

**FORM A**  
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

ECJ NO: 021/2006

**PARTIES: DALEEN SMIT AND THE ROAD ACCIDENT FUND**

**REFERENCE NUMBERS –**

- Registrar: **277/05**

**DATE HEARD: 15 FEBRUARY 2006**

**DATE DELIVERED: 23 FEBRUARY 2006**

**JUDGE(S): JONES J**

**LEGAL REPRESENTATIVES –**

*Appearances:*

- for the State/Applicant(s) **Appellant**(s): **P MOUTON**
- for the accused/**respondent**(s): **LA SCHUBART**

*Instructing attorneys:*

- Applicant(s)/**Appellant**(s): **LE ROUX INC.**
- **Respondent**(s): **JOUBERT GALPIN & SEARLE**

Possibly reportable on quantum

In the High Court of South Africa  
(South Eastern Cape Local Division)

Case No 277/04  
Delivered: **23/02/06**

In the matter between

**DALEEN SMIT**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

**SUMMARY:** Motor collision – bodily injuries – quantum of damages – whiplash – soft tissue injury to lower back – permanent residual disability giving rise to future medical and other expenses, an impaired earning capacity, loss of amenities, and pain and suffering – 33 year old police woman – awarded R97 198.40 plus certificate for future expenses.

## **JUDGMENT**

### **JONES J:**

[1] On 25 July 2001 the plaintiff suffered bodily injuries in the course of a motor collision between her motor car and a motor car driven by one Els. She alleged that the collision was caused solely by Els's negligent driving and in consequence she claimed compensation from the defendant (the Fund) in terms of the provisions of the Road Accident Fund Act No 56 of 1996.

[2] On the morning of the trial (15 February 2006) the Fund conceded that the collision was caused solely by Els's negligence, and that the plaintiff was entitled to the full amount of her damages, which included claims for

- (a) past and future costs of employing a domestic servant to perform household tasks which she can no longer do herself;
- (b) past and future costs of employing a domestic servant to perform household tasks which she can no longer do herself;
- (c) loss of earning capacity; and

(d) general damages for pain and suffering and loss of amenities.

The parties agreed upon the amount of past medical expenses in the sum of R1 438-84. The Fund has furthermore tendered to furnish a certificate in terms of section 17(4)(a) in respect of all future medical and hospital expenses which the plaintiff may incur by reason of her injuries, and in respect of the costs of the services to be rendered by a domestic servant in the future.

The remaining issues are

- (a) the plaintiff's entitlement to damages for the costs of employing a domestic servant up to the date of the hearing (February 2006);
- (b) her entitlement to damages for loss of earning capacity in the future;
- (c) her entitlement to general damages; and
- (d) the quantification of her damages under each of these heads.

[3] The only witnesses were the plaintiff and Dr Edelstein, a specialist orthopaedic surgeon who compiled a medico-legal report on the plaintiff's condition. The parties are not *ad idem* about the various inferences to be drawn from their evidence, but the facts are not in dispute.

[4] Before the collision the plaintiff was a young woman in good physical health. She is now 33 years old, and has a small son aged 3 years and 10 months. She is employed by the South African Police Services as an inspector in the uniform branch. Her duties involve long sifts in a police vehicle patrolling the streets of Port Elizabeth on crime prevention duties. The work is exacting and stressful. It demands a high degree of physical fitness and commitment. The plaintiff is good at her job and she enjoys it. She has been doing this kind of work – fulfilling the traditional role of the 'bobby on the beat' – for most of her 15 year services in the police, and she has derived a high level of job satisfaction from it.

[5] The insured vehicle was driven into the side of the plaintiff's motor car with the result that the plaintiff sustained a soft tissue to her lower back and a whiplash injury to her neck. The next day she was aware of pain in the neck and lower back. She began to get severe headaches. She consulted her family doctor within a few days. He prescribed physiotherapy and analgesic medication. Her

condition has not however resolved despite her treatment, which, though conservative, has been repeated and prolonged. For example, in 2004 she underwent physiotherapy until the full amount payable by her medical aid fund for physiotherapy was exhausted and she was obliged to discontinue it. She still suffers from severe headaches every day, for which medication is necessary. She still has lower back pain and neck spasms regularly. This has a significant effect on the quality of her daily life.

[6] The plaintiff's duties in the police require her to spend long shifts of 10 hours or more in a motor car every day. Sitting in a car causes back ache. At times she must drive. Driving causes neck spasms. Headaches develop daily, of such severity that she cannot manage to do her job without taking painkillers. The regular use of analgesics obtainable over the counter causes its own sequence of problems for her digestive system. The result is that the plaintiff's efficiency and the enjoyment she derives from her work is significantly compromised on a daily basis. She could alleviate her situation by seeking more sedentary employment within the police force. For example, she has in the past performed the less demanding work of a court orderly, and could no doubt do so again. But this work is less rewarding, both from a financial point of view and for personal reasons. More sedentary work involves giving up an additional income of R500 per month which she gets as a danger allowance and for overtime and special public holiday duty. The plaintiff is a woman of spirit. She prefers to put up with the unpleasantness of headaches, neck pain and back pain for the additional income and for her job satisfaction. She will not, however, be able to do so indefinitely.

