WHERE'S THE BEEF?

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FOR VEHICLES COLLIDING WITH LIVESTOCK ON HIGHWAYS

Determining when and under what circumstances the owner of an animal can be subrogated against in a civil action for damage to a motor vehicle or truck remains one of the greatest challenges of claims handlers attempting to subrogate in multiple states. In no other area of subrogation, other than perhaps workers' compensation, are the differences in the law from state to state more painfully obvious. It remains both the challenge and obligation of subrogation personnel to become and remain familiar with the variety of laws from state to state which play such an integral role in determining whether property damage is subrogable when your insured collides with cattle or livestock on the highway.

OPEN-RANGE LAWS

At common law, the owner of cattle or livestock was liable if he caused or allowed livestock to enter upon someone else's property, without that person's consent, and damage resulted. As the cattle industry grew, states began to pass "open-range laws," which allowed domestic livestock to graze and move about generally, unrestrained by fences, with little or no liability to the owner. As urban areas spread and traffic increased, some repealed open-range laws and enacted "closed-range laws," created "stock-law" areas, prohibiting cattle by statute or ordinance from running at large. Still, other states enacted restrictive definitions of "open-ranges" resulting in some areas or counties of a particular state being "open-range" and some areas being "stock-law areas." This was overlaid with a patchwork and variety of state tort laws, resulting in a confusing array of laws for the subrogation specialist, varying not only from state to state, but county to county. Many states currently have or have had some open-range or non stock-law areas in their borders.[1]

1> Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Minnesota, Montana, Nevada, New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, and Vermont all have or have had open-range laws and case decisions which require that if the driver of a motor vehicle does not exercise reasonable care, he will be liable to the livestock's owner if he injures or kills livestock on the highway, even at night.

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Idaho's open-range laws clearly state that domestic animal owners have no duty to keep animals off of the highway or an open-range and shall not be liable for damage to any vehicle or injury to any person caused by a collision between the vehicle and the animal.[2]

2> I.R.S. §25-2118 (2000).

The term "open-range" is generally defined by Idaho statute as:

"All unenclosed lands outside of the cities, villages, and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam."

The legislature uses absolute language in immunizing owners in open-range areas from liability under any cause of action, where the animals are lawfully present on the highway. But not all of Idaho is open-range, and in any area where cattle does not by "custom, license, lease, or permit" graze or roam on the land, the owner has a duty to keep such animals off of the highway and may be liable for damages to a vehicle or injury to a person caused by a collision where he fails to do so.[3]

3> *Witt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966). The 9th Circuit has used a 3-prong test to determine whether or not a section of land is deemed "open-range". It must be 1) unenclosed; 2) located outside of cities, villages and herd districts; and 3) land upon which cattle by custom, license, lease, or permit are grazed or permitted to roam. *Hubbard v. Howard*, 758 F. Supp. 594 (D. Idaho 1990), *aff'd*, 927 F.2d 609 (9th Cir. 1991).

On the contrary, the state of **Mississippi** is a stock-law state. By law, the entire state is stock-law area, and cattle are not allowed to run at large upon the open or unfenced lands of another person, including highways. In Mississippi, however, upon the petition of 20% of the qualified electors of any county,[4]

4> A limit of only three recounts and two hand counts are allowed - "pregnant chads" will not be considered a vote for open-range.

individual counties may become open-law counties.[5]

5> Miss. Code Ann. §69-13-1 (2000).

Unlike Idaho, the entire state of **Missouri** became a stock-law state, making it unlawful for the owner of livestock to permit the animals to run at large outside of an enclosure.[6]

6> V.A.M.S. §270.010 (Mo. 2000).

The Missouri statute itself also provides that the owner will pay all person's damage by reason of such animals running at large, any damages sustained by them, unless the owner can establish that the animals were outside of the enclosure through no fault of theirs. Liability for an animal on the highway is incurred only when the owner permits it to be there or when the owner has something to do with the animal's presence.[7]

7> *Anderson V. Glascock*, 271 S.W.2d 243 (Mo. App. 1954).

