IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 49
WRC 42/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BEATRICE KATZ Plaintiff
AND	MANA COACH SERVICES LTD Defendant

Hearing: 23 March 2011
(Heard at Wellington)

Appearances: Tanya Kennedy, Counsel for the Plaintiff
Blair Scotland, Counsel for the Defendant

Judgment: 25 May 2011

JUDGMENT OF JUDGE A D FORD

The issue

[1] The issue in this case is whether the plaintiff is entitled to be indemnified by her employer for legal expenses she incurred in successfully defending a careless driving charge arising out of an accident occurring in the course of her employment. The end result of the criminal proceeding was that the plaintiff was discharged without conviction.

The facts

[2] The facts can be briefly stated. The plaintiff is a bus driver employed by the defendant. On 10 June 2009 she was involved in an accident at an intersection in Paraparaumu when she appeared to cut the corner while turning her bus to the right from Golf Road into Martin Road. Her bus collided with and scraped along the front

of a Mitsubishi motor vehicle being driven by Mr Ian Phillips. Mr Phillips' vehicle was stationary in Martin Road waiting to cross over the intersection.

[3] Later that same day, Ms Katz completed an insurance motor accident claim form for the defendant in which she admitted responsibility for the accident stating in explanation: "Just didn't see vehicle".

[4] The police attended the scene and on 11 June 2009, Ms Katz was issued with an infringement notice alleging that she had operated a vehicle carelessly. On 21 October 2009 she was discharged without conviction.

[5] On 2 November 2009, Ms Katz was invoiced by her counsel for attendances in defending the careless driving charge. The invoice showed that counsel had been required to make three court appearances on 9 August 2009, 26 August 2009 and 21 October 2009. The invoice totalled $562.50.

[6] On 14 March 2010 Ms Katz, through the New Zealand Tramways and Public Passenger Transport Employees Union Inc (the union), wrote to the defendant seeking to recover the expenses she had incurred in defending the careless driving charge. The letter explains the grounds for making the claim in these terms:

> As these expenses were incurred by Beatrice in the reasonable performance of her duty and the general rule of law is that an employee is to have indemnity acting in the execution and reasonable performance of duty, and the relationship of employer and employee raises by implication on the part of the employer a contract to reimburse the employee all expenses incurred in the reasonable performance of duty, we now ask that you reimburse Beatrice the sum of $562.50 which was the actual costs incurred by Beatrice in successfully defending the charge.

[7] Following an unsuccessful attempt at mediation, the defendant's Chief Executive Officer responded to the union by letter dated 7 July 2010 rejecting the plaintiff's claim. He also pointed out that the issue of indemnity in such circumstances had been raised by the union in the renegotiation of the collective employment agreement but no agreement had been reached on the subject and the defendant had signalled that it was not prepared to agree to the suggested proposal.

[8] Ms Katz then took the matter to the Employment Relations Authority (the Authority). The Authority Member specifically recorded in his determination[1] dated 30 November 2010 that the parties' employment agreement did not deal with the issue of indemnification and the case, therefore, fell to be decided on the basis of the common law.[2] The Authority dismissed the plaintiff's claim. Ms Katz then elected to challenge the whole of the determination by way of a hearing de novo in this Court, although it was accepted that there was no express indemnity clause in the parties' employment agreement and that the case was to be decided on the basis of the common law.

The contentions

[9] The basis of Ms Katz's claim is set out in her statement of claim in these terms:

> *Grounds of claim*
>
> 15. When the facts giving rise to the charge occurred, the Plaintiff was *"on duty"* and performing a duty of her employment.
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> 16. The Plaintiff relies on the term of employment, implied into every employment agreement in New Zealand, that an employer is liable to indemnify its employees for expenses incurred by those employees in the reasonable execution of their employment related duties.

[10] In her submissions on behalf of the plaintiff, Ms Kennedy emphasised that the plaintiff was engaged in her employment duties when the accident occurred and she was "not off on a frolic of her own". There was thus, in counsel's words, "a direct causal link between the bringing of the careless driving allegation and the performance of the Plaintiff's duty." Counsel also submitted that there was no finding that the plaintiff had been driving carelessly because she was acquitted of that charge. Reference was made to s 106 of the Sentencing Act 2002 which provides that a discharge without conviction is deemed to be an acquittal.

