in Texas illustrate the division between courts on whether to apply *res ipsa loquitur* to cases involving damage incurred due to pesticide discharge. In *Farm Services, Inc. v. Gonzales*, a farm worker lost consciousness while operating a tractor due to liquid pesticides being

48. *Id.* at 287.

49. *Id.* at 288.

50. *Id.* at 289-90.

51. *Id.* at 281.

52. *Id.* at 290.

53. 416 P.2d 810, 814 (Cal. 1966).

54. *Id.* at 812.

55. *Id.* at 814.

56. *Id.*

sprayed on him.⁵⁷ Soon thereafter, the farm worker suffered a number of health problems due to exposure to methyl parathion,⁵⁸ a pesticide.⁵⁹ The operator of the defendant's airplane on the date of the incident testified that, while en route to crop dust, the chemical discharged unexpectedly from the plane.⁶⁰ The defendant argued that the spray mechanism was not under their management and control at the time of the incident due to an "unforeseeable mechanical failure."⁶¹

In upholding the negligence findings of the trial court on the grounds of *res ipsa loquitur*, the *Gonzales* court remarked that "the sudden discharge of a large amount of concentrated, toxic pesticide by a crop-dusting airplane en route to its destination is an event which ordinarily would not occur in the absence of negligence."⁶² The *Gonzales* court also found that it was clear that the defendants had management and control over the sprayer mechanism at the time of the incident.⁶³ Thus, the *Gonzales* court upheld the application of *res ipsa loquitur*.⁶⁴

In 2007, nearly two decades after the 1988 *Gonzales* decision, the Texas Court of Appeals again encountered a similar issue relating to malathion⁶⁵

57. 56 S.W.2d 747, 749 (Tex. App. 1988).

58. See *Public Health Statement for Methyl Parathion*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Sept. 2001), <https://www.atsdr.cdc.gov/phs/phs.asp?id=633&tid=117> ("Methyl parathion is a pesticide that is used to kill insects on crops. Usually, it is sprayed on the crops. Methyl parathion comes in two forms: a pure form of white crystals and a technical-grade solution (brownish liquid), which contains methyl parathion (eighty percent) and inactive ingredients in a solvent. The technical-grade methyl parathion smells like rotten eggs or garlic. Methyl parathion is a manufactured chemical, so it is found in the environment only as a result of its manufacture or use. Methyl parathion has been manufactured in the United States since 1952 and has been used to kill insects on many types of crops since this time. Because methyl parathion can be dangerous to humans, the EPA has restricted how it can be used and applied. Methyl parathion must be sprayed on crops from the air or from the ground in certain ways to minimize the danger of being exposed, and only trained people are allowed to spray methyl parathion. Methyl parathion is no longer used on food crops commonly consumed by children, and the maximum amount of methyl parathion that can be present as a residue on specific crops is regulated.").

59. *Farm Servs., Inc.*, 756 S.W.2d at 749.

60. *Id.*

61. *Id.* at 752.

62. *Id.*

63. *Id.*

64. *Id.*

65. See *Public Health Statement for Malathion*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Sept. 2003), <https://www.atsdr.cdc.gov/phs/phs.asp?id=520&tid=92> ("Malathion is a pesticide that is used to kill insects on agricultural crops, on stored products, on golf courses, in home gardens, and in outdoor sites where trees and shrubs are

exposure in *Parker v. Three Rivers Flying Service, Inc.*⁶⁶ In *Parker*, two homeowners filed suit against the Texas Boll Weevil Eradication Foundation, a nonprofit corporation that performs aerial pesticide spraying for negligently spraying malathion on two adjacent cotton fields.⁶⁷

The *Parker* court declined to apply the doctrine of *res ipsa loquitur*.⁶⁸ In contrast with the *Gonzales* court, the *Parker* court noted that the damages in the case were caused by the alleged negligent skill, judgment, and technique of the crop duster rather than a sudden, unexpected discharge due to a defect or failure in the spraying equipment of the airplane.⁶⁹ The *Parker* court acknowledged that the evidentiary testimony provided that pesticide drift may occur in every application of pesticide, even in the absence of negligence; thus, *res ipsa loquitur* did not apply.⁷⁰

