

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 58 of 2016

27/07/17
Scan, email,
upload & file

BETWEEN: PAULA 'EUKALITI

Plaintiff

AND: PULOKA CONSTRUCTION LIMITED

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. L Niu SC for the plaintiff

Mrs. P Tupou for the defendant

Hearing: 3, 5 and 13 July 2017

Date of Ruling: 25 July 2017

RULING

The claim

- [1] The plaintiff (Mr. 'Eukaliti) was employed by the defendant (Puloka) as a construction labourer. In the course of his work the middle and index fingers of his right hand were caught between a steel cable and a pulley. They were severed above the second joints. Mr. 'Eukaliti alleges that Puloka was negligent in failing to provide proper instruction, safety equipment and a safe work environment causing him to be injured. He claims damages for pain and suffering, permanent disfigurement and loss of earnings.

The facts

- [2] At the time of the accident Mr. 'Eukaliti was 20 years old. He left school in Form 4 and worked as a dishwasher. He then got work with a construction company called Group Construction. That company was owned by Tevita Puloka (who now owns Puloka) and one Valingi Niutei. Group Construction was building disaster relief housing at Niuatoputapu. Mr. 'Eukaliti cooked for the workers and later he did labouring. In 2013 he returned to Tongatapu and worked for Puloka.
- [3] Puloka was engaged to erect eight Digicel masts at sites around Tongatapu. With one exception the masts are all free standing, triangular in shape, wide at the base and narrow at the top and between 30 and 45 metres in height. They were built in sections which were bolted on top of one another.
- [4] The accident occurred at Ha'ateiho on 18 August 2014. A mast was being erected there and Mr. 'Eukaliti was one of the workers. His duties included climbing the mast to bolt sections in place. All that was to be done to complete the mast was to hoist and bolt in a steel ladder that technicians would use to install transmission equipment. The ladder was heavy. It had brackets at its top and bottom. The ladder was hoisted by a steel cable. There was one pulley secured to the top of the mast. The steel cable ran through the pulley. One end of the cable was connected to the ladder. The other end ran through another pulley that was attached to a leg of the mast and then to an electrical winch about 20 metres away. The winch in-turn was secured to a mango tree and powered by a generator.

- [5] A number of workers were involved in hoisting the ladder. There was a worker who operated the winch. There was a rope connected to the ladder controlled by another worker on the ground (who I understand is called the pilot). There were also three workers on crossbars at different levels of the mast whose role it was to clear the ladder from the mast by pushing or pulling the steel cable. Calls could be made by them to the pilot and from him to the winch operator to stop and start the winch.
- [6] Puloka's supervisor on the job was Teivisi Peini (Teivisi). Mr. 'Eukaliti said that Teivisi instructed him to climb to the top of the mast and to push or pull the steel cable so as to ensure that the brackets on the ladder did not get caught on the mast. Mr. 'Eukaliti's evidence was that he had gone to work in *flip flops* because he was tired and did not want to climb the mast and that he only did so because he was instructed by Teivisi and one Taita Mafi. Teivisi's evidence was that he did not instruct Mr. 'Eukaliti to climb the mast. He said that he intended to climb the mast himself and it was only after he put on his safety belt that he saw that Mr. 'Eukaliti had already climbed the mast. I preferred the evidence of Mr. 'Eukaliti that he was told to climb the mast.
- [7] Mr. 'Eukaliti changed into sneakers before he climbed the mast. He put on his safety belt which he secured only when he reached the top of the mast. He said that he had not been issued with any safety gloves and did not wear any safety equipment other than the safety belt. Teivisi said that he was aware that Mr. 'Eukaliti was not wearing safety gloves. He said that he did not insist that workers wear gloves and he does not wear them himself.

