



# IN THE SUPREME COURT OF BERMUDA

## CIVIL JURISDICTION

2005: No. 234

**BETWEEN:**

**TRACY A. MORRISSEY**

**Plaintiff**

**and**

**MASTERS LIMITED**

**Defendant**

## JUDGMENT

Date of Hearing: Friday, 3 October 2008

Date of Judgment: October 2008

Mr. Michael C. Telemaque for the Plaintiff

Mr. Jeffrey Elkinson, Conyers, Dill & Pearman, for the Defendant

### **Introduction**

1. This action arises from an accident which occurred on Saturday, 2 August, 2003, and pursuant to an order for directions made on 4 October, 2007 is a trial on the issue of liability only.
2. On the day of the accident, the plaintiff (“Ms. Morrissey”) went to the store operated by the defendant (“Masters”) at Dundonald Street in Hamilton, with

a view to establishing a list of houseware items to be included in a bridal register. In the course of so doing, Ms. Morrissey considered whether to include a set of six steak knives, which were sold by Masters together with a piece of butcher block in which the knives were stored. Her case was put somewhat differently in the pleadings, in the witness statements and in the evidence, so I will deal with each of those separately. However, the position as it emerged after the evidence was that Ms. Morrissey had picked up an empty box, which had formerly contained a piece of butcher block and a set of six steak knives. This box had been on the top shelf of a set of display shelves which contained a number of full boxes, the one empty box, and a display, taken as I understand it from the empty box, comprising a piece of butcher block in which there were six horizontal spaces, into each of which was inserted a steak knife. Although the blades of the knives themselves were protected by plastic sheathes when in the boxes, the blades would not fit in the butcher block with the plastic sheathes on, so that the butcher block contained the six knives without any protective sheathe.

3. At this time Ms. Morrissey was with two other customers, one of whom had previously been known to her, and one of whom had not. Those two customers had a similar mission to Ms. Morrissey's, which was to identify potential gifts for a bridal shower. Having ascertained the price, there was a conversation between the three customers as to whether the steak knives were too expensive for the purposes of the bridal register, and the conclusion of the three was that they were. It was at this point that Ms. Morrissey returned the empty box to the top shelf, causing the display or a major part of it to fall towards her. Ms. Morrissey said that she put her hands up to protect her face and neck, and as the dislodged items fell, she sustained a severe laceration to her left thumb.

## The Pleadings

4. In the statement of claim, the second paragraph indicated that Ms. Morrissey had entered the store as a customer, for the purpose of purchasing certain items, and continued in the following terms:

“She took a knife from an unguarded shelf, examined it and when replacing it back on the said shelf, a whole stack of knives fell from the said shelf, unto (sic) the plaintiff, causing her to sustain a severe laceration to her left thumb.”

5. In fact, Ms. Morrissey’s witness statement referred to her having examined a box of steak knives, which she described as being on the shelf by itself, with the same version of events insofar as the return of the box to the shelf caused “the whole stack of knives next to it” to come tumbling down towards her. The reference to a box of steak knives might suggest a full box rather than an empty one. However, Ms. Morrissey’s evidence was that the box that she took down from the shelf was empty, no doubt because this was the box from which the display block and knives had been taken. Ms. Morrissey reiterated that it was upon the return of this box to the shelf that the items had fallen from the shelf towards her.

6. The statement of claim carried on to plead that the accident was caused by the negligence and/or breach of statutory duty owed by Masters to Ms. Morrissey pursuant to Section 4 of the Occupiers’ and Highway Authorities’ Liabilities Act, 1978 (“the Act”). Particulars of the negligence and breach of statutory duty were given in the following terms:

“(a) Causing or permitting an unguarded shelf to be stacked in such a manner so that it was a danger to persons lawfully using their premises;  
(b) Failing to take any or any reasonable care to see that the Plaintiff would be reasonably safe in using their premises;

(c) Failing to warn the Plaintiff adequately or at all that the shelf was unguarded and dangerously stacked.”