In some cases involving alleged pesticide drift, the plaintiff may not provide sufficient evidence to outweigh a defendant's evidence regarding *res ipsa loquitur*. The 1965 Louisiana Court of Appeals case *Watson v. Mid-Continent Aerial Sprayers, Inc.* is one such example.⁷¹ *Watson* involved the death of thirty-one cattle on the property of a neighbor adjacent⁷² to a

grown at home; it is also used to kill mosquitoes and Mediterranean fruit flies (medflies) in large outdoor areas. Additionally, malathion is used to kill fleas on pets and to treat head lice on humans. It is usually sprayed on crops or sprayed from an airplane over wide land areas, especially in the states of California and Florida. Malathion comes in two forms: a pure form of a colorless liquid and a technical-grade solution (brownish-yellow liquid), which contains malathion (greater than 90%) and impurities in a solvent. The technical-grade malathion smells like garlic. Malathion is a manufactured chemical, so it is only found in the environment as a result of its manufacture or use. Malathion has been manufactured in the United States since 1950 and has been used to kill insects on many types of crops since this time. The Food and Drug Administration (FDA) and the EPA allow a maximum amount of 8 parts per million (ppm) of malathion to be present as a residue on specific crops used as foods. Because malathion can be dangerous to humans, the EPA requires that a certain amount of time must pass between the time of application of the insecticide and entry by a worker into a field where the chemical has been applied. Usually, at least 12 hours must pass between application and entry, but in some cases, such as when workers are entering a field to hand harvest or hand prune the crops, time periods as long as 6 days must pass between application and entry into the field. In this way, exposure to malathion can be controlled and accidental exposures can be prevented.”)

66. 220 S.W.3d 160 (Tex. App. 2007).

67. *Id.* at 162, 165.

68. *Id.* at 168.

69. *Id.*

70. *Id.*

71. 170 So.2d 149 (La. Ct. App. 1964).

72. *Id.* at 150.

property where a crop duster sprayed a fire ant poison (heptachlor).⁷³ While the plaintiff offered testimony that granules of heptachlor were found on the premises and that the cattle became sick after exposure to the poison, the defendant offered expert testimony that heptachlor did not cause the disease and death of the cattle in question.⁷⁴ Because the plaintiff did not show by a preponderance of the evidence that the heptachlor exposure caused the cattle deaths, *res ipsa loquitur* did not apply.⁷⁵

Despite the Louisiana Court of Appeals declining to apply the *res ipsa loquitur* doctrine in *Watson*, other courts have found that *res ipsa loquitur* properly applies to pesticide drift cases. For example, the Supreme Court of Oklahoma held in *Young v. Darter* that a farmer applying 2,4-D herbicide⁷⁶ in his pasture was liable for damage incurred to a neighbor's cotton crop, based on the doctrine of *res ipsa loquitur*.⁷⁷

Additionally, the Supreme Court of Colorado reached a similar conclusion in the 1979 case of *Bloxsom v. San Luis Valley Crop Care, Inc.*⁷⁸ The facts of *Bloxsom* involved drift to a neighbor's alfalfa crop following an application of 2,4-D to a barley field.⁷⁹ The barley field owner's crop-dusting company took a number of steps to protect adjacent

73. See *Heptachlor/Heptachlor Epoxide*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <https://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=135> (last updated Mar. 3, 2011) ("Heptachlor is a manufactured chemical and doesn't occur naturally. Pure heptachlor is a white powder that smells like camphor (mothballs). The less pure grade is tan. Trade names include Heptagran®, Basaklor®, Drinox®, Soleptax®, Termide®, and Velsicol 104®. Heptachlor was used extensively in the past for killing insects in homes, buildings, and on food crops, especially corn. These uses stopped in 1988. Currently it can only be used for fire ant control in power transformers. Heptachlor epoxide is also a white powder. Bacteria and animals break down heptachlor to form heptachlor epoxide. The epoxide is more likely to be found in the environment than heptachlor.").

74. *Watson*, 170 So.2d at 150-51.

75. *Id.* at 151.

