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1) A Child Beneath the Age of Five Charged with Contributory Negligence Cannot Be Negligent as a Matter of Law; 2) A Defendant Is Entitled to a Definition and Explanatory Charges of Unavaoidable Accident by Reason of the Child Plaintiff Being Incapable of Negligence; 3) Sole Proximate Cause Is Immaterial to the Function of the Sudden Emergency Doctrine; 4) Unavoidable Accident and Sudden Emergency Are No Longer Subject to Special Issue Submission.

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can be used to impeach an accused's credibility, but such a decision is completely discretionary and reviewable by no one. Once this tainted evidence has been introduced by the prosecution, regardless of a charge by the court as to the use for which the evidence may be considered, "[t]he reverberating clang of those accusatory words would drown all weaker sounds."[48] The law-and-order approach to crime definitely weakens the constitutional safeguards regulating unlawful police practices, and "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[49]

Russell C. Busby

TORTS — PROCEDURE — INFANTS — CONTRIBUTORY NEGLIGENCE — SPECIAL ISSUES—UNAVOIDABLE ACCIDENT—SUDDEN EMERGENCY—1) A CHILD BENEATH THE AGE OF FIVE CHARGED WITH CONTRIBUTORY NEGLIGENCE CANNOT BE NEGLIGENT AS A MATTER OF LAW; 2) A DEFENDANT IS ENTITLED TO A DEFINITION AND EXPLANATORY CHARGES OF UNAVOIDABLE ACCIDENT BY REASON OF THE CHILD PLAINTIFF BEING INCAPABLE OF NEGLIGENCE; 3) SOLE PROXIMATE CAUSE IS IMMATERIAL TO THE FUNCTION OF THE SUDDEN EMERGENCY DOCTRINE; 4) UNAVOIDABLE ACCIDENT AND SUDDEN EMERGENCY ARE NO LONGER SUBJECT TO SPECIAL ISSUE SUBMISSION. *Yarborough v. Berner,* 467 S.W.2d 188 (Tex. Sup. 1971).

The plaintiff brought action to recover for injuries sustained by his four year and ten month old son when an automobile driven by the defendant struck the child. The child was playing at Galveston beach near the water's edge when he suddenly jumped up and ran toward his parents and into the automobile's path. The day was clear, the view of the child was unobstructed, and no other cars were passing by. The trial court refused to submit the defendant's requested issues of unavoidable accident, sudden emergency, and the contributory negligence of the child. The jury found no negligence in the defendant's speed or his failure to sound his horn, apply his brakes, or turn his vehicle. The jury did find, however, that the defendant's failure to keep a proper lookout was negligence and the proximate cause of the collision. Held—*Reversed and remanded.* 1) A child beneath the age of five

[48] Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 25, 78 L. Ed. 196, 202 (1933). *See generally* Comment, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264 (1967).

[49] Harris v. New York, 401 U.S. 222, —, 91 S. Ct. 643, 649, 28 L. Ed.2d 1, 8 (1971), *quoting from* Mapp v. Ohio, 367 U.S. 643, 659, 81 S. Ct. 1684, 1694, 6 L. Ed.2d 1081, 1092 (1961).

charged with contributory negligence cannot be negligent as a matter of law; 2) a defendant is entitled to a definition and explanatory charges of unavoidable accident by reason of the child plaintiff being incapable of negligence; 3) sole proximate cause is immaterial to the function of the sudden emergency doctrine; 4) unavoidable accident and sudden emergency are no longer subject to special issue submission.[1]

When charged with negligence, an infant of tender years is not held to the same standard of conduct as an adult. The standard usually allows for the child's age, experience, intelligence, and capacity, whether he is charged with contributory negligence,[2] negligence per se,[3] or primary negligence.[4] The United States Supreme Court ruled on the contributory negligence of a young child as early as 1872 in *Railroad Co. v. Gladmon.*[5] The court held:

> The rule of law in regard to the negligence of an adult, and rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion . . . . Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge . . . . The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.[6]

The United States Supreme Court reiterated its position a year later in *Railroad Co. v. Stout.*[7]

The first Texas case considering the individual characteristics of a child was *Evansich v. Gulf C. & S.F. Ry.*[8] The court, citing *Stout,* said,

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1 *See* Note, 9 U. Hous. L. Rev. 168 (1971) for a discussion of the present case relative to the holding that unavoidable accident and sudden emergency are no longer subject to special issue submission.

