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The Immanent Tensions of ‘Compensation’ of Loss of Life – A Multidimensional Model and Some Global Thoughts Based on the Recent Legislative Reform in Hungary

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Abstract: Immanent tensions of tort law vibrate apparently with greater amplitude regarding the so-called ‘loss of life’ claims of secondary victims (family members) for non-pecuniary damages. The loss of a loved one cannot be expressed in terms of money, yet tort law attempts to do so. Deterrence and punishment are basically alien to civil liability (at least in the civil law tradition), but there is an element of punishment involved. It is impossible to serve two masters; nevertheless, both predictability of law and individual justice are sought at the same time. There is a constant fear of unfounded claims, yet there is also a tendency to release the surviving family member(s) from the burden of proving feelings that are difficult to quantify (if possible at all).

In this paper, a multi-dimensional model is created for a better understanding, based on those tensions and the possible combinations of solutions provided by the legal systems to them. While some contrasts are highlighted (eg first, having legislative acts according to which particular relatives are entitled to compensation and in what particular amount; or on the contrary, leaving matters to the discretion of the trial judge; and second, whether the degree of relation matters and/or emotional proximity is crucial), reference is also made to the still unanswered basic questions, such as what actually is the loss to be compensated: the grief and sorrow felt in itself, the aggravation of the claimant’s own life (among others, loss of guidance, care and companionship), the loss to the integrity of the family as a value, or finding the energy to deal with the loss and therefore not investing in other constructive purposes or life goals?

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The analysis of the author's own legal system, ie of the Hungarian approach, recently rich in variety, and some additional comparative remarks provide the first test of the model and allow some general conclusions.

I Introduction

This paper focuses on the loss of life and its 'compensation' in the law of damages, restricting itself to the non-pecuniary aspects of the loss of a loved one and/or a family member (or relative). Even this introductory sentence shows how controversial this issue is: it is difficult to find a common denominator for the subject matter, since competing approaches can be envisaged. Indeed, whether compensation is due can depend on particular personal ties of love and affection ('loved one') but since subjective feelings or emotions can hardly – if ever – be mapped and made subject to evidence, another approach supports linking the compensation to 'legal ties', ie certain (close) relatives provided for in the law (including case law) can be entitled to compensation in the event of death of their family member. These two basic approaches can also assume mixed shapes. In sum: it is difficult to label the subject matter of this paper without taking up a position.

The analysis focuses on non-pecuniary aspects, irrespective of the nature and peculiarities of the applicable cause of action (liability rule or concept) including, but not limited to, traffic and workplace accidents and medical malpractice; these include what is referred to as 'grief and sorrow' to be compensated with *solatium doloris*, etc. The material aspects (for example, loss of maintenance or alimony; funeral costs, etc) are not touched upon here. Neither are the features of various legal systems on the concept of 'loss of a chance' that can also include non-material aspects.¹

However varied the solutions of the legal systems are, the questions to be assessed are very similar. For this reason, a legislative reform (in civil law systems, for example, a recodification of private law) is a good occasion to re-evaluate basic positions. The immanent contradictions, the suggested solutions and the recent flaws may enable one to draw some general conclusions. Hungary enacted a new

¹ In Hungarian legal scholarship, cf *I Kemenes*, *Az esély elvesztése mint vagyoni és nem vagyoni hátrány* [Loss of a chance as material and non-material loss] (2018) 12 *Magyar Jog* 657, 668f. He is of the view that the personality right of family members to live in a complete and 'uninjured family' (see below V.B.2.) is also infringed in the event of death if it cannot be proven that the primary victim would certainly have survived but for the medical malpractice. The 'normal or usual amount' of the remedy to be awarded shall be decreased proportionally to the chance of survival if the malpractice had not been committed.

Civil Code (Act No V/2013) in 2013, which entered into force on 15 March 2014.² The recodification involved a fundamental change related to immaterial losses and their compensation.

II Immanent tensions

The immanent tensions characteristic of the non-pecuniary aspects of loss of life can be compressed into four theses. The first is that human life cannot be assessed in terms of money³ since it does not have an *a priori* conventional monetary value (though it has the highest moral value in modern societies); there is no possibility of *in integrum restitutio* if someone died. Nevertheless, there is no other way – at least from a private law perspective – to provide family members with monetary compensation; private law does not want to leave without sanction those who are responsible for the death.⁴ Consequently – in the absence of *a priori* monetary value – both the legal bases (among other things: who is entitled to claim) and the factors decisive to the amount shall be established artificially, involving the legal reflections of this tension at the level of private law and policy.

The second tension follows from the first and is related to the basic dilemma of the law of damages in general: shall aims other than compensation – eg prevention, deterrence, punishment, in particular – be pursued or at least tolerated in private law? This question, at least as far as punitive functions are concerned, is predominantly answered in the negative, though an element of punishment – regarding the non-pecuniary aspects – can hardly be denied. The presence of a punitive effect (or side effect depending on the respective legal system) raises quite a few follow-up questions. Is this truly punishment at all or merely a different manifestation of compensation (adjusted to the nature of the loss)? Is punishment justified by the fact that compensation *in stricto sensu* does not provide enough incentives to prevent the wrongful conduct? If punishment is among the justified goals of the respec-

2 For an overview and detailed explanations on the new Civil Code, cf *A Harmathy*, Introduction to Hungarian Law (2nd edn 2019).

3 See in Hungarian scholarship, eg *L Székely* in: L Vékás/P Gárdos (eds), *Nagykommentár a Polgári Törvénykönyvhöz* [Commentaries on the Civil Code] (2020) 197. According to *Lábady*, this is why it cannot be called ‘compensation’ at all: this loss cannot be compensated. *T Lábady*, *A nem vagyoni kártérítés metamorfózisa sérelemdíjjá. A bírói gyakorlat kezdeti dilemmái* [The metamorphosis of non-pecuniary damages into grievance award. First dilemmas in case law] (2016) 2 *Polgári Jog* no 5.

4 And this should not be the case: the fact that full compensation is not possible does not mean that no – not even an approximate and imperfect – monetary satisfaction should be awarded; on the contrary. See already in 1917: *Gy Dezső*, *Az objectív kártérítés tana* [The theory of objective compensation] (1917) 305.

tive remedies, does the *ne bis in idem* principle apply, and impact the amount to be awarded, if the wrongdoer was condemned in a criminal procedure?⁵ Can the hypothesis be verified that the more punishment is recognised among the goals of the remedy, the lowest standard of proof (or no proof at all) applies regarding the particular (emotional, etc) consequences of the death of the family member?⁶

The third (evergreen) tension is between the requirement of individual justice, on the one hand, and the predictability of the law, on the other. These expectations are at the two ends of a scale; the legislator (and the judge) cannot serve two masters at the same time. The more flexibility and discretionary power the judge is given, the more the amount to be awarded can be adjusted to the peculiarities of the case (serving individual justice) but the less predictable the law is going to be. Every legal system has to identify its position (priorities of policy and balance) on this scale, closer to either the one end or the other. For this reason, the family members entitled to 'compensation' are clearly specified in the applicable statute by their (legal) relationship to the deceased and also the exact amounts are set in some legal systems (with a clear preference for predictability) but neither of these two aspects is predefined by law in others. Nevertheless, justice and predictability converge with each other, since justice requires that 'like cases should be treated broadly alike',⁷ which is more challenging if neither the circle of family members, nor the amounts, nor the factors to be considered are specified by (statutory) law.

5 *A Mátyus*, A sérelemdíj funkció-analízise [Function-analysis of the grievance award] (2020) 3–4 Debreceni Jogi Műhely 97, 101. If so, the civil law sanction should be restricted to 'compensation'; *ibid* 114. Similarly *K Szeghő*, Sérelemdíj – kérdések és a kezdeti tapasztalatok [Grievance award – questions and the first experiences] 3 (2020) Magyar Jog 136, 142, 144. More nuanced *T Fézer*, Megőrizve megszüntetni! A sérelemdíj bevezetésének korai tapasztalatai [Repeal and preservation! The early experiences of introducing the grievance award], in: F Gárdos-Orosz/A Menyhárd (eds), *Az új Polgári Törvénykönyv első öt éve* (2019) 130: *ne bis in idem* does not apply if the monetary penalty (criminal law) and the grievance award (private law) follow different goals. (But does not substantiate when this is the case, since it still concerns punishment related to both.) Of a different view is *A Menyhárd*, Büntető elemek a polgári jogban [Punitive elements in private law], in: K Gellén/M Görög (eds), *Lege et fide – Ünnepi tanulmányok Szabó Imre 65. születésnapjára* (2016) 385. 'Ne bis in idem' applies only within criminal law. Criminal law sanctions do not exclude private law remedies.

6 *T Barzó*, A nem vagyoni sérelem szankcionálásának fejlődési tendenciái [Development tendencies of sanctioning non-pecuniary losses], in: K Gellén/M Görög (eds), *Lege et fide – Ünnepi tanulmányok Szabó Imre 65. születésnapjára* (2016) 44.

7 *European Group on Tort Law* (ed), *Principles of European Tort Law – Text and Commentary* (2005) (hereinafter: PETL) 177. The Hungarian courts, though they reject the 'Gliedertaxe' approach, frequently refer to earlier decisions and give detailed reasons why they did or did not follow them. See *P Bárdos*, *Elutasított sérelemdíj igények* [Rejected grievance award claims] (2021) 2 Kártérítési és biztosítási jog no 10.

Finally, the fourth tension concerns evidence. The plaintiffs should be released from providing detailed evidence on their feelings (the impact of the loss of a loved one) for two reasons. First, mapping and analysing emotions is hardly possible, if at all; second, plaintiffs should be spared from living through the tragedy again and again. (Another good reason to focus on legally relevant family relationships instead of particular feelings.) But wherever we look, there is a continuous fear of unrealistic and exaggerated compensation claims (the so-called floodgates argument) according to which only evidenced and real losses will be compensated in an approximate foreseeable magnitude. Misuse of legal institutions, windfalls and overcompensation should be avoided.

