OF PROCESS SERVERS, DEFAULT SUMMONSES AND THE JUDICIAL PROCESS

By JOHN WILLIS*

'Due notice to a party of the commencement of suit against him and the opportunity to respond and to be heard is the very essence of the administration of justice . . .'[1]

INTRODUCTION

Process servers are persons who serve the summonses and other court documents.[2] My concern in this article is to examine the part played in the administration of justice by process servers — the nature of their task, its significance and their general efficiency. In particular, I wish to examine the role of the process server in default summons procedures in Magistrates' Courts.

THE MACHINERY OF DEBT ENFORCEMENT

Default Summonses

By far the most common procedure in the Magistrates' Courts for the recovery of debt is the default summons, whereby a creditor can get judgment without having to appear in Court. The procedure is set out in some detail in s. 102 of the Justices Act and broadly speaking enables the default summons procedure to be used for any debts which do not exceed $600 and where the precise amount of the debt is known or can be determined exactly[3]. This, of course, covers a huge number of the claims made in Magistrates' Courts.

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[1] *United States v. Barr* (1969) 295 F. Supp. 889, 892 (S.D.N.Y.) (per Judge Edward Weinfield).

[2] The Private Agents Act 1966 s. (3), provides a definiinition — 'Process Server' means any person (whether or not he carries on any other business) who exercises or carries on or advertises or notifies or states that he exercises or carries on or that he is willing to exercise or carry on or in any way holds himself out to the public as ready to undertake the function of serving any writ summons or other legal process on behalf of any other person and for or in consideration of any payment or other remuneration (whether monetary or otherwise).

[3] Under s. 102 of the Justices Act a default summons can be issued with regard to a matter arising under s. 67(4) — an ordinary default summons — or under s. 68(1) of the Justices Act — a special default summons.
Section 67(4) of the Justices Act encompasses the vast bulk of civil debts under $200. S. 68(1) gives the Magistrates' Court a special jurisdiction to determine summarily 'any cause of action arising out of a contract expressed or implied where the amount value or damages sought to be recovered is or are not more than $600,

The summons need not be served on the defendant personally — it can be served alternatively at the defendant's place of abode on 'some person apparently above the age of 16 years, who is apparently residing thereat'.[4] The process server then swears an affidavit stating how, when and where he served the summons,[5] which is sent to the Magistrates' Court where it 'shall be received . . . as *prima facie* evidence of the service of the summons'.[6]

If the defendant does not give notice of his intention to defend to the plaintiff or the plaintiff's solicitor at least a week (for debts up to $200) or at least a fortnight (for debts up to $600) before the date of the hearing, judgment can be entered in the absence of both plaintiff and defendant by the Clerk of Courts.[7]

In practice, if the default summons is on its face in order and if the affidavit of service is in order, the clerk of courts will make an order in favour of the plaintiff on the date of the hearing by writing the order in the register book of default summonses.[8] It should be stressed that this judicial order can be made by a Clerk of Courts, as well as a Justice or a Stipendiary Magistrate. Less than 5% (actually closer to 3% or less) of default summonses are defended.[9]

whether on balance of account or otherwise.' This encompasses the bulk of debts up to $600. There is an overlap in jurisdiction between summonses under s. 67(4) and s. 68(1).

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[4] Justices Act 1958 s. 102(2)(b)
It is noteworthy that until the Justices (Amendment) Act 1962 a default summons had to be served personally. The relaxed requirements for service of default summonses are fairly similar to those for an ordinary summons. (Justices Act 1958 s. 23). These requirements clearly make allowance for the difficulties of personal contact for each default summons, but they also and more seriously heighten the risk that the defendant will not receive the summons. Firstly, the person to whom it is given in accordance with the provisions of s. 102, may not pass it on. There have, for example, been many instances where a wife through fear of her husband concealed the summons.
Secondly, it offers an easy loophole to a lazy, frustrated or unscrupulous process server who can fail to comply with the service requirements (even to the extent of burning the copy summons) and then state 'I served it on a male (or female) apparently above the age of 16 . . . '. It is virtually impossible to disprove such an allegation.

[5] Justices Act 1958 s. 102(c).

[6] *Ibid.* s. 102(2)(d).

[7] If the defendant does not return the notice of intention to defend within the prescribed time, he shall not be allowed to defend the action unless by permission of the court. If permission is granted, the complainant can ask for an adjournment which is always granted. If the complainant is not present, the court must adjourn the case. (Justices Act 1958 s. 102(4)). The conduct of a defended case is governed by general evidentiary rules and s. 91 of the Justices Act. Of course belated amateur defences, although often given every consideration by the Court, run a high risk of involving the defendant in considerably more expense for if he loses he will have to pay the complainant's costs.

[8] Justices Act 1958 s. 103(3)(b).