76. See Danielle Sedbrook, *2,4-D: The Most Dangerous Pesticide You've Never Heard Of*, NAT. RESOURCES DEF. COUNCIL (Mar. 15, 2016), <https://www.nrdc.org/stories/24-d-most-dangerous-pesticide-youve-never-heard> ("One of the cheapest and most common weed killers in the country has a name you've probably never heard: 2,4-D. Developed by Dow Chemical in the 1940s, this herbicide helped usher in the clean, green, pristine lawns of postwar America, ridding backyards everywhere of aesthetic undesirables like dandelion and white clover. But 2,4-dichlorophenoxyacetic acid, as it's known to chemists, has a less wholesome side. There's a growing body of scientific evidence that the chemical poses a danger to both human health and the environment.").

77. 1961 OK 142, ¶ 10, 363 P.2d 829, 832.

78. 596 P.2d 1189 (Colo. 1979).

79. *Id.* at 1190. Importantly, 2,4-D has minimal effects on barley but is very harmful to broad-leafed plants such as alfalfa. *Id.*

properties, including creating fires around the field to ascertain the direction and velocity of the wind, and utilizing flagmen to inform the pilot of conditions for spraying.⁸⁰ Although the *Bloxson* court noted the precautions taken by the defendant prior to spraying, it still found that the unexplained damage “would not have ordinarily occurred in the absence of negligence.”⁸¹ Key to the court’s decision was the fact that other alfalfa crops in the area grew normally during the season in absence of the 2,4-D application.⁸² Thus, the court upheld the trial court’s application of the res ipsa loquitur doctrine.⁸³

The res ipsa loquitur doctrine has also been applied in some cases involving either the application of an improper pesticide or herbicide or the improper application of an otherwise acceptable pesticide. For example, in *Wing v. Clark’s Air Service, Inc.*, the plaintiff alleged that an air service with which he contracted to apply a pesticide for a sugar beet crop in Idaho instead improperly applied the herbicide Metribuzin, resulting in the destruction of the sugar beet crop.⁸⁴ The defendant argued, however, that the trial court had committed error in finding that res ipsa applied, contending that there was no direct proof that the defendant ever even had Metribuzin in its possession.⁸⁵ The *Wing* court disagreed, finding that the plaintiff produced enough evidence to show that the damage to the sugar beet crop resulted from the defendant’s crop dusting operation.⁸⁶

In the 1991 Missouri Court of Appeals case *Hall v. Superior Chemical & Fertilizer, Inc.*, the plaintiff alleged improper application of a weed control agent on soybean crops by a spraying company.⁸⁷ The plaintiff alleged that while proper weed control had taken place on 276 acres of soybeans, improper weed control resulted in a reduced soybean harvest on twenty-eight to thirty-two acres, located on two separate tracts of land.⁸⁸ The *Hall* court affirmed the trial court’s application of the res ipsa loquitur doctrine, finding that

80. *Id.*

81. *Id.* at 1191.

82. *Id.*

83. *Id.*

84. 683 P.2d 842 (Idaho 1984).

85. *Id.*

86. *Id.*

87. 819 S.W.2d 422, 423 (Mo. Ct. App. 1991), *abrogated by* KMS, Inc. v. Wilson, 857 S.W.2d 525 (Mo. Ct. App. 1993).

88. *Id.*

[i]t was [defendant's] agent who mixed the chemicals and sprayed the chemicals onto [plaintiff's] crops. These crops were sprayed at the same time, in the same weather conditions, with the same chemicals, and by the same persons. Yet, two tracts received poor weed control. The trier of fact could reasonably have concluded that [defendant] had control over the selection, mixing and application of the chemicals sprayed on [plaintiff's] crops which failed to retard the growth of weeds.⁸⁹

Finally, another fact pattern where courts have found that *res ipsa loquitur* applies are cases where a manufacturer supplies contaminated insecticide that causes damage to a plaintiff's crops. For example, in the 1954 Supreme Court of California case *Burr v. Sherwin-Williams*, the plaintiff alleged damages to his cotton crop after applying an insecticide containing 2,4-D.⁹⁰ The trial court applied the *res ipsa loquitur* doctrine in finding the defendant liable.⁹¹ What makes the *Burr* case unique, however, is its rejection of the "exclusive control" rule. Generally, in a *res ipsa loquitur* case, the plaintiff must prove that the instrumentality that caused the injury was in the exclusive control of the defendant at the time of the injury.⁹² The *Burr* court, however, affirmed an exception to the "exclusive control" rule for cases in which the instrumentality was not in actual possession by the defendant at the time of injury, but also had not been improperly handled or modified by any subsequent possessor after the defendant relinquished control.⁹³ In finding that the trial court properly applied the *res ipsa loquitur* doctrine, the *Burr* court noted that there was sufficient evidence before the trial court that unopened drums of the defendant's insecticide contained sufficient 2,4-D to cause the injury to the cotton.⁹⁴

Similar to *Burr*, the Supreme Court of Arizona noted a question of fact existed as to application of the *res ipsa loquitur* doctrine in a lawsuit against

89. *Id.* at 425.

