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## Personal Injury Law - Comparative Negligence and the Obvious Danger Rule: *Klopp v. Wackenhut Corp.*

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# PERSONAL INJURY LAW—Comparative Negligence and the Obvious Danger Rule: *Klopp v. Wackenhut Corp.*

## I. INTRODUCTION

Generally, “there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent that he may reasonably be expected to discover them.”<sup>1</sup> In *Klopp v. Wackenhut Corp.*,<sup>2</sup> however, the New Mexico Supreme Court indicated that the general rule, known as the obvious danger doctrine, is not so clear-cut anymore.

In *Klopp*, the court held that an occupier of a place of public accommodation owes a duty to safeguard all business visitors whom the occupier may reasonably foresee being injured by danger that is avoidable when the occupier uses reasonable precautions.<sup>3</sup> The court injected into its reasoning the abrogation, by comparative negligence, of the obvious danger doctrine.<sup>4</sup>

## II. STATEMENT OF THE CASE

On February 27, 1988, Nancy Klopp was at Albuquerque International Airport on her way to catch her departing TWA flight.<sup>5</sup> She passed through the metal detector, owned by the airline and operated by Wackenhut, setting off the alarm.<sup>6</sup> Klopp removed some jewelry and placed it in a tray on an adjacent table. She went through the metal detector again.<sup>7</sup> The alarm did not sound the second time, so Klopp’s attention turned to her jewelry.<sup>8</sup> She moved to her left, toward the jewelry.<sup>9</sup> Klopp tripped over the stanchion base of the metal detector, which protruded about eighteen inches, suffering injuries to her left leg and right knee.<sup>10</sup> On August 22, 1988, Klopp filed a personal injury suit against the Wackenhut Corp. and against Trans World Airlines, Inc. in Bernalillo County District Court.<sup>11</sup>

After Klopp presented her case, the trial court granted TWA and Wackenhut a directed verdict.<sup>12</sup> Klopp took the case to the court of

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1. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 427 (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER & KEETON].

2. 113 N.M. 153, 824 P.2d 293 (1992).

3. *Id.* at 157, 824 P.2d at 297.

4. *Id.*

5. *Id.* at 155, 824 P.2d at 295.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Brief in Chief for Petitioner at 1, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

12. *Klopp*, 113 N.M. at 154, 824 P.2d at 294.

appeals, which affirmed, deferring to the New Mexico Supreme Court, which granted certiorari.<sup>13</sup> Because Wackenhut lacked authority to rearrange the equipment, the supreme court affirmed the directed verdict in its favor.<sup>14</sup> The court, however, reversed the directed verdict in favor of TWA and remanded the case for a jury trial.<sup>15</sup>

### III. HISTORICAL BACKGROUND

It is important to know the law of occupiers of land, contributory negligence, and comparative negligence to understand *Klopp's* effect on the obvious danger rule. Discussion of those areas follows.

A nineteenth century English case established the rule that the occupier of premises has a duty to protect those who enter those premises to do business with the occupier, upon the occupier's express or implied invitation, against dangers that the occupier knows or might discover with reasonable care.<sup>16</sup> Such a business visitor is called an invitee.<sup>17</sup> A customer in a store is a typical example.<sup>18</sup> Nancy Klopp was an invitee at the airport.<sup>19</sup>

Invitees who encountered obvious dangers, though, were outside the protection of occupiers—the obvious danger doctrine required the invitee to protect himself against obvious dangers.<sup>20</sup> Courts typically required the occupier to exercise reasonable care, and interpreted that to mean a warning of danger.<sup>21</sup>

Before 1981, New Mexico recognized the defense of contributory negligence in personal injury cases.<sup>22</sup> One treatise's definition of contributory negligence is:

conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection . . . . [A]lthough the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action.<sup>23</sup>

Contributory negligence is a harsh doctrine for plaintiffs.<sup>24</sup> The doctrine bars a plaintiff from any recovery if he acts even slightly outside the community standard of conduct, though the defendant's negligence may

13. *Id.* at 155, 824 P.2d at 295.

