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Redefining Duty: the Future of New Mexico Negligence Law and Wrongful Conception after Provencio v. Wenrich

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REDEFINING DUTY: THE FUTURE OF NEW MEXICO NEGLIGENCE LAW AND WRONGFUL CONCEPTION AFTER *PROVENCIO V. WENRICH*

Michael L. Timm, Jr.*

I. INTRODUCTION

In *Provencio v. Wenrich*,[1] the New Mexico Supreme Court found that claims of medical negligence resulting in wrongful conception require a physician to breach two distinct duties[2]: failure to complete a sterilization procedure and failure to inform the patient of her continued fertility. The court relied on an approach to medical malpractice law unique to wrongful conception claims,[3] striking a balance between the interests of parents, who conceive of unwanted, but otherwise healthy, children,[4] and providers, who may already be insulated from suit.[5]

In *Provencio*, the supreme court clarified the independent duty to inform in claims of wrongful conception.[6] While reaffirming New Mexico's minority position in allowing child-related damages for wrongful

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1. 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089.

2. A duty is a "legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right." BLACK'S LAW DICTIONARY (9th ed. 2009); *see, e.g.*, Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181 (discussing negligence law in New Mexico); *see also* RESTATEMENT (THIRD) OF TORTS § 6 cmt. a (1999).

3. *See* Mark Strasser, *Misconceptions and Wrongful Births: a Call For a Principled Jurisprudence*, 31 ARIZ. ST. L. J. 161, 163-64 ("Wrongful pregnancy is distinguishable from wrongful conception, although as a general matter the latter may be viewed as a subset of the former. . . . For example, an action for wrongful pregnancy might result from a negligent sterilization or from an individual's negligent failure to protect the bodily integrity of an incompetent woman in that individual's care, resulting in her pregnancy. In the former, there might also be an action for wrongful conception, although in the latter there would not be, since, in the latter, the negligence would not have involved the mechanics of contraception." (footnotes omitted)).

4. Lovelace Medical Center v. Mendez, 1991-NMSC-002, 111 N.M. 336, 805 P.2d 603.

5. *See* New Mexico's Medical Malpractice Act, NMSA 1978, § 41-5-1 et seq.; *see also infra* Section V(A).

6. *Provencio*, 2011-NMSC-036, ¶ 1, 150 N.M. 457.

conception claims, the *Provencio* court restricted such claims by holding that a warning by a physician who realized his mistake effectively releases any future liability for subsequent pregnancy.[7] *Provencio* bolsters a medical provider's inherent credibility[8] by allowing the breach to be proven only after a two-step duty analysis. Thus, the duty of the doctor after the negligent operation is limited to informing the patient of her continued fertility.[9] Before *Provencio*, the jury would simply apportion comparative negligence between the plaintiff and the defendant. Now, evidence that the plaintiff was on notice as to her continued fertility precludes any damages caused by wrongful conception. While *Provencio* can perhaps be limited to its facts, the court's analysis suggests a willingness to rely on the Restatement (Third) of Torts in all medical malpractice actions. This note argues that the shift in *Provencio* towards judicial considerations of policy over findings of fact by the jury is contrary to traditional New Mexico medical negligence jurisprudence.

II. STATEMENT OF THE CASE

In order to prove medical negligence, a plaintiff must show that a physician owed that plaintiff a duty, and by breaching that duty, the physician both actually and proximately caused actual harm to that plaintiff.[10] Wrongful conception is a subset of medical negligence.[11] Damages for

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7. *Id.*

8. *See* Mireles v. Broderick, 1994-NMSC-041, ¶ 5, 117 N.M. 445, 872 P.2d 863 ("[W]ithout expert witness testimony demonstrating departure from medical standards there can be no issue of fact as to the negligence or proximate cause unless the case is one where exceptional circumstances within common experience or knowledge of the layman are present[.]"(citation omitted)); *see also* UJI 13-1101 NMRA (Providing that "[t]he only way in which you may decide whether the [doctor] in this case possessed and applied the knowledge and used the skill and care which the law required of [him/her] is from evidence presented in this trial by [doctors] testifying as expert witnesses.").

9. *See* Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181 ("[N]egligence is generally a question of fact for the jury. A finding of negligence, however, is dependent upon the existence of a duty on the part of a defendant. Whether a duty exists is a question of law for the courts to decide." (citations omitted)).

10. *See* UJI 13-1101 NMRA (Medical Negligence) *et seq*.

11. *Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336 ("[W]e view plaintiffs' claims as an ordinary claim for negligence or medical malpractice, and the damages at issue here as damages that plaintiffs are entitled to claim under ordinary principles of tort law as applied in this state.")

wrongful conception include the costs of raising a child born as a result of a failed sterilization procedure to the age of majority.[12]

Provencio resolved disagreements over the specific duty a physician owes when she agrees to perform an elective sterilization procedure and negligently fails to complete the procedure.[13] After concluding that the duties involved are *both* non-negligent care and effective notification to the still-fertile patient, the court summarily dismissed the plaintiffs' wrongful conception claim.[14] This decision prevents future juries from deciding whether a doctor ought to be held responsible for at least *some* of the plaintiff's damages in a wrongful conception suit where a warning, however inadequate, is given. *Provencio's* limited duty rule is a policy decision that departs from the traditional analytical framework of New Mexico malpractice law.[15]

A. Facts

On October 21, 2002, Cynthia Provencio consented to have a tubal ligation[16] performed by Dr. Steven Wenrich after the delivery of her fourth child.[17] Mrs. Provencio consented to the ligation because she did not wish to have additional children.[18] On December 12, 2002, Dr. Wenrich delivered Cynthia Provencio's fourth child via caesarean section and attempted a tubal ligation procedure on Mrs. Provencio's viable fallopian

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12. *See generally id*. Awarding costs for raising a child is the minority approach and had only been examined once before *Provencio*, by the New Mexico Supreme Court in *Mendez*, 1991-NMSC-002, 111 N.M. 336.

13. 2011-NMSC-036, ¶ 1, 150 N.M. 457.

14. *See id*. ¶ 29 ("It was the doctor in Mendez, not the patient, who controlled the relevant medical information. By conforming his conduct to the relevant standard of care and fulfilling his duty to inform, the doctor in Mendez could have empowered the parents to take whatever measures they deemed appropriate to avoid pregnancy. It was the doctor's failure to do so that placed the parents in a position they could not be reasonably expected to control. Following this reasoning, we think the Mendez court intended to define the duty, though somewhat obscured, to include an obligation of notice.")

15. *See infra* note 86 (NMSA 1978 § 41-5-2).

16. A common elective sterilization procedure wherein a physician cuts (ligates) a patient's fallopian tube, ideally preventing future risks of pregnancy. Sterilization by laproscopy is a common technique, wherein a patient is administered anesthetic intravenously, followed by: 1) an incision is made in or near the navel; 2) carbon dioxide gas is introduced to inflate the stomach slightly; 3) a laproscope is introduced; 4) a smaller device is introduced to move and hold the tubes; 5) the tubes are closed through ligation; 6) and the incisions are closed. Patient Education Pamphlet, *Sterilization by Laproscopy* (American College of Obstetricians and Gynecologists, 2003).

