so to do".[35] It is submitted that the argument from Lord Watson's dictum would involve an incorrect view of the effect of the Judicature Acts, for it implies that because a Court of Chancery could in theory give equitable remedies at its discretion, therefore a Superior Court invested with equitable jurisdiction could *ipso facto* use its equitable discretion also in regard to common law remedies that parties were previously entitled to as of right from common law courts.[36]

In conclusion it is submitted that a satisfactory solution to this problem might have been found in a liberal interpretation of the maxim that contracts are to be construed according to the expressed or implied intention of the parties. Thus the nature of the contract and the circumstances of its inception would be scrutinised in order that the court may determine whether it was within the intention of the parties that if one party repudiates, the other should have a right to perform in addition to his remedy in damages.[37]

This is open to the obvious counter that the right to continue performance can always be expressly deleted from a contract. However, if it is true, as submitted, that the common man would not have anticipated the survival of the right to perform in cases like the present, it seems preferable that such contracts should be construed as containing an implied term to that effect, leaving the right to perform to be protected, if desired, by express provision.

35. [1962] 2 W.L.R. 17, 37.
36. This submission concerns the validity of the argument in English Law. The status of equity in the Scottish Jurisprudence provides some support for Lord Watson's dictum and in this respect Lord Hodson's refutation may be somewhat dogmatic. See Walker: *Equity in Scots Law* (1954) 66 Jur. Rev. 103.
37. *Ahmed Angullia*, which suggests that parties primarily contract for performance, is interpreted accordingly. Although contracts are primarily for performance, the express or implied intention of the parties may show otherwise.

NEGLIGENCE

Novus actus interveniens — rescuer killed by negligence of third party — apportionment of liability — contributory negligence of rescuer.

Chapman v. *Hearse*[1] is a rescue case which, because of its involved and rather unusual facts, is more interesting than most reported cases of this kind. It is unusual in that, while the rescuer had been placed in a perilous position by the negligence of the original wrongdoer, he was in fact killed by the subsequent negligence of a third party. It was necessary to decide whether this act of negligence had broken the chain of causation thereby relieving the original negligent actor from liability.

The case arose as the result of a collision which occurred on a main road near Adelaide. A car driven by one Chapman struck the rear of another vehicle, which was making a right-hand turn at an intersection, and Chapman was thrown out of his car. He was lying unconscious near the centre of the road when a Dr.

1. (1961) 106 C.L.R. 112.

Cherry, who happened to be driving past, stopped and went to his assistance. It was dark and raining at the time, and visibility was poor. Shortly afterwards, while the doctor was stooping over attending to Chapman, he was struck and killed by another car driven by Hearse. Dr. Cherry's executors brought an action against Hearse for damages under the provisions of the Wrongs Act 1936-1959, and Hearse joined Chapman as a third party and claimed contribution from him.

Napier C.J. found that both Hearse and Chapman had been negligent, but that Dr. Cherry had not been guilty of contributory negligence. His Honour ordered Chapman to contribute one quarter of the damages and costs awarded to the plaintiffs.[2] The Full Court of the Supreme Court of South Australia dismissed an appeal from this decision, and a further appeal to the High Court of Australia was also dismissed.

To determine the question of contributory negligence, Napier C.J. considered whether Dr. Cherry had acted unreasonably in assisting Chapman and thereby exposing himself to risk.[3] His Honour thought that it might have been more prudent for the deceased to have watched for and warned oncoming traffic of Chapman's presence on the road, and to have postponed the examination of the injured man until more help arrived.[4] However, His Honour found that in all the circumstances he had not acted unreasonably, and the Full Court[5] and the High Court[6] saw no reason to disturb this finding.

It appears that the questions of the extent of the duty of care owed to a rescuer and of the application to a rescuer of the doctrine of *volenti non fit injuria* are now well settled,[7] and in future rescue cases the crucial question will often be whether the rescuer was guilty of contributory negligence. It may therefore be of some interest briefly to summarize the effect of the authorities on this question in the light of the case under review. In the first place, it seems that the reasonableness or otherwise of the rescuer's conduct should be considered not in the light of after knowledge, but in all the circumstances as they reasonably appeared to him at the time of his rescue attempt.[8] Secondly, a rescuer's conduct will not be reasonable unless some person or property was in imminent danger,