14. *Id.* at 161, 824 P.2d at 301.

15. *Id.* at 162, 824 P.2d at 302.

16. *Indermaur v. Dames*, 1 L.R.-C.P. 274 (1866).

17. PROSSER & KEETON, *supra* note 1, at 419.

18. *Id.*

19. *Klopp*, 113 N.M. at 155, 824 P.2d at 295.

20. PROSSER & KEETON, *supra* note 1, at 427.

21. *Id.*

22. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

23. PROSSER & KEETON, *supra* note 1, at 451-52.

24. *Id.* at 468.

be extreme.<sup>25</sup> To correct the problem, courts turned to allocation of damages under the doctrine of comparative negligence.<sup>26</sup>

In the 1981 case of *Scott v. Rizzo*,<sup>27</sup> New Mexico joined the many jurisdictions, both within the United States and without,<sup>28</sup> that had replaced contributory negligence with comparative negligence. In *Scott*, the New Mexico Supreme Court adopted a "pure" comparative negligence standard.<sup>29</sup> "Pure" comparative negligence apportions fault between or among negligent parties and total damages in proportion to the fault of each party.<sup>30</sup>

Nancy Klopp argued that the obvious danger doctrine was a contributory negligence bar to her cause of action.<sup>31</sup> As such, the obvious danger doctrine was thereby incompatible with comparative negligence, according to Klopp.<sup>32</sup>

#### IV. DISCUSSION OF THE COURT'S RATIONALE

Shortly after affirming the trial court's decision in *Klopp*,<sup>33</sup> the New Mexico Court of Appeals addressed the issue of the foreseeable behavior of invitees in *Davis v. Gabriel*.<sup>34</sup> According to the supreme court in *Klopp*, the court of appeals in *Davis* correctly applied section 384 of the Restatement (Second) of Torts.<sup>35</sup> The *Davis* court held that one who creates a danger on behalf of a land occupier enjoys the same freedom from liability as the land occupier.<sup>36</sup>

With regard to the duty a land occupier has to protect invitees, however, the court of appeals sent mixed signals:

[D]espite the obviousness of the danger, a jury could find that a possessor [or occupier] of land breached a duty to invitees if (1) the possessor could have reasonably foreseen that invitees exercising due

25. *Id.* at 468-69.

26. *Id.* at 470-71.

27. 96 N.M. 682, 634 P.2d 1234 (1981).

28. PROSSER & KEETON, *supra* note 1, at 470.

29. *Scott*, 96 N.M. at 690, 634 P.2d at 1242. The other forms of comparative negligence are "modified" and "slight-gross." In a modified comparative negligence system, a plaintiff is not barred from recovery so long as his contributory negligence is below a specified percentage of the total fault. In a slight-gross system, the plaintiff's contributory negligence is a bar to recovery unless it is slight and the defendant's negligence, by comparison, is gross. PROSSER & KEETON, *supra* note 1, at 473-74.

30. *Scott*, 96 N.M. at 688, 634 P.2d at 1240.

31. *Klopp*, 113 N.M. at 156, 824 P.2d at 296.

32. *Id.*

33. *Id.* at 157, 824 P.2d at 297.

34. 111 N.M. 289, 804 P.2d 1108 (Ct. App. 1990).

35. *Klopp*, 113 N.M. at 157, 824 P.2d at 297. The Restatement provides that:

[o]ne who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

RESTATEMENT (SECOND) OF TORTS § 384 (1964).

