CASE NOTES

LETANG v. COOPER[1]

Involuntary trespass to the person—Facts also give rise to cause of action in negligence—Whether cause of action in trespass or negligence—Whether period of limitation six years or three years.

The plaintiff, whilst sunbathing on a piece of grass which was being used as a car park was injured when the defendant drove his car over her legs. Some three and a half years later, the plaintiff issued a writ claiming damages for loss and injury in alternative actions of negligence and trespass to the person. Under section 2 of the Limitation Act 1939, the limitation period for a simple tort action was six years. However, in section 2 (1) of the Law Reform (Limitation of Actions, *etc.*) Act 1954,[2] the limitation period for actions for damages for negligence, nuisance or breach of duty, was placed at three years, which would thus bar the action of the plaintiff if its basis was negligence. At first instance in the Queen's Bench Division, Elwes J.,[3] sitting alone, held that the words 'negligence, nuisance or breach of duty' did not include an action for trespass to the person, and since an action for trespass was maintainable on these facts, the plaintiff was awarded damages. From this decision the defendant appealed, and the appeal was upheld by the Court of Appeal.

As the appeal was thus centred on the distinction between trespass and negligence, it assumed great importance as a commentary on the much-discussed judgment of *Diplock* J. in *Fowler v. Lanning,*[4] and also of the more recent Victorian case, *Kruber v. Grzesiak.*[5] This is especially significant when it is remembered that Lord Denning, a radical in many respects, was a member of the Court giving this decision.

There were two main limbs in Lord Denning's judgment. Firstly, His Lordship examines the distinction between trespass and negligence, and then he considers the meaning of the words 'breach of duty' as used in section 2 (1) of the Law Reform (Limitation of Actions, *etc.*) Act 1954.

On the first subject, His Lordship not only agreed with, but extended, the opinions of Diplock J. in *Fowler v. Lanning.*[6] Referring to the traditional example of the distinction between the two actions, namely the illustration of Fortescue J. in *Reynolds v. Clarke*[7] of the careless throwing of the log on to the highway, Lord Denning says that today, whether the log hit the plaintiff, or lay there and the plaintiff fell over it, the action would be one of negligence.[8] In *Fowler v. Lanning,*[9] Diplock J. stated that 'trespass to the person does not lie if the injury to the plaintiff although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part'.[10] Lord

[1] [1964] 3 W.L.R. 573. Court of Appeal; Lord Denning M.R., Danckwerts and Diplock, L.JJ.

[2] The corresponding legislation in Victoria is section 5 (6) of the Limitation of Actions Act, 1958.

[3] *Letang v. Cooper* [1964] 2 W.L.R. 642.

[4] [1959] 2 W.L.R. 241.

[5] [1963] V.R. 621.

[6] [1959] 2 W.L.R. 241.

[7] (1795) 1 Str. 634, 635.

[8] [1964] 3 W.L.R. 573, 576.

[9] [1959] 2 W.L.R. 241.

[10] *Ibid.* 249.

Denning develops this further. He states that even if there was negligence, trespass is not available if the act was unintentional. Thus, the opinion of probably the most important jurist in England today on the difference between the actions of trespass to the person and case is that the distinction hinges solely and entirely on the presence of intention. If intention is present, 'the least touching of another'[11] becomes a trespass to the person. If intention is not present, negligence is the only action available. With this opinion, Danckwerts L.J. concurs,[12] and thus, while Diplock L.J. prefers to see negligence and trespass to the person as synonyms for the one factual situation,[13] this view must be taken to represent the correct state of English law upon the topic.

The meaning of the words 'breach of duty', for the purposes of the English Act, or for the corresponding Victorian Act,[14] is given a sweeping interpretation by all members of the Court. Lord Denning's explanation is particularly lucid. The whole basis of modern tort is the duty not to injure one's neighbour, the doctrine that began with the decision in *Donoghue v. Stevenson*,[15] and trespass to the person is a breach of that duty, and, therefore, as it is within the meaning of the Act, the three year limitation period applies and the appeal succeeds. A possible criticism of this theory could be that, as breach of duty is the whole foundation of modern tort law, there are very few, if any, actions for personal injuries that could still exist under the old 1939 Limitation Act, so that if the Legislature had intended this wide interpretation, they need only have stated that any action claiming damages for personal injuries had a three year limitation period. Another possible objection, namely that the 1954 Act is limiting rights which a person might possess at common law, is dispelled by Danchwerts L.J.,[16] who states that the words of the Statute are plain in meaning, and should be followed, while Diplock L.J., in countering the objection of unnecessary verbiage mentioned above, states that 'economy of language is not invariably the badge of parliamentary draftsmanship'.[17] Thus, the words 'breach of duty' can, after the decision in this case, be taken to include trespass to the person as well as the more obvious negligence cases.

