

# Torts - Contributory Negligence as a Matter of Law - Auto Collisions in Smoke, Fog, and Dust

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French jurisprudence, good faith requires only belief in the vendor's title. A purchaser can prescribe against defects (even those of which he is aware) in the immediate transaction with his vendor, provided the defects are not apparent on the face of the instrument and do not render the transaction absolutely null.<sup>38</sup>

### *Conclusion*

The practice of the Louisiana courts in distinguishing between moral and legal good faith is inconsistent with the spirit and structure of the Code, and, while it simplifies the job of the courts, it creates a difference between what the law requires for good faith and what the average man means by good faith. Such a difference between the law and the practice and understanding of the men whose affairs it regulates is not desirable.

*M. Hampton Carver*

### TORTS—CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW— AUTO COLLISIONS IN SMOKE, FOG, AND DUST

Louisiana jurisprudence has consistently found a plaintiff automobile driver contributorily negligent as a matter of law, irrespective of actual fault, if he is involved in a head-on collision while proceeding on the correct side of the road through heavy fog, smoke, or dust. This Note will consider the application of the contributory negligence doctrine under such circumstances.<sup>1</sup>

*Castille v. Richard*<sup>2</sup> was one of the first decisions in the formulation of this policy. The parties collided head-on in a heavy dust cloud raised by a car that had just overtaken the defendant. The court pointed out that the road was very narrow and that it was difficult for cars to avoid a collision even when visibility was unobscured. It was impossible to tell which of the

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38. 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2667 (12th ed. 1939).

1. The same general rule of law is present in cases where a plaintiff, proceeding through heavy smoke, fog, or dust, runs into the rear of a vehicle negligently stopped in the middle of the road. It is not within the scope of this Note, however, to investigate the development of the rule in those situations since it is based on the "assured clear distance" doctrine, which is not the same basis for the rule in the situations discussed above. For an application of the "assured clear distance" rule in rear-end collision cases, see, *e.g.*, *Rachal v. Batthazar*, 32 So.2d 483 (La. App. 2d Cir. 1947); *Giorlando v. Maitrejean*, 22 So.2d 584 (La. App. Orl. Cir. 1945).

2. 157 La. 274, 102 So. 398 (1924).

parties, if not both, had been in the wrong lane. The Louisiana Supreme Court held plaintiff contributorily negligent:

"In these circumstances it was inexcusable negligence for the drivers of the automobiles not to have come to a full stop until the dust had subsided."<sup>3</sup> (Emphasis added.)

Later cases interpreted the preceding statement to mean that a plaintiff is contributorily negligent as a matter of law when an accident follows his driving into a heavily obscured area under *any* circumstances.<sup>4</sup> Thus, in the recent case of *Walden v. Employers Liability Assur. Corp.*,<sup>5</sup> the court held a plaintiff who was hit from the rear while proceeding through a heavy fog at a greatly reduced speed contributorily negligent as a matter of law:

"A driver of a vehicle is guilty of negligence or contributory negligence . . . when he drives into a screen of dust, smoke or fog which greatly impairs his visibility."<sup>6</sup>

The court cited and quoted *McLelland v. Harper*<sup>7</sup> in support of its decision:

"The jurisprudence of this State is now well established to the effect that . . . the action of the driver of a vehicle in continuing the movement of his vehicle when vision is obscured or reduced to the danger point constitutes negligence."<sup>8</sup>

Although *McLelland* dealt with a *head-on* collision in heavy

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3. *Id.* at 275, 102 So. at 399.

4. *Dominick v. Hayes Bros.*, 127 So. 31 (La. App. 2d Cir. 1930), cited *Castille* and held contributorily negligent as a matter of law a plaintiff who had proceeded through heavy smoke covering a paved highway at a reduced rate of speed. The same court applied this rule again when faced with similar facts in *Employer's Fire Ins. Co. v. Rodgers*, 47 So.2d 404 (La. App. 2d Cir. 1950). In *Outman v. Imperial Oil & Gas Products Co.*, 144 So. 749 (La. App. 2d Cir. 1932), plaintiff was held contributorily negligent as a matter of law after he entered a dust cloud and was hit by defendant, who was attempting to pass the vehicle that was raising the dust. In *McLelland v. Harper*, 38 So.2d 425 (La. App. 2d Cir. 1948), plaintiff was hit almost immediately upon entering heavy smoke covering a paved highway. There was some problem in determining exactly the position of the vehicles when the collision occurred, but the court held that "[T]he question of the exact location of the vehicles is relatively unimportant." Plaintiff was held contributorily negligent as a matter of law in *Gardsbane v. Horton*, 56 So.2d 858 (La. App. 2d Cir. 1952), when he was hit from behind after being forced to stop while driving through heavy fog.

5. 197 So.2d 350 (La. App. 2d Cir. 1967).

6. *Id.* at 351.

7. 38 So.2d 425 (La. App. 2d Cir. 1948).