36. *Davis*, 111 N.M. at 291, 804 P.2d at 1110, cited with approval in *Klopp*, 113 N.M. at 157, 824 P.2d at 297.

care would be injured by the condition of the land and (2) that risk made it unreasonable for the possessor not to take certain precautions. Whether a particular precaution would be required depends on such factors as the expense of the precaution, the probability of harm, and the probable extent of harm.<sup>37</sup>

TWA contended in *Klopp* that the above passage meant that it had no duty to design the metal detector "for klutzes and total idiots."<sup>38</sup> TWA pointed out that more than a million people had passed through the metal detector, yet Klopp's accident was the only one of its kind on record.<sup>39</sup>

The supreme court in *Klopp* disagreed with TWA's argument and sought to clarify the matter, holding that "in a place of public accommodation, an occupier of the premises owes a duty to safeguard each business visitor whom the occupier reasonably may foresee could be injured by a danger avoidable through reasonable precautions available to the occupier of the premises."<sup>40</sup>

It seems the court hinged its decision on foreseeability.<sup>41</sup> It pointed out an important difference between the foreseeable behavior of reasonably careful visitors, and the foreseeable behavior of business visitors.<sup>42</sup> "Simply by making hazards obvious to reasonably prudent persons," the court reasoned, "the occupier of premises cannot avoid liability to a business visitor for injuries caused by dangers that otherwise may be made safe through reasonable means. A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care."<sup>43</sup> The court cited a products liability case, *Fabian v. E.W. Bliss Co.*,<sup>44</sup> that applied New Mexico law and came up with such a conclusion fourteen years before the *Klopp* decision.<sup>45</sup>

When the supreme court reversed the directed verdict in favor of TWA,<sup>46</sup> it explained that "some degree of negligence on the part of all persons is foreseeable, just like the inquisitive propensities of children, and thus, should be taken into account by the occupant in the exercise of ordinary care."<sup>47</sup> Cases holding that liability can be avoided by an adequate warning, such as *Skyhook Corp. v. Jasper*,<sup>48</sup> were categorically overruled.<sup>49</sup>

37. *Davis*, at 292, 804 P.2d at 1111.

38. Oral argument of Respondent TWA, quoted in *Klopp*, 113 N.M. at 157, 824 P.2d at 297.

39. Brief for Respondent TWA at 3, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19-318).

40. *Klopp*, 113 N.M. at 157, 824 P.2d at 297.

41. *Id.*

42. *Id.*

43. *Id.*

44. 582 F.2d 1257 (10th Cir. 1978).

45. *Id.* at 1263. In *Fabian*, a worker was injured when the punch press he was operating double-punched. The jury found for the plaintiff. The court of appeals affirmed, stating that even though the danger was open and obvious, the liability of the manufacturer was not absolved. *Id.* at 1259, 1263.

46. *Klopp*, 113 N.M. at 162, 824 P.2d at 302.

47. *Id.* at 157, 824 P.2d at 297.

48. 90 N.M. 143, 560 P.2d 934 (1977).

49. *Klopp*, 113 N.M. at 157, 824 P.2d at 297.

Although it abrogated the obvious danger rule in *Klopp*,<sup>50</sup> the New Mexico Supreme Court may have already had the ammunition it needed to enforce something beyond a duty to warn.<sup>51</sup> According to section 343A of the Restatement (Second) of Torts, which the New Mexico Supreme Court adopted in the 1972 slip-and-fall case of *Proctor v. Waxler*,<sup>52</sup> the occupier may be required to provide something more than a warning, even when the danger is obvious.<sup>53</sup> A situation where there is reason to expect that the invitee might be distracted, as Nancy Klopp was,<sup>54</sup> may warrant additional precautions.<sup>55</sup> Without abrogating the rule, a North Carolina court held that the anticipation of an invitee being distracted from an obvious danger by a merchandise display warranted something more than a warning.<sup>56</sup> Likewise, several courts have held that a shopper with an arm full of bundles may be anticipated to overlook an obvious danger in a store.<sup>57</sup>

TWA, in fact, admitted that the obvious danger doctrine would not necessarily bar Klopp from recovery.<sup>58</sup> "The rule merely defines the duty owed by premises owners and operators," the airline stated.<sup>59</sup>

