

THE LOSS OF A CLOSE PERSON – INTERSECTIONS BETWEEN LAW AND PSYCHOLOGY. CASE OF POLISH LAW

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Abstract The Polish legislator allows for compensation for the harm suffered due to the death of close person resulting from a tort (for example, a car accident). The basis for such claims is Article 446 § 4 of the Polish Civil Code, which contains a vague expression “the closest family member.” Courts must therefore determine whether and how someone was close to someone. The language of the judicial justifications indicates that the courts do not determine proximity solely based on legal criteria. In this publication, I will analyze court decisions in which the scope of the vague expression “the closest family member” has been adjudicated. The analysis aims to establish the legal understanding of closeness in the indicated case and to determine whether and how references to psychology support it.

Keywords
close person,
legal closeness,
grief, law and
psychology,
material closeness

*“Someone was always, always here,
then suddenly disappeared
and stubbornly stays disappeared”*
(Szyborska 2012)

1 Intrudaction

When you type: “death of a close person” in your search engine, advice appears on how to come to terms with death, regain a sense of life and continue to function. The experience of the death of a close person is referred to as loss,¹ a sense of emptiness, depression, grief, and suffering. This is also how many people view the death of a close person - as a traumatic life experience that cannot be foreseen and for which it is impossible to prepare oneself.

In the context of consideration of death, the law is associated primarily with inheritance laws which, however, as a rule, regulate matters of property: they focus on the rules of distribution of the inheritance among the beneficiaries, ignoring matters of closeness between the living and the dead. In this paper a very different situation will be discussed in which closeness in a relationship broken by death is still fundamental for the law.

The Polish legislator allows compensation for the harm suffered as a result of the death of a close person on the basis of Article 446 § 4 of the Polish Civil Code (hereinafter Article 446 PCC), which provides that: “The court may also award the immediate family members² of the deceased an appropriate sum as monetary compensation for the harm suffered,”³ Compensation is intended to compensate for the harm (pain and suffering) caused by the death of an immediate family member as a result of a prohibited act (for example, car accident, medical error).

This article analyzes the court decisions issued on the basis of Article 446 PCC. When issuing judgments on this basis, Polish courts are required to determine the existence of a relationship between the deceased person and the living person (the

¹ It is worth outlining here the Polish linguistic context of the word “loss” (pl. “strata”). One of its meanings is: “the unwelcome departure of a person from a close environment due to death or separation.” Entry: “strata” [in:] Żmigrodzki, P. (ed.). Wielki Słownik Języka Polskiego [The Great Dictionary of the Polish Language]. Retrieved from [https://wsjp.pl/haslo/podglad/28558/strata/5122758/bliskiej-osoby_\(January 20, 2022\)](https://wsjp.pl/haslo/podglad/28558/strata/5122758/bliskiej-osoby_(January 20, 2022)).

² I will use this expression in the text interchangeably with „the closest family member” and “close person”.

³ Article 446 § 4 of the Civil Code Act of 23.04.1964 (Journal of Laws of 2020.1740).

claimant), most often – a family member. The main focus of court findings is to determine if and how someone was close to someone else. Although claims under Article 446 PPC are very popular in Poland today, and that provision is the subject of extensive judicial decisions,⁴ it does not provide - as it initially seems - a systematic, consistent approach to interpretation. In the section of this article analyzing the case law, I will present the most distinctive and recurring argumentation elements.

The paper will analyze the criteria courts use to determine the existence of closeness between a living claimant and a deceased close person. First, the paper will compare the legal and psychological understandings of closeness in the context of losing a close person. Then, sequentially, the paper will analyze (1) the characteristics of the elements of a close relationship and the meaning attributed to the loss of a close person from the perspective of psychologists; (2) the characteristics of a close relationship in the legal sense, and the legal effects produced by the loss of a close person; and, based on these findings, (3) whether courts consider the psychological perspective when determining the scope of the vague expression “immediate family member” and if so, how. If courts do not follow the findings of psychologists, then what is the source of knowledge on closeness for lawyers determining the claims under the above-mentioned provision?

First, it is important to understand the characteristics of the main protagonist of this text a little more, that is Article 446 PPC. The solution adopted in Article 446 PPC is modeled on the former Article 166 of the Code of Obligations,⁵ which was repealed in 1965, because in the jurisprudence of the 1950s, there were numerous claims that it was wicked to seek compensation for the death of an immediate family member.⁶ For example, many questioned the ability of parents to seek redress for

⁴ The LEX database shows that (as of January 25, 2022) 6975 were issued on the basis of that legal regulation.

⁵ Article 166 of the Regulation of the President of the Republic of Poland of 27.10.1933 - Code of Obligations (Journal of Laws): “In the event of the death of an injured person as a result of bodily injury or health disorder, the court may award the immediate family members of the deceased or the institution designated by them an appropriate sum of money as compensation for the moral harm suffered by them.”

⁶ Resolution of the Supreme Court (CI) of 29.01.1957, 1 CO 37/56, OSNCK 1958, No. 1, item 2: “A claim for compensation for moral harm under Article 166 of the Civil Code cannot be accepted when the harm consists exclusively in suffering due to the loss of a loved one, but is not connected with deterioration of the personal circumstances of the entitled person.” (...) This kind of compensation does not solve the issue satisfactorily, since it can only be measured with money, which is not suitable for estimating psychological experiences of a person.”

the moral injury suffered following the death of their child.⁷ Objections were also raised against compensating for pain and suffering through financial gain.⁸

The possibility of claiming compensation for the death of an immediate family member was finally restored in the Polish Civil Code in 2008. As the bill authors then indicated, the issue of compensation ceased to be controversial in the Polish law studies, while courts - without a clear standard - are conflicted regarding the appropriate grounds to use for determining the claims to compensate for the harm other than financial, related to losing a close person.⁹

Why is the chosen example unique compared to other provisions of Polish law? First, because of the abnormal interruption of the parties' ability to continue their physical relationship, independent of their will. When a close relationship ends by divorce or separation, the law will generally no longer recognize such persons as close.¹⁰ The separation, after all, is by their will. The case at hand involves a different state of affairs - termination of the relationship occurs independently of the will of the individuals, as a result of sudden death caused by a prohibited act.

The regulation is also unique because Polish law associates the death of a close person with the creation of several property privileges designed to make it easier for close person to live after the death of the deceased (for example, in situations where the deceased was the primary breadwinner in the family or the owner of the property in which the close person reside). For many of these situations, the content of the emotional relationship linking the individuals is irrelevant; all that matters is whether

⁷ Judgment of the Supreme Court of 15.03.1963, I CR 151/62, LEX No. 1672863: "The Province Court's reasoning that the claimants are entitled to compensation because their personal circumstances have deteriorated as a result of the death of their 5-year-old child, is also completely misplaced. The age of the child and the lack of any realistic prospect of improvement of the claimants' lot once the child could start helping them does not allow, as is also evident from the cited resolution, to make such an assessment."

⁸ Resolution of the Supreme Court of 15.12.1951, C 15/51, OSNCK 1953/1, item 3; Government bill to amend the Civil Code Act and the Code of Civil Procedure Act, form No. 81, pp. 8–9: "For it was also supported by views questioning precisely the legitimacy of pecuniary compensation for harm in the event of the death of a loved one (represented also in other legal systems - for example, German, Austrian law), and this because of the negative assessment of the situation in which the death of a loved one becomes a source of pecuniary gain."

⁹ Act of 30 May 2008 amending the Civil Code Act and certain other acts (Journal of Laws 2008, No. 116, item 731). As indicated in the government's justification of the bill, "since the possibility of redress exists in the case of violation of personal rights (...) «all the more so should such a possibility exist in the case of death of a loved one, which significantly affects the sphere of psychological feelings of the individual." Government bill amending the Civil Code Act and the Code of Civil Procedure Act, print No. 81, p. 8.

¹⁰ In principle, because it is possible to find regulations in the law that treat former spouses on an equal footing with current ones, for example, in the grounds for recusal of a judge by operation of law.

the deceased was someone's husband, father, etc. The situation is different in the case of Article 446 PCC - that provision obliges the courts to perform a deeper analysis of the emotional ties between individuals, and this is the relationship in which only one of the parties is still alive.¹¹ One may, of course, ask why, when a death occurs in “natural” conditions, there is no possibility of seeking redress. The circumstances of death are of key importance here - in claims under Article 446 PCC, death occurs in an unnatural way, as a result of the actions or omissions of a third party.

2 Close Relationships From A Psychological Perspective

Here we will evaluate two primary considerations. The first question is how psychologists determine that a relationship is close, while the second is how the interruption of a close relationship as a result of death affects surviving individuals.

2.1 What does a “Close Relationship” Mean?

No single, universal understanding of close relationships has been developed in psychology.¹² The terms “closeness” or “close relationships” appear most often in the context of issues involving romantic relationships, friendships, or family relationships (marriage, parenting, family), but these are only labels of closeness. The mere indication that, for example friendship, is a close relationship, fails to answer the basic question: what does it mean that someone is close to another person (Clark & Lemay, 2010, p. 899)?