In addition, the pleading relied upon the maxim *res ipsa loquitur*.

7. By the time of closing argument, it had become clear that the reference in the second paragraph of the statement of claim to Ms. Morrissey having taken and examined a knife was in error, and I therefore permitted an amendment substituting the word “box” for “knife”.
8. Masters’ defence pleaded that there had been a sign on the shelves where the steak knives were to be found stating, “If you wish to inspect any utensils, please ask a member of staff for assistance.” The defence averred that it was Ms. Morrissey who had knocked over the container with the sharp knives, and there was a denial that the maxim *res ipsa loquitur* applied, as well as an averment that Ms. Morrissey had herself caused the accident by failing to take care for her own safety and failing to comply with the sign.

### **The Evidence**

9. The accident was not witnessed by any member of the staff of Masters, and evidence was given by Ms. Morrissey herself, and by the two other ladies who had been present at the scene of the accident, Ms. Charla Douglas and Ms. Darlene Philpott. Those parts of the witness statements dealing with the accident itself were relatively brief, and I would therefore set out the pertinent parts in full, as follows:

Ms. Morrissey:

“I examined a box of the said knives that was on the shelf by itself and as soon as I rested it back on the shelf, the whole stack of knives next to it came

tumbling down towards me. I raised my left hand to prevent being struck in the face, but one of the boxes was open and the knives from that block fell on my hand causing a severe injury to my left thumb.”

Ms. Douglas:

“Tracy examined the box that was on display and when she reached to put it back, just as it touched the shelf, the whole stack of boxes next to it fell towards her. She put her hand up to stop the boxes from hitting her in the face, but one of the boxes was open and the knives fell from the block and injured her left thumb.”

Ms. Philpott:

“Tracy Morrissey examined a block of the steak knives which was on the shelf by itself and as she went to put it back in its place all the boxes of knives next to it came tumbling down upon her.”

10. As is shown by these extracts, both Ms. Morrissey and Ms. Douglas refer to Ms. Morrissey having examined a box and having been struck by something which fell from an open box. Both refer to knives from the block falling on her hand, but, in fact, the knives are separate from the block when in the box. Ms. Philpott referred to Ms. Morrissey examining a block of steak knives, and did not say where the knife which caused the injury came from. When it came to her oral evidence, Ms. Philpott said that the reference in her witness statement to a block of steak knives was in error, and that it was a box that Ms. Morrissey put back on the shelf, not the block as described in the witness statement.
11. In her oral evidence, Ms. Morrissey expanded upon her witness statement. She was adamant that she had not touched either a knife or a block of knives. When shown the box containing the block and knives, Ms. Morrissey said that the box that she was shown was not exactly the same as the box she had

seen in the store on the day of the accident, referring to the fact that the box she had looked at had indicated that the knives had been made in Sweden. More significantly, she said that the block that she was shown was not the same as the block which had been on display on the day of her accident. She said that that block was bigger, with more than six spaces in it, and with more and bigger knives, including a bread knife. She also indicated that the slots in the block she had seen were vertical, compared with the horizontal slots on the block produced in court.

12. In relation to the return of the box to the shelf, Ms. Morrissey said that she did not have to tiptoe to put the box back, and she could see that there were knives sitting in the display block which were not protected by sheathes. She said that was why she had never picked up the block. Ms. Morrissey was adamant that she had never touched the display block, or picked up a knife.
13. There was one other issue, in relation to the presence of warning signs, and an offer of assistance from a member of Masters' staff. Ms. Morrissey maintained that she had never seen signs in all the time that she had been attending the store, until the one occasion well after the accident when she had gone expressly to check on the issue. She also maintained that, contrary to the case for Masters, no one had offered to assist her.
14. Ms. Douglas' evidence was relatively brief. When shown the box produced by counsel, she said that that looked similar to the boxes she had seen on the day of the accident at Masters. She said that she had seen the signs after the accident, but that she did not recall seeing such signs beforehand. She did not elaborate upon the circumstances of the accident itself.
15. Finally, for Ms. Morrissey, Ms. Philpott indicated that the reference in her witness statement to Ms. Morrissey having touched the block of knives was an error, and what Ms. Morrissey had picked up was a box, which she said was

similar to that shown to her in court. She did not recall seeing any warning signs in the store.