17. Defendant-Petitioner's Brief in Chief at 1, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089 (No. 32,344).

18. *Provencio*, 2011-NMSC-036, ¶ 2, 150 N.M. 457.

tube.[19] Dr. Wenrich sent a portion of what he believed to be the successfully ligated fallopian tube out for pathological analysis.[20] Dr. Wenrich was informed that the tissue belonged to Mrs. Provencio's broad ligament; her fallopian tube remained intact.[21]

At Mrs. Provencio's first follow-up appointment on December 18, 2002,[22] Dr. Wenrich told her "not to trust"[23] the tubal ligation because he had failed to "get it."[24] Mrs. Provencio was provided with orders for a radiological study to confirm her continued fertility.[25] Although Mrs. Provencio never returned to Dr. Wenrich's care, she underwent the scan in November 2003, eleven months after the failed ligation procedure.[26] The test confirmed Mrs. Provencio's continued fertility.[27] To prevent another pregnancy, Mrs. Provencio and her husband, Perfecto, used condoms as their sole contraceptive measure.[28] Approximately five months after the test, Mrs. Provencio conceived her fifth child, who was ultimately born normal and healthy on January 12, 2005.[29]

B. Procedural History

On December 12, 2005, the Provencios filed suit against Dr. Wenrich for wrongful conception and battery, seeking damages related to raising their fifth child to the age of majority.[30] They did not seek damages associated with harm resulting from the failed sterilization procedure.[31] At the close of the Provencios' case in chief, Dr. Wenrich asked the dis-

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19. *Id.*

20. *Id.*

21. Plaintiffs-Respondents' Answer Brief at 3, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089 (No. 32,344), 2010 WL 8848663, at *4.

22. *Id.*

23. *Id.*

24. *Provencio*, 2011-NMSC-036, ¶ 3, 150 N.M. 457.

25. Mrs. Provencio was given a hysterosalpingogram, which is an x-ray scan of the uterus and fallopian tubes used to determine fertility. Healthwise, *Hysterosalpingogram*, WEB MD INFERTILITY AND REPRODUCTION HELP CENTER (June 29, 2010), http://www.webmd.com/infertility-and-reproduction/guide/hysterosalpingogram-21590. *See* Defendant-Petitioner's Brief in Chief at 2, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089 (No. 32,344).

26. *Provencio*, 2011-NMSC-036, ¶ 4, 150 N.M. 457.

27. *Id.*

28. Plaintiffs-Respondents' Answer Brief at 4–5, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089 (No. 32,344), 2010 WL 8848663, at *4–5.

29. Defendant-Petitioner's Brief in Chief at 2, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089 (No. 32,344).

30. *Provencio*, 2011-NMSC-036, ¶ 5, 150 N.M. 457.

31. *Id.*

trict court for judgment as a matter of law under Rule 1-050(A) NMRA.[32] The district court granted Dr. Wenrich's motion on the grounds that "the physician's failure to timely inform the patient of the failed sterilization is an essential element' in wrongful conception."[33] The district court asked the Provencios if they wished to reduce their claim for damages and proceed on an action relating to the negligent sterilization procedure alone.[34] They refused, and judgment was entered for Dr. Wenrich.[35]

The New Mexico Court of Appeals reversed the district court.[36] Chief Judge Fry wrote that New Mexico treats wrongful conception claims as ordinary medical negligence with an additional damages category.[37] The appellate court held that the Provencios had the burden of proving that: (1) the defendant owed them a duty recognized by law; (2) Dr. Wenrich failed to conform to the recognized standard of medical practice in the community; and (3) that the actions complained of were the proximate cause of their injury.[38]

The supreme court agreed with the court of appeals as to the Provencios' burden, but held that the duty owed by Dr. Wenrich was twofold, encompassing both "a duty of reasonable medical care"[39] *and* an "obligation to inform a patient that a sterilization procedure was unsuccessful, regardless of the cause, when the doctor reasonably knows or should know the results of [the] failed procedure."[40] The court found that "[t]he nature of Mrs. Provencio's admission [that she knew she was still fertile] is such that neither she nor her husband could have suffered the informational injury that lies at the heart of a claim for wrongful conception."[41] This holding established the breach of the duty to inform the patient is a necessary element of wrongful conception claims.

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32. *Id.* ¶ 6.
33. *Id.* (internal quotation marks omitted).
34. *Id.* ¶ 7.
35. *Id.*
36. *Id.* ¶ 8.
37. *Provencio*, 2010-NMCA-047, ¶ 9, 148 N.M. 799 ("To the extent that New Mexico recognizes a 'wrongful conception' action, that term relates only to the special type of damages that may be available when the alleged malpractice involves a sterilization procedure.").
38. *Id.* ¶ 10 (citations omitted).
39. *Provencio*, 2011-NMSC-036, ¶ 16, 150 N.M. 457.
40. *Id.* ¶ 27.
41. *Id.* ¶ 35.

III. BACKGROUND: *LOVELACE MEDICAL CENTER V. MENDEZ*

In *Provencio*, the supreme court revisited its decision in *Lovelace Medical Center v. Mendez*, where it held that "the parents of a normal, healthy baby conceived as a result of a negligently performed, unsuccessful sterilization operation [may] recover the costs of raising the child from birth to adulthood[.]"[42] The facts and holdings of *Mendez* are helpful to understanding *Provencio*.[43]

In *Mendez*, the Plaintiffs wanted to limit the size of their family because they could not afford an additional child.[44] Maria Mendez underwent a tubal ligation procedure in which the treating physician failed to successfully ligate both of her fallopian tubes.[45] The physician "failed to inform [Mrs. Mendez] that only one of her tubes had been found and ligated, that despite surgery she was still able to conceive a child, and that she should therefore continue to use birth control measures."[46] Due to this failure, Maria and Jacob Mendez took *no* contraceptive measures and conceived another child within months of the surgery.[47] The New Mexico Court of Appeals recognized the claim for wrongful conception. Writing for the appellate court, Judge Alarid defined the legal issue presented by the case as "whether plaintiffs in [a] medical malpractice action are entitled to seek, as part of their compensatory damages, an amount representing the present value of the reasonable out-of-pocket expenses they will incur in raising [the resulting child] to the age of majority."[48] In its opinion, the supreme court relied on and attached the opinion of Judge Alarid.[49]

The supreme court held that the costs of raising the child to the age of majority could be sought because of the two separate harms suffered by the plaintiffs: an infringement of their interest in limiting the size of their family; and an infringement of their interest in financial security.[50] The court found that both harms resulted from "Lovelace's negligent per-

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42. *Mendez*, 1991-NMSC-002, ¶ 1, 111 N.M. 336.

43. *See Provencio*, 2011-NMSC-036, ¶ 11, 150 N.M. 457.

44. *See Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336. The reader will note that citations to portions of the supreme court's opinion are not identified by paragraph and that the author refers to Judge Alarid's court of appeals opinions, which is attached as an appendix to the supreme court's opinion.

45. *Id.*

46. *Id.*

47. *See id.*

48. *Id.*

49. *See Mendez*, 1991-NMSC-002, ¶ 3, 111 N.M. 336.