Still, the court threw Klopp's distraction into the comparative negligence mix,<sup>60</sup> a mix that Klopp argued was discordant with the obvious danger rule.<sup>61</sup> The court solved the problem by citing cases from Idaho,<sup>62</sup> Michigan,<sup>63</sup> Missouri,<sup>64</sup> Oregon,<sup>65</sup> Texas,<sup>66</sup> Utah,<sup>67</sup> and Wyoming,<sup>68</sup> all of which abolished the obvious danger doctrine in light of comparative negligence.<sup>69</sup> Among the factors to go into the mix are whether the danger could be avoided if the invitee were warned, the severity of the possible injury, the possibility of distracting the invitee, and the obscurity of the danger.<sup>70</sup>

50. *Id.* at 155, 160, 824 P.2d at 295, 300.

51. PROSSER & KEETON, *supra* note 1, at 427; *cf.* *Fabian v. E.W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978) (obviousness of danger in products liability case does not relieve defendant of liability).

52. 84 N.M. 361, 503 P.2d 644 (1972).

53. See RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1964).

54. *Klopp*, 113 N.M. at 160, 824 P.2d at 300.

55. PROSSER & KEETON, *supra* note 1, at 427.

56. *Norwood v. Sherwin-Williams Co.*, 279 S.E.2d 559 (1981).

57. See *Seng v. American Stores Co.*, 121 A.2d 123 (Pa. 1956); *Hansen v. Town & Country Shopping Center, Inc.*, 144 N.W.2d 870 (Iowa 1966); *Stofer v. Montgomery Ward & Co.*, 249 F.2d 285 (8th Cir. 1957).

58. Brief for Respondent at 8, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

59. *Id.*

60. *Klopp*, 113 N.M. at 160, 824 P.2d at 300.

61. *Id.* at 156, 824 P.2d at 296.

62. *Harrison v. Taylor*, 768 P.2d 1321 (Idaho 1989).

63. *Riddle v. McLouth Steel Prod. Corp.*, 451 N.W.2d 590 (Mich. Ct. App. 1990).

64. *Cox v. J.C. Penney Co.*, 741 S.W.2d 28 (Mo. 1987) (en banc).

65. *Woolston v. Wells*, 687 P.2d 144 (Or. 1984) (en banc).

66. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978).

67. *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App. 1989), *cert. denied*, 789 P.2d 33 (Utah 1990).

68. *O'Donnell v. City of Casper*, 696 P.2d 1278 (Wyo. 1985).

69. *Klopp*, 113 N.M. at 158-59, 824 P.2d at 298-99.

70. *Id.* at 159 n.3, 824 P.2d at 299 n.3.

The supreme court clearly intends for the job of weighing the factors to go to the jury:<sup>71</sup> "[T]he principal consideration is to minimize interference with the jury function so as not to erode the litigant's right to trial by jury."<sup>72</sup> Thus, a directed verdict would only be proper when there is no substantial evidence supporting any element of the case.<sup>73</sup>

The supreme court found the substantial evidence standard to be satisfied in Klopp's claim against Wackenhut.<sup>74</sup> TWA hired Wackenhut to run its security station, including the metal detector.<sup>75</sup> The position of the equipment was certified by the Federal Aviation Authority, and the position could not be changed without recertification.<sup>76</sup> Wackenhut was not allowed to reposition the equipment.<sup>77</sup>

Because of Wackenhut's limited role with regard to the metal detector, its argument in defense of Klopp's claims was different from TWA's.<sup>78</sup> Wackenhut argued that its duty to passengers like Klopp was to keep weapons off the plane and that it had no duty regarding the positioning, operation or maintenance of the metal detector.<sup>79</sup>

Such an argument ignores the law of negligence.<sup>80</sup> Since Wackenhut acted as TWA's agent, the appropriate law is in section 355 of the Restatement (Second) of Agency, which states that:

[a]n agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take.<sup>81</sup>

Particularly relevant to Wackenhut is section 355 comment b: "If an agent has only a limited control over land or chattels, he is subject to liability only to the extent that he is authorized to exercise such control."<sup>82</sup> Klopp pointed out that Wackenhut sometimes placed a wastebasket beside the metal detector, detouring people around the protruding stanchion base, and thereby asserting some control over the situation.<sup>83</sup> The court decided, however, that:

while Wackenhut certainly had a greater duty to passengers than merely to search for weapons, [e.g., preventing its employees from

71. *Id.* at 159, 824 P.2d at 299.

