

1988

# Hornsby v. Corporation of the Presiding Bishop : Brief of Appellant

Utah Supreme Court

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James R. Black, Mary R. Rudolph; Black & Moore; Laura Boyer; attorney for appellant.

Stephen G. Morgan, Mark L. Anderson; Morgan, Scalley & Reading; Allen M. Swan; Kirotn, McConkie & Bushnell; attorneys for respondents.

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**880031-CA**

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES HORNSBY, :  
Appellant-Plaintiff, : Appeal From  
vs. : Third District Court,  
: Honorable Timothy Hanson  
: District Court Judge  
CORPORATION OF THE PRESIDING : No. C-83-5019  
BISHOP OF THE CHURCH OF JESUS :  
CHRIST OF LATTER-DAY SAINTS, :  
a Utah corporation sole, : Utah Supreme Court  
CHARLES GIBLETT, JOHN SUTTON, : No. 860007  
and JOHN DOES I through X, :  
inclusive, : (Argument Priority No. 4)  
Respondents-Defendants. :

**88-0031-CA**

BRIEF OF APPELLANT

James R. Black, #0357  
Mary A. Rudolph, #4245  
BLACK & MOORE  
261 East Broadway, Suite 300  
Salt Lake City, Utah 84111  
Attorneys for Appellant-  
Plaintiff

Laura Boyer, #3767  
Attorney at Law  
3167 West 4700 South  
Salt Lake City, Utah 84118  
Attorney for Appellant-  
Plaintiff

Stephen G. Morgan  
Mark L. Anderson  
MORGAN, SCALLEY & READING  
261 East 300 South, Second Floor  
Salt Lake City, Utah 84111  
Attorneys for Respondents-  
Defendants

Allen M. Swan  
KIRTON, MCCONKIE & BUSHNELL  
330 South Third East  
Salt Lake City, Utah 84111  
Attorneys for Respondents-  
Defendants

**FILED**

Nov 28 1988

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

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James R. Black, #0357  
Mary A. Rudolph, #4245  
BLACK & MOORE  
261 East Broadway, Suite 300  
Salt Lake City, Utah 84111  
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Laura Boyer, #3767  
Attorney at Law  
3167 West 4700 South  
Salt Lake City, Utah 84118  
Attorney for Appellant-  
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Stephen G. Morgan  
Mark L. Anderson  
MORGAN, SCALLEY & READING  
261 East 300 South, Second Floor  
Salt Lake City, Utah 84111  
Attorneys for Respondents-  
Defendants

Allen M. Swan  
KIRTON, MCCONKIE & BUSHNELL  
330 South Third East  
Salt Lake City, Utah 84111  
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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was it reversible error for the trial court judge to refuse to voir dire the jury on their interest in defendant LDS Church?

2. Was it reversible error to allow defense counsel to refer to his client as the welfare farm?

3. Was it reversible error for the trial court judge to refuse to give an instruction on res ipsa loquitur to the jury?

4. Did the trial court judge commit reversible error by refusing to give instructions to the jury on negligence per se?

5. Did the trial court judge commit reversible error in refusing to give a strict liability instruction in this case?

### STATEMENT OF THE CASE AND OF THE FACTS

This lawsuit was initiated to recover personal injury damages sustained by plaintiff, James Hornsby (hereinafter referred to as Hornsby) when he laid down his motorcycle in order to avoid hitting a cow that had escaped while defendant was attempting to load livestock on a truck. The case was heard before Judge Timothy R. Hanson in Third Judicial District Court, State of Utah, by a seven-person jury for a period of four days (October 29 through November 1, 1985). After fifty minutes of deliberation, the jury found the defendants zero (0%) percent negligent and plaintiff 100% negligent in causing the accident. From that jury verdict and a judgment of no cause of action, comes this appeal.

The facts in material part are that on March 30, 1983, at 5:40 p.m., James Hornsby was operating his motorcycle easterly on 2820 South approximately 7975 West, City of Magna, County of Salt Lake, State of Utah, when a cow, owned by defendant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (hereinafter referred to as "LDS Church"), darted out from behind a fence into his pathway. (R. 822, 823.) To avoid hitting the cow (which he avoided by inches, R. 569), Hornsby applied his brakes and then laid down his bike in the road. In doing so, he incurred severe physical injuries.