2 Rodford v. Sample, 290 N.Y.S.2d 30, 31 (App. Div. 1968); Brown v. Connolly, 398 P.2d 596, 598 (Cal. 1965); Annot., 77 A.L.R.2d 917 (1961).

3 Rudes v. Gottschalk, 159 Tex. 552, 556, 324 S.W.2d 201, 205 (1959).

4 Beekman Estate v. Midonick, 252 N.Y.S.2d 885, 888 (Sup. Ct. 1964); Ellis v. D'Angelo, 253 P.2d 675, 678 (Cal. Dist. Ct. App. 1953); Annot., 67 A.L.R.2d 570 (1959). Primary negligence involves a breach of duty owed to another while contributory negligence involves a failure to take proper precautions for one's own safety. Baltimore County v. State, 193 A.2d 30, 37 (Md. 1963).

5 Railroad Company v. Gladmon, 82 U.S. (15 Wall.) 401, 21 L. Ed. 114 (1872). The plaintiff's child, seven years of age, was injured when he ran in front of the defendant's horse-drawn car. The defendant charged the child with contributory negligence.

6 *Id.* at 408, 21 L. Ed. at 116.

7 Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 660, 21 L. Ed. 745, 748 (1873). The child sustained injuries while playing on the defendant's turntable. The *Stout* court cited the *Gladmon* case, but the rule adopted in the *Gladmon* case was dicta in the *Stout* case since the defendant did not allege the negligence of the child.

8 57 Tex. 126 (1882). The seven year old child plaintiff was injured on the defendant's turntable. The defense alleged the contributory negligence of the child. (A turntable is a revolvable platform, as a pivoted structure that supports a platform or track and revolves in a horizontal plane for turning wheeled vehicles (locomotives). Merriam Co., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2469 (1963)).

"The care and caution required of a child is according to its maturity and capacity only, and this is to be determined in each case by the circumstances of that case."[9] In later cases, the language used by courts stating the Texas rule varies in form.[10] Whatever the exact form of the language used by the courts, the result seems to be that the conduct of a child of tender years will be judged by his individual capacity.

While courts are generally in agreement as to the standard of care of young children, they are not in agreement as to what age a child has no legal capacity for negligence. Some courts speak in terms of presumptions, i.e., that below a certain age a child is conclusively presumed to be incapable of negligence.[11] The age most often adopted is seven years, a carryover from the arbitrary rules of criminal law.[12] Between the ages of seven and fourteen, these courts usually hold that there is a rebuttable presumption that the child is not negligent.[13] This presumption can be rebutted by evidence of capacity,[14] which is a function of his age and experience.[15]

Jurisdictions which have avoided these presumptions still have found necessary the adoption of an arbitrary minimum age below which a child cannot be negligent as a matter of law. New York courts have determined that a child beneath the age of four is incapable of both contributory negligence[16] and primary negligence.[17] California courts have decided that a four year old child is incapable of negligence as a matter of law.[18] Other jurisdictions have likewise set a minimum age.[19]

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9 Evansich v. Gulf, C. & S.F. Ry., 57 Tex. 126, 128 (1882).

10 In Dallas Ry. & Terminal Co. v. Rogers, 147 Tex. 617, 621, 218 S.W.2d 456, 458 (1949), the court said, "[T]he standard by which to measure the child's conduct . . . [is] that degree of care ordinarily exercised by children of the same age, intelligence, experience, and capacity under the same or similar circumstances." A 1969 Fifth Circuit decision dealing with Texas law stated, "According to Texas law, a child is required to act only with such care as one could reasonably expect from a child of his age. . . ." Taylor v. Bair, 414 F.2d 815, 822 (5th Cir. 1969). In attractive nuisance cases, the test is whether the child could ". . . have realized the risk or danger . . . ." Eaton v. R.B. George Invs., Inc., 152 Tex. 523, 531, 260 S.W.2d 587, 591 (1953). *See also* Gulf Prod. Co. v. Quisenberry, 128 Tex. 347, 352, 97 S.W.2d 166, 168 (1936).

