COMMENTS
COMMENTAIRES

SIGNIFICANT DEVELOPMENTS IN THE LAW OF OCCUPIERS' LIABILITY—THE FATE IN CANADA OF *London Graving Dock Co. Ltd.* v. *Horton*.—The storm raised in England[1] by the decision of the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton*[2] has now subsided. The main holding of that case—that where an invitee is injured by a dangerous condition of the land he visits at a time when he was aware of the danger, the occupier's duty of care toward him is discharged—was restricted by *Smith* v. *Austin Lifts Ltd.*;[3] and it has become a dead letter in the United Kingdom since the Occupiers' Liability Act, 1957[4] came into operation. Since none of the common-law provinces of Canada has passed similar legislation, it is of some importance to ascertain whether the majority holding in the *Horton* case will be followed in this country. This question seems particularly topical because of the surprisingly large number of recent Canadian judicial decisions in which it has arisen.

Actually, the *Horton* case stands for two main propositions of law, and it is advisable to consider each of them separately. I shall refer to them respectively as Rule 1 and Rule 2 of the *Horton* case.

Rule 1. Since Willes J. rendered his famous judgment in *Indermaur* v. *Dames*,[5] one of the prerequisites for finding that a duty of care is owed by an occupier to an invitee has been the existence of "unusual danger" upon the premises. Although the five law lords who heard the *Horton* appeal were divided on the second, and

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[1] See the materials cited in Fleming, Torts (2nd ed., 1961), p. 414, note 32.

[2] [1951] A.C. 737, [1951] 2 All E.R. 1 (H.L.).

[3] [1959] 1 All E.R. 81, [1959] 1 W.L.R. 100 (H.L.). Here it was held that knowledge of danger on the invitee's part does not suffice to vitiate a claim he otherwise would have against the occupier unless this knowledge amounts to a full appreciation of the danger.

[4] 5 & 6 Eliz. II, c. 31, s. 2(4)(a): "Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

[5] (1866), L.R. 1 C.P. 274.

principal, issue in that case, they all agreed that whether or not a danger is "unusual" is to be determined in an "objective" sense. In other words, the danger is considered from the viewpoint of a reasonable person in the position of the occupier, having regard to the knowledge, if any, that he has or ought to have of (a) the capacity of the particular invitee to learn of and avoid the danger or (b) failing knowledge of the particular invitee, the like capacity of the class of persons of whom the invitee is one. This holding seems consistent with the broad principle of negligence law that no duty of care is to be imposed upon a defendant unless he knew or ought to have known of an unreasonable risk of harm to the plaintiff or to the class of persons of whom the plaintiff is one.[6]

Rule 2. Thus, the fact that the invitee knows of the danger does not prevent it, according to the House of Lords, from being "unusual". Nevertheless, by a three-two majority, the House of Lords also held that the invitee's knowledge of the danger—whether or not attributable to a warning given by the occupier—immediately discharges the invitor's duty of care. Here the injured plaintiff was a welder who was required by his contract of employment with a third party to work on a ship occupied by the defendant in conditions both the plaintiff and the defendant knew to be dangerous. Yet the majority held in effect that it did not matter that there was economic compulsion for the invitee to remain in the area of danger and that the occupier had a direct material interest in the invitee's continued presence, so long as there was no contractual relationship between occupier and invitee. In the words of Lord Porter,[7] ". . . a full appreciation of the danger on the part of the invitee and a continuance of his work with that knowledge is sufficient to free the invitor from liability for damage occasioned by the insecurity of the premises to which resort is made". This majority decision attracted uniformly unfavourable comment, since (1) it was not dictated by prior precedent; (2) it revived the privity-of-contract fallacy that had apparently been banished from negligence law by *Donoghue* v. *Stevenson*;[8] (3) it revived the discredited doctrine that equated *scienti non fit injuria* and *volenti non fit injuria*;[9] (4) it

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[6] I have considered this question at greater length in Some Trends in the Law of Occupiers' Liability (1963), 41 Can. Bar Rev. 401, at pp. 429-434.

[7] *Supra*, footnote 2, at pp. 749 (A.C.), 7 (All E.R.).

[8] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.). For further inroads on the citadel of privity of contract see *Hedley, Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1963] 2 All E.R. 575, [1963] 3 W.L.R. 101 (H.L.).

[9] "If the invitee sciens is not necessarily volens as well, then, as I see it, the whole virtue of giving him notice of the danger, the whole relevance of knowledge on his part, must lie in his being in a position to keep clear

circumvented modern principles of loss distribution by precluding apportionment of damages under contributory negligence legislation; (5) it ignored the social consequences of economic compulsion of the plaintiff to continue to work in the area of danger, to the material advantage of the occupier, without legal redress against the occupier even where the danger is easily removable; (6) it misinterpreted the significance of Willes J.'s language in *Indermaur* v. *Dames*[10] and of the Judicial Committee's judgment in *Létang* v. *Ottawa Electric Ry. Co.*;[11] (7) it created a needless difference between the law of occupiers' liability and the rest of negligence law, where the plaintiff's knowledge of danger is only one factor to be taken into account in determining whether the risk to him is sufficiently unreasonable to justify imposing upon the defendant a duty of reasonable care toward him.[12] It proved comparatively easy in England to alter by statute a common-law rule that was generally deplored; it would be much more difficult to do so in any uniform way in the nine common-law provinces of Canada. In any event, a more flexible and satisfactory solution can probably be reached by judicial initiative than by superimposing upon the common law the rigidity of a legislative formula.[13] Nevertheless, several Canadian courts have recently applied Rule 2 of the *Horton* case with little or no consideration of whether an alternative approach was possible or desirable. First, however, let us consider what Canadian courts have done with Rule 1.

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of the danger once he knows of it." Lord MacDermott, dissenting in the *Horton* case, *supra*, footnote 2, at pp. 763 (A.C.), 15 (All E.R.).

[10] *Supra*, footnote 5. Willes J. refers to "notice" as one of the possible ways in which the occupier may discharge his duty of care to prevent damage to an invitee from unusual danger. He is not suggesting (indeed, the context indicates otherwise) that giving notice is in all cases *per se* the exercise of reasonable care. It is clear to any intelligent layman that an occupier is not exercising reasonable care for the safety of a business visitor by merely ensuring that the visitor has knowledge of a particular danger where the visitor, because of circumstances in which the occupier has a material interest, is unable, as a practical matter, to use that knowledge to protect himself from the danger.

[11] [1926] A.C. 725, [1926] 3 W.W.R. 88, [1926] 3 D.L.R. 457 (P.C.), rev'ing [1924] S.C.R. 470, [1924] 4 D.L.R. 89. I shall return to this case presently.

[12] Once a duty has been found, the plaintiff's knowledge of danger is, of course, relevant in determining whether there has been voluntary assumption of risk or contributory negligence.

My criticism of Rule 2 of the *Horton* case in *loc. cit.*, footnote 6, at pp. 437-38 and elsewhere, has been described as "a somewhat shrill attack" by Brown J. in *Dankoski* v. *Orre* (1963), 43 D.L.R. (2d) 747, at p. 753 (B.C. S.C.). Despite the surprising adjective, I retract nothing.

[13] See Wright, The Adequacy of the Law of Torts (1961), 6 J.S.P.T.L. 11, at pp. 13-14, [1961] Cam. L.J. 44, at pp. 47-48, quoted in *loc. cit.*, footnote 6, at p. 428. See also Wright, Cases on the Law of Torts (2nd ed., 1958), p. 549, (3rd ed., 1963), pp. 634-635.