The cow was one of two that had, earlier escaped from the LDS Church welfare farm (R. 677) onto defendant John Sutton's property. The two cattle remained at the Sutton property during

March 1983 until their removal would not disturb Sutton's cattle. (R. 632, 643-646). On March 30, 1983, the LDS Church agent, Charles Giblett, went to retrieve the cattle. Because the LDS Church trailer was broken, they used Mr. Sutton's horse trailer. (R. 548.) Mr. Sutton had never before used his trailer to load and/or transfer any cattle. (R. 554.)

Before backing the trailer to the corral, Mr. Sutton opened the only gate from his property leading to 2820 South. The gate was left open during the loading procedure for Mr. Sutton's convenience. (R. 553, 635.) The Sutton trailer was designed to be loaded by chute. Mr. Sutton acknowledged that there would be a smaller possibility of an animal escaping if the trailer had been used as designed. (R. 559.) He nonetheless chose to back the trailer to the corral gate. He then attached the gate to the trailer. (R. 555, 557.)

Mr. Sutton used bailing wire to secure the trailer to the corral gate during loading. No inspection was made of the wire before its use. (R. 599.) He couldn't recall if he used a hook on the gate to secure it. Mr. Sutton expressed uncertainty as to how the cow escaped. He did not express an opinion as to whether the wire broke or merely came loose. (R. 591, 596, 598.) The animal did escape, however, and gained access to the road, where the accident took place, through the gate Mr. Sutton had left open. (R. 598.)

The cow had been loose for at least an hour before the accident occurred. (R. 612.) During that hour there was no



organized plan to contain this cow other than to herd the cow back across the road (2820 South) to Sutton's property. (R. 647, 584, 612.) While the cow was on and about the road, the accident occurred.

#### SUMMARY OF ARGUMENT

Appellant argues that the jury verdict in this case was against the undisputed evidence and should be overturned. The trial court committed reversible error in rulings on a number of issues to be discussed hereinafter. First, the court refused to allow voir dire of the jury concerning their potential prejudicial involvements with the defendant church. Second, the court allowed defendant's counsel to refer to his client as the "welfare farm". Finally, the judge refused plaintiff's proposed jury instructions on res ipsa loquitur and negligence per se and strict liability. The jury found the defendant zero (0%) negligent. That verdict goes against the evidence, shows the impact of the court's trial errors, and is reversible as a matter of law.

That finding of 0% neglect on the part of the defendants is clearly contrary to the evidence. John Sutton admitted that he used a horse trailer which he had never used to load cattle. (T. 13.) He testified further that he left the upper gate opened. (T. 20.) The fact is, a cow, under the supervision and control of defendants, darted onto a public highway creating an undeniable hazard. The defendants had a duty to the plaintiff and others rightfully operating their motor vehicles on a public road to keep their livestock off the road. Failure to do so is negligence.

The plaintiff is not asking this Court to apportion negligence in this case. This Court should find that the evidence did not support the jury's finding that the defendants were zero (0%) percent negligent. As a matter of law, the defendants were negligent to the extent of some percentage. The jury's apportionment of negligence reflects the bias and prejudice which contaminated this trial and the ultimate verdict.

### ARGUMENT

#### POINT I

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT JUDGE TO REFUSE TO VOIR DIRE THE JURY ON MATTERS INVOLVING THEIR POTENTIALLY PREJUDICIAL INVOLVEMENT WITH THE DEFENDANT LDS CHURCH.

It is a widely held principle that wherever a religious organization is a party to the litigation, the religious faith of the prospective juror is a proper subject of inquiry. 47 Am. Jur. 2d, Jury, Section 283.

In the Landmark case Casey vs. Roman Catholic Arch Bishop of Baltimore, 143 A.2d 627 (MD. 1958), the Maryland Court of Appeals held that in a jury trial, parties have an actual right to voir dire prospective jurors on their religious affiliation if it is "specific cause for disqualification". Id. at 631. Failure of the court to allow such voir dire questioning is an abuse of discretion constituting reversible error.