[11] Ms Kennedy claimed that the statement made by the plaintiff in the insurance form was irrelevant in that it was prepared for insurance purposes and was completed on the day of the accident when the plaintiff was in a state of shock. In

[1] WA 192/10, 30 November 2010.
[2] At [12].

the alternative, counsel submitted that the insurance statement did "not support a finding that the expenses incurred by the Plaintiff in defending the allegation of careless driving were solely attributable to her own default or breach of duty."

[12] In support of her submissions, Ms Kennedy cited the following extract from Brookers' *Employment Law*:[3]

> An employer is obliged to indemnify or reimburse an employee against liabilities, and in respect of expenses, incurred in the reasonable performance of the duties of the employment. The employee's right to be indemnified extends to a tortuous action, provided that the employee does not know that the action is unlawful: *F v Attorney-General* [1994] 2 ERNZ 62 (EmpC) at 70 (alleged defamatory communication about another employee in confidential memorandum to employer). The right extends to expenses incurred in defending a criminal charge of which the employee is acquitted: *Attorney-General v Jones* SC Wellington M73/99, 16 June 1981 per Quilliam J (discharge without conviction under s 42 of the Criminal Justice Act 1954; see now s 106 of the Sentencing Act 2002).

[13] Ms Kennedy also sought to rely upon observations made in this Court in the recent decision of *New Zealand Tramways and Public Passengers Transport Employees' Union Inc v Wellington City Transport Ltd*[4] where reference was made to an earlier decision of the Employment Court in *Davidson v Christchurch City Council*[5] which went on appeal to the Court of Appeal as *Christchurch City Council v Davidson*.[6] In the *Tramways* case a bus driver had been charged by the police with indecent assault arising from an incident where he required an intoxicated female passenger to leave the bus he was driving. He pleaded not guilty and the police subsequently withdrew the charge. The Court held that, pursuant to the relevant collective agreement, the employer was contractually required to reimburse the legal costs of the bus driver in successfully defending the criminal prosecution arising from events which occurred at work.[7] The Court also considered the position at common law and, after reviewing the authorities concluded:

> [35] The position at common law alone with regard to criminal prosecutions is therefore not settled. To the extent necessary for determining this case, I would be inclined to find that, but for cl 25 of the collective agreement, the common law of employment would have

[3] Employment Law (online looseleaf ed, Brookers) at CL 1.13.
[4] [2010] NZEmpC 12, (2010) 7 NZELR 483.
[5] [1995] 1 ERNZ 172.
[6] [1996] 2 ERNZ 1.
[7] At [28].

> included an indemnity of the employee's costs in successfully defending the prosecution that arose from the performance by him of his employment duties.

[14] *Davidson* was a case involving a number of former employees at the Christchurch Civic Creche who were dismissed as a result of a police investigation into child abuse. They subsequently sought indemnity from their employer, the Christchurch City Council, for their costs in successfully defending themselves against the resulting criminal charges. The Employment Court concluded that under the relevant provision in the collective employment agreement, the employees were entitled to be reimbursed the costs of their successful defence in the criminal proceedings. Ms Kennedy cited the following passage from the judgment of Chief Judge Goddard which was also referred to in the *Tramways* case:[8]

> It is self-evident that no one may be indemnified for knowingly committing a criminal act, but there is no reason why an employee or other agent should not be indemnified for the cost of defending herself or himself against an allegation which in the event is never established that he or she committed a crime in the course of the agency or employment. That is not indemnifying for criminal conduct, but indemnifying for the consequences of working in the employer's or principal's interests.

[15] In his submissions on behalf of the defendant, Mr Scotland acknowledged that an employee was entitled to be indemnified for liabilities and expenses when acting in the reasonable performance of his or her duties and he conceded that if Ms Katz could convince the Court that she had been acting reasonably when the collision occurred then she would be entitled to be reimbursed for the legal expenses claimed. The thrust of Mr Scotland's submissions, however, was that on the evidence before the Court it could not be said that Ms Katz had been acting reasonably. On the contrary, in counsel's words: "She was acting in breach of the implied contractual duty owed to her employer to exercise reasonable care in the performance of her duties" and in those circumstances there was no obligation on the defendant to indemnify her for the expenses incurred.