The decision of Coffin J. in *Fiddes* v. *Rayner Construction Ltd.*[14] has been unanimously reversed by four judges in the Nova Scotia Court of Appeal.[15] The trial judge appeared to hold that since the plaintiff invitee was aware of the danger of falling rock in a quarry it was not "unusual" as far as he was concerned. Ilsley C.J. (MacQuarrie J. concurring) found that this amounted to treating "unusualness" of danger as a "subjective" rather than an "objective" question. Giving effect to Rule 1 of the *Horton* case, Ilsley C.J. held that the danger in the circumstances *was* unusual and that the defendant occupier was liable for the plaintiff's injuries. In a separate opinion the late MacDonald J. (Currie J. concurring) agreed with the result but expressly refrained from adopting Rule 1 of the *Horton* case: in his view of the facts it did not matter whether the test of "unusualness" was "objective" or "subjective".

The question thus left open by the Nova Scotia court seems now to have been settled by the Supreme Court of Canada in *Campbell* v. *Royal Bank of Canada.*[16] The plaintiff, a customer of the defendant bank, was injured on a winter day when she slipped on the floor of the bank premises, which had become slippery because of snow tracked into the bank by other customers. She admitted that she had noticed water on the floor and had tried to walk with care. The majority of the Manitoba Court of Appeal, in finding for the defendant, had held that "both from the subjective and the objective viewpoints"[17] there was no unusual danger. By a three-two majority the Supreme Court of Canada allowed the plaintiff's appeal. The majority adopted the "objective" test set forth in the *Horton* case and held that the plaintiff invitee's knowledge of the presence of water on the floor did not prevent the danger of slipping on the wet floor from being "unusual". Rule 1 of the *Horton* case thus seems now to be part of the established common law in Canada.

As already mentioned, Rule 2 of the *Horton* case has been followed quite mechanically in a number of recent Canadian decisions. In *Such* v. *Dominion Stores Ltd.*[18] the Ontario Court of Appeal held that where a customer of a supermarket walking to his car in the store parking lot knew of the danger of slipping on

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[14] (1962), 35 D.L.R. (2d) 63 (N.S.S C.).

[15] (1963), 49 M.P.R. 171 (N.S.C.A.).

[16] (1963), 46 W.W.R. 79, 43 D.L.R. (2d) 341 (S.C.C.). This judgment reversed a 3-2 decision of the Manitoba Court of Appeal in favour of the defendant — (1963), 41 W.W.R. 91, 37 D.L.R. (2d) 725.

[17] Per Guy J.A. (Miller C.J.M. and Schultz J.A. concurring), *ibid.*, at pp. 102 (W.W.R.), 735 (D.L.R.).

[18] [1963] O.R. 405, 37 D.L.R. (2d) 311 (C.A.).

snow and ice that the occupier had neglected to remove, the occupier's duty of care was discharged. Schroeder J.A., following Lord Normand in the *Horton* case, purported to distinguish the Judicial Committee's decision in *Létang* v. *Ottawa Electric Ry Co.*,[19] which had held that an invitee who knew of the danger of slipping on icy steps and had no reasonable alternative route could not be held to have voluntarily incurred the risk of injury from using the steps and could recover from the occupier when she slipped and was injured on them. The suggested basis for distinction is that the defendant's argument before the Judicial Committee assumed that mere knowledge of the danger by the invitee was not enough and that the occupier had to show that there had been voluntary assumption of risk by the invitee; consequently, it is said, the Judicial Committee did not consider whether the defendant was entitled to succeed simply on the basis of the plaintiff's knowledge of the danger.[20] The fallacy of this reasoning appears from the very judgment in the *Such* case: the Judicial Committee in *Létang* was reversing a decision of the Supreme Court of Canada,[21] which had held (as is shown in a quotation from that judgment in the *Such* case[22]) that in invitee cases "the true maxim seems to be *scienti non fit injuria*"—in other words, the plaintiff's claim had been dismissed on the basis of what subsequently became Rule 2 of the *Horton* case; in reversing this judgment the Judicial Committee must have been aware of this view of the law and rejected it.[23] Essentially the same approach as in the *Such* case has been taken in *Holman* v. *Ellsmar Apartments Ltd.*;[24] *Dankoski* v. *Orre*;[25] *Sanders* v. *Shauer*;[26] and the majority judgment of the Manitoba

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[19] *Supra*, footnote 11.

[20] See the *Horton* case, *supra* footnote 2, at pp. 755-756 (A.C.), 11 (All E.R.); *Such* v. *Dominion Stores Ltd.*, *supra* footnote 18, at pp. 314-316 (D.L.R.).

[21] *Supra*, footnote 11.

[22] *Supra*, footnote 18, at p. 315 (D.L.R.).

[23] In *loc. cit.*, footnote 6, at p. 438, I criticized the *Such* decision on the ground that "the legitimate interests of a business visitor whose presence is of commercial advantage to the occupier and who cannot, by reasonable care, protect himself against a danger that can easily be removed by the occupier deserve to be given greater weight in the scales of justice".

[24] (1963), 40 D.L.R. (2d) 657 (B.C. S.C.). The judgment is misleading in suggesting, at p. 664, that Rule 2 of the *Horton* case was approved by the Supreme Court of Canada in *Hillman* v. *MacIntosh*, [1959] S.C.R. 384, at p. 391, 17 D.L.R. (2d) 705, at p. 711: Martland J. referred to the *Horton* decision without expressing his approval or disapproval, and it was not in issue in that case. Similarly the reference to the *Horton* case in *Trans-Canada Forest Products Ltd.* v. *Heaps*, [1954] S.C.R. 240, [1954] 2 D.L.R. 545, cited in the *Holman* case at p. 665, is purely dictum.

[25] *Supra*, footnote 12.

[26] (1964), 43 D.L.R. (2d) 685 (B.C. S.C.).

Court of Appeal in *Campbell* v. *Royal Bank of Canada*,[27] where Lord Porter's formulation of Rule 2[28] is quoted with apparent approval.

In my view, the decision of the Supreme Court of Canada in *Campbell* v. *Royal Bank of Canada*[29] must be taken as implicitly rejecting Rule 2 of the *Horton* case, even though that decision was not referred to by name in this context. It is true the Supreme Court upheld the trial judge's finding of fact (which the majority of the Manitoba Court of Appeal had rejected) that the plaintiff did not have a *full* knowledge of the dangerous condition of the part of the bank floor on which she slipped, so that technically the *Horton* case was distinguishable.[30] Nevertheless, the majority judgment (delivered by Spence J.) proceeds as follows:[31]

> I am of the opinion that under the circumstances, the finding of the learned trial Judge should be accepted. Certainly, the defendant has failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered. See *Létang* v. *Ottawa Elec. R. Co.*....

Spence J. then quoted established authorities on the defence of *volenti non fit injuria* and found that, on the facts of the case, this defence had not been established. Surely the allegation of inadvertence made against the Judicial Committee in *Létang* cannot also be made against the Supreme Court of Canada in *Campbell*, which was reversing a judgment that had relied on and quoted from the *Horton* case[32] and must have preferred to treat *Létang* as properly expressing the common law of Canada on the legal effect of the invitee's knowledge of danger. It may be debated whether this rejection of Rule 2 of the *Horton* case is part of the holding of *Campbell*; but I would submit that it is an *alternative* holding of the majority judgment, which is saying: (1) the plaintiff did not have a full knowledge of the danger; (2) whether or not this finding of fact is correct, she clearly did not have full knowledge of the danger in circumstances leading to the inference that she had voluntarily assumed the risk—and the defendant must prove all this before the plaintiff's knowledge of danger discharges the defendant's duty of care.

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[27] *Supra*, footnote 16, at pp. 122 (W.W.R.), 749 (D.L.R.).
[28] See text accompanying footnote 7 *supra*.
[29] *Supra*, footnote 16.
[30] This would be in accord with the reasoning in *Smith* v. *Austin Lifts Ltd.*, *supra*, footnote 3.
[31] *Supra*, footnote 16, at p. 353 (D.L.R.).
[32] In the Supreme Court the majority judgment itself refers to the *Horton* case] in approving Rule 1 of that case—*ibid.*, at pp. 347-348 (D.L.R.).