Even beyond initial questions regarding church affiliation, the Casey court stated that:

. . . If the religious affiliation of a juror might reasonably prevent him from arriving at a fair and impartial verdict in a particular case because of the nature of the case, the parties are entitled to ferret it out or preferably, have the court discover for them, the existence of bias or prejudice resulting from such affiliation. . . A party is entitled to a jury free of all disqualifying bias or prejudice without exception and not merely a jury free of bias or prejudice of a general abstract nature. (Miles vs. U.S., 109 U.S. 304, 1881, Jurors asked if they believed in the truth of Mormon teachings).

Id. at 631. Plaintiff's counsel in the instant case should have been allowed to voir dire the jury regarding their affiliation with the defendant LDS church. (Plaintiff's requested voir dire, specifically numbers 38-45.) (R. 325-328.) Furthermore, to ferret out any bias and prejudice, counsel should have been allowed to question them regarding whether any attended the Oquirrh Stake from where the cow came; whether any of them held church positions, i.e. bishop; and/or whether any of them either volunteered at the subject farm or knew persons who had or did. Because of the large LDS Church population, the probability of a juror holding a position of leadership in the Church is great. Therefore, it was very likely that a juror would perceive that plaintiff was suing "my Church". The judge, therefore, committed prejudicial error by refusing to make appropriate inquiry into that potential perception.

Rather than give the written instructions submitted by counsel, the trial court judge herein gave a general instruction to the effect as follows: "Would any of you find it difficult to be fair and impartial and render a judgment against defendant LDS

church?" Out of the twenty-two prospective jurors, no one responded when asked this question. A more detailed probing as requested would have at least given counsel the opportunity to use peremptory challenges in a more considered manner.

The Utah Supreme Court in State v. Ball 685 P.2d 1055 (Utah 1984) held that this type of general question is insufficient. The trial judge in Ball, having no juror response when asked whether anyone had prejudices against people who drink, allowed no further questioning on the matter. Likewise, the prosecution considered any further questions "superfluous". In reversing the trial court decision, the court aptly noted that "the most characteristic feature of prejudice is its inability to recognize itself". Id. at 1058. The Ball court recognized that a peremptory challenge may be predicated on group affiliation. The basis for the Ball decision "the detection of actual bias", is applicable here. Id. at 1059.

The Tenth Circuit Court of Appeals in United States v. Affleck, 776 F2d 1451 (10th Cir. 1985) found that the trial court provided a fair trial when it allowed a forty-four page questionnaire to be submitted to the prospective jurors asking for detailed information about, inter alia, religious affiliation. Affleck involved the prosecution of a defendant who had defrauded persons affiliated with the Mormon Church. Returning a guilty verdict in Affleck would vindicate the rights of Mormons, and, therefore, the defense counsel needed to ferret out religious bias and prejudice against an accused. Here, a verdict finding

liability on the part of the defendants would be a finding against the Mormon Church.

Besides knowing the defendant to be the LDS Church, the case at hand contained several innuendos and references to the Church. The following excerpts from the record demonstrate the type of prejudicial information that infiltrated the trial. "Mr. Sutton was greatly disturbed that he had to be involved in a lawsuit, and his "stake president" [emphasis added] told me that I should call him and try to explain to him what the situation was and how sorry we were that he was." (R. 640); Mr. Sutton and Mr. Giblett had a "church relationship". (R. 640.) Further, there was a reference to one of the "brethren" telling Giblett that Sutton had called. (R. 630.)

Appellant contends that the jury in this case was biased and prejudiced in favor of the LDS Church and this is inferable from the fact that after a four-day trial of a serious personal injury case demanding damages in excess of \$300,000, the jury only deliberated fifty minutes (jury retired November 1, 1985 at 4:40 p.m. and gave verdict at 5:30 p.m.) and returned an insupportable verdict finding the defendants were 0% negligent and appellant 100% negligent. This was in the face of absolute evidence of negligence on the part of each defendant.

#### POINT II

IT WAS REVERSIBLE ERROR TO ALLOW DEFENSE  
COUNSEL TO REFER TO HIS CLIENT AS THE WELFARE  
FARM.