[16] Mr Scotland submitted that the duty of indemnification in agency relationships is that set out in *Laws of New Zealand*:[9]

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[8] At 206.
[9] *Laws of New Zealand* Agency (online ed) at 99-100.

> **99. Right of indemnity.** The relation of principal and agent by implication raises a contract on the part of the principal to reimburse the agent for all expenses, and to indemnity the agent against all liabilities incurred in the reasonable performance of the agency, including the agent's fees and costs...
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> **100. Extent of indemnity.** The right to an indemnity does not extend to expenses or liabilities incurred by an agent as a result of his or her own negligence, default, insolvency, or breach of duty..."

[17] In reference to the *Davidson* case, Mr Scotland cited the following *obiter dicta* statement from the Court of Appeal judgment, also referred to in the *Tramways* decision:[10]

> ... we should record that the indemnification of agents at common law does not extend to expenses incurred in defending an allegation that the person charged did something which he or she did not in fact do and which it was not his or her duty to do. The reason is that such expenses were not incurred by the worker as an agent of the employer in the reasonable performance of the worker's duties – (*Tomlinson v Adamson* [1935] Session Cas 1 (HL) ...

[18] The passage just cited was *obiter* in that the Court of Appeal acknowledged that the Employment Court finding on the indemnity question was protected by the exclusion from appellate challenge of a decision of the Employment Court on the construction of employment agreements. However, Mr Scotland stressed the affirmation by the Court of Appeal that the obligation to indemnify only applied where the expenses in question were incurred in the reasonable performance of the employee's duties.

[19] In relation to the *Tramways* decision itself, Mr Scotland submitted:

> In the *Tramways* case there was no evidence before the Employment Court of the reasonableness or otherwise of the employee's actions on the night in question that gave rise to the charge against him. The employee maintained his innocence and it appears that the police eventually agreed with him. There was no issue that he was acting in contravention of his contractual duties to his employer. This case differs, because this Court has evidence before [it] to enable it to decide whether or not Ms Katz's actions were in fact reasonable.

[20] Mr Scotland also made submissions in relation to the decision of Quilliam J in *Attorney-General v Jones*[11] which Ms Kennedy had strongly relied upon. In that

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[10] At 24.
[11] HC Wellington M73/79, 16 June 1981.

case the Master of an interisland ferry had been charged with a strict liability offence relating to his alleged failure to keep the stern door of the vessel closed while the ship was at sea. The elements of the offence were proved in the Magistrate's Court but he was discharged without conviction pursuant to the predecessor of s 106 of the Sentencing Act 2002. The Master then sought to recover from his employer the costs he had incurred in connection with the prosecution. The Magistrate held that he was entitled to be reimbursed by his employer and on appeal by the employer Quilliam J upheld the Magistrate's decision. Mr Scotland submitted:

> 16. The present case is distinguishable from the High Court's decision in *Attorney-General v Jones*. Jones did not admit fault, nor was he charged with an offence that carried any element of fault. The High Court was hearing an appeal on the decision in the Magistrate's Court; it did not have evidence before it regarding the reasonableness or otherwise of the employee's actions. There was no evidence before the Court as to whether the Master had acted contrary to his contractual duties to his employer or not. Justice Quilliam noted at page 6: "There was no allegation against the respondent that he had acted in breach of his contract of employment by the department."

[21] Mr Scotland also submitted that in light of the Court of Appeal's *obiter* comments in *Davidson,*[12] the decision in *Jones* could no longer be regarded as correct in law. The decision in *Jones*, Mr Scotland submitted, appeared to indicate that where a discharge without conviction is granted that automatically made the employee's actions reasonable for the purposes of the common law duty of indemnification. Counsel contended that such a proposition could not be correct, "as the obligation to indemnify only applies where [the] expenses were '...incurred in the reasonable performance of the agency' as per the Court of Appeal's decision in *Christchurch City Council*."