[9] These figures were obtained by C. Bishop. 'The procedure for the recovery and enforcement of Judgment Debts in the Victorian Magistrates' Courts'. Unpublished Honours Thesis for LL.B. 1972 p.10 and note 33.

The default summons procedure has been created for efficiency and speed in the administration of justice. The dangers of a system where the complainant does not have to prove his case and neither complainant nor defendant has to be present for an order to be made are evident. In particular it is clear that the process server is the lynch pin of this whole process — a process which is, in fact, far more administrative than judicial. The complainant need not prove his case; it is presumed that he has a good case if the defendant does not defend. From the very nature of things, the defendants in default summons procedures tend to be poorer people and in the vast majority of cases they do not defend. The relaxed requirements of service, and the high probability that the defendant will not defend anyway, can tempt the process server to fail to serve the summons and yet to swear an affidavit that he has served the summons.

The defendant who does not receive the summons and who has an order made against him is disadvantaged in many ways; he cannot seek legal advice; he cannot contact the plaintiff who is very often a finance company and make arrangements about different payment schemes; he cannot settle the claim before court and thus cut his costs (especially if the debt is small); even if he may have some defence it is expensive to reopen a case[10] and even more expensive to lose it once reopened.

EXTENT OF THE DEFAULT SUMMONS BUSINESS

It is impossible to determine with any degree of accuracy the number of summonses served each year. Two responses to the question by persons experienced in the field were, 'Well over a million a year', and 'certainly over 100,000 . . . God knows!'

Certain figures do provide some means of checking the accuracy of those rough estimates. The numbers of Ordinary Default Summons judgments in the Melbourne Magistrates' Courts in the years 1969-71 were as follows —

1969	58,668
1970	65,019
1971	65,614

These figures represent only the cases heard; they do not include the very large number of summonses issued and served but later settled and/or withdrawn. It has been estimated that for every summons on which a judgment is made there are perhaps two issued which do not reach judgment. Moreover, these figures are for the 'ordinary default summons' (*i.e.* claims under $200), and do not include claims up to $600 under the Court's special jurisdiction.

[10] Justices Act 1958 s. 69.

In 1971, there were 166,341 ordinary default summons hearings in Magistrates' Courts in Victoria, of which 65,019 or about 40% were heard in Melbourne. This percentage between the Melbourne Magistrates' Court and the rest of Victoria would probably apply for most years.

There were, in 1970, 11,317 summonses heard in the Magistrates' Courts of Victoria under the Service and Execution of Process Act. These consisted mainly of interstate matters. In 1971 there were approximately 23,700 special default summonses heard in the Melbourne Magistrates' Court.

If we assume that this number also was about 40% of all the special default summonses heard in Magistrates' Courts in Victoria, the total number of special default summonses would be of the order of 55 to 60,000. Thus, including ordinary and special default and 'Commonwealth' summonses, the total number heard in 1971 would seem to be in the range of 230,000 to 240,000 or more. It is also clear that if the number of all default summonses actually heard in 1971 was around 240,000, the number actually issued in Victoria would conservatively exceed half a million and could well approach, if not exceed, one million. In the last few years there seems to have been some decrease in the number of ordinary default summonses heard at the Melbourne Magistrates' Court and a corresponding small increase in the number of special default summonses heard. This overall increase is perhaps due to the cost of enforcing small debts by legal process — it is cheaper to write them off against tax. For all that, however, the number of summonses being issued annually would seem still to be in the order of 500,000 to 1,000,000. The amount of money involved in 1971 was $14,317,842.

Aggregate of Claims in Magistrates' Courts in Victoria 1970-71[11]

		1970	1971
		$	$
Default		4,059,995	6,646,150
Special Default		5,744,330	6,536,580
	Sub-total	9,804,325	13,182,730
Commonwealth		918,988	1,135,112
	Total	$10,723,313	$14,317,842

The sum for 1974 would scarcely be less and with inflation, the credit squeeze and unemployment, it is probably more. This volume of business is impressive on any standard; and when one remembers that this area of the law affects the poor perhaps more than any other group — a group less able to protect themselves against unfair and unscrupulous practices — the need for control and supervision of the whole process is manifest.

[11] C. Bishop. *op.cit.* Tables A, B, C, and E. pp.xiv-xv.

REGULATION OF SERVICE OF SUMMONSES

The Private Agents Act 1966

The Private Agents Act is *inter alia* a re-enactment of the Process Servers and Inquiry Agents Act of 1956, 'in the light of experience gained since the coming into operation of the legislation in 1957'.[12] In the debates on the original bill in 1956 there were three main reasons proposed for the introduction of licensing arrangements;

(a) to limit the work of the police by removing from them the service of much of civil process,

(b) 'to cull out the worst elements in this occupation,'[13]

(c) 'to admit to the practise of process serving only those of good character and trustworthiness because they carry out duties that may have material effect upon the subsequent process of law.'[14]

The Private Agents Act of 1966 requires all who serve process to be licensed. However, police, barristers and solicitors while acting in the ordinary course of their profession, qualified public accountants and some few others while so acting and any officers of the court are exempted from the requirement of a licence for the service of process.[15] In practice, the vast proportion of civil process at the Magistrates' Court level is served by licensed process servers.

