

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CHERYL INDALECIO as Personal Representative of
CHRISTOPHER RAY INDALECIO, deceased

Appellant,

v.

JOHN YAROFALIR, COMMONWEALTH OF THE
NORTERHN MARIANA ISLANDS, and the
DEPARTMENT OF PUBLIC HEALTH AND SERVICES,

Appellees.

Supreme Court Appeal No. 04-0015-GA
Superior Court Civil Case Action No. 03-0514

OPINION

Cite as: Indalecio vs. Yarofalir, et al., 2006 MP 18

Argued and submitted on November 19, 2004
Saipan, Northern Mariana Islands

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FOR PUBLICATION

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

Demapan, Chief Justice:

¶1 The trial court summarily dismissed Cheryl Indalacio’s cause of action for failure to state a claim in a wrongful death action seeking damages for both her own injuries and those of her deceased son. While the trial court was correct that the CNMI wrongful death statute does not permit recovery for injuries sustained by the decedent, we find that Indalecio adequately plead a wrongful death action to recover damages for her own injuries despite her having plead it using medical malpractice language. For the reasons below, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

I.

¶2 On June 24, 2002, Cheryl Indalecio brought her eighteen-year-old son, Christopher Indalecio (“Christopher” or “decedent”), to the Commonwealth Health Center (CHC) for treatment for a respiratory infection. Christopher suffered from muscular dystrophy, and thus required a tracheotomy to assist his breathing. The tracheotomy was performed and Christopher was expected to make a full recovery. He was set to be discharged from CHC, but since the tracheotomy had proven difficult, the medical staff decided that the tracheotomy tube should be left in place in the event that the respiratory infection returned. Upon inspection, however, a nurse noticed that the tracheotomy tube was protruding from Christopher’s neck more than it should. Dr. John Yarofalir was called to adjust the tube.

¶3 The adjustment caused Christopher a lot of discomfort, and he spent that night in the CHC being treated for pain. Early the next morning he began bleeding from the site

of the tracheotomy. Medical staff was immediately summoned, but they were unable to stop the bleeding. Christopher died shortly thereafter in the presence of his mother and sisters.

¶4 As a result of these events, Indalecio initiated a claim in the trial court alleging that Dr. Yarofalir was negligent in adjusting the tracheotomy tube. She alleged that as a direct and proximate cause of Dr. Yarofalir's negligence, Christopher endured a great deal of pain and discomfort and ultimately bled to death. Based on this alleged negligence, Indalecio claimed damages for injuries incurred by both Christopher and herself. Dr. Yarofalir moved for summary judgment on both counts. He argued that because Indalecio's claims were based on a medical malpractice theory, they required a "survivorship statute" which the CNMI does not have. Dr. Yarofalir noted that the CNMI Legislature has enacted a "wrongful death" statute, but Indalecio did not claim damages for Christopher's injuries or her own injuries based on that statute. He argued, and the trial court agreed, that since Indalecio's claims were for "malpractice" and not "wrongful death," the claims were extinguished when Christopher died. In the trial court's own words: "[b]oth of Plaintiff's causes of action are based on negligence theories as they relate specifically to injuries suffered by the decedent. ...[S]urvival actions are not at present available in the Commonwealth, and cannot be maintained."

II.

¶5 We have jurisdiction to hear appeals of final judgments entered by the Commonwealth Superior Court pursuant to Article IV, Section 3 of the N.M.I. Constitution, and 1 CMC § 3102(a).

III.

¶6 This case presents the following issues:

1. Does the CNMI wrongful death statute¹ preserve a decedent's claims so that the decedent's estate may recover damages for the decedent's injuries?
2. Is an action to recover medical malpractice expenses, burial expenses, and other damages incurred by the deceased's family sufficient if not specifically plead as a wrongful death action?
3. Was decedent a "child" for purposes of 7 CMC § 2103(a) so as to make damages for Indalecio's mental pain and suffering recoverable?

¶7 Because each of these issues hinges on statutory interpretation, we review them *de novo*. See *Commonwealth v. Taisacan*, 1999 MP 8 ¶ 18, 5 N.M.I. 236, 236; *Triple J. Saipan, Inc. v. Rasiang*, 1999 MP 7 ¶ 2, 5 N.M.I. 232, 233; *Northern Marianas Hous. Corp. v. Marianas Pub. Land Trust*, 1998 MP 1 ¶ 2, 5 N.M.I. 150, 151; *Commonwealth v. Cabrera*, 1997 MP 18 ¶ 2, 5 N.M.I. 104, 105.