[22] Mr Scotland's principal submission was that Ms Katz was not entitled to be indemnified by her employer for the legal expenses she had incurred because they had resulted from unreasonable actions on her part in breaching the common law obligation she owed to her employer to take all reasonable skill and care in the course of her employment. On the issue of the obligation of an employee to perform his or her duties with proper care, Mr Scotland referred to the House of Lords

[12] At [17] above.

decision in *Lister v Romford Ice and Cold Storage Co Ltd*[13] and the statement by Viscount Simonds quoting from *Harmer v Cornelius*[14] that:[15]

> "When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes, – Spondes peritiam artis." ... I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction...

[23] Mr Scotland also relied on the *Romford Ice* decision in support of his final submission that the defendant could rightly have sought indemnity from Ms Katz for costs it had incurred arising out of the accident because of the breach of her implied contractual duty to exercise reasonable care in the discharge of her duties as a bus driver. However, neither the defendant nor its insurer took any such steps. The evidence was that the damage to the defendant's bus totalled $5,026.93. The extent of the damage to Mr Phillips' motor vehicle did not emerge from the evidence but Mr Phillips told the Court that the costs of those repairs had been met by the defendant's insurer.

Review of the authorities

[24] The origins of indemnification in the employment relationship are found in the general principles relating to the law of agency. In addition to the authorities cited, both parties sought to rely on the statement of the principle of indemnification in *Halsbury's Laws of England*:[16]

> An employer is under an implied duty to indemnify or to reimburse the employee, as the case may be, against all liabilities and losses and in respect of all expenses incurred by the employee either in consequence of obedience to his orders, or incurred by him in the execution of his authority, or in the reasonable performance of the duties of his employment. Notwithstanding the fact that an employee was acting in the course of his employment, he may lose his right of indemnity or reimbursement where the liabilities or expenses did not arise out of the nature of the transaction which he was employed to carry out, but were solely attributable to his own default or breach of duty, or where, by reason of his conduct, he has forfeited his right to receive any remuneration for his services.

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[13] [1957] A.C. 555.
[14] (1858) 5 CB (NS) 236.
[15] At 572-573.
[16] (5th ed, 2009) vol 29 Employment at [39].

[25] *Chitty on Contracts* defines "Indemnity of agent" in this way:[17]

> Unless otherwise agreed, the principal is under a duty to reimburse and indemnify the agent against all expenses and liabilities incurred in the execution of his authority.

However, it also notes that:[18]

> There is, however, no duty of indemnity in respect of liability incurred solely by the agent's negligence or breach of duty, or through his insolvency; in respect of transactions which are obviously or to the agent's knowledge unlawful.

[26] *Bowstead and Reynolds on Agency* states that:[19]

> Subject to the provisions of Article 63, every agent has a right against his principal to be reimbursed all expenses and to be indemnified against all losses and liabilities incurred by him in the execution of his authority.

Article 63 (2) provides:[20]

> An agent is not entitled to reimbursement of expenses incurred to him, nor to indemnity against losses or liabilities –
>
> (a) in respect of any unauthorised act or transaction which is not ratified by the principal, except where the agent has a right of action in restitution;
>
> (b) incurred solely in consequence of his own negligence, default, insolvency or breach of duty;
>
> (c) in respect of any act or transaction which is obviously, or to his knowledge, unlawful...

The related commentary notes that where, "the expenses and liabilities only arise because of the agent's fault, it is obvious that there is no liability to indemnify".[21]

[27] In one of the early decisions on the issue of indemnification, *Thacker v Hardy*,[22] Lindley J stated the general principle adding the following explicit limitations to its application:

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[17] HG Beale (ed) *Chitty on Contracts* (30th ed, Thomson Reuters, London, 2008) at 31-160.
[18] At 31-161.
[19] Peter Watts and FMB Reynolds (eds) *Bowstead and Reynolds on Agency* (19th ed, Thomson Reuters, London, 2010) at 7-056.
[20] At 7-062.
[21] At 7-065.
[22] (1878 – 79) LR 4 QBD 685 at 687.

> Upon general principles an agent is entitled to indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default.

In that case, the Court found that no such illegality existed in an agent speculating in the sharemarket when that was what he was authorised to do.