After much uncertainty, reflected in even very recent decisions, the fate in Canada of both rules of the *Horton* case seems to have been clarified by the Supreme Court in *Campbell* v. *Royal Bank of Canada*: Rule 1 has been expressly approved, while Rule 2 has been implicitly rejected.[33] In each instance the Supreme Court has broken down further the artificial dividing lines that grew up for purely historical reasons between the law of occupiers' liability and the mainstream of negligence law: these dividing lines could not be justified in the mid-twentieth century on grounds of either principle or social policy. It is becoming increasingly apparent that the existence of a duty of care owed by an occupier to an invitee for defects in the premises is to be determined by applying the general principles of negligence law.

Because of their context, the significance of these developments might easily escape the attention of the Canadian bench and bar.

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Non est factum—MISTAKE AS TO NATURE AND CONTENTS OF A DOCUMENT.—In *Longley* v. *Barbrick*[1] the defendant mortgaged her property for $5,000.00, the mortgage containing a collateral agreement which stated that the actual sum advanced to the mortgagor was $2,500.00 and that the difference between the $5,000.00 and the $2,500.00 was being given by the mortgagor to the mortgagee as a bonus in consideration of the mortgagee granting the loan. The mortgagee subsequently assigned the mortgage to the plaintiff. The defendant stated in evidence, and the judge accepted her evidence, that she was unaware of the collateral agreement and thought that she was signing a mortgage for $2,500.00 only. On these facts Coffin J. held that the mortgage was void under the plea of *non est factum* because the defendant was so misled as to the contents of the document that her "mind did not go with her signature". It is submitted with respect that this decision was wrong, and that the learned judge failed to appreciate the importance of the distinction between mistake as to the nature and mis-

[33] Rule 2 has also been rejected in Ireland: *Long* v. *Saorstat & Continental Steamship Co. Ltd.* (1953), 93 Ir. L.T. 137, noted in (1956), 72 L.Q. Rev. 34.

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[1] (1962), 36 D.L.R. (2d) 672 (N.S.).

take as to the contents of a document in establishing a plea of *non est factum.*

The case most often cited in support of the proposition that if a person signs a document under a mistake as to the nature of the document, for instance if he signs a guarantee of an overdraft when he thinks he is witnessing a will, he may plead *non est factum,* but that if he signs a document under a mistake as to the contents of the document, for instance if he signs a guarantee for $2,000.00 when he thinks he is signing a guarantee for $1,000.00, he may not plead *non est factum,* is *Howatson* v. *Webb.*[2] However there is earlier authority for this proposition in the decision of the Court of Appeal in *National Provincial Bank* v. *Jackson.*[3] In that case a solicitor persuaded his sisters to sign documents conveying their freehold property to him by representing to them that it was necessary for them to sign the documents in order to clear off an existing mortgage on the property. The Court of Appeal held that the sisters could not plead *non est factum,* as their mistake was as to the contents and not the nature of the documents which they had signed. Cotton L.J. said:[4]

> Now the rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void. But I cannot come to that conclusion here. The defendants trusted Jackson both as their brother and solicitor, and cannot be said to have been guilty of negligence in so doing. On the evidence it is clear that nothing was said to mislead them as to the nature of the instrument they were executing. It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses. This contention therefore fails.

Lindley L.J. was of the opinion that:[5]

> It is impossible, consistently with legal principles, to hold the conveyances executed by the sisters absolutely void. They knew that they related to their houses although they did not understand their effect.

Lopes L.J. stated:[6]

> Were their conveyances void in law? That depends on the evidence, from which it appears that they knew they were executing deeds of some kind or other. They clearly did not know the effect of them, but

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[2] [1907] 1 Ch. 537; [1908] 1 Ch. 1.
[3] (1886), 33 Ch. D. 1.
[4] *Ibid.*, at p. 10.
[5] *Ibid.*, at p. 13.
[6] *Ibid.*, at p. 14.

as to this they placed reliance on their brother. It follows, in my opinion, that the conveyances were voidable only.

This decision was followed in *Howatson* v. *Webb*.[7] In that case the defendant signed a mortgage thinking that he was signing a conveyance. Warrington J. held that he could not plead *non est factum* as his mistake was as to the contents of the deed which he had signed and not as to its nature. In the course of his judgment Warrington J. said:[8]

> He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents. The deed contained a covenant to pay. Under those circumstances I cannot say that the deed is absolutely void.

The decision of Warrington J. was upheld by the Court of Appeal, and Farwell L.J. stated:[9]

> If a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of *non est factum*, to shew that a misrepresentation was made to him as to the contents of the deed.

These earlier authorities have been followed in later English cases. In *Blay* v. *Pollard and Morris*[10] the two defendants, who had been partners as garage proprietors, agreed orally to dissolve the partnership on the terms that Morris should take over all liabilities of the firm incurred after the dissolution. A written agreement was drawn up by Pollard's father, who was a solicitor, dissolving the partnership; under the terms of this agreement Morris was liable to indemnify Pollard for arrears of rent incurred before the date of dissolution. Morris signed the agreement thinking that it contained the terms of the prior oral agreement, and not realizing that he was liable under the written agreement to indemnify Pollard for arrears of rent due before the date of dissolution. The Court of Appeal cited *Howatson* v. *Webb* with approval and held that Morris could not plead *non est factum* as his mistake was as to the contents and not as to the nature of the document he signed; he knew that the document he was signing was an agreement dissolving the partnership, he was mistaken merely as to its terms. Recently, in *Muskham Finance Ltd.* v. *Howard*,[11] the Court of

[7] *Supra*, footnote 2.
[8] [1907] 1 Ch. 537, at p. 549.
[9] [1908] 1 Ch. 1, at p. 3.
[10] [1930] 1 K.B. 628.
[11] [1963] 1 All. E.R. 81.

Appeal reiterated the rule that mistake as to the contents of a document, as opposed to mistake as to its very nature, is not sufficient to uphold a plea of *non est factum*. Donovan L.J., delivering the judgment of the Court of Appeal (Ormerod, Donovan and Pearson L.JJ.), said:[12]

> The plea of *non est factum* is a plea which must necessarily be kept within narrow limits. Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed. Furthermore, although the expression is a convenient paraphrase of the plea, *it is not enough to assert that "the mind did not go with the pen"*. . . . What has to be established, if the plea of *non est factum* is to succeed, is that the misrepresentation which caused the signature was a misrepresentation of the character and class of the document in question, and not a misrepresentation simply as to its contents.

On the English authorities, therefore, it is clear that *Longley* v. *Barbrick*[13] was wrongly decided.

Coffin J. in his judgment relied on the decision of the Supreme Court of Canada in *Prudential Trust Co.* v. *Cugnet*.[14] Professor O. E. Lang, in a comment on this case,[15] attacked the proposition that a mistake as to the nature of the document will support a plea of *non est factum*, whereas a mistake as to its contents will not, and said of *Howatson* v. *Webb:*

> In the course of holding *non est factum* inapplicable, Warrington J. did say about the defendant: "He knew he was dealing with the class of deed with which he was dealing, but did not ascertain its contents." It is submitted that it is most unfortunate to take this remark by the trial judge and make it a legal distinction.[16]

Unfortunate or not, this is precisely what the courts have done; at any rate in England. What, then, of the Canadian authorities?

At first sight *Prudential Trust Co.* v. *Cugnet*[17] might appear to support the judgment of Coffin J. and Professor Lang's contention, but on closer inspection it is submitted that it does no such thing.