- [8] Mr. 'Eukaliti was on the top crossbar of the mast. He was within reach of the top pulley. As the ladder was nearing the top of the mast, but about 2 or 3 metres below Mr. 'Eukaliti, it got caught on the mast. Mr. 'Eukaliti grabbed and pushed the cable to free the ladder. He had a full grip of the cable in his right hand and was concentrating on freeing the ladder. Unexpectedly (or as he said 'before I knew it') his right index and middle fingers got caught between the steel cable and the pulley and were severed near the second (top) joints.
- [9] Mr. 'Eukaliti called to alert those below him that he was injured. He was not initially heard. The evidence was that the winch was very noisy. When he was heard the winch was stopped. Teivisi climbed up to him and he was lowered by the cable to the ground. He was taken to Viola Hospital where he remained for treatment for a week and a half. Mr. 'Eukaliti remained off work for a time to heal and was paid a half of his wages in some weeks.
- [10] Much was made by Puloka of the fact that it had an insurance policy providing cover in the event of the death or injury of its workers. I regard this as irrelevant to any issue I have to decide. Puloka made a claim on the policy and on around 24 September 2014 the claim was settled by payment of \$2,450. This was not paid to Mr. 'Eukaliti.
- [11] The wages record of Puloka shows that Mr. 'Eukaliti returned to work at the end of October 2014 and worked until around 10 March 2015.
- [12] It appears Mr. 'Eukaliti's attendance at work was always irregular. Mr. 'Eukaliti's said that he stayed away from work 'a lot' and five or six days a month due to illness. The wage records suggest that he took more time off work than that. There was no explanation as to why he was so

sickly. There was a lengthy period between 2 December 2014 and 26 January 2015 when he was absent from work. He said that this was the Christmas break and that his mother was ill. He was clearly uncertain about that. He acknowledged that on the day of the accident he felt lazy and tired and so chose to turn up for work in *flip flops* rather than in his usual safety footwear. It appears to me that this could only have been to avoid his duties.

[13] Mr. 'Eukaliti said that upon returning to work he found that he could not perform tasks or handle tools properly and that he took longer to do his work. He also said that his co-workers talked about him and they ridiculed and teased him calling him names such as 'butt hands' and 'butt fingers'. After closing Mr. 'Eukaliti's case (and following a break for a public holiday) Mr. Niu sought and obtained leave to recall Mr. 'Eukaliti to give further evidence about the difficulty he had performing his work following the accident. I was reluctant to grant leave as Mr. Niu had already asked Mr. 'Eukaliti about this. The further evidence did not impress me and to my mind was contrived. Mr. 'Eukaliti gave precise times for the performance of various work tasks before and after his accident yet he had never timed his work. His evidence was implausible and unconvincing when one considers the absence of complaint about his work from Puloka or his later employer for whom he also did construction work (to which I shall later refer).

[14] Mr. 'Eukaliti decided he would not return to work with Puloka. He did not advise Puloka of his intentions. On 10 March 2015 he received his pay and took a loan from Puloka and then did not return to work or repay the loan. He initially denied any knowledge of the loan.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 58 of 2016

[15] Mr. 'Eukaliti's evidence was that he decided not to return to work because he could no longer perform his work properly and other workers were talking about him and teasing him. He said he 'felt bad' and did not want to work like that anymore so 'I just did not go back to work'. Mr. 'Eukaliti failed by a large margin to satisfy me, even to the civil standard, that he left his employment for any of these reasons. I do not accept that Mr. 'Eukaliti's decision to abandon his employment with Puloka was due to the accident or his injuries. After the accident Puloka continued to employ Mr. 'Eukaliti on the same terms as before. It never complained about his work. No other witness gave evidence that his work was unsatisfactory or that there was any talk about him or teasing by his co-workers. If Mr. 'Eukaliti had genuine concerns about his work or his co-workers (and I am not satisfied that he did) he never raised those concerns with Puloka. He said he did not do so because no one would pay attention to him but there was nothing to suggest to me that was the case.

[16] Mr. 'Eukaliti acknowledged only under cross-examination that after leaving Puloka he had taken a construction job with Valingi Niutei building a large residence for a Minister at Kolovai. He was offered this work because he is a friend of Valingi Niutei's son. He said that the work included partitioning, hammering, painting, hand sawing and bricklaying. He was not entirely sure when he worked (it was probably late 2016 and early 2017) and gave no evidence of the total amount that he earned. He said that he finished when the work ran out. There was no evidence that anyone ever complained about his work.