8. *Id.* at 425-26.

smoke, the court in *Walden* applied the rule developed from *Castille* to a factual situation quite different from those present in either of the earlier cases.

Contributory negligence may be defined broadly as "conduct on the part of plaintiff which falls below the standard to which he should conform for his own protection."<sup>9</sup> More specifically, there are two types. The first consists of "an intentional and unreasonable exposure . . . to danger created by defendant's negligence, of which danger the plaintiff knows or has reason to know";<sup>10</sup> the second is "conduct which . . . falls short of the standard to which the reasonable man should conform in order to protect himself from harm."<sup>11</sup>

The duty of the plaintiff is to take reasonable precautions to protect himself from a defendant's negligence. This question of the plaintiff's *duty* is a matter of law.<sup>12</sup> The question of the *breach* of that duty, however, is a question of fact.<sup>13</sup>

The first type of contributory negligence referred to above is sometimes known as "voluntary exposure to unreasonable risk."<sup>14</sup> Before a court can make a general statement of law such as is present in *McLelland*, if it is speaking of this type of contributory negligence, it must show that every plaintiff who drives into heavy fog, smoke, or dust knows or should know of defendant's negligence. It may be that when Louisiana courts speak of contributory negligence as a matter of law in these cases they mean that anyone driving into heavy fog, smoke, or dust always assumes the risk that someone will act negligently toward them.

Every experienced driver knows that collisions are not a rarity when automobiles are driven in very poor visibility. Every driver may therefore be reasonably held to the knowledge that there may be some danger involved in proceeding under such circumstances. A plaintiff is not, however, guilty of this type of contributory negligence merely because he ventures into a situation where some vague dangers may be lurking about. If this were not so, every pedestrian who crosses a busy intersection, no matter how carefully, would be chargeable with con-

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9. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

10. *Id.* § 466.

11. *Id.*

12. *Id.* § 328A(c).

13. *Id.* § 328B(c).

14. *Id.* § 466 comment c.

tributory negligence if hit by a negligently driven automobile. The risk involved is *not* the risk that someone *may* act negligently; the risk involved is the risk of harm to plaintiff caused by a negligent act of defendant, and the plaintiff must know, or have reason to know, of the act. It is submitted that the Louisiana courts have misplaced their reliance if they are depending upon this type of contributory negligence to support the position they have taken in this area, for they cannot find this to be an issue of law but must look to the particular fact situation to make a determination. This position is supported by the decisions of several other states.<sup>15</sup>

But perhaps the courts are referring to the second type of contributory negligence, for which the standard of plaintiff's conduct is "substantially similar to that conduct on the part of defendant which is dealt with as negligence."<sup>16</sup> The only substantial difference is that "the standard of behavior to which plaintiff is required to conform is that to which a reasonable man would think necessary to conform to his own protection rather than for the protection of others."<sup>17</sup> Before, therefore, the courts can hold a plaintiff contributorily negligent as a matter of law in the manner of *Walden*, if they are using these standards, they must decide that every plaintiff, no matter what the

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15: *Cf.* *Wilson v. King*, 116 Fla. 752, 156 So. 694 (1934); *Caudle v. Zenor*, 217 Iowa 77, 81, 251 N.W. 69, 70 (1933): "[T]he driver of the appellee car could not reasonably have anticipated that appellant would be driving his car after dark, in a fog, without lights at the rate of 35 miles per hour . . . on the wrong side of the road"; *Rabenold v. Hutt*, 226 Iowa 321, 233 N.W. 865 (1939); *Odell v. Powers*, 284 Mich. 201, 205, 278 N.W. 819, 820 (1938); "Plaintiff was not bound to anticipate that defendant would violate the law and operate his automobile on the wrong side of the road." The facts in *Odell* are roughly analogous to those in the *McLelland* case (note 3 *supra*), but this court found that the position of the automobiles could indeed be important. "Assuming, however, that it was negligent for plaintiff to proceed . . . the question still remained . . . as to whether such negligence contributed to the accident. . . . Under these facts, the jury might well have found that even had plaintiff brought his car to a complete stop . . . he would have been struck by defendant, in any event, who was driving on the wrong side of the highway." *Id.* at 205, 278 N.W. at 821; *Salera v. Schroeder*, 183 Minn. 478, 237 N.W. 180 (1931); *Baker v. Wood*, 346 Mo. 523, 142 S.W.2d 83 (1940); *French v. Christner*, 173 Ore. 158, 135 P.2d 464 (1943); *Halback v. Robinson Bros.*, 173 Pa. Super. 622, 626, 98 A.2d 750, 752 (1953): "[S]he was not required to anticipate and guard against the want of ordinary care on the part of another"; *Crowe v. O'Rourke*, 146 Wash. 74, 262 P. 136 (1927). In a situation very similar to that in the *Outman* case (note 3 *supra*), this court held that "it had a right to assume that no one would project his car into the cloud of dust and upon their side of the road, and strike them." *Id.* at 78, 262 P. at 137-38.