50. *See id.* ¶¶ 22-29, 111 N.M. 336.

formance of the sterilization operation and subsequent failure to inform Mrs. Mendez that she was still fertile."[51] In other words, the negligence included both the failed ligation and failure to inform Mrs. Mendez of her continued fertility, while the injury included the lost chance of the family to limit its size and to maintain its future financial security.[52]

Although *Mendez* seems to establish that recovery in wrongful conception cases requires both an act of medical negligence and a subsequent failure to inform, the supreme court recognized in *Provencio* that *Mendez* did "not clearly resolve the question of duty."[53] For example, it quotes from *Mendez* that the tortious conduct involved in wrongful conception claims relates to "the doctor's negligence in performing the sterilization operation and failing to inform the mother of the unsuccessful outcome."[54] The court also refers to other parts of the *Mendez* opinion where it "appear[s] to characterize the tortious conduct as the negligently performed surgical procedure alone[,] without including the effect of a failure to warn."[55] These contrary assertions triggered the opposing views of the parties in *Provencio*, with the Provencios arguing that the supreme court's two-prong view of the duty in *Mendez* was merely dicta[56] and with Dr. Wenrich maintaining that application of any lesser standard would amount to strict liability for any damages incurred after the botched sterilization procedure.[57]

The court of appeals accepted the Provencios' view of *Mendez*, holding that "Plaintiffs do not . . . have to prove that Defendant failed to disclose that the sterilization procedure was unsuccessful" although "the effect of the doctor's disclosure should be considered by the jury in its assessment of causation and, if there is causation, the apportionment of

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51. *Id.* ¶ 29, 111 N.M. 336.

52. *Id.* ¶ 33.

53. *Provencio*, 2011-NMSC-036, ¶ 17, 150 N.M. 457.

54. *Id.* (citing *Mendez*, 1991-NMSC-002, ¶ 3, 111 N.M. 336) (internal quotation marks omitted).

55. *Id.* (citing *Mendez*, 1991-NMSC-002, ¶ 29, 111 N.M. 336).

56. Plaintiffs-Respondents' Answer Brief at 11, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.3d 1089 (No. 32,344), 2010 WL 8848663, *10 ("Nothing in either opinion, save the thread of dicta from which all of Defendant's arguments hang, can be read to create a singular exception in wrongful conception cases which absolves a physician from all medical negligence unless he has also breached a duty to inform.").

57. Defendant-Petitioner's Brief in Chief at 26, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, P.3d 1089 (No. 32,344) ("Applying Respondents' theory, if Respondents established that Petitioner botched the procedure, the fact that the Petitioner used all reasonable care in providing notice that the procedure was not successful would subject Petitioner to strict liability for any damages Respondents incurred after Petitioner performed the sterilization procedures.").

the parties' relative fault."[58] This holding embraced New Mexico's comparative negligence system, in which "a plaintiff is entitled to recover damages diminished in proportion to the fault attributable to him."[59] The supreme court granted certiorari in *Provencio* to clarify the scope of the duty incurred by a physician who agrees to perform an elective sterilization procedure.[60]

IV. RATIONALE

In *Provencio* the New Mexico Supreme Court found that the tort of wrongful conception requires both the underlying tort of a negligently-performed tubal ligation procedure *and* a subsequent failure to inform the patient of her continued fertility.[61] In deciding the case, the court rejected the court of appeals' view that a plaintiff may recover the costs of raising a child to the age of majority "*regardless* of whether [a] doctor informs the patient about the failed procedure."[62] Under the court of appeals' proposed formulation, the jury would weigh the effect of the notice (or lack thereof) when assessing causation and damages at the trial.[63] In contrast, Dr. Wenrich argued that the issue was more properly couched in duty,[64] a purely legal question.[65]

The supreme court agreed with the court of appeals that wrongful conception is not a distinct tort but one that properly sounds in the law of medical negligence.[66] The court analogized wrongful conception to wrongful birth and distinguished it from wrongful life.[67] Wrongful birth is pled when parents are denied the opportunity to make an informed decision whether to terminate a pregnancy and the child is born with birth defects; the supreme court characterized it as an injury to the parents directly, "including the costs associated with the pregnancy and the costs of raising an unexpected child."[68]

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58. *Provencio*, 2010-NMCA-047, ¶¶ 10–11, 148 N.M. 799.
59. *Id.* (internal citations omitted).
60. *Provencio*, 2011-NMSC-036, ¶ 18, 150 N.M. 457 ("We recognize that any ambiguity in *Mendez* is due to its concern with damages—whether New Mexico would recognize the recovery of child-raising costs as a matter of policy—rather than a careful analysis of every aspect of the doctor's duty." (citations omitted)).
61. *See id.*
62. *Id.* ¶ 13, 150 N.M. 457.
63. *Id.*
64. *Id.* ¶ 14, 150 N.M. 457.
65. *Id.* ¶ 16, 150 N.M. 457.
66. *Id.* ¶ 15, 150 N.M. 457.
67. *See id.* ¶¶ 19–22, 150 N.M. 457.
68. *Id.* ¶ 22, 150 N.M. 457.

Wrongful life, on the other hand, is pled by the child born with birth defects and is an "injury to the child itself."[69] Because the Provencios' child was born healthy, the court found that the harm they sustained was solely due to the wrongful birth of their child.[70]

After conceptualizing the Provencios' injury, the supreme court declined to rely on out-of-state cases to define Dr. Wenrich's duty to the Provencios; instead, the court relied on New Mexico uniform jury instructions and "general principles," including the nature of the doctor's tortious conduct.[71] The court broke up a doctor's duty in a medical negligence action into two responsibilities: (1) "to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors in the same field of medicine practicing under similar circumstances[;]" and, (2) "to provide the patient with certain information."[72] The court then acknowledged "that a doctor who breaches this duty is liable for the harm that results to the patient if a reasonably prudent person would have acted upon the information to avoid the harm."[73] The court reasoned that because the instructions "are relevant only in failure-to-inform cases . . . the duty owed by a doctor in a wrongful conception case includes the duty to inform following an unsuccessful sterilization procedure."[74]

The conclusion that a claim for wrongful conception requires a failure to inform is likely related to the fact that "courts should take great care in shifting the full weight of child-rearing expenses onto someone other than the parents."[75] The supreme court relied on the facts involved in *Mendez* for this conclusion: "[i]t was the doctor in *Mendez*, not the patient, who controlled the relevant medical information" and "[i]t was the doctor's failure . . . that placed the parents in a position they could not be reasonably expected to control."[76] The court distinguished *Mendez*

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69. *Id.* ¶ 19, 150 N.M. 457.

70. *Id.* ¶ 33, 150 N.M. 457.

71. *Id.* ¶ 23, 150 N.M. 457 ("Rather than relying on out-of-state cases, which we do not find helpful in an area of law where our precedent has already chosen a different course, the question of duty is best answered by resorting to general principles, including the nature of the doctor's tortious conduct, and our medical negligence jury instructions.").

72. *Id.* ¶ 25, 150 N.M. 457 (citations omitted).

73. *Id.*

74. *Id.* ¶ 26, 150 N.M. 457 (citing *Mendez*, 1991-NMSC-002, ¶ 46, 111 N.M. 336 (Ransom J., specially concurring)).