[17] Mr. 'Eukaliti says that he is now only working in the plantation and cannot do some tasks such as carrying heavy buckets or scraping

coconuts and that he has difficulty doing household duties. He said that if he was still working at Puloka he would be earning \$280 per week and that if he had not been injured he would have continued as a construction worker until age 60 and would have received a pension or retirement sum. I do not accept this evidence. Mr. 'Eukaliti has lost one segment on two fingers. The greater part of those fingers remain. He demonstrated that they function and can bend. I cannot see why he cannot perform tasks such as carrying a heavy bucket or scraping coconuts. There was no medical evidence called by Mr. 'Eukaliti about the expected loss of function resulting from his injuries to support his evidence. What is clear is that after the accident Mr. 'Eukaliti was able to work in construction for both Puloka and Valingi Niutei performing tasks requiring both strength and dexterity.

[18] Since abandoning his employment with Puloka Mr. 'Eukaliti has not applied for any employment in construction or as a cook or a dishwasher (the work he has done before) or indeed in any other field.

Duty of care and negligence

[19] There is no dispute that Puloka owed Mr. 'Eukaliti a duty to take reasonable care to avoid foreseeable risks of injury in the performance of his work (*Smith v Charles Barker & Sons* [1891] A.C. 362). The obligation encompasses various aspects including the provision to an employee of adequate materials, proper systems and effective supervision but can perhaps be summarised as a duty to avoid injury by providing 'a safe system of work'. The duty does not mean that an employer is required to guarantee the safety of an employee. There is a balance to be drawn between the degree of risk against the measures

that can be taken to eliminate it (*Miletic v Capital Territory Commission* (1995) 69 ALJR 675).

[20] Mr. Niu submitted that Puloka was negligent and thereby caused Mr. 'Eukaliti's injuries in three respects. First, he said that the winch should have been positioned at the bottom of the mast and not 20 metres away so that the winch operator could have seen for himself that the ladder was caught and stop and start the winch instantly. Secondly, he said that Puloka failed to provide safety gloves to Mr. 'Eukaliti. Thirdly, he submitted that the pulley should have had a cover or a cut out switch to prevent a hand or finger getting caught in the pulley.

[21] Mrs. Tupou submitted that where the negligence alleged is a failure to take some action to avoid harm then the proof of that is one of two kinds:

'...either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it' (*Morton v William Dixon Ltd.*, 1909 S.C. 807 at 808 per Lord Dunedin)

[22] Mrs. Tupou argued that Puloka was not negligent because it provided a safe system of work for its employees and taught and instructed them on safe work practices and provided safety gear including safety gloves for their use.

[23] It is an important feature of this case that the risk of Mr. 'Eukaliti getting his fingers caught in the pulley was well known to Puloka's supervisor Teivisi. Sometime earlier in his career while working at

Vava'u Teivisi's fingers had got caught in a pulley in almost identical circumstances. He was fortunate as his fingers were not severed. This was because a rope was being used rather than a steel cable. Nevertheless, his injuries were serious and he was taken by plane to Tongatapu for treatment. Mr. 'Eukaliti said he only learned of Teivisi's accident after he had left Puloka and while drinking with Teivisi and I accept that evidence.

[24] Evidence was given by Teivisi and Raymond Langi that Puloka regularly (at least monthly) conducted meetings with its workers at which it emphasised the need for safe work practices and the use of safety equipment. There was also evidence that Puloka provides safety equipment to its workers if they do not have their own and that there were safety gloves kept in a drum on site along with other safety equipment for use by the workers at the mast. I am unable to accept this evidence.

[25] As far as the monthly meetings are concerned, Mr. 'Eukaliti said he did not attend such meetings and I believe him. There were no records of the meetings, who attended them and what was discussed. Mr. Langi said he recalled seeing Mr. 'Eukaliti at only one of the meetings but he could not recall the date. Furthermore, the evidence went no further than that workers were told in general terms that safety is important and that they should wear safety gear. There was no training of staff to identify and avoid known risks of injury. There was no evidence that Puloka has any safety policies or procedures in place that are known to the staff. Importantly, there was no evidence either that Mr. 'Eukaliti was trained or given any instructions on how to safely perform the dangerous work that led to his injuries.