The very act of calling someone one's beloved or friend, already provides some relevant information (the individual identifies the person as close), but does not answer the question of what closeness in a relationship is. Adital Ben-Ari and Youve

¹¹ On the basis of that provision, even a former spouse or a separated spouse may be considered a relative provided, of course, that they can prove that they had been really close to the deceased. Judgment of the Supreme Court of 22.02.2018, I CSK 377/17, LEX No. 2484752: “A former spouse may be considered the closest family member of deceased person if, despite formal dissolution of the marriage, the former spouses re-started living together as husband and wife, demonstrating a close personal, physical, emotional and economic relationship that was visible to those around them, similar to the relationship existing in a properly functioning marriage (...). This possibility is excluded if the deceased person has married another person, as in the case at hand, where, in addition, the former spouses did not maintain close personal contacts with each other on a regular basis, did not spend free time, holidays or family celebrations together, and were in fact bound only by their child”.

¹² The term “close relationships” is often used by psychologists; characterizing the “essence” of the term, however, is difficult (Parks & Floyd, 1996, p. 86; Register & Henley, 1992, p. 467).

Lavee indicated that closeness is conceptualized as an emotional trait (feeling close to someone), referring to essentially stable, enduring relationships based on positive interactions. From that point of view, the quality of the relationship, the level of intimacy, trust, and commitment, will be evaluated as characteristics of stable relationships that are resilient to day-to-day changes (Ben-Ari & Lavee, 2007, p. 640). Psychology lists several key criteria for determining that a relationship is characterized by intimacy.

2.1.1 Interdependence

The basic prerequisite for the existence of close relationships is interaction, which involves individuals influencing each other and leading to interdependence between them¹³ (Regan, 2011, p. 5). One person's behavior (i.e., how they act, think, or feel) influences another person's behavior (i.e., how they act, think, or feel) and vice versa. However, interdependence can also arise, for example, in relationships with supervisors or co-workers, which does not yet mean that we can call these relationships close. To speak of closeness, interdependence needs to be complemented by two further factors: (1) uniqueness and (2) mental representation of the person.

To recognize the existence of the first factor, interactions must be unique in some way to the two people involved. The pattern of their interactions must differ from the interactions each of them has with other individuals and from the patterns of interaction in the groups to which they belong (for example, work-related). In order to recognize the second factor, individuals must create a mental representation of their relationship (known as a 'relationship schema'), i.e., in their mind they must retain a history of previous interactions with the given person. It is this "historical warehouse" of the interaction of a particular relationship that allows individuals to react to each other in unique ways not based on learned roles. An individual reacts differently to their best friend than to other people. For example, friends - through shared history, future - easily recall information about each other's character and behavior. That mental "warehouse of knowledge" affects day-to-day interactions and is permanently present in them. Researchers use the term "close relationships"

¹³ "Interaction is a necessary condition for a relationship to exist. This means that if two people seldom interact they do not have much of a relationship, and if there is no interaction whatsoever then there is no relationship — regardless of what they themselves might say or wish to believe" (Regan, 2011, p. 5).

only for relationships that meet the above conditions. The respective relationships vary in the nature and degree of intimacy present in them. Recognition of what may be indicative of closeness is aided by making a distinction between two dimensions of closeness: the behavioral dimension and the subjective one.

2.1.2 The behavioral dimension of close relationships

The behavioral dimension of close relationships refers to the interactions that occur between specific individuals and the degree to which these individuals exhibit high interdependence (Regan, 2011, p. 11). It is an externally observable dimension of the relationship that can be assessed based on objective criteria. The Relationship Closeness Inventory (hereafter: RCI) is used to identify that dimension of a close relationship (Berscheid, Snyder & Omoto, 1989, pp. 792–807). Ellen S. Berscheid and her colleagues developed that form to simplify the assessment of closeness in relationships (*the back-to-basics approach*). To go back to basics in this case is to establish “what one sees and hears,” as if from the perspective of a visitor from outer space, unaware of the complexity of human relationships (Swails & Bowerman, 2020, p. 146). Thus, the form asks questions about easily observable issues, i.e., frequency of interactions, their variety, impact of individuals on each other, and duration of relationships.

2.1.3 The subjective dimension of intimate relationships

The subjective dimension of intimate relationships also includes the emotional bond that connects individuals, i.e., love and intimacy. Most often, this dimension is assessed on the basis of self-definition - the individual himself or herself indicates that he or she considers a particular relationship to be close (Regan, 2011, p. 11). The Inclusion of Others in Self (hereafter: IOS) scale is helpful in characterizing this type of relationship (Aron, Aron & Smollan, 1992, pp. 596–612). Closeness as measured under IOS is seen as a merging of the self that results in a sense of oneness in the individuals in the relationship. The IOS scale can be used to determine the extent to which a person feels connected to another.

To assess the existence and degrees of closeness (close, closest), the subjective quality of the interaction between individuals is crucial - that is, whether in the individuals' discernment their relationship is good and meets their needs (Doroszewicz, 2008, p. 9).

These initial intuitions about the psychological understanding of close relationships already show that it is such a relationship that is considered special and unique. Stable and enduring close relationships can be one of the important factors that contribute to enhancing individuals' sense of well-being (Leary & Baumeister, 2000, p. 11).¹⁴ When asked what makes their lives valuable, individuals often point specifically to close, intimate relationships with others (Simpson & Tran, 2006, p. 3). According to many authors, it is close relationships that give meaning to human existence and are its purpose (Finkel & Simpson, 2017, pp. 383–411; Doroszewicz, 2008, pp. 5–18; Baumeister & Leary, 1995, pp. 497–529; Deci & Ryan, 2014, pp. 53–73), affect the quality of life and the level of happiness (Crossley & Langdridge, 2005, pp. 107–135; Suwalska-Barancewicz, 2016, pp. 11–13), and the psychological well-being of individuals (Slatcher & Selcuk, 2017, pp. 16–21; Pietromonaco, Uchino & Schetter, 2013, pp. 499–513). In the text, I deliberately omit issues related to attachment (attachment styles), because such a broad issue would require a separate study.

2.2 How the Death of a Close Person Affects an Individual

The interruption of a close relationship through death is associated with a sense of loss and being orphaned. Bereavement is a natural response to the loss of a close person, a reaction to the severing of ties with another person, but also to the loss of a part of one's "inner world and identity co-created with the deceased" (Stencler, 2015, pp. 47–56). Sigmund Freud saw a similarity between mourning and the state of melancholia, which is characterized by a lowering of mood, a loss of interest in the outside world, and a full awareness of the impossibility of replacing the lost object of love with another one (Freud, 1992, pp. 20–30). Freud wrote about the withdrawal of emotional involvement that the individual directed toward the deceased person. The individual regains freedom only when the process of

¹⁴ "People appear to be particularly predisposed to seek and maintain personal relationships that are characterized by stability, affective concern, frequent contact, and continuation into the foreseeable future" (Leary & Baumeister, 2000, p. 11).

detachment is complete. Mourning is a process of returning to normal life, without the close person¹⁵ (Freud, 1992, pp. 20–30):

“the need to abandon the object and to withdraw libido from it does not occur suddenly - the process is extended over time, gradual, with an enormous expenditure of cathectic energy. During this process, the existence of the object is extended - it continues to exist, against a reality that is difficult to accept, in the grieving psyche [...] And when the grieving process is complete - the Ego becomes free and uninhibited again.”

The withdrawal of feelings from a close object, i.e., also grief, is experienced by individuals on an emotional and physical level. It manifests itself in somatic complaints (weakness of the body), feelings of guilt, chaotic actions, and irritation related to the presence of others (Lindemann, 1994, pp. 141–149). The intensity of experiences after the death of a close person is usually related to the characteristics of the deceased, the characteristics of the grieving person (age, health), and the quality of the bond the person had with the deceased¹⁶ (Field, 2016, p. 1). One might also ask how bereavement occurs when individuals have been in a difficult relationship based on negative interactions¹⁷ (for example, related to violence). Bereavement in such cases is referred to as *problematic* grief, because it can involve feeling different, opposing emotions (for example, understanding the deceased while also blaming him or her) (Lin, Servaty-Seib & Peterson, 2019, p. 2). An individual who has been a victim of violence by the deceased may also experience relief, reduced anxiety, freedom (Lin, Servaty-Seib & Peterson, 2019, p. 3). These kinds of feelings are rarely treated in the society as an acceptable way to experience someone's death.¹⁸ This situation, as well as others in which the individual is not grieving as he or she “should” according to social perceptions, can be referred to as disenfranchised grief, or “a loss that is not or cannot be openly acknowledged,

¹⁵ “Reality shows that the loved object does not exist, which requires the withdrawal of all libido from it. This requirement causes understandable opposition - it is well known that people are reluctant to abandon their libido positions, even when a substitute for the object is nearby. Opposition can be so strong as to cause withdrawal from reality”.

¹⁶ The loss of an individual can be much more complex here: “In addition to the loss related to bereavement, there are the many losses associated with experiences of abuse and neglect, including a damaged self-image, self-blame relating to abuse and neglect, mourning the lack of protection and safety, the impact to future formation of relationships, and the capacity to trust, just to name a few” (Field, 2016, p. 1).