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2. *Executor Trustee & Agency Co.* v. *Hearse* [1961] S.A.S.R. 51.
3. This test was applied by Maugham L.J. in *Haynes* v. *Harwood* [1935] 1 K.B. 146, 162. See also *Baker* v. *T. E. Hopkins & Son Ltd.* [1958] 1 W.L.R. 993, 1003; [1959] 1 W.L.R. 966, 976-7. In the case under review, the High Court of Australia asked itself whether, in the unusual circumstances of the case, Dr. Cherry's conduct involved any departure from the standard which reasonable care for his own safety demanded: (1961) 106 C.L.R. 112, 119.
4. The case was not as clear on its facts as *Baker* v. *T. E. Hopkins & Son Ltd.* (*supra*), where the doctor had taken a number of precautions to minimize the risk to himself.
5. [1961] S.A.S.R. 51, 74.
6. (1961) 106 C.L.R. 112, 119.
7. See *Haynes* v. *Harwood* [1935] 1 K.B. 146, 152-3, 161; *Wagner* v. *International R.R.* 232 N.Y. 176 (1921), 133 N.E. 437; *Baker* v. *T. E. Hopkins & Son Ltd.* (*supra*). In the case under review, the Courts took it for granted that the plaintiffs were not barred by the doctrine of *volenti non fit injuria.*
8. See *Executor Trustee & Agency Co.* v. *Hearse* [1961] S.A.S.R. 51, 56; *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, 38.

or the rescuer reasonably believed that this was so.[9] Thirdly, the question to be considered is whether the rescuer was guilty of contributory *negligence*, and for this purpose the fact that his actions were misguided and of no assistance to the person or property in imminent danger is immaterial.[10] The important question is whether his conduct involved any departure from the standard which reasonable care for his own safety demanded.[11] He may recover whether he acted on a sudden impulse or only after a deliberate decision.[12] It seems that a rescuer may expose himself to greater risk in cases where human life is in danger than in cases where only property is in danger.[13] Finally, the question of contributory negligence is to be considered in all the circumstances of each case, and if the rescuer has some characteristic different from that of an ordinary person, the court may, it seems, take this into account. Thus, in the case under review, Napier C.J. thought that conduct which might ordinarily have been imprudent was not unreasonable, partly because the rescuer was a doctor and had the ability to give skilled assistance to Chapman.[14]

In the High Court of Australia the dispute turned mainly on whether Chapman was "liable in respect of the same damage" at the suit of the plaintiffs as Hearse within the meaning of the Wrongs Act 1936-1956,[15] and, if so, whether Hearse was entitled to recover a contribution from Chapman.

The Court had little hesitation in deciding that Chapman was under a duty of care to the doctor. It was not necessary that the

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9. *Cutler* v. *United Dairies (London) Ltd.* [1933] 2 K.B. 297; *Haynes* v. *Harwood* [1935] 1 K.B. 146, 157; Goodhart, *Rescue and Voluntary Assumption of Risk* (1934) 5 *Cambridge L.J.* 192, 200. An example of a case where the only imminent danger was to property is *Hyett* v. *Great Western Railway Company* [1948] 1 K.B. 345.
10. *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, 38. If this fact should reasonably have been apparent to the rescuer at the time of his rescue attempt, it would, of course, be important in determining the question of *novus actus interveniens* and remoteness of damage.
11. See *Chapman* v. *Hearse* (1961) 106 C.L.R. 112, 119. If the rescuer's conduct was sufficiently rash, it seems that he would not simply be held guilty of contributory negligence, but that any injury to him would not be the result of the negligence which caused the danger: *Baker* v. *T. E. Hopkins & Son Ltd.* [1959] 1 W.L.R. 966, 977.
12. *Haynes* v. *Harwood* [1935] 1 K.B. 146, 159.
13. *Hyett* v. *Great Western Railway Company* [1948] 1 K.B. 345, 347-8. Cf. *Wardrop* v. *Santi Moving and Express Co.* 233 N.Y. 227 (1922).
14. [1961] S.A.S.R. 51, 56, 74. Cf. *Cutler* v. *United Dairies (London) Ltd.* [1933] 2 K.B. 297, 306 and *Hyett* v. *Great Western Railway Company* [1948] 1 K.B. 345, 348 where it was thought that the relationship of the rescuer to the person in danger would be a relevant circumstance. The question whether negligence and contributory negligence are to be determined by a subjective or an objective test is discussed by Fleming: *The Law of Torts* 2nd Ed. 119 and 241, and by Parsons, *Negligence and Contributory Negligence*, 1 Melbourne University Law Review 163.
15. s. 25 (1) provides: "Where damage is suffered by any person as a result of a tort (whether a crime or not)—(c) Any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