75. *Id.* ¶ 28, 150 N.M. 457 ("As a matter of sound policy, we think that the extraordinary damages of raising a child to the age of majority should be reserved for extraordinary cases like *Mendez*.").

76. *Id.* ¶ 29, 150 N.M. 457.

from Mrs. Provencio's knowledge that she remained fertile[77] on the ground that she and Perfecto "possessed information that they could have used to avoid conception, assuming this was their goal."[78]

The supreme court stated that it relied on policy rather than legal doctrine: "[a]s a matter of sound *policy*, we believe that shifting the costs of raising Plaintiffs' fifth child onto Dr. Wenrich is not commensurate with the duty that he breached nor with the harm that such a breach could have caused."[79] To support this rationale, the court offered a hypothetical: "[i]f we were to allow *Mendez*-type recovery when parents *are* aware of their continued fertility, then a jury could award child-raising costs not only for the resulting child, but for all children born thereafter."[80] According to the court, "[t]his result would be absurd and unjust" and would "invite unnecessary confusion, since the jury's attention would not be directed towards a doctor's post-surgical conduct and whether these actions deprived the parents of the opportunity to make an informed choice about pursuing additional children."[81] Finally, the court maintained that such a result would "encourage doctors to act responsibly and notify their patients about surgical results[,]" rather than keeping such information hidden from a patient on the grounds that such "notice would not terminate liability in a future lawsuit for medical negligence based on the failed surgery."[82]

The court concluded

> that damages relating solely to a negligently performed sterilization are those that would normally flow from a failed surgery, such as the cost of a second sterilization procedure, any physical or emotional harm that may result from the initial or subsequent sterilization, lost wages, the reasonable costs of birth control until a second procedure is feasible, and so forth.[83]

However, it also recognized that "the timeliness and adequacy of a doctor's warning are questions of fact that go to the element of breach" and that "[a]ny successful warning must include information that is objectively understandable, delivered in a manner that is reasonably likely to

77. *Id.* ¶ 30, 150 N.M. 457 ("[I]f the doctor had provided notice to Mr. and Mrs. Mendez, we believe the Court would not have authorized the recovery of future, child-rearing costs.").
78. *Id.*
79. *Id.* (emphasis added).
80. *Id.* ¶ 31, 150 N.M. 457.
81. *Id.* ¶ 32, 150 N.M. 457.
82. *Id.*
83. *Id.* ¶ 33, 150 N.M. 457.

convey the desired information to the patient in a meaningful way."[84] Although Dr. Wenrich did not breach his duty to inform the Provencios,[85] the statement suggests that a doctor *could* breach this duty to inform by failing to adequately inform a patient of continued fertility. Nevertheless, under *Provencio's* dual-duty analysis, it seems unlikely that a plaintiff who has received any warning at all will successfully convince a trial court judge that such a breach has occurred and caused her damages.[86]

V. ANALYSIS

Provencio unreasonably ignores the legal interests of the average patient, which are central to New Mexico malpractice law.[87] This is because the court treats knowledge of continued fertility as a per se bar to damages for wrongful conception:[88] "Despite our misgivings about the adequacy of Defendant's post-surgical communications to Mrs. Provencio," the court noted, "the fact remains that Plaintiff understood she was still fertile."[89] The question is how and why the court limited the Provencios' recovery, and whether this restriction is in harmony with general princi-

84. *Id.* ¶ 34, 150 N.M. 457.

85. *Id.* ¶ 35, 150 N.M. 457 ("Despite our misgivings about the adequacy of Defendant's post-surgical communications to Mrs. Provencio, the fact remains that Plaintiff understood she was still fertile" and "[t]he nature of Mrs. Provencio's admission is such that neither she nor her husband could have suffered the informational injury that lies at the heart of a claim for wrongful conception.").

86. *Id.* ¶ 34, 150 N.M. 457 ("Because the timeliness and adequacy of a doctor's warning are questions of fact that go to the element of breach, we see no reason to discuss in any detail the components of a successful warning following a failed sterilization procedure[;]" rather, "[e]ach case will contain its own unique set of circumstances, and our case law commits this important issue to the jury.").

87. *See* Maestas v. Zager, 2007-NMSC-003, ¶ 19, 141 N.M. 154, 152 P.3d 141 ("The victim of medical malpractice is in a vulnerable position and should not be punished for his or her lack of medical expertise;" therefore, "[t]he disparity between doctors and patients places a duty on the law 'to protect the patient from injury caused by a negligent act of a physician.'"); *see also* NMSA 1978, § 41-5-2 ("The purpose of the Medical Malpractice Act is to promote the health and welfare of the *people* of New Mexico by making available professional liability insurance for health care providers in New Mexico." (emphasis added)).

88. *Provencio*, 2011-NMSC-036, ¶ 33, 150 N.M. 457 (Whereas the plaintiffs sought damages for raising their child to the age of majority, under the Court's holding they were restricted to recovering "damages relating solely to a negligently performed sterilization . . . such as the cost of a second sterilization procedure, any physical or emotional harm that may result from the initial or subsequent sterilization, lost wages, the reasonable cost of birth control until a second procedure is feasible, and so forth.").

89. *Id.* ¶ 35, 150 N.M. 457.

ples of medical malpractice law in New Mexico.[90] Other areas of medical malpractice law apply common law tort doctrines such as comparative fault and successive tortfeasor liability.[91] These doctrines allow a jury to determine proportionate fault,[92] rather than relying on any strict limitations based on knowledge or fault.[93]

The supreme court's decision in *Provencio* conflicts with principles of comparative fault and the responsibilities of the finder of fact at the heart of New Mexico's medical negligence jurisprudence. The policy considerations the *Provencio* court relied on to reach its decision do not account for existing statutes and the *Mendez* rule, which both act to limit wrongful conception damages. Finally, the court's holding undercuts the jury's traditional role in answering questions like the reasonableness of notice and the plaintiff's mitigation of damages. *Provencio* hampers a plaintiff's ability to recover for wrongful conception and contradicts the New Mexico preference for jury deliberation.

A. Policy Basis for Limiting Recovery Through a Dual Duty

The policy considerations that the *Provencio* court relied on conflict[94] with those recognized in *Mendez*.[95] While the *Mendez* court recognized that recovery of monetary damages in wrongful conception actions indemnify plaintiffs against the financial losses incurred as a result of a Defendant's negligence and deterring future similar conduct,[96] the policy

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90. *See* NMSA 1978, § 41-5-6 (setting out the limitations of pecuniary recovery in malpractice actions).

91. *See* Payne v. Hall, 2006-NMSC-029, ¶ 50, 139 N.M. 659, 137 P. 3d 599 (indicating that claims falling in the category of successive tortfeasor negligence and concurrent comparative fault should be separated so as to allow the jury to more properly determine whether two casually-distinct injuries have been proven).

92. *See* Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 27, 134 N.M. 43, 73 P.3d 181 (an overly-broad use of the doctrine of independent intervening cause, based upon the disproportionate fault of a third party, 'is inconsistent with New Mexico's system of pure comparative fault'" (citing Torres v. El Paso Elec. Co., 1999-NMSC-029, ¶ 15, 127 N.M. 729, 987 P.2d 386)); *see also* Wilschinsky v. Medina, 1989-NMSC-047, ¶ 18, 108 N.M. 511, 775 P.2d 713 ("The timing and adequacy of any warnings, if given, are fact questions for the jury to decide in order to determine the proportionate fault, if any, of the physician.").