¹⁷ This includes, for example, relationships that can be described as ambivalent or those that are “generally marked by mixed, opposing, and often contradictory feelings”.

¹⁸ More broadly on the need for a shift in the paradigm of grief (Elison & McGonigle, 2004).

publicly mourned, or socially supported”¹⁹ (Corr, 1999, p. 2). This type of grief can also be experienced in relationships that were not socially acceptable, and the participants kept it hidden.

Experiencing the death of a close person can manifest itself in at least two different attitudes. The first one - “disconnection and continuing bond” - involves a focus on the deceased. The individual continues the patterns adopted by the deceased (values, judgments, goals) and often appeals to his or her judgments, authority. Emotional ties can also be maintained after the death of a close person in an altered form. Developing them allows individuals to come to terms with the loss of a close person by preserving their memory. The close person is no longer physically present, but this does not prevent a spiritual connection with him or her. The memory of a close person changes over time - memories are viewed through the diverse contexts of our lives. Thus, it can be said that death does not end a close factual relationship, but reduces it to what underlies it - an emotional bond that takes a different form than before. This approach is associated with a model of grief called continuing bonds²⁰ (Currier et al., 2014, p. 202). The individual thus wants to maintain a personal relationship with the deceased loved one through his or her mental image. After the death of a close person, the relationship continues, but the primary role will be played by the mental representation of the deceased and his or her uniqueness rather than actual interactions (Klugman, 2006, p. 250).

The second attitude is one of “termination and personality enrichment.” Here, the individual treats the death of a close person as a formative experience that simultaneously provides a premise to begin a new life (Ogryzko-Wiewiórkowska, 1991, p. 72). The individual becomes accustomed to their own mortality, but tries to treat the death of a close person as a resource, an inspiration to continue living²¹ (Moss & Moss, 1984, p. 73).

¹⁹ This is well illustrated by the statement quoted by the author: “I just don’t see why you should be so upset over the death of your ex-husband. He was a bum, you hated him, and you got rid of him years ago. Why cry over his being gone for good?”

²⁰ It involves “ongoing memory and connection between a bereaved individual and the deceased loved one that can be maintained over time.” More on this topic in Klass, Silverman & Nickman, 1996.

²¹ “As the bond is loosened, the child can reevaluate the dynamics of the tie and its personal meaning and come to a better understanding of who he was and who he is in the process of becoming. This calls for a shift in identity, in finding one’s true roots, and in being less an extension of parents. Some may find the strength to discover and modify the legacies of their parents and value their own difference and creativity. Thus, loss of a parent may potentially free the person to trust more in the self and to risk new behavior” (Moss & Moss, 1984, p. 73).

As can be seen from the above, an individual has to go through a certain path by which they will be able to return to a normal life after the death of a close person. This path is not always smooth. The literature distinguishes between normal and abnormal (complicated) course of the grieving process. In the case of the normal process, the individual comes to terms with the loss of a close person and adjusts to life in the new reality. Factors that influence the proper course of grief include age, health status, personality traits, attachment style of the individual, degree of closeness to the deceased, and circumstances of death.

As for “complicated” bereavement, it involves the occurrence and development of depression, an established state of deterioration in an individual’s quality of life. People experiencing complicated bereavement cannot come to terms with the death of a close person, they want them back, and that longing becomes the main motive of their life (Brudkiewicz, 2021). A new category has been introduced in the ICD-11 classification: “prolonged grief disorder” (6B42). The complicated course of grief shows some similarities to PTSD (post-traumatic stress disorder), especially with respect to experiencing emotional numbing (Tofthagen et al., 2022, p. 2). In other respects, the complicated course of mourning and PTSD differ (Bonnano et al., 2007, p. 349). For bereavement, the central experience is yearning, loss, or emptiness, not the key components of PTSD. However, the ICD classification emphasizes that “[s]imilar to Post-Traumatic Stress Disorder, Prolonged Grief Disorder may occur in individuals who experience bereavement as a result of the death of a close person occurring in traumatic circumstances.” As indicated in the ICD-11’s characterization of PTSD, its symptoms can occur when an individual is directly exposed to a dramatic experience, and such include “witnessing the threatened or actual injury or death of others in a sudden, unexpected, or violent manner.” Such situations may occur in the example analyzed in the paper. For the occurrence of a prolonged grief, it is important what kind of relationship the individual had with the deceased and the social support he can count on after his death (Hibberd et al., 2010, p. 443). Also of some importance in such cases may be how the living person was notified of the death of the close person. (Stewart, 1999, pp. 289-321).

3 Close Relations From The Perspective Of The Polish Legislator

The Polish legislation draws a distinction between two basic, but quite different, approaches to closeness: formal (formal closeness) and substantive (substantive closeness). Therefore, when asking the question what conditions must be met in order to be recognized as a close person by the Polish law, the answer depends on which approach is used. A person considered close on the basis of formal closeness may not be considered close on the basis of substantive closeness.

The formal understanding of closeness (formal closeness) is a type of legal closeness, where people in a legally formalized relationship (marriage, parenthood, kinship, affinity, adoption, etc.) are considered close. In this type of intimacy, we focus on the legal form of the relationship (marriage, kinship, affinity) rather than its content, which is why it is called “formal”. Scope definitions and inductive definitions are the legislative techniques used to define formal closeness.

The substantive understanding of closeness (substantive closeness) means a type of legal closeness, where persons who are in a relationship (legal or factual) with each other, involving certain factual ties, relevant from the perspective of the legal provision being analyzed, are considered to be close. Emotional bonding plays a special role here. In substantive closeness, we focus on the content of the relationship rather than its legal form, which is why it is called “substantive”. From a legislative perspective, substantive closeness is introduced into legal acts by means of vague terms, including vague terms with an indication of the necessary elements of scope.

The following part of the paper focuses on analyzing one case of substantive closeness - the vague term “immediate family member” used in Article 446 PPC.

4 Close Relations From The Perspective Of The Polish Legislator

Courts perform several operations when applying Article 446 PPC. They first assess whether the claimant can be considered a family member of the deceased (4.1). Then, they establish the circumstances to determine the extent of the harm (4.2). Harm is a legal term for the condition that arises after the loss of an immediate family member, among other things. The findings regarding the extent of the harm focus

on: determining the content of the claimant's relationship with the deceased person and on the course of mourning after the death of a close person. In the first case, it will be a matter of the type and intensity of the bond between the injured party and the deceased person (fulfillment of needs in the relationship, uniqueness of the relationship in the life of the individual, irreplaceability), while in the second case the following will be assessed: the dramatic gravity of the experiences of the close person, the sense of loneliness and emptiness, the moral suffering and mental shock caused by the death of the close person, the support found in other close people, the treatment of the trauma suffered, and the duration of mourning.

When determining the extent of the harm, courts also evaluate the individual circumstances of the claimant (age of the person entitled to compensation, their state of health, the extent to which the injured party will be able to find himself or herself in the new reality and the ability to accept it) and of the deceased (age, role in the family played by the deceased).

4.1 Who is a Family Member?

Courts typically begin the process of analyzing the phrase “immediate family member” by observing it is not defined and is in need of clarification.

There are three traditions of understanding the expression “family member.” Supporters of the first (minority) approach claim that the key is the existence of legal ties between the claimant and the deceased, i.e., marriage, kinship, affinity, adoption. They emphasize that the expression “family member” can have only the meaning to which the legislator itself refers. Unfortunately, however, the Polish legislator does not define the term “family” in a universal way throughout the Polish legal system, and the respective understandings differ from each other.

In the second approach, legal ties are only ancillary, not decisive, in determining whether a claimant is a family member. Some importance is also attributed to the mere intention to establish a legal bond (for example, intention to marry).²²

²² Judgment of the Appellate Court in Gdańsk of 13.11.2012, V ACa 849/12, LEX No. 1313253: “The claimant indicated that, as a result of the accident, she lost her fiancé, with whom she had formed a happy couple for several years. They had a church wedding date set and were putting money aside for the cost of the wedding ceremony. They shared a household together and considered building a house. The event (...) derailed her life plans.”

According to the third, dominant view, the family is a group of people connected by factual and permanent ties.²³ Thus, for purposes of determining whether a claimant is a family member, the key issue here is factual ties, not legal ones. Factual ties, in turn, consist of not only the emotional ties and the behavior associated with them, but also economic and physical ties. It would be an oversimplification to say that legal ties are immaterial within the third view. The existence of a legal bond between individuals (for example, marriage), is considered by the court as a significant indicator but is not the sole indicator. The existence of a legal bond must be complemented by the existence of a factual bond. Therefore, courts evaluate the behavior of individuals in a relationship and, on that basis, determine whether individuals can be considered a family member.

The following discussion focuses on the third approach mentioned above. Since we already know that family members treated as relatives are persons connected by factual ties (in particular emotional ties), the question becomes what kind of ties they should be in order for their interruption by death to be recognized as constituting legal harm. Courts utilize a multifactorial approach to estimate the extent of harm of the relationship between the deceased and the claimant.

