Finally there was the decision in *Graham v. Baker*[29] where the plaintiff received from his employer sick leave payments before his retirement and a pension after his retirement. The High Court held that in assessing the plaintiff's damages, (1) the sick leave payments should be taken into account and (2) the pension should not be taken into account. Their Honours[30] claimed that whether the sick leave payments were wages or not depended on the terms of the contract. If the rendering of services was a condition precedent to the receipt of wages then the sick leave payments could not be 'wages' and would be disregarded in the assessment of damages. But here the contract gave full pay in certain conditions. These conditions did not require the rendering of services and the payments were wages.

National Insurance Co. of New Zealand Ltd v. Espagne and *Paff v. Speed* were accepted as good law but whether the causation test of Menzies and McTiernan JJ. or the purpose test of Dixon C.J. and Windeyer J. will be followed is open to doubt. The Courts will probably tend towards the purpose test.

R. MERKEL

CHAPMAN v. HEARSE[1]

Negligence—Duty of care—Collision between motor vehicles—Rescuer killed—Novus actus—Contribution

In September, 1958, an accident occurred on a main highway near Adelaide, South Australia. Weather conditions were bad and visibility on the road was poor, because of both the rain, and the absence of street lighting (which had failed at that particular spot). Chapman, the original defendant, was travelling along the highway when the car in front of his began to make a right turn at an intersection. Chapman, in attempting to avoid hitting this car, swerved back from its right side, and, grazing its rear left side, turned the first car over, and he himself was deposited on the road. Among the first on the scene was a Dr Cherry, who went to attend to Chapman lying on the road, whilst several other bystanders attended to injured persons in the first car. Moments later, a car driven by Hearse struck and fatally injured the doctor attending Chapman.

In consequence of this accident, an action was brought by the Executor Trustee Company, acting on behalf of the doctor's widow and children under the provisions of the South Australian Wrongs Act 1936-1956, against Hearse and Chapman. Hearse, by his statement of defence, denied that he was negligent and alleged contributory negligence on the part of the doctor. He also claimed that in the event of his being found liable, he should be entitled to contribution from Chapman to such an extent as the Court should deem just and equitable. The learned trial Judge, Napier C.J., found that Hearse was negligent in the control and management of his car, and ordered him to pay £16,584 damages. He also found Chapman,

[29] [1962] Argus L.R. 330.
[30] Dixon C.J., Kitto and Taylor JJ.
[1] (1961) 35 A.L.J.R. 170. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

the third party, liable to contribution of one fourth of the sum. An appeal to the Full Court of the South Australian Supreme Court by Chapman was dismissed and further appeal was made to the High Court. The grounds for appeal by Chapman were that no order of contribution should have been made, and, secondly, that the amount of his (Chapman's) contribution should be reduced. Hearse cross-appealed on the grounds that Chapman's contribution should be increased, and that the finding that Dr Cherry was not himself guilty of contributory negligence should be reversed. Several main issues were involved in the decision: firstly, the question of the extent of the duty of care owed to a rescuer, and secondly, the problem of causation as it affects the liability for injuries received by rescuers.

Napier C.J. discussed the factor of the 'Rescue Case' principle as it applied in the present case.[2] Before considering fundamental issues, he considered in a preliminary way the actions of Dr Cherry at the scene of the accident. The question argued was whether the deceased acted unreasonably in taking the risk that he undoubtedly took.[3] Argument had been advanced that the doctor should have taken more protective precautions before attending to Chapman.

It would seem in principle that nothing is achieved by such an argument when a rescue case arises, since it is human nature (though perhaps something of a human failing) that most persons in the deceased's position would have been more concerned with the welfare of the patient than with protecting themselves in the situation. The Court adopted such an attitude and did not attempt to question the rescuer's actions on the basis that he could have done something which might have warned oncoming cars of the accident before he attended to Chapman. Perhaps more consideration on the doctor's part might have saved his life, but as His Honour remarked, 'it is easy to be wise after the event . . .'.[4] Such sentiment was recently expressed by the Judicial Committee of the Privy Council in *The Wagon Mound*:[5]

> After the event even a fool is wise. But it is not the hindsight of a fool but the foresight of a reasonable man which can determine responsibility.