90. 268 P.2d 1041, 1043-44 (Cal. 1954).

91. *Id.* at 1044.

92. *See, e.g., Eaton Fruit Co. v. Cal. Spray-Chemical Corp.*, 445 P.2d 437, 440 (Ariz. 1968).

93. *Burr*, 268 P.2d at 1044 ("The fact that an accident occurs after the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled or its condition otherwise changed after control was relinquished by the defendant.").

94. *Id.*

an insecticide manufacturer following damage to a cotton crop after the spraying of an insecticide.⁹⁵ In *Eaton Fruit Co. v. California Spray-Chemical Corp.*, the Supreme Court of Arizona noted that even though the plaintiff and defendant presented uncontradicted evidence before the trial court, it was erroneous for the trial court to direct a verdict against the plaintiff on the application of the res ipsa loquitur doctrine because of the existence of questions of fact.⁹⁶

Along with the *Burr* and *Eaton Fruit Co.* decisions, appellate courts in Georgia⁹⁷ and Colorado⁹⁸ have also upheld application of the res ipsa loquitur doctrine in cases involving application of an incorrect insecticide. Analyzing the appellate cases involving application of pesticides and herbicides, a pattern has developed in which courts will generally uphold the application of the res ipsa loquitur doctrine.

IV. Res Ipsa Loquitur and Escaped Livestock

In addition to cases involving crop or barn fires and drifting or contaminated pesticide, courts have also examined whether to apply res ipsa loquitur to cases involving escaped livestock. In a typical escaped

95. *Eaton Fruit Co.*, 445 P.2d at 441.

96. *Id.* (“Each party has presented an air tight case and one of them is obviously wrong. [Defendant’s] evidence is uncontradicted, and, if believed, would exonerate it from liability. However, [plaintiff] has presented equally uncontradicted evidence which entitled it to the permissible inference of negligence under the res ipsa doctrine. Which evidence is to be believed is a question of fact, and questions of fact, along with the weight to be given the inference, are matters for the jury. It was error to direct the verdict.”).

97. *See DeVane v. Smith*, 268 S.E.2d 711, 713 (Ga. Ct. App. 1980) (“Res ipsa loquitur creates a mere inference of fact and not a presumption of truth. Here the evidence showed defendants were in requisite control of the offending instrumentality; the airplane was in fact the causative agent and testimony that the defendants on several occasions admitted they were responsible for the damages to the cotton and that the damage resulted by allowing ‘2-4-D,’ or a derivative thereof, to be sprayed on the cotton belonging to plaintiff. While there is not a complete explanation that the defendants sprayed the cotton with a herbicide known as ‘2-4-D,’ or a derivative thereof, there was sufficient evidence to support a mere inference of fact which is all that is required under the doctrine of res ipsa loquitur. Therefore the plaintiff was entitled to have a charge given to the jury as to the doctrine.”).

98. *See Stone’s Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1114 (Colo. 1991) (“After finding that the ammonium sulfate was contaminated with 2,4-D, and that the farmers had met the requirements for the use of res ipsa loquitur, the trial court required [defendant] to come forward with exculpatory evidence and to rebut the presumption of negligence. [Defendant] did not rebut the presumption of negligence and was held liable for the damage to the farmers’ potato crops, and there is ample evidence in the record to support that conclusion.”).

livestock case, a car or truck driver on a highway suffers property damage and personal injuries due to a collision with livestock, often cattle, that have escaped from a farm.