16. For Masters, the first witness was Donna Hollis, who had been a manager for about ten years and was acting as floor manager on the day of the accident. In her witness statement she described the area of the store in question, and her witness statement exhibited photographs of the shelving, and merchandise including the butcher block and boxes.
17. Ms. Hollis indicated that the person responsible for the display was Karen Ingham, who had not been working that day. The day of the accident was the Saturday immediately after Cup Match, so that the last business day for the store had been the previous Wednesday. Ms. Hollis had not inspected the display on the morning of the accident, but said that there would have been a check of the merchandise at the close of the previous business day, undertaken either by herself or Ms. Ingham, to make sure that things were clean and tidy.
18. Ms. Hollis did demonstrate how she believed the display had been set up, and in this regard, her evidence differed slightly from that of the other witnesses, insofar as she said that the block would have been sitting on top of a box; during her evidence Ms. Morrissey had given a demonstration of the block and the box sitting directly on the shelf, and had placed them side by side, with the box to the right of the block. This accorded with how Ms. Ingham and Tamika Zuill subsequently gave their evidence. Ms. Hollis did indicate that it had been Ms. Ingham who had stacked the shelf that fell, some time previously.
19. In relation to the signs, Ms. Hollis was not certain that the sign had been posted on the day of the accident, as shown on the photograph exhibited to her witness statement. She simply said that there were signs posted around the

store, some with the language appearing in the photograph, and some with other language.

20. Lastly, Ms. Hollis said that since the accident the knives had been moved lower on the shelves with a view to preventing a repeat of the accident.
21. Ms. Ingham then gave evidence. She was the floor manager, but had been off work on the day of the accident. She was, however, the person who had put up the display and she demonstrated how this had been done, putting the block directly on the shelf and not on top of another box. She confirmed that the knives on display on the day in question were those that had been produced in court and said that they were identical steak knives. Moreover, she indicated that Masters had never had butcher blocks in which the slots were vertical as opposed to horizontal, and also said that while the store had other knives hanging up individually on shelves, and indeed sold other steak knives, there was only one type of butcher block knife set that Masters sold, and that was this block containing the six steak knives.
22. In her demonstration, Ms. Ingham had placed boxes on top of each other, and said there might have been as many as eight boxes in the display. She maintained that the boxes were perfectly safe, although she agreed that a shopper could have opened the box and interfered with the contents. However, she demonstrated that if a box were to fall over, one would not expect it to open. This is because there is a cardboard flap which inserts into the lid of the box, so that the lid itself cannot be opened unless the flap is pulled back. When that is done and the lid opened, it is apparent that the knives inside are separate from the block, and packed with the blades inserted into a piece of cardboard and protected by plastic sheathes, with the handle towards the top.



23. Finally, Ms. Zuill gave evidence. She had been working in the area on the day in question, and confirmed that she had asked Ms. Morrissey before the accident if she needed help, saying that that was part of her job. She said that she knew how the shelves were stacked, even though she had not stacked them herself, and demonstrated this in the same manner as had Ms. Ingham, with the block directly on the shelf, and boxes both to the side and behind the block. Ms. Zuill said the boxes were lying down, side by side, and agreed that they could not have opened if they fell. She recalled there being fewer boxes than Ms. Ingham had said. She also recalled that when she had attended on Ms. Morrissey immediately following the accident, she had seen the display butcher block on the floor.
24. Ms. Zuill was referred to an accident report form, and although this had not been prepared by the member of staff to whom she had reported, she said it was consistent with what she had been told by Ms. Morrissey, namely, that she had reached for the butcher block and it had fallen.