III The legal arena of those tensions – theme and variations

Our understanding is that all four tensions are necessarily present in every legal system. The position(s) on each scale and the legal framework wherein the positions are taken are different. The inherent tensions cause resonances and uncertainties in the (case) law; contradictions can hardly be avoided. We admit that any systematisation is artificial to some extent, because all these challenges are interdependent.

A Measuring the immeasurable and the functions of damages

As referred to above, since compensation is not possible *in stricto sensu*, other possible goals of the respective remedy gain importance. The mainstream seems to adhere to the compensation approach,⁸ even if this is a different, imperfect, rather fictitious type of compensation,⁹ ie an alternative approximate equilibration in terms of money, which is more or less proportional to the non-pecuniary loss suffered. This indirect ‘compensation’ (equilibration is a better term) can provide a substitute source of pleasure and serve quietude and solace, supporting the regaining of internal peace.¹⁰

⁸ PETL (fn 7) 175: taking the tortfeasor’s conduct into consideration involves a twist of punishment, but shall be considered only if the conduct contributed to the grievance of the victim, in order to remain faithful to the compensation principle.

⁹ The term ‘fictitious compensation’ was used first in Hungarian jurisprudence by *Lábady* (2016) 2 Polgári Jog no 5.

¹⁰ *Lábady* (2016) 2 Polgári Jog no 8.

The preventive function of private law remedies cannot be denied; moreover, frequently, only criminal law and private law sanctions together can appropriately express society's disapproval of the wrongful conduct. The core issue is whether a private law remedy can or should go beyond 'restoration' of the value lost. The justification for this can be identified in the feature that restoration in itself – provided it is possible at all – is not suitable to provide enough incentives to refrain from the wrongful conduct. This pragmatic view may supersede the concerns of the inconsistency of punishment and deterrence with the classic private law principle of restorative justice.¹¹

As will be elaborated upon below, the Hungarian legislator changed the whole concept in 2013 and accepted the 'private law punishment' as a justified function of the so-called grievance award (*sérelemdíj*) that replaced non-pecuniary damages, alongside compensation.¹² According to sec 2:52 para 3 Civil Code: 'The court shall determine the amount of the grievance award in one sum, taking into account the circumstances of the case, in particular the gravity of the violation, whether it was committed on one or more occasions, the degree of fault, and the impact of the violation on the aggrieved party and his environment.'¹³ Explicitly referring to the gravity, repetitiveness and degree of fault supports the punitive aspect, while the impact of the violation and other circumstances of the case consider those factors (such as the age, way of life, mental status, etc of the victim) that are more in line with the compensation principle.¹⁴ After the legislative acknowledgement of the punitive function, legal scholars argued strongly for the priority of compensation in order not to transform the remedy into 'US-style' punitive damages.¹⁵ The secondary

11 *Menyhárd* (fn 5) 373f, 379.

12 Motives to the new Civil Code (2013) 2nd book, 3rd part, ch XII, subch 2. Historical and comparative analysis verifies that there has always been a twist of punishment involved, cf *Lábady* (2016) 2 Polgári Jog no 8.

13 Translation provided by the (Hungarian) Ministry of Justice, available at <<https://njt.hu/jogszabaly/en/2013-5-00-00>>.

14 *M Görög*, Miként ítéltető meg a megítélhetetlen? [How to measure the immeasurable?], in: M Homoki-Nagy (ed), *Ünnepi kötet dr. Nagy Ferenc egyetemi tanár 70. születésnapjára* (2018) 354. She detects a slight increase of the amounts awarded, which she believes is due to the increased significance of prevention, *ibid* 356. The Budapest Capital Court of Appeal stated in a published non-binding opinion in 2013 that compensation and punishment have the same weight within the framework of the new concept, cf reasoning to ch 7, 11f. The pecuniary nature of the remedy does not change this since gratification of a monetary nature is a broader term than compensation, because it also involves the elimination or at least diminishment of the subjective feeling of loss aimed at the restoration of physical and mental balance of the victim; moreover it expresses the disapproval of the wrongful conduct in and by society.

15 *Vékás/Gárdos/Székely* (fn 3) 200; *K Kovács-Böszörményi* in: Gy Wellmann (ed), *A Ptk. magyarázata I/VI* [Commentary on the Civil Code I/VI] (4th edn 2021) 208f. Similarly *N Varga*, *Sérelemdíj a bírói*

and subordinate characteristic of punishment is also confirmed in the case law: courts emphasise that if there is no need to compensate anything, punishment on its own does not justify a grievance award;¹⁶ however, deterrence and punishment can increase the amount of the award provided granting an award is justified by compensation as the primary function.¹⁷

B Individual justice v predictability

After giving an answer to the preliminary question as to whether the death of a loved one and/or family member as such (ie without any medically diagnosable impact on the health of the claimant beyond the ‘normal level’ of grief) suffices to claim a kind of ‘compensation’ for loss of life, ie for the distress felt, or, on the contrary, damages can only be awarded if the tragedy caused the deterioration of health of the plaintiff or if the plaintiff was present when their loved one and/or family member died (the nervous shock approach), one necessarily faces further structural questions ie which relatives shall be entitled to claim ‘compensation’ and how should the amount be assessed?

As referred to above, in some legal systems, it is up to the judge, based on their free discretion (taking the particular facts of the case – the presence or absence of close ties of love and affection in particular – into account) to make these decisions. This applies in Hungary. Neither the circle of family members (and others) nor the amounts are specified by statutory law, not even as a threshold or a cap. Though the published decisions play an important orientation role, especially those of the higher courts, the case law and the outcomes are less predictable.

In other legal systems, predictability is preferred. According to sec 1A (bereavement) of the UK Fatal Accident Act of 1976 (ch 30) both the family members entitled to sue¹⁸ and the exact amount (£15,120) are precisely specified.¹⁹ However, regarding

gyakorlatban [Grievance award in court practice], in: *ÁO Homicskó/R Szuchy* (eds), 60: *Studia in honorem Péter Miskolczi-Bodnár* (2017) 591. Slightly differently, *T Nochta*, *A személyiségi jogok védelmére szolgáló magánjogi szankciók egymáshoz való viszonyáról* [On the relationship of civil law sanctions of personality right infringements], in: *ÁO Homicskó/R Szuchy* (eds), 60: *Studia in honorem Péter Miskolczi-Bodnár* (2017) 415: besides compensation, ‘gratification’ plays an important role.

¹⁶ See the report of *Vékás/Gárdos/Székely* (fn 3) 203. Similarly *L Vékás*, *A Polgári Törvénykönyv első hét évéről* [On the first seven years of the Civil Code] (2021) 3 *Jogtudományi Közlöny* 101, 107.

¹⁷ *Mátyus* (2020) 3–4 *Debreceni Jogi Műhely* 97, 112, 114f. The implementation of deterrence and punishment is questionable if not the wrongdoer but their liability insurance is the final risk bearer; *ibid* 113.

¹⁸ Paras 2–2a.

¹⁹ Para 3.

the 'cohabiting partner', additional (factual) prerequisites apply,²⁰ and there is no reference in the statute to the presence or absence of any personal (emotional) relationship or to the quality thereof. As a result, family members can receive 'compensation' even if there was no contact with the deceased or it was hostile. Bereavement can theoretically be claimed also if, for example, an alcohol or drug addicted family member dies, which might in fact be a relief for the survivors. This extreme hypothetical shows the rigidity to be paid as the price for predictability.

Some legal systems follow a combined approach. According to sec 4a in ch 5 of the Finnish Tort Liability Act (Act 412/1974), the list of family members with standing to claim is not exhaustive: besides the parents, children and spouse of a person who has died, also 'another comparable person who was especially close to that person', is entitled to damages 'for the anguish arising from the death, if the death has been caused deliberately or by a grossly negligent act and if the awarding of the damages is deemed reasonable in view of the close relationship between the deceased and the person seeking the damages, the nature of the act, and other circumstances.'²¹

C Burden and standard of proof

Three preliminary questions as part of the legal framework precede (and are interwoven with) the question of the burden and standard of proof. The first is whether the remedy is result-focused, ie is it connected to the (immaterial or moral) disadvantage the plaintiff suffered through the death of a loved one and/or family member, and therefore some disadvantage is the prerequisite of the claim? Or did the legislator opt for another approach, namely for a conduct-focused one, according to which, it is not necessarily and strictly the particular disadvantage but the wrongful conduct – the personality right infringement or the like – as such that is put at the heart of the analysis and identified as the necessary precondition of the remedy? If the latter applies and if the death of a family member is accepted as a personality right infringement in itself, then the immaterial loss or disadvantage is basically irrebuttably or rebuttably presumed, which has a significant impact on the burden and standard of proof. The extreme and sudden turns in Hungarian law in this respect will be presented below.

²⁰ Bereavement damages are only due if the cohabiting partner was living with the deceased in the same household immediately before the date of the death and had been living with the deceased in the same household for at least two years before that date; and was living for the entire period as the wife or husband or civil partner of the deceased.

²¹ Unofficial translation available at Finlex (provided by Finland's Ministry of Justice): <https://www.finlex.fi/en/laki/kaannokset/1974/en19740412_19990061.pdf>.