11 Dickeson v. Baltimore & O. C. Term. R.R., 245 N.E.2d 762, 764 (Ill. 1969); Williams v. Standard Supply Co., 312 F. Supp. 1047, 1050 (D.N.C. 1970); Goff v. Horsley, 439 S.W.2d 937 (Ky. 1969); Holbrook v. Hamilton Distrib., Inc., 228 N.E.2d 628, 630 (Ohio 1967).

12 PROSSER, LAW OF TORTS, § 32 (4th ed. 1971).

13 Rowe v. Frick, 159 S.E.2d 47, 50 (S.C. 1968); Sutton v. Monongahela Power Co., 158 S.E.2d 98, 106 (W.Va. 1967); Masters v. Alexander, 225 A.2d 905, 909 (Pa. 1967); Dickeson v. Baltimore & O. C. Term. R.R., 245 N.E.2d 762, 764 (Ill. 1969).

14 Rowe v. Frick, 159 S.E.2d 47, 50 (S.C. 1968).

15 Masters v. Alexander, 225 A.2d 905, 909 (Pa. 1967).

16 Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. 1946).

17 Beekman Estate v. Midonick, 252 N.Y.S.2d 885, 888 (Sup. Ct. 1964).

18 Morales v. Thompson, 340 P.2d 700, 702 (Cal. Dist. Ct. App. 1953).

19 Colorado—a child six years of age or younger is incapable of negligence, Benallo v. Bare, 427 P.2d 323, 325 (Colo. 1967); Washington—cannot be negligent until sixth birthday, Scholm v. Hamilton, 419 P.2d 328, 331 (Wash. 1966); Maryland—four year old cannot be negligent, State v. Barlly, 140 A.2d 173, 177 (Md. 1958); *see* Annot., 77 A.L.R.2d 918 (1961).

Texas courts have faced the problem in the past. *Sorrentino v. McNeill*[20] rejected the common law rule that a child below the age of seven is conclusively presumed to be incapable of negligence and determined that the contributory negligence of a six year old child was a jury question.[21] In *Gulf Production Co. v. Quisenberry*,[22] the court held that the ability of a five year old to understand and avoid the danger was a jury question.[23] That a child three years and eight months old was too young to realize the danger was the holding in *Eaton v. R. B. George Investments, Inc.*[24] The court in *Temple Lumber Co. v. Living*[25] decided that there was not sufficient evidence to charge a child of four years and nine months with contributory negligence.[26] *Temple* also said that in Texas the rule of decision seems to be that a child five years of age cannot be charged with contributory negligence.[27]

In the instant case, *Yarborough v. Berner*,[28] the plaintiff child was four years and ten months old, and the trial court refused to submit an issue as to the child's contributory negligence. The Texas Supreme Court stated that it adhered to the five years of age guideline and held that the child was incapable of negligence as a matter of law.[29] The court reasoned that although a child's individual capacity is to be considered, at some age a child is too young to be negligent as that term is used in law.[30]

Possible effects of the holding regarding the five year age limit may arise because the *Yarborough* court did not expressly limit the holding to contributory negligence. The court said the plaintiff was "incapable of negligence,"[31] not incapable of contributory negligence. The child may have violated a statute (negligence per se), or the child may be charged with primary negligence. Will the fact that the child is less than five years of age be a good defense to his alleged negligence in such situations?

In 1959, the Texas Supreme Court in *Rudes v. Gottschalk*,[32] ruled on

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20 Sorrentino v. McNeill, 122 S.W.2d 723 (Tex. Civ. App.—Galveston 1938, writ ref'd). This case dealt with the contributory negligence of a six year old who had run in front of the defendant's automobile.

21 *Id.* at 725.

22 128 Tex. 347, 97 S.W.2d 166 (1936). This is an attractive nuisance case where the child was injured when playing on a tubing rack owned by the defendant.

23 *Id.* at 352, 97 S.W.2d at 168.

24 152 Tex. 523, 531, 260 S.W.2d 587, 591 (1953). This is an attractive nuisance case where the child drowned in a cattle dipping vat located on the defendant's premises.

25 289 S.W. 746 (Tex. Civ. App.—Galveston 1926, writ ref'd).

26 *Id.* at 748. The defendant's truck trailer bounced out of the street and killed the child who was about three feet from the street. The court did not hold that the four year and nine month old child could not be negligent because of his age, but rather that the evidence would not support a charge of negligence as to this child.

27 *Id.*

28 467 S.W.2d 188 (Tex. Sup. 1971).

29 *Id.* at 190.