IV.

A. The CNMI Wrongful Death Statute Does Not Preserve a Decedent's Claims so that the Decedent's Estate May Recover for the Decedent's Injuries.

¶8 Before addressing the boundaries of recovery provided by our wrongful death statute, it should be noted that American jurisprudence in this area has been greatly complicated by the historical context in which wrongful death statutes arose and the often ambiguous language in which they were couched. Every jurisdiction providing recovery for wrongful death has been forced to grapple with these difficulties. This has led to the

¹ For readability we often refer to our wrongful death statutory scheme simply as our "wrongful death statute." However, it should be noted that three statutory provisions, *i.e.*, 7 CMC §§ 2101- 2103, define our wrongful death cause of action.

current state of the law in which similarly worded statutes are interpreted in different, and often incongruent, ways. Although we have touched on this in our previous decisions, we feel that a more thorough historical analysis is in order to better lay the foundation for wrongful death jurisprudence in the CNMI. For this reason we shall briefly highlight the historical evolution of American wrongful death recovery in order to more accurately place our statutory framework within that context.

1. Wrongful death statutes and the basis of post-mortem recovery

¶9 It is well established in American jurisprudence that there is no common law right of recovery for wrongful death. *See, e.g. Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539, 53 S.Ct. 231, 232, 77 L.Ed. 477 (1933) (“The right to recover for a wrongful death is the creature, not of the common law, but of a statute ...”); *Borer v. American Airlines, Inc.*, 19 Cal.3d 441, 451-52 (1977) (“By 1846, the date of the enactment of the first wrongful death statute, the common law courts had settled that the heirs of a deceased victim could not bring a cause of action against the tortfeasor.”) (citations omitted); *Huebner v. Deuchle*, 514 P.2d 470, 471 (Ariz. 1973); *Goheen v. General Motors Corp.*, 502 P.2d 223, 226 (Or. 1972); *Bortle v. Osborne*, 285 P.425, 428 (Wash. 1930). This rule was pronounced in 1808, in the English case of *Baker v. Bolton*, but its pedigree reaches back into the earliest developments of common law. *See generally* 1 STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY §§ 1:1-1:2 (3d ed. 1992); 2 DAN B. DOBBS, LAW OF REMEDIES § 8.3(1) (2d ed. 1993).

¶10 English common law did not permit recovery for tortious conduct unless both tortfeasor and victim lived until a judgment was rendered. 2 DOBBS, § 8.3(1). If either the tortfeasor or his victim died, then recovery was barred. The reason for this aversion

to recovery is unclear, but might lie in the fact that these cases were decided before ‘torts’ became a distinct area of law, and thus courts approached such cases from a criminal law framework. *Id.* at n.2 (citations omitted). The courts probably required a living tortfeasor because they were reluctant to ‘punish’ an individual’s successors for the individual’s quasi-criminal conduct – what we would now label a tort – after that individual died. *Id.* Since punishment for criminal activity is remedial, whereas tort recovery is compensatory, such reasoning made sense in pre-tort jurisprudence. A judge would not order a money judgment against a tortfeasor’s family instead of the tortfeasor, just as a judge would not send a criminal’s family to jail instead of the criminal.

¶11 Similarly, the death of the tortfeasor’s victim precluded recovery. If the victim died, then any claim she might have had against the tortfeasor merged into the greater offense of a crime against the Crown.² *Id.* at § 8.3(1). Common law did not recognize any right of recovery for the decedent’s estate, but instead viewed wrongful death as a loss to the Crown, which warranted a deterrent, a fine, payable to the State from the tortfeasor’s belongings. *See* SPEISER, §1.2 n.6, *citing* LORD HALE, P.C., vol. i, p.476. Less clear is why the decedent’s family would also be barred from recovery, especially since in the Anglo-Saxon tradition all homicide was originally considered a type of civil wrong that required only monetary compensation. SPEISER, §1.2. Some commentators have noted that since a tortfeasor’s belongings were forfeited to the Crown upon the decedent’s death, no private action would have been practical. *Id.* In effect, the tortfeasor would be rendered judgment-proof because the State took first. Whatever the reason, English common law, as it stood in the early nineteenth century, precluded the

² Dobbs notes, “however, ... some tort actions, such as those for conversion of or damage to personal property did survive the victim’s death, even though torts to his person or real property did not.” 2 DAN B. DOBBS, LAW OF REMEDIES § 8.3(1) n.3 (2d ed. 1993) (citation omitted).

decendent's family from recovering damages for the wrongful taking of the decedent's life.