72. *Id.* at 155, 824 P.2d at 295 (citing *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 728-29, 749 P.2d 1105, 1107-08 (1988)).

73. *Klopp*, 113 N.M. at 155, 824 P.2d at 295.

74. *Id.* at 161, 824 P.2d at 301.

75. *Id.*

76. *Id.* at 159-60, 824 P.2d at 299-300.

77. *Id.* at 160, 824 P.2d at 300.

78. *Id.*

79. *Id.*

80. *Id.*

81. RESTATEMENT (SECOND) OF AGENCY § 355 (1957).

82. *Id.* cmt. b.

83. *Klopp*, 113 N.M. at 161, 824 P.2d at 301.

leaving suitcases where people might trip over them] that duty was limited by the extent of its control over the chattels in its custody or over the area that it occupied.<sup>84</sup>

Because Wackenhut lacked the authority to rearrange the equipment, the supreme court affirmed its directed verdict and relieved it of liability.<sup>85</sup>

## V. ANALYSIS AND IMPLICATIONS

In 1928, the famous case of *Palsgraf v. Long Island Railroad Co.*<sup>86</sup> focused the law of negligence on the issue of foreseeability with regard to duty.<sup>87</sup> From that case came two views of such foreseeability that vie for supremacy, even today, among American jurisdictions.<sup>88</sup>

The *Palsgraf* majority opinion, written by then-Judge Cardozo, imposed no duty, and therefore the defendant was not liable to an unforeseeable plaintiff.<sup>89</sup> In Judge Andrews's dissent, on the other hand, there is a duty to all, even those who are unforeseeable, to refrain from unreasonably dangerous acts.<sup>90</sup> Before *Klopp*, New Mexico appeared to be in a state of confusion on the issue of whether defendants had a duty only to foreseeable plaintiffs, or to unforeseeable plaintiffs, as well.<sup>91</sup>

Like foreseeability with regard to duty, there are two fundamental theories as to the basis for the special duty of an occupier of land to protect invitees, although there is general agreement that such a duty exists.<sup>92</sup> The first is Professor Bohlen's economic benefit theory,<sup>93</sup> adopted by the first Restatement of Torts.<sup>94</sup> Under that theory, the occupier's duty to make the premises safe is in exchange for the economic benefits the visitor can provide.<sup>95</sup> The second theory, adopted by many courts, stresses the invitation of the business visitor.<sup>96</sup> According to this theory, it is implied that the occupier has used reasonable care to make the place safe when he encourages people to enter his land to further his purpose.<sup>97</sup>

It is important to note that there is no requirement for the occupier to ensure the safety of the invitees.<sup>98</sup> The occupier's duty is only to use reasonable care to protect them.<sup>99</sup> "But [that] obligation . . . is a full one," according to commentators, "applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk

84. *Id.*

85. *Id.*

86. 162 N.E. 99 (N.Y. 1928).

87. PROSSER & KEETON, *supra* note 1, at 284.

88. *Id.* at 285.

89. *Palsgraf*, 162 N.E. at 100.

90. *Id.* at 103.

91. See *Calkins v. Cox Estates*, 110 N.M. 59, 66, 792 P.2d 36, 43 (1990) (Ransom, J., dissenting).

92. PROSSER & KEETON, *supra* note 1, at 420.

93. *Id.*

94. RESTATEMENT OF TORTS §§ 331, 343 cmt. a (1939).

95. PROSSER & KEETON, *supra* note 1, at 420.

96. *Id.* at 422.

97. *Id.*

98. *Id.* at 425.

