



The plaintiff called a number of witnesses who testified to frequent trespass over his plantation by pigs and considerable damage having been caused. I do not recite all that evidence but the owner of the 'api, Tu'ifua, gave clear and, I am satisfied, accurate and truthful evidence that on many occasions he saw pigs on the plantation damaging the plaintiff's crops. When he chased them they ran to the defendants' api. That 'api was originally part of Tu'ifua's land and is adjacent to the plantation and he knew the pigs that were kept there. He was satisfied that those were the pigs he chased away. Other witnesses testified to similar effect although they referred to some other pigs also being involved.

Identification of pigs in cases such as these is always difficult. The plaintiff was successful in trapping some of the pigs and I am satisfied they were those of the second defendant and of the first defendant's wife and family.

The second defendant gave evidence and agreed his pig had trespassed on the plantation in early September. He told the court that Tu'ifua had agreed that, if the second defendant watched over the plantation, the plaintiff would not take any action. As a result he watched over the plaintiff's crops on three nights. He took a powerful torch and on each night chased away up to thirty pigs. Tu'ifua denies both the agreement and the fact of the second defendant having kept watch. I do not believe the second defendant over this. I am satisfied that his pig did trespass and whilst I accept that there were other pigs involved in causing damage to the plaintiff's plantation, I do not accept the suggestion there were so many. Had there been that number attacking the crops for three nights, the damage would have been far greater.

The plaintiff asked an officer from the Ministry of Agriculture to assess the damage. The plaintiff stated he came three times but the officer recalled only two visits. His assessment of the damage was that it would have been caused by a group of pigs. When asked if it could have been done by three pigs he said that they could but only if very hungry. Taking that evidence with that of Tu'ifua and Sione Vailea I am satisfied that the damage was the work of no more than six pigs.

The plaintiff was able to trap some pigs and it is not disputed that they were pigs belonging to the occupants of the first defendant's 'api. I am satisfied that four of the pigs which caused the damage to the plaintiff's plantation have been proved to the necessary standard to have been the pigs kept on the first defendant's land by the occupants.

The first visit of the agricultural officer was on 23 September and he estimated the value of the crops damaged to be \$750.00. Following further damage he again visited the plantation on 9 October and the damage then was \$1,000.00. He added a \$10.00 assessment fee on each visit and the total of \$1770.00 is claimed as special damage.

In addition the plaintiff claims \$1,000.00 for general damages.

The defendants both gave evidence.

The first defendant is the holder of the 'api and lives there with his wife and the second defendant. He told the court he does not and did not then own pigs. His wife has pigs and so does the husband of his daughter. They are all kept on his land. He agrees that the second defendant also owns one of the pigs kept there.

My note of his evidence on this was:

"At home I tell them they do what they want to do. If they want pigs and to keep pigs they can do so. It is my 'api but because so many live there I would be a dictator if I tried to control them."

He went on to say, however, that he had instructed them about keeping the pigs and he had built a pig fence for them. He explained that, when he built the pig fence he told his wife and children, including his daughter and her husband when they went to New Zealand, to put the pigs in the fence. There is no dispute that, by the time of the trespass in September and October, he was abroad. When he returned he was shown the assessment of the damage and repeated his assertion that he owned no pigs. His defence is that he does not own any of the pigs that trespassed on the plaintiff's plantation.

In evidence, the second defendant denied that, apart from the incident in early September, his pig had been involved but he admitted that all the pigs were able to leave the pig fence. The first defendant's wife told the court that one of the pigs trapped later and returned was that of the second defendant. The second defendant described how he had assisted the first defendant to build the pig fence and explained that he used to collect the pig food but any of the people living on the 'api would feed them and put them back in the fence if they were outside.

The wife of the first defendant told the court the pigs were nothing to do with her husband. However, her evidence was that the plaintiff told her to take care of the pigs and to keep an eye on them. When there was a warning from the squash growers, he told her to look after them properly.

I am satisfied on the evidence as a whole that four of the pigs from the first defendant's 'api trespassed on the plaintiff's plantation and caused damage to his crops. One of these pigs was the personal property of the second defendant and three belonged to the wife and family of the first defendant. I am also satisfied that the pigs were looked after and generally cared for by all the occupants of the 'api.

The common law has long held that the owner or keeper of domestic animals has a duty to confine them and he is liable for any damage caused if they trespass on another's land. The evidence in this case is that the first defendant allowed those pigs to be kept on his land. Had it stopped there he may not have been liable for the damage caused by their trespass. However, he clearly also performed actions that point to him being the keeper of those animals. He helped build the pig fence and he instructed his family to keep the pigs inside it. I am satisfied his actions went far beyond that of a landowner who has simply given permission to another to use his land to keep stock. I am satisfied he was the keeper of those pigs and gave instructions as to how they were to be kept by the occupants of his land even though the strict ownership of them was in other members of his family and the second defendant. He is liable to the plaintiff for the damage caused and his absence at the actual time of the trespass affords him no defence.