¶12 American jurisdictions originally permitted recovery for wrongful death, but in 1848 the Massachusetts Supreme Court, in *Carey v. Berkshire R.R. Co.*, ignored this precedent and adopted the English rule prohibiting recovery. *Goheen*, 502 P.2d at 226 (citations omitted). Other courts began following Massachusetts's lead and it became settled law in American jurisdictions that there can be no recovery for wrongful death absent a statute. Most states, if not all, have enacted such legislation and now permit some type of recovery for wrongful death. RESTATEMENT (SECOND) OF TORTS § 925 cmt. a (1979).

2. *Lord Campbell's Act and the CNMI's wrongful death statute*

¶13 Lord Campbell's Act, enacted in 1846, was "the first wrongful-death statute ... [and] became the prototype of American wrongful-death statutes, [thus] most state statutes contained nearly identical language and have been similarly interpreted by state courts." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 579-81, 94 S.Ct. 806, 812-13, 39 L.Ed.2d 9 (1974), superseded by statute on other grounds as noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). Indeed, this is true with the CNMI's wrongful death statute. As we noted in *Ito v. Macro Energy, Inc.* 4 N.M.I. 46, 62 (1993), the CNMI's wrongful death statute, 7 CMC § 2101, is based on Lord Campbell's Act.³ As such, it is important to consider our wrongful death statute in

³ The similarities are readily apparent. Lord Campbell's Act reads in relevant part:

[W]hensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover damages in respect thereof, then and in ever such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person

the historical context from which it arose, one that barred a family from recovering for the wrongful killing of one of its members. Only by reading our wrongful death statute against this historical background can we determine the contours of the remedy created by our legislature.

¶14 As Professor Dobbs explains, common law’s prohibition on recovery for wrongful death was based on three separate judge-made rules:

(1) If the tortfeasor died after committing a tort against his victim, the victim’s claim died as well. (2) If the tort *victim* died, his cause of action was at an end, “drowned,” in the larger matter of a crime against the Crown. (3) The victim’s survivors had no independent claim of their own against the tortfeasor for the loss of their support or for their grief and sorrow.

2 DOBBS, *supra*, § 8.3(1) (emphasis in original). Thus, no recovery is permitted for wrongful death absent a statute expressly overcoming one or more of these three common law rules. The first of these rules, cutting off liability upon the tortfeasor’s death, has clearly been abolished by our Legislature. 7 CMC § 2601 states, “[a] cause of action based on tort shall not be lost or abated because of the death of the tortfeasor or other person liable.” Rules (2) and (3), however, are not as clearly addressed.

¶15 Rules (2) and (3) of Dobbs’s list involve judge-made law that denied two distinct types of recovery. Rule (2) denies a cause of action to the deceased’s estate for *the deceased’s* injuries. Rule (3) states that no independent cause of action exists for the

injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony

II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person Deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit the Action shall be brought ...

Lord Campbell’s Act, 9 & 10 Vict., c. 93, *quoted in Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 579 n.6, 94 S.Ct. 806, 812, 39 L.Ed.2d 9 (1974).

deceased's family for *their own* injuries. This distinction, coupled with the often-ambiguous language of many wrongful death statutes, has caused courts to frame the discussion of wrongful death statutes in terms of survivorship statutes and pure wrongful death statutes. A survivorship statute operates to preserve the decedent's claim for damages; the claim "survives" the decedent and belongs to the estate. A pure wrongful death statute, by contrast, creates a new cause of action upon the death of the decedent which provides a remedy to the survivors for their own injuries. *See e.g. Smith v. Whitaker*, 734 A.2d 243, 249 (N.J. 1999) (discussing New Jersey's survivorship statute, the Court notes, "[u]nlike a wrongful death action, which is a derivative action arising in favor of beneficiaries named under that act, the Survivor's Act preserves to the decedent's estate any personal cause of action that the decedent would have had if he or she had survived.") (citations omitted); *Rowell v. Clifford*, 976 P.2d 363, 364 (Colo. App. 1998); RESTATEMENT (SECOND) OF TORTS § 925 cmt. b; 2 DOBBS, § 8.3(1).