In *Prudential Trust Co.* v. *Cugnet* the respondent had executed a transfer of his mineral interests, believing that the document was only an option of his mineral interests. The Supreme Court of Canada (Taschereau, Locke, Fauteux and Nolan JJ., Cartwright J. dissenting) held that the respondent could plead *non est factum.* Cartwright J., in his dissenting judgment, cited *Howatson* v. *Webb*

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[12] *Ibid.*, at p. 83. Italics mine.
[13] *Supra*, footnote 1.
[14] (1956), 5 D.L.R. (2d) 1 (S.C.C.).
[15] (1957), 35 Can. Bar Rev. 566.
[16] *Ibid.*, at p. 567.
[17] *Supra*, footnote 14.

and was of opinion that the respondent could not plead *non est factum* as his mistake was as to the contents of the document which he had signed and not as to its very nature. A study of the majority judgments, however, will show that they were not overruling *Howatson* v. *Webb*, but merely distinguishing the facts in that case from those in the case before them. Nolan J., in a judgment with which Taschereau and Fauteux JJ. concurred, said:[18]

> In my view, while the respondent Edmond Cugnet knew that he was dealing with his petroleum and natural gas rights, the representation made to him was as to the *nature and character of the document and not merely as to its contents.*

The Supreme Court itself indicated that *Prudential Trust Co.* v. *Cugnet* did not attack the proposition that mistake as to the nature of a document will support a plea of *non est factum* whereas mistake as to contents will not, in the latter case of *Prudential Trust Co.* v. *Forseth.*[19] In that case Martland J., delivering the judgment of the Court (Cartwright, Fauteux, Martland, Judson and Ritchie JJ.), stated:[20]

> Counsel were unable to refer us to any case in which a plea of *non est factum* had been upheld where a literate person executed a document after having read it through, or after having heard its contents completely read. The fact that some of the terms may be difficult to comprehend, a matter which weighed heavily in the Court of Appeal, does not serve to establish such a plea. This goes only to the issue of a misconception as to the contents of the document and not as to its nature and character. A literate person who signs a document after reading it through or hearing it fully read, must, I think, be presumed to know the nature of the document which he is signing. This proposition does not conflict in any way with the judgment of this Court in *Prudential Trust Co.* v. *Cugnet.*

The question of *non est factum* was again considered by the British Columbia Court of Appeal in *Stearns* v. *Ratel.*[21] In that case the plaintiff, who had been injured in a motor car accident, had signed a "final release" in respect of all claims arising out of the accident. He thought that the release which he was signing applied only to claims for damage to his car and did not realize that it applied also to his claims for personal injuries. The Court of Appeal held by a majority (DesBrisay C.J.B.C. and Tysoe J.A., Davey J.A. dissenting) that the plaintiff could plead *non est factum.* Both DesBrisay C.J.B.C. and Tysoe J.A. made it clear in their judgments

[18] *Ibid.*, at p. 20. Italics mine.
[19] (1959), 21 D.L.R. (2d) 587 (S.C.C.).
[20] *Ibid.*, at p. 597.
[21] (1961), 29 D.L.R. (2d.) 718 (B.C.C.A.).

that the plaintiff succeeded because his mistake was as to the very nature of the document which he had signed, and not merely as to its contents.

DesBrisay C.J.B.C. said:[22]

> In the present case while the respondent knew that he was giving a release the representation made to him was not merely as to its contents but that it was a release in respect of repairs and nothing more.

Tysoe J.A. also said:[23]

> This is not a case of a man being misled as to the purport and effect of the contents of a document but as to its nature and character.

If the Supreme Court in *Prudential Trust Co.* v. *Cugnet*[24] had meant to overrule *Howatson* v. *Webb*, and it is submitted that they did not, they would have been running counter to previous authority not only in England but in Canada, and also in Australia and New Zealand. In *Bank of Nova Scotia* v. *Canadian Road Equipment Ltd. and Large*,[25] the defendant signed a guarantee of the indebtedness of the company of which he was a director without reading the document. It was held that his plea of *non est factum* failed as he was aware of the nature of the document he was signing, and was ignorant only of its contents. In *Rayfuse* v. *Mugleston*[26] the British Columbia Court of Appeal upheld the proposition that mistake as to the contents of a document, as opposed to its very nature, will not support a plea of *non est factum*, and cited *Howatson* v. *Webb* and *Blay* v. *Pollard and Morris* with approval. And in *Summer* v. *Sapkos*[27] the same proposition was upheld by the Saskatchewan Court of Appeal, and Procter J.A., delivering the judgment of the court (Martin C.J.C., Gordon, Procter, McNiven and Culliton JJ.A.), said:[28]

> In the absence of proof of fraud a person who is informed of the contents of a document the full effect of which he does not understand may be bound by it if he signs it even though illiterate. If, however, the document is of an entirely different nature so that his mind does not accompany his signature the plea of *non est factum* applies.

In Australia and New Zealand there are surprisingly few reported decisions on the question of *non est factum*. The few that there are, however, support the proposition that a mistake as to the nature of a document will support the plea of *non est factum*, while a mistake as to its contents will not. In *Bank of Australasia* v. *Reynell*[29] the defendant signed a guarantee for £5,000, thinking

[22] *Ibid.*, at p. 720. [23] *Ibid.*, at p. 729. [24] *Supra*, footnote 14.
[25] [1951] 2 D.L.R. 749 (Ont. H.C.).
[26] [1954] 3 D.L.R. 360 (B.C.C.A.).
[27] [1955] 5 D.L.R. 102 (Sask. C.A.).
[28] *Ibid.*, at p. 105. [29] (1892), 10 N.Z.L.R. 257.

that he was signing a guarantee for £500. The New Zealand Court of Appeal held that the defendant could not plead *non est factum*. The Court of Appeal based its decision on two grounds; the negligence of the defendant, and the fact that he was aware of the nature of the document which he was signing, his mistake being only as to the amount of the guarantee. In *Cansdell* v. *O'Donnel*[30] the defendant signed a mortgage of her property, thinking that she was signing an application for a mortgage. The Full Court of the Supreme Court of New South Wales held that she could plead *non est factum*, as her mistake was as to the very nature of the document which she was signing, and not merely as to its contents. Gordon J., in a judgment with which Campbell J. and Kalston A.J. concurred, cited *Howatson* v. *Webb* with approval, and said:[31]

> In my opinion the effect of those decisions is that in the case of an action on a deed the plea of *non est factum* is made out when it is proved that there was an ignorance of the nature and contents of the document, brought about by the misstatements of the person who induced the defendant to sign that deed, but the plea of *non est factum* is not made out when the defendant so induced to append his signature to the deed is aware that he is signing a document affecting his property, but is misled as to the extent to which that document affected his property.

In *Taylor* v. *Smith*[32] a property owner signed a document authorising an estate agent to sell his property and to retain any money which he secured for it in excess of £4,000 as commission: he thought that the document merely authorised the agent to receive the usual rate of commission. The Full Court of the Supreme Court of Victoria held that the property owner could plead *non est factum* as he was mistaken as to the nature and not merely as to the contents of the document which he had signed. The decision seems hard to justify on the facts,[33] but the Full Court was clear in its statement of the principles of the law involved. McArthur J., delivering the judgment of the court (Irvine C.J., Cussen and McArthur JJ.,), stated:[34]

> There are some fine distinctions drawn by the authorities between ignorance of the *nature* of the document signed and ignorance of some of its terms. And nice questions have been raised as to the circumstances necessary to be proved in order to enable a person to rely upon ignorance of the nature of the document signed, it being clear that a

[30] (1924), 24 S.R. (N.S.W.) 596.

[31] *Ibid.*, at p. 602.

[32] [1926] V.L.R. 100.

[33] The County Court judge who tried the case at first instance appears to have been considerably influenced by the fact that the property owner could not read without his glasses and did not have his glasses with him at the time he signed the document.

[34] *Supra*, footnote 32, at p. 113.

person cannot rely *merely* upon the fact that he did not know the nature of the document he was signing.