[26] As far as the safety equipment is concerned the evidence was that Puloka provides safety gear to its staff *if they do not have their own* (apart from shoes). Mr. Langi acknowledged in cross-examination that employees who were provided with safety equipment were required to pay back the cost of it to Puloka. He agreed that this meant that the workers might not ask for it. The only inference that can be drawn from that evidence is that such workers would then work without the safety gear.

[27] I was not satisfied that there were in fact safety gloves in a drum on site that were available to Mr. 'Eukaliti on the day he was injured. There was no evidence from Teivisi or Mr. Langi that they had checked that the gloves were available that day. In any event I found the evidence about the availability of safety gloves to be of limited relevance. Contrary to Puloka's assertion that it emphasises safe work practices Teivisi has an entirely lax attitude to the wearing of safety gear. He said that workers do not wear hats or gloves and he does not force them to do so because that is what they prefer. He does not wear safety gloves either. He said he had never seen Mr. 'Eukaliti wear gloves while climbing and clearly he never required him to wear them. Mr. 'Eukaliti gave evidence that he climbs masts without attaching his safety belt to the mast. I do not accept that a supervisor with an awareness and concern for the safety of his workers would allow such practices on a construction site. In any event the evidence of Teivisi was that even if Mr. 'Eukaliti had been wearing gloves he still would have been injured by the pulley but perhaps not to the same extent.

- [28] Mrs. Tupou also submitted that Puloka followed 'best practice' in Tonga in hoisting the ladder. I do not accept that submission. There was no evidence called by Puloka as to what is best practice in Tonga.
- [29] It was folly to have put Mr. 'Eukaliti in the position where he was required to handle the steel cable in such close proximity to the unguarded pulley. The pulley was shown to the Court. It is a dangerous piece of equipment simply because it is made of metal and has exposed moving parts (the pulley's rollers) into which fingers or clothing could be easily caught. It is plain that a guard could be installed to prevent fingers or clothing coming near the pulley's rollers. I can see nothing at all to support Teivisi's evidence that installing a guard might cause the cable to fail.
- [30] I accept also Mr. Niu's submission that the winch should have been positioned at the bottom of the mast and not 20 metres away so that the person operating the winch could see if the ladder 'got tangled and stop the winch immediately. In that way the ladder could have been untangled with no risk of injury. In this case the system used relied upon the workers on the mast untangling the ladder by pushing and pulling the cable. If they could not untangle it they had to give instructions to stop the winch. Those instructions had to be relayed from the workers on the mast to the workers below and then relayed again to the winch operator. It is hard to see how such a system could ever allow for the winch to be stopped in a timely manner.
- [31] In addition Mr. 'Eukaliti should not have been asked to do the work without proper and specific training making him aware of the risk of

injury and the steps that he must take to avoid it. He was not given training.

- [32] For those reasons there is no doubt in my mind that Puloka was negligent in the manner in which the ladder was hoisted putting Mr. 'Eukaliti at unnecessary risk and that its negligence caused his injuries.

Contributory negligence

- [33] Mrs. Tupou submitted that Mr. 'Eukaliti caused his own injuries. I do not accept that Mr. 'Eukaliti caused or contributed in any respect to this own injuries.
- [34] Mrs. Tupou said that Mr. 'Eukaliti said he had not done the work before and took it upon himself to climb the mast thereby putting himself in a vulnerable position. Mr. 'Eukaliti was instructed to climb the mast and Teivisi's evidence was that he was capable of the work.
- [35] It was then argued that despite knowing that the pulley might injure him Mr. 'Eukaliti was focused on the ladder and not the pulley. Mr. 'Eukaliti said, and I accept, that the ladder posed the greatest danger to him. The ladder was a short distance below him. It was very heavy. It had become tangled but the winch was running. In such circumstances the cable would be coming under tension and upon being released might move quickly striking Mr. 'Eukaliti. He had every reason to be focused on the ladder.
- [36] It is then submitted that Mr. 'Eukaliti could have avoided injury if he had signaled to stop the winch and released the cable. I have already mentioned the difficulty of stopping the winch in a timely manner. This was confirmed by Mr. 'Eukaliti's evidence that when he was injured he

