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.

taining fourteen flats, so that they could be sold by the company as 'own-your-own flats'. The intention was that the building and land on which it was constructed, should be subdivided into fifteen allotments with each flat comprising one allotment, and the residual land comprising the fifteenth. The council declined to seal the plans of subdivision in pursuance of their duty under section 569 (5) (a) of the Local Government Act 1958, which provides so far as is material:

> The council shall not cause the plan to be sealed unless they are satisfied that . . . all the provisions of the Health Act 1958, or this Act or any by-law or regulation under the said Acts are complied with and that every allotment into which such land is to be subdivided, is capable of being used for a purpose permitted by any such by-law or regulation, or any planning scheme under the Town and Country Planning Act 1958.

It was the contention of the council that although all necessary formalities had been complied with, and although the building as a whole conformed to the provisions of the Uniform Building Regulations, which are regulations under the Local Government Act 1958, nevertheless when each of the proposed allotments into which the building was to be subdivided, was looked at, it did not comply with those regulations. In particular, it was said, clause 804 (b) of the Regulations had been contravened and that it required in a case where there were separate titles to each flat comprised in one building, that each flat, as distinct from the building as a whole, should comply with the site requirements therein prescribed for building of that type.

The question thus presented to the court was one which could have had grave practical consequences for subdividers of buildings who wished to sell allotments contained within buildings under an 'own-your-own flat' scheme. Clearly, if it had been held that each flat had, considered as a single allotment, to have the minimum site area at ground level required by the Regulations for flat buildings, it would be impractical to subdivide buildings on the *stratum* title basis. Possibly, the objection would be overcome under some other method of 'own-your-own flat' scheme,[2] because the building as a whole would conform to the Regulations and the objection here raised would not then arise.

The solution which Adam J. reached is, it is submitted, simple, convenient, and correct. He held that what clause 804 (b) prohibited is construction of a building otherwise than in conformity therewith, not any subdivision of buildings that have already been constructed. Thus clause 804 (b) has no relevance here and the Council was not justified in a refusal to seal the plans on this ground. His Honour raised, but did not purport to solve another problem—would clause 804 (b) prohibit the construction of a building which was to be constructed on land which had already been subdivided into *stratum* titles? The answer to this problem, it could be suggested, may be rested on the same basis as His Honour's solution to the second problem in the instant case.

[2] R. Norris, 'Why Not an Own-Your-Own Flat?' (1960) 33 *Australian Law Journal* 361.

The second substantial ground advanced by the Council in this case, was that if they were to seal the plans, the area, the frontage and depth of the allotments would fall below the minimum required under clause 804 (b), and this was prohibited by clause 803 of the Uniform Building Regulations which provides:

> When a building has been constructed on any site, the width of frontage, depth and area of such site shall not thereafter be reduced to less than the minimum width of frontage, depth and area respectively prescribed by these regulations, or by a by-law of the municipality for a building of the same class or occupancy.

His Honour, having pointed out that nowhere in the Regulations is 'site' defined, and that 'building' is defined as including a part of a building, thought that the question turned not on in whom the title was vested but, in the language of clause 804 (b) whether the site appertained exclusively to the building in question. Here, notwithstanding that the title to the residual land would be vested in the service company, there was no doubt that the site would be 'exclusively appertaining to such building'.

The remaining contention of the Council was that within the meaning of section 569 (5) (a) of the Local Government Act 1958, the Council could not be satisfied that 'every allotment site which such land is to be subdivided, is capable of being used for a purpose permitted by' such regulations. His Honour thought this argument untenable. Even if he were prepared to hold that clause 804 (b) prohibited future reconstruction of, or alterations to, the allotment, this would not establish that they could not now be used for a purpose permitted by the regulations. He was not, however, purporting to decide that clause 804 (b) would so apply.

Thus Adam J. was able to hold that the plan of subdivision should have been sealed by the Council. The decision, although not remarkable, must have caused flat builders much relief.

J. G. LARKINS

COMMISSIONER FOR RAILWAYS (N.S.W.) v. YOUNG[1]

Evidence—Best evidence rule—Application of rule to inscribed chattels —Purpose of testimony

The deceased, Young, was killed when he attempted to board a train as it moved from the Town Hall Station in Sydney. His widow accordingly framed her action alleging negligence on the part of the employees of the Commissioner for Railways.

The defendant sought to argue that the injury was caused, not by the negligence of its servants, but rather by the intoxicated state of the deceased which caused him to slip as he entered the moving vehicle. To put this case on its feet, evidence was sought to be adduced that a sample of the deceased's blood had been taken by a Dr Sheldon and on testing by Mr McDonald, the senior analyst in the Department of Public Health,

[1] (1962) 35 A.L.J.R. 416. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.