30 *Id.*

31 *Id.*

32 159 Tex. 552, 324 S.W.2d 201 (1959).

the contributory negligence of an eight year old who was injured when he *unlawfully* attempted to cross a controlled access expressway at an unmarked crosswalk. The court acknowledged that the conduct of a child is not to be judged by the standard of an adult simply because statutory negligence (negligence per se) is involved.[33] Violation of a statute is some evidence for the jury in determining whether the child used less care than that which ordinarily could be expected of a child of the same age, intelligence, knowledge, and experience.[34] In a recent Arizona case,[35] a child three and a half years of age (legally incapable of negligence) was hit by the defendant's automobile. The trial court gave an instruction that Arizona law requires a pedestrian to yield right-of-way to all vehicles when crossing a street at a point other than a crosswalk. The Arizona Supreme Court determined that since the child was legally incapable of negligence, the instruction was both unnecessary and confusing.[36] Likewise, Texas courts should not hold a plaintiff child below the age of five responsible for his negligent acts even if charged with negligence per se; violation of a statute would be evidence only of the child's failure to adhere to his standard of care,[37] and a child below the age of five is incapable of negligence as a matter of law.[38] Evidence is unnecessary to prove a point conclusive as a matter of law.

The standard of care of a child charged with primary negligence is generally the same as where he is charged with contributory negligence.[39] Other jurisdictions have been faced with the situation where a child charged with primary negligence was below the age at which the jurisdiction had previously determined he could not be charged with contributory negligence. These jurisdictions have extended the age limit protection to primary negligence.[40] Texas appears to be void of cases where a young child is charged with primary negligence; but as noted previously, the court in *Yarborough* did not expressly limit its holding to a contributory negligence situation.[41] Also, in *Gottschalk* the court said, "It is well settled that where common-law negligence . . . is involved, the minor is judged by the standard of a child and not that of an adult."[42] In light of decisions from other jurisdictions and

33 *Id.* at 556, 324 S.W.2d at 205.

34 *Id.* at 557, 324 S.W.2d at 205. The court discussed the practice of some jurisdictions which instruct juries to determine whether the child had the capacity to comply with the statute. But the court stated that the general rule of a child's standard of care is more compatible with Texas practice and less likely to confuse the jury.

35 Esquivel v. Nancarrow, 450 P.2d 399 (Ariz. 1969).

36 *Id.* at 401.

37 Rudes v. Gottschalk, 159 Tex. 552, 557, 324 S.W.2d 201, 205 (1959).

38 Yarborough v. Berner, 467 S.W.2d 188, 190 (Tex. Sup. 1971).

39 Beekman Estate v. Midonick, 252 N.Y.S.2d 885, 888 (Sup. Ct. 1964); Ellis v. D'Angelo, 253 P.2d 675, 678 (Cal. Dist. Ct. App. 1953); Annot., 67 A.L.R.2d 570 (1959).

40 Beekman Estate v. Midonick, 252 N.Y.S.2d 885 (Sup. Ct. 1964); Shaske v. Hron, 63 N.W.2d 706 (Wis. 1954).

41 467 S.W.2d 188, 190 (Tex. Sup. 1971).

42 159 Tex. 552, 555, 324 S.W.2d 201, 204 (1959).

the wording in these Texas cases, the child beneath the age of five charged with primary negligence should not be held responsible for his allegedly negligent conduct by Texas courts.[43]

Another effect of a young child being incapable of contributory negligence is demonstrated in *Yarborough* relative to the issue of unavoidable accident. The Supreme Court of Texas held in 1952 that a charge of unavoidable accident is allowable only if the evidence raises the issue that something other than the negligence of any party to the event caused the injuries.[44] "Under such a definition the conduct of any person could not be the basis for a finding that there was unavoidable accident."[45] The result is that unavoidable accident is to be used only to submit the theory that some physical, non-human circumstances caused the injuries.[46] These physical circumstances would include rain or fog, wet or slick pavement, or obstruction of view, among others.[47] The court in *Yarborough*, however, asserted that the definition contemplates the parties to the event will be *capable* of negligence. The court held that since the child was incapable of negligence as a matter of law, the defendant was therefore entitled to the usual definition of the term with an additional explanatory charge that the plaintiff by reason of his age did not possess the experience, intelligence, and capacity to be negligent.[48]