It has long been established in the law of negligence[6] that a duty of care is owed to one's neighbour when one should reasonably have him in contemplation when doing the act in question. Rescue cases are no more than a special application of the general principle by which a wrongdoer is held responsible for what the law treats as the natural and reasonable result of a wrongful act,[7] and it is perfectly reasonable that such a principle should extend to rescue cases.

In *Baker v. Hopkins*[8] it was stated that: 'Although no one owes a duty

[2] [1961] S.A.S.R. 51, 56. [3] See *Haynes v. Harwood* [1935] 1 K.B. 146.
[4] [1961] S.A.S.R. 51, 56.
[5] *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd The Wagon Mound* [1961] 2 W.L.R. 126, 140.
[6] *Donoghue v. Stevenson* [1932] A.C. 562, 580 *per* Lord Atkin.
[7] *The Oropesa* [1943] P. 32 *per* Lord Wright.
[8] [1958] 3 All E.R. 147.

to anyone else to preserve his own safety, yet if, by his own carelessness a man puts himself into a position of peril of the kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would come to his aid'.[9] Basically, the rule is now that a person who negligently creates a dangerous situation is liable to the rescuer for any injury sustained by him in aiding the person imperilled.[10]

In the present case, the Chief Justice rejected arguments that the doctor was not really a rescuer in the legal sense at all, and found that a 'rescue' situation had in fact existed.

The question arose whether it would be correct to say that the rescue principle would apply if A, as a result of his own negligence, placed himself in a situation from which he had to be rescued, since it is clear that if he had been put there by the negligence of another, then the rescuer would be able to hold the negligent person responsible for the accident. Would it not be unfair to hold that in the first case the rescuer would have no recourse against A who was negligent? As a matter of principle, there seems to be no cause for such a distinction: such view being upheld by the Court. Two authorities were cited by the defendants. The first was a Saskatchewan decision[11] to the effect that if there had been no breach of duty by the defendant to another person imperilled, then the rescuer could not recover. The second was *Cutler v. United Dairies (London) Ltd.*[12] In fact little authority existed for the Court's decision, and reliance was based for the most part on legal writings. Professor Fleming, in his *Law of Torts*[13] rejects the view that the rescuer's cause of action is based on the defendant's negligent conduct in imperilling a third person. He argues that the duty owed to the rescuer is independent and not derivative in relation to the original act of negligence, that is, the breach of duty is the negligent creation of a perilous situation which provokes the rescuer to expose himself to an undue risk, and not in the negligent conduct imperilling a third person. By such an analysis, it would be immaterial that the person attempted to be rescued and the defendant are one and the same person. Gerald Dworkin[14] in discussing the decision of Barry J. in *Baker v. Hopkins*[15] writes:

> If A negligently places B in danger and C reasonably attempts to rescue B, then C can recover. So far as C is concerned, his act may be just as reasonable and just as heroic if it is B who has placed himself in danger. . . . [T]he attitude of the courts is to examine the reasonableness of the behaviour of the rescuer rather than the act of the negligent person.[16]

[9] *Ibid.* 153. See also *Wagner v. International Railway Co.* (1921) 133 N.E. 437 *per* Cardozo J.

[10] See also Pollock, *Law of Torts* (13th ed. 1929) 428; and for a conflicting theory: Payne, 'Foresight and Remoteness of Damage in Negligence' (1962) 25 *Modern Law Review* 1.

[11] *Dupuis v. New Regina Trading Co. Ltd* [1943] 4 D.L.R. 275.

[12] [1933] 2 K.B. 297. This decision of Court of Appeal was regarded as turning its peculiar facts which did not really constitute a 'rescue' situation.

[13] (2nd ed. 1961) 168.

[14] 'Doctor to the Rescue' (1960) 23 *Modern Law Review* 103.

[15] [1958] 3 All E.R. 147.