As Professor Lang points out it is difficult to contrast the difference between the transfer and option to lease in *Prudential Trust Co.* v. *Cugnet* with the difference between the transfer and mortgage in *Howatson* v. *Webb*, and support for the view that *Prudential Trust Co.* v. *Cugnet* overrules *Howatson* v. *Webb* may be found in a passage from the judgment of Locke J. where he says:[35]

> Despite statements in some of the decided cases such as *Howatson* v. *Webb* which would suggest that the plea of *non est factum* cannot succeed if the person signing the document is aware that the instrument he is asked to sign disposes of an interest in his property, where as here documents represented as being simply an option on mineral rights to be operative in the event of an outstanding option being dropped, include in fact an out-and-out sale of an undivided half interest in the mineral rights, the defence is, in my opinion, an answer.

However, it should be remembered that in England at the time that *Howatson* v. *Webb* was decided the method of creating a mortgage was a conveyance in fee simple with a covenant to reconvey to the property on repayment of the loan:[36] the defendant in *Howatson* v. *Webb*, therefore, was aware of the nature of the deed which he was signing, a conveyance in fee simple.[37] Since 1925 this method of creating a mortgage is no longer available,[38] and if the facts of *Howatson* v. *Webb* had to be decided in England today the decision might well go the other way.

In conclusion it is submitted that while *Howatson* v. *Webb* might well be decided differently today, the principles of law laid down in that and subsequent cases still hold good: a mistake as to the very nature of a document will support a plea of *non est factum*, a mistake as to its contents will not. It follows, therefore, that the defendant in *Longley* v. *Barbrick* was mistaken not as to the nature of the document which she was signing, she knew that she was signing a mortgage of her property, but merely as to its contents, that she could not plead *non est factum* and that the case was wrongly decided.

W. E. D. DAVIES*

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[35] *Supra*, footnote 14, at p. 2.

[36] See Megarry and Wade, The Law of Real Property (2nd ed.), p. 842 *et seq.*

[37] The judges in *Howatson* v. *Webb*, *supra*, footnote 2, appear to have been considerably influenced by the fact that the defendant was himself a solicitor.

[38] The Law of Property Act, 1925, 15 Geo. 5, c. 20, s. 85 (1).

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CRIMINAL LAW—SENTENCING—USE OF THE PRE-SENTENCE REPORT—LEGAL AND SOCIAL ROLE OF THE PROBATION OFFICER IN THE SENTENCING PROCESS.—The problems surrounding the sentencing of criminal offenders has been receiving increasing attention. Numerous sentencing seminars, judges' conferences and meetings of magistrates' associations are being held.[1] These attempts to improve the administration of criminal justice are encouraging and, fortunately, this interest in corrections is not restricted to the legal aspects that are the direct concern of the defence lawyer and trial judge. Sentencing conferences have been attended by personnel from a wide range of disciplines and agencies. Consequently, questions of treatment, punishment and rehabilitation have been looked at broadly so that the aims of the criminal law can be realized most effectively.

When these conferences started five years ago[2] it became apparent that the problems of the police officer, prosecutor or prison officer were not properly understood by the judge or the probation officer (and *vice versa*). The judge saw that there were many facets of the correctional process that could not be solved in the courtroom, that the prison programme or the probation service was not geared to the type of disposition which the judge as sentencer, was making. The Streatfield[3] and Fauteux[4] Committees also recognized these problems.[5]

These reforms in the administration of criminal justice are dependent on, or the natural product of, the "new penology", with its emphasis on the "rehabilitative ideal".[6] A new approach to

[1] This interest has taken on more concrete form in the model legislation prepared by National Council on Crime and Delinquency (the Model Sentencing Act (1963), 9 Crime and Delinquency 337) and the American Law Institute (the Model Penal Code, Proposed Official Draft, 1962).

[2] The business of the Pilot Institute for United States Federal Court Judges is recorded in 26 F.R.D. 231. For a report on the first significant Canadian conference, see, Proceedings of the Seminar on the Sentencing of Offenders, Queen's University, June 4th-June 15th, 1962, Kingston, 1962.

[3] Report of the Interdepartmental Committee on the Business of the Criminal Courts (1961), Cnmd. 1289.

[4] Report of a Committee appointed to inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada, Ottawa (1956).

[5] These reports recommended that judges should have a better knowledge of corrections, that they should visit prisons, that greater use should be made of the pre-sentence investigation and that sentencing manuals should be prepared for the further education of the judge. One of the most important suggestions made was that sentencing could be made more meaningful if past sentencing experience was put to proper use.

[6] For a description of the "New Penology" and the "rehabilitative ideal", see the Archambault (1938) and Gibson (1946) Reports. Also

penal administration has shown that imprisonment is not necessary for many criminal offenders, and that the imposition of long sentences,with little or no institutional training, was not only senseless but probably produced more crime than it prevented. The young offender has received most attention from the reformers.[7] At the same time, the changed attitudes did not discard the deterrent or retributive aspects of punishment where they proved to be necessary after proper investigation. Neither the Model Sentencing Act[8] nor the Model Penal Code[9] abandons the incapacitation of a criminal in appropriate circumstances, where other methods of treatment have proved ineffective. The habitual criminal or the dangerous sexual offender might have to be incarcerated for long periods—until he has changed his ways or is no longer a threat to society.

The rehabilitative ideal, in its desire for correctional justice, does not imply a return to the pure classical rigidity and uniformity of punishment. While there must be a uniformity of legal rights for all offenders, correctional justice will be achieved by individualization of punishment.

The Fauteux and Streatfield Committees suggested one means of achieving this individualization. The reports of these Committees recommend that the background of the offender be investigated before final determination of the type or length of sentence. This recommendation has led to the wider use (or at least the more frequent advocation) of the pre-sentence report.

No one denies that the most effective sentencing can be realized by a proper combination of law and social science. The judge can gain valuable insights into the offender's personality, background, and character through the reports that a social worker, psychologist, or psychiatrist prepares for him.

In the ordinary case, where there is no mental disability, the judge is likely to derive most help from the pre-sentence investigation and report which is carried out and written by a probation officer, who should be a professionally trained social worker.

Ideally, every criminal offender should have a pre-sentence report prepared for the judge's information, attempting to give some explanation for his anti-social conduct; such a plan is im-

Topping, Crime and You (1960), pp. 31-44 and Parker, The Application of the "New Penology" in the Prison System of British Columbia (1962), 5 Can. Pub. Admin. 312.

[7] This is particularly true of England, resulting in the passage of the Criminal Justice Act 1948, 11 & 12 Geo. VI, c. 58, and the Criminal Justice Act, 1961, 9 & 10 Eliz. 2, c. 39.

[8] *Supra*, footnote 1.

[9] *Ibid.*

practical and likely to remain so. Instead, the problem facing the sentencing judge is the choice of those cases in which he should order a pre-sentence report to be prepared. There are no fixed rules regulating the choice. He may order a pre-sentence report from the probation department out of habit, puzzlement, sympathy, indecision, or purely as a delaying tactic. Inequities arise from this haphazard method of choosing cases for further investigation.[10] One would imagine that the most obvious cases for a pre-sentence investigation would be those of first offenders, offenders for whom there is no local background information already available to the judge, and those convicted of serious crimes or who are likely to be subjected to preventive detention.

The present comment is not concerned with the policy that should underly a magistrate's ordering a pre-sentence report. The above considerations are important, however, because most probation services are severely overworked and under-staffed. The heavy load of casework with probationers and supervision of parolees is such that a large volume of pre-sentence investigations (particularly if they were inappropriate) would severely strain the resources of social work agencies. Perhaps this lack of manpower may explain the inferior quality of the pre-sentence report in the case to be discussed.

Regina v. *Dolbec*,[11] a recent decision of the British Columbia Court of Appeal, illustrates the consequences arising from an unfortunate use of the pre-sentence report, both by the investigating probation officer and the sentencing judge.

The appellant, a youth of nineteen years had been convicted, of theft of a motor vehicle worth more than fifty dollars. The magistrate remanded Dolbec for one week so that he could obtain more information about him. Dolbec, who had no previous convictions, was sentenced to nine months' imprisonment for an offence that carried a possible maximum penalty of ten years.