¶16 Most states provide recovery for wrongful death through an adopted or adapted version of Lord Campbell's Act. The ambiguity of the Act's terms have caused state courts to differ in their interpretation of the Act, but they have primarily categorized their respective jurisdiction's statute into one of three categories; pure wrongful death, survivorship, or hybrid. *See* RESTATEMENT (SECOND) OF TORTS § 925 cmt. b; 2 DOBBS § 8.3(1). Drawing on the insights of those courts having previously considered the issues before us, we shall now address the remedy created by the CNMI's wrongful death statute.

3. *The CNMI's wrongful death statute compensates the decedent's family for their own losses.*

Indalecio's complaint requested damages for both decedent's pain and suffering and her own expenses related to decedent's death. Thus, Indalecio is requesting damages which require both survivorship and wrongful death statutory authority. She argues that both such provisions are found in 7 CMC § 2101, and she asks this court to read our wrongful death statute in this manner. We decline to do so. Rather, we find that our statutory scheme is tailored to permit recovery based solely on a pure wrongful death rationale and does not preserve the decedent's own claims beyond death.

Our wrongful death statutory scheme reads in part:

§ 2101. Liability in Action for Wrongful Death; Proceedings.

(a) When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, the person or corporation which would have been liable if death had not ensued, or the administrator or executor of the estate of that person, as the administrator or executor, is liable to an action for damages notwithstanding the death of the person injured, and although the death was caused under circumstances which make it in law murder in the first or second degree, or manslaughter.

(b) When the action is against the administrator or executor the damages recovered shall be a valid claim against the estate of the deceased person.

...

§ 2102. Action to be Brought in Name of Personal Representative; Beneficiaries of Action.

Every action for wrongful death must be brought in the name of the personal representative of the deceased, but shall be for the exclusive benefit of the surviving spouse, the children and other next of kin, if any, of the decedent as the court may direct.

It is immediately apparent that § 2101 was intended to prevent the decedent's death from precluding a cause of action against the tortfeasor. What is less clear is to whom that cause of action belongs and for what injuries. The language is ambiguous as to whether the decedent's cause of action is preserved, or if the statute creates a new cause of action – in favor of the decedent's family – upon the decedent's death.

¶18 We have addressed this issue before in *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46 (1993). However, in that case we were primarily concerned with whether our wrongful death statute permits loss of consortium damages. As such, our discussion did not fully address the basis upon which, and the class of plaintiffs for whom, other compensatory damages might lie. In *Ito*, we began by noting the basis of § 2101:

Our wrongful death statute stems from and is substantially the same as the Trust Territory wrongful death statute. The Trust Territory High Court determined that this statute was fashioned after England's "Lord Campbell's Act," meaning that "damages are limited to the pecuniary benefits which the beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated."

4 N.M.I. at 62. (quoting *Ychitaro v. Lotius*, 3 TTR 3, 17) (Trial Div. 1965) (citation omitted). Thus, since *Ito* this Court has recognized that the purpose of our wrongful death statute is to compensate the decedent's *family* for the decedent's death. Indeed, the majority of state courts faced with similarly worded statutes have held likewise. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 949 (5th ed. 1984) ("Under Lord Campbell's Act and the great majority of the death acts the action proceeds on the theory of compensating the individual beneficiaries for loss of the economic benefit which they might reasonably have expected to receive from the decedent ..."); *see generally* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1062-76 (1965) (traces evolution of wrongful death in American jurisprudence).

¶19 As the above quote from *Prosser & Keeton* implies, the method of calculating damages derives from the same basis as the justification for awarding those damages. In the case of pure wrongful death acts, damages are awarded to compensate the decedent's

family for losses they have *and will* incur due to their loved one's death. Thus, as we noted in *Ito*:

The Trust Territory High Court followed what the majority of states have adopted as the measure of damages applied in wrongful death actions: the "loss to dependents" measure. These damages "are measured by the support and amenities lost by the victim's dependents or beneficiaries ... [c]ontributions made by the deceased from earnings or even from pension income reflect the loss under this measure."