The second defendant's evidence that he helped keep all the pigs also makes him liable for the damage caused when they were not properly confined and he is also jointly liable for the damage caused. I would add that I accepted the evidence of the plaintiff's witness that, when the second defendant was shown the pigs of the first defendant's wife that had been trapped, he referred to them as "our pigs".

I also note that, by section 17 of the Pounds and Animals Act, compensation for cattle trespass may be recovered from the "owner or person having the charge, management or control" of the cattle. I am satisfied on the evidence that both the first and second defendants are such persons.

The defendants have pleaded that the fault also lay with the plaintiff for not fencing his land adequately. They accept the duty of the pig keeper to confine his pigs but suggest an equivalent duty on the landholder to fence his land to protect it from the animals. Mr Veikoso cites the cases of *Lonitenisi v Tu'i'onetoa*, Civil Appeal 709/95, and *Tupou'ahome'e v Talau*, Civil Appeal 762/97.

In the first case, Hampton CJ referred to the pig owner's duty to care for and to fence and properly secure his animals under the Act and went on to say:

"As to the appellant (the owner of the land upon which the pigs trespassed) the Magistrate found that there was an obligation, a duty to care for and maintain and fence his crops. In the context of the local community, I agree with the magistrate about that. Each side, the magistrate said, failed in their respective duties.

First the respondents let out their pigs from the sty and let them wander loose despite warnings from the others about that in the past, including the appellant.

Secondly, the appellant, knowing the situation and the claimed trespass by animals in the past and destruction of his crops, failed to fully fence and secure his plantation."

In 'Ahome'e's case, which was an appeal on the basis of Hampton CJ's ruling in Lonitenisi, Lewis CJ referred to the ruling in the earlier case that "a reciprocal duty was owed by land-owners to care for and protect (by fencing) their crops" and continued; "That is surely a correct conclusion - in cases such as these there are rights and duties on both sides. In Lonitenisi.... The pig owner had not fenced his land securely as the Act requires, but nor had the land-owner secured his land as he ought."

I have considered those cases with care and I must, with great respect to the learned judges involved, disagree. As both stated, the Pounds and Animals Act makes it an offence for any person who is the owner or occupier of land who keeps or permits to be kept cattle on that land to neglect to enclose or otherwise secure the cattle (which includes pigs) and, under section 17, compensation may be recovered.

I have already stated that the common law imposed a duty on the owner or keeper of domestic animals to prevent them trespassing and causing damage to other peoples property and that is, I would venture to suggest, the basis of a claim in trespass such as this for damages in excess of actual compensation. That duty is owed to other property holders in general by anyone keeping cattle.

Where I must differ from the cases cited is that I cannot accept nor can I find any authority for the proposition that anyone who plants crops on his land has any duty to fence the land to protect it except where some special law or custom dictates it should be done and no such exception was pleaded here. (Neither do I accept he has the duty suggested in those cases cited to maintain or care for his crops quite apart from fencing them.) If there is duty to protect his crops by a fence I can only ask, to whom is this duty owed? The only way I can read the two judgments referred to is that the duty must be owed to the pig owner and that only needs to be stated to be shown to be untenable.

I do accept that, in determining damages under common law as opposed to compensation under the Act, the fact that a farmer cultivates unfenced land with full knowledge that the land in question has been consistently foraged by pigs previously may be awarded reduced damages.

In this case, the evidence is that there was a fence but it was clearly not maintained sufficiently to stop the pigs. On the other hand it is common knowledge that pigs will find and open any weakness in a fence in a way few other domestic animals will do.

I do feel the plaintiff, once the serious damage occurred near to harvest could have taken more effective steps to prevent the pigs from continuing to enter and I shall, in consequence, reduce the award by 10%.

I have found that the defendants are liable for the damage caused by four out of a possible six pigs and I therefore order the defendants shall pay four sixths or \$1180.00 of the special damages proved.

The claim for general damages is based on the problems caused to the plaintiff by the actions of the defendant's pigs beyond the actual damage. The plaintiff gave evidence of having to attend the plantation daily towards harvest. He had to seek the assistance of the landholder to guard his crops, he had to repair damage by the pigs to the fence and he had to take and keep the pigs trapped until after the completion of the harvest. No specific sum was mentioned but I consider a proper award under this head would be \$500.00.

Both those sums are reduced by 10% producing a total award of damages of \$1512.00.

The plaintiff also claims interest at 10% from 23 September 1998 - the date the damage occurred. I do not accept that interest should run from that date nor do I accept that it should be at such a high rate. I order interest on the damages at 5% from the date the writ was served, 26 January 1999, to the date of judgment and it shall continue at that rate until payment.

The defendants shall pay the plaintiff's costs to be taxed if not agreed.



*H. W. ...*

**NUKU'ALOFA:** 7<sup>th</sup> April 2000.

**CHIEF JUSTICE**