The second preliminary question is: what exactly is to be compensated in the event of death of a family member? (i) The personal loss (grief) as such, ie the feeling of having lost someone, which is a necessary part of life? (ii) With or without regard to the internal energies to be mobilised in order to tackle the mental crisis, internal turmoil and anxiety, what energy could have been invested in living a successful and ‘normal’ life? (iii) The integrity of the family as a value, which irreversibly diminished with the death? (iv) The aggravation of the claimant’s personal life due to the loss of a family member (ie loss of guidance, care and companionship; the necessary reallocation of family tasks, for example, the difficulties due to having become an overburdened single parent, etc)?

The third preliminary question is related to the remedy itself, ie not to the input, but to the ‘output’: it goes beyond what to compensate and may be expressed as how to compensate. The subjective (personal) approach focuses on the particular grief and sorrow of the individual claimant and, needless to say, this is the most difficult to quantify. The objective approach allocates an amount (but not an *a priori* value, therefore necessarily an artificial one) to the loss. This approach prevails in those legal systems where the list of family members with standing to claim is exhaustive and the amount to be awarded is specified in the statutory law. The third approach – the functional approach – is a kind of synthesis of the two and focuses on the reasonable solace to be provided to the claimant.²² Though not necessarily regarding relational losses (loss of a loved one and/or family member), but, in general, the objective approach seems to prevail and this is the justification for awarding damages even to a comatose (primary) victim.²³

While the legislator provides a conceptual answer to the first preliminary question, rarely, if ever, is there a clear structural position on the second and the third questions. This leads to tensions and contradictions.

²² D Benedek, Non-Pecuniary Damages: Defined, Assessed and Capped (1998) 3 *Revue Juridique Themis* 608, 621ff.

²³ PETL (fn 7) 175. Bárdos is of the view that the courts *de facto* cannot find out and evaluate the internal feelings and perceptions of the victim and this is why common knowledge should be relevant in deciding whether there is non-material harm and how serious it is. Bárdos (2021) 2 *Kártérítési és biztosítási jog* no 8.

IV Interim result: a multi-dimensional model

A The shape of the model

The compensability of non-material harm (loss) in general and in the event of loss of life in particular arises in every legal system as an issue. An interconnected and interwoven net of explicit or implicit binary (or sometimes ternary) codes characterises the answer. The binary codes can be seen as the two ends of a scale: moving closer to the one end (by the legislator or judge) means necessarily distancing oneself from the other end since one cannot comply with both of them at the same time. The specified balance at the respective axis can possibly be found at more points and finding the balance, pinpointing a particular point certainly depends on the historical and structural features of the respective legal system (private law). Both ends of the scale have advantages and disadvantages. All axes are interconnected, so setting the balance somewhere on the one axis certainly impacts the others; if there is a shift on the scale, the other scales do not remain unaffected either. Besides this multi-dimensional interconnection, there are axes that have a particularly stronger bilateral relation to each other.

The prerequisite of the model is that the respective legal system acknowledges the loss of life of a loved one/family member (relational loss) as a harm in itself to be 'compensated' at all and not only if the latter is combined with the deterioration of health of the secondary victim or with nervous shock suffered in witnessing the tragedy.

B The five axes

One axis is that of the conduct-oriented or personality right infringement approach at the one end and the result-oriented or compensation approach at the other end of the scale. With reference to the latter, more precise answers are required concerning whether what exactly should be compensated (grief and sorrow; the internal energies to be mobilised to cope with the loss; the infringement of the family as a value; the aggravation of way of life, etc).

Another axis covers the functions of the remedy including 'compensation' (equilibration), prevention and deterrence (punishment). This axis provides answers to the question of 'why' to grant the remedy.

The third axis answers the question of 'how' to remedy. The options are three-fold: the subjective-individualised approach focusing on the particular pain and suffering; the objective approach that tries to assign a more or less proportional amount to the respective type of loss, irrespective of its individual perception (stan-

dardisation approach); and, finally, the functional approach that favours a combination of the two in seeking reasonable solace for the loss suffered.

The fourth axis is rather a square and involves a legislative-methodological complex balancing between individual justice and predictability from a substantive perspective. At one end of the scale is the belief that both the family members with standing to claim and the amounts are specified by law while, at the other end of the scale is the question if all those details are to be decided at the free discretion of the judge. The latter approach goes more in the direction of individualisation and requires a consideration and evaluation of the existence and quality of the (emotional) relationship between the primary and secondary victim on a factual basis. (Even a legally close relative can be deprived of the remedy if there were no close ties of love and affection and vice versa: in theory, not necessarily only close family members in a legal sense can claim an award successfully, but anyone – a far relative or the best friend, for example – if there were close ties of love and affection.) There are two intermediate stations on the scale. One is closer to the free discretion if the latter is not limited, nevertheless there are some non-binding charts and compilations available (such as *Schmerzensgeldtabellen*) that serve as orientation and which ensure that like cases are treated alike. Another compromise is if there are binding thresholds and/or caps set by the legislator or in the case law (but no fixed amounts in between) so that the particular amount is decided at the judge's discretion within the cap.

The fifth axis refers to the burden and standard of proof. The one end of the scale is if the secondary victim has to specify and prove the particular loss (and suffering). The other end is if – in the event of loss of a loved one and/or family member – the loss is presumed, rebuttably or irrebuttably, and there is no need for any evidence as a prerequisite.

C Some correlations

If the personality right infringement approach is preferred and the loss of life of a loved one and/or family member qualifies as a personality right infringement, then no strict standard of proof of any particular (additional) harm is required. The personality right infringement as such constitutes the harm or loss suffered; it is the harm itself. (Particular negative impacts can serve as aggravating circumstances.)

The more prevention, deterrence and punishment increase in recognition and significance, the more generous the respective legal system can again be regarding the standard of proof. No evidence of the harm, loss or negative impacts (beyond the death) is required at all if the particular family members who are to receive 'compensation' and the extent thereof is clearly specified in the respective legal system.

For the same reason, the latter approach is necessarily combined with the objective answer to the question of 'how to compensate' and vice versa: if the decision on those two aspects (standing and amount) is left to the free discretion of the judge without any statutory restriction, then (and only then) is the door open for the subjective or functional approach.

V *Volte-face* and U-turn: struggle for a feasible concept in Hungary

A Snapshot beforehand: Hungary's answers to the five axes

Hungary prefers the personality right infringement approach: causing the wrongful death of someone is the infringement of a judge-made personality right. Granting compensation is not restricted to nervous shock cases or cases where the secondary victim suffered some medically qualified mental deterioration beyond 'normal' grief and sorrow.²⁴ The loss of life suffices. This is not an inherited claim: the secondary victims claim in their own right. The predominant goal is the indirect compensation or approximate 'equilibration' of the loss, but deterrence and punishment are acknowledged as secondary functions alongside compensation and prevention.

There is no clear-cut finding as to whether the subjective, objective or functional approach is followed: all of them to some extent. What family members (or whether only family members at all) are entitled to claim or the amount of compensation are not specified by law and it is up to the free discretion of the judge. This is why the particular emotional relationship is taken into consideration alongside legally defined family relations. In the case of close relatives (spouse, child, parent), the award is almost automatically granted and the particular circumstances are taken into account as a kind of fine-tuning. The particular loss and grief gain significance if the deceased did not belong to that circle.

It is very controversial whether or not any other harm or loss (beyond the death) is required to be proven by the claimant and whether the personality right infringement equals a rebuttable or irrebuttable presumption of having suffered an (immaterial) loss.

The so-called 'grievance award' is granted only as a lump sum (ie periodical payments, annuity, etc cannot be claimed and awarded) and the claim is attached

²⁴ Wellmann/*Kovács-Böszörményi* (fn 15) 211.

personally to the secondary victim, ie cannot be transferred, assigned or inherited. However, if the claimant already started litigation and dies in the meantime, the heirs can continue the litigation and can be awarded compensation in their capacity as the legal successors of the secondary victim.

B Reform and restoration: the dynamics of loss of life and its ‘compensation’

1 Starting point before the new Civil Code: non-pecuniary damages

Though the courts required a personality right infringement as a prerequisite, this did not change the fact that some identifiable non-material or non-pecuniary damage was required to have occurred, because the remedy belonged to the traditional remedy of damages (compensation). Until the early 2000s, the loss of a loved one (family member) in itself was not sufficient to be awarded damages; they were granted only if the secondary victim suffered a medically diagnosable mental, psychiatric (or psychosomatic) illness as a consequence. This can be traced back to the judicial survival of an earlier restrictive provision (in force until 31 May 1992) of the former Civil Code, which provided for compensation of non-pecuniary loss only if the wrongful conduct permanently or grievously aggravated the victim’s participation in social life or their life in general.²⁵

2 Change to the personality right approach: a new personality right as a prerequisite

Since the list of personality rights in the (former) Civil Code²⁶ was not exhaustive (as is also the case in the new Civil Code), the courts discovered, or rather created, a new personality right in order to detach the remedy from the diagnosable illness (of

²⁵ *T Fézer*, *Ítélezési állandók és vitás kérdések az erkölcsi kártérítés újabb magyar joggyakorlatában* [Consistent case law and controversial questions in the recent Hungarian court practice of moral damages] (2004) 1 *Debreceni Jogi Műhely* subch IV.2.a. *T Barzó*, *A sérelemdíj alkalmazásának új dimenziói az egészségügyi kártérítési perekben* [The new dimensions of grievance award in medical malpractice cases] (2017) *Publicationes Universitatis Miskolciensis Section Juridica et Politica*, Tomus XXV 202, 210f. The proof of the non-material harm was generally required, not only regarding the loss of a family member. *M Csöndes*, *Előreláthatóság, okozatosság és a sérelemdíj iránti igény* [Foreseeability, causation and claims for a grievance award], in: B Landi/A Koltay/A Menyhárd (eds), *Lábady Tamás emlékkönyv* (2019) 227.