Part 2 of the Private Agents Act sets out the requirement for obtaining a licence. The applicant must lodge with the Clerk of Court for the Court nearest to the applicant's place of business an application form accompanied by a copy of his birth certificate, three testimonials signed by different reputable persons as to the character of the applicant and three passport-size photographs at least 21 days before the day on which the application will be made.[16] The Clerk of the Court must have notice of the application published in the Government Gazette[17] and must also send a duplicate of the application, one photograph of the applicant and the originals of the character testimonials to the officer in charge of the police district in which the court is situated for investigation and report.[18] At the Melbourne Magistrates' Court, at any rate, there is a set form sent to the police which asks them to furnish a report on the applicant with respect to (a) his character and fitness to hold a licence and (b) the value

[12] Hansard Parliamentary Debates 1966-67, vol. 238 p.784. Mr. Porter, introducing the second reading on the Bill.
[13] *Ibid.* vol. 248 p.3248 — Hon. A. G. Warner.
[14] *Ibid.* vol. 248 p.2914. Mr. Sutton.
[15] The Private Agents Act 1966 s. 4.
[16] *Ibid.* s. 10.
[17] *Ibid.* s. 11(a).
[18] *Ibid.* s. 11(b)(1).

and authenticity of his referees. It is also stated that if the report by the police is not returned to the Court by the date for the hearing, it will be presumed that there is no police objection to the granting of the licence. In practice, it would seem that the police check whether the applicant has any prior convictions and beyond that, in many cases at any rate, do not check any further. At the Melbourne Magistrates' Court Licensing room which has probably the largest number of process servers registered in Victoria, there was no objection to any process server's application for licence or renewal in the eleven months from January to November 1974. There is also a recommendation in the pipeline that the requirement as to references be done away with.

S. 13(1) of the Act states: 'the court shall *in the presence of the applicant*[19] consider every such application for a licence and any objection thereto'.

In some of the suburban Magistrates' Courts, at any rate, the applicant is not required to be present on the day of hearing. This would seem to be in direct contravention of the provisions of the Act. If the Court is satisfied that the applicant is of good character, over 18 years of age, not bankrupt, has not been guilty of harassing tactics or of conduct which renders him unfit to hold a licence, has not been convicted of an offence involving stealing, fraud or unlawful entry or any other such offence, and is capable of carrying out the duties of licence holder, then the Court shall grant the applicant a licence on payment of the prescribed fee, at present $18.[20] The licence is renewable annually for $18 also, and roughly the same procedure is followed in applying for a renewal of the licence.

The Act states that the Court shall grant a licence when it is satisfied that the applicant 'is capable of carrying out the duties of a licence-holder.[21] Later, the Act, dealing only with inquiry agents and not with process servers, states 'no person shall be granted an inquiry agent's licence unless the Court is satisfied that his intelligence, education and knowledge of the English language are such that he can capably and adequately carry out his duties as an inquiry agent.'[22] If the provision with regard to capacity to carry out the duties means anything, this latter section seems redundant. Certainly, one would have expected a knowledge of English as an essential for a process server.

In fact, there is never, to my knowledge, any examination by the Court to discover if the applicant knows even the most basic rules about service of court documents. Even where the police object to a licence being

[19] My italics.
[20] The Private Agents Act 1966 s. 13(2).
[21] *Ibid.* s. 13(2)(a)(vii).
[22] *Ibid.* s. 41.

granted on the grounds of the applicant's prior convictions, it is not uncommon for a Magistrate to overrule the objection. There is virtually no difficulty in obtaining a process server's licence; the licensing requirements merely give the government some revenue and the police some work without having any particular effect upon the quality of those who receive licences. The aims stated in Parliament for licensing are not being achieved.

The Registrar of Private Agents

The Act establishes a Registrar of Private Agents[23] who is to keep a register of Private Agents which contains details of all current licences and licence-holders and is to be open at all reasonable times for inspection. In addition, the Registrar has power to object to any application for a licence,[24] or renewal of a licence[25] and may issue an information summonsing before a Magistrates' Court a private agent to show cause why his licence should not be cancelled.[26]

The Private Agents Regulations 1967 give the Registrar power to inspect a process-server's records.[27] These records have to be kept in great detail[28] and retained for five years.[29] The Act clearly attaches great importance to these records. However, in the last three years at least the Registrar has inspected no records — he has no staff for the purpose.