In **Oregon**, §607.261 prescribes that no person will allow an animal to run on the open range other than a purebred bull of the recognized beef breed. Female breeding cattle are not allowed on the open range unless accompanied by one purebred bull of a recognized beef breed for every twenty-five females.[8]

8> O.R.S. §607.261(1) (1999).

To make matters worse, no stallion or jackass, 18 months old or older, is permitted to run on the open range from April 1st to October 3rd of each year.[9]

9> O.R.S. §607.261 (2).

No ram shall be permitted to run at large on the open range from July 1st through October 31st.[10]

10> O.R.S. §607.261 (2).

So at least in Oregon, subrogation personnel have to be aware of not only the sex of the cattle which is struck by the insured, but also its age, the number of females it is accompanied by, and the time of year.

In **Louisiana**, some parishes are stock-law and some are open-range law.[11]

11> L.S.A. - R.S. §3:3003 (2000).

To the contrary, **Alabama** has no open-range counties.[12]

12> Ala. Code 1975 §3.5.2.

The state of **Nevada** has open-range lands, but defines them as:

"all unenclosed land outside of cities and towns upon which cattle, sheep, or other domestic animals by custom, license, lease, or permit are grazed or permitted to roam".[13]

13> N.R.S. §568.355 (1999).

The state of **Montana** likewise has an open-range law, but defines "open range" as:

"those areas of the state where livestock raised and maintained in sufficient numbers as to constitute a significant part of the local or county economy and where such animals graze move about generally unrestrained by fences".[14]

14> N.C.A. §60-7-102 (2000).

The state of **Oregon** recognizes open-range areas, but specifically prohibits allowing cattle or livestock within the boundaries of the right of way for a state highway which is part of the national system of interstate and defense highways.[15]

15> O.R.S. §607.527 (1999); This statute specifically lists Interstate 5, Interstate 84 and Interstate 82 as highways on which cattle is prohibited. Written permits may be applied for with the Director of Transportation to herd or drive livestock on a single trip across or within the borders of these highways.

Subrogation personnel should be keenly aware of when, where, and under what circumstances an area may be defined as "open-range." Attempting to subrogate against the owner of cattle for a collision which occurs in an open-range area may result in a counterclaim against your insured for loss of the cattle. In some cases, the driver of the motor vehicle must exercise unusually high or the highest degree of care to avoid striking the cattle.[16]

16> *Southern Farm Bureau of Casualty Insurance Company V. Gay*, 276 So.2d 893 (La. App. 1973); *Davis V. Draper*, 148 S.W.2d 662 (Ark. 1941).

PROOF OF NEGLIGENCE REQUIRED

In most stock-law areas, the owner of livestock will be liable for property damage to your insured's motor vehicle only upon proof of negligence.[17]

17> *Carrow Company V. Lusb*, 804 P.2d 747 (Ariz. 1990); *Ambrogini V. Todd*, 642 P.2d 1013 (Mont. 1982); *Bilderback V. United States*, 558 F.Supp. 903 (D.C. Or. 1982); and *Beck V. Sheppard*, 566 S.W.2d 569 (Tex. Civ. App. 1978.)

This negligence could be allowing the animals to escape from confinement, providing inadequate enclosure for the animals, keeping a gate unlocked or open, failing to promptly pursue escaped animals, or even proof that the animals had been previously at large on one or more occasions.

While strict or absolute liability for damage to a motor vehicle on the part of the owner of a domestic animal has been summarily rejected in virtually every jurisdiction,

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some courts have allowed for a presumption or inference of negligence on the part of the owner of cattle, allowing the owner an opportunity to rebut this presumption of negligence with sufficient evidence.[18]

18> *Pirkle V. Triplett*, 274 S.E.2d 59 (Ga. 1980); *Cunningham V. Bundy*, 600 P.2d 132 (Id. 1979); *Oliver Trucking Company V. Harris*, 441 S.W.2d 775 (Ky.1969); *Anderson V. McCarty*, 519 So.2d 324 (La. App. 1988); and *Reed V. Molnar*, 423 N.E.2d 140 (Ohio 1981) (by statute, prima facie evidence).