called down to stop the winch but he was not heard. I cannot see how Mr. 'Eukaliti can have been expected to untangle the ladder without gripping the cable. Puloka cannot absolve itself when Mr. 'Eukaliti was simply doing what he had been required to do.

Damages

[37] Mr. 'Eukaliti has sought:

- a) \$10,000 damages for pain and suffering,
- b) \$20,000 for his permanent disfigurement;
- c) \$582,400 for loss of earnings.

[38] Mr. Niu has helpfully referred me to reported decisions of this Court and the Court of Appeal. Unfortunately they are not recent. They do however provide me with some guidance on relevant principles and the appropriate level of awards.

[39] *Kaufusi v Lasa & others* [1990] Tonga LR 139 was an appeal from a Supreme Court decision awarding the appellant \$15,000 general damages and \$1,000 exemplary damages following an assault by a Police Officer causing him the loss of an eye. The awards were increased to \$20,000 for general damages and \$5,000 for exemplary damages. The appellant had returned to work but could no longer do a 'first class job', could no longer play rugby and his marriage prospects might have been affected due to his fixed unwavering eye. The Court of Appeal noted that although the appellant had returned to work his prospective loss of earning capacity was a factor to be taken into account and said:

The loss of earning capacity generally forms the principal head of damages in a personal injury action and both loss of earnings by the time of the trial and prospective loss must be taken into account. In this case the loss by the time of trial was minimal, but no allowance appears to have been made for prospective loss. The amount which the Appellant is presently earning may not be the amount which he will continue to earn in the future, for while a partial disability may not have immediate effect it may well put him at a disadvantage in the labour market should he have to look for fresh employment. A fully sighted employee has obvious advantages over a one eyed man. It is not easy to assess the loss of earning capacity represented by the Appellant's physical handicap but it is certainly much more than a negligible risk and in our opinion justified serious consideration in arriving at an appropriate award of damages.

- [40] In *Coleman v Kolo* [1991] Tonga LR 35 the Court of Appeal upheld an award of \$8,000 damages for what were described as severe injuries. The appellant suffered multiple fractures to his leg, was in hospital or receiving treatment for about six months but made a good recovery. The Court found the award high by local standards but not so high as to warrant interfering with it.
- [41] In *Falakiko v Tukala* [1992] Tonga LR 4 the plaintiff was injured in a traffic accident and suffered a compound fracture of her left ankle and a simple fracture and substantial tissue loss of her right tibia and fibula. The injuries left substantial scarring and permanent deformity. She was confined to bed for six weeks in hospital and spent a further six and a half weeks in hospital learning to walk again. The Court accepted that her scars caused embarrassment and prevented her from dancing and

she was hindered doing household chores. She was able to do the same job as before the accident but with a reduced amount of lifting and carrying. The Court awarded a global sum of \$34,000 for general damages.

- [42] In *Manu and Kingdom of Tonga v Muller* [1997] Tonga LR 192 an assessment of \$10,000 for 5% permanent loss of function to the appellant's left knee was upheld by the Court of Appeal following an assault. The Court noted at 194:

It is important that the Supreme Court, in assessing damages, takes into account levels of ordinary income in Tonga and the value of money and general conditions in the Kingdom.

- [43] Finally in *Kilisimasi v Malanai & Tonga Telecom* [1996] Tonga LR 189 the Court awarded a 79 year old who had been knocked out by the defendant driver and could no longer work as a watchman \$4,000 for pain and suffering and loss of future earnings for 4 years of \$3,800 along with other sums in respect of the costs of his nursing assistance.