It is a basic principle of American law that a party is entitled to a jury free of all disqualifying bias or prejudice without exception. The use of the word "welfare", portraying an apparently penniless defendant, obviously creates a bias in favor of finding the defendant not liable. Further an organization with the apparent design to magnanimously alleviate the trials of penniless and helpless creates an unjust sympathy factor in a lawsuit such as this. In this case Judge Hanson recognized the likelihood of such bias and unjust sympathy. He instructed counsel in chambers not to refer to the fact that defendant is a "welfare" institution. Plaintiff's counsel refrained from referring to defendants as being represented by insurance companies. Notwithstanding the admonishment, counsel introduced his client Charles Giblett as the supervisor of the "Church Welfare Farm" known as the Oquirrh Stake Farm. (R. 544.) Plaintiff's counsel did not object, as not to draw the jury's attention to the "welfare" defendant. But, for the record and to prevent further references to "welfare", she brought the admonishment again to the attention of the parties and the Court. Notwithstanding the prior order of the court counsel again, later in the proceedings, brought the "welfare farm" notion to the attention of the jury. (R. 544.) These references to the "welfare farm" constitute reversible error.

### POINT III

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT  
JUDGE TO REFUSE TO GIVE AN INSTRUCTION ON RES  
IPSA LOQUITUR.

Plaintiff's counsel requested the court to give a jury instruction on res ipsa loquitor. The court refused. (R. 411.) Recently this Court reiterated the following requirements plaintiff must satisfy to be entitled to an instructions on the theory of res ipsa loquitur:

1. That the accident was of a kind, in the ordinary course of events, would not have happened had due care been observed;
2. That the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury; and
3. That the agency or instrumentality causing the injury was under the exclusive management or control of the defendant.

Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1230 (Utah 1984).

The court in Kusy stated that it was only necessary for the plaintiff to make a prima facie showing. Kusy's prima facie case was:

1. Pallets were able to bear much greater weight than his own which supported the inference that the pallets would not have broken if due care had been observed;
2. He testified he loaded the truck in the normal manner under manager's instructions and directions; and
3. Defendant had retrieved the pallets from its own yard and brought them to the truck for plaintiff's use.

The court found that the plaintiff was entitled to a res ipsa loquitur instruction. The court, in so finding, stated if

plaintiff could prove that the pallet broke and caused the fall, but could not point to a specific act that caused it to break, then the res ipsa instruction could be appropriate.

The plaintiffs in this case did make the necessary prima facie showing for res ipsa loquitor as follows:

1. Cows do not normally escape from their enclosure in the absence of some negligence and that negligence was defendant's.
2. Plaintiff's own use of the instrumentality was not the cause of the accident as he had no control over any part of the loading procedure; and
3. The defendants had exclusive control of loading facilities which allowed this cow's escape. (R. 634-638.)

Plaintiff accordingly requested instructions of res ipsa. (R. 410, 411). (See Plaintiff's Requested Instruction attached hereto as Addendum 1.) The trial court judge unjustifiably refused the instructions.

The Ballow v. Monroe, 699 P.2d 719 (Utah 1985), this court relaxed the res ipsa standard stating:

Something less than exclusive control of the instrumentality causing damage may be sufficient if evidence demonstrates the probability that defendant was responsible for damage.

Id. at 721. Res ipsa may be used even where defendant claims not to have knowledge of what caused plaintiff's injury. Herein, as in Ballow, defendants claim not to know exactly how the cow escaped the corral, i.e. whether the wire came lose or broke (R.



591, 596, 598). Viewing the evidence in a light most favorable to the plaintiff, which is required in res ipsa cases, plaintiffs was entitled to the res ipsa instruction. Anderton vs. Montgomery, 607 P.2d 828 (Utah 1980) at 833.

Under similar facts, a sister court held that, although res ipsa loquitur did not apply to every case where a cow escapes from an enclosed area and enters a public highway, the jury could reasonably have concluded that cows normally could not escape from the enclosure if the gate was securely locked. Watzig v. Tobin, 642 P.2d 651 (OR 1982). The court emphasized that:

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

Id. at 655. Interestingly, the court further held that plaintiff would not need an expert to testify that these kinds of accidents do not commonly happen in the absence of a defendant's negligence. Id. at 655.

In this case we have more evidence than the "mere" escape of defendants' cow. We have evidence of a loading procedure which was fraught with problems which allegedly caused the cow's escape: the uninspected bailing wire (R. 600); an ineffective hook that will "pop off" when hit (R. 594, 595); a chute-trailer not backed up to a chute (R. 557); the use of an inexperienced 16-year old boy to load (R. 602, 606).