[28] In *Tomlinson v Liquidators of Scottish Amalgamated Silks Ltd*,[23] the House of Lords considered a case in which a company director was indicted on two counts of fraud. The director was acquitted on one charge and the other charge was found not proven. The director then claimed his litigation expenses from the liquidators of the company, which was refused. The company's articles of association gave an indemnity to a director for acts done in the "discharge of his duties". The House of Lords found on the facts that the director had no entitlement to indemnity under either the relevant article or at common law. Lord Tomlin stated:[24]

> In my view the expenses incurred by reason of the allegations made against the deceased [the company director], being allegations of matters which would have been a breach of his duty and which were held to be disproved or non-proven, are not expenses incurred by him by reason of an act done by him as a director in the discharge of his duties.

[29] A review of the Canadian authorities indicates that their approach to the issue of indemnification is consistent with the English approach. Thus, in *Clayburn Industries Ltd v Recor Services Inc*,[25] the British Columbia Supreme Court considered a case where an employee, Mr Piper, in breach of his employment contract with Clayburn, left to work for a rival company, Recor. After being ordered to pay damages to the plaintiff, Mr Piper sought indemnity from his new employer. The Court considered that "a party cannot claim indemnification in respect of a loss which he or she has brought about by his or her own fault"[26] and held that because Mr Piper was in breach of contract with his original employer, he was blameworthy and not without personal fault. The claim for indemnity from the new employer was rejected.

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[23] 1935 SC (HL) 1.
[24] At [6].
[25] 2000 BCSC 1069, 78 BCLR (3d) 19.
[26] At [19].

[30] In *Clayburn*, the Court relied upon the decision of the Ontario Court of Appeal in *Proctor v Seagram*.[27] In *Proctor*, the Court considered a case where a chauffeur was acquitted of the manslaughter of his passenger and sought an indemnity for his legal costs from his employer. The Court held:[28]

> There is no liability on the part of a master to indemnify the servant against the consequences or supposed consequences of the servant's own misconduct. On the contrary, the servant is bound to indemnify his master, and I know of no authority for the proposition that the master is bound to indemnify his servant against a false accusation of misconduct, even though that misconduct may be in the course of the master's employment. If the precise thing done constituting the alleged misconduct had been authorised and instructed by the master, then there would be an implied obligation on the part of the master to indemnify the servant against the consequences of his obedience to the master's orders. The allegations of misconduct here was such negligent driving as resulted in the death of a passenger. The master at the time was across the seas and in no way responsible criminally for the servant's conduct.

[31] In the recent decision of *Wormell v Hagen*,[29] the British Columbia Supreme Court again discussed indemnification. In that case the defendant negligently operated his crane causing the plaintiff injury. The defendant sought indemnification from what he claimed was his employer. The Court found both that the defendant was not an employee and that an employer is not liable to indemnify an employee against the consequences of the employee's own negligence. Applying *Proctor* the Court held:[30]

> An employer can only be liable if the precise thing done constituting the alleged misconduct had been authorized and instructed by the employer. That is not what occurred in this case. It was Mr. Hagen [the defendant] who determined how he was going to operate the crane and it was Mr. Hagen who negligently commenced to lift the cargo while Mr. Wormell was still on it. Mr. Moses [the alleged employer] did not authorise or instruct Mr. Hagen to use the crane in that fashion. *This case does not fall outside of the general rule that an employer has no obligation to indemnify an employee against the consequences of the employee's own misconduct*. (Emphasis added)

[32] There have been several recent English authorities where the courts have had to consider whether an employee could claim indemnity or compensation where the injury or disadvantage was a consequence of criminal or quasi-criminal offending. It

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[27] [1925] 2 DLR 1112.
[28] At 1113-1114.
[29] 2009 BCSC 1166.
[30] At [45].

is clear under English law that an employee could not claim indemnity (or indeed found any civil claim) for the consequences of a criminal conviction because of the maxim *ex turpi causa non oritur actio* which holds that "a civil court will not award damages to compensate a claimant for an injury or disadvantage which the criminal courts... have imposed on him by way of punishment for a criminal act for which he was responsible."[31] However, there remains a question mark over what criminal offences are covered, particularly regarding whether strict liability offences are included. The English Court of Appeal recently noted that it is undecided whether the maxim prevents recovery in cases of strict liability offending or mere negligence.[32] The present case is not concerned with the consequences of criminal or quasi-criminal offending and the recent English authorities make no reference to the discussion in the Canadian cases cited above.