[16] Dworkin, *op. cit.* 107.

Both the trial judge and the Full Court found that this made no difference to the principle of rescue cases, and that considerations of the duty owed to rescuers were based not on negligent conduct endangering the rescuer, but on a situation being created causing the rescuer to assume an undue risk. This type of situation tends to defeat the argument of Evatt J. in *Chester v. Waverley Corporation*[17] concerning primary and secondary duties, where he draws the distinction between a primary duty arising between A and B, a breach of which creates a negligent situation, and the secondary duty owed to a rescuer. For if a duty to a rescuer were to depend on a breach of a primary duty to someone else recovery would be precluded where the person imperils himself since it is axiomatic that a man cannot owe a legal duty to himself.[18]

It was argued before the High Court that it was not reasonably foreseeable that as a result of the accident a body would be on the road, and that someone (the fact that he was a doctor being immaterial) would be present to attend to it. This argument was rejected by the Court on the basis that it assumed as a *test* of the existence of a duty of care to the doctor, that it was based on 'the reasonable foreseeability of the precise sequence of events which led to his death'.[19] The test was rather whether consequences of the same general character as those which followed the accident were reasonably foreseeable as not unlikely to follow a collision between two vehicles in such conditions. Their Honours reformulated the test to read:

> . . . to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable. It is sufficient if it appears that injury to that class of persons of which he was one might reasonably have been foreseen as a consequence.[20]

On this basis the High Court upheld the decision that Chapman owed a duty of care to the doctor, on the ground that it was reasonably foreseeable that someone would fulfil their moral duty to come to his aid. In so holding their Honours supported the policy of the law of aiding rescuers.

From this statement, an implication can be made that the question involved is the reasonable foreseeability of the general event, and not that of a particular event. This factor has caused some controversy in previous decisions. In *The Wagon Mound*[21] opinion, the Privy Council sought to overrule a trend epitomized and consolidated by the decision of the Court of Appeal in *Re Polemis,*[22] and in the course of their opinion, quoted a statement by Lord Russell of Killowen in *Bourhill v. Young*:[23]

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contem-

[17] (1939) 62 C.L.R. 1, 38.
[18] See Fleming, *op. cit.* 168.
[19] (1961) 35 A.L.J.R. 170, 171.
[20] *Ibid.* 172.
[21] [1961] 2 W.L.R. 126; [1961] A.C. 388.
[22] [1921] 3 K.B. 560.
[23] [1943] A.C. 92, 101.

plated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, *i.e.*, to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, *i.e.*, to the question of culpability, not to compensation.

The Wagon Mound opinion denied to a large extent the double criteria, proposed by the Court of Appeal in *Re Polemis*—their Lordships being of the opinion that in the question of remoteness the test is to be the reasonable foreseeability of the general event or damage.[24] Thus the High Court, in holding in the present case that the test of duty of care is the reasonable foreseeability of the general event, would appear to adopt the principle as defined by the Privy Council.

On the question of the liability of Hearse, the Chief Justice found that he was also negligent in his driving and was liable with Chapman for the death of the doctor. In the Supreme Court, Reed J. dissented on the ground that Chapman should not have to reasonably foresee the probability of particular events that happened, and that the events were so extraordinary that no one could possibly foresee them.[25]

On behalf of Chapman it was argued that if Hearse's subsequent act was negligent then he (Chapman) was no longer liable as a *novus actus* intervened to curb his liability in the event of Hearse's act being negligent: the argument was that a 'last opportunity' rule here existed, so that if Hearse could have, by using reasonable care, avoided hitting the doctor, then Chapman would be absolved from liability. The Court rejected any argument based on this rule, and stated that it no longer had application after the South Australian Contributory Negligence Act 1945. In England the House of Lords has stated that: 'In truth there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?'[26] Before the enacting of apportioning legislation the rule had been used to mitigate the harshness of the doctrine of contributory negligence. The High Court, in rejecting Chapman's argument, examined the question of *novus actus* and set out to determine by what test they would ascertain liability. In a previous South Australian decision[27] involving a similar fact situation with a cyclist, a motor cyclist and a car, and the Court had held that the chain of causation had been broken by the 'extraneous and unwarrantable act' of the car. The only material difference in fact in the earlier case was that weather conditions were good and there was no impairment of visibility.