Escaped livestock cases raise a key question: how did the livestock escape from a farm? As noted previously, the typical *res ipsa loquitur* case requires the presence of three elements:

- (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence;
- (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer;
- and (3) there must be an absence of explanation by the alleged wrongdoer.⁹⁹

In cases involving escaped livestock, the second element—whether the livestock was in the exclusive control of the defendant—is typically not difficult to establish. The first element—whether the livestock would escape in the absence of negligence—likely requires an analysis of the type of pen or enclosure the livestock were in as well as the quality and condition of the pen or enclosure. The third element—whether the defendant can give an alternative explanation for the escape—may lead to conflicting evidence and testimony regarding potential causes of the livestock escape or of the resulting injury. Certainly, a farmer or an employee of a farm may negligently leave a gate unlocked or a pen or enclosure not securely fastened, leading to the escape of the livestock. Alternatively, it is possible that there may be a trespasser on a farm who intentionally tampers with a gate or enclosure, leading to an escape. Or, there could be an argument regarding the proximate cause of an accident—a defendant may argue that the livestock would not have struck a car or truck but for the driver driving in such a fashion as to alarm or frighten the animal(s). Given the varied factual scenarios that exist relating to how and why escaped livestock cause property damage and personal injury, it is not surprising that there is a split among courts on applying the *res ipsa loquitur* doctrine in escaped livestock cases.

The Nebraska Supreme Court is among the courts that have upheld the use of the *res ipsa loquitur* doctrine in escaped livestock cases. In *Roberts v. Weber & Sons, Co.*, a semi-truck hauling feed salt from Hutchinson, Kansas, to Fort Dodge, Kansas, collided with two to four cattle during the early morning hours at the intersection of a state highway and a county road

99. See *McLaughlin Freight Lines, Inc. v. Gentrup*, 798 N.W.2d 386, 389 (Neb. 2011).

in Nebraska.¹⁰⁰ The Nebraska Supreme Court held that the *res ipsa loquitur* doctrine could apply.¹⁰¹ To support its decision, the *Roberts* court noted that the evidentiary testimony revealed that the cattle pens at issue in the case were “constructed of the sturdiest and most expensive materials” and were essentially “secure, state-of-the-art cattle pen[s].”¹⁰² Thus, the *Roberts* court noted that cattle would not ordinarily escape in the absence of negligence.¹⁰³ As for the second element of *res ipsa loquitur*, the *Roberts* court remarked it was uncontested that the instrumentality which caused the incident was in the exclusive control of the defendant.¹⁰⁴ Finally, as to the third element of *res ipsa loquitur*, a question of fact existed as to whether or not the defendant provided a reasonable explanation on how the cattle escaped from the pens.¹⁰⁵

A unique issue arose in Nebraska nearly two decades after the *Roberts* decision concerning how a state statute interacted with the *res ipsa loquitur* doctrine. In *McLaughlin Freight Lines, Inc. v. Gentrup*, as in *Roberts*, a semi-truck collided with cattle on a Nebraska state highway.¹⁰⁶ In the wake of *Roberts*, the Nebraska Legislature enacted a statute clarifying liability in situations involving livestock collisions with motor vehicles.¹⁰⁷ In addition to reiterating that the plaintiff always retains the burden of proof in a negligence case¹⁰⁸ and that the standard of care in a livestock collision case is ordinary negligence,¹⁰⁹ the statute stated that “the fact of escaped livestock is not, by itself, sufficient to raise an inference of negligence against the defendant.”¹¹⁰

The defendant in the *Gentrup* case contended that the statute supplanted the *res ipsa loquitur* doctrine.¹¹¹ The *Gentrup* court closely analyzed the language of the statute and noted that the wording of the statute indicated that “escaped livestock is not, *by itself*,” sufficient to raise an inference of negligence.”¹¹² Under this interpretation, the Nebraska statute did not

100. 533 N.W.2d 664, 666 (Neb. 1995).

101. *Id.* at 669.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 798 N.W.2d 386, 388 (Neb. 2011).

107. *Id.* at 392.

108. NEB. REV. STAT. § 25-21,274(1)(a) (2001).

109. *Id.* § 25-21,274(1)(c).

110. *Id.* § 25-21,274(1)(b).

111. *McLaughlin Freight Lines, Inc.*, 798 N.W.2d at 391.