Id. at 63. (citation omitted).

¶20 Following from this "loss to dependents" measure, it becomes apparent that our wrongful death statute is a "pure" wrongful death statute. Since there is no recovery for the decedent's own injuries, any argument that our wrongful death statute contains a survivorship component must fail. Thus far, *Ito* clearly supports Dr. Yarofalir's interpretation of § 2101.

¶21 An ambiguity arises, however, as *Ito* continues. Although our opinion there clearly demonstrates this jurisdiction's long adherence to a pure wrongful death reading, when we approached the issue actually before us, our language appeared to equivocate. In *Ito* we were called upon to determine whether loss of consortium damages are allowed under our wrongful death statute. In answering that question in the negative, we stated:

The Commonwealth's wrongful death statute grants a cause of action vested in the decedent's personal representative. This cause of action creates a right to relief for damages caused to the "party [fatally] injured." The statute does not provide a right to relief for derivative injuries, such as loss of consortium, to the adult decedent's surviving spouse or children.

Loss of consortium is a claim for damages suffered by the non-injured spouse. Our wrongful death statute allows only for recovery to the "party injured," that is, the deceased – not his spouse or children.

Id. (brackets in original) (citation omitted). It is understandable that Indalecio would read this section of *Ito* as support for her claim to survivorship damages. That language,

however, was intended only to highlight the prerequisite to recovery under § 2101; that an individual wrongfully killed must have had an actionable claim prior to death before any wrongful death recovery in favor of the family is triggered. We find that the pecuniary damages previously alluded to in *Ito* are not precluded, or altered, by this language. In addition, we find that *Ito* was not intended to expand the scope of allowable damages to include recovery for injuries sustained by the decedent prior to death.

4. *The CNMI has no applicable survivorship statute.*

¶22

Although we conclude that 7 CMC § 2101 is a “pure” wrongful death statute – compensating the decedent’s family for their own injuries – a decedent’s estate would still be able to recover for the decedent’s injuries if the CNMI had a separate statute which permitted it. It is readily apparent, however, that no such statute exists. Section 2601 of Title 1 of the Commonwealth Code, entitled “Survival of Claims After Death of Tortfeasor or Other Person Liable,” demonstrates that the CNMI Legislature was well aware of common law’s bar to recovery upon the death of a tortfeasor. It also evidences their willingness to remedy this situation by enacting a statute to override that harsh rule. Yet there is no similar statute providing that claims sustained during a tort victim’s life survive his death. We must assume that the Legislature’s silence here was not an oversight, but a calculated decision. As such, we hold that the CNMI has no statute which preserves a tort victim’s claims after his death. Accordingly, Indalecio cannot recover for decedent’s injuries, regardless whether she is acting as decedent’s personal representative under our wrongful death statute or as administratrix of decedent’s estate pursuant to any probate proceeding.

B. So Long as the Complaint Sets Forth the Grounds for Recovery, No Mention of “Wrongful Death” is Required.

¶23 The trial court found that Indalecio’s two claims were based on medical malpractice, and then dismissed both. The trial court reasoned that since the tortious conduct at issue in a malpractice claim involves the wrong done to a patient, rather than any wrong done directly to a patient’s family, the claims must fail due to the CNMI’s lack of an applicable survivorship statute. Although the court was correct to dismiss Indalecio’s claim of damages for decedent’s injuries prior to death (regardless whether the court viewed the pleadings as based on malpractice or wrongful death), the court erred in similarly dismissing Indalecio’s claim of damages for her own injuries simply because she plead it in malpractice language. It is the substance of pleadings which control, not the terminology employed.