4.2 Extent of harm

4.2.1 A good and a bad close person

Close persons are most often considered to be people who have shared positive, non-pathological relationships. A close one is a person who provided for certain needs of the claimant(s): “The concept of family cannot be limited to only spouse, ascendants, descendants and in-laws. Also, a cohabitation of several years, in which both cohabitants' financial and emotional needs, aspirations for self-actualization and a sense of security were met, should be considered a family.”²⁴

²³ Particular attention should be paid to the statement of the Supreme Court from 2005, which has been repeated in other judicial decisions: “in defining the concept of 'family', the following criteria may be used: kinship, marriage, adoption, affinity, foster family and living in a common household. Thus, one can approve of the definition of family as the smallest social group, bound together by a sense of personal and economic closeness and commonality, arising not only from kinship”. See: Judgment of the Appellate Court in Łódź of 23.11.2018, I ACa 30/18, LEX No. 2625551; Judgment of the Appellate Court in Cracow of 16.12.2016, I ACa 970/16, LEX No. 2250197; Judgment of the Appellate Court in Gdańsk of 23.12.2014, I ACa 638/14, LEX No. 1665074.

²⁴ Judgment of the Appellate Court in Poznań of 2.06.2021, I ACa 377/20, LEX No. 3215837.

Therefore, as on the grounds of psychology, from this perspective a close person is the person who meets the needs of a given individual in the relationship. Jurisprudence has framed these needs differently, with the needs most frequently cited including emotional ones (love, warmth), a sense of security, and financial needs.²⁵ Close relationships are therefore seen as an important factor for determining the well-being of the individual, the quality of his or her life - the irreplaceable loss of a close person is associated with a reduction in the standard of life.

The courts are also sometimes confronted with non-obvious situations, in which the claimant or the deceased exhibited negative behaviors toward others or failed to meet the needs that make a close relationship positive for the well-being of the individual.²⁶ These situations fit into the understanding of 'problematic grief' or 'disenfranchised grief'. These are very different cases.²⁷ Illustrative cases include when a wife who was abused by her deceased husband sues for damages,²⁸ when a

²⁵ Judgment of the Appellate Court in Cracow of 8.11.2019, I ACa 731/18, LEX No. 2974684. "The foster family provided the claimant with peace and a sense of security, as well as took care of the claimant's emotional and financial needs"; similarly, Judgment of the Appellate Court in Szczecin of 16.11.2017, I ACa 533/17, LEX No. 2488765: "for the claimant, the father was the person with whom he felt strongly emotionally connected and who met his emotional and financial needs, gave him a sense of love, security and belonging."

²⁶ This ambiguity of judgments is well illustrated by one court case, in which the deceased person was a father who was deprived of parental rights and absent for most of the claimant's (his daughter's) life. The child spent most of her life in institutional care. Her father appeared in her life after she was released from prison when she was less than 15 years old. Shortly (within a few days) after making contact with his daughter, he died in a car accident. The claimant demonstrated an emotional bond with her father, that she was the "apple of his eye". The expert's opinion indicated that the claimant was experiencing longing and hopes related to her father's return, and was not experiencing an actual relationship. The court of the first instance nevertheless found that the father and daughter had an intimate relationship. The court of the second Instance disagreed with this view, "in fact, the father of the claimant was never a support for her, he did not give her the sense of security, love and care, during the period that was crucial for her proper psychological development, i.e. childhood and adolescence - in no way was he a role model and authority for the claimant, unfortunately he played a negative role in the claimant's family". The claimant, on the other hand, experienced depressive disorders after her father's death related to the expectations and hopes she had for her father's return. Thus, the court awarded damages not because the father-daughter relationship was close, but because the claimant experienced her father's death in a severe way. Judgment of the Appellate Court in Szczecin of 28.03.2018, I ACa 312/17, LEX No. 2668158.

²⁷ For example, the judgment of the Appellate Court in Gdańsk of 27.04.2017, V ACa 459/16, LEX No. 2362605: "the claimant not only did not live with his children, but also at an earlier period of their life behaved towards them in a highly reprehensible manner, psychologically abusing the entire family, not participating in their costs of living, not showing concern for their fate.(...) having regard to the findings of experts that the emotional ties between the deceased and the claimant were of formal character and there was lack of emotional closeness between the claimant and his children, it was impossible (...) to assume that the size of the harm suffered by the claimant was significant."

²⁸ Judgment of the Appellate Court in Lublin of 28.08.2013, I ACa 298/13, LEX No. 1372348: "I. L. alleged [during the divorce proceedings - MDG] that there were criminal proceedings pending against C. L. for family abuse. She indicated that they did not live in harmony, her husband abused alcohol, beat her, and started violent arguments. (...) The claimant's allegations that despite her initiation of the divorce proceedings and dissolution of marriage she and C. L. continued to form a happy family are, in the opinion of the Regional Court, untrue and made only for the purpose of the present proceedings. (...) the former spouses were not connected by a special or close emotional

child abuser who was deprived of parental rights claims compensation for the death of his or her children, or when minor children claim compensation for the death of their mother who did not take care of them.²⁹

Each of these example situations should be treated quite differently. Intuitively, awarding compensation to a person who abused their close person may in fact constitute acceptance of the abuser's past behavior. The situation is quite different when compensation is sought by those who have suffered harm from the deceased - here compensation may be treated as the only "good thing" resulting from the relationship with the deceased.

Regardless of the possible variations of the factual conditions that are examined by courts, what is common to each is that the court must determine whether the death of a particular person has affected the claimant's life and whether claimant has grieved. The court's primary problem may be evaluating the measure of the positive, normal aspects of the relationship and the negative, pathological ones, and determining which ones were predominant. The negative aspects of relationships are often used by defendants (often insurance companies) as an argument against claims of close person.³⁰ Court decisions run in two directions - sometimes, even though the claimant has not grieved, claimant may end up with minimal compensation. In such situations, the mere loss of a family member, regardless of the actual relationship, is considered harm. At other times, the ambivalence of the relationship will result in dismissal of a claim on the grounds that the claimant (whether claimant-victim or claimant-perpetrator) has exploited the law.

Examples of disenfranchised grief in the literature include situations where individuals are unable to manifest their grief because the relationship with the deceased - as socially unacceptable - has remained hidden. This may include grief over a deceased informal partner. Research of Polish jurisprudence failed to uncover any cases where compensation was claimed by the partner of a same-sex couple, perhaps due to the fear of stigmatization. Individuals do not make claims following the death of the partner in these situations because they are afraid to have the judicial

bond for many years before C. L.'s death. The relationship between I. L. and her ex-husband remained deeply disturbed.²⁹

²⁹ Also: Judgment of the Regional Court in Siedlce dated 23.10.2017, I C 63/14, LEX No. 2449997.

³⁰ Judgment of the Appellate Court in Katowice of 30.09.2016, V ACa 48/16, LEX No. 2139382.

system evaluate their relationship. Meanwhile, the pursuit of claims by cohabitants of heterosexual relationships is quite common in Poland.³¹ Examination of the case law revealed no examples of factual conditions in which friendship was analyzed under Article 446, PCC.³² This is probably because friendship is treated in Polish law as a factual relationship with no legal dimension.

4.2.2 Close in the Meaning of Irreplaceable and Unique

Courts emphasize the irreplaceability of close relationships recognizing that the needs realized therein cannot be met in other relationships.³³

A distinction arises here. Courts recognize that the relationship between parent and child is indisputably irreplaceable. With respect to marriage, on the other hand, they assume that the surviving spouse can still establish another close relationship (and thus replace the one lost).³⁴ Blood ties (parent-child) are thus considered stronger than those formed in marriage. Courts also note that a young child (for example, a 2-year-old) does not grieve in the same manner as, say, an 11-year-old child.³⁵ What is crucial, however, is the inability to develop a relationship in the future that is fundamental from the perspective of meeting the child's needs: "The extent of the harm to a young child suffered as a result of the death of the mother is determined

³¹ See, for example: Judgment of the Appellate Court in Wrocław of 6.11.2019, III APa 14/19, LEX No. 2764390.

³² Regarding psychological research into the course of bereavement, it is mostly related to loss in marital and family relationships (based on blood ties), while bereavement in friendship relationships is rarely explored. In their recent study, Liu, Forbat and Anderson demonstrated that the pain and suffering associated with the death of a friend can affect individuals in very similar ways as when losing a close family member (Liu, Forbat & Anderson, 2019, p. 2). Also: "Bereavement of a close friend is a type of disenfranchised grief. It renders significant negative impact on people's physical health, vitality, mental health, social functioning and role limitations due to emotional problems" (Liu, Forbat & Anderson 2019, p. 13).

³³ Judgment of the Supreme Court of 15.05.2015, V CSK 493/14, LEX No. 1751292: "The claimants (...) lost their father as children(...). They already knew what the father's role in the family was, that their emotional needs were fulfilled by contact with him, but at the same time they were not and would not be able to meet those needs in relationships with other family members or outside the family".