99. *Id.*



of harm."<sup>100</sup> Included within the scope of the obligation are the duties: (1) of care not to injure the invitees negligently; (2) to warn of hidden dangers known to the occupier; (3) to inspect and discover dangerous conditions if they exist; and (4) to take reasonable precautions to protect invitees from dangers that are foreseeable from the arrangement or use of the property.<sup>101</sup> The New Mexico Supreme Court issued its writ of certiorari "to review, with respect to an obvious danger, the duty owed business visitors by TWA as the occupier of the premises, and by Wackenhut as the operator of the station."<sup>102</sup>

According to TWA and Wackenhut, the metal detector was open and obvious and there was no reason to believe it was dangerous.<sup>103</sup> Therefore, they argued, they owed no duty of care to Klopp.<sup>104</sup> Klopp argued that the respondents had a duty to protect her from what she considered an unreasonable risk of harm—the protruding stanchion base of the metal detector.<sup>105</sup> Even if she was negligent, Klopp contended, "[that] does not eliminate . . . the duty [of] the defendant . . . [in relation to an open and obvious danger]."<sup>106</sup>

The question of duty was one that the New Mexico Defense Lawyers Association explored in its amicus curiae brief for the respondents.<sup>107</sup> The Defense Lawyers argued that New Mexico courts, in both premises and products liability cases, have long used the obvious danger doctrine with regard to the duty to warn of known or obvious danger.<sup>108</sup> To illustrate the point, the Defense Lawyers cited a list of ten cases so holding,<sup>109</sup> including *Skyhook Corp. v. Jasper*<sup>110</sup> and *Proctor v. Waxler*.<sup>111</sup>

100. *Id.*

101. *Id.* at 425-26.

102. *Klopp*, 113 N.M. at 155, 824 P.2d at 295.

103. *Id.*

104. *Id.*

105. *Id.* at 156, 824 P.2d at 296.

106. *Id.*

107. Brief of New Mexico Defense Lawyers Ass'n, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

108. *Id.*

109. The Defense Lawyers' list included: *Garrett v. Nissen Corp.*, 84 N.M. 16, 498 P.2d 1359 (1972); *Villanueva v. Nowlin*, 77 N.M. 174, 420 P.2d 764 (1966); *Romero v. Kendricks*, 74 N.M. 24, 390 P.2d 269 (1964); *Burgi v. Acid Eng'g, Inc.*, 104 N.M. 557, 724 P.2d 765 (Ct. App.), *cert. denied*, 104 N.M. 460, 722 P.2d 1182 (1986); *Arenivas v. Continental Oil Co.*, 102 N.M. 106, 692 P.2d 31 (Ct. App. 1983), *cert. quashed*, 102 N.M. 88, 691 P.2d 881 (1984); *Jones v. Minnesota Mining & Mfg. Co.*, 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983); *Michael v. Warner/Chilcott*, 91 N.M. 651, 579 P.2d 183 (Ct. App.), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978); and *Perry v. Color Tile*, 81 N.M. 143, 464 P.2d 562 (Ct. App. 1970). The list also includes those mentioned in the text and cited in notes 111 and 112 below. *Klopp*, 113 N.M. at 156, 824 P.2d at 296.

The Defense Lawyers also listed the few New Mexico cases where the plaintiff encountered an obvious danger and was held to have assumed the risk: *Dempsey v. Alamo Hotels, Inc.*, 76 N.M. 712, 418 P.2d 58 (1966); and *Bogart v. Hester*, 66 N.M. 311, 347 P.2d 327 (1959). Also listed were the New Mexico cases in which the plaintiff encountered an obvious danger and was held to have been contributorily negligent: *Boyce v. Brewington*, 49 N.M. 107, 158 P.2d 124 (1945); and *Wood v. Southwestern Pub. Serv. Co.*, 80 N.M. 164, 452 P.2d 682 (Ct. App. 1969). *Klopp*, 113 N.M. at 156 n.1, 824 P.2d at 296 n.1.

110. 90 N.M. 143, 560 P.2d 934 (1977).