112. *Id.*

abrogate the common law doctrine of *res ipsa loquitur*. The *Gentrup* court noted that evidence in the case was provided relating to the construction of the cattle pen as well as the defendant's inspection of the pen following the escape.¹¹³ Thus, the *Gentrup* court affirmed the trial court's utilization of the *res ipsa loquitur* doctrine.¹¹⁴

In addition to the Nebraska Supreme Court, a number of other courts have also approved of the utilization of the *res ipsa loquitur* doctrine in escaped livestock cases, including the United States Court of Appeals for the Eighth Circuit,¹¹⁵ the United States District Court for the District of Nebraska,¹¹⁶ the Supreme Court of Oregon,¹¹⁷ the Supreme Court of Idaho,¹¹⁸ the Supreme Court of Pennsylvania,¹¹⁹ the Supreme Court of New Jersey,¹²⁰ the Louisiana Court of Appeals,¹²¹ and the New Mexico Court of Appeals.¹²²

113. *Id.*

114. *Id.* at 392.

115. *See* Nuclear Corp. of Am. v. Lang, 480 F.2d 990 (8th Cir. 1973).

116. *See* Nuclear Corp. of Am. v. Lang, 337 F. Supp. 914, 919 (D. Neb. 1972), *aff'd*, 480 F.2d 990 (8th Cir. 1973) ("The question in the present case is thus one of whether the defendant exercised that degree of care the law of Nebraska requires of one in his circumstances. Stated another way: Did the defendant exercise that degree of care which the ordinary, reasonable and prudent man would have exercised under the same or similar circumstances. The circumstances to which reference is made included the maintenance of livestock in a pen in close proximity to a heavily traveled public highway; leaving said livestock unattended for a period of twelve hours, with knowledge, in advance, that there would be an extended absence from the farm; checking of the fences surrounding the livestock prior to leaving, but failing to check at least one of the gates to the livestock pen. The evidence as to the sufficiency of defendant's fences around the area he was keeping the livestock is conflicting. This Court cannot definitely state that they were inadequate. However, the Court can infer from the fact that the heifer got out of the pen that either a gate was left unlatched or that the fences were inadequate, or both. Thus, it is the opinion of the Court that the plaintiff has adduced sufficient evidence to raise an inference or presumption of negligence on the part of the defendant. This is to say, of course, that there is enough evidence to bring the doctrine of *res ipsa loquitur* into play. That doctrine is part of the law of the State of Nebraska.").

117. *See* Watzig v. Tobin, 642 P.2d 651, 654 (Or. 1982) ("The Court of Appeals was not correct in stating that *res ipsa loquitur* would apply if no conclusion could be drawn from the fact that a cow escaped from a pasture other than that the accident was caused by the defendants' negligence. In this case the operative incident is the escape of the cows. *Res ipsa loquitur* applies if the incident—the escape of the cows—was of a kind which does not normally occur in the absence of negligence and the negligence which caused the incident was probably that of the defendant.").

118. *See* O'Connor v. Black, 326 P.2d 376 (Idaho 1958).

119. *See* Bender v. Welsh, 25 A.2d 182 (Pa. 1942).

120. *See* Vaclavicek v. Olejarz, 297 A.2d 3 (N.J. 1972).

However, a significant number of courts have declined to apply the *res ipsa loquitur* doctrine in cases involving escaped livestock. For example, the Arizona Court of Appeals declined to apply *res ipsa loquitur* in *Brookover v. Roberts Enterprises, Inc.*¹²³ In *Brookover*, a couple was traveling along a state highway on open-range land in Arizona when they hit a farmer's cow.¹²⁴ The *Brookover* court focused on the lack of the farmer's notice of a dangerous condition, as the accident was the first reported accident along the open-range land on the highway since the defendant began to lease the land.¹²⁵ The plaintiffs alleged in the case that the defendant could have warned of the cattle by posting signs along the highway.¹²⁶ Despite this argument, one of the plaintiffs conceded that he had driven along the highway four or five times a month prior to the incident and that he had previously seen cattle on the road.¹²⁷ The *Brookover* court held that the *res ipsa loquitur* doctrine did not apply as the plaintiffs "did not show that a collision between an automobile and a cow on a highway through open range territory is a type of accident that would not occur absent negligence by the cow owner."¹²⁸