precise sequence of events leading to the doctor's death should have been reasonably foreseeable by Chapman at the time of his negligence, but in the circumstances of this case it was sufficient to ask whether "a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles on a dark wet night upon a busy highway."[16] Napier C.J. also disposed of this aspect of the case briefly, saying that rescue cases are no more than a special application of the general principle upon which a wrongdoer is held responsible for what the law treats as a natural and probable result of the wrongful act.[17] It was decided that it made no difference to a determination of the duty of care that the original wrongdoer had imperilled himself by his own negligence and that he was the person being rescued.[18]

The question whether Chapman's negligence was to be regarded as a cause of Dr. Cherry's death was more difficult. The Privy Council delivered its well known decision in *The Wagon Mound*[19] shortly before the appeal to the High Court of Australia was argued. However, the High Court made it clear that the test of "reasonable foreseeability" laid down in that case should only be applied to mark the limit beyond which a wrongdoer would not be responsible. In other words, the test is to be used to determine whether the defendant should be liable for a particular item of damage which was in fact caused by his conduct. In *Chapman* v. *Hearse*, however, the problem was to decide whether the doctor's death should be attributed to one of several "causes", and it was first necessary to decide whether Chapman's negligence was, in fact, a cause of his death. It was only when this was established that the court had to consider whether the ultimate consequence was reasonably foreseeable at the time of Chapman's original negligent act.[20]

In the course of argument, it was emphasized that Hearse's intervening act was negligent, and it was contended that on the analogy

16. (1961) 106 C.L.R. 112, 120. Cf. *Dwyer* v. *Southern* (1961) 78 W.N. (N.S.W.) 706. A similar view was expressed in *Marshall* v. *Nugent* 222 Fed. 2d. 604, 610-11 (1955). Magruder C.J. said that one should contemplate a variety of risks which are created by negligent driving, and that "in a traffic mix-up due to negligence, before the disturbed waters have become placid and normal again, the unfolding of events between the culpable act and the plaintiff's eventual injury may be bizarre indeed."
17. [1961] S.A.S.R. 59-60. Cf. *Baker* v. *T. E. Hopkins & Son Ltd.* [1959] 1 W.L.R. 966, 981. It was stated that Chapman would have owed a duty of care to his rescuer even if he had not been a medical practitioner: *Ibid.*, 72; (1961) 106 C.L.R. 112, 120; cf. *Dwyer* v. *Southern* (1961) 78 W.N. (N.S.W.) 706. In that case it was said that nervous shock cases should be disregarded in rescue cases for the purposes of determining the existence of a duty of care.
18. If the existence of a duty of care to a rescuer depended on the breach of a primary duty to someone else, as was said by Evatt J. in *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, 41, Chapman would not have been liable to his rescuer, since he was under no legal duty to himself to preserve his own safety. However, it was decided that the duty owed to a rescuer is an independent duty based on the creation of a perilous situation which provokes the rescuer to expose himself to undue risk. The authorities on this point are discussed exhaustively in the judgment of Reed J.: see [1961] S.A.S.R. 51, 60, 67-72.
19. *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*) [1961] A.C. 388.
20. (1961) 106 C.L.R. 112, 122.

of the last opportunity rule this should relieve Chapman from responsibility.[21] However, the High Court, while acknowledging that the last opportunity rule had been treated in many cases as if it had assumed the role of a test causation, pointed out that the rule only applied in cases where the plaintiff's negligence was in fact a cause of the damage. It was invoked simply to enable the plaintiff to succeed in cases where his contributory negligence would otherwise preclude him altogether from recovery. Their Honours doubted the assumption that the rule still existed where apportionment legislation was in force, and said that in any event it was clearly not a test of causation.[22] It was further decided that, quite apart from the analogy of the last opportunity rule, it was impossible on principle to exclude from the realm of reasonable foresight subsequent intervening acts merely on the ground that they are in themselves wrongful. Where a clear line could be drawn, the subsequent negligence was the only one to look to; but the Court thought that in most cases of this kind no such clear line could be drawn. Once it was established that reasonable foreseeability is the criterion for measuring the extent of liability for damage, the test must take into account all foreseeable intervening conduct, whether wrongful or otherwise.[23]