¶24 The trial court essentially finds that a wrongful death claim must specifically reference the CNMI wrongful death statute, regardless of whether the pleadings state sufficient facts to justify recovery under the statute. Dr. Yarofalir asks this court to hold similarly. He notes, “[p]laintiff might well recover medical expenses, burial expenses, and other pecuniary loss in a wrongful death action. The problem is, Indalecio has not brought a wrongful death action, but has elected to bring a medical malpractice action, and seek damages within that context.” Brief for Appellee at 14. Dr. Yarofalir supports these contentions by noting the title of Indalecio’s complaint was “Complaint for Medical Malpractice,” and nowhere does it mention “wrongful death.” He goes on to speculate that Indalecio brought a malpractice claim instead of a wrongful death claim “in the hope that Plaintiff would be successful in overcoming existing law and obtaining recovery for damages not allowed in a wrongful death action.” *Id.* Indalecio responds by pointing to

sections of her pleadings where she specifically claims damages for personal injuries beyond those her son incurred.

¶25 In *Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268, 276 (1995) we stated, “‘pleadings shall be so construed as to do substantial justice.’ Com. R. Civ. P. 8(a)(3), (f). However, where a plaintiff has not set forth a particular claim for relief under Com. R. Civ. P. 8(a), (e)(2) and (b)(10), the prima facie elements of a claim must each be either directly alleged or implied.” Thus, even if Indalecio’s complaint did not correctly specify “wrongful death” as a basis for recovery, so long as she “directly alleged or implied” each element of the prima facie case, her pleadings were sufficient for recovery on that basis.

¶26 Our wrongful death statute requires the following elements to state a prima facie case: 1) a wrongful or negligent act; 2) which would have given rise to a cause of action on behalf of the decedent had she lived; and which 3) led to the death of the decedent. Indalecio has met that burden. Her complaint clearly alleges that 1) Dr. Yarofalir was negligent in treating her son; 2) that negligence caused her son substantial pain so as to be actionable; and 3) that negligence caused her son’s death. Thus, Indalecio stated a cause of action for wrongful death and the trial court erred in dismissing it to the extent it requested damages for her own injuries.

C. Decedent Was a “Child” Under 7 CMC § 2103 (a) so as to Make Damages for Indalecio’s Mental Pain and Suffering Recoverable

1. Emotional damages not generally recoverable under CNMI’s wrongful death statute.

¶27 Before determining whether Christopher was a “child” – thereby allowing Indalecio to recover for her own mental pain and suffering – and in light of our previous

discussion of *Ito's* equivocal statements, we first reiterate the general rule that no emotional damages are available under our wrongful death statute. In *Ito* we were faced with the question of whether loss of consortium damages were permitted under our statute. Before answering that question in the negative, we noted that many jurisdictions faced with the issue had held otherwise.

Historically, wrongful death damages were limited to “pecuniary” losses. ... The purpose of the pecuniary loss rule was to prevent “extravagant” jury verdicts based on “sad emotions and injured feelings” instead of actual pecuniary loss.

Yet “[m]ost jurisdictions now recognize the ‘consortium’ recovery for lost companionship, society, love, advice and guidance, either because those elements are considered ‘pecuniary loss,’ or because the statute specifically permits their recovery, or because the court has judicially discarded the ‘pecuniary loss’ limitation.

Ito, 4 N.M.I. at 63 (citations omitted). Despite our sympathy to this modern trend, we refuse to act as a super-legislature. We are today, like we were in *Ito*, “constrained by the language of our statute.” *Id.*

¶28 Reading our wrongful death statutory scheme as a whole, it is obvious that our legislature created a right to recover only pecuniary losses. The damages section, 7 CMC § 2103, reads:

(a) Except as provided for in 7 CMC § 2202(a) [limiting the government’s liability], the court may award damages as it may think proportioned to the pecuniary injury resulting from death, to the persons for whose benefit the action was brought; provided, however, that where the decedent was a child, and where the plaintiff in the suit brought under this chapter is the parent of that child, or one who stands in the place of a parent pursuant to customary law, the damages shall include mental pain and suffering for the loss of the child, without regard to provable pecuniary damages.

If the specific use of the word “pecuniary” in the statute was not enough,⁴ the last section of the statute puts all questions to rest. By creating a single instance in which mental pain and suffering (a type of emotional harm) is allowed – when a parent loses a child, the legislature effectively precludes it in all other instances. As we noted to in *Ito*, although there might be valid policy reasons to extend wrongful death recovery to include emotional harm, we will not take it upon ourselves to do so. “[I]t is logical to assume that the passage of a wrongful death statute, creating a right of recovery unknown to the common law, was intended to preclude further judicial initiative.” *Ito*, 4 N.M.I. at 62. (quoting *Reed v. Pacific Intermountain Express Co.*, 597 F.Supp. 42, 45 (D. Conn. 1984)).

