

# NEW MEXICO INJURY ATTORNEY BLOG

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## Comparative Negligence Decided by Jury in New Mexico Personal Injury Cases

Proof of causation is essential for liability in a personal injury claim. The Tenth Circuit Court of Appeals recently set forth the "but for" analysis undertaken in New Mexico personal injury cases in *Wilcox v. Homestake Mining*. The Court made it clear that a plaintiff must show that "but for" the negligence of the defendant, the plaintiff would not have suffered injuries. In *Wilcox*, a toxic tort case, the Court found that the plaintiffs had failed to make this showing. The ruling suggested rather harsh treatment of plaintiffs in New Mexico personal injury cases when it comes to causation since the plaintiffs were unable to show that their illnesses, including cancer in some of the plaintiffs, would not have occurred but for the toxic exposure.

The ruling in *Wilcox* is interesting when viewed in light of a recent New Mexico Court of Appeals case, *Provencio v. Wenrich*. *Provencio* involved a failed and admitted negligently performed sterilization procedure. The plaintiff sued the doctor for medical malpractice for the wrongful birth of a child. Notably, New Mexico law allows a parent to recover in damages the costs of raising a child following a negligent and failed sterilization procedure. Perhaps, the most remarkable aspect of the case is that the doctor informed the plaintiff that the sterilization procedure had failed and the plaintiff chose not to have the procedure corrected. Instead, the plaintiff chose to use condoms for birth control purposes and became pregnant as a result.

The defendant moved for judgment as a matter of law at the close of plaintiff's case at trial for failure of plaintiff to prove that defendant failed to warn the plaintiff of the failed procedure. The district court granted the defense motion dismissing the case. The New Mexico court of appeals reversed stating that proof of failure to warn by the doctor was not an essential element of the plaintiff's claim.

Essentially, the defendant argued that plaintiff's knowledge of the failed procedure and her failure to take appropriate remedial action constituted an independent intervening cause of the wrongful birth. The court followed the 1999 New Mexico Supreme Court case of *Torres v. El Paso Electric* in holding that independent intervening causation is no longer followed in New Mexico. Instead, the law in New Mexico is based upon comparative fault and comparative fault is always left to the jury.

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Thus, the case will be sent back to the district court for retrial. The jury will be left to decide the issue of comparative fault and may very well decide in favor of defendant. However, the court rightfully turned this decision back over to the jury. The ruling is seemingly difficult to reconcile with the *Wilcox* case. In *Wilcox*, the court ruled that the plaintiffs had failed to adequately illustrate the causal connection between the toxic exposure and the resulting illnesses. In *Provencio*, there was no lack of evidence.

In fact, even following *Wilcox* with a "but for" analysis in *Provencio* would lead back to the jury. It is left to the jury to weigh the "but for" of the doctor's negligence against the "but for" of the plaintiff's comparative negligence. The main difference in the two cases is that the Tenth Circuit in *Wilcox* took the issue from the jury while the New Mexico Court of Appeals in *Provencio* left the determination where it rightfully belongs.

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