²⁶ Act no IV/1959, in force until 14 March 2014.

the secondary victim) required previously. This was referred to as the right to live in a complete or 'uninjured' family. Later, variations in the terminology appeared, such as the right to grow up in a family, the right to live in a balanced family in harmony, the right to the healthy development of one's personality.²⁷

The family as such and fundamental rights related to the family are highlighted in, and also protected by, the Fundamental Law (Constitution) of Hungary. According to art VI para 1 thereof: '[e]veryone shall have the right to have his or her private and family life ... respected. Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others.' Moreover it is stated in art XV para 5 that: '[b]y means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities.' According to art L para 1, 'Hungary shall protect ... the family as the basis of the survival of the nation.' If the claimants are the children of the deceased, art XVI para 1 is also sometimes referred to, according to which, '[e]very child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development.'²⁸

Two interim conclusions can be drawn. First, the concept implies that (only) family members have standing to claim. This is in line with the European mainstream.²⁹ Second, proof of the non-pecuniary loss was still an open issue, because the remedy was still called and qualified as 'damages' and, therefore, there was a need to show what exactly is to be compensated. This generated uncertainties in the case law: besides the death, what else is required to be proven?

3 Ease of the burden of proof: a procedural sidestep

The former Code of Civil Procedure (§ 163 para 3 of Act no III/1952), just as the current Code (§ 266 paras 2, 4 of Act no CXXX/2016), declared that facts which are considered by the court to be commonly known shall be taken into account by the court even if they are not invoked by any of the parties. If one of the closest family members died (spouse, parent, child, sometimes siblings), the courts tended to refer to this procedural solution by stating that it is common knowledge that the loss of such a close family member is serious (immaterial) harm. A contradiction of the substan-

²⁷ *T Fézer* (2004) 1 Debreceni Jogi Műhely subch IV.2.a.

²⁸ For the latter, see eg Szeged Court of Appeal Pf.III.20.466/2021/6. Translation of the Fundamental Law is provided by the (Hungarian) Ministry of Justice, available at <<https://njt.hu/jogszabaly/en/2011-4301-02-00>>.

²⁹ The relationship shall bear 'at least some resemblance to a "family" one', including de facto cohabitation and same-sex partnership. Cf PETL (fn 7) 175.

tive law was solved (rather: circumvented) by a procedural tool.³⁰ Nevertheless, the courts also took the (emotional) quality of the particular relationship into account.³¹

4 The new Civil Code: grievance award – a Copernican revolution?

When it came to the general recodification of Hungarian private law and to the enactment of the new Hungarian Civil Code in 2013, the legislator decided to eliminate the inherent contradictions of non-pecuniary damages (since the particular loss cannot be proven in some important case groups) and this is why they were replaced by the so-called *sérelemdíj* (grievance award, *Schmerzensgeld*). The structural nature of this change of concept is also evident – besides renaming and changing the content – by its relocation from the law of obligations into the second book of the new Civil Code (Persons) among the rules on personality rights as one of the remedies for their infringement.

The new concept is not free of contradictions either and these have subsequently become apparent in legal scholarship and case law. The new rules are in § 2:52 Civil Code. According to para 1, '[a]ny person whose personality rights have been violated may claim a grievance award for non-material harm done to him.' The 'non-material harm' still seems to be a prerequisite for the remedy. There is some clarification on this point in para 2: '[...] apart from the fact of the violation, there is no need to prove further loss.' This formulation implies that the personality right infringement – in this analysis: the infringement of the right to live in an 'un-injured' family – is the loss in itself, otherwise why would the text use the term 'further loss.' As a result, the claimant does not have to prove the harm and the court is not required to 'search' for harm in order to grant an award.³² In other words, § 2:52 Civil Code contains an irrebuttable presumption that any personality right infringement involves non-material harm.³³ Nevertheless, the particular disadvantage that the claimant suffered still plays an important role in determining the amount of the grievance award.³⁴ Finally, as already referred to, para 3 contains a non-exhaustive list of the factors to be taken into consideration when assessing the amount of the award as follows: '[t]he court shall determine the amount of the

³⁰ *L Pribula*, A köztudomású tények értékelése a hozzátartozói nem vagyoni kártérítés bírói gyakorlatában [The evaluation of facts commonly known in the judicial practice of non-pecuniary relational damages] (2012) 7–8 *Jogtudományi Közlöny* 288, 288.

³¹ *Pribula* (2012) 7–8 *Jogtudományi Közlöny* 288f.

³² Motives (fn 12) subch 2.

³³ *Lábady* (2016) 2 *Polgári Jog* no 9, *Csöndes* (fn 25) 228.

³⁴ *Vékás/Gárdos/Székely* (fn 3) 200; *Vékás* (2021) 3 *Jogtudományi Közlöny* 101, 109.

grievance award in one sum, taking into account the circumstances of the case, in particular the gravity of the violation, whether it was committed on one or more occasions, the degree of fault, and the impact of the violation on the aggrieved party and his environment.³⁵

5 Conservative U-turn through reinterpretation

a The dilemmas

After this fundamental change, new challenges arose in the court practice very soon (though basically related to personality right infringements other than the loss of life of a loved one or family member). The first question was whether the personality right infringement as such really suffices to claim the remedy and whether the award should indeed be granted automatically, with special regard to so-called 'bagatelle' claims. On the one hand, the floodgates argument was reactivated (fear of masses of unfounded claims) and, on the other hand, there was also a fear that symbolic amounts of grievance awards in bagatelle cases deprive this legal institute of its significance, seriousness and dignity.

b Reinterpretation: the rehabilitation of non-material harm as a prerequisite

The relation of the provisions specified in paras 1 and 2 (§ 2:52 Civil Code) were reinterpreted in a way that the emphasis was put on the first provision stressing that the non-material harm is still a prerequisite for the remedy. Thus, the grievance award will not be granted automatically in the event of a (proven) personality right infringement;³⁶ the legislator being anxious not to open the floodgates for 'business-like' and 'abusive' claims.³⁷

Paragraph 2 cannot be interpreted as a release from this substantive prerequisite, since it is nothing but a procedural rule of a complementary and ancillary nature that sets up a rebuttable presumption of non-material harm (in the event of a personality right infringement) and in this way relieves the claimant of the (procedural) burden of proof;³⁸ but the court can still come to the conclusion that there

35 Translation provided by the (Hungarian) Ministry of Justice, available at <<https://njt.hu/jogszabaly/en/2013-5-00-00>>.

36 *Vékás/Gárdos/Székely* (fn 3) 202. *Wellmann/Kovács-Böszörményi* (fn 15) 209. All commentaries refer to one particular published decision of the Curia (BH 2016 241).

37 *Vékás* (2021) 3 *Jogtudományi Közlöny* 101, 108.

38 *Vékás/Gárdos/Székely* (fn 3) 202, with reference to the non-binding opinion of the Advisory Body besides the Curia (ie the highest court in Hungary). *Vékás* (2021) 3 *Jogtudományi Közlöny* 101, 108f. The

was no non-material harm (despite the personality right infringement), based either on facts commonly known or on counter evidence provided by the defendant.³⁹ This is why the non-material harm has to be substantiated by the claimant, despite the proof not being required, otherwise the defendant would not be aware of what they are required to defend and to provide counter evidence.⁴⁰ If the defendant contests the plaintiff's statements, then the same taking of evidence takes place as before under the former Civil Code, wherein the remedy was conceived of and called non-pecuniary damages,⁴¹ with the not insignificant difference that the burden of proof lies now with the defendant. The prevailing view thus provides a completely different interpretation of the reference to 'further loss' in para 2. The statement that no further loss needs to be proven means *a contrario* that the non-material harm is still a prerequisite of the grievance award and no grievance award can be granted in the absence of non-material harm.⁴² The courts have recently followed this view, generally speaking.⁴³

Some authors – with reference to published judgments of appellate courts – go even further and say that if the claimant refers to further non-material harm (caused by the death of a family member) or a different type of non-material harm and requests an amount far above the average (whereby the average is based on facts commonly known), the onus of proof lies *ab ovo* with him or her in this respect, because those further or different types of non-material harm and/or amounts above the average are beyond the scope of the rebuttable presumption indicated by the Civil Code.⁴⁴ As referred to in the commentaries, some courts specify that the non-material harm requires either a corporal or mental deterioration or a disadvantageous change in the natural and social environment of the (secondary) victim.⁴⁵

presumption was seen as irrebuttable right after the new Hungarian Civil Code entered into force, but recently it has been qualified as rebuttable.

39 Vékás/Gárdos/Székely (fn 3) 202, Wellmann/Kovács-Böszörményi (fn 15) 209. Vékás (2021) 3 Jogtudományi Közlöny 101, 109.

40 Wellmann/Kovács-Böszörményi (fn 15) 214. Varga (fn 15) 594 with reference to one particular published judgment of the Debrecen Court of Appeal.

41 Cs Szabó, 'A sérelem bére' – új bírói gyakorlat a nem vagyoni sérelem megítélése kapcsán ['The wages of pain' – Recent case law on non-material harm] (2017) 9 Polgári Jog no. 8.

42 Vékás/Gárdos/Székely (fn 3) 202.

43 Csöndes (fn 25) 231. The approach returned *de facto* to the status quo ante; a quite cynical maths exercise would describe this as follows: 10 passengers are on a bus. 15 get off. How many should get on for there to be nobody on it?