However, the presumption of negligence will not apply in open-range areas.[19]

19> *Harrington V. Upchurch*, 331 So.2d 506 (La. App 1976), *cert. denied*, 337 So.2d 222 (La. 1976).

Where a presumption of negligence is applicable, the jury may be instructed that they can infer negligence on the part of the defendant from the fact that the animal was on the highway at the time of the collision, but that such an inference is not conclusive, and that the burden of proof is on the defendant to prove that the animal was on the highway without any fault or negligence on his part.[20]

20> *Keefer V. Hartzler*, 351 S.W.2d 479 (Mo. App. 1961).

RES IPSA LOQUITUR

Res. ipsa loquitur is Latin for "the thing speaks for itself." However, after the last few cases I have tried based on a res. ipsa loquitur theory, I am convinced that it stands for "this case is a dog." The theory of res. ipsa loquitur is a difficult theory on which to prevail, especially in cases where it may be very difficult to prove negligence on part of the owner, such as where only the owner knows exactly what happened. Extenuating circumstances such as repeated patterns of cattle being loose on the highway, or large number of cattle loose on the highway at one time, may or may not be enough to convince the jury that the cattle would not have been on the highway were it not for the negligence of somebody. The doctrine of res. ipsa loquitur allows the jury to presume negligence without proof thereof. Although difficult to do, res. ipsa loquitur can be used to place liability upon the owner of a domestic animal which is roaming on the highway.[21]

21> *Martinez V. Teague*, 631 P.2d 1314 (N.M. App. 1931).

The doctrine of res. ipsa loquitur allows the jury to find negligence without any proof of negligence, and can be used in numerous states.[22]

22> Idaho, Massachusetts, Missouri, Nebraska, New Mexico, and Oregon are examples of some states where the doctrine can be used.

INVESTIGATION IS CRITICAL

Situations where the owner of the cow has admitted to leaving the gate open or not quite getting around to fixing the hole in the fence are rare. In other words, because most jurisdictions require, at the very least, proof of some negligent act, investigation which you conduct immediately after you receive notice of the claim is critical. Frequently, a downed fence is mended within hours of the loss. Photographing new sections of fencing or sections of downed fencing in other areas can help prove negligence on the part of the animal's owner. Checking with the county sheriff's department regarding other accidents involving cattle in the area over a several year period preceding the loss may also provide other similar examples of the owner's cattle getting loose and causing accidents. If necessary, an expert may be retained inexpensively to help shore up a case for an inappropriate or substandard enclosure for the animals. Visiting and interviewing neighbors can often reveal testimony about frustration with constant and repetitive instances of the neighbor's cattle being loose on their property.

INSURED'S CONTRIBUTORY NEGLIGENCE

When evaluating "cow in the road cases," be sure to evaluate your own insured's negligence objectively. Contributory negligence can be placed on your insured's driver for failure to keep a proper excessive speed, failure to keep an assured clear distance, and for having improper equipment such as lights and/or brakes.

SUMMARY

When subrogating against the owner of livestock struck on the roadway by your insured, it is imperative that subrogation personnel be familiar with the range laws of the state, and perhaps county involved, that a proper and thorough investigation be conducted as soon as possible, and that every effort be made to ascertain specific acts of negligence conducted on the part of the owner of the animal in order to avoid relying on presumptions and doctrines such as res. ipsa loquitur. The more rural an area, the more likely a jury is to find for a rancher or animal owner. In more urban areas, juries tend to put a higher burden on the animal owner to keep the animal off of the highway. Simply being familiar with the laws involved will go a long way to settling such disputed cases.