93. *See Provencio*, 2011-NMSC-036, ¶ 35, 150 N.M. 457.

94. *Id.* ¶ 28, 150 N.M. 457.

95. *Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336.

96. *Id.* ("[D]amages in tort actions are designed to put plaintiffs as nearly as possible in the position they would have been absent defendant's negligence, and to indemnify plaintiffs against financial expenses or losses that are the result of a defendant's negligence. 4 RESTATEMENT (SECOND) OF TORTS § 901. To a lesser extent, money damages are also designed to deter negligence, by insuring that a negli-

consideration cited by the court in *Provencio* focuses upon the severe detriment to a medical provider by having to assume the costs of raising a child to the age of majority.[97] This inconsistency makes both decisions' omission of any discussion of the New Mexico Medical Malpractice Act even more glaring.[98]

The New Mexico Medical Malpractice Act prohibits juries from considering monetary damages for future medical expenses.[99] Future medical expenses are instead taken care of on an as-needed basis after a judgment of liability has been entered against a physician.[100] The jury determines whether the patient has proven the need for additional care.[101] The Act limits the total recovery medical negligence claims.[102] The Act limits the aggregate dollar amount recoverable in a medical malpractice action to $600,000.00 per occurrence, not including "the value of accrued medical care and related benefits" or punitive damages.[103] The provider's out-of-pocket expenditure is thereafter capped at $200,000.00, with remaining payments (not including punitive damages, for which the provider is personally liable[104]) allocated from New Mexico's patient's compensation fund.[105] If the patient makes a sufficient showing at trial, the physician or health care provider pays for the medical or surgical care required by the patient for as long as is reasonably necessary,[106] subject to the requirement that the patient submit for physical examination by a physician of the heath care provider's choice.[107] There is no suggestion in

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gent act has consequences for the actor. Recovery of the expenses of raising a child serves both these purposes.").

97. *Provencio*, 2011-NMSC-036, ¶ 28, 150 N.M. 457 ("Because child-rearing costs will normally far exceed other damages associated with a failed sterilization procedure, such as the costs of a second procedure and pain and suffering, courts should take great care when shifting the full weight of child-rearing expenses onto someone other than the parents. As a matter of sound policy, we think that the extraordinary damages of raising a child to the age of majority should be reserved for extraordinary cases like *Mendez*.").

98. *See Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336 (setting forth detailed instructions about the kind of damages that may be sought for wrongful conception and the type of evidence relevant to each damages category but failing to address the source of the damages to be paid).

99. NMSA 1978, § 41-5-6(C); NMSA 1978, § 41-5-7.

100. NMSA 1978, §§ 41-5-7(B)-(D).

101. NMSA 1978, § 41-5-7 (A).

102. *See* NMSA 1978, § 41-5-1 *et seq*.

103. NMSA 1978, § 41-5-6(A)-(B).

104. NMSA 1978, § 41-5-7(H).

105. NMSA 1978, § 41-5-7(E).

106. NMSA 1978, § 41-5-6(B).

107. NMSA 1978, § 41-5-10.

either *Mendez* or *Provencio* that these same requirements do not apply to plaintiffs in wrongful conception actions.[108] Thus, a jury's award of damages relating to the future costs of raising a child to the age of majority is analogous to a future medical expense determination in the context of general medical negligence governed by the New Mexico Medical Malpractice Act.

After *Provencio*, a jury is required to consider only whether the medical provider breached his duty of care and failed to inform the patient of her continued fertility in order to find him liable.[109] This leaves out a determination of whether the patient requires future care, as damages are essentially determined with liability.[110] The court acts consistently with the Medical Malpractice Act, but in so doing facially undermines its claimed policy rationale by preventing juries from considering the actual extent to which a physician ought to "apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified" health-care provider in the context of a wrongful conception action.[111] The jury is provided with no ability to sever the impending child-rearing expenses from the legal harms of the lost chance for family planning and financial security.[112] Given the provider-friendly statutory limitations involved, there is a substantial disconnect between the court's asserted policy rationale and the actual pecuniary detriment to a health-care provider, whose burden cannot exceed $200,000.00.[113]

B. Informational Injury and Reasonable Mitigation

The dual-duty requirement creates confusion as to the damages available for wrongful conception when notice has been given, and fails

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108. Because wrongful conception claims are not distinct from ordinary malpractice. *Provencio*, 2011-NMSC-036, ¶ 15, 150 N.M. 457 ("[W]rongful conception is not a distinct tort. It is well-established among courts and scholars that wrongful conception sounds in the law of medical negligence."); *Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336 ("We recognize that courts and commentators have found these labels [referring to wrongful birth, conception, life] useful. However, we view plaintiffs' claims as an ordinary claim for negligence or medical malpractice.").

109. *Provencio*, 2011-NMSC-036, ¶ 34, 150 N.M. 457.

110. *See id.* ¶ 29, 150 N.M. 457.

111. UJI 13-1101 NMRA.

112. *See* Lori McCamey Bencoe, *Lovelace Medical Center v. Mendez: A New Approach to Damages Awards in New Mexico*, 23 N.M. L. REV. 458–59 (Spring, 1993).

113. NMSA 1978, § 41-5-6(D). Perhaps the court's policy rationale can more properly be explained as deferring to a general approach that medical malpractice actions should be limited given the overall effect that claims could have on the patient's compensation fund. *See* NMSA 1978, § 41-5-25 (2012) (creating a compensation fund for medical malpractice claims).

to acknowledge that mitigation must be reasonable. The *Mendez* plaintiffs suffered two injuries: one to their interest in economic stability and the other to their interest in controlling the size of their family.[114] In contrast, the court in *Provencio* focused on the information used to make decisions impacting legally protected interests.[115] If notice alone is sufficient to cut off liability, then the duty to avoid pregnancy falls entirely upon the plaintiff, without regard to the reasonableness of the plaintiff's efforts to mitigate the damages caused by her doctor's negligence. The court does not specify the doctor's responsibility to prevent pregnancy in the gap between sterilization procedures beyond providing "reasonable costs of birth control until a second procedure is feasible."[116]

As with any claim for damages resulting from the tortious conduct, a plaintiff in a wrongful conception cause of action would be expected to mitigate her injury by taking those reasonable steps that would minimize her damages.[117] Substantial authority requires an injured person to submit to surgery or medical treatment to minimize tort damages;[118] however, the supreme court in *Mendez* expressly held that mitigation in wrongful conception claims does not require that the patient seek an abortion or carry the child to term and put it up for adoption.[119] Mitigation is limited to abstaining from intercourse or using contraceptive measures. The Provencios chose to rely on condoms.[120] Mitigation must be reasonable,[121] and reasonableness is generally a jury question.[122] Patients making the decision to undergo a voluntary sterilization procedure submit to medical expertise for the very purpose of preventing the uncertainties and lost intimacy introduced by traditional family-planning methods.[123] With *Provencio*, the extent to which a patient must subsequently protect her

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114. *See* Bencoe, *supra* note 112, 458–59.