A fortiori, there is no system of spot checks or inspection of individual process servers. Complaints made to the Registrar are handed over to the police for investigation. In fact, there are very few complaints; thus in the two years to September, 1974 there were only twelve complaints made against process servers and in all cases after investigation by the police there was insufficient evidence to justify any action at all. This is a comment on the widespread ignorance of the existence of the Registrar and the difficulty in obtaining convictions for perjury rather than evidence of the integrity of process servers. Not only is there very little vetting of an applicant for a licence, but once a licence has been granted there is effectively no inspection or supervision of his use of the licence.

In New York City where process servers now have to be licensed by the Commissioner of Consumer Affairs, there is considerable policing by the Department of Consumer Affairs. Thus there is regular examination of the records of individual process servers; whenever a complaint against a process server is received, the Department automatically holds a hearing; and there has been an examination of certain process servers swearing a

[23] *Ibid.* s. 7.
[24] *Ibid.* s. 12.
[25] *Ibid.* s. 15.
[26] *Ibid.* s. 18.
[27] *Ibid.* s. 51(d); Private Agents Regulations 1967 reg. 24.
[28] Private Agents Regulations 1967. reg. 23(1)(d).
[29] The Private Agents Act s. 44A.

large number of affidavits of service. In these cases, the defendants who have been served by the process server in question are sent letters by the Department enquiring as to service. If there is any doubt as to service, a hearing is held. This has led to some licence revocation hearings and, in some cases, to the suspension of process servers' licences.[30] Such initiatives would be most desirable in Victoria.

The Register of Private Agents

Each year in the Government Gazette there is published a list of all process servers who are currently licensed. This, together with an inspection of the register, offers some information as to the persons engaged in process serving.

Numbers of Licensed Process Servers

Year	Number of Individuals	Number of Partners, Firms, *etc.*
1970	369	21
1971	396	25
1972	448	31
1973	452	49
1974	408	40

There is a very high turnover of process servers. The number who did not renew their licence at the end of 1972 was 173 and the number at the end of 1973, 211. That is, of the 448 process servers licensed in 1972, 173 or 39% did not renew their licence, and in 1973, the number was 211 out of 452 or just on 47%. A turnover as high as this combined with a more or less steady number of persons in each year actually possessing a licence suggests a very high element of inexperience among process servers.

The following is a breakdown by date of first application of licence of all process servers licensed for the year 1974:

Year of first licence	1967	1968	1969	1970	1971	1972	1973/4
Number	96	32	19	32	49	48	132

[31]

This breakdown begins only at the year 1967, when the new register pursuant to the Private Agents Act commenced. Therefore the numbers whose first year of licence is 1967 include those who would have been practising as process servers prior to that time. The 96 first licensed in 1967 or before represent the hard core of experience and constitute

[30] Frank M. Tuerkheimer 'Service of Process in New York City: A Proposed End to Unregulated Criminality' (1972) 72 *Columbia Law Review*, 847.
[31] The number for 1973-4 includes licences issued up to 31/1/74.

something rather less than 25% of the total. Moreover, a significant number of these are running firms or agencies and employing process servers rather than actually serving the process themselves.[32] Those who first applied for a licence in the years 1971-73 number 229, or just on 56% of the total; these have all less than two years' experience. Those first licensed in 1968-70 number 83 only, or approximately 20% of all the licensed process servers. The overall picture then, is of a significant group with experience and expertise now mainly employing other process servers and a large group of inexperienced persons, the vast proportion of whom will not remain in the occupation.

There are a number of persons who are basically inquiry agents, but who also serve some process — these are often ex-policemen who generally possess both experience and expertise. However, their main interest and source of revenue is in their work as inquiry agents. In introducing the original Process Servers and Inquiry Agents Bill in Parliament in 1956, the Honourable Minister, Mr. Porter, adverted to this fact: 'not infrequently, persons who conduct the business of inquiry agents act also as process servers'.[33] Such are not the persons who are serving the bulk of Magistrates' Court Default Summonses.

The vast majority of licensed process servers work part time; indeed the definition of process servers in the Private Agents' Act takes note of the fact — 'process server means any person (whether or not he carries on any other business)'.[34] Many take on the job for a short period for a specific economic purpose — for example, to pay off the loungeroom suite or the TV or whatever. Their interest is not in job satisfaction nor in process serving as a career, and as newcomers, of course, they receive the least remunerative types of process to serve. It is the part-time process servers who serve the great bulk of default summonses in the Magistrates' Court; they serve little County Court and virtually no Supreme Court work with the odd exception of some Divorce Petitions.

They are a part-time short-term group who work mostly in the early morning and evening and deal in large measure with the poor; as a result they are a very submerged group in the community, though no less significant for that.