111. 84 N.M. 361, 503 P.2d 644 (1972).

The supreme court answered by stating that warning would be a false issue if the nature of the risk would not be made more prominent by additional warning.<sup>112</sup> Instead, it turned its attention to the issue of duty, irrespective of a specific duty to warn.<sup>113</sup>

On the subject of duty, the supreme court in *Klopp* found particular fault with a point in the *Davis* opinion,<sup>114</sup> where the court of appeals stated: "The scope of the duty is determined by reference to the foreseeable behavior of reasonably careful invitees, considered as a class."<sup>115</sup> The *Davis* court went on to explain that "[t]he negligence of the particular invitee is relevant only for purposes of reducing recovery under comparative negligence principles."<sup>116</sup> Still, the supreme court in *Klopp* reasoned that a lack of duty to foreseeably injured invitees injured through contributory negligence would lessen the utility of comparative negligence, and stated that:

[w]hile we fully understand that, absent a breach of duty, in logic there can be no fault to compare, the fallacy in that argument is that it is premised not on the foreseeable behavior of business visitors, but on the foreseeable behavior of reasonably careful visitors. On that premise, the negligence of a particular visitor is preclusive if outside the ambit of the foreseeable behavior of reasonably careful visitors.<sup>117</sup>

The court analogized to the law of products liability where the duty is to use reasonable care in design, a duty that does not change if the danger is obvious.<sup>118</sup> An occupier has no duty, though, if he has no reason to know of an unreasonable risk of danger to an invitee.<sup>119</sup>

Justice Ransom, writing the *Klopp* opinion, relied heavily on his dissent in *Calkins v. Cox Estates*,<sup>120</sup> a 1990 case that defined the duty of a landowner. In the *Calkins* dissent, Justice Ransom maintained that a lack of duty toward an unforeseeable plaintiff is "a matter of public policy."<sup>121</sup> In *Klopp*, the majority accepted Justice Ransom's belief that in New Mexico negligence actions: (1) the plaintiff must be foreseeable; and (2) the risk he encountered must be unreasonable.<sup>122</sup> According to *Klopp*, whether those two requirements are met is to be decided by the jury in virtually every case.<sup>123</sup>

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112. *Klopp*, 113 N.M. at 156, 824 P.2d at 296.

113. *Id.*

114. *Id.* at 157, 824 P.2d at 297.

115. *Davis v. Gabriel*, 111 N.M. 289, 292, 804 P.2d 1108, 1111 (Ct. App. 1990).

116. *Id.*

117. *Klopp*, 113 N.M. at 157, 824 P.2d at 297.

118. *Fabian v. E.W. Bliss Co.*, 582 F.2d 1257, 1263 (10th Cir. 1978), cited with approval in *Klopp*, 113 N.M. at 157, 824 P.2d at 297.

119. *Klopp*, 113 N.M. at 158, 824 P.2d at 298.

120. 110 N.M. 59, 66, 792 P.2d 36, 43 (1990) (Ransom, J., dissenting).

121. *Id.* at 68, 792 P.2d at 45.

122. *Id.* at 67, 792 P.2d at 44, cited with approval in *Klopp*, 113 N.M. at 158, 824 P.2d at 298.

123. *Klopp*, 113 N.M. at 159, 824 P.2d at 299.

"Negligence, proximate cause, and comparative fault are issues to be decided by the jury whenever reasonable minds differ,"<sup>124</sup> the supreme court summarized. Its holding in *Klopp* means juries in such cases will now have to be instructed differently.<sup>125</sup> In situations where an obvious danger injured an invitee, the standard under Uniform Jury Instruction ("UJI") 13-1310 was:

An [owner] [occupant] owes a duty to a business visitor, with respect to known or obvious dangers, if and only if:

(1) The [owner] [occupant] knows or has reason to know of a dangerous condition on his premises involving an unreasonable risk of danger to a business visitor; and

(2) The [owner] [occupant] should reasonably anticipate that the business visitor will not discover or realize the danger [or that harm will result to the business visitor, even though the business visitor knows or has reason to know of the danger].