16. RESTATEMENT (SECOND) OF TORTS § 466, comment *f* (1965).

17. *Id.*

circumstances, breaches his duty to protect himself when he drives into heavy fog, smoke, or dust.

Since the breach of this duty is determined by using the same method that is used to determine the breach of defendant's duty, if the question is decided as a matter of *fact*, the magnitude of the risk and the utility of the chance, among other factors, must be determined.<sup>18</sup> In making such a determination many questions must be asked: was the traffic heavy or light; what was the importance of plaintiff's mission; how heavy was the obscurity, and was it such that it would dissipate in a few minutes or several hours; once plaintiff entered the area, did he exercise the special caution required in such a situation?

It is submitted that by going through such an analysis, a court could indeed find that a plaintiff was acting reasonably and did not breach his duty of self-protection upon entering heavy smoke, fog, or dust. The Louisiana practice of making plaintiff's breach of duty a question of law, not fact, could easily lead to patently unfair and inequitable results. Applying the pronouncement of *Walden*, a plaintiff, in an extreme example, driving through a thick fog at five miles per hour while taking a sick child to a hospital would be guilty of contributory negligence if hit from the rear by a truck speeding at fifty miles per hour. Decisions from several other states support the view that questions of contributory negligence of this type should be viewed as issues of fact, not law.<sup>19</sup>

The Louisiana rule that a plaintiff is contributorily negligent as a matter of law for driving into an area of heavy smoke, fog, or dust developed from a line of jurisprudence following the previously mentioned *Castille* case. It is submitted, however, that

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18. *Id.* § 291.

19. *Bixby v. Pickwick Stage Co.*, 131 Cal. App. 739, 741, 21 P.2d 972, 973 (1933): "[I]t is almost uniformly the rule that whether the conduct of a person in driving into smoke, fog, dust, or mist offends the doctrine of ordinary care is ordinarily a question to be determined by the court or jury"; *Marston v. Pickwick Stages, Inc.*, 78 Cal. App. 526, 248 P. 930 (1926); *McCormick v. Sioux City*, 243 Iowa 35, 50 N.W.2d 564 (1951); *Burtchell v. Willey*, 147 Me. 339, 87 A.2d 658 (1952); *Peasley v. White*, 129 Me. 450, 452, 152 A. 530, 531 (1930): "[T]he driver of an automobile, encountering a fog, is not bound as a matter of law to stop and wait for the fog to lift in order escape the charge of negligence. . . . The degree of care to be exercised must vary with the conditions of fog, or roadway, and of traffic"; *Cole v. Wilson*, 127 Me. 316, 143 A. 178 (1928); *Winslow v. Veterans of Foreign Wars Nat. Homes*, 328 Mich. 488, 44 N.W.2d 19 (1950); *Marsh v. Burnham*, 211 Mich. 675, 179 N.W. 300 (1920); *Young v. Great Northern Ry.*, 204 Minn. 122, 282 N.W. 691 (1938); *Silva v. Waldie*, 42 N.M. 514, 82 P.2d 282 (1938); *Devoto v. United Auto Transp. Co.*, 128 Wash. 604, 223 P. 1050 (1924).

*Castille*, from its very language, was meant to be a limited holding.<sup>20</sup> The courts' attempts to hold on to the strict rule which developed has resulted in some questionable attitudes regarding the nature of contributory negligence, and has left the courts very little maneuverability with which to prevent inequitable results.<sup>21</sup>

The courts' classification of contributory negligence as an issue of law in this area seems unfortunate, no matter how well founded on previous jurisprudence which is itself suspect. It is suggested that the contributory negligence of an individual driving into heavy fog, smoke, or dust should be a question of fact.

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20. See text accompanying note 3 *supra*.

21. In striving to reach an equitable result, the courts are forced to ignore previous jurisprudence. This is illustrated by three decisions of the Louisiana Second Circuit Court of Appeal. In *Gardsbane v. Horton*, 56 So.2d 858 (La. App. 2d Cir. 1952), a plaintiff who was hit from behind after he had been forced to stop while driving through heavy fog was held contributorily negligent as a matter of law because he had ventured into the fog in the first place. The court approached the question of contributory negligence as a matter of fact, not law, however, in *Ervin v. Burns*, 126 So.2d 805 (La. App. 2d Cir. 1961), and allowed a plaintiff who had been hit from the rear after she entered a cloud of heavy smoke to recover: "[S]he followed a most reasonable course and acted with prudence in either greatly reducing her speed or stopping her car when she drove into the heavy smoke." *Id.* at 808. Later, the court held a plaintiff guilty of contributory negligence as a matter of law in an analogous situation. *Walden v. Employers Liab. Assur. Corp.*, 197 So.2d 350 (La. App. 2d Cir. 1967).