Considerations for the quantification of damages awards

*Coughlan NO v Road Accident Fund 2015 (4) SA 1 (CC)*

By Wim Loots

The recent judgment in *Coughlan NO v Road Accident Fund 2015 (4) SA 1 (CC)* concluded that foster care and child support grants should not be taken into account when an award for loss of support is made. Actuaries that specialise in this field routinely encounter a range of scenarios involving state welfare. In this article, I discuss the potential wider implications of *Coughlan* for damages awards.

**History of litigation on the topic**

The deductibility of child support or foster care grants from damages awards has been considered in a number of judgments such as:

- *Makhuvelaobo H v Road Accident Fund 2010 (1) SA 29 (GJ)* – foster care grant is not deductible.
- *Road Accident Fund v Timis (SCA)* (unreported case no 29/09, 26-3-2010) (Mhlantla, JA) – child support grant is deductible.
- *Road Accident Fund v Coughlan 2014 (6) SA 376 (SCA)* – foster care grant is deductible.
- *Coughlan* – foster care and child support grants are not deductible.

**Summary of Coughlan**

The Constitutional Court (CC) ruled that both foster care and child support grants should not be taken into account when an award for loss of support is made, following the death of a breadwinner.

The judgment addressed the following four key points in reaching a conclusion:

- The state has a constitutional duty to support children in need of care.
- Child and foster care are unrelated to damages for loss of support and hence are different in nature than compensation received. The state acts in the role of caregiver when paying grants, but indemnifies the wrongdoer when paying compensation via the Road Accident Fund (RAF).
- Grants are paid to the caregiver and not to the child, whereas compensation is paid to the child.
- There is not a causal link between the death of the breadwinner and payment of the grant. Payment is rather predicated on a child being in need of care, whatever the cause (by reference to the Social Assistance Act 13 of 2004).

**Broader considerations stemming from the judgment**

The *Coughlan* judgment specifically addressed a loss of support award where foster or child support grants commenced following the death. The judgment raises a number of questions, when considered in relation to the broader spectrum of possibilities, such as –

- other forms of state welfare, namely, care dependency, disability or old age grants;
- whether the grant commenced before or after the accident or is expected to commence in future; and
- other categories of loss.

In the discussion that follows I will focus on various types of grants, the situations that typically give rise to these grants and how the key points in *Coughlan* may be of relevance. Note that it is not clear if all four key points must be mutually satisfied, for the judgment to be more universally applied. The first two key points are fairly fundamental arguments, based on the Constitution and role of the state, and are generally true for all types of state grants. If the first two key points are deemed sufficient, it may imply that all types of grants can be ignored when an award is made.

**Grants that commenced prior to the cause of action**

Prior to *Coughlan*, it was common practice to –

- deduct the value of child support grants from loss of support awards in accordance with *Timis* (provided the grants were paid as a result of the accident); and
- exclude the value of foster care grants in accordance with *Makhuvela* (for a brief period the grants may have been deducted in accordance with *Coughlan*).

All the judgments referred to above, seem to implicitly consider only grants that commenced after the cause of action. It is, however, common to encounter grants that were already in payment, for example, many poor families receive child support grants that pre-exist the cause of action. In practice it could have been the deceased or the surviving spouse that was the recipient.

Prior to *Coughlan*, it seemed logical to allow for pre-existing grants as family income in the actuarial calculations, which influenced the support allocated to the dependants. Although the *Coughlan* judgment probably did not have pre-existing grants in mind, one could argue that the first three points addressed in the judgment are satisfied. The fourth point is not applicable since the question of causality does not arise for a pre-existing grant.

Following *Coughlan*, one could conclude that pre-existing grants should also be excluded from calculations. This would generally be in favour of dependants, provided the surviving spouse was the grant recipient. However, where the deceased was the recipient (and the grant did not revert to another family member) this would penalise the dependants. I would argue that this is not intended and a pragmatic approach is to only exclude child or foster grants where this does not deprive the dependants of support.

**Care dependency grant**

The care dependency grant is payable to the primary caregiver of a child in need of permanent care due to an impairment. The grant has the same value as the disability grant but is payable to the child’s caregiver until the child turns 18. The grant may be converted to a disability grant after age 18.

The grant is often of relevance for injury matters where a young child was in an accident or the victim of medical negligence. The question is whether the value of the care dependency grant should be offset against the award (probably the cost of caregivers or possibly the loss of income component).

It follows that the first three key points in *Coughlan* are satisfied for the care dependency grant. The fourth key point concerns causality and whether the cause of action resulted in the commencement of the grant. One could follow a similar argument to *Coughlan*, namely, the grant is predicated on the
child being in need of permanent care (by reference to the Social Assistance Act), whatever the cause.

The care dependency grant, therefore, seems similar in nature to the foster and child support grants. If this is accepted, it suggests that the grant should be ignored when compensation is calculated.

**Disability grant**

The disability grant is payable to a person over the age of 18 that is unable to obtain employment due to an impairment. The grant is usually of relevance for injury matters and the value of past payments is deducted from the loss of income award.

The disability grant satisfies the first two key points of Coughlan but not the third, since it is paid directly to the claimant (there are exceptions, eg, mental incapacity). Finally, the causal link with the cause of action seems stronger, but it can still be argued that the grant is predicated on the claimant being in need of financial assistance, regardless of the cause.

There seems to be doubt whether the disability grant is deductible, assuming all four points in Coughlan must be mutually satisfied. However, if the first two key points are deemed fundamental and sufficient, the grant is not deductible. Hopefully future judgments will provide clarity in this regard. Actuaries typically state the value of the disability grant and this can easily be excluded from the award if needed.

Finally, an interesting scenario arises where the care dependency grant was converted to a disability grant. If it is accepted that the care dependency grant is not deductible (refer to previous section) it would seem inconsistent to then deduct the disability grant once converted.

**Old age pension**

The old age pension is payable to persons over 60 that satisfy the means test. The fourth key point of Coughlan is generally not applicable, since the pension cannot be linked to the cause of action. The first two key points are satisfied but the third not, similar to the disability grant.

The old age pension can be relevant to a wide range of situations. In my view, the treatment of the pension should be considered in conjunction with the specifics of each scenario. The following are two examples involving loss of support calculations:

- Deceased was recipient of the pension: To exclude the pension would deprive the dependants from support they would have received. I would, therefore, argue that the pension should form part of the support calculations.

- Surviving spouse unemployed at date of death, but will qualify for the pension at age 60: Allowing for the pension effectively reduces the support calculated for the surviving spouse. The pension can be excluded if the first two points of Coughlan are deemed fundamental and sufficient, else probably not.

**Conclusion**

The Coughlan judgment specifically deals with the treatment of foster and child support grants that commence following the death of a parent. This article aims to broaden the discussion regarding the treatment of other types of state welfare payments that may impact the actuarial assessment of compensation under a variety of circumstances.

The article is not aimed at expressing a legal opinion, but rather to create awareness of the various complications that may arise. The author welcomes comments or alternative arguments from other practitioners.