³⁴ Judgment of the Supreme Court of 15.05.2015, V CSK 493/14, LEX No. 1751292: "A parent, in principle, cannot be replaced by another person in that social role which he or she has to perform with respect to a minor child, and the family relationship between him or her and the child cannot be terminated by any event other than death. Ties between spouses are sometimes severed not only by the death of one of them as a result of a prohibited act, in which case it cannot be excluded that the surviving spouse will establish a relationship of intimacy with another person." Also: Judgment of the Supreme Court of 7.04.2017, V CSK 448/16, LEX No. 2305923.

³⁵ However, this view may be disputable in light of psychological research, see Revet et al., 2020, p. 2: "It was long thought that children were protected from this suffering because of the immaturity of their cognitive and psychic development, so that they were seen as being insensitive to loss. (...) Indeed, recent studies have clearly established that the loss of a loved one is one of the most stressful life events that a child can have to cope with and that it is a risk factor for numerous disorders".

primarily, (...) by the deprivation, which cannot be overstated, of the mother's participation in the child's life, development, adolescence, maturation."³⁶

In making its assessment, courts also evaluate the role a person played in the family. Courts therefore evaluate the significance of the role (among the claimant's other relationships) of the relationship with the deceased person. Court judgments employ language such as that the deceased was the "head of the family," the person who kept the family members together, or that the deceased was the main inspiration, the source of support for the claimant and other family members.³⁷ In yet other judgments, courts have stated for example, that "the claimant's family has been broken up by the death of her father and brother"³⁸ or that the children have lost a "good role model for males and females alike."³⁹ Courts also emphasize the importance of claimants' expectations of the role the deceased would have played in their future lives had they lived (for example, parents-children).⁴⁰

4.2.3 Behavioral and Subjective Dimensions of Close Relationships

In the text of the justifications, the courts particularly focus on emotional ties, and thus the subjective dimension of closeness. A relationship is considered close if it

³⁶ Judgment of the Supreme Court of 17.04.2015, III CSK 173/14, LEX No. 1745796.

³⁷ Judgment of the Appellate Court in Szczecin of 15.01.2021, I ACa 515/20, LEX No. 3150085: "(...) if she were alive, she would continue to play her primary role in the family, and the claimant would have had constant support not only from his wife, but also from the whole family. The claimant 'did not put his life together' after losing his wife". Judgment of the Appellate Court in Szczecin of 27.11.2018, I ACa 515/18, LEX No. 2635217: "It was the claimant's deceased father who acted as the head of the family at home, and it was he who bore the main burden of supporting the family". See also: Judgment of the Regional Court in Lublin of 23.01.2014, II Ca 908/13, LEX No. 1852470; Judgment of the Appellate Court in Gdańsk of 24.09.2020, V ACa 328/20, LEX No. 3102185; Judgment of the Appellate Court in Gdańsk of 17.11.2020, V ACa 410/20, LEX No. 3219689; Judgment of the Appellate Court in Lublin of 12.05.2020, I ACa 117/20, LEX No. 3044490; Judgment of the Appellate Court in Warsaw of 1.12.2017, I ACa 1530/16, LEX No. 2516059.

³⁸ Judgment of the Appellate Court in Warsaw of 9.05.2018, I ACa 72/17, LEX No. 2516033: "Currently, the claimant has virtually no contact with his mother, brothers and sister, the contacts he has are maintained only by virtue of living together with his grandmother and uncle. The claimant lost previous relationships with peers and developed social alienation. The suffering of the claimant will have a long-term impact on his future functioning."

³⁹ Judgment of the Appellate Court in Cracow of 9.11.2012, I ACa 1018/12, LEX No. 1236698: "(...)According to the conclusions of the opinion, claimants may very intensively seek contact with a man, both of them are at an age when a "good role model" for males and females is very important. The loss of a male role model and the lack of someone in the immediate environment to fill that space brings an increased risk of searching in a diverse environment, including an unfavorable one that seemingly only offer acceptance. Therefore, claimants require and will require increased attention to the kinds of environments in which they will seek out these role models. It is advisable for the claimants to receive help in the form of psychological therapy to promote the development and regulation of the feelings experienced."

⁴⁰ Judgment of the Supreme Court of 21.01.2021, I CSKP 23/21, LEX No. 3108592: "The death of their son affected the functioning of the family system because the claimants' desire was for their youngest son to live with them and provide for them in their old age. To date, none of the claimants' children have taken on this role."

involved the fulfillment of emotional needs.⁴¹ Courts most often point to realization of the need for love, intimacy, care, affection, and safety. Many statements also emphasize attachment to the deceased.⁴² By determining the emotional aspects of the relationship, courts can determine the extent of the harm caused by the death of a close person. Crucial factors include the mental representation of the deceased - both in the claimant's and in other people's (witnesses') minds - i.e., elements of the relationship the individual recalls as significant, and the image of the deceased they have retained in their memory. Of course, there is a caveat to be made that is relevant on both psychological and legal grounds. Neither lawyers nor psychologists have access to an individual's actual experience of a close relationship; their cognition is always indirect. What differs between the representatives of these two disciplines, however, is the way in which they familiarize themselves with the experience of intimacy. The legal "cognition" of closeness will usually be doubly mediated and corroborated by evidence other than that of the claimant's own report of feelings and emotions.

However, the subjective aspect itself is not sufficient for the law: "The love, attachment, emotional and affective bonding, sense of safety and stability that arise when family relationships are built, constitute feelings of highly subjective nature."⁴³ A mere assertion by the claimant and witnesses that certain persons were close to each other may be insufficient, and it is necessary to establish objective evaluation criteria.⁴⁴ Examples of such criteria include: the dramatic nature of experiences, the sense of loneliness and emptiness, moral suffering and mental shock caused by the death of a close person, the type and intensity of the relationship between the injured party and the deceased, support in other people close to the deceased, the age of the person entitled to compensation, the extent to which the injured person will be able to find themselves in a new reality and the ability to accept it, the treatment of

⁴¹ Judgment of the Appellate Court in Szczecin of 30.07.2020, I ACa 325/20, LEX No. 3116045: "the claimant was very close to his wife, with whom he lived for almost 40 years - they met as young people, she was his first love. The marriage was peaceable and the spouses were very attached to each other. The court kept in mind that the family was close-knit, celebrated holidays, and enjoyed spending time with friends. Their life together went smoothly. The claimant's relationship with his wife was strong and enduring."

⁴² Judgment of the Appellate Court in Cracow of 27.08.2020, I ACa 1160/18, LEX No. 3120079: "There was a very close emotional bond between the claimant and her mother, and although it was typical of a parent-adult child relationship, it was also special. It was characterized by emotional attachment and closeness, while at the same time the claimant was an independent and self-reliant person."

⁴³ Judgment of the Appellate Court in Gdańsk of 13.03.2018, I ACa 157/17, LEX No. 2487730.

⁴⁴ Judgment of the Supreme Court of 11.07.2019, V CSK 179/18, LEX No. 2712254: "each case should be treated individually, taking into account all the circumstances of the case, while this assessment is to be based on objective criteria, and not solely on the subjective feelings of the injured party."

trauma, and the age of the injured person. Some of these criteria correspond to the behavioral dimension, while others to the subjective, dimensions of closeness.

When awarding damages for the death of an immediate family member, courts examine other factual ties that are related to the presence of emotional ties. In doing so, they reconstruct the behavioral dimension of the close relationship. In a properly functioning close relationship, these two dimensions of intimacy intermingle. Thus, the focus is on how the deceased actually participated in the life of the claimant(s). Accordingly, courts analyze the interactions of individuals - the ones that are most common and characteristic of their relationships. Through this, they can determine the degree of interdependence in the lost relationship.

In reconstructing factual ties, courts focus, if only in general terms, on the history of the relationship linking individuals. In that history, they analyze factors including the duration of the relationship, its intensity, the frequency of meetings, the circumstances of the meetings (for example, family events, joint trips), the transformations that occurred during the relationship (for example, related to the adult child moving away to live elsewhere), the nature of the support the deceased provided to the claimant (for example, help with school), and shared passions.⁴⁵

The above circumstances are established by the evidence, including expert opinions. When courts rely on expert psychological or psychiatric opinions, the facts of the case are evaluated in great detail. Regardless of whether psychological (psychiatric) opinions are treated as an auxiliary tool or as primary evidence in proceedings, they provide courts with a broader picture of the impact of a close relationship on a particular person's life and the consequences caused by the interruption of the

⁴⁵ Judgment of the Supreme Court of 29.11.2017, II CSK 137/17, LEX No. 2416279: "the only person providing support in the claimant's life was her daughter, with whom she remained in almost daily contact, (...). For many years they lived together, later separately, but in the same tenement house, and when the addresses of residence of the two women changed, they were still in constant contact". Judgment of the Appellate Court in Białystok of 29.06.2020, I ACa 622/19, LEX No. 3033415: "the father was a central figure in the applicant's life, with whom he spent a significant amount of time. The claimant shared with his father not only passions (such as scuba diving) and interests, but also professional plans related to restoring old production lines. The claimant could also always count on his father for support and assistance." Judgment of the Appellate Court in Warsaw of 3.06.2020, VI ACa 619/19, LEX No. 3069833: "The K. family was very close, spending every spare moment together, celebrating important family and religious occasions, as well as performing household chores together. P. K. was a cheerful, sociable and energetic man, always willing to help, including by cooking, bringing firewood, feeding livestock (chickens and ducks), mowing the grass, and helping his father with repairs and renovations to the house".

relationship.⁴⁶ Based on their specialist knowledge, experts can precisely examine the state of affairs, relating it to the circumstances of death, the age criterion, the claimant's past illnesses, mental disorders⁴⁷ as well as the claimant's characterological traits.⁴⁸ Although there are several judgments in which courts considered expert opinions unnecessary, stating the judge was able to assess the facts of the case on their own thanks to their knowledge and life experience,⁴⁹ such decisions seem controversial and risky.