44 Wellmann/Kovács-Böszörményi (fn 15) 214. With reference to more published judgments Csöndes (fn 25) 231.

45 Vékás/Gárdos/Székely (fn 3) 202.

To sum up, the legislative revolution was turned back by a jurisprudential *desuetudo* and the significance of the non-material harm was emphasised. Although this reaction is understandable, because it is very difficult indeed to treat like cases alike and to reach substantive justice if one of the most important aspects (the harm) is required to be disregarded because it is presumed by law (to be precise: to be considered only regarding the amount and not as a prerequisite); nevertheless, this new approach creates some additional difficulties.

c Some new contradictions

First of all, it seems to be contradictory to the original aims and purposes of the legislator as these were specified in the Motives. This is also a constitutional issue, since, according to art 28 of the Fundamental Law of Hungary (ie the Constitution), '[i]n the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law.'⁴⁶

Second, the courts may reject the claim if they are of the view, based on facts commonly known, that the claimant did not suffer any non-material harm. According to § 266 para 4 of the Civil Procedure Code, the court shall inform the parties of such facts and opposing evidence shall be allowed. If the court disregards this, it commits a procedural error.⁴⁷ Moreover the defendant is allowed to present counter evidence. If the legislator's goal was to spare the claimant from re-experiencing the infringement, then this goal is certainly thwarted. Moreover, it is unclear which aspects belong to the questions of facts (in general, and related to loss of life in particular) and which to the questions of law that are left to the judge's discretion. The issue of whether wrongful conduct causes non-material harm or not is not necessarily a question of fact, but rather a conclusion drawn from a legal evaluation of facts.⁴⁸

Last but not least, the separation of the personality right infringement and the non-material harm still seems to be artificial and the content of these terms is also unclear.⁴⁹

46 Translation is provided by the (Hungarian) Ministry of Justice, available at <<https://njt.hu/jogszabaly/en/2011-4301-02-00>>.

47 *M Parlagi*, A sérelemdíj iránti kereset elutasítása és a hátrány kutatása [The rejection of claims for grievance award and the search for disadvantage] (2018) 9 Jogtudományi Közlöny 369, 374f.

48 *Parlagi* (2018) 9 Jogtudományi Közlöny 369, 375.

49 *Parlagi* (2018) 9 Jogtudományi Közlöny 369, 373f. *Csöndes* (fn 25) 228.

C Loss of life and its compensation in recent Hungarian case law

1 General remarks

The tensions and tendencies referred to above are obviously reflected in loss of life cases. It is hardly surprising that relational losses are seen as an ‘unsolved problem’ in legal scholarship.⁵⁰ Since neither the circle of family members with standing to claim nor the particular amounts (not even as a threshold or cap) are specified by statutory law, the courts enjoy a degree of discretion. Some authors observe that losing a close family member belongs to the gravest non-material harm and justifies higher amounts of grievance awards.⁵¹

Since the issue of loss of life is part of the broader concept of non-material harm and grievance award, the general statements on the latter are also relevant. Authors emphasise that the circumstances taken into account before the legislative reform continue to be considered, since the list in § 2:52 para 3 Civil Code is not exhaustive.⁵² These are, among others, the standard of living at the time the wrongful conduct was committed, the personal circumstances of the victim, such as their age and their prospective situation and chances, quality of life and way of living, development of their personality, etc, also bearing the dual (ie compensatory and deterrent) function of the remedy in mind.⁵³ Sound self-restraint is expected from the courts.⁵⁴ Some authors suggest that the courts should specify – with reference to other cases – why they granted a particular amount and, if they deviate from similar cases, which particular circumstances justify this.⁵⁵ In numerous Court of Appeal judgments, detailed references are indeed made to similar decisions issued by the same and other Courts of Appeal.⁵⁶ Some issues specific to loss of life will be tackled next.

⁵⁰ *Vékás* (2021) 3 *Jogtudományi Közlöny* 101, 110.

⁵¹ *Szeghő 3* (2020) *Magyar Jog* 136, 145. For the details see below V.C.2. According to *Wellmann/Kovács-Böszörményi* (fn 15) 214, loss of a family member belongs to the most severe personality right infringements.

⁵² *Szeghő 3* (2020) *Magyar Jog* 136, 136.

⁵³ *Varga* (fn 15) 597. *Wellmann/Kovács-Böszörményi* (fn 15) 213. An aggravating circumstance would be, among others, if the wrongful conduct was committed out of a business interest, *ibid* 214.

⁵⁴ *Wellmann/Kovács-Böszörményi* (fn 15) 213. Whatever that means.

⁵⁵ *Szeghő 3* (2020) *Magyar Jog* 136, 145.

⁵⁶ Cf eg Győr Court of Appeal Pf.I.20.184/2020/4, Pécs Court of Appeal Pf.III.20.116/2021/4. Very detailed: Pf.III.20.116/2021/4.

a Relationship in legal sense v emotional content

There is a reverse correlation between the family affiliation in a legal sense and the quality of content of a personal (emotional) relationship (whether there was a relationship at all and, if so, whether there were close ties of love and affection between the deceased and the claimant). The closer the relative is from the legal point of view, the less the emotional content of the relationship is analysed by the courts and the more the compensable non-material harm is presumed. As the 'legal distance' grows, the significance and the characteristics of the particular personal (emotional) relationship as a prerequisite grow with it. In the event that a close family member dies, the particular circumstances and emotional content of the relationship are taken into account (only) by way of fine-tuning.⁵⁷ According to legal scholarship, the following relatives or family members belong to the inner circle of closer relatives – as referred to above – in the case law: child, parent, spouse (companion, in particular if the relationship resembles marriage and the lack of marriage is just a formality), (minor) sibling, grandparent, and grandchild.⁵⁸

In only one published judgment is reference made to § 8:1 para 1 no 1–2 Civil Code, wherein the terms 'close relative' (the spouse, the lineal relative, the adopted child, the step-child and the foster child, the adoptive parent, the step-parent and the foster parent and sibling) and 'relative' (all those who qualify as 'close relatives' plus the cohabitant, the spouse of a lineal relative, the lineal relative and the sibling of the spouse, and the spouse of the sibling) are determined. The court rejected the claims of fathers-in-law and mothers-in-law with the reasoning that they are not 'close relatives', just 'relatives', according to the law.⁵⁹ Nevertheless, this reference is not coherent in itself and does not reflect the prevailing view, since a grievance award is generally granted to civil law partners and it has already been granted to sons-in-law, who are not 'close relatives' by law either. In other published judgments, it is explicitly underlined that § 8:1 Civil Code is irrelevant, because neither the Civil Code nor any other law restricts the circle with standing to 'close relatives' in the sense of § 8:1 para 1 no 1 Civil Code and the basis of the claim is the tight emotional ties and the trust based on family relationships, which are characterised by the mutual support of the family members and emotional security provided by them to each other.⁶⁰

⁵⁷ *Pribula* (2012) 7–8 *Jogtudományi Közlöny* 288, 296.

⁵⁸ *Pribula* (2012) 7–8 *Jogtudományi Közlöny* 288, 292, 294. However, this observation seems to be a little too generous. In published judgments, a more restrictive approach can be detected. The Győr Court of Appeal mentions only the spouse, parent, child and sibling as those family members related to whom the non-material harm can be presumed in the event of death, without substantiation of the factual content and quality of the relationship, (Pf I.20.047/2020/7).

⁵⁹ Pécs Court of Appeal Pf III.20.106/2021/7.

⁶⁰ Szeged Court of Appeal Pf.III.20.466/2021/6.

The prevailing view and the case law does not seem to follow (and this is just and correct) the restricted notion and concept of family as it is specified in the Fundamental Law (Constitution of Hungary). According to art L para 1 2nd sentence: '[f]amily ties shall be based on marriage or the relationship between parents and children.'⁶¹

Some authors apply a reverse approach and suggest putting even more focus on the emotional content of the personal relationship, because this is crucial both from the point of view of standing and the merits.⁶²

The increasing significance of the existence and quality of (emotional) relationships between the deceased and the claimant is not surprising, since this is the axis along which the causal connection rolls from the wrongful conduct to the non-material harm of the claimant.⁶³ (If the deceased acted with fault and contributed to their own death, this is also taken into account to the disadvantage of the claimant.⁶⁴)

Some authors report and even support – without reference to any published judgment – that, if the relationship to the deceased was so distanced and 'loose' that it is remote from everyday life for the claimant to feel any grief and sorrow, the claims are basically rejected.⁶⁵ The same stands true if the relationship was troubled and hostile.⁶⁶ Though these thoughts sound convincing, there is – to our understanding – still non-material harm: the family member loses the chance of reconciliation and of making or restoring a relationship of close ties of love and affection in the future. This chance is always there while the relatives involved are alive.

b What is to be compensated?

It is still unclear what exactly is to be compensated, ie what and how substantiated should the claimant present their loss in order to be successful in litigation? In 2008, the Budapest Metropolitan Court of Appeal (*Fővárosi Ítéltábla*) issued a non-bind-

61 Translation is provided by the (Hungarian) Ministry of Justice, available at <<https://njt.hu/jogszabaly/en/2011-4301-02-00>>.

62 *A Molnár*, A sérelemdíj elméleti és gyakorlati kérdései [The theoretical and practical questions of the grievance award] (2013) 7 Kúriai Döntések 744, 747f.

63 *Fézer* (fn 5) 129.

64 *Wellmann/Kovács-Böszörményi* (fn 15) 216. For example, Curia Pfv III.20.166/2020/7: the deceased did not fasten his seatbelt and this contributed to his death. According to some authors, the same applies if not the contributory fault, but the own health conditions of the deceased contributed to their death. *Kemenes* (2018) 12 Magyar Jog 657, 667.

65 *Bárdos* (2021) 2 Kártérítési és biztosítási jog no 6. *Szeghő* 3 (2020) Magyar Jog 136, 141.

66 Without reference to any particular published judgment *Pribula* (2012) 7–8 Jogtudományi Közlöny 288, 295.

ing opinion on relational losses. Though some theses are certainly exceeded by the recent legislative reform, others seem to have survived and continue to apply in case law.