### **Findings of Fact**

25. Against that evidential background, I make the following findings of fact. First, I am satisfied that the butcher block that was produced in court was the same as that on display on the date of the accident. I accept Ms. Ingham's evidence that at the material time, the store did not sell any other sort of block, and that the block was designed only for six steak knives, with horizontal rather than vertical slots in which the knives were to be placed. It follows that I reject Ms. Morrissey's evidence that there were knives of a different size and type than the steak knives in either the block or the boxes.
26. Secondly, I find that the butcher block and steak knives were placed directly on the top shelf, with boxes behind and beside it, as described by Ms. Ingham.

27. Next, and this may appear redundant, I do accept and find that when Ms. Morrissey returned the empty box to the shelf where the butcher block display and full boxes were set out, both the butcher block (containing the six steak knives) and a number of full boxes fell from that top shelf towards Ms. Morrissey. That is not quite in accordance with the evidence given by Ms. Morrissey, although it does broadly accord with that of her two witnesses. Those witnesses, Ms. Douglas and Ms. Philpott, each referred to boxes of knives having fallen down. Ms. Morrissey had referred in her witness statement to “the stack of knives”, though this was followed by a reference to boxes containing knives. In her oral evidence, Ms. Morrissey referred to knives being on the shelf, followed by “everything” tumbling down. But Ms. Zuill was clear that the display block was on the floor following the accident, and I find that the items which fell comprised the block with its complement of six steak knives, and some boxes containing knife sets. I nevertheless need to consider in more detail how the accident happened.
28. In this regard, I accept (and find) that if a box were to fall over, one would not expect the lid to open so that the contents would fall out. The flap mechanism seemed to me to be solidly made, and no doubt effective for its purpose. Moreover, even if the flap had been interfered with, so that the lid was capable of falling open, the block would be separate from the knives, and quite apart from the fact that the handles of the knives would leave the boxes first, the blades would be covered in the plastic sheathes.
29. In his closing submissions, Mr. Telemaque said that the knife which damaged Ms. Morrissey’s hand could have come from the display block or from the boxes. Ms. Morrissey and Ms. Douglas both said in their witness statements that the injury was caused by a knife falling from one of the falling boxes. Whilst it may be theoretically possible for the injury to have been caused by a knife coming from one of the boxes, it would have been necessary for a customer to open the box, take out the knife or knives, remove the plastic

sheathe or sheathes, and then put the knives back. Even then, if the cardboard flap had been reinserted, the knives would not escape from the box. If the cardboard flap had not been reinserted, this may or may not have been detected in the sort of check undertaken by Ms. Hollis or Ms. Ingham. But even then, the knives would have to be blade down, and handle towards the top. The knife blades fitted into a piece of cardboard within the box, whereas the knife handles clearly could not do so. If there had been an attempt to put the knives back upside down, they would not have fitted, and the boxes could not have been closed, something which would have been immediately apparent.

30. It seems to me inherently improbable that any customer would have gone to such lengths when there are knives sitting on the butcher block on display, available for inspection by any interested customer. Looking at matters on a balance of probabilities, it seems to me that the overwhelming probability is that the knife which caused Ms. Morrissey's injury must have come from the butcher block, and not from a knife falling out of one of the display boxes either behind or beside the block, as described in the witness statements of Ms. Morrissey and Ms. Douglas. I do, therefore, find that Ms. Morrissey's injury was caused by a knife falling from the butcher block.
31. I would next refer to the evidence from Ms. Hollis that following the accident, Masters had moved the knives and brought them lower. She was not asked how much lower, but presumably the knives would not have been put in a position where they would be accessible to children. It does not seem to me that such a move is of particular significance. Although the knives had been displayed on the top shelf, Ms. Morrissey had been clear that she had not needed to stretch or stand on tip toe, either to take the box from its shelf, or to put it back.
32. Finally, in relation to the signs, it is not clear that there was a sign in the immediate area, so that I make no finding in regard to that. As to the

conversation between Ms. Zuill and Ms. Morrissey, I do accept that Ms. Zuill asked Ms. Morrissey if she needed assistance, but neither do I think that anything turns on that. The reality is that Ms. Morrissey was interested in the box primarily for the purpose of checking the price, and not interested in examining the knives for quality or any other purpose.