The British Columbia Court of Appeal found that, in deciding upon sentence, the magistrate had been strongly influenced by the probation officer's report. The report of the probation officer could well serve as a model in a training manual describing how not to make an investigation and report. The information in the report was obtained second-hand. In itself, such a practice is not

[10] Many probation officers complain that judges order pre-sentence investigations in cases where they are reasonably sure of the final disposition. They simply want their judgment vindicated. The same observation was recently made in Hood, Sentencing in Magistrates' Courts: A Study in Variations in Policy (1962), p. 126.

[11] [1963] 2 C.C.C. 87 (B.C.C.A.).

unusual; in the short time available for the collation of information for a pre-sentence report it is impossible to make an original and exhaustive inquiry. The major flaw in the *Dolbec* report, however, was that the probation officer had not named the sources of his information or the grounds on which he relied for making statements about the appellant. In the preparation of a pre-sentence report, it is essential that the sources of information should be stated so that the accused might refute or at least question their validity.

Dolbec, who was unrepresented at the trial had not seen the pre-sentence report prior to the imposition of sentence and had had no opportunity to contradict the alleged facts set out there. The usual practice followed by the British Columbia courts is not known exactly, but the customary procedure is for the probation officer to prepare numerous copies of his report and present them in person to the judge who is then responsible for their distribution to the prosecutor and the offender's counsel if the offender is represented.[12] As is the case in the many Canadian criminal courts, where legal aid is inadequate, Dolbec's rights were prejudiced. An experienced criminal defence lawyer would have ensured that the statements in the report received a thorough examination. In the circumstances, therefore, an additional burden was placed on the magistrate to take extraordinary care in protecting the rights of the unrepresented accused. This was obviously not done.

In addition to the above factors, Dolbec also claimed grounds for appeal as a result of the highly prejudicial remarks made in the report of the probation officer. Although one does not expect a social worker to frame his report in the precise, uncompromising language of a legal pleading, the colourful expressions used by the probation officer could hardly be described as in accordance with professional social work standards. The final remarks of a probation officer usually summarise the contents of a pre-sentence report, and give a personal assessment of the subject. In the *Dolbec* report, the probation officer showed that his opinion of Dolbec was, to say the least, unfavourable. He described the appellant in these terms:[13]

> Although chronologically he is nineteen, emotionally he is much less

[12] Opinions differ from province to province, and even from court to court, on whether the unrepresented accused should be shown a copy of the pre-sentence report. See *infra* on the broader policy question of whether the accused should see the report under *any* circumstances.

[13] *Supra*, footnote 11, at p. 88.

> —he has never grown up, shows a marked degree of immaturity and irresponsibility. Locally he is described as a smart alex, lippy punk who frequents all the questionable cafes and hangouts. His earnings come from the pool cue and part time work . . . (he has lost the latter source of income).

Disregarding the acerbity of the language, one might gather that the probation officer was describing the attributes of many young men who appear before the courts, particularly on automobile theft charges. Dolbec's criminal behaviour cannot be condoned but there seems little justification in singling out Dolbec as the object for the probation officer's scorn.

The probation officer also reported that the appellant attributed his troubles to alcohol and the investigator believed that Dolbec's drinking habits had a "greater hold on him than he is prepared to admit".[14] As a result of all these factors, the probation officer decided that Dolbec was "an extremely doubtful candidate for probation".

The form of this pre-sentence report does not show its greatest fault. In addition to alleging a dereliction of duty by the probation officer in failing to verify his facts, the appellant contended that these facts were also untrue. In support of his contention, Dolbec produced evidence from his school principal and parish priest describing him as a "pleasant, cheerful and co-operative" student and an assiduous attender at Sunday services. No one is asking a sentencing magistrate to accept this sympathetic testimony *in toto* but it should have been given some consideration at the trial.

The British Columbia Court of Appeal, following *R.* v. *Benson and Stevenson*,[15] allowed Dolbec's appeal on the ground that the non-disclosure of the sources of information and the lack of any opportunity afforded the appellant to rebut the contents of the pre-sentence report constituted a miscarriage of justice.

A secondary reason for reducing the sentence and releasing Dolbec on probation was the doubt raised as to the veracity of the pre-sentence report in the light of the vastly different story told by the school principal and the parish priest.

Considering the specific reasons given for the Court of Appeal's decision, the fault is not wholly attributable to the probation officer. The magistrate has an equal, if not a major, share of the responsibility. The probation officer is an officer of the court but the final discretion on sentencing, including the degree of reliance to be placed on the pre-sentence report, resides with the magistrate.

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[14] *Ibid.*, at p. 89.

[15] (1951), 100 C.C.C. 247 (B.C.C.A.).

This case must have caused the probation officer's supervisors some consternation. Probation is still in its infancy but the present climate of corrections hopefully indicates its wider use in the future. Therefore any occurrence, such as that in *Dolbec*, which tends to tarnish its image is regrettable. The sentencer needs the assistance of probation officers and the pre-sentence reports they are trained to prepare. Unfortunately, there are still some magistrates who refuse to make proper use of these services; such resistance robs the sentencing process of the correctional insights and advice which the social worker possesses. A case like *Dolbec* is not likely to persuade conservative magistrates that the probation officer is a useful ally in the task of sentencing.

Undoubtedly, the magistrate in *Dolbec* placed too much reliance on his probation officer. Furthermore, if the pre-sentence report in that case is typical, he has been sorely misguided. A social worker is a professional, and if his role as a competent participant in the administration of justice is to be maintained and even expanded, then his work and demeanour must achieve higher standards than were exhibited in the case under discussion.

Undoubtedly the decision in *Dolbec* was a proper one. The point at issue was a narrow one that caused the Court of Appeal little difficulty. Of greater importance and complexity are the implications of the case—which cause us to examine the very concept of probation, the legal status of the probation officer and his role in the court's sentencing process.

Some problems presently unsolved are fundamental to the future of probation and the service which administers it. Too many facets of probation are vague—in legal and social work terms. The probation officer is described as an officer of the court and yet his legal position, as well as his duties to that court are far from clear. For instance, in the absence of any explicit legal rule to the contrary, many probation services advise their officers against offering any opinion as to the specific type or length of sentence to be imposed; yet many magistrates, including the one in *Dolbec*, rely, all too heavily in some cases, on such recommendations. Perhaps such a situation only arises when there is the unfortunate combination of an unprofessional probation officer and an unschooled or careless judge. Even if formal recommendations as to sentence are forbidden or discouraged,[16] a close relationship

[16] See comment on the respective roles of the courts and the extra-judicial agencies in the sentencing process, with particular reference to *R.* v. *Holden* (1962), 40 W.W.R. 571 (B.C.C.A.), in (1963), 5 Crim. L.Q. 405.

between the magistrate and probation officer is not automatically precluded. In the difficult and lonely task of sentencing, the probation officer can be (and often is) very useful as a confidant of the court.

Nevertheless, the chief source of help should be the pre-sentence report; the degree of real assistance given, as we have seen, will depend, to a great extent, on the quality of that report. Quality does not depend solely on the veracity of the information provided. Even if the probation officer-magistrate relationship is not an intimate one, a well-trained and perceptive social worker can have a decisive and beneficial influence in the determination of sentence. The probation officer can be effective by making proper use of the pre-sentence report; he will be able to accentuate the most important facts about the offender—whether they refer to family, living conditions, his physical or mental health, spiritual or moral welfare, attitude toward the offence, previous record,[17] education, habits and recreations, financial status, or even his military record—so that the best disposition of the case will be made by an intelligent magistrate, drawing the necessary implications from the way in which the report is presented.