115. *Provencio*, 2011-NMSC-036, ¶ 28, 150 N.M. 457.

116. *Id.* ¶ 33, 150 N.M. 457.

117. Mitigation, UJI 13-1811 NMRA. *See also Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336 ("The law in this state is that a person injured by the tort of another is required to use ordinary care to minimize or lessen the injuries sustained." (citing Rutledge v. Johnson, 1970-NMSC-023, 81 N.M. 217, 465 P.2d 274)).

118. W. E. Shipley, Annotation, Duty of Injured Person to Submit to Surgery to Minimize Tort Damages, 62 A.L.R. 3D 9, 70 (1975).

119. *Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336.

120. Plaintiffs-Respondents' Answer Brief at 4–5, Provencio v. Wenrich, 2011-NMSC-036, 150 N.M. 457, 261 P.2d 1089 (No. 32,344), 2010 WL 8848663, at *4–5.

121. *Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336 ("[A]ll that is required is that the injured party undertake ordinary or reasonable measures to mitigate damages." (citations omitted)).

122. UJI 13-1811 NMRA.

123. *See* Lisa M. Kerr, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 607

own interest is disproportionate to the burden on providers, because the consequences of physician's negligence fall solely upon the patient once notice that she remains fertile is given.[124]

Under *Mendez*, a trial court ought not allow instruction relating to the emotional and psychological costs and benefits associated with raising a child to the age of majority (where wrongful conception is properly proven) because "[t]he intangible benefits or burdens a child provides are too speculative and would encourage the parties and the jury to engage in distasteful moral determinations."[125] The *Provencio* court similarly limited recoverable damages to "those that would normally flow from a failed surgery, such as the cost of a second sterilization procedure, any physical or emotional harm that may result from the initial or subsequent sterilization, lost wages, the reasonable costs of birth control until a second procedure is feasible, and so forth."[126] The "so forth" would include loss of consortium on the part of a patient's spouse and other dependents for the period of continued fertility for the former and the recovery from a second sterilization procedure on the part of the latter.[127] While the *Mendez* court refused to engage in "distasteful moral determinations,"[128] the *Provencio* court did not hesitate to shift the burden of proving damages caused by a negligently-performed tubal ligation to a patient whose only fault lies in choosing the wrong healthcare provider for her sterilization procedure.[129]

(1999) (recognizing that voluntary sterilization procedures have "infertility as their purpose").

124. *Provencio*, 2011-NMSC-036, ¶ 29, 150 N.M. 457 ("By conforming his conduct to the relevant standard of care and fulfilling his duty to inform, the doctor in *Mendez* could have empowered the parents to take whatever measures they deemed appropriate to avoid pregnancy. It was the doctor's failure to do so that placed the parents in a position they could not be reasonably expected to control. Following this reasoning, we think the *Mendez* court intended to define the duty, though somewhat obscured, to include an obligation of notice. Conversely, if the doctor had provided notice to Mr. and Mrs. Mendez, we believe the Court would not have authorized the recovery of future, child-rearing costs.").

125. *Mendez*, 1991-NMSC-002, ¶ 3, 111 N.M. 336.

126. *Provencio*, 2011-NMSC-036, ¶ 33, 150 N.M. 457.

127. UJI 13-1810A NMRA (Defining loss of consortium as "[t]he emotional distress of [the plaintiff] due to the loss [of the society, guidance, companionship, and sexual relations] resulting from the injury to [the patient].").

128. *Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336.

129. Even though "[i]t was the doctor's failure to [inform] that placed the parents in a position they could not be reasonably expected to control." *Provencio*, 2011-NMSC-036, ¶ 29, 150 N.M. 457.

VI. IMPLICATIONS FOR NEW MEXICO NEGLIGENCE LAW

The supreme court's dual-duty analysis in wrongful conception narrows the question of actual breach.[130] It therefore limits the discrete damages available in cases not mirroring the facts of *Mendez*[131] and avoids the deference generally given to the jury in apportioning fault as it relates to the actual legal injury sustained.[132] The court is correct to note the policy concerns raised by claims for wrongful conception,[133] but there is an appropriate middle ground between allowing full cost-shifting for the remainder of the patient's natural fertility and barring recovery where the parents are aware of their continued fertility.[134] "It is well-established among courts and scholars that wrongful conception sounds in the law of medical negligence;"[135] the following sections discuss the shadow *Provencio* may cast on other areas of medical negligence liability.

A. Departure From New Mexico's Traditional Approach to Duty

Duty rests on jurisprudential principles that are withheld from the jury and decided by the court acting in its purely legal capacity.[136] Keeping duty determinations away from juries is based on the notion that duty in the context of tort litigation ought to be sparingly revisited and cautiously expanded.[137] New Mexico has traditionally relied on a foreseeability analysis in determining the scope of a defendant's duty,[138] as generally

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130. *Id.* ¶ 35, 150 N.M. 457.

131. *See id.* ¶¶ 31-32, 150 N.M. 457.

132. *See* Payne v. Hall, 2006-NMSC-029, ¶ 19, 139 N.M. 659, 137 P.3d 599.

133. *Provencio*, 2011-NMSC-036, ¶ 28, 150 N.M. 457 ("[C]ourts should take great care when shifting the full weight of child-rearing expenses onto someone other than the parents.").

134. *See id.* ¶ 32, 150 N.M. 457.

135. *Id.* ¶ 15, 150 N.M. 457.

136. *See* Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 14, 148 N.M. 646, 241 P.3d 1086 ("The question of the existence and scope of a defendant's duty of care is a legal question that depends on the nature of the . . . activity in question, the parties' general relationship to the activity, and public policy considerations." (citation omitted)).

137. *See id.* ¶ 16-21, 148 N.M. 646 (Stating the proposition that "[a]s a general rule, an individual has no duty to protect another from harm" and inferring that Courts ought to "tak[e] 'into account factors that might escape the jury's attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors.'" (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. I (2012)).

138. Rodriguez v. Del Sol Shopping Center Associates, 2013-NMCA-020, ¶ 8, 297 P.3d 334 ("New Mexico courts have applied foreseeability in the following ways: (1) as the primary consideration in a legal duty analysis; (2) as a necessary element alongside policy considerations." (citations omitted)).

laid out in the Restatement (Second) of Torts.[139] The New Mexico Supreme Court's early precedent makes clear that the Restatement (Second) of Torts has long been recognized as an "authority entitled to great weight."[140] Because the *Provencio* court's rationale was driven by policy considerations,[141] their ultimate decision may provide an early example of how negligence cases in New Mexico will be handled in the future—under the Third Restatement.[142]

The American Law Institute recognized this trend in the Restatement (Third) of Torts by providing two distinct mechanisms by which a court may analyze duty under traditional negligence principles.[143] The first, under Section 3, comports with traditional negligence standard by examining the foreseeability that a particular harm would arise from the

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139. *See* RESTATEMENT (SECOND) OF TORTS § 284 (2012) ("Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.").

140. *See generally* Cotter v. Novak, 57 N.M. 639, 641, 261 P.2d 827, 828 (1953); Proctor v. Waxler, 84 N.M. 361, 364, 503 P.2d 644, 647 (1972); Gabaldon v. Erisa Mortg. Co., 1999-NMSC-039, ¶ 27, 128 N.M. 84, 990 P.2d 197; Fikes v. Furst, 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545 (citing *Gabaldon*).