#### POINT IV

THE TRIAL COURT JUDGE COMMITTED REVERSIBLE  
ERROR BY REFUSING TO GIVE INSTRUCTIONS TO THE  
JURY ON NEGLIGENCE PER SE.

The violation of a statutory duty or municipal ordinance designed to protect a person claiming to be injured by reason of its violation is negligence per se. 57 Am. Jur. 2d, Negligence, §239 (p. 622). The effect of establishing liability from breach of such a statutory duty is that such liability may not be escaped by proof that the breaching defendant has exercised due care.

In the exercise of its broad, general welfare powers, Salt Lake County enacted a highway ordinance entitled, "Unattended Animals on Highway Prohibited", Section 10-10-3. This ordinance in pertinent part is as follows:

Every person . . . herding . . . or allowing  
to run at large, or causing to be . . .  
herded . . . or allowed to run at large, any  
. . . cow . . . upon any of the public  
highways of the county shall be guilty of  
misdemeanor. (See ordinance in its entirety  
as Addendum 2 hereto.)

The trial court judge erred in refusing plaintiff's instruction regarding the Salt Lake County ordinance, and negligence per se. (R. 395, 397.) These instructions were entirely substantiated by the evidence in this case. The defendants, by various statements, admitted that after the cow had escaped and already run across the public highway (2820 South) one time, they intended to herd the cow back across 2820 South to Mr. Sutton's property. Mr. Giblett was following the cow on foot to "return it to its home corral". (R. 647.) Defendants Mary and John Sutton "had separate

vehicles and drove along 2820 South Street prepared to herd the animal back into the Sutton corral . . . ". (Emphasis added.) Kelly Nielsen, Mr. Sutton's 16-year-old helper, chased the cow with Mr. Giblett. (R. 602, 606.) Mr. Sutton's intent was to "direct the cow down the road" and back into his place (R.584) through the gate which he intentionally left open for that purpose (after the cow had escaped) (R. 581).

#### POINT V

THE TRIAL COURT JUDGE COMMITTED REVERSIBLE  
ERROR IN REFUSING TO GIVE A STRICT LIABILITY  
INSTRUCTION IN THIS CASE.

All courts adhere to the common principle of law that an owner of a domestic animal is liable for injuries caused by the animal if the animal has a dangerous or vicious tendency, the owner had knowledge of the animal's dangerous or vicious tendency, such as would put a reasonable person on guard, and the owner neglects to act to prevent the risk of damage. Restatement (Second) of Tort, Section 509.

A cow is considered a "domestic" animal for purposes of strict liability. Vigue v. Noyes, 550 P.2d 234 (Az. 1976). The owner is "bound to keep such an animal secured at his peril and the fact that it escapes does not relieve him from liabilities inflicted." (Emphasis added.) Id. at 236. One court considered a horse to have a "propensity to be dangerous" when it bolted (two times) when heading for an alfalfa field, thus throwing its rider. Macho v. Mahowald, 374 NW2d 312 (Minn. App. 1985).

One previous incident of dangerous propensity is enough to take a case involving injury, allegedly inflicted by an animal, to the jury under the doctrine of harboring an animal with a dangerous propensity. Flynn v. Lindenfield, 433 P.2d 639 (AZ 1967).

Based on these authorities, the trial court judge's refusal to give the requested instruction on strict liability was reversible error. (R. 411). (See Plaintiff's Requested Instruction No. 25 attached hereto as Addendum 6.) Even if the defendants were not at fault for the escape of the cow, their knowledge of its propensity to escape its confines renders them strictly liable for harm to the plaintiff. It was defendant Giblett's testimony that he maintained all four sides of the LDS Church pasture, and that it contained 81 head of cattle (R. 415), and this was the first time he had had any cows escape from this LDS Church property before this incident. (R. 677.) This substantiates that this "renegade" cow is abnormal. None of the witnesses could fully explain how this cow escaped. (R. 624.) But, it is inferred from Mr. Giblett's insistence the fence was properly maintained, that the cow must have jumped over it. (R. 667, 624.) Mr. Giblett believed that this cow had jumped the fence again after the accident. (R. 666.)

Thus, the propensity of this particular animal to escape was within the knowledge of the defendants. In spite of its renegade nature, they took no extra precautions to keep it confined during loading. Even immediately before the critical escape, Mr. Sutton

and Mr. Nielson, noticed that the animal was nervous, running about and excited. (R. 556, 608.)