Training

The Honourable J. W. Galbally, in the Debate on the 1956 Bill, stated: 'the trade or profession [process serving] . . . is one in which honesty,

[32] Interviews with Assistant-Registrar of Private Agents and the Resident of the Federation of Private Investigators (Victoria).
[33] Parliamentary Debates 1955-6. vol. 248 p.2582.
[34] The Private Agents Act 1966, s. 3.

integrity and some degree of legal skill and knowledge are not merely desirable but essential'.[35] An experienced process server running an agency has described process servers as: 'part-time amateurs doing a professional's job'. Both remarks seem very accurate.

In *Pino v. Prosser and Hassan,* McInerney J. enunciated the general principle of service quoting *Hope v. Hope*;[36] 'The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of, and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done as required'.[37] The principle is clear enough, but as with many things, the actual application of the principle to various fact situations is another story. Thus in *Pino v. Prosser and Hassan,* McInerney J. had to decide whether the leaving of the writ with Hassan's wife, who subsequently handed it to Hassan, constituted personal service on Hassan. After a careful examination of the authorities and with the help of legal argument, McInerney J. tentatively considered that the process server, a Mr. Beggs, had personally served Hassan, but admitted that it was more than possible that Hassan's wife had served him, and further agreed that it was also possible that Hassan had not been served.[38] The process server with far less time or expertise must decide what will constitute sufficient service in the circumstances.[39] In any particular fact situation, of course, the process server can state in his affidavit of service exactly what happened and what he did and leave it to the Magistrate to decide — but even filling out an affidavit of service is a skill, particularly where on a default summons there is little room for any such special affidavit of service.

The legal rules as to method of service, time for service and the correct endorsements and/or affidavits are both complicated and scattered throughout the Statutes. For the novice at process serving, it is easy to make mistakes; thus the defendant living at a hotel can be served by having the default summons left with someone apparently in charge of the hotel or employed in the office thereof; the defendant only working at the hotel can be served a default summons at the hotel only by personal service.[40] Moreover, the new process server will need time to find his way around legal documents with their small print and their legal technical writing.

In deciding to grant a process server's licence, the Court is required to

[35] Parliamentary Debates 1955-6 vol. 248 p.3246.
[36] (1854) 4 De G.M. & G. 328 at p.342.
[37] [1967] V.R. 835 at 837.
[38] *Ibid.* p.839.
[39] See *Graczyk v. Graczyk* [1955] A.L.R. 1077 for creative responses to problem service situations — service through the fanlight.
[40] Justices Act 1958 s. 102(2)(b)(i) and (ii).

be satisfied that the applicant is capable of carrying out the duties of the licence holder.[41] As I have said, little or no notice is taken of this requirement. There was once a little booklet of some eight pages brought out called 'Summary of Requirements as to Service of Documents (for information of persons licensed as Process Servers pursuant to the Private Agent's Act 1966)'. This little booklet used to be given to all who received a process server's licence; however, the book is apparently out of print; certainly it is no longer the custom to hand it out. The content of the booklet makes one aware just how much knowledge is needed by the process server.

The new process server must then learn his trade in some other way. Some agencies who employ process servers stated that they gave short oral instructions of perhaps fifteen to thirty minutes, together with a short list of basic instructions and kept a closer eye on the new process server's affidavits of service over the first two or three weeks. Another agency rather euphemistically referred to providing 'on the job training'. This latter description of training accords more closely with the experience of an experienced process server who stated that when she first presented herself to serve summonses, she was given a group of summonses and told 'give them the summons that hasn't got the stamp on it'. Many years later, she claims that she is still learning about the service of process. The County Court bailiff insists that all new process servers spend two weeks going around with an experienced process server; this would seem an ideal, but one difficult to require and virtually impossible to supervise.

There is a severe deficiency in the training of process servers and it is a deficiency which urgently needs to be remedied. Three changes would seem a step in the right direction —

1. The little booklet setting out the summary of requirements as to service of documents should be reprinted and given to all applicants for a process server's licence.

2. The court should ensure on the date of application by cross-examination or questioning that in fact the applicant does know and is capable of carrying out the duties of a licence holder.

3. The Crown Law Department could run an intensive course (weekend or night time) every three months, say, for applicants. Satisfactory completion of the course would be a prerequisite for a process server's licence.

[41] The Private Agents Act 1966 s. 13(1).

THE NATURE OF THE JOB

'The life of the process server in New York City, is neither safe, remunerative, nor easy'.[42] The same can be said of the life of a process server in Victoria.

Easy

Mention has been made of the various and sometimes confusing legal rules concerning correct service of summonses. That is but one aspect of the task. There is a considerable amount of organization and paper work required of the process server.

