IN THE COURT OF APPEAL OF TONGA **APPEAL NO.29/99**

NUKU'ALOFA REGISTRY

BETWEEN : ***UILANOMA FIFITA and OTHERS***

\- ***Appellants***

AND : ***SITANI MAFI and ANOTHER***

\- ***Respondent***

Coram : Ward CJ
: Tompkins J
: Beaumont J

Counsel : Mr T. Fifita for appellant
: Mr S. Tu'utafaiva for respondent

Date of hearing : 12 July 2000.

Date of judgment: 21st July 2000.

Judgment of the Court

The appellants, all members of the same family, brought an action for damages in tort arising from the effects of eating hamburger meat purchased by them from the respondents' shop.

The trial judge dismissed the claim with costs. His conclusion was;

"On the evidence before me it cannot be held on the balance of probabilities that the defendants sold bad meat to the plaintiffs.

In respect of the cause of the illness likewise, it is not proved on balance that it was the meat that caused the upset. There is no doubt that the family members blame the meat, but on the evidence before me their illness is still unexplained. Other causes come to mind but it is not for the Court to speculate."

There are three grounds of appeal.

The learned trial Judge erred in finding that:

1. "It is notable that there is no evidence that the father brought for testing the cooked meat he said was the bad meat."
2. The illness is unexplained.
3. Ignoring admissions made by Chris Mafi for the company.

We would only comment briefly on those grounds.

The first ground accurately repeats a passage from the judgment and it is correct that there was some evidence about the father of the appellants bringing the meat back but it is confused and contradictory. The learned Judge plainly did not accept the parts of the evidence that suggested it had been brought back.

In relation to the second ground, the burden was on the plaintiff to prove that the illness was caused by the meat. The learned Judge clearly considered the evidence fell short and we would agree with his conclusion.

The admissions referred to in the third ground were comments reported by other witnesses to have been made by Chris Mafi. Even if the evidence of those witnesses was accepted, they fell far short of an admission and, if the learned Judge ignored them, he had reason to do so.

This is an appeal against the trial Judge's finding of fact from the evidence he has heard. It has been repeated many times in this Court and elsewhere, that an appellate court will not lightly interfere with a trial judge's assessment of the evidence. He has seen and heard the witnesses and is generally in a better position to assess the value of their evidence than is the appellate court which has the evidence only in the printed record.

This Court has stated the position many times. As recently as last year it was repeated in Liou and another v Li; Appeal number 5/99. Counsel considering an appeal on such grounds may find it instructive to consider the authorities cited in that case and the comments of the House of Lords in Benmax v Austin Motor Co (1955) AC 370 especially the judgment of Lord Reid at 375.

In the present case, the learned judge gave a careful judgment in which he set out the principal parts of the evidence and his findings based on his assessment of that evidence. We see no reason to interfere and the appeal is dismissed with costs.

G. Ward

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WARD CJ

COURT OF APPEAL TONGA

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TOMPKINS J

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BEAUMONT J