4.2.4 Bereavement after the Death of a Close Person

Concerning evaluating the grieving process, courts also perform individualized case-by-case analyses. This is evident in the statements indicating that a claim under Article 446, PCC is due regardless of whether the course of mourning was complicated or normal.⁵⁰ Courts consider whether the grief is still ongoing, how it has affected the individual's life to date, and whether the claimant has come to terms

⁴⁶ For example: Judgment of the Appellate Court in Warsaw of 9.05.2018, I ACa 72/17, LEX No. 2516033; Judgment of the Appellate Court in Rzeszów of 3.11.2017, I ACa 747/16, LEX No. 2662807: "Life experience indicates that a person in despair is unable to concentrate on the issues of daily life. This view with respect to the claimant was confirmed by the conclusions of the opinion of an expert psychologist. The findings of fact indicate that the claimant has remained in this condition to the present day".

⁴⁷ Judgment of the Appellate Court in Szczecin of 15.04.2019, I ACa 611/18, LEX No. 2668132: "in the case of patients with schizophrenia, it is very important to get support from the environment, to motivate to participate in social life, to create opportunities for patients to establish relationships with people of similar age. Siblings, better than other relatives, support people with schizophrenia because the relationship between siblings is more of a partnership than the relations between the patient and their parents. Siblings, less often than parents, tend to be overprotective, overly controlling, and limit the patient's independence:"

⁴⁸ Judgment of the Appellate Court in Cracow of 29.11.2000, I ACa 882/00, TPP 2002, No. 4, item 107.

⁴⁹ Yes: Judgment of the Supreme Court of 4.07.2018, I PK 201/17, LEX No. 2519342: "In doing so, it is not necessary to admit evidence from an expert psychologist. The extent of suffering may be determined by the court based on a comprehensive evaluation of the evidence on the record and the life experience of the judges deciding the dispute." Judgment of the Appellate Court in Białystok of 28.03.2018, I ACa 966/17, LEX No. 2528765: "At the same time, the court held that the minutes of the community interview, the statements of the family members of the deceased, as well as the testimony of the parties given at the hearing on 1 June 2017, are sufficient to establish the mental health of the injured persons (...) in connection with the death of M. K., the ties linking the injured persons to M. K., to determine whether they belong to the circle of immediate family members, and the extent of their suffering, harm and the consequences of the event for the injured persons." Judgment of the Appellate Court in Wrocław of 19.09.2018, I ACa 633/18, LEX No. 2696840: "the practice of admitting expert evidence on the mental state of the claimants in connection with the death of a loved one is wrong, which position is fully shared by the Court, in the composition examining the case. Clearly, intangible harm is unquantifiable and there is no evidentiary way to measure the extent of a grieving person's suffering." Also: Judgment of the Appellate Court in Wrocław of 23.04.2014, I ACa 330/13, LEX No. 1392154.

⁵⁰ Judgment of the Appellate Court in Gdańsk of 25.10.2017, V ACa 721/16, LEX No. 2471806: "(...) neither the validity of the claim for compensation, nor its amount, are dependent on the existence of only circumstances indicating the pathological course of mourning, or the appearance of any diseases or mental health disorders in the injured person. The mere fact of trying to find one's way in a new situation does not demonstrate that claimants have not experienced changes in emotional functioning of a long-term nature. The position that the legislator intended to compensate only those persons who, after the loss of a loved one, suffered from negative psychological experiences beyond the natural feelings characteristic of the state of mourning, cannot be shared."

with the loss. They also assess whether the individual remains in a state of “disconnectedness and continued bond”, that is, whether the deceased is still the central object of claimant’s life or whether the death resulted in “termination and personal enrichment”. In the latter case, courts do not take a negative view when a claimant has restored their life after the death of a close person or started a new family. They accept that reorganizing one’s life is a natural way of coping with loss.⁵¹

Some courts recognize (most likely based on psychological opinions) the presence of PTSD in the plaintiff experience. Interestingly, in the case-studies analyzed, PTSD was not linked to the plaintiff’s direct contact with the tragic event. These courts have reasoned that PTSD is primarily recognized as a disorder resulting from traumatic experiences related to the death of a close person.⁵²

Courts also examine an individual’s functioning after the death of a close person to assess whether they have come to terms with the loss (or whether it is still difficult or impossible to do so). This is important in determining the extent of the harm. To that end, they analyze whether the claimant sought psychological help after the loss of a close person.⁵³ Our research has not revealed cases in which courts have negatively evaluated a claimant’s failure to reach out for professional support. The assumption is that recovery from crisis depends on individual circumstances.⁵⁴

⁵¹ Judgment of the Appellate Court in Łódź of 7.08.2013, I ACa 329/13, LEX No. 1356575: “Experiencing the trauma of losing a loved one is an individual matter of each person. According to one’s own mental capacity, personality and character, as well as external circumstances, each person seeks their own solutions in this respect. (...) The birth of a child from a new relationship does not necessarily mean a lack of memory and pain from the loss of a child born earlier. It can only ease that pain.”

⁵² Judgment of the District Court in Piotrków Trybunalski of 8.06.2017, II Ca 345/17, LEX No. 2605360: “In determining the amount of compensation, the Court also took into account one of the criteria justifying the award of compensation so-called post-traumatic disorder (PTSD) as a disorder resulting from traumatic experiences. Indeed, the existence of PTSD is scientifically proven as a normal reaction to the tragic death of a loved one and does not require proof in court.” Judgment of the District Court in Lublin of 1.12.2014, I C 390/13, LEX No. 1845422: “(...) as indicated by the expert psychologist giving an opinion in the case, gives grounds for concluding that the plaintiff, as a result of the death of his wife, suffered severe mental suffering in the form of psychological trauma resulting in post-traumatic stress disorder, expressed in feelings of fear and anxiety, helplessness, restlessness, loss of control and adaptive disorders. (...) He often walks past the crosswalk where the accident occurred, feeling sadness and grief at the time, which indicates the presence of intrusion mechanisms in his psyche (PTSD symptoms).”

⁵³ Judgment of the Appellate Court in Katowice of 6.12.2018, III APa 51/18, LEX No. 2615758: “The claimant still has not come to terms with her father’s death, and to this day she is still reliving the negative effects of the accident, which directly affected her life. Currently, however, her functioning is within normal limits and requires further monitoring through visits with the school psychologist/pedagogue.”

⁵⁴ Judgment of the Appellate Court in Katowice of 4.04.2013, I ACa 98/13, LEX No. 1315666: “Currently, the claimant does not participate in any therapy, nor does she receive regular psychological help because she does not want to keep talking about what happened.”

In many cases, individuals sue for damages long after the death of a close person.⁵⁵ Courts typically do not view this negatively, because compensation is awarded for “the harm resulting from losing a close person forever.”⁵⁶ It can be argued that someone grieving the death of a close person did not “feel like” litigating and it is only after the grieving is over that they are able to stand in front of a judge and talk about the loss. On the other hand, both the determination of closeness and the course of bereavement, after a long period of time following the death of a close person, is difficult, because the evidence is based primarily on memories and descriptions of the emotions experienced. In these situations, courts refer to the pattern of a typical course of grief for a person of a certain age and health status.

However much the courts individualize their assessment of the bereavement process, their consideration of it is usually quite chaotic. The use of questions from the Bereavement Risk Inventory and Screening Questionnaire (BRISQ) developed by Roberts et al. (2017),⁵⁷ could be helpful in sorting these issues out. The form contains questions divided into categories: background, support, relationship style, prior stressors and coping style, relationship with family member, circumstances of death. Each one corresponds to the previously discussed criteria that courts look at.

4.3 Compensation

Based on these findings, courts ultimately determine the amount of compensation, and thus value the harm caused by the interruption of a relationship due to death. Estimating an amount that would correspond to the harm suffered is very difficult, as the courts have emphasized.⁵⁸

⁵⁵ This is most often the case when the claimant was a minor at the time of the loved one's death and only filed a lawsuit after coming of age.

⁵⁶ Judgment of the Supreme Court of 29.11.2017, II CSK 137/17, LEX No. 2416279: “The fact that 'the suit was initiated nine years after the death of the claimant's daughter at a time when the strongest feelings accompanying grief had long since subsided' cannot be relevant in determining the amount of compensation (...). This is because the court awards it not only for the emotions and suffering during the grieving period, but also, and indeed primarily, for the harm resulting from losing a loved one forever.” Judgment of the Appellate Court in Szczecin of 30.07.2020, I ACa 325/20, LEX No. 3116045: “On an emotional level, it is clear that no amount of money will be adequate and will not express the suffering caused by the loss of a loved one. This is because any amount will be too small for the entitled person, and any amount may seem excessive to the obligated person.”