The quality of the pre-sentence report can vary enormously, depending on the time available to the probation officer, his skill, the community services assisting him, and, of course, the mode of presentation. At the present time, the law has no direct control over the quality of the pre-sentence report. Defects, such as those in *Dolbec* can be corrected on appeal although this should not often be necessary as most probation services carefully supervise the reports that are prepared by their officers. If a study should show that the type of report prepared in *Dolbec* was a common occurrence, there might be good reason to take legislative measures to ensure its continued usefulness by the maintenance of proper standards.

Similarly, the law might establish rules as to the use of the report. At the present time official regulation of pre-sentence report is, at best, vague. When a court is disposed to extend leniency to a first offender by imposing a suspended sentence, section 638 of the Criminal Code allows the judge to take account of the offender's age, character and antecedents, the nature of the offence and any extenuating circumstances surrounding the offence. General authorization for the reports (and, in particular, on those offenders

[17] Some probation services seek the individual preference of the sentencer on the inclusion or exclusion of previous record information (and other matters).

who have been previously convicted or for whom the magistrate does not contemplate suspended sentence) is usually found in provincial statutes.[18] None of these provisions sets out, *vis-à-vis* the court, the legal position of the probation officer, the pre-sentence report or the probationer. Any suggestion that a probation officer has exceeded his powers (whatever they might be) deeply concerns the probation service. On the other hand, the probation service, manned by members of the social work profession, is likely to resist the imposition of wholesale restrictions on its jurisdiction over casework and the supervision of offenders who are placed on probation or parole.

The more responsible probation services in Canada distribute handbooks to their officers for guidance in the preparation of pre-sentence reports and other duties. These probation services have satisfied the need for creating their own ground rules in an area where the law is silent. One such handbook suggests, for instance, that the report should not contain any mention of the story of the offence which has already been given as evidence. The officer is advised to desist from making any statement that is not "extenuating".[19] Such a precaution seems unnecessary and makes a very narrow interpretation of the phrase "extenuating circumstances surrounding the commission of the offence" in section 638 of the Code; the same section seems to allow the court a wide discretion in taking into account the "offender's age, character and antecedents". Such cautious advice urges the probation officer to be discreet as does the suggestion in the same handbook that he should avoid, where possible, unsupported statements.

What then is the status of the pre-sentence report as defined by the courts? Fortunately, the British Columbia Court of Appeal has previously given serious consideration to the problem in the leading case of *Benson and Stevenson*,[20] which was followed in *Dolbec*.

When the pre-sentence report is presented in written form by an "officer of the court" after guilt has been determined, the report is said to become "part of the court record". Although the terms "officer of the court" and "part of the court record" may appear unambiguous the decisions, which will be discussed presently do not reflect this supposed clarity. Similarly the legal posi-

[18] *E.g.* British Columbia: Probation Act, R.S.B.C., 1960, c. 60; Ontario: Probation Act, R.S.O., 1960, c. 308, s. 3. Constitutional law problems may arise but they will be ignored in the present discussion.

[19] The term used in section 638 of the Canadian Criminal Code, R.S.C., 1953-54, c. 41.

[20] *Supra*, footnote 15.

tion of the probation officer is also uncertain. The British Columbia Court of Appeal in *Benson and Stevenson* saw the probation officer as the successor of the police officer[21] who, in the days before the pre-sentence report became a common tool in sentencing, used to provide the court with an extemporary report on his knowledge of the offender. The information which the probation officer provides is therefore supposedly received by the court in the manner of the *voire dire* with the requirement that the informant believes that the information is correct. Such an explanation would appear, on first sight, to settle the matter. Yet the position is not entirely clear because Lord Goddard C.J. has said in *Marquis*,[22] a case which has been fully accepted by many Canadian courts:

> . . . the learned Recorder seems to have some doubt as to whether he could accept what he called "hearsay evidence" of character after conviction. Of course he could . . . although the matter is not proved with the strictness which would be necessary to prove an issue at trial.[23]

The Chief Justice also said that:

> After conviction, any information which can be put before the court, can be put before it in any manner which the court will accept.[24]

This latter statement is ambiguous and leaves subsequent courts, subject to the qualifications below, ample scope for pursuing and receiving information which will aid them in fixing the appropriate penalty. The Supreme Court of the United States has been more specific in their comments upon the quality of the evidence that might be received by a sentencing judge. In *Williams* v. *New York*,[25] Mr. Justice Black, who delivered the opinion of the Supreme Court stressed the need to draw a clear line of demarcation between "strict evidentiary procedural limitations" imposed on courts in determination of guilt by reason of the United States Constitution, and the relaxation of these strictures when sentence is being considered. He said:

> Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and the sentencing process. For indeterminate sentences and probation have resulted in an increase in the

[21] As is the case in many English criminal courts with insufficient probation officers.

[22] (1915), 35 Cr. App. Rep. 33. [23] *Ibid.*, at p. 35.

[24] *Ibid.* Martin J.A. in *R.* v. *Markoff* (1937), 67 C.C.C. 308 (Sask. C.A.), at p. 311 said: ". . . from this statement of practice it appears that the information as to the general character of the accused and other circumstances may be given after the conviction even though not in the proper form of evidence proper."

[25] (1949), 337 U.S. 241.

> discretionary powers exercised in fixing punishments. . . . [Probation officers'] reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognise that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation officer draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.[26]

Whatever might be the form in which a court received them, these statements, as Martin J.A. decided in *Markoff*,[27] must be made in the presence of the accused. The rule was true of the old procedure of receiving additional information from the police officer and there is no reason to doubt its application to the probation officer. One further rule was always reasonably certain: the judge may not make private investigations of his own without the knowledge of the accused.[28]

The general legal position of the pre-sentence report is not clear. As stated previously, a legally represented offender can expect his counsel will receive a copy of any report that has been prepared. This does not necessarily mean that the accused is given an opportunity of reading it. Many social workers believe that a full disclosure to the accused of the contents of the report may be "very undesirable".[29] Suggestions have been made that the fact that the offender is an adopted child, that his wife has been unfaithful or that he has some serious illness might profitably and properly be withheld.

If any accused is unrepresented (which has been the case in many appeals relating to pre-sentence reports), the trial judge usually reads portions of the pre-sentence report to him and gives

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[26] *Ibid.*, at pp. 248-249.

[27] *Supra*, footnote 24.

[28] See *R.* v. *Bezeau* (1958), 122 C.C.C. 35 (Ont. C.A.), where the sentencing judge had a private conference with a psychiatrist which was not made known to the accused. The sentence was not disturbed on appeal because the appeal court was convinced that the psychiatrist had not influenced the sentence that the magistrate imposed.

[29] *Per* Lord Goddard C.J. in *R.* v. *Dickson* (1949), 34 Cr. App. Rep. 9, at p. 13. The Chief Justice stated: "It is not clear to me or to any of His Majesty's Judges, why it is necessary to serve that report on the prisoner. In some cases I think it very undesirable, because it may sometimes give him ideas about his mental condition which he perhaps should not know."

him an opportunity to refute such information. Many of the cases imply that the judge should only read those parts of the report which he had decided were pertinent in fixing sentence. This practice hardly provides sufficient protection to an accused and allows the discretion of the judge to hold unnecessary sway.

With the exception of the clear rule that the court will demand full disclosure and strict proof of the offender's prior criminal record, there does not appear to be an inherent right in the accused to have all the facts and factors, possibly relevant to sentence, revealed to him. The principle laid down in *Benson and Stevenson* was well stated by Sloan C.J.B.C.:

> . . . a convicted man ought to be informed of the substance of a Probation Officer's report, insofar as it is detrimental to him, so that he may have an opportunity to agree therewith, or deny it if he chooses to do so. If the report contains prejudicial observations which the Court considers relevant and likely to influence his sentence and this material is denied by the prisoner then proof of it, if required, should be given in open Court when its accuracy may be tested by cross-examination. Alternatively, if the Court does not consider it of sufficient importance to justify formal proof then such matters should be ignored as factors influencing sentence.[30]

Although the headnote in the *Dolbec* case implies that the accused should be informed of the substance of the whole report, Bird J.A.'s judgment goes no further than the earlier British Columbia case in holding that the accused should be given an opportunity to refute any statement "insofar as it is detrimental to him".