Prior to this case, unavoidable accident as well as sudden emergency would have been submitted by way of special issue. In Texas civil cases, the court's submission of charges to the jury is universally by special issues.[49] Special issues are separate and distinct questions of fact germane and material to the action, upon which the plaintiff relies for recovery or upon which the defendant relies as a defense.[50] The Rules provide "[i]n submitting special issues, the court shall sub-

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[43] In Texas, minors are civilly liable for their torts. Brown v. Dellinger, 355 S.W.2d 742, 746 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.). A distinction has been made between a child's capacity for intent to harm another and his capacity for realizing that his negligent conduct might lead to the injury of another, i.e., intentional and negligent tort. Ellis v. D'Angelo, 253 P.2d 675, 677 (Cal. Dist. Ct. App. 1953). The court held that while a four year old, who had either intentionally or negligently shoved the plaintiff to the floor, was incapable of negligence, it was a fact question whether the child possessed the intent to harm. *Id.* at 678. Essentially the same holding was announced in Jorgensen v. Nadelman, 195 N.E.2d 422 (Ill. App. Ct. 1963). The defendant child, six years old, struck the plaintiff in the eye with a stone. The plaintiff alleged both intentional tort and negligence by the defendant. The court determined that while the child was legally incapable of negligence because of his age, it was a jury question whether the child had the capacity to intend to harm. *Id.* at 424. Such distinction should be kept in mind when dealing with a child under five years, since his injurious act might be alleged to be either negligent or intentional.

[44] Dallas Ry. & Term. Co. v. Bailey, 151 Tex. 359, 367, 250 S.W.2d 379, 383 (1952).

[45] HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 19 (1959).

[46] *Id.*

[47] *Id.* at § 21.

[48] Yarborough v. Berner, 467 S.W.2d 188, 191 (Tex. Sup. 1971).

[49] McDONALD, TEXAS CIVIL PRACTICE § 12.02 (Revised 1970).

[50] Ormsby v. Ratcliffe, 117 Tex. 242, 245, 1 S.W.2d 1084, 1085 (1928).

mit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues . . . ."[51] The jury makes a separate finding as to each issue submitted,[52] and the trial court then renders judgment based on these findings.[53] By contrast, in a general charge, the court outlines to the jury the principles of law applicable to the facts and relates the combination of facts which will justify a verdict. The jury is then required to apply the evidence to the law and generally find for one or more of the parties.[54] Texas courts were using special issues as early as 1876.[55] In 1913, a legislative enactment provided that courts would be bound to special issue submission upon request of either party.[56] The current rule, adopted in 1941, also provides that either party may compel the court to submit charges by special issue.[57]

When the evidence raised the issue that a plaintiff's injuries were the result of an unavoidable accident, the rule has been that the defendant was entitled to have unavoidable accident submitted by way of special issue.[58] Unavoidable accident is referred to by text writers as an inferential-rebuttal issue, i.e., it is an argumentative denial of some element of the opponent's case rather than a direct disaffirmance of liability.[59] The issue must be submitted in such a way as to cast upon the plaintiff the burden of proving that his injuries were not the result of such unavoidable accident.[60] The method of placing the burden of proof is to include the phrase, "from a preponderance of the evidence," and to place it on the plaintiff, the issue must be answered affirmatively.[61] Thus the issue was phrased, "Do you find from a preponderance of the evidence that the collision was not the result of an unavoidable accident?"[62] An affirmative answer would have been in the plaintiff's favor, as required.

The rules provide that separate instructions may be used to place the burden of proof where, in the opinion of the court, a single issue cannot be given without complicating the form.[63] Thus to place the burden on the plaintiff the issues submitted would have been in the

51 TEX. R. CIV. P. 277.
52 TEX. R. CIV. P. 277, 290.
53 TEX. R. CIV. P. 300.
54 McDONALD, TEXAS CIVIL PRACTICE § 12.39 (Revised 1970).
55 Yeary v. Smith, 45 Tex. 56, 66 (1876).
56 Tex. Laws 1913, ch. 59, § 1, at 113.
57 TEX. R. CIV. P. 277.
58 Hicks v. Brown, 136 Tex. 399, 403, 151 S.W.2d 790, 793 (1941).
59 *See* HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS §§ 15-25 (1959); McDONALD, TEXAS CIVIL PRACTICE § 12.10.2 (Revised 1970).
60 Hicks v. Brown, 136 Tex. 399, 403, 151 S.W.2d 790, 793 (1941).
61 HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 30 (1959).
62 *Id.* at § 32, corrected by 1969 Supplement.
63 TEX. R. CIV. P. 277.