An interesting and important side light of the judgments is the opinion of the Court of the judgment of Adam J. in *Kruber v. Grzesiak*.[18] Diplock L.J. is especially warm in his praise of the decision, referring to it as 'yet another illustration of the assistance to be obtained from the citation of relevant decisions of courts in other parts of the Commonwealth',[19] while Lord Denning mentions the 'valuable judgment' of Adam J.[20] *Kruber v. Grzesiak*,[21] a decision interpreting the Victorian Limitation of Actions Act 1958, is authority in this state for the proposition that a

11 (1704) 6 Mod. 149. *per* Holt C.J.
12 [1964] 3 W.L.R. 573, 580.
13 *Ibid.* 581.
14 Limitation of Actions Act, 1958. See *supra* n.2.
15 [1932] A.C. 562.
16 [1964] 3 W.L.R. 573, 579.
17 *Ibid.* 584. It is interesting to note that Adam J., in *Kruber v. Grzesiak*, found the discarding of particular terms by the Victorian Legislature an argument to arrive at a similar conclusion.
18 [1963] V.R. 621.
19 [1964] 3 W.L.R. 573, 582.
20 *Ibid.* 579.
21 [1963] V.R. 621.

factual situation which is a trespass to the person can be described as giving rise to an action in negligence for the purposes of the Act. After this warm approval from such eminent English jurists, it would seem that the old distinction between trespass and case has vanished from Victorian Law.

The state of the law in England after *Letang v. Cooper*[22] would seem to be as follows. An intentional direct wrong to the person of another gives rise to an action in assault and battery, or trespass to the person. An unintentional wrong, whether direct or indirect, gives rise to an action in negligence. In England, both of these actions are subject to a three year limitation period, and for the purposes of either the English or the Victorian Act on this point, both can be described as 'breach of duty'. Whether this analysis applies entirely to Victoria is doubtful. While he may blur the old distinction between trespass and negligence, Adam J. in *Kruber v. Grzesiak*[23] propounded the newer principles which Lord Denning laid down in the later case, *Letang v. Cooper*,[24] dividing the two actions on the sole ground of intention. After *Letang v. Cooper*,[25] we can certainly say that negligence is a synonym for trespass to the person in cases of direct unintentional wrong, and is subject to a three year limitation period. We can also say that it is quite probable that the persuasive authority of the decision of the Court of Appeal in *Letang v. Cooper*[26] could well be made binding in future decisions of Victorian courts.

J. R. BOWMAN

THE QUEEN v. TERRY[1]

Criminal law—Murder or manslaughter—Provocation—Acts done by deceased to third party—Whether third person has to be a relative.

Recently two Victorian cases have thrown some light on two interesting and unresolved problems concerning the defence of provocation.

In the case of *The Queen v. Terry*[2] the problem which arose was whether the law would recognize as sufficient provocation, provocation offered not by the deceased to the accused but by the deceased to a third person. It was held that the acts of the deceased, directed against the sister of the accused, constituted sufficient provocation to reduce the charge of murder to manslaughter, providing that all the other elements of provocation were present.

The Court took the step of following a Canadian case, *The King v. Mouers*,[3] which held that the acts of the deceased in beating a young girl constituted sufficient provocation to the accused who had seen these acts taking place. The decision is also justified by the case of *Regina v. Fisher*[4] in which the jury was directed that a father seeing a person committing an unnatural offence with his son might be justified in killing that person,

22 [1964] 3 W.L.R. 573.
23 [1963] V.R. 621.
24 [1964] 3 W.L.R. 573.
25 *Ibid.*
26 *Ibid.*
1 [1964] V.R. 248. Supreme Court of Victoria: Pape, J.
2 *Ibid.*
3 (1921) 57 D.L.R. 569.
4 (1837) 8 C. & P. 182; 173 E.R. 452.