Regulation 23(1) of the Private Agents Regulations 1967 states:

> Every licensed . . . process server . . . shall keep a record in the form of a properly bound book . . . and such record shall contain the following particulars:
> (d) in the case of a process server
> (i) the name and address of the firm corporation or person requesting the process to be served;
> (ii) the date such process was received;
> (iii) the nature of the process;
> (iv) the name and address of the person to be served with the process;
> (v) the date place and time of day of service of the process;
> (vi) whether the process was served personally on the person named therein;
> (vii) if the process was not served personally on the person named therein, the name of the person with whom the process was left and the time date and place of such leaving;
> (viii) (In the event of non-service) the reason for failure to serve process;
> (ix) the fee charged for the service.

The Act then requires the process server to 'keep or cause to be kept for a period of at least five years a permanent record containing fully and correctly the prescribed particulars of the functions performed by him'.[43] The amount of paper work is impressive, indeed staggering, especially when one remembers that a process server's job is a low cost high volume business.

In addition to the records required by the Act and Regulations, the summonses that have been served will require a correct affidavit of service, completed and sworn. Much of this is of course routine, but it takes time; and there are anomalies which need to be watched. Above all, however, the person to be served must be located and this can be difficult. Many summonses are issued months or even years after the debt (or alleged debt) was incurred and people have moved on. A large percentage of recipients of default summonses are highly mobile, whether by force of circumstances, or to evade debts. The process server, moreover, as the

[42] 'Abuse of Process — Sewer Service' (1967) 3 *Columbia Journal of Law and Social Problems* p.22.
[43] The Private Agents Act 1966 s. 44A.

front line man of debt collectors is not a popular figure and many regular bad debtors become skilful at evasion.[44]

There is little the process server can do in the face of what he or she suspects is a lie — 'No, Mr. X does not live here.' Generally the size of the debt and the uncertainty of recovery make investigations at this level unprofitable. It is also quite common for a child to answer the door with 'No, I am not over 16 . . .' and thus, of course, not able to be served summonses.

The general opinion of experienced process servers is that more default summonses are unserved than served. The most optimistic estimate I heard was that 50% of the default summonses were served; however, the general feeling was that this figure would have been lower, but how much lower is difficult to determine. Certain agencies connected with debt collection have done surveys in this matter. Thus, say, Melbourne is divided into a number of geographical areas and over a fixed period the percentage of successful service is recorded. Certain areas have had a rate of successful service of close to 30%, *i.e.* only 1 in 3 summonses was able to be served. Certain kinds of summonses are very difficult to serve. There is a success rate of only 1 in 5 for the personal service of Melbourne City Council parking offence summonses which have been returned by the Post Office unclaimed after service by post.

At present the process server cannot serve summonses on Sundays.[45] This prohibition of service of summonses on Sunday whilst it might have made sense in another age, seems now quite unnecessary. If warrants may be issued and executed on a Sunday,[46] there seems no reason why summonses cannot be served. It would certainly facilitate the process server's work since Sunday is one of the two days on which a large proportion of the population is likely to be at home.

Remunerative

In the interests of making justice in the Magistrates' Court as economical as possible, fees for the service of process have been kept very low. However, the explanation so often given for higher prices charged in certain large department stores 'you will have to pay for good service' holds true for process servers also.

[44] See P. Clyne. *How not to Pay your Debts,* Ferret Books 1973 for techniques of evasion, esp. ch.7.

[45] Service is expressly forbidden by 0.50 R.4 of the County Court Rules 1964. For Supreme Court — 'Service on a Sunday is absolutely void' Williams, Supreme Court Practice, 2nd ed. 1973. [9.2.2] p.1130. There is no explicit prohibition in the Justices Act 1958 and there is some suggestion that such service might be legal. (See Paul's Justices of the Peace 2nd ed. 1965, notes to s. 30, s. 31, p.44). In practice Magistrates' Court process is not served on Sundays. Police Standing Order No. 2192 explicitly prohibits the service of summonses on Sundays.

[46] See Justices Act 1958 s. 30.

The present scale of costs in the Magistrates' Courts for service of summons is as follows:

For service or attempted service by a member of the Police Force of any summons[47]	$2.00
For service where service is not required to be made personally	$2.60
For service where service is required to be made personally, except under the provisions of the Imprisonment of Fraudulent Debtors Act 1958	$3.80
For service where service is effected by post	$0.55
For service of summons issued under the Imprisonment of Fraudulent Debtors Act 1958	$3.90
For attempted service when the time, date and number of visits attempting service is shown by Affidavit attached to or endorsed on the summons or other document	$0.55
There is also a mileage rate allowed of 25c for each 1.5 km in respect of any distance travelled one way in excess of 3 km from the nearest Court House.[48]	

At this point it is necessary to make a distinction between the two main groups of employers who provide work for individual process servers. These are commercial agents and what are known as agencies. The commercial agent who is licensed under The Private Agent's Act 1966, is carrying on the business of collecting or requesting payment of debts.[49] The Agency, so called, is a business which acts as a 'go-between' for solicitors and other firms or businesses who want summonses and other court documents served. These agencies distribute the various court documents to individual process servers to be served. In general, the commercial agent can pay the process servers he employs close to if not the full scale cost as set out above, because he is able to make his profit from the creditors for whom he collects his debts, either on a commission basis or on some other arrangement. The Agency however, as middle man, cannot pay the individual process server the full scale cost since its only source of income in this area will be the charge it makes on the solicitors or businesses who employ it to distribute court documents.