121. See *Honeycutt v. State Farm Fire & Cas. Co.*, 890 So.2d 756, 761 (La. Ct. App. 2004) ("We find that the trial court was correct in applying the *res ipsa loquitur* doctrine. It created an inference that the defendants were negligent. Absent negligence, a cow confined within fencing of proper height and maintenance will not wander into the center of the roadway in the middle of the night, endangering motorists. However, [the owner of the livestock in question] offered no plausible explanation except to testify that neither he nor any member of his family left the gates open and that he observed no open or drooping areas in his fence. He did admit that even new fencing will droop to some extent within a short time. [Plaintiff], on the other hand, testified that she consistently traveled this road on her way home and that she had noticed that some of the fencing in the area of the accident drooped significantly. The trial court made a credibility call which we will not disturb on appeal. Finding no manifest error in the trial court's decision, we affirm its judgment in favor of the plaintiff and against the defendants.")

122. See *Martinez v. Teague*, 631 P.2d 1314, 1323 (N.M. Ct. App. 1981) (Sutin, J., concurring) ("I favor the rule which holds that an unattended animal on the highway is sufficient evidence to allow the jury to infer negligence on the part of those whose duty it is to restrain the animal because unattended animals do not escape their enclosure unless someone is negligent, a conclusion which is supported by an abundance of authority.") (citations omitted).

123. 156 P.3d 1157, 1163 (Ariz. Ct. App. 2007).

124. *Id.* at 1159.

125. *Id.* at 1161.

126. *Id.*

127. *Id.* at 1161-62.

128. *Id.* at 1163.

Along with the *Brookover* case, a number of courts have declined to apply the *res ipsa loquitur* doctrine in escaped livestock cases, including the United States Court of Appeals for the Tenth Circuit,¹²⁹ the United States Court of Appeals for the First Circuit,¹³⁰ the United States District Court for the Eastern District of Arkansas,¹³¹ the Supreme Court of Kansas,¹³² the Supreme Court of Ohio,¹³³ the Supreme Court of Mississippi,¹³⁴ the Texas Court of Appeals,¹³⁵ the Washington Court of Appeals,¹³⁶ the Colorado

129. See *Vanderwater v. Hatch*, 835 F.2d 239, 242 (10th Cir. 1987).

130. See *Mercer v. Byrons*, 200 F.2d 284, 288 (1st Cir. 1952).

131. See *Poole v. Gillison*, 15 F.R.D. 194, 199 (E.D. Ark. 1953) (“Counsel have not cited any authority in support of their contention that the *res ipsa* doctrine applies here, and we are of the opinion that it is not applicable.”).

132. See *Wilson v. Rule*, 219 P.2d 690, 695-96 (Kan. 1950) (“Plaintiff argues that even in the absence of statute, proof that the mule was unattended upon the highway was sufficient proof of negligence by circumstantial evidence to make out a *prima facie* case. It is true there are some authorities holding that way. What this argument amounts to is that in such a case the rule of *res ipsa loquitur* applies. To so hold would be to hold that the fact an animal escapes from a pasture or corral or from custody while being led, ridden or driven or while hitched or tied to a hitching rack is so unusual that no other conclusion can be drawn from the occurrence itself, than that the owner was negligent. Our knowledge of the ways of domestic animals forbid us doing that. We cannot assume merely because two mules were loose on the highway that the owner was negligent in the manner in which he confined them.”).

After the *Wilson* case, in two subsequent cases the Kansas Court of Appeals declined to apply the *res ipsa loquitur* doctrine in escaped livestock cases. See *Harmon v. Koch*, 942 P.2d 669, 673 (Kan. Ct. App. 1997); *Walborn v. Stockman*, 706 P.2d 465, 468 (Kan. Ct. App. 1985) (“Kansas courts have consistently refused even to consider the application of *res ipsa loquitur* to the livestock trespass case.”).

133. See *Reed v. Molnar*, 423 N.E.2d 140, 145 (Ohio 1981) (“A division of authority exists on the question of the applicability of *res ipsa loquitur* to animal escape cases. Without passing on the first branch of the foregoing test, we find that it may not be said that the presence of unattended cattle on the public highway is an occurrence that would not have materialized absent someone’s negligence. Thus, the doctrine is inapplicable and appellants were not prejudiced by the trial court’s refusal to instruct the jury on *res ipsa loquitur*.”).