141. *Provencio*, 2011-NMSC-036, ¶ 28, 150 N.M. 457.

142. *See* Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 20 n.2, 134 N.M. 43, 73 P.3d 181 ("We note that some legal scholars continue the longstanding debate over the role of foreseeability in a duty analysis. *Compare* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, § 6 cmt. f (Tentative Draft No. 2, 2002) ('Modern scholars tend to classify the issue of the foreseeable plaintiff under the general heading of proximate cause, as does this Restatement in Chapter 6.'), with John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 727 (2001) ('Sometimes foreseeability is treated as an issue of law, sometimes as an issue of fact. . . . Foreseeability is in the language of duty, the language of breach, and the language of proximate cause. . . . [F]oreseeability plays a special role in the context of questions about obligation, but it is not the only question relating to duty in that sense.')"). In New Mexico, the Court of Appeals appears to be conforming to the supreme court's lead. *See* Rodriguez v. Del Sol Shopping Center Associates, 2013-NMCA-020, ¶ 1, 297 P.3d 334 (Affirming the District Court's grant of Summary Judgment "not based on the foreseeability-driven duty analysis employed by the district courts, but based on the policy-driven duty analysis advanced by the Restatement (Third) of Torts and Plaintiffs, and recently embraced by our New Mexico Supreme Court in Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 15, 148 N.M. 646, 241 P.3d 1086.").

143. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2012); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2012).

defendant's conduct.[144] The second, under Section 7, allows courts, in exceptional instances, to determine the scope of a defendant's duty in classes of cases where it finds that the standard of care involved should have been less than the ordinary duty of reasonable care or that under the circumstances no duty was involved.[145]

Two recent New Mexico cases indicate *Provencio*'s reliance on the Restatement (Third) of Torts will have far-reaching effects: *Edward C. v. City of Albuquerque*,[146] and *Rodriguez v. Del Sol Shopping Center Associates*.[147] *Edward C.* involved a claim by the parents of a child struck by a baseball during pre-game batting practice in a commercial baseball stadium.[148] *Rodriguez* involved a "combination of driver and vehicle failure" that caused the death of at least three people when a vehicle "hurtled through one of [the Defendant's] business front glass walls."[149] In both cases the reviewing court held that the defendants owed the plaintiffs no duty of care. *Rodriguez* relied upon the legal duty test from *Edward C*.[150] This view, though simple to apply in the average case, appears to minimize the doctrines of assumption of risk and comparative fault.[151] Rather

144. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2012) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. *Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm*." (emphasis added)).

145. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(B). DUTY (2012) ("In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.").

146. 2010-NMSC-043, ¶ 15, 148 N.M. 646, 241 P.3d 1086.

147. 2013-NMCA-020, ¶ 1, 297 P.3d 334.

148. Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 1, 148 N.M. 646.

149. Rodriguez v. Del Sol Shopping Center Associates, 2013-NMCA-020, ¶ 1, 297 P.3d 334.

150. *Id.* ¶ 10, 297 P.3d 334 ("Fortunately, for the sake of clarity in the law and ease of analysis, the legal duty test in New Mexico appears to have achieved homeostasis, as recently written by our New Mexico Supreme Court in *Edward C.*, 2010-NMSC-043. In reversing the Court of Appeals' judgment—'that ordinary care was the applicable standard [of duty] because [the plaintiff] and his injury were foreseeable'—our Supreme Court unanimously, and for the first time, adopted an approach more consistent with the Restatement (Third) of Torts than with *Palsgraf*, and that 'disapprov[es] the use of foreseeability to limit liability.'" (alterations original)).

151. Even though the Court in *Edward C.* specifically sought to avoid such a result. 2010-NMSC-043, ¶ 12, 148 N.M. 646 ("[W]e look for instances where courts have imposed a duty other than the duty to exercise ordinary care that are supported by

than a factual causation question for the jury, the duty analysis is a question of law. In the future, New Mexico appellate courts may continue restricting duty despite principles of fairness.[152] *Provencio* is a further step in that trend.

Despite this shift in analysis, the court's citation of the Restatement (Third) is questionable as it was applied in *Provencio*. The *Provencio* court relied on the duty laid out in Section 7, or that applied to an "exceptional cas[e]," where the "ordinary duty"—the duty to exercise ordinary care—is inappropriate for policy reasons.[153] The supreme court responded to the exceptional damages being sought by the Provencios by creating a two-step duty analysis;[154] however, the specific duty the court defined actually encompasses two actions that would both fall under the ordinary duty in the Restatement (Third)—professional negligence and a subsequent failure to inform.[155] These provisions are similar to their precursors in the Restatement (Second),[156] indicating that there is room for a

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sound policy consistent with New Mexico's pure comparative fault system and a general interest in promoting safety, welfare, and fairness.").

152. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 38 (2012) (Affirmative Duty Based On Statutory Provisions Imposing Obligations To Protect Another: "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty."); *see also* NMSA 1978, § 41-5-2 (2012) ("The purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.").

153. *Compare* Provencio, 2011-NMSC-036, ¶ 23, 150 N.M. 457, *with* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).

154. Both negligent conduct and failure to inform. *See Provencio*, 2011-NMSC-036, ¶ 1, 150 N.M. 457.

155. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 4 (Tentative Draft No. 1, 2012) ("A professional is subject to liability in tort for economic loss caused by the negligent performance of an undertaking to serve a client."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 6 (Tentative Draft No. 1, 2012) ("(1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, performs a service for the benefit of others, is subject to liability for pecuniary loss caused to them by their reliance upon the service, if he fails to exercise reasonable care in performing it. (2) The liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit the actor performs the service; and (b) through reliance upon it in a transaction that the actor intends to influence. (3) A plaintiff's recovery under this Section is subject to the same rules of comparative responsibility that apply to other claims of negligence. (4) This Section does not recognize liability for negligence in the course of negotiating or performing a contract between the parties.").

156. *See* RESTATEMENT (SECOND) OF TORTS § 323 (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recog-

traditional assessment of duty as to *both* duties set out in *Provencio*. Given the holdings in *Edward C.* and *Del Sol*, however, New Mexico courts appear to favor the exceptional duty analysis set out in Section 7 of the Restatement (Third).[157] Relying on Section 7 rather than other provisions to limit the scope of a defendant's liability[158] may lead to further derogation of duty,[159] especially for fault and jury-determinations of causation.[160] These changes are contrary to New Mexico's historical deferment to jury determinations of fault and causation.

B. Incomplete Treatment of New Mexico's Uniform Jury Instructions

The supreme court relied substantially on New Mexico's Uniform Jury Instructions in developing wrongful conception jurisprudence: for

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nize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."); *see also* RESTATEMENT (SECOND) OF TORTS § 311 (1965) (Negligent Misrepresentation Involving Risk Of Physical Harm: "(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken. (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated.").

157. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010) (Duty).

158. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (2010) (Limitations on Liability for Tortious Conduct); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 34 (2010) (Intervening Acts And Superseding Causes: "When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

159. *See* RESTATEMENT (SECOND) OF TORTS § 457 (1965) (Additional Harm Resulting From Efforts To Mitigate Harm Caused By Negligence: "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.").

160. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 27 (2010) (Multiple Sufficient Causes); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26 (2000) (Apportionment of Liability When Damages Can Be Divided by Causation); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 35 (2010) (Enhanced Harm Due To Efforts To Render Medical Or Other Aid: "An actor whose tortious conduct is a factual cause of harm to another is subject to liability for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other's injury, so long as the enhanced harm arises from a risk that inheres in the effort to render aid.").

the availability of damages in *Mendez*[161] and for dual nature of the duty in *Provencio*.[162] Among the instructions, the court cited to the "duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [doctors] practicing under similar circumstances, giving due consideration to the locality involved;"[163] the duty to inform a patient about that which a prudent patient under similar circumstances would need to know about her condition, alternative treatment options and the likely result if the condition remains untreated;[164] and that a successful plaintiff is entitled to recover "[t]he reasonable value of necessary nonmedical expenses which have been required as a result of the injury and the present cash value of such nonmedical expenses reasonably certain to be required in the future."[165] On the basis of those instructions the court in *Provencio* affirmed its decision to require a separate duty to inform the patient of her continued fertility because "[t]hese jury instructions relied upon in Mendez are relevant only in failure-to-inform cases."[166]

The court's reliance on its instructions is warranted,[167] yet it ignores other instructions that seem relevant in the context of wrongful conception. Among those withheld are instructions for the duty of a specialist, given the particularized nature of the fields of obstetrics-gynecology and surgery[168] and the duty to inform a patient for the need of another doctor.[169] "[T]he duty stated in [that] instruction [(to inform a patient of their need for a subsequent doctor)] is one application of the doctor's duty of communication to the patient about all aspects of the patient's medical condition and treatment."[170] Similarly, pertaining to abandonment: "[a] doctor's duty to a patient who is in need of care continues until the doctor has withdrawn from the case . . . [mediated only by the fact that] [a] doctor can withdraw by giving the patient reasonable notice under the cir-

161. *See Mendez*, 1991-NMSC-002 app. at 12–19, 111 N.M. 336.

162. *See Provencio*, 2011-NMSC-036, ¶ 25, 150 N.M. 457.

163. UJI 13-1101 NMRA.

164. UJI 13-1104B NMRA; UJI 13-1104C NMRA.

165. UJI 13-1805 NMRA.

166. *See Provencio*, 2011-NMSC-036, ¶ 26, 150 N.M. 457.

167. State v. Laney, 2003-NMCA-144, ¶ 38, 134 N.M. 648, 81 P.3d 591 ("A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law." (citing State v. Duncan, 1990-NMCA-063, 113 N.M. 637, 830 P.2d 554)).

168. UJI 13-1102 NMRA.

169. UJI 13-1103 NMRA ("If a treating doctor knows, or should know, that a doctor with other qualifications is needed for the patient to receive proper treatment, it is the duty of the treating doctor to tell the patient.").

170. UJI 13-1103 NMRA (committee commentary).

cumstances."[171] Finally, New Mexico's mitigation doctrine requires that "[e]very patient has a duty to exercise ordinary care for the patient's own health and safety" and that "[a] patient who fails to do so is negligent."[172]

These instructions involve the general consequences upon the failure of either doctor or patient to act reasonably given the circumstances of an individual case.[173] The court's failure to discuss these instructions in *Provencio* demonstrates the intent of the court: comparative fault does not apply where a patient has been made aware of her continued fertility.[174] This omission may also signal a purposeful departure from reliance on the finder of fact in subcategories of malpractice, like wrongful conception, where the appropriate concept of duty is uncertain.[175]

VII. CONCLUSION

The supreme court of New Mexico made a decision on the basis of public policy by failing to recognize the kind of claim, and on the specific facts, pled in *Provencio*. That decision also bars future plaintiffs from asserting wrongful conception claims that, factually, might bear more merit in the eyes of a jury and, ultimately, the Justices themselves. The court could have allowed for mediation of the Plaintiff's ultimate damages in accordance with the causal finding of the court of appeals below.[176] Without drawing a bright-line rule the court could have allowed the question of causation to remain with the jury[177] when disclosure of a patient's continued fertility only meets some egregious low.[178] As it stands, most district courts will likely shy away from allowing such cases past the

171. Termination of Physician-Patient Relation; Abandonment, UJI 13-1115 NMRA.

172. *See* UJI 13-1110 NMRA (the Use Note states: "[t]his instruction should be given if there is an issue as to the patient's comparative fault, e.g., by failing to follow the doctor's instructions, as a cause of the claimed injury. UJI 13-1601 and 13-1603 (negligence and ordinary care) should be given with this instruction."); *see also* UJI 13-1811 NMRA (Mitigation).

173. *See* UJI 13-1102 NMRA; UJI 13-1103 NMRA; UJI 13-1103 NMRA; UJI 13-1115 NMRA; UJI 13-1110 NMRA; and, UJI 13-1811 NMRA.

174. *See Provencio*, 2011-NMSC-036, ¶ 35, 150 N.M. 457.

175. Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 9, 134 N.M. 43, 73 P.3d 181 ("We have expressed that there is nothing sacred about duty, which is nothing more than a word, and a very indefinite one, with which we state our conclusion." (internal quotation marks and citations omitted)).

176. Provencio, 2010-NMCA-047, ¶ 10, 150 N.M. 457.

177. *See id.* ¶ 35, 150 N.M. 457.

178. *See id.* ¶ 34, 150 N.M. 457.

summary judgment stage.[179] Because trial by jury is preferred to summary judgment or directed verdicts in New Mexico courts, the supreme court ought to have incorporated apportionment as seen in the lost-chance doctrine[180] and embraced encompassing factors like mitigation and duty.[181] Instead, the court created a defense for a health provider who provided minimal notice to his patient without requiring further steps to mitigate these harms, however reasonable.[182] In the meantime plaintiffs presenting claims similar to the Provencios' must endure the court's limitation of liability for negligent sterilization procedures,[183] and doctors ought to make an extra effort to notify—and provide follow-up services for—their patients with unfortunate surgical results.[184]

179. Based on the author's experience as an extern in both New Mexico Federal and State District (trial) Courts it is clear that New Mexico precedent and procedure is not as favorable towards summary judgment as is Federal. However, where faced with a matter of clearly established law and undisputed facts even state trial courts will issue summary judgment as a matter of law. Self v. UPS, 1998-NMSC-046, ¶ 8, 126 N.M. 396, 970 P.2d 582 (citing Roth v. Thompson, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241); Rule 1-056 NMRA.

180. *See Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279 (seminal case recognizing the lost-chance doctrine in New Mexico medical malpractice).

181. *See* UJI 13-1102 NMRA; UJI 13-1103 NMRA; UJI 13-1103 NMRA; UJI 13-1115 NMRA; UJI 13-1110 NMRA; and, UJI 13-1811 NMRA.

182. *See Provencio*, 2011-NMSC-036, ¶ 35, 150 N.M. 457.

183. *See id.* ¶ 34, 150 N.M. 457.

184. *See id.* ¶ 32, 150 N.M. 457.