#### **The Law – *Res Ipsa Loquitur***

33. I have referred to the fact that Mr. Telemaque pleaded that the doctrine applied. In his closing submissions, he did not expand upon its applicability, but simply said that something must have been wrong with the way the boxes had been stacked for them to fall as they did.
  
34. The doctrine applies where the occurrence is such that it would not have happened without negligence, and the thing that inflicted the damage was under the sole management and control of the defendant. Neither of those matters is made out in the case before me. Clearly, the display as a whole was not under the sole management and control of Masters. Ms. Morrissey removed the box from the display, as she was entitled to do, and it was when she returned it to the display that the accident occurred. Further, it cannot be said that the accident would not have happened without negligence on the part of Masters. One clear possibility, as pleaded by Masters, is that Ms. Morrissey was responsible for her own misfortune. I do not, therefore, accept that the doctrine of *res ipsa loquitur* has any application in the circumstances of this case, and I so find.

#### **Section 4 of the Act**

35. This section sets out the duty owed by an occupier to every visitor to his premises, the duty being to “take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises” for the purpose for which he is invited or permitted to be there.

36. I should also refer to section 8 of the Act, which provides that a warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to his visitor, unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe. Given that I have made no finding in relation to any warning, this section has no application.

### **Case Law**

37. In relation to the duty of care imposed upon shop owners, Mr. Elkinson for Masters relied upon two cases, *Zucchi -v- Waitrose Ltd.* [30 March 2000, unreported] an English Court of Appeal case, and *Bogle -v- McDonald's Restaurants Ltd.* [2002] EWHC 490, a first instance decision of Mr. Justice Field.
38. In the case of *Zucchi*, a plastic bottle of mineral water fell from the check out conveyor in a supermarket, and damaged the lower leg of a customer. The trial judge was criticised by the Court of Appeal for not assessing the risk of plastic bottles falling and causing injury, and then asking himself if that risk put the occupier of the supermarket in breach of the duty which it owed to the customer. The Court of Appeal held that had the judge asked himself that question, he must have given the answer, no. The judge was criticised for having come to his own conclusion as to the stability of the bottles and the risk of their falling, and for having ignored the evidence of the cashier and a senior services manager employed by the supermarket chain. There was in that case also the question of whether a notice would have reduced the risk, and the Court of Appeal held that the trial judge did not have the material on which to come to such a conclusion.
39. The case of *Bogle* concerned the trial of a set of generic preliminary issues arising from the pleaded cases of a group of claimants suing for personal injuries caused by the spillage of hot drinks served by McDonald's. The

majority of the injured claimants were children, injured when hot drinks which had been purchased by an adult fell over either on or from a tray, or on or from a table, such that the lid came off the lidded cup and part of the hot contents poured over the claimant. The trial judge pointed out that McDonald's were not under a duty to ensure that there were no accidents involving hot drinks; their duty was to take such steps as were reasonable in the circumstances to avoid or reduce the risk of injury.

40. The judge pointed out that the facility offered to the public by McDonald's whereby they could purchase hot drinks to be consumed either on or off the premises was something the public wanted, and inevitably meant that those who bought to consume on the premises would carry their drinks to and place them on a table. The cups and lids were designed to retain the drink if the cup were tipped over, and there was no evidence that it was reasonably feasible for another type of lid or cup to have been designed and manufactured which would have allowed the lid to be easily removed by the customer, and at the same time would have retained the hot drink if it dropped to the floor from a table or tray, or was knocked over violently. The judge took the view that the steps which McDonald's had taken in respect of cups and lids to avoid injury were reasonably adequate. He also took the view that the customers could be taken to know that the coffee and tea that they were buying was hot and could cause a nasty scalding injury if spilled on someone. He accordingly took the view that there was no duty on McDonald's to warn their customers about the risk posed by the temperatures at which tea and coffee were served, but carried on to find that if he were wrong in that regard, the warning printed on cups from 1995 with the words "Caution: Hot!" and "Caution: Contents Hot!" was adequate to discharge the duty.