134. See *Hughes v. W & S Constr. Co.*, 196 So. 2d 339 (Miss. 1967).

135. See *Lee v. Huntsville Livestock Servs., Inc.*, No. 14-02-00182-CV, 2003 WL 1738418, at *3 (Tex. Ct. App. Apr. 3, 2003) (“Appellant did not present any expert testimony that cattle ordinarily do not escape confinement and wander onto public roads without negligence, or establish that it is a matter of common knowledge that such an occurrence cannot happen in the absence of negligence. To the contrary, the uncontroverted evidence showed that the gate and locking mechanisms used by appellee were standard in the livestock industry. No testimony was presented by appellant demonstrating that it was a breach of ordinary care not to chain and padlock every gate to avoid cattle breaking loose, or that appellee’s actions in attempting to regain control over the cattle were below the standard of care. Appellant clearly attempted to show through cross-examination of appellee’s

Court of Appeals,¹³⁷ the Indiana Court of Appeals,¹³⁸ and the New York Supreme Court Appellate Division.¹³⁹ A true split in authority has emerged over the years.

V. Conclusion

Courts throughout the country vary on whether to apply *res ipsa loquitur* to cases involving agricultural interests. As the foregoing cases indicate, the following three general rules can be gleaned depending upon the fact pattern:

- A majority of courts have held that the *res ipsa loquitur* doctrine does not apply in cases involving crop or barn fires.
- A majority of courts have held that the *res ipsa loquitur* doctrine applies in cases involving pesticide drift, the application of pesticides by crop dusting and spraying companies, and the application of contaminated pesticides.
- There is a split in authority regarding whether or not *res ipsa loquitur* applies in cases involving escaped livestock.

witnesses, and argued during closing argument, that specific acts and omissions of appellee caused the accident—such as not chaining and padlocking the gates, not closing the outside perimeter gates, not notifying law enforcement authorities of the escaped cattle, and not posting warnings along the road that cattle had escaped. Texas courts have held that *res ipsa* is not appropriate when direct evidence points to specific acts of possible negligence.”).

136. See *Brauner v. Peterson*, 557 P.2d 359, 361 (Wash. Ct. App. 1976) (“With regard to *res ipsa loquitur*, the presence of an animal at large on the highway is not sufficient to warrant application of the rule, i.e., the event must be of a kind not ordinarily occurring in the absence of someone’s negligence. A cow can readily escape from perfectly adequate confines.”).

137. See *Barnes v. Frank*, 472 P.2d 745, 746-47 (Colo. Ct. App. 1970) (“The fact that the cattle were on the highway does not in and of itself make defendant liable or raise a presumption of negligence against defendant. The cattle may have entered on the highway because of any number of factors, including possible acts of third persons. The duty rests upon plaintiff to prove defendant was negligent by a preponderance of the evidence.”).

138. See *Taylor Bros., Inc. v. Sork*, 348 N.E.2d 42, 45 (Ind. Ct. App. 1976) (“The question of whether the doctrine of *res ipsa loquitur* may be applied to supply an inference of negligence in instances where domestic animals escape from their enclosures appears to be one of first impression in Indiana. Other jurisdictions are divided on the question. In our opinion, the better view is represented by those jurisdictions deciding the question in the negative.” (citation omitted)).

139. See *O’Hara v. Holiday Farm*, 147 A.D.3d 1454, 1455 (N.Y. Sup. Ct. App. Div. 2017).

Agriculture has a strong and vibrant role as a positive contributor to the fabric and growth of America's economy.¹⁴⁰ With agriculture's prominent role, litigated cases have arisen relating to agricultural liability issues. As future courts continue to examine agricultural liability issues, it is very likely that the doctrine of *res ipsa loquitur* will continue to appear in courtrooms throughout the country and play an important role in resolving agricultural liability questions.

140. On March 21, 2017, President Donald Trump signed a proclamation designating March 21, 2017 as National Agriculture Day. The proclamation stated:

American agriculture is the largest positive contributor to our Nation's net trade balance, generating 10 percent of our exports and millions of American jobs. America's farmers and ranchers provide a safe and plentiful domestic food supply, which is vital to our national security. Moreover, they safeguard our sustainable resource base for future generations.

President Donald J. Trump Proclaims March 21, 2017, as National Agriculture Day, WHITE HOUSE: PRESIDENT DONALD J. TRUMP (Mar. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/21/president-donald-j-trump-proclaims-march-21-2017-national-agriculture>.