If both of these conditions are found to exist, then the [owner] [occupant] had a duty to use ordinary care to protect the business visitor from harm.<sup>126</sup>

The New Mexico Trial Lawyers Association, in its amicus curiae brief for the petitioner, argued that the instruction is erroneous "because it improperly constricts the occasions when a court can declare that a landowner owes a duty of reasonable care as to known or obvious dangers."<sup>127</sup>

The supreme court held UJI 13-1310 to be unsuitable for comparative fault cases because the "court must determine as a matter of law whether a particular defendant owes a duty to a particular plaintiff."<sup>128</sup> If a duty is found, it is one of ordinary care to keep the premises safe for invitees.<sup>129</sup> Ordinary care is to be determined by the jury after receiving this instruction,<sup>130</sup> which provides:

"Ordinary care" is that care which a reasonably prudent person would use in the conduct of his own affairs. What constitutes "ordinary care" varies with the nature of what is being done.

As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.<sup>131</sup>

124. *Id.* at 160, 824 P.2d at 300.

125. *Id.* at 159, 824 P.2d at 299.

126. N.M. U.J.I. Civ. 13-1310.

127. Brief of New Mexico Trial Lawyers Ass'n, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

128. *Calkins v. Cox Estates*, 110 N.M. 59, 62, 824 P.2d 296, 299 (1990), *quoted in Klopp*, 113 N.M. at 159, 824 P.2d at 299.

129. N.M. U.J.I. Civ. 13-1309 ("An [owner] [occupier] owes a business visitor the duty to use ordinary care to keep the premises safe for use by the business visitor.")

130. *Klopp*, 113 N.M. at 159, 824 P.2d at 299.

131. N.M. U.J.I. Civ. 13-1603.

“Further,” the supreme court directed, “the jury will be instructed that to rise to the level of negligence an act must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to another.”<sup>132</sup>

Finally, in launching the new rule of law in the *Klopp* case, the supreme court faced three possible times to begin application of that rule: (1) after *Klopp*; (2) with *Klopp* and thereafter; or (3) with *Klopp* and before and after.<sup>133</sup> Nancy Klopp, of course, wanted the court to abrogate the obvious danger doctrine in such a way that she could take advantage of the change.<sup>134</sup> TWA argued that it relied “on the standard of duty set forth in the mandatory instructions which were in effect at the time of this accident.”<sup>135</sup> If the law were to change, TWA wanted it to do so after *Klopp*.<sup>136</sup> Nancy Klopp countered by claiming the new rule would not impose any significant new duties or conditions or eliminate any existing rights.<sup>137</sup> The court decided to give Nancy Klopp the benefit of the change. It remanded the cause against TWA to the district court for a jury trial.<sup>138</sup>

## VI. CONCLUSION

As a result of the decision in *Klopp*, New Mexico land occupiers are no longer shielded from liability to invitees by the obvious danger doctrine. An occupier owes a duty to safeguard invitees whom the occupier may reasonably foresee being injured by a danger on the premises that is avoidable through reasonable precautions available to the occupier.

It is for the jury to determine liability from the comparative negligence mix. Among the factors to be considered are avoidability and obscurity of the danger, severity of the possible injury, and the possibility of distracting the invitee. The foreseeability of the plaintiff and the unreasonableness of the risk are also for the jury to decide.

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132. *Klopp*, 113 N.M. at 159, 824 P.2d at 299, *approving* N.M. U.J.I. Crv. 13-1601 (definition of negligence).

133. *See* Maxwell v. Ross Hyden Motors, Inc., 104 N.M. 470, 722 P.2d 1192 (Ct. App. 1986).

134. Reply Brief for Petitioner at 4, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

135. Brief for Respondent TWA at 22, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

136. *Id.*

137. Reply Brief for Petitioner at 4, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992) (No. 19,318).

138. *Klopp*, 113 N.M. at 162, 824 P.2d at 302.