[33] Turning to the New Zealand cases referred to by counsel, I accept Mr Scotland's submission that the present case is distinguishable from the High Court decision in *Jones* because in that case the employer made no allegation of fault against the employee. The decision must, therefore, be understood in the light of the particular facts of the case and the way in which it was argued.

[34] In *F v Attorney-General*[33] this Court, in deciding whether an employee should be indemnified for expenses incurred in a libel action, reaffirmed the formulation of the duty as stated in *Halsbury*.[34] However, Chief Judge Goddard went on to discuss situations when an indemnity would not apply stating:[35]

> It is an evident corollary of the axiomatic rule earlier mentioned that the right to be indemnified does not apply where the activity giving rise to the liability consists of an unauthorised breach of duty owed by the agent to the principal. In such a case, if the injured party seeks to sue the principal on the footing of the principal's vicarious ability for the acts of the agent, the principal could seek indemnity from the agent, rather than the other way around. ... Once it is established that the employer can sue the employee for damages for breach of duty, it follows that the employee cannot have a right of indemnity in respect of acts for which he or she is so liable to the employer.

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[31] *Gray v Thames Trains Ltd and another* [2009] UKHL 33, [2009] 1 AC 1339 at [69].
[32] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 1 Lloyd's Rep 462 at [18] and [26]. See also *Les Laboratories Servier v Apotex Inc* [2011] EWHC 730 (Pat) at [91]-[92].
[33] [1994] 2 ERNZ 62.
[34] At 68.
[35] At 69.

[35] On the facts, the Court in that case was not prepared to hold that the writing of the allegedly defamatory memorandum was in breach of the employee's duty and the employer was ordered to meet the plaintiff's costs in connection with the libel action. The observations by Chief Judge Goddard on the effect of the employer's right to seek indemnity from an employee for breach of duty have particular relevance to the facts of the present case.

[36] In relation to the passage in the judgment in *Davidson* relied upon by Ms Kennedy at [14], I accept that although the observations of Chief Judge Goddard on indemnity were not explicitly overruled by the Court of Appeal, they must now be subject to substantial doubt. As noted, the comments of the Court of Appeal[36] were based on the conclusions of Lord Tomlin in *Tomlinson*.

[37] Finally, in relation to the *obiter* observations by Chief Judge Colgan in the *Tramways* case, I accept for the reasons stated by Mr Scotland, that the facts of that case can readily be distinguished from the facts of the case before me. There was no suggestion by the employer in the *Tramways* case that the employee was at fault or acting contrary to his contractual obligations.

Conclusions

[38] From the foregoing authorities, it seems clear that at common law an employee may lose his or her right of indemnity or reimbursement where the liabilities or expenses sought to be recovered arise out of some breach of duty, negligence or other fault on the part of the employee.

[39] The fact that Ms Katz is deemed to have been acquitted of the traffic offence with which she was charged is not the end of the matter. It is still necessary for this Court to look at all the circumstances of the case and determine, in accordance with the standard of proof in civil cases, whether the defendant has established that the expenses Ms Katz seeks to recover arose out of some breach of duty, negligence or other fault on her part.

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[36] At [17] above.

[40] Ms Kennedy contended that the admission of fault made by Ms Katz in the insurance form was "irrelevant" because she was in a state of shock when she completed the form. Even if that submission were accepted, however, I have now heard evidence from witnesses called by both parties and I have been able to form my own judgment in relation to the incident that gave rise to the indemnity claim. I am satisfied that the accident in question was caused solely through the plaintiff's negligence, in other words, through a breach of her obligations to take all reasonable skill and care in the course of her employment.

[41] Those findings of fact are sufficient to dispose of the case. The plaintiff's claim is dismissed and the defendant is awarded costs. If agreement cannot be reached on the issue of costs then Mr Scotland is to file and serve a memorandum within 21 days and Ms Kennedy is to have a like period in which to respond.

A D Ford
Judge

Judgment signed at 9.30 am on 25 May 2011