[7] The plaintiff's condition takes its toll on her quality of life on a daily basis in other ways as well. Such ordinary activities as standing for long periods, bending, stretching, getting dresses, and picking up her child give rise to discomfort on a continual basis. Pain interferes with her sleeping. She finds that she can no longer manage her housework without the assistance of a domestic servant. Since February 2004 she has been obliged to employ a domestic servant to do the cleaning and ironing once a week, at a cost of R240-00 per month. She can no longer work in her garden, which was a source of pleasure before. Worse still, she can no longer attend a gymnasium. Before the collision she regularly went to the

gym five times a week for what appears to have been a rigorous session of body building exercises and circuit work, which not only kept her fit but alleviated stress and was to her immensely enjoyable. She can no longer do so at all, with the result that she is prone to depression and she is not as fit as before.

[8] Dr Edelstein is of the opinion that the plaintiff's complaints are genuine, reasonable and realistic. By now, more than 2 years after the collision, her condition of chronic pain syndrome is established and will not resolve. She is one of that small but well-documented class of victims of whiplash and soft tissue injuries whose symptoms persists and will continue to persist for the rest of her life. Physiotherapy and analgesic treatment will therefore be necessary for the rest of her life. They will not bring about a cure, but they will make her condition manageable and will help to prevent it from getting much worse, though some deterioration is likely. Because of this she has a 20% chance of requiring surgery for a discectomy, or a spinal fusion, or a prosthetic implant, by the time she reaches about 45 or 50 years of age. Her capacity to perform the physically demanding work which she presently does will cease about 5 to 10 years earlier than would have been the case had she not been injured, whether or not she has the surgery. She will then become fit for sedentary work only.

[9] The evidence, none of which as I have said was contradicted or disputed, establishes beyond question the plaintiff's entitlement to compensation under the three headings in dispute – the costs of the domestic servant, diminished earning capacity giving rise to less income for a period of from 5 to 10 years in the future, and general damages for pain and suffering and loss of amenities.

[10] The costs of the domestic servant amounts to R5 760-00 which is R240-00 per month for 24 months. Mr *Dala* argued for the fund that this amount must be reduced for the 'contingency' of the domestic servant also doing ironing for the plaintiff's fiancé who since joined the household. This argument is unsound. The fact of the matter is that, but for her injuries, the plaintiff would have been perfectly capable of doing all the housework for her household. She now cannot do so, and the cost to her has in fact been R5760-00. Ironing for the fiancé is not a

contingency and there is no logical reason to make any deduction for it. It would have been included among her ordinary household chores had she not been injured.

[11] Mr *Mouton* submitted on behalf of the plaintiff that the plaintiff has proved an amount of R42 000-00 for diminished earning capacity. This is a loss of R500-00 per month or R6000-00 per annum for a period of 7 years which is midway between Dr Edelstein's estimate of the period of 5 to 10 years by which the plaintiff's earning capacity will be reduced. He argued that the need to capitalize this amount is offset by the effects of inflation and future salary increases. Mr *Dala* did not argue that this was an improper basis to approach the matter. He contended himself with the bald submission that the plaintiff has not discharged the onus of proving her loss under this heading. In the light of the acceptable evidence placed before me which Mr *Dala* was not able to challenge, this submission is entirely without substance. Mr *Dala* argued in the alternative that I should make a contingency deduction of at least 30% of whatever I might award, without however offering any argument or suggestion of what the award should be, how I should calculate it, and why a deduction of 30% is appropriate.

[12] I am satisfied that the plaintiff has proved on a balance of probabilities that at some time in the future her earning capacity will be reduced by an amount of R500-00 per month or R6000-00 per annum for a period of at least 5 years, probably more and possibly for as long as 10 years. This loss may not be capable of exact computation on the evidence placed before me. But in my view it is nevertheless capable of quantification, and '[a]ll that a court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss' (*Southern Insurance Association v Bailey* NO<sup>1</sup>). I must do the best I can to estimate the present value of the loss on a realistic basis, regard being had to the facts and figures which emerge from the evidence, and to reach a conclusion which is fair to both parties. In order to do so I take into account

- that the plaintiff will on the date of judgment receive the benefit of a capital amount for a loss which be incurred in the future;

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<sup>1</sup> 1984 (1) SA 98 at 113G.

