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.

and by the case of *Regina v. Harrington*.[5] The decision is also in agreement with the opinions expressed by Kenny[6] and other writers.

There were, however, certain decisions which seem in conflict with the decision in *The Queen v. Terry*.[7] In *Rex v. Duffy*,[8] Lord Goddard, quoting the direction of Devlin J. to the jury, said: 'Provocation is some act or series of acts . . . done by the dead man to the accused.'[9] Although these words might seem to exclude a situation such as that in *The Queen v. Terry*,[10] it is obvious that Lord Goddard was not really directing his mind to such a situation but was merely applying the words to cover the situation before him, in which the provocation was actually given by the deceased to his wife.

In the Victorian case of *The King v. Scriva (No. 2)*[11] the matter was briefly discussed but no conclusion was arrived at.

The decision in *The Queen v. Terry*[12] appears to be a good one. Pape J. leaves open for inquiry the question whether there may be provocation where the third person to whom the acts are done, is someone other than a relative. In the case of *The Queen v. Terry*,[13] of course, the acts were directed against the sister of the accused. This query throws into relief a criticism which can be made, not in relation to the decision itself, but as to the mode of reasoning which was employed to reach it. If the facts of the case, and cases similar to it, are looked at in a broader light, it can be seen that though the acts constituting provocation may in themselves be offered to a third person, when examined in the context of all the relevant circumstances, they may constitute provocation to any reasonable man.

If this formulation were used it would be unnecessary to inquire as to whom the acts were actually done. The only question required to be answered would be the usual one: would a reasonable man seeing these acts (no matter to whom they are done) be so provoked. This approach would resolve the question as to whether the third person to whom the acts of provocation are done need necessarily be a relative of the accused.

M. FORSTER

THE QUEEN v. FALLA[1]

Wounding with intent to murder—Provocation as a defence—Self-defence —Use of excessive force in wounding with intent to murder.

The case of *The Queen v. Falla*[2] deals with another question arising from the defence of provocation. The problem which arises is whether provocation is available as a defence only to the charge of murder, to reduce it to manslaughter or whether it is available as a defence to charges of lesser crimes, such as wounding with intent to kill. The attitude taken in the earlier case of *The Queen v. Cunningham*,[3] in which the accused ap-

5 (1866) 10 Cox. C.C. 370.
6 *Kenny's Outlines of Criminal Law* (18th ed. 1962) 172.
7 [1964] V.R. 248. 8 [1949] 1 All E.R. 932.
9 *Ibid.* 932. 10 [1964] V.R. 248.
11 [1951] V.L.R. 298; [1951] A.L.R. 733.
12 [1964] V.R. 248. 13 *Ibid.*
1 [1964] V.R. 78 Supreme Court of Victoria: Pape, J. 2 *Ibid.*
3 [1959] 1 Q.B. 288; [1958] 3 All E.R. 711.