2. *Decedent is a “child” for purposes of 7 CMC § 2103 (a).*

¶29

Although emotional injuries are generally unrecoverable under our wrongful death statute, the legislature carved out one exception - when the deceased is the “child” of the plaintiff. The statute reads in relevant part, “where the decedent was a child, and where the plaintiff...is the parent...the damages shall include mental pain and suffering

⁴ Indalecio notes, however, that 7 CMC § 2103 (a) is susceptible to two different readings. Specifically, the wording (“provided, however...”) and the syntax (behind a semicolon) indicate that recovery for mental pain and suffering is an exception meant to modify the clause it follows. The beginning of the statute reads, “the court may award damages as it may think proportioned to the pecuniary injury resulting from the death, to the persons for whose benefit the action was brought; provided, however...” There are at least two plausible readings here. The first would allow a court to award only damages for “pecuniary injury.” This reading focuses on the type of damages allowable. Thus mental pain and suffering damages are not allowed *except* in the single instance of a parent losing a child. This is the reading we believe was intended by the legislature. Specifically, that the legislature meant for a new and different category of damages, mental pain and suffering – a type of emotional harm – to be available only in the single instance of a parent losing a child.

Indalecio urges us to adopt a different reading. She argues that this statute limits a court to awarding only those damages that are “proportioned” to the pecuniary loss. This reading focuses on the amount of damages that may be awarded as opposed to the type (e.g. only an amount “proportioned” to pecuniary losses). This would cause the second part of the statute – the part allowing recovery for mental pain and suffering – not to be bound by the same limitation, but to be determined “without regard to provable pecuniary damages.” This reading would preserve an award of damages for parents who normally would not be able to prove much, if any, “pecuniary” loss not because of the unique type of injury, but instead because children typically have no earning power.

for the loss of the child.” 7 CMC § 2103(a). It is undisputed that the decedent, Christopher, is Indalecio’s son. The issue here arises due to Christopher’s age. He was 18. Thus, the issue is whether 7 CMC § 2103(a) permits additional recovery to parents regardless of the age of their wrongfully killed offspring, or whether the decedent must be a minor to be considered a “child” under the statute.

¶30 Not surprisingly, Dr. Yarofalir asks the court to read the word “child” to include an age requirement. Indalecio, on the other hand, argues that since no age requirement is given, none was intended by the Legislature. She points out that CNMI family law defines “child” as “a son or daughter, whether by birth or adoption,” and “minor” as “an individual under the age of 18 years.” Indalecio also argues, and cites various authorities for the proposition, that due to the unusually grave injury suffered by a parent who loses a child, an increased damage award is an understandable legislative decision regardless of the child’s age.

¶31 We agree with Indalecio. Similar to our reasoning that the Legislature’s silence as to any survivorship statute or any emotional damages should be interpreted as a conscious decision on their part to exclude such provisions, we read the term “child” in 7 CMC § 2103(a) in accordance with its plain language meaning. The legislature was fully aware of the difference between a ‘child’ and a ‘minor,’ as evidenced by their defining the two separately in our adoption code, 8 CMC § 1401. We see no reason to conflate the two here.

V.

¶32 Since the CNMI has no survivorship statute to preserve a tort victim’s claim after death, we AFFIRM the trial court’s decision that Indalecio, as personal representative for

her son Christopher, may not recover damages for injuries suffered by decedent prior to his death. However, our wrongful death statute clearly provides recovery to the family of a wrongfully killed decedent, and since we find that Indalecio adequately plead such relief, we REVERSE the trial court's dismissal of Indalecio's claim of damages for her own injuries. Additionally, we find that 7 CMC § 2103(a) does not include an age requirement for parents to recover mental pain and suffering for the loss of a child. Thus, Indalecio may recover such damages if properly plead. For the foregoing reasons, we REMAND this case for further proceedings consistent with this decision.

SO ORDERED this 27th day of July, 2006.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN
Chief Justice

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO
Associate Justice

/s/ John A. Manglona
JOHN A. MANGLONA
Associate Justice