⁵⁷ This questionnaire was designed as a tool to identify the course in relatives of a person with cancer. See: Roberts, 2017.

⁵⁸ Judgment of the Supreme Court of 11.07.2019, V CSK 179/18, LEX No. 2712254: “The harm suffered as a result of the death of a loved one is very difficult to assess and express in monetary terms, and each case should be treated individually.” Judgment of the Appellate Court in Cracow of 28.09.2021, I ACa 469/20, LEX No. 3269027: “Harm,

It appears that monetary compensation can be a supportive factor for an individual who has lost a close person. As Hulst and Akkermans' research indicates, an individual seeking monetary compensation in a bereavement situation: "(...) may be seeking acknowledgement of their emotional losses and the norm violation. (...) Results suggested that victims' family members viewed a monetary award as a means to an end, rather than as an end in itself. It seems that money can symbolize acknowledgment to victims' relatives" (Hulst & Akkermans, 2011). Monetary compensation, then, may be some form of recognition of the value of loved ones' experiences related to the death of the deceased.

Litigation under Article 446, PCC is conducted in the form of legal proceedings, thus putting the claimant and the defendant in a position of a conflict of interest. The defendant, which is most often the insurance company, tries to advance arguments with which to counter the claim (for example, to raise allegations that the relationship was not truly close, that the claimant did not grieve). Thus, the defendant-insurer usually presents a different story of the relationship between the deceased and the claimant - unfavorable in light of the claimant's interests, and sometimes showing other aspects hidden by the claimant. On the other hand, the claimant, although most often genuinely aggrieved by the death of a close person, also presents versions of events according to their own interests. Most often claimants idealize the deceased person, speaking very highly of them, describing them as a very significant figure in their lives (*de mortuis aut bene aut nihil*)⁵⁹ while deliberately omitting uncomfortable aspects of the relationship (for example, lack of contact for a long period of time). This raises the crucial question for lawyers. What is the best way to assess when the claimant's assertions are truthful and accurate recreations of a mental representation of the deceased's image and a way of coping with the loss, as opposed to a sham litigation tactic that bears little resemblance to what the reality of the relationship was. This issue requires separate discussion.

Courts adjudicating claims under Article 446 PCC face a difficult task both because the premises of the claim are vague and yet require precise findings of fact. The court must do justice by evaluating the circumstances of the case in light of its own life

(...) is difficult to define, much less quantify with a monetary amount. The term 'appropriate amount' as used by the legislator, leaves its determination to the discretion of the court, which at the same time imposes an obligation to examine individually the situation of each injured person".

⁵⁹ On eulogizing the deceased (Hayes, 2016, pp. 375–388).

experience. Pursuant to Article 233.1 of the Code of Civil Procedure: “The court must judge the credibility and strength of the evidence according to its own conviction, on the basis of a comprehensive consideration of the evidence gathered.”⁶⁰ The judge's subjective life experience and individual preconceptions may well cause him or her to evaluate one case as an irreparable loss, while another one as a minor impairment.

Article 446 PCC is an example of the so-called “judge's law” - the legislator does not ultimately determine the prerequisites of that claim, and leaves this task in the hands of judges. Courts often obscure this reality through assertions that “the margin of discretion left to the court does not imply arbitrariness, for the determination of claims must be made with due regard and careful consideration of the guidelines contained in the provision.”⁶¹ But does Article 446 PCC provide any such guidelines? After all, it includes only vague expressions (immediate family member, harm), the meaning of which must not so much be clarified, as even constructed, by judges.

Here the issue of the so-called lines of case law comes into play. The judgments presented in this text are representative of an established, dominant line of case law. Although the arguments of the courts in specific case studies are chaotic, this does not affect the consistency of the final decisions - the interpretations of Article 446 PCC are essentially uniform. From the perspective of the law's predictability, this is good news. On the other hand, the awareness of the existence of a permanent line may “block” judges from making different decisions, including even new proposals for describing closeness that would be adequate to the changing world (for example, regarding the socially acceptable diversity of romantic relationships). In dispensing justice, a judge must also reckon whether their ruling will be sustained in higher courts (Vidmar, 2011, pp. 58-62).

5 Conclusion

The discussion presented here was intended to provide answers to three questions. First, what do psychologists perceive as the elements that best characterize a close

⁶⁰ Article 233 § 1 of the Code of Civil Procedure Act of 17.11.1964 (Journal of Laws of 2021.1805).

⁶¹ Judgment of the Appellate Court in Łódź of 8.12.2016, I ACa 714/16, LEX No. 2200306.

relationship and what meaning is attributed to the loss of a close person from this perspective. Second, what elements characterize a close relationship, and what are the legal effects produced by the loss of a close person. Third, do courts search for a psychological perspective when determining the scope of the vague expression contained in Article 446 PCC (“immediate family member”) - and if so, how. If courts do not follow the findings of psychologists, then what is the source of knowledge on closeness for lawyers determining the claims under the above-mentioned provision?

It can be said that most individuals remain or have remained in close relationships throughout their lives. However, explaining what it means to be close to someone is difficult. It is undoubtedly a condition more felt by individuals than conceptualized into a set of easily testable criteria. Close relationships in the psychological sense are characterized by the following features:

1. they are based on sustained and frequent interactions between individuals;
2. based on these interactions, interdependence develops in the behaviors, thoughts, feelings, and emotions experienced by both individuals;
3. interactions between individuals must be unique for them and be accompanied by special (not present in relationships with strangers) emotions and feelings, for example, love, intimacy;
4. we can distinguish between two dimensions that are intertwined in a proper close relationship, i.e., the subjective dimension of close relationships (related to how the individual defines and experiences the close relationship, how they think about it and how they remember interactions with the other person) and the behavioral dimension of close relationships (related to how individuals behave in relationships, the frequency and intensity of interactions between them);
5. individuals in a close relationship perceive themselves in the context of their relationship with the other person, and thus define their identity in terms of “we”. Close relationships are thus an important part of individuals' identities;
6. close relationships provide a “place” for the fulfillment of individual needs; individuals in properly functioning close relationships potentially increase their own well-being and the well-being of the other person. This is especially true in the context of parental relationships (with the primary

caregiver being the attachment figure) as well as romantic relationships. These can be said to be the “primary places” for fulfilling an individual's need to belong.

Of course, the above-mentioned characteristics of close relationships refer to a model and simplified view. The individual case often is more complex, if only because close relationships are filled not only with positive interactions, but also with hurtful, difficult ones that can make it difficult to assess closeness in a given case (like the example of problematic grief mentioned in the text).

Death generally occurs independently of the will of individuals - it leads to a sudden and sometimes violent termination of relationships. The experience of the death of a close person involves the experience of grief, which can be put most simply as “[t]he emotional reaction to the death of a close person, which commonly includes grief, sadness, anger, a sense of loss, and guilt, whose occurrence, though, is often unpredictable in timing and sequence” (Matsumoto, 2009, p. 81). It is a natural process following the loss of a close person. Several characteristic features of grief can be identified:

1. it is the process by which an individual experiences difficult emotions and feelings (including sadness, anger, depression) associated with the loss of an important person;
2. experiencing these emotions and feelings may be associated with somatic symptoms (for example, sleep problems, headaches or pain in other parts of the body, fatigue);
3. it is an individually shaped process that depends on both the characteristics of the deceased (for example, age, health, character traits) and of the surviving close person (for example, age, health, character traits); the circumstances of death may also be relevant;
4. it is a process spread over time.

Being in a close relationship is a sizable investment for an individual, involving many intense experiences and emotions. Just as staying in a close relationship involves working with each other, grieving involves working “on the relationship but without the relationship itself.” The individual must recognize that the close person is gone and withdraw the energy invested in the relationship with the other person. This,

however, gives rise to a protest - since a close person is “almost me”, by rejecting him or her, I consent to losing a part of myself, irrevocably. As one researcher rightly notes, “mourning is a form of reaction to deprivation of something that has the qualities of ownership, belonging to the ego that invests its feelings in that object. Thus, depriving the ego of its object results in experiencing the absence of the object in reality. The result is a diversion from reality” (Bakalarz, 2016, p. 57). Thus, the individual may deny reality - not allowing himself or herself to know about the loss or identifying with the lost person. But this will not yet liberate the individual, although having the belief that the deceased is there even though they are not, can be pleasant. As Freud points out, the proper way to grieve is to strive to be “here and now” and thus to detach from the deceased “by which, the ego regains the freedom to re-enter relationships based on love” (Bakalarz, 2016, p. 57).