- that account should be taken of the eroding effects of inflation, the probability of salary increases, and the plaintiff's liability to pay tax;
- that Dr Edelstein thinks that, because the plaintiff is now only 33 years old because attrition will be over a long period, her reduction in earning capacity is more likely to be for a longer period than a shorter period; therefore, her loss will probably be incurred for a period of not less than 5 years, and, more probably, for a period approaching 10 years;
- that I must bear in mind such adverse contingencies as early mortality and other accidents of life in the police force which might in any event reduce her active working life;
- that plaintiff has a positive attitude both to her disability and to her employment, and she will more likely than not make the best of it by keeping to her present employment until it is no longer possible for her to do so.

In all the circumstances I think that a fair and reasonable quantification of the present value of the plaintiff's reduction in earning capacity is R35 000-00.

[13] In my view a proper award for pain and suffering and loss of amenities is R55 000-00. In arriving at this figure I have taken into account the plaintiff's past pain and suffering, the prognosis of future chronic pain syndrome, and their effect on her quality of life as outlined earlier in this judgment. I have tried to compare them to the awards made in the cases to which counsel has referred me: *Stemmett v RAF*<sup>2</sup>, *Turner v RAF*<sup>3</sup>, *Southgate v RAF*<sup>4</sup>, and *Cewu v RAF*<sup>5</sup>, which, with the exception of *Turner's* case, are contained in Corbett and Honey's *Quantum of Damages in Bodily and Fatal Injury Cases*. To make comparisons meaningful, I must not forget that the value of the awards in earlier cases must be brought up to date. I must also not lose sight of the differences between the circumstances of those cases and this case. Similar cases are rarely, if ever, sufficiently similar in circumstance to justify following them slavishly. They are no more than general

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<sup>2</sup> Volume V, C4 - 60

<sup>3</sup> Case No SECLD 2698/00(Pickering J)

<sup>4</sup> Volume V, C3 - 71

<sup>5</sup> Volume V, C3 120

guidelines. Thus, an amount of R40 000-00 was awarded in 2000 to the 51 year old plaintiff in *Turner's* case for arguable no more serious consequences of a whiplash injury than occurred here, (although it aggravated an already compromised cervical spine). The court held that the period during which the disability and pain would be suffered was only for a further 5 years. In the case before me the consequences are no less severe (except that here the headaches are not described as excruciating), but they must be endured for something in the vicinity of 30 to 40 years, which places the two cases in different categories. In *Southgate's* case an award of R20 000-00 was regarded as appropriate in 2001 for a mild whiplash from which a full recovery had been made. The judgment in *Cewu's* case discusses a number of other whiplash injury cases which are also useful for comparative purposes. The award was R40 000-00 in 2002 for disability following a moderately severe whiplash injury, disability which would probably dissipate for a while with treatment but which would ultimately become more aggravated. The award in *Stemmet's* case of R150 000-00 is not helpful: it was for injuries considerably more serious than those suffered by this plaintiff.

[14] In summary, the following damages are payable to the plaintiff in addition to the amounts covered by the defendant's certificate in terms of section 17(4)(a):

Past hospital and medical expenses	R1 438.40
Past cost of domestic servant	R5 760.00
Loss of earning capacity	R35 000.00
General damages	R55 000.00
Total	R97 198.40

[15] The defendant is also liable to pay the plaintiff's costs of suit, which shall include the qualifying expenses, if any, of Dr Edelstein and the costs of an inspection *in loco* with counsel. In view of the amount for which the defendant is liable in terms of this judgment together with the probable amount for which it will become liable in terms of the certificate it is obliged to issue, there is no justification for limiting costs to the magistrates' court scale as suggested by the



defendant in the rule 37 minute. I do not believe, however, that in this case the defendant should be obliged to pay the qualifying expenses of Ms Benita Crouse who furnished an occupational therapist's report for the plaintiff but who was not called to testify.

[16] There will be the following order:

1. The defendant is ordered to pay R97 198.40 to the plaintiff as and for damages, with interest thereon at the prescribed rate from 14 days from the date of judgment to the date of payment.
2. In terms of section 17(4)(a) of the Road Accident Fund Act 96 of 1996 the defendant is liable to pay, has undertake that it will pay, and is hereby directed to furnish an undertaking in writing that it will pay, the costs of future accommodation in a hospital or nursing home or the treatment of or rendering of a service (inclusive of service rendered by a domestic servant) or the supply of goods to the plaintiff in respect of her claims arising out of the collision of 25 July 2001, after the costs thereof have been incurred and on proof thereof.
3. The defendant is ordered to pay the plaintiff's taxed party and part costs, with interest thereon at the prescribed rate from a date 14 days after the date of the taxing master's *allocatur* to the date of payment, such costs to include the qualifying costs, if any, of Dr Edelstein, and the costs of a pre-trial inspection *in loco* attended by counsel.

RJW JONES  
Judge of the High Court  
20 February 2006