form, "Was the collision the result of an unavoidable accident?", with an accompanying instruction, "If you find from a preponderance of the evidence it was not, you will answer 'no', otherwise you will answer 'yes.' "[64]

The sudden emergency doctrine was another inferential-rebuttal issue subject to special issue submission.[65] Sudden emergency has been defined as a condition arising suddenly and unexpectedly, not proximately caused by the negligence of the party invoking it and calling for immediate action on his part without time for deliberation.[66] The doctrine is not a separate basis for liability but rather operates to lower the standard of care so that conduct otherwise negligent is not so regarded. It may be invoked as a defense to either primary or contributory negligence.[67]

The principal case held that *unavoidable accident and sudden emergency will no longer be subject to special issue submission.* These issues are to be presented in suitable explanatory charges or definitions so that the jury will be aware that they may be present.[68] The court adopted this position because it felt that the present practice of the submission of these issues has caused much confusion, and has unduly complicated the special issue system.[69] The court cited *Wheeler v. Glazer,* which said the only legitimate purpose for submitting unavoidable accident is to alert the jury that they do not necessarily have to find either party to blame for the accident.[70] The *Yarborough* court felt that the only real purpose of the submission of unavoidable accident is to make sure the jury is advised of it, and that the same could be said of sudden emergency.[71] The jury can best be advised of these issues by explanatory charges and definitions.[72]

Considering the criticism that has been directed at the submission of unavoidable accident as a separate issue,[73] many authorities should welcome this holding. One of the reasons for the criticism is that confusion is created when an affirmative finding of unavoidable accident conflicts with an affirmative finding of an issue which it is intended

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64 HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 31 (1959).

65 Schroeder v. Rainbolt, 128 Tex. 269, 272, 97 S.W.2d 679, 680 (1936).

66 Goolsbee v. Texas & N.O. Ry., 150 Tex. 528, 532, 243 S.W.2d 386, 388 (1951). *See* Thode, *Imminent Peril and Emergency in Texas,* 40 TEXAS L. REV. 441 (1962) which asserts that a distinction should be made between sudden emergency and imminent peril. However, it is recognized in the article that the Texas courts no longer make any distinction.

67 *Id.* at 531, 243 S.W.2d 387.

68 Yarborough v. Berner, 467 S.W.2d 188, 193 (Tex. Sup. 1971).

69 *Id.*

70 Wheeler v. Glazer, 137 Tex. 341, 347, 153 S.W.2d 449, 452 (1941).

71 467 S.W.2d 188, 192 (1971).

72 *Id.* at 193.

73 *See* MCDONALD, TEXAS CIVIL PRACTICE § 12.22 (Revised 1970); Green, *Blindfolding the Jury,* 33 TEXAS L. REV. 273, 279 (1965); Stout, *Our Special Issue System,* 36 TEXAS L. REV. 44, 46 (1957).

to rebut. The Texas Supreme Court case of *Bradford v. Arhelger*[74] presents an extreme example. The jury had found 1) the defendant negligent and his negligence the proximate cause of the accident; 2) the plaintiff negligent and his negligence the proximate cause of the accident; and 3) the accident was unavoidable.[75] The plaintiff filed a motion for a mistrial which the trial court denied. Clearly, each answer conflicted with the others. To determine if the conflicting answers warranted a mistrial, the *Bradford* case adopted the test that each conflicting answer must be considered in light of other answers, disregarding *one* of the answers with which it conflicts. If the process would render judgments in favor of both parties or would render situations with fatally conflicting answers, then a new trial would be granted. When answer 2) was disregarded, and the answers 1) (that the defendant was negligent and his negligence the proximate cause of the accident) and 3) (that the accident was unavoidable) were considered together, fatally conflicting answers resulted. Accordingly the *Bradford* court reversed and remanded for a new trial.[76]

Juries returned conflicting answers because they did not know how to answer the issue of unavoidable accident. In *Green v. Evans*, the trial court had submitted the special issue as follows:

> Do you find from a preponderance of the evidence that the accident in question was not an unavoidable accident?
>
> You are instructed that in the event your finding in response to the above issue is in the affirmative, the form of your answer should be, "It was not an unavoidable accident," and otherwise your answer should be, "No."[77]

The jury in its deliberation sent a message that they agreed the accident was unavoidable, but that they did not like the construction of a question with a double negative. The trial judge instructed the jury that they must consider the issue as submitted.[78] The court of civil appeals upheld the trial court.[79] The jury was obviously confused in the *Green* case, and the test as prescribed in the *Bradford* case is also a source of confusion to members of the legal profession.