The strong statement of Mr. Justice Black in *Williams* v. *New York*[31] gives the impression that the American practice does not protect the accused from a sentencing judge considering factors which are never made known to him. Sloan C.J.B.C. in *Benson and Stevenson* was not prepared to go so far; in any event the statement of Mr. Justice Black was only *obiter* dicta and it is doubtful whether the Supreme Court of the United States would apply such a stringent rule if it had to decide this point. As can be seen from the statement from Sloan C.J.B.C. in *Benson and Stevenson*, Canadian courts have not gone so far and the same principle has been applied in the English courts.[32] When incorrect evidence is presented, which the sentencing judge would otherwise consider relevant in the determination of punishment, it has been held that the accused may cross-examine the person presenting this evidence

[30] *Supra*, footnote 15, at p. 256. [31] *Supra*, footnote 25.
[32] *E.g. R.* v. *Campbell* (1911), 6 Cr. App. Rep. 131, at p. 132.

(which must be strictly proved). In addition, the appeal court may seek further evidence and make a more comprehensive investigation if it considers that the information is likely to be germane to a just disposition of the case.[33]

The anomaly, already mentioned, which bars the watertight protection of the offender's rights, is that the judge alone will decide whether the information is "detrimental" and whether he has been influenced by it in assessing punishment. This rule will even apply to statements that the offender denies. The present position seems to raise insoluble problems. No doubt the sentencing judge carefully weighs the information in a pre-sentence report before making a final disposition. It is difficult to believe, however, that he could enumerate, with any precision, those factors that were decisive in fixing sentence. Most of the problems could be solved by a set of evidentiary rules for the pre-sentence report.

In the light of the danger inherent in the present practice, perhaps the contents of the pre-sentence report should be fully disclosed and strictly proved. Alternatively, the probation officer could present his report in oral form in open court and be prepared to defend (or even prove) any statements or judgments he makes. In such a situation, however, I see an aggravation of the dilemma in which the probation officer is already placed under the existing system. The lawyer, on the one hand, wants to ensure the full protection of "his client's rights". We must, on the other hand, try to understand the viewpoint of the probation officer; he does not wish to be restricted by legal proof and does not appreciate the importance that the law attaches to the freedom of the individual. The probation officer, as a social worker, looks beyond the trial and sentence to the relationship that he hopes to establish with the offender who is placed on probation. The probation officer wants to avoid the image of police officer or prosecutor; he wants to be in a position to gain the confidence of the probationer when they meet in the more informal casework environment.

The probation officer is described as an officer of the court although the true meaning and legal significance of that term is not known. Presumably, he is not meant to act as a counterbalance to either defence or prosecution; he is meant to assist the court. Sometimes the probation officer finds himself in an ambiguous position where he is the trustee of information supplied by the offender or probationer which he is obliged to divulge to the court.

[33] *E.g. R.* v. *Elley* (1921), 15 Cr. App. Rep. 143. See also the remarks of Martin J. A. in *R.* v. *Markoff, supra*, footnote 24, at pp. 311-312. *Cf.* Laidlaw J. in *R.* v. *Carey* (1951), 13 C.R. 370, at p. 376.

No privilege exists in the communications between a probation officer and his "client". At the same time there are occasions, particularly in the supervision of a probationer, when he is forced, as a social worker, to use his own judgment in circumstances that might well conflict with the strict provisions of the law.[34] These legal and moral decisions are not daily occurrences but they tend to arise in those hard cases that would make bad law and result in ineffective casework. The probation officer does not want a more restricted sphere of operation but he does need a more definite legal structure in which to operate, one that leaves him with some discretion in his actions as a professional member of the correctional team.

While the sentencing process is being examined, there is another recent British Columbia case that deserves comment. In *R.* v. *Durocher*,[35] *Dolbec* was approved but in relation to the duties of the prosecutor rather than the probation officer. The Crown prosecutor made some highly uncomplimentary remarks about the appellant, that were neither admitted nor proved. The appellant, who had been convicted of causing bodily harm with intent to wound and sentenced to seven years imprisonment, claimed on appeal that these remarks had influenced the magistrate in fixing sentence.

Despite the fact that the magistrate had received the derogatory remarks with the observation that he did not want the personal opinions of the Crown counsel, the British Columbia Court of Appeal was convinced that the magistrate must have been influenced by them. In light of the previous discussion, the decision in itself is perhaps encouraging because the appeal court took a more objective view of the factors likely to influence a sentencing judge.

Tysoe J.A., cited dicta from *Benson and Stevenson* that applied the identical principles to the pre-sentence and the police reports. His Lordship equated a police report with the remarks of a Crown prosecutor; this is probably a more accurate assessment of the functions of the personnel in the criminal process than the analogy drawn by Sloan C.J.B.C., in *Benson and Stevenson*. DesBrisay C.J.B.C., after citing works on the ethics of advocacy, stated that it was his opinion that Crown counsel was not in the position of

[34] There are many examples, frequently discussed at social work conferences. One of the most obvious is the dilemma of the probation officer when his probationer is technically in breach of probation and yet the probation officer believes that good social work practice calls for ignoring the breach and proceeding, hopefully, to a successful rehabilitation.

[35] [1964] 1 C.C.C. 17 (B.C.C.A.).

ordinary counsel and that the prosecutor's remarks indicated an absence of those qualities of fairness and moderation that should characterize the conduct of a Crown counsel. Unfortunately, the Chief Justice did not cite *Dolbec*. He relied solely on his conception of the prosecutor's role and did not discuss the problem which has been considered in this comment. He was of the opinion that the prosecutor acts in a "quasi-judicial capacity and ought to regard himself as part of the court and conduct himself accordingly".[36] In other words, for what little enlightenment it provides in examining the role of the probation officer, the prosecutor is an "officer of the court".

The dilemma of the probation officer, which has been briefly described above, recalls a recent House of Lords decision where the law Lords were discussing the right of a party to have access to hearsay evidence of a "confidential" nature. *In re K (Infants)*[37] arose in an entirely different jurisdictional setting, namely in wardship proceedings in the English Court of Chancery, but some comment seems apposite.

The infants concerned had been made wards of the court. The Official Solicitor sought psychiatric advice concerning the children to aid him and the court in deciding upon general problems of child guidance and the choice of the more appropriate parent for custody. The final reports of the Official Solicitor and the doctor recommended that the mother should have custody of the children so long as they attended a clinic at specified intervals.

The mother demanded to see the reports of the Official Solicitor and the psychiatrist. The court refused. The House of Lords upheld this decision—mainly on the ground that the wardship jurisdiction of the Court of Chancery was a very special one in which the principles of natural justice must bow to (or be qualified by) the welfare of the wards of court. The court adhered to the principle of *parens patriae*.

The contrast in the roles of a probation officer and the Official Solicitor is obvious. This decision of the House of Lords also reflects some of the difficulties which the juvenile court has faced; that court attempts to dispense watered-down criminal justice to those who are considered delinquent but not fully accountable as adult criminal offenders. The "rights" of the juvenile, as well as those of the ward of Chancery, are protected, not by any Bill of Rights, but by the *parens patriae* role of their respective courts. Perhaps the adult criminal court is now operating a poor compro-

[36] *Ibid.*, at p. 20.

[37] [1963] 3 W.L.R. 408.

mise between its usual strict surveillance of individual rights and the benevolent despotism of the courts that deal with children.[38]

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[38] See also the other recent Canadian decisions: *Milburn* v. *Phillips* (1964), 41 D.L.R. (2d) 682 (B.C.S.C.), and *Irmscher* v. *Johl.* (1964), 41 D.L.R. (2d) 688 (B.C.S.C.).

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