The Budapest Metropolitan Court of Appeal acknowledges the tension between predictability and individual justice. In order to evaluate the loss, it is suggested that the functions of a family are to be analysed. Besides biological and economic functions, social, emotional and educational functions are also allocated to the family. The infringement of the latter induces rather (only) non-material harm. For this reason, the court should reveal the functioning and operation of the respective family prior to the death and compare the situation with that existing after the loss of life. The needs, age, etc of the victim are to be considered in order to assess whether and how the loss of the loved one has impacted on the claimant's private life, development of personality, emotional balance, mental health, way of living. Full or partial deterioration (of one or more) of the family's functions is a prerequisite for non-material harm, according to the Budapest Metropolitan Court of Appeal (though the opinion was issued before the legislative reform), in combination with the crisis as a result of the sudden and unexpected death of the family member.⁶⁷ The personal sensitivity and (lack of) mental countenance of the claimant is also relevant and necessitates differentiation, though it is controversial whether and why mentally 'stronger' victims (who do not necessarily show their grief and sorrow) should be awarded a lower amount.⁶⁸

Therefore non-material damages (before the legislative reform) were adjusted to take account of these disadvantageous consequences referred to above and their goal was to support the victim in adjusting their life to the changed circumstances (eg due to the necessary reallocation of family tasks), to alleviate the grief and sorrow through providing alternative sources of pleasure and satisfaction (even if these cannot resurrect the deceased) in order to solve or at least to ease the difficulties of everyday life.⁶⁹

c Prominent circumstances

The integrity of the family – in other words, the right to live in a complete and 'uninjured' family – is a double-edged sword. Though it serves as a justification for

⁶⁷ This approach is frequently referred to in the recent case law too, cf eg Budapest Metropolitan Court of Appeal 6.Pf.20.402/2019/4-II and 7.Pf.20.567/2018/6; Szeged Court of Appeal Pf.III.20.466/2021/6.

⁶⁸ According to the Budapest Metropolitan Court of Appeal (9.Pf.20.340/2020/5), this does not justify a lower amount.

⁶⁹ With reference to published judgements of appellate courts from the early 2010s, see *Pribula* (2012) 7–8 *Jogtudományi Közlöny* 288, 292.

the claim, since growing up in a supportive and loving environment is a fundamental need and right that significantly influences how one finds one's way in society and life in general, a family is a source of joy, safety and security, but, on the other hand, it seemingly opens new analyses as to whether and when this particular right is infringed. In this context, two particular circumstances appear in the case law as prominent: the age of the primary victim and claimant; and whether they lived together or not.

The fact that the deceased and the claimant lived together does not in itself justify the award, but the opposite is also true: just because the claimant (a child of full age) did not live together with the deceased (parent) anymore, he or she is not *per se* excluded. If the surviving child is of full age, he or she may present to court and, in case of doubt, verify the close ties of love and affection with the deceased.⁷⁰ There is no doubt that a minor child is entitled to a grievance award if the parents divorced earlier and he or she did not live together with his or her father who died in an accident. There are cases, however, in which the courts distinguished between those children who lived together with the deceased in the same household and those who did not and the former were granted a higher amount.⁷¹ If the claimant is a minor child, the courts tend to accept the non-material harm as proved based on facts commonly known.⁷² No doubt, losing a child is an ineradicable, irreplaceable and tragic loss at any age (of the child and the parent). If the parents (and the child) were young, then the parents face a long life with their deep sorrow. If the parents were older (and the child was an adult), they lose their most important support in their older years.

Besides, the degree of fault of the wrongdoer,⁷³ the circumstances of the death (eg the claimant sat in the same car and suffered serious personal injuries) – though a sudden and unexpected death almost always causes a family crisis due to the burden of being unprepared and the immutability of the loss and pain⁷⁴ – the role of the deceased within the family (eg having been the only living ascendant; having provided the logistical support regarding grandchildren to overworked parents; having been the heart and soul and as such the emotional centre of the family as an

⁷⁰ Wellmann/*Kovács-Böszörményi* (fn 15) 210f. *Pribula* (2012) 7–8 *Jogtudományi Közlöny* 288, 292. The same applies to siblings of full age living apart from the deceased, *ibid* 295; and to grandparents having lost a grandchild of full age, *ibid* 296.

⁷¹ Szeged Court of Appeal Pf.III.20.466/2021/6.

⁷² *Barzó* (2017) *Publicationes Universitatis Miskolciensis Section Juridica et Politica* 202, 211 fn 36.

⁷³ For example, the gross negligence of a general medical practitioner, which is also a crime, cf Budapest Metropolitan Court of Appeal 7.Pf.20.099/2022/6/II.

⁷⁴ Debrecen Court of Appeal Pf.I.20.112/2022/5.

integrative personality) are taken into account, however not as prerequisites but rather as factors that impact the amount of the grievance award.

The Szeged Court of Appeal attempted to set up a structural approach and schedule of analysis as regards the most important factors to be considered and an order of assessment that consists of two objective and two subjective steps. The first (objective) factor is the distance of kinship in a legal sense. The second one is the factual relationship between the deceased and the claimant, including, but not limited to, the intensity, frequency and means of contact (personal or not): within this framework, the court comes to the conclusion that living in the same household implies a stronger relationship and thereby justifies a higher grievance award. The first subjective factor is the emotional content of the relationship; in other words, the emotional ties, which are necessarily stronger in case of spouses and of the parent-child relationship and which can be assessed by means of psychological expert evidence. The second subjective element is the difficulty and progress of the grief and sorrow, which is dependent on the very personality of the claimant.⁷⁵

2 Summary of the case law of the last five years

Besides evaluating the commentaries, papers and other secondary sources, a direct analysis of the published judgments between 2018 and 2022 (until mid-August 2022) has been performed. Thirty-nine loss of life decisions of the Curia (*Kúria*, the highest court in Hungary)⁷⁶ and the regional Courts of Appeal (*Ítéltábla*)⁷⁷ were considered, ie all in which the court elaborated on the grievance award claims of the claimants.

⁷⁵ Szeged Court of Appeal Pf.III.20.466/2021/6.

⁷⁶ Curia: BH 2021 74 (old man with dementia jumped out of the window of the nursing home because the staff left it wrongfully open); Mfv.X.10.179/2020/9 (young bomb disposal expert, father of three, dies at work); Pfv.III.22.025/2018/5 (young man is electrocuted while repairing a baling machine); Pfv.III.20.059/2020/5 (young man with leukaemia lost the chance to live longer due to medical malpractice); Pfv.III.20.166/2020/7 (companion and father died in a traffic accident); Pfv.III.20.846/2021/4 (loss of a 17-year-old son in a traffic accident); BH 2022 153 (wife and mother were run over when cycling).

⁷⁷ Budapest Metropolitan Court of Appeal: 4.Pf.20.709/2020/6 (husband dies in a traffic accident caused wrongfully by the defendant and the wife also suffers serious injuries); 9.Pf.20.340/2020/5 (minor child drowns in an open air swimming pool due to the negligence of the supervising adult friend of the family); 6.Pf.20.402/2019/4-II (woman and daughter die together in a traffic accident); 7.Pf.21.246/2018/5 (mother of two adult daughters dies in a traffic accident); 7.Pf.20.567/2018/6 (68-year-old mother and grandmother dies because of medical malpractice); 7.Pf.20.207/2018/4 (new-born baby dies because of medical malpractice); 7.Pf.20.708/2020/15/II (the hospital could not prove due to lack of documentation that the husband did not die as a result of medical malpractice); 2.Mf.31.277/2020/10 (parents lost their adult son in a workplace accident); 7.Pf.20.374/2021/6/II (wife and mother lost the chance of survival due to medical malpractice); 7.Pf.20.854/2021/6/II (wife died due to

The average grievance awards and the lower and higher outliers will be specified. It should be taken into account that the average gross salary in Hungary in December 2021 was HUF 492,800 (as converted approx € 1,336) and the net salary was HUF 327,700 (approx € 888).⁷⁸

Although no specific law excludes it, and it would therefore be legally possible, since the circle of people with standing is not restricted to family members or so, we did not observe any case among the published judgments in which a close friend or similar non-family member (though being in a close and affectionate relationship with the deceased) was granted a grievance award.

The most important changes in society seem to be reflected in the case law: with the massive increase of cohabitation, it is less and less questionable whether the surviving civil law partner should be granted a grievance award or not. Similarly, since grandparents play a huge role in Hungary in supporting overworked parents in taking care of their (grand)children, this contribution to the functions and balance of the family (and the loss of it) is also taken into account.

Though the highest court in the country (the Curia) does not seem to support this view, the amount is frequently decreased if the causal connection between the wrongful conduct and the death cannot be proven with certainty, in other words, if

medical malpractice); 7.Pf.20.282/2022/5/II (loss of a newborn child due to diagnostic error and infringement of the right to family planning); 7.Pf.20.099/2022/6/II (loss of a child living together with the parents due to medical malpractice); 7.Pf.20.077/2022/10 (loss of a wife and mother due to medical malpractice).

Debrecen Court of Appeal: Pf.I.20.316/2020/4 (75-year-old mother and grandmother dies as a result of medical malpractice and own health conditions); Pf.I.20.256/2020/6 (elderly woman dies as a result of medical malpractice); ÍH 2020 49 (still-birth as a result of medical malpractice); Pf.I.20.318/2020/5 (loss of a sibling and mother due to postponement of surgery); Pf.I.20.112/2022/5 (loss of a husband due to medical malpractice).

Győr Court of Appeal: Pf.I.20.047/2020/7 (69-year-old man dies in a traffic accident); Pf.I.20.010/2018/5/I (15-year-old young woman dies in a traffic accident); Pf.I.20.184/2020/4 (loss of a spouse and parent in a fatal traffic accident); Mf.V.30.015/2022/7 (loss of a child and sibling in a workplace accident).