## **Conclusion**

41. In this case, it is obvious that there is a danger to a customer if a butcher block containing sharp knives were to fall on the customer. Ms. Morrissey knew that

there were knives on the shelf, and seems to have appreciated that the knives constituted a danger, insofar as she said in her evidence “You could see that the knives were sitting in the block without sheathes. That’s why I never picked up the block.”

42. However, the fact remains that when Ms. Morrissey replaced the empty box, the display block with its knives and other full boxes did fall from the shelf towards Ms. Morrissey, with the consequence that she sustained a severe laceration, which I have found must have been caused by a knife from the display butcher block.
43. I am, frankly, puzzled as to how the return of an empty box to the shelf could have caused the display block and boxes to fall from the shelf. The block itself was, as Mr. Telemaque conceded, “not that easy to knock over”. Clearly the block and boxes did fall from the shelf, either at the time that Ms. Morrissey did return the empty box to the shelf, or immediately thereafter.
44. Mr. Telemaque urged in his closing remarks that it would have been prudent for there to be some railing or casement in the front of the display. There was no evidence to suggest that this would make the display more safe, and it seems to me speculative to accept this submission. No doubt any danger from the knives would have been eliminated if they had been kept in a locked glass case which could only be opened by a member of Masters’ staff. But the question which I have to answer is not whether such a course would have prevented the accident; it is whether the risk of knives falling from the display and injuring a customer was such as to put Masters in breach of the duty it owed to Ms. Morrissey. What is curious in this case is that Ms. Morrissey was astute to the risk, but nevertheless caused the display to fall. That is not to suggest that Ms. Morrissey necessarily put the empty box back carelessly, but the juxtaposition in time of the return of the empty box and the falling of the

items from the top shelf must, it seems to me, mean that the one led to the other in some way.

45. At the end of the day, it seems to me that it is an important factor that Ms. Morrissey did appreciate that this was a display of unsheathed knives, which she must have appreciated would constitute a danger to her and other customers were they to fall. The block itself was, as Mr. Telemaque accepted, relatively stable. Given the relative stability of the butcher block, the question which has to be answered in considering whether Masters did or did not comply with the common duty of care, is whether the danger of the block falling (and if it fell, there would be an obvious danger that the knives could fall out and injure a customer) was such as to impose a duty upon Masters to take some step to prevent the block from falling over, and that of course would have to be a reasonable step in all the circumstances of the case.
46. Considering all the circumstances of the case, and particularly given the relative **stability** of the butcher block, I hold that there was no need for Masters to take any such further step, and that Masters did take such care as was in all the circumstances reasonable to see that their customers, including Ms. Morrissey, would be reasonably safe in using their premises. I therefore find that Masters was not negligent and/or in breach of the statutory duty owed to Ms. Morrissey, and would therefore hold that Ms. Morrissey's claim against Masters fails.

### **Alternative Finding**

47. If I were to be wrong on my finding that the knife which cut Ms. Morrissey came from the block, rather than the boxes, that would not cause me to alter my view as to liability. If a customer were to have removed the protective sheathes from the knives and to have returned the unsheathed knives to a particular box and closed it, then it seems to me that that is the sort of event which could be virtually impossible for Masters to discover, and a failure on



the part of Masters to detect such an act would not in my view constitute a failure to comply with the common duty of care.

**Costs**

48. I would expect that costs should follow the event in the normal way, but in the event that counsel wish to address me on costs, they are of course free to do so.

Dated this      day of October 2008.

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Geoffrey R. Bell  
Puisne Judge