Their lack of care is exemplified by the following:

(1) The gate accessing the public highway was left open (R. 553);

(2) A chain link fencing which is inadequate to contain cattle was used when alternatives such as a solid piece of a gate blocked with a piece of board could have been used. (R. 705.);

(3) Bailing wire twisted four times was used as a latch when it was known that twisting the wire would cause it to weaken. (R. 708, 710, 712.) The more logical alternative latching system should have been a chain.

(4) They relied on leaning the corral gate against the trailer knowing that a cow hitting it would move it, allowing an escape (R. 709); and

(4) They allowed an inexperienced 16-year old to assist in loading a skittish, 700-pound animal (R. 602, 606).

All of these facts support the appellant's contention that the trial court should have given the strict liability instruction as requested.

#### CONCLUSION

The jury verdict in this case resulted from a number of errors by the trial court each of which individually constitute reversible error. Taken together, they also created an atmosphere that deprived plaintiffs of a fair trial. The fact that the jury

found defendant zero (0%) percent negligent under the facts of this case, reflects the biased circumstances in which this case was tried. Appellant respectfully requests this Court to reverse the judgment herein and remand this case for a new trial with appropriate instructions to the trial court.

DATED this 22 day of May, 1986.

BLACK & MOORE

/s/

James R. Black

/s/

Mary A. Rudolph

LAURA L. BOYER

/s/

Laura L. Boyer

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the above and foregoing Appellant's Brief, was mailed, postage paid, on the 27 day of May, 1986, to the following:

Laura L. Boyer  
3167 West 4700 South  
Salt Lake City, Utah 84118

Stephen G. Morgan  
Mark L. Anderson  
MORGAN, SCALLEY & READING  
261 East 300 South, Second Floor  
Salt Lake City, Utah 84111

Allen M. Swan  
KIRTON, MCCONKIE & BUSHNELL  
330 South Third East  
Salt Lake City, Utah 84111

BY, /S/

ADDENDA



## ADDENDUM 1

INSTRUCTION NO. 24

Our law recognizes a doctrine known as res ipsa loquitur which means: The thing speaks for itself. By reason of it, under certain circumstances, one who is injured may hold another responsible without showing the exact conduct of the other party that caused or set in motion the act that caused the injury. The doctrine of law may be applied only under special circumstances, they being as follows:

First: That the bailing wire that came undone, allowing the cow's escape, which proximately caused the injury to the plaintiff, James Hornsby, was in the possession and exclusive control of the defendants, John Sutton and Charles Gilett, and it appears that the injury resulted from some act or omission in the manner in which said defendants maintained, tied, and/or secured; or exercised due care in the tying/securing of said bailing wire to the trailer gate.

Second: That the incident was one of such nature as does not or would not have happened in the ordinary course of things, if those who have control of or are responsible for the securing of the bailing wire to the corral gate, use ordinary care.

Third: That the circumstances surrounding the causing of the occurrence were such that the plaintiff is not in a position to know what specific conduct or act or omission or

failure to act, was the cause, whereas the defendants being those in charge of securing said bailing wire to the corral gate, may be reasonably expected to know, and thus to be able to explain their lack of negligence.

If you find all of the above conditions to exist, they may give rise to an inference by you that the defendants, John Sutton and Charles Gillett, were negligent, which inference will support a verdict for the plaintiff, in the absence of evidence of non-negligence on the part of the defendants.

White v. Pinney, 99 U. 484, 108 P2d 249 (1940).

*Refused*  
*11-1-85*  
*TMA*

## ADDENDUM 2

**Sec. 10-10-3. Unattended Animals on Highway Prohibited.** Every person staking, tethering, herding, grazing or pasturing, or allowing to run at large or causing to be staked, tethered, herded, grazed or pastured, or allowed to run at large, any horse, cow, mule, sheep, goat or swine, or other animal upon any of the public highways of the county shall be guilty of a misdemeanor.

### ADDENDUM 3

INSTRUCTION NO. 10

You are instructed that an ordinance of the County of Salt Lake (Sec. 10-10-3) provides that herding, or allowing livestock to run at large, or cause to be herded or allowed to run at large upon any public highway of the County, shall be guilty of a misdemeanor.