Pécs Court of Appeal: Pf.III.20.106/2021/7 (after 21 years of being happily married, a wife dies in a traffic accident); Pf.III.20.116/2021/4 (loss of a mother in a traffic accident); Pf.III.20.061/2021/9 (a spouse, mother and grandmother with dementia committed suicide in a nursing home due to lack of supervision); Pf.III.20.031/2022/7 (loss of a 2-year-old child and sibling due to medical malpractice).

Szeged Court of Appeal: Pf.II.20.304/2020/5 (loss of a husband and father in a traffic accident); Pf.II.20.140/2022/4 (loss of an adult brother who was run over by a car and the dead body was hidden in a sewer); Pf.II.20.325/2021/7 (loss of chance of survival of a mother and spouse due to medical malpractice); Pf.III.20.466/2021/6 (father of six, son and sibling died in a traffic accident).

⁷⁸ Data provided at the official website of the Hungarian Central Statistical Office, <<https://www.ksh.hu/docs/hun/xftp/gyor/ker/ker2112.html>>. We used the average exchange rate at the time the judgments were delivered, based on the data of the Hungarian National Bank.

reference is made to the non-material harm as the loss of a chance to survive or to live longer.⁷⁹

a Loss of a spouse

The average grievance award was – as converted approximately – between € 14,000 and € 27,000. The lowest amount was € 7,100 and the highest € 57,000. The lowest amount was justified by the fact that the widow remarried soon after the death and her minor child accepted the new husband.⁸⁰ In one case, the claimant was a handicapped woman who had been taken care of by the deceased husband; in another case, the wife died after having been happily married for 21 years and the harmonious and balanced family background collapsed.⁸¹ Both cases awarded average amounts. The amount was closer to above average when a wife lost her husband after having been happily married for four years when they planned to have children and she was overcome by grief, which is extremely difficult to get over, if possible at all,⁸² the amount awarded was lower than average when an elderly spouse committed suicide in a hospital due to his psychiatric illness and dementia.⁸³ The highest amount was awarded in a case when a young couple suffered a serious traffic accident (with no fault of their own), the husband died immediately in front of the wife who witnessed his death and suffered serious personal injuries herself. In this case, several personality right infringements came together.⁸⁴ In another case, the amount was also above average when a young bomb disposal expert, the caring father of three minor children, died during the performance of his work duties.⁸⁵ Loss of a companion (civil law partner) is assessed in the same manner as

79 Budapest Metropolitan Court of Appeal 7.Pf.20.708/2020/15/II, 7.Pf.20.374/2021/6/II. Szeged Court of Appeal Pf.II.20.325/2021/7.

80 Interestingly enough, this was not considered as a decreasing factor related to the child's claim (he accepted the new partner of the mother as a *de facto* father, cf Curia Pfv.III.22.025/2018/5).

81 Pécs Court of Appeal Pf.III.20.106/2021/7.

82 Budapest Metropolitan Court of Appeal 7.Pf.20.854/2021/6/II, the widow kept the things used by her deceased husband, the house was full of his photos and her long term sorrow was combined with anxiety and depression.

83 Pécs Court of Appeal, Pf.III.20.061/2021/9.

84 Budapest Metropolitan Court of Appeal 4.Pf.20.709/2020/6. The court considered that they were just married (four months previously), they had planned their joint life, this was or would have been the happiest period of their life; the wife lived on her own after the accident, there was a high risk of loneliness. As to the reference to a 'fresh' marriage, see also Budapest Metropolitan Court of Appeal 6.Pf.20.402/2019/4-II.

85 Curia Mfv.X.10.179/2020/9: the courts considered the upbringing of the children as a single parent, the decrease of the chance to find a new partner combined with distress and anxiety of loneliness, the way the husband died, the unstable mental condition and insomnia that also affected her work as

the loss of a spouse, but the courts consider the duration and stability of the relationship as well as its emotional content.⁸⁶

As already emphasised in a non-binding opinion issued by the Budapest Metropolitan Court of Appeal and as referred to in the judgments, the loss of a spouse frequently results in an inevitable reallocation of family tasks that involves an additional burden for the surviving spouse as well as a loss of opportunities. (Due to the increased tasks, there is less opportunity to develop one's own personality and to enjoy free time.) For example, it might be difficult to find a new partner, there is an increased risk of loneliness, the spouse's mental and emotional support is missing. The loss of joy of sexual relations is also considered.⁸⁷ If the loss occurs in old age, other factors are to be taken into account: the surviving spouse loses their life partner when they are very much dependent on each other's help due to their age and health concerns. It is even more relevant if the couple did not have children and, therefore, the surviving spouse loses their only support, the feeling of togetherness and security.

b Loss of a parent

The average grievance award was between € 11,000 and € 32,000. The lowest amount was € 6,775 and the highest € 71,000. Only lower amounts were awarded when the deceased was already old (eg 68 or 75, but still took part in the life of the family and supported their children in taking care of the grandchildren; the deceased suffered dementia in another case, but had previously played an active role in the family: tended the garden, ran the household, etc⁸⁸), and/or already suffered from a poor health condition that interfered with the consequences of the wrongful conduct.⁸⁹ The average amounts were granted in other cases when the children of

factors leading to an increase of the amount. As to having become a single parent, cf also Budapest Metropolitan Court of Appeal 6.Pf.20.402/2019/4-II. The latter is frequently combined with anxiety from bearing the responsibility alone; see in this respect, *Sz Pál*, 'Viszlek a szívemben' – a hozzátartozó elvesztése, sérülése miatt a családban bekövetkezett nem vagyoni értékvesztések a bírói gyakorlatban ['I take you with me in my heart' – the non-material losses of value in the family due to the loss or injury of a family member – the court practice] (2022) 7–8 Magyar Jog 431, 440.

⁸⁶ Curia Pfv.III.20.166/2020/7.

⁸⁷ *Pál* (2022) 7–8 Magyar Jog 431, 439.

⁸⁸ Curia BH 2021 74. Similarly Pécs Court of Appeal Pf.III.20.031/2022/7: the fact that the deceased would have been dependent on the everyday support of his family members due to his bad health conditions does not change the fact that his premature death has disturbed the peace and harmony of the family.

⁸⁹ Debrecen Court of Appeal Pf.I.20.318/2020/5.

the deceased parent were already of full age,⁹⁰ had families themselves but they could prove that they had an active, harmonious and affectionate relationship with the deceased, who did not live together with the claimants though, but the latter visited him at a daily basis. In the respective cases, it was always highlighted how the deceased contributed to the family tasks. It was an aggravating circumstance in one case that the child lost his parent and grandparent in the same accident;⁹¹ and in another one that the mother was the only living relative who brought up her daughters (already of full age at the time of the accident) as a single parent.⁹² As correctly underlined in a published judgment of the Győr Court of Appeal, the changing functions of being a parent over time are reflected in the court practice. If the child is already of full age, the educative-care taking functions no longer apply. However, the parent continues to serve as a support, as an advisor and as a point of reference, providing the opportunity to 'return to the roots' any time. Later, parents participate in bringing up grandchildren and they play an essential role in transferring knowledge, experience and values.⁹³

As already referred to above, the younger the child, the higher the sum. The courts consider that the (minor) child lost the guidance, care and companionship of the parent and the support in reaching milestones of life, as well as important role models (both parents serve as role models) when growing up.⁹⁴ The (minor) child is deprived of the joy, harmony and safety of a family. The highest sum was awarded to the minor children of the young bomb disposal expert who died in a workplace accident.⁹⁵

90 For example, Curia BH 2022 153. However, in a published judgment of the Szeged Court of Appeal, only € 8,130 was granted to each claimant without any further explanation though the one child finished secondary school right before the father's fatal accident and the other was still a pupil there, see Pf.II.20.304/2020/5.

91 Budapest Metropolitan Court of Appeal 6.Pf.20.402/2019/4-II.

92 And other family tragedies had happened in the past (divorce, tragic death of their brother), which is why the care and companionship of their mother was valued so highly. Budapest Metropolitan Court of Appeal 7.Pf.21.246/2018/5.

93 Győr Court of Appeal Pf.I.20.184/2020/4.

94 Budapest Metropolitan Court of Appeal 6.Pf.20.402/2019/4-II. The court considered that the child lost her mother in a phase of her life when she was most needed. Similarly, Budapest Metropolitan Court of Appeal 7.Pf.21.246/2018/5. The daughters were 18 and 21 when the accident occurred and they were deprived of the support of their mother at a stage when they were starting their own families. See also Pécs Court of Appeal Pf.III.20.106/2021/7: the deceased mother was definitely the confidante of the then 20-year-old daughter; they were also close friends and wanted to work together in the mother's hairdresser saloon.

95 Curia Mfv.X.10.179/2020/9: the youngest child was a newborn baby, the other one was three years old; both of them will completely miss their father, to be precise: being brought up by their father, etc.

The degree of fault of the wrongdoer and the tragic circumstances of the death are also aggravating factors,⁹⁶ as are the psychical reflections of the loss on the part of the children involved.⁹⁷

c Loss of a child

The non-material harm suffered is the most obvious if parents survive their child. It is emphasised in every relevant case that it is an ineradicable, irreplaceable and tragic loss at any age. (This also applies, of course, to adopted and foster children.) The average grievance award was between € 11,380 and € 40,000. The lowest amount was € 2,710 and the highest € 51,000. In the judgment in which the lowest award was granted, the child was suffering from leukaemia and the time to be spent with the family was shortened by a couple of months due to medical malpractice.⁹⁸ The lower sums were justified by the fact that the child was already of full age and they contributed to the accident as well.⁹⁹ The tragic death of newborn babies and minor children resulted in average awards. Amounts still within the average but closer to the lower end were granted if the child was of full age, but the parents provided evidence of close ties of love and affection and mutual support, visiting each other almost on a daily basis.¹⁰⁰ Higher sums were granted if this was justified by the aggravating circumstances of the death (eg a tragic drowning case when a minor child drowned in a spa), frequently combined with the parents experiencing

96 The elderly primary victim with dementia managed to jump out of the window of a nursing home due to the gross negligence of the staff. Curia BH 2021 74. The young bomb disposal expert exploded while working and the family could not give him an ordinary funeral, cf Curia Mfv.X.10.179/2020/9.