At present, commercial agents are, in many cases, paying the process server the scale cost of $2.60 for service of a default summons but nothing for attempt. The rates paid by agencies to individual process servers for service of default summons vary from $1.25 for service and nothing for attempt, up to $2.00 for service of the summons and nothing for attempt. It should be noted that these figures have just been substantially increased as a result of the recent increases in the Magistrates' Courts costs scale, which came into effect on February 1st of this year.[50]

[47] Statutory Rules No. 363 of 1974.
[48] Statutory Rules No. 33 of 1975.
[49] See the Private Agents Act 1966 s. 3.
[50] At the end of 1974, the rates paid by 'Agencies' ranged from 90 cents with nothing for attempt, to $1.25 or perhaps $1.50 with nothing for attempt.

Without going into any work-value analysis, it seems universally agreed that these rates are far too low. One point perhaps could be made — the largest single item of expense for process servers is the cost of running a car and that cost has risen at a very high rate.

There are three main areas of dissatisfaction with the present pay scale. These are:

1. The rate for police service which is higher than for service by an ordinary process server.
2. The discrepancy between rates for service in the Magistrates' Court and the County Court where the minimum service fee is now $6.30.
3. The overall lowness of the rates.

A letter from the President of the Federation of Private Investigators (Victoria) to the Secretary of the Law Department dated June 7, 1974, sets out the issues quite well:

> It is submitted that these fees are totally inadequate in the present economic situation and should be increased, without delay, to the following:
>
> For non-personal service $3.00
> For personal service of Oral Examinations and Orders $4.00
> For personal service of Summons under the Imprisonment of Fraudulent Debtors Act $4.00
>
> . . . we would point out that the Police are receiving more than Process Servers. This, we consider, is a grave injustice to our profession. In many cases of Police service, they make one call and if there is no one home they leave a card under the door of the premises for the person to call to the Police Station and he is promptly served there.

And speaking of the discrepancy between rates for Magistrates' Courts and County Court, the President continues:

> A Magistrates' Court summons requires no less skill and ability to serve and where personal service is required, the proper identification must be made to effect correct service. This frequently requires several calls, whereas a County Court summons can be served non-personally.
>
> The expense involved in serving a Magistrates' Court summons is equally the same as that involved in serving a County Court process. We are required to maintain registers *etc.* which involve many hours of unproductive work which requires the service of clerks to complete.
>
> To give a competent service throughout the metropolitan area is more than an individual server can accomplish; to overcome this he must employ other servers and staff to enable this to be done. At the present rate . . . it is virtually impossible to recruit servers and be able to retain their services and pay them a reasonable fee and for an Agency to show a reasonable return for their efforts.

It should be noted that this letter was written a year ago and that the present fee scale despite the recent fee increases and inflation is still below the recommended rates.

The other criticisms seem quite valid. There is clearly need for some rationalization of the whole scale of rates for service. One suggestion is

a scale encompassing all courts and based on the degree of difficulty. Applying this scale to the Magistrates' Courts jurisdiction we would have

Fraud summonses	$6.00
Personal summonses	$5.00
Non-personal summonses	$3.00

It is clear that personal service is more difficult than non-personal service; likewise, that fraud summons requires personal service but in addition such a summons must be served on a person who is often recalcitrant and evasive. It is also recommended that there be a minimum fee for attempted service of $1.50. In support of this recommendation, it should be noted that Police service receives the same rate for successful service and for attempted service.[51] Moreover, the process server expends the same amount of effort and energy on an attempted service as he does on a successful service and a refusal to compensate him for attempted service must as a matter of human nature tempt him to improper service.

Safe

Assaults do occur; one process server described the occurrence as 'frequent'; another spoke of 'the ever present danger'. For many process servers, there is always a tension, and there have been serious assaults hospitalizing process servers. One experienced process server who was inclined to discount the danger from assault, while describing the one occasion on which she was assaulted by having a brick thrown through the window of her car, commenced her account with the following statement: 'of course, when I am doing process serving, I always leave my car running'! Another person who employed a large number of process servers distinguished the drunken assaults which he regarded as quite common and not very dangerous ('you can always avoid them') and more serious assaults. He considered that there were a significant number of these more serious assaults — at least one a month — and of course there were many that you did not hear about.