The violation of this ordinance is negligence per se. Under the negligence per se doctrine, the violation of such a statute gives rise to a presumption of negligence in the absence of justification or excuse, provided that the plaintiff suffering the injury is a member of the class of persons for whose protection the statute was adopted, i.e. a motorist.

If you find that any of the defendants herein violated this County ordinance just read to you, and that such violation was a proximate cause of injury to James Hornsby, you will find that such violation was negligence, unless such defendant(s) prove by a preponderance of the evidence that s/he had an excuse or a justification in not complying with the County ordinance.

*Dequise*  
*11-1-81*  
*JMS*

## **ADDENDUM 4**



INSTRUCTION NO. 1

Under the County ordinance just read to you, it is not necessary for you to find that the person who herded, or allowed, the cow to run at large was the cow's owner, because the County ordinance prohibits "every" person from that conduct.

Under this County ordinance, despite the fact that John Sutton and/or Mary Lee Sutton, did not own the cow in question, if you find that by their actions they violated the County ordinance, then that violation will constitute negligence per se.

Misterek v. Washington Mineral Products, 531 P2d 805,  
85 Wash. 2d 166 (1975).

*Revised  
11-1-85  
TMS.*

## ADDENDUM 5

INSTRUCTION NO. 7

In the County ordinance just read to you the phrase "allowing" to run at large implies knowledge, consent, or willingness or such negligent conduct as is equivalent thereto on the part of the owner that the animals be at large.

State v. Dear, 638 P2d 85, 96 Wash. 2d 652 (1981).

*Revised /  
11-1-85  
TMS*

## ADDENDUM 6

INSTRUCTION NO. 15

The owner/keeper of domestic animals is bound to take notice of propensities of class to which it belongs and any particular propensities peculiar to the animal itself of which he is put on notice, and insofar as those propensities are likely to cause injury, must exercise reasonable care to guard against it.

An owner of a domestic animal, that is aware of one prior dangerous propensity, will be held strictly liable, regardless of any fault on his part, for injuries caused to another person as a result of this dangerous propensity.

Strict liability on the owner of a cow or horse may be imposed where the owner has reason to know, prior to the damage-causing event, that the animal had a dangerous propensity abnormal to its class.

If you find that the defendants, Sutton and Giblett, knew of the dangerous propensity of this cow, i.e. its wild nature so as to escape its confines and roam, then said defendants should be held liable for damages caused by the escaped cow, regardless of their fault in allowing said damage-causing escape.

*refused*  
*11-1-85*  
*TMA*

Vigue v. Noyes, 550 P2d 234, 113 Az 237 (1976); Flynn v. Lindenfield, 433 P2d 639, 6 Az App 459 (1967); Fernandez v. Marks, 642 P2d 542, 3 Haw App 12 (1982).

## ADDENDUM 7

CLERK OF DISTRICT COURT  
SALT LAKE COUNTY, UTAH

NOV 11 1985

Allen M. Swan, A3165  
KIRTON, McCONKIE & BUSHNELL  
Attorneys for  
330 South Third East  
Salt Lake City, Utah 84111  
Telephone: (801) 521-3680

*Evelyn Thompson*  
District Court  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

JAMES N. HORNSBY,

Plaintiff,

vs.

CORPORATION OF THE PRESIDING  
BISHOP OF THE CHURCH OF JESUS  
CHRIST OF LATTER-DAY SAINTS, a  
Utah corporation sole, CHARLES  
GIBLETT, JOHN SUTTON AND MARY  
LEE SUTTON, and DOES I through  
X, Inclusive,

Defendants.

JUDGMENT ON VERDICT

Civil No. ~~C-85-5019~~  
Honorable Timothy R. Hanson

C 83-5019

The above entitled matter came on regularly for trial before the Honorable Timothy R. Hanson, District Judge, commencing Tuesday the 29th day of October, 1985 and continuing through Friday the 1st day of November, 1985, Laura L. Boyer appearing for plaintiff, Allen M. Swan of Kirton, McConkie & Bushnell appearing for defendants Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints and Charles Giblett and Stephen G. Morgan of Morgan, Scalley & Reading appearing for defendants John Sutton and Mary Lee Sutton and testimony having been adduced and argument of counsel

heard and the matter having been submitted to the jury on a Special Verdict and the jury having returned its Special Verdict finding that the plaintiff, James Hornsby, was negligent and that his negligence was a proximate cause of the accident and finding that none of the defendants were negligent, now therefore it is hereby

ORDERED that judgment enter on the verdict in favor of each of the defendants and against the plaintiff, no cause of action together with defendants' costs incurred herein in the sum of \$ TO BE DETERMINED UPON FILING OF AN APPROPRIATE MEMORANDUM OF COSTS - TMA

DATED this 14 day of November, 1985.