It should again be emphasized that the legal concept of closeness is not consistent - in the respective provisions, the legislator adopts either a formal or a substantive understanding of closeness. This paper was focused on the example of substantive understanding of closeness - i.e., Article 446 PCC. Close relationships, in their substantive understanding, share the following characteristics in the legal context:

1. it is the content of the relationship, not its legal form, that is crucial. A close relationship in the substantive sense can therefore be a legal relationship based on factual ties (for example, a well-functioning marriage), as well as a merely factual relationship not based on legal ties (for example, cohabitation). The content of the relationship here consists of certain factual ties;
2. among these factual ties, it is crucial to recognize closeness between individuals, that there be an intense and enduring emotional bond between them;
3. statements of the close person are not sufficient to establish the existence of an emotional bond. Emotional ties must be “corroborated” by conduct indicative of such ties, i.e., frequent interactions, intimacy, participation in major life events, knowledge of the other person, cohabitation, or having common property interests;
4. these are enduring relationships, i.e., ones that have not been broken by the will of individuals;

5. they are relationships that are fundamentally based on positive behaviors by individuals and that promote their well-being, and are therefore important for meeting their individual needs.

The interruption of such a close relationship in a sudden and unpredictable manner, and at the same time at the fault of a third party, i.e., interruption as a result of a prohibited act, is recognized in law as a source of harm to the individual. However, significantly, this harm can only be experienced if the given relationship is considered close. In order to determine whether or not harm has occurred, courts must look at the grief experienced by the individual. Courts can be aided in this task by procuring the opinions of experts in psychology or psychiatry, to whom the courts often refer when ruling on the basis of Article 446 PCC. Relying on the deductions derived from these opinions, as well as on their own intuition, courts capture mourning in a manner that is close to the psychological approach. This is well-illustrated by one of the court's statements: “the grieving process, understood in the psychological sense, which is a natural consequence of the loss of a close person, takes place individually (differently) for each person and depends on a combination of a number of internal and external factors.”⁶²

To summarize the perspectives presented in sections 4.1 and 4.2, we may conclude that the analyzed case of the substantive understanding of closeness shows many similarities to the psychological view of closeness. Lawyers can use questionnaires prepared by psychologists to determine relevant aspects of close relationships. They can also use psychological nomenclature, such as “behavioral dimension of close relationships” or “subjective dimension of close relationships” to put the argument about them in order.

However, despite the similarities, there are also important differences between the two approaches.

Lawyers need concrete “evidence of closeness” that demonstrates the external elements (as verifiable as possible) of the relationship between individuals - it is not enough to simply state that certain individuals share an intense emotional bond. Such a statement must be supported by external manifestations of closeness. What is also

⁶² Judgment of the Appellate Court in Szczecin of 31.03.2021, I ACa 121/21, LEX No. 3187721.

problematic for the law is the cases in which the relationship is characterized by similar intensity of both negative and positive interactions. The fact of violations in a relationship (for example, abuse, conflict) will most often result in the court's determination that a particular relationship is not considered close.

Importantly, the courts, when analyzing Article 446 PCC, adopt an understanding of the family that focuses primarily on the actual ties between individuals. Legal ties play a secondary role and the mere fact of kinship, marriage or affinity is insufficient. Of course, most often it is these people who seek redress for the death of a close person, but the mere fact that they are a family member in the legal sense is insufficient. There is a need for 'emotional closeness' between individuals, which means care, trust and joy in the relationship with another person. It arises between individuals as a result of their mutual, intense interactions. It is the result of many factors (for example, the amount of time spent together, being close to living). Because individuals spend a lot of time together and their interactions are frequent, they are more likely to help and care for each other (Korchmaros & Kenny, 2001, pp. 262-265).

When answering the question whether the courts, when deciding on the scope of the vague expression contained in Article 446 PCC ("immediate family member"), refer to the psychological perspective, the answer should be in the affirmative, but with certain reservations.

Undoubtedly, the most important source of psychological knowledge in the analyzed case is opinions of psychological experts - although it is worth remembering that it is not obligatory to consult them. However, expert opinions are not the only source of "psychologizing" statements by courts.⁶³

⁶³ This is well illustrated by one statement from a court's decision: "Family ties, the right to family life, and attachment to loved ones, are a complex mosaic of various forces within the family of fluid, often complicated nature, created by the constant interactions of the people sharing those ties. It includes relationships and contacts between family members arising because of their roles and tasks, thoughts, feelings, desires, mutual attitudes toward each other of family members, relationships between them based on specific cultural patterns. These elements are variable and are not necessarily reciprocal or mirrored. Relationships within the family (like other social relationships) are fluctuating constantly. They can be altered or even broken both by external events or by the decision of one of the parties. Their content is ambiguous, because the external image may not correspond to the real, internal tensions." See: Judgment of the Regional Court in Piotrkow Trybunalski of 11.08.2020, I C 1646/17, LEX No. 3069513.

In the body of their justifications, judges usually do not disclose the sources of their extra-legal knowledge of close relationships. The use of psychological terminology in the justification of a judgment may be associated with paraphrasing or interpreting a psychologist's expert opinion in a particular case. Thus, it is difficult to separate situations in which a judge uses a particular term based on an expert opinion from situations in which the judge uses a particular terminology in an intuitive manner.

For example, to describe the type of relationship that connects individuals, courts quite often use the word “attachment”, which has its established meaning in psychology (Bowlby's attachment theory). Based on the statements from the case law, we can infer that it is a term for a state in which individuals are intimate with each other, and their relationship is enduring.⁶⁴ This is an intuitive understanding of the term, not explicitly referring to psychological attachment, but it does express some suggestions about it.

Judges refer to psychological context by creating it intuitively. In the course of legal education in Poland, lawyers are not obliged to obtain knowledge in psychology. Rather, it is a matter of choice dictated by their interests. Also, during their apprenticeship, judges do not learn to describe emotions - rather, they learn how to establish premises and how to systematize them within existing legal categories.

Of course, saying that judges rely on their own intuition does not express any negative sentiment. The Polish language of the law and of the lawyers does not include terminology adequate to describe the experiences of an individual. The legislator does not define the concept of closeness by indicating its characteristics (for example, a close relationship is one that is based on a special emotional bond). The analyzed Article 446 PCC contains a vague term, i.e., one whose understanding and content is to be determined *ad casum*. Therefore, it is natural for the entities applying the law, not having “concrete” indications from the legislator, to apply the resources closest to them - intuition and life experience. The doctrine and

⁶⁴ For example: “The marriage was peaceable and the spouses were very attached to each other. The court kept in mind that the family was close-knit, celebrated holidays, and enjoyed spending time with friends. Their life together went smoothly. The claimant's relationship with his wife was strong and enduring.” See: Judgment of the Appellate Court in Szczecin of 30.07.2020, I ACa 325/20, LEX No. 3116045; “the claimant had extremely strong, positive feelings for her late mother. Their bond was characterized by deep attachment and support, which manifested itself, among others, in mutual assistance, maintenance of daily contact.” See: Judgment of the Appellate Court in Katowice of 24.05.2018, I ACa 1205/17, LEX No. 2514518.

established lines of case law play an important role in determining the meaning of closeness in the context of Article 446 PCC.

Although judges use their intuition that would perhaps dictate the adoption of a personal, individual perspective, we can discern a uniformity of judicial decisions with respect to Article 446 PCC. It is an interesting phenomenon. The high level of uniformity in the judicial decisions may be related to the existence in law of some conventional understanding of closeness, or at least some “core” of it. The repetition of closeness criteria and their acceptance in discourse may prove that judgments are just referring to the conventional understanding of closeness, which may in turn be in close correlation with the psychological understanding of closeness. Based on the analysis of the case law presented, we can observe that the minimum content of substantive closeness primarily includes the relationships that are based on a lasting, intense and positive emotional bond.

On the other hand - which, to some extent, is justified by the practice of determining the meaning of vague expressions - lawyers look for some reproducible criteria in close relationships to allow them to determine whether they are dealing with a relationship that is close or not. In this respect, they draw on the criteria of closeness and harm developed in case law. Thus, we can speak here of a “binding interpretation” of Article 446 PCC - the courts automatically reproduce the criteria already adopted in case law, replicate them in their own judgments, and check, as if by means of a copying machine, whether or not a specific feature occurs in the case under consideration. This repetition, while it may affect the predictability of the final decision (and thus legal certainty), can significantly limit the legal view of closeness and, in extreme cases, lead to rejection of relationships that do not fit the usual pattern.

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Povzetek v slovenskem jeziku

Poljski zakonodajalec dovoljuje odškodnino za škodo, nastalo zaradi smrti bližnje osebe, ki je posledica civilnega delikta (na primer prometne nesreče). Podlaga za takšne zahtevke je člen 446 § 4 poljskega civilnega zakonika, ki vsebuje nejasen izraz "najbližji družinski član". Sodišča morajo torej ugotoviti, ali je bila oseba nekemu blizu in kako. Iz besedila sodnih obrazložitve je razvidno, da sodišča bližine ne določajo izključno na podlagi pravnih meril. V prispevku so analizirane sodne odločbe, v katerih je bil sodišče odločalo o obsegu nejasnega izraza »najožji družinski član«. Analiza želi ugotoviti pravno razumevanje 'bližine' in ugotoviti, ali in kako ga podpirajo sklicevanja na psihologijo.