The Court then examined the facts of the case in the light of these principles, and concluded that a casualty of the kind which in fact happened was reasonably foreseeable, and so Chapman was "liable in respect of the same damage" as Hearse within the meaning of the Wrongs Act 1936-1956.[24] The High Court agreed with Napier C.J.'s view that it was Hearse who was "principally responsible" for the fatality, and did not interfere with the order for apportionment which His Honour made.[25]

In the Supreme Court, Napier C.J. and Chamberlain J. had some difficulty in reconciling their decision with the earlier case of *Kane* v. *Hill*.[26] In that case a cyclist riding in a city street at night was struck by a motor cycle and thrown on to the roadway. While attempting to rise he was run down by a motor vehicle and injured. Both drivers were held negligent, but it was decided that the motor cyclist was not liable to contribute to the damage caused by the second collision, since the chain of causation had been broken by the "ultraneous and unwarrantable" act of the driver of the utility. Their Honours might, perhaps, have been less troubled by that case

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21. In his dissenting judgment in the Supreme Court, Reed J. treated as important the fact that Hearse had a reasonable opportunity of avoiding the doctor, and was negligent in not doing so: [1961] S.A.S.R. 51, 79-83.
22. (1961) 106 C.L.R. 112, 123-4. Cf. *Fleming op. cit.* 229-239, where the various views on this question are summarized.
23. *Ibid.*, 124-125.
24. Here again it is apparently not necessary for the defendant to foresee the exact sequence of the events which occurred, or the exact nature of the damage in question. Reed J. thought that Hearse's intervening conduct was not reasonably foreseeable in the circumstances of the case: [1961] S.A.S.R. 51, 83-86.
25. Chamberlain J. considered that the determination of a just and equitable apportionment between wrongdoers involves a comparison of culpability, and moral blameworthiness could be taken into account in some cases: *ibid.*, 92-93.
26. [1951] S.A.S.R. 162.

if they could have foreseen *Teubner* v. *Humble*, which was only recently decided by the High Court of Australia.[27] There Windeyer J. stated that decisions on the facts of one case do not really aid the determination of another case. His Honour said:

> Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application that a pedestrian is always entitled or that a motorist is always obliged, to act in some particular way. That would lead to the substitution of a number of rigid and particular criteria for the essentially flexible and general concept of negligence.

This dictum should, perhaps, be kept in mind in future rescue cases which arise as the result of a road accident, and *Chapman* v. *Hearse* should be referred to simply for the propositions of law which it contains.

27. (1963) 36 A.L.J.R. 362.

CONTRACT

Parol Evidence

The business convenience[1] supporting a general rule prohibiting the introduction of parol evidence to vary the terms of a written contract has been extensively deferred over the years to the no less compelling requirements of justice in the particular case. Most of the rules now accepted as qualifying the parol evidence rule have long been recognised.[2] There are others whose operation, though no less effective, is less frequently acknowledged. The *High Trees* principle, which is not restricted to cases where the representation relied upon as modifying the promisee's rights is contained in a written document, is a notable example.[3]

There are other exceptions to the parol evidence rule which, because they derive from the substantive law of contract, are not usually found in standard texts on the law of evidence. In each of these cases a verbal representation may govern the parties' rights despite the presence of a written document purportedly dealing with those same rights. In the first place, the prior verbal representation may be understood as a promise the consideration for which is the representee accepting the written contract.[4] Here there are independent contracts, the intention being that the verbal contract will control that which is written. Secondly, the verbal representation,

1. *Pollock*, 13th ed. 199. There does not appear to be unanimity as to the true basis of the rule: *Phipson*, 9th ed. 599.
2. *Phipson*, 601-613; *Cross*, 476-495; see also 472.
3. This follows from the formulation of the doctrine by Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215 at 220, that "words or conduct" are sufficient. This formulation is adopted in 15 *Halsbury's Law of England*, 3rd ed., p. 175, para. 344.
4. Per Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, 47; *City and Westminster Properties Ltd.* v. *Mudd* [1901] 2 K.B. 215.