BY THE COURT:

ATTEST  
H. DIXON HINDLEY  
Clerk  
By Evelyn Thompson  
Deputy Clerk

[Signature]  
District Judge

Served by mailing copies this 4<sup>th</sup> day of November, 1985, to Laura L. Boyer, 3167 West 4700 South, Salt Lake City, Utah 84118 and to Stephen G. Morgan, 261 East 300 South, 2nd Floor, Salt Lake City, Utah 84111.

Allen M. Swan  
Allen M. Swan



## ADDENDUM 8

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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|  |   |                     |
|--|---|---------------------|
| JAMES HORNSBY and<br>NANETTE MAILLY HORNSBY, his wife,   | : | MEMORANDUM DECISION |
| Plaintiffs,  | : | CIVIL NO. C-83-5019 |
| vs.  | : |                     |
| CORPORATION OF THE PRESIDING<br>BISHOP OF THE CHURCH OF JESUS<br>CHRIST OF LATTER DAY SAINTS,<br>a Utah corporation, sole, et al., | : |                     |
| Defendants.  | : |                     |

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The Motion for Partial Summary Judgment on the part of the defendants asking the Court to dismiss the claims for loss of consortium, together with the defendant Church and Giblett's Motion in Limine seeking to restrict evidence regarding an earlier alleged negligent act came before the Court for hearing, together with all parties Motion to Continue the Trial Date, and plaintiffs' Motion to Amend. The Court allowed the plaintiffs to amend their Complaint to set forth additional claims of negligence, and to join an additional party defendant. The Court after discussion with counsel also agreed to strike the trial date currently scheduled for August 28, 1984, and continue this matter without trial date until such time as one of the parties at their option files a supplemental Certification of Readiness for Trial. The Court

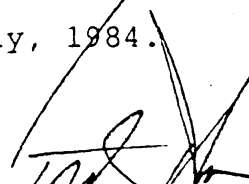
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granted the defendants' Motion regarding the plaintiffs' claims for loss of consortium, and took the question of defendants' Motion in Limine under advisement for further consideration.

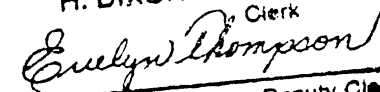
Upon reviewing the file and considering carefully the issues of proximate cause, independent intervening proximate cause, and foreseeability, the Court declines at this point in time to grant the defendants' Motion in Limine restricting evidence that may pertain to alleged negligent conduct on the part of the defendant Church regarding its fences approximately a month prior to the date the animal in question escaped. The Court is unable to rule as a matter of law at the present time regarding the question of proximate cause and foreseeability, keeping in mind that such issues are normally reserved for a jury in cases of negligence such as the one before the Court.

Counsel for the plaintiffs is to prepare an Order setting forth the Court's decision as contained in this Memorandum Decision dealing with plaintiffs' Motion to Amend, the continuance of the trial date, and the defendants' Motion in Limine. Counsel for the defendant Church is requested to prepare an Order setting forth the Court's ruling dismissing the plaintiffs' claim for loss of consortium

Dated this 18 day of July, 1984.

  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE

ATTEST  
H. DIXON HINDLEY  
Clerk

By   
Deputy Clerk

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 18 day of July, 1984:

Laura L. Boyer  
Attorney for Plaintiffs  
3167 West 4700 South  
Salt Lake City, Utah 84118

Allen M. Swan  
Attorney for Defendant  
Corporation of the Presiding Bishop  
330 South 300 East  
Salt Lake City, Utah 84111

Stephen G. Morgan  
Attorney for Defendant Sutton  
261 East 300 South, Second Floor  
Salt Lake City, Utah 84111

*Evelyn Thompson*

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