- [44] It is not easy to reconcile these awards. Clearly each case must be determined on its own particular facts. As the Court of Appeal noted in *Manu* (supra) at page 194 it is a 'difficult and invidious task to draw comparisons because physical injuries and the range of consequential sequelae do vary so much.' The awards made in the cases appear to me to be modest which no doubt reflect the economic circumstances and levels of income in Tonga. However these cases were decided 20 or more years ago and I must have regard to changes in the value of money over time (of which neither party called any evidence) and to the fact that workers earnings in Tonga have increased.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 58 of 2016

[45] In respect of pain and suffering Mr. Niu argues that the \$10,000 claimed is reasonable. He relied upon the *Manu* case where the award was \$4,000 but noted that it was decided 20 years ago. Whilst I accept that Mr. 'Eukaliti would have suffered considerable pain at the time of the accident and until he received treatment I note that he healed and returned to work quickly and there was no evidence that he presently suffers ongoing pain or will do so in the future. In contrast the claimant in *Manu* required surgery, prolonged physiotherapy and experienced continuing discomfort that was likely to increase with age. In the circumstances I think a fair award in this case for pain and suffering is \$5,000.

[46] In respect of permanent disfigurement, loss of amenity and enjoyment of life Mr. 'Eukaliti claims \$20,000. Mr. Niu relies upon the *Falakiko* case where \$34,000 was awarded but that case involved far more serious injuries and the award was a global sum covering all heads of loss. It is the case that Mr. 'Eukaliti has suffered permanent disfigurement although I did not accept his evidence that this resulted in him being teased nor do I accept the submission that he will in the future be subject to embarrassment and ridicule. The evidence of loss of amenity and enjoyment to life was scant. I accept that there are some tasks he may not be able to perform as proficiently as before the accident but I do not accept that there are activities that he previously enjoyed that are now closed to him. In all the circumstances I consider an award of \$10,000 under this head is appropriate.

[47] The final head of claim is for loss of earnings. The amount claimed is \$582,400. This is unrealistic representing the total loss of all future earning capacity. Mr. 'Eukaliti was not deprived of his employment with

Puloka; he chose to leave it. He then worked for Valingi Niutei with no complaints about his work. He is capable of working in the construction industry. I can see no reason that he cannot obtain employment in other fields. I therefore do not allow this head of claim as he has framed it. But that is not an end of the matter. In view of the comments of the Court of Appeal in *Kaufusi* (supra) I must have regard to prospective loss of earnings because Mr. 'Eukaliti's partial disability may in the future put him at a disadvantage in the job market. I cannot exclude this risk as negligible. That said I do not accept Mr. Niu's submission that it is common sense that no building employer will employ Mr. 'Eukaliti. A company did employ him following the accident with no evidence of complaints. Weighing these factors as best that I can an award of \$4,000 is justified.

[48] In addition to that, Mr. 'Eukaliti received reduced wages during the period that he was healing. He is entitled to the balance of his wages. Between 18 August 2015 and 24 October 2015 he was paid \$612.50 when at his usual rate of pay (I adopt Mr. Langi's evidence of \$175 per week for 9 weeks) he was entitled to be paid \$1,575. I therefore award him the difference of \$962.50.

Result

[49] The plaintiff's claim is successful. There will be judgment in favour of Mr. 'Eukaliti against Puloka for the following sums:

- a) In respect of pain and suffering the sum of \$5,000.
- b) In respect of permanent disfigurement, loss of amenity and enjoyment of life the sum of \$10,000.
- c) In respect of prospective loss of earnings \$4,000.

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

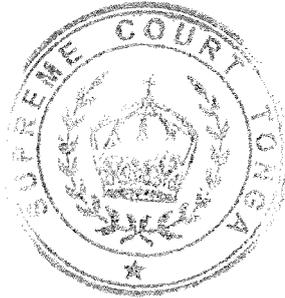
CV 58 of 2016

d) In respect of the loss of past earnings the sum of \$962.50.

[50] These sums will attract interest at 10 per cent from the date of judgment until paid.

[51] Mr. 'Eukaliti is entitled to his costs which are to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 25 July 2017



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen
LORD CHIEF JUSTICE