97 See eg Pécs Court of Appeal Pf.III.20.116/2021/4: the court analysed the impacts of the death of their mother on each child. One daughter was 17 at the time the fatal accident occurred. She was at a most sensitive age and had a very close relationship to the deceased who was also her closest friend. The other – younger – child was very withdrawn and incommunicative and this status even worsened. Another one became aggressive and her performance at school increasingly worsened. Moreover, the deceased mother was the emotional centre of the patchwork family who managed to keep the family together as a functioning unit based on caring and affectionate relationships.

98 Curia Pfv.III.20.059/2020/5.

99 But without any explanation, only € 6,775 was granted in the event of the death of an adult child (47 years old), cf Szeged Court of Appeal Pf.III.20.466/2021/6.

100 Curia Pfv.III.22.025/2018/5. In another case, the deceased daughter was the only child of their elderly and ill parents, cf Pécs Court of Appeal Pf.III.20.106/2021/7. See also Curia Pfv.III.20.846/2021/4: 17-year-old (only) son died in a traffic accident, there were very close ties of love and affection between him and his parents, the deceased was the centre of their life and they lost their future support in their old age. Similarly in Budapest Metropolitan Court of Appeal 2.Mf.31.277/2020/10: the deceased son started his own life with his own family right before the fatal workplace accident, but the relationship was very close, meeting his parents on a daily basis.

emotional trauma and suffering psychiatric illnesses themselves,¹⁰¹ or if the child was the 'sunshine of the family', a super-talented, very kind and peaceful personality, and therefore losing her causes a continuous crisis including, but not limited to, depression of the parents, insomnia, lack of appetite and learning difficulties of the siblings, with family events no longer being held.¹⁰²

d Loss of a sibling

In the event the claimant requests a grievance award because of his or her sibling's death, the content and quality of their relationship gains importance in the court's analysis. Circumstances that are highlighted include that the siblings grew up together and were also best friends and that they spent all their free time together;¹⁰³ or the deceased brother was much older than the surviving younger one and served as an important support, sometimes as a parent-substitute for the claimant; or the surviving sibling suffered the loss at a most sensitive age.¹⁰⁴ Besides the grief and sorrow felt, growing up in a distressed, traumatised and sad family as a secondary consequence is also emphasised.¹⁰⁵

A grievance award is granted even if the siblings were already of full age and did not live in the same household, but there was a living and affectionate relationship between them. The average grievance award was between € 1,400 and € 8,500. The lowest amount was € 900 and the highest € 14,000. The lowest sum was justified by the contributory negligence of the deceased to his own death and by the fact that both the deceased and the claimant were already of full age. An average grievance award was granted even if the deceased was a newborn baby, and the sibling lost the opportunity to grow up in the company of a younger brother. The amount awarded was closer to the lower end of the average in a case when the claimant's elderly, single brother who suffered bad health and alcoholism was run over by a car and his dead body was hidden in a sewer and later found there. The claimant visited the primary victim on a regular basis and took care of him; there was an affectionate relationship between the siblings despite the deceased's unorthodox

101 Budapest Metropolitan Court of Appeal 9.Pf.20.340/2020/5 and also 2.Mf.31.277/2020/10. Similarly, Pécs Court of Appeal Pf.III.20.031/2022/7: the 2-year-old child suffered greatly due to an erroneous diagnosis before he died.

102 Győr Court of Appeal Pf.I.20.010/2018/5.

103 Budapest Metropolitan Court of Appeal 4.Pf.20.709/2020/6.

104 For the latter cf Curia Pfv.III.22.025/2018/5.

105 Budapest Metropolitan Court of Appeal 9.Pf.20.340/2020/5 and 7.Pf.20.207/2018/4 (the death of the second child as a newborn due to medical malpractice resulted in serious psychiatric illness of the parents and this also impacts on the everyday life of the family). Similarly Győr Court of Appeal Pf.I.20.010/2018/5.

way of living. The claimant was traumatised as a result of how he found his dead brother in the sewer.¹⁰⁶ An amount at the lower end of the average was awarded in a case where the adult sister of the 47-year-old primary victim lived abroad and visited her brother only once a year, though there was – no doubt – a close emotional relationship between them and earlier she had helped her brother to find a job abroad.¹⁰⁷

The courts sometimes do not differentiate according to the age of the siblings. In the event of the death of a 15-year-old girl, both sisters were granted the same amount, although one still attended kindergarten, while the other was just about to sit her school-leaving exams when the accident occurred.¹⁰⁸

e Other family members

Grievance awards were also granted to grandchildren, with the amounts ranging between € 2,710 and € 10,000. The courts specified that the grandparents almost served as parent substitutes, having been very active in taking care of their grandchildren (emotional centre of the family) and there were also very close ties of love and affection between them and the grandchildren.¹⁰⁹

A grievance award (even if only a lower amount) was also granted to a son-in-law when his father-in-law died, but this was justified by very special circumstances: the father-in-law was a kind of father-substitute for the young man and the family was very dependent on the father-in-law's services in managing family life with special regard to the transport of the children between school, home and tutorials.¹¹⁰

A claim brought by a mother-in-law and father-in-law was rejected in another case despite close ties of love and affection.¹¹¹ The ex-wife was also not granted a grievance award, although she and her deceased ex-husband wished to rekindle their relationship right before his death.¹¹²

106 Szeged Court of Appeal Pf.II.20.140/2022/4.

107 Szeged Court of Appeal Pf.III.20.466/2021/6.

108 Győr Court of Appeal Pf.I.20.010/2018/5.

109 See eg Budapest Metropolitan Court of Appeal 7.Pf.20.567/2018/6, Debrecen Court of Appeal Pf.I.20.316/2020/4 and Győr Court of Appeal Pf.I.20.047/2020/7. Living together with the grandparent is definitely not a prerequisite, cf Pécs Court of Appeal Pf.III.20.061/2021/9.

110 Győr Court of Appeal Pf.I.20.047/2020/7. Similarly in the legal scholarship: the daughter-in-law/mother-in-law relationship must resemble a mother-daughter relationship from the emotional perspective, see *Pál* (2020) 7–8 Magyar Jog 431, 435.

111 Pécs Court of Appeal Pf.III.20.106/2021/7. They did not live in the same household and there was also no relationship on a daily basis.

112 *Pál* (2020) 7–8 Magyar Jog 431, 435.

VI Closing remarks

Although the dynamic and multi-dimensional model in Part IV involves a more precise description of the interconnected structures, factors, approaches of civil law doctrine and policy reasons that frame and shape the principles and concepts on loss of life and its compensation (and shall not be repeated here), there are some outlining fundamental linkages of worth to be underlined.

After a particular legal system has accepted loss of life (of a loved one and/or family member) as non-material harm to be compensated in itself, without simultaneous personal (including mental) injuries of the claimant and irrespective of having witnessed the death (nervous shock) or not, the next crucial question is to take a position on the almost antagonistic opposition of individualisation (focusing on individual justice) and standardisation (preferring predictability). Flexibility and the uniqueness of each and every case speak for the first approach, but the second simplifies the judge's task to a high extent, since it is very difficult to assess subjective emotions, such as grief and sorrow. The first approach leaves more room for judicial fine-tuning, granting compensation to claimants other than the closest relatives or even to non-family members provided close ties of love and affection justify this. A good compromise seems to be to combine the two approaches in such a way as the Finnish legislator has done. The non-material harm is seen to be established if the claimants are the closest relatives of the deceased, but also others can try to prove close ties of love and affection. It is in line with the common understanding of society and qualifies as a *ratio communis* that close ties of love and affection can be presumed if the closest family members are at stake. The particular circumstances of the case, ie the content and quality of the relationship between the deceased and the claimant, should be considered as the prerequisite for granting the award only if the claimant does not belong to the group of family members regarding which the close ties of love and affection are (and can be, should be) presumed; apart from that, they should be used as a fine-tuning tool (increasing or decreasing the amount). This author suggests not taking the lack or hostile nature of the relationship into account as a factor depriving the claimant of the (entire) award if the case concerns one of the closest relatives. The chance of reconciliation and resumption of contact always exists until death.

The analysis shows that the assessment of the non-material harm itself could not be and should not be avoided or circumvented. There is no justification for any remedy without non-material harm. The recent history of the Hungarian perspective confirms this finding. The legislator intended to 'de-emphasise' non-material harm and to transfer the focus to the personality right infringement: it was not successful. The courts adhered to the former approach, retained their earlier practice that attached the highest importance to the disadvantageous impacts of the loss.

This again seems to verify the fact that, despite the non-pecuniary nature of the loss and the immeasurability of life (of a loved one), compensation is the primary and prevalent function of the remedy. Deterrence and punishment can also be perceived as the non-material versions or variants of compensation and be conceived as the fine-tuning elements within compensation.

Case law should reflect changes in society and this is the case in Hungary, for example, as courts grant grievance awards to the civil law partner of the deceased or as they consider the role grandparents play in post-modern society in supporting their overworked children. The law of damages (and any remedies) shall be based on the order of values of and in society. Only a loss of value can qualify as a compensable harm and, at the same time, as a harm to be compensated. The same should apply to the details.