The confusion of sudden emergency as a special issue arose from a lack of understanding of the effect of the doctrine.[80] This confusion stemmed from such cases as *Beck v. Browning*, where the defendant by his allegedly negligent conduct caused an emergency which in turn

74 Bradford v. Arhelger, 161 Tex. 427, 340 S.W.2d 772 (1960).
75 *Id.* at 431, 340 S.W.2d at 774.
76 *Id.* at 429, 340 S.W.2d at 773.
77 Green v. Evans, 362 S.W.2d 377, 379 (Tex. Civ. App.—Dallas 1962, no writ).
78 *Id.*
79 *Id.* at 380.
80 HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 24 (1959).

caused the plaintiff's injuries.[81] In a 1951 Texas Supreme Court case, *Goolsbee v. Texas and N.O. Ry.*, the court acknowledged that the *Beck* case tended to support the view that imminent peril was a basis of liability.[82] The court, however, refused to accept this principle and held that the doctrine operated to lower the standard of care so as to excuse conduct otherwise negligent.[83] Even so, Texas courts have indicated that, in conjunction with the sudden emergency issue, a party is entitled to submission of an issue inquiring whether or not the emergency was the sole proximate cause of the accident.[84] The instant case disapproved of those cases and held "that sole proximate cause is immaterial to the function of the sudden emergency doctrine."[85] Placing the doctrine in definitions or explanatory charges rather than submitting it in a special issue will insure the alleviation of the confusion.

As a result of this case, in Texas a plaintiff child below the age of five will not be prevented from recovering for his injuries because of any alleged negligence on his part. Also, the party who injured the child will be entitled to a charge of unavoidable accident, regardless of the lack of any physical condition which might have caused the accident. Other jurisdictions have extended the age limit protection to situations where the plaintiff child has also violated a statute, and to situations where the child is charged with primary negligence. With *Gottschalk* and the instant case as a foundation, the Texas courts should hold that a child beneath the age of five will be incapable of negligence as a matter of law in *any* situation. Further, the procedural holdings that unavoidable accident and sudden emergency will no longer be submitted as special issues and that sole proximate cause is immaterial to the function of sudden emergency, should be a step forward in eliminating the confusion surrounding the special issue system in Texas.[86]

Herbert E. Dickey, Jr.

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81 Beck v. Browning, 129 Tex. 7, 101 S.W.2d 545 (1937). If the emergency is proven, then any negligence on the part of the plaintiff in trying to escape from the emergency would not prevent his recovery. Thode, *Imminent Peril and Emergency in Texas*, 40 TEXAS L. REV. 441, 443 (1962).

82 Goolsbee v. Texas & N.O. Ry., 150 Tex. 528, 531, 243 S.W.2d 386, 387 (1951).

83 *Id.*

84 Missouri Pacific R.R. v. Young, 403 S.W.2d 898, 900 (Tex. Civ. App.—Corpus Christi 1966, no writ); Stephens v. McCarter, 355 S.W.2d 93, 95 (Tex. Civ. App.—Waco 1962, no writ); City Trans. Co. v. Vatsures, 278 S.W.2d 373, 376 (Tex. Civ. App.—Waco 1955, writ dism'd). Sole proximate cause means the only proximate cause; if an event has more than one proximate cause, none can be the sole proximate cause. Goolsbee v. Texas & N.O. Ry., 150 Tex. 528, 533, 243 S.W.2d 386, 388 (1951).

85 467 S.W.2d 188, 192 (Tex. Sup. 1971). A recent court of civil appeals case by way of dicta said that neither sole proximate cause nor proximate cause should be submitted in connection with sudden emergency. Vaughn v. Glazener, 459 S.W.2d 898, 900 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).

86 A discussion of the desirability of the continued use in Texas of the special issue system is beyond the scope of this note.