It would appear that this case would not be so decided after the decision

[24] See generally: Goodhart, 'Obituary: Re Polemis' (1961) 77 *Law Quarterly Review* 175; Williams, 'The Risk Principle' (1961) 77 *Law Quarterly Review* 179; Fleming, 'The Passing of Polemis' (1961) 39 *Canadian Bar Review* 439; Payne, 'Foresight and Remoteness of Damage in Negligence' (1962) 25 *Modern Law Review* 1; 'Causation in the Law' (1961) 3 *M.U.L.R.* 197.

[25] [1961] S.A.S.R. 51, 78.

[26] *Boy Andrew (Owners) v. St. Rongvald (Owners)* [1948] A.C. 140, 149 *per* Viscount Simon quoting Law Revision Committee, Cmd 6032 (1939) 16.

[27] *Kane v. Hill and Another* [1951] S.A.S.R. 162.

of *Chapman v. Hearse*. Their Honours were of the opinion that reasonable foreseeability provides the test for determining the extent of the duty of care but that it was not, however, primarily the test for ascertaining whether a defendant is liable for particular consequences of a breach of that duty. The principle of *The Wagon Mound*[28] still applied—so that it remained a question of 'causation'—though for the defendant to escape liability the *novus actus* should not have been reasonably foreseeable. The High Court stated that because the intervening act was wrongful A will still not escape liability unless a clean dividing line can be drawn to show that it was not reasonably foreseeable.[29] It is beyond doubt that once it is established that reasonable foreseeability is the criterion for measuring the extent of the liability the test must take into account all foreseeable intervening conduct to determine whether he will be liable. Surely that the intervening act was wrongful is no defence.[30]

In the present case it was reasonably foreseeable that the rescuer might himself be injured by traffic passing along the highway as the result of his attempt to aid the accident victim. In considering this case one could agree with the sentiment expressed by McDonald J. in *Nova Mink Ltd v. Trans-Canada Airlines*[31] that:

> . . . there is always a large element of judicial policy and social expediency involved in the determination of a duty-problem, however it may be obscured by use of traditional formulae.[32]

One may ask whether it is now necessary to retain the double test in determining liability in negligence claims? South Australia is the only State jurisdiction in Australia in which the civil jury has all but disappeared.[33] The distinction drawn between duty and remoteness formulae in determining liability was accentuated by a division of function between judge and jury, and there seems to be no particular reason why one comprehensive test should not now suffice in determining liability in negligence.

R. CHAMBERS

WEBB'S DEVELOPMENT PTY LTD v. CITY OF SANDRINGHAM[1]

Local Government—Plan of subdivision of flats—Vertical and horizontal divisions—Sealing of plan by council

This was an appeal by way of order *nisi* to review the decision of a Court of Petty Sessions at Sandringham, affirming the refusal of the City of Sandringham to seal certain plans of subdivision submitted to it by the appellant company, pursuant to section 569 of the Local Government Act 1958. The plans related to the proposed subdivision of a building con-

[28] [1961] 2 W.L.R. 126; [1961] A.C. 388. [29] (1961) 35 A.L.J.R. 170, 173.
[30] See *Ferroggiaro v. Bowline* (1959) 64 A.L.R. 2d 1355.
[31] [1951] 2 D.L.R. 241, 256.
[32] *Ibid.* 256. There seems some truth in the statement by Heuston that: 'the Australian courts, like those in England are quietly abandoning this featureless generality that the defendant is found to take care of a reasonable man in favour of the more helpful formulation in terms of risk': 'Law of Torts in Australia' (1959) 2 *M.U.L.R.* 35, 40. [33] See Fleming *op. cit.* 264.
[1] [1962] V.R. 63. Supreme Court of Victoria; Adam J.