There is a famous early English case where the process server was made to eat the writ by the irate defendant,[52] and, I am informed, the experienced process server also carries as part of his tools of trade dog biscuits for unfriendly mastiffs. In general, the attitude of the police towards process servers is unhelpful. They will not help a process server serve a summons when there is likely to be danger and in many cases, they have stated that they will not interfere until the actual assault occurs, which is cold comfort. One member of the police force stated that in fact

[51] See Statutory Rules No. 363 of 1974. Magistrates' Courts (Amendment) Rules 1974 s. 2 2nd Schedule No. 13.

[52] See *Halsbury Laws of England* 2nd Ed. Vol. vii, Sub-section 4. s. 15, note (u) and Clyne *op.cit.* p.37.

it was the unofficial police practice not to help process servers. He also said, if a process server did not serve the summons and then swore an affidavit that he had, and a judgment was given, the first time that the defendant heard of this was when the police came around to seize goods in executing the warrant. In such circumstances, the defendant was generally very irate and took out his anger on the police, not on the process server. The police understandably resent this sort of thing and it promotes an unsympathetic attitude to process servers. Of course, too, many of the police executing warrants in the poor areas tend to develop a sympathy for the defendant and see the process server as an instrument of oppression by large companies. Interestingly, one experienced process server considered that since the police had stopped serving summonses, defendants in certain areas were more belligerent.

Workers' Compensation

The relationship of most individual process servers to the agencies is one of 'independent contractor'. Since they are not employees they are not eligible for Workers' Compensation for injury suffered either in car accidents or as a result of assaults while they are in the course of their work as process servers. They can, of course, insure themselves at their own expense, but apparently few do. There is now some protection afforded them, from assault at least, by the Crimes Compensation Tribunal.[53] The fact remains, however, that they are a group of people engaged in a dangerous occupation with no special protection.

Protection of Process Servers

It seems clear that any assault on a process server who is serving court documents constitutes a contempt of that court. Thus in *Barnes'* case, which incidentally involved the threatened assault of a process server trying to serve a subpoena, the N.S.W. Court of Appeal stated:

> the principles of law upon which such cases are governed are not in doubt. They are stated succinctly in *Oswald on Contempt* in the 3rd ed. at p.84 where the learned author says: "the respect due to the Court itself is owing also to its process. It has often been held to be a contempt to use insolent or indecent expressions, or oaths, or other violent or profane language on being served with any process." And at p.85, it is stated: "It is also a contempt to assault, illtreat, or threaten a process server engaged in his duty."[54]

It would appear that apart from statutory authority an inferior Court of Record can punish only for contempt committed in the face of the

[53] Set up by Criminal Injuries Compensation Act 1972. The Secretary of the Tribunal said he knew of no process server who had applied to the Tribunal for compensation.

[54] *Re Barnes; Rule Nisi for Contempt of Court* [1968] 1 N.S.W. R. 667 at 700. See also *Ullathorne Hartridge and Company Limited v. Green, In re Hartridge* (1901), 27 V.L.R. 22.

Court.[55] While a Magistrates' Court in Victoria is a Court of Record,[56] most assaults on process servers do not occur in the face of the Court. However, the Magistrates' Courts Act 1971 does give the Court some authority — s. 46(3) states:

> If any person
> (b) wrongfully influences or attempts to influence any justice clerk or officer of the Court or any witness or any person concerned in any way with the proceedings of the Court in relation to any civil or any criminal proceeding, appeal, action or matter being heard or to be heard by the Court; the Chairman may orally or in writing direct the apprehension of any such person and if he thinks fit, may commit him to prison for any time not exceeding six months or may impose on him a fine of not more than $500 for every such offence . . .

It would appear that a process server serving a default summons comes under the words 'any person concerned in any way with the proceedings of the Court in relation to any civil or criminal proceeding'; but it is not absolutely clear just whether the words 'wrongfully influences or attempts to influence' would cover abusive behaviour and assault before or (more doubtfully) after the service of a summons. It could well be argued that such behaviour by the person who received the summons was basically an expression of his anger; it was not on his part any attempt to influence the process server nor did it in fact influence him in any way contemplated by the Statute. This section of the Statute seems concerned with various ways of 'influencing' persons relevant to a case to not carry out their duty during the actual trial or hearing — its scope is subornation of a witness and allied offences. However, the width of the section could well lead to a broad interpretation so as to hold that threatening or assaulting process servers in the course of their duty did fall within the section.

At any rate, whether or not s.46 does catch assaults on process servers, there is in the Supreme Court a power to deal summarily not only with contempt of itself, but with contempt of any inferior Court as part of its supervisory function over the lower court.[57] This principle was applied in Victoria in *Wright's* case where Starke J. stated: 'this Court has jurisdiction to deal summarily with contempt of an inferior Court'[58] — in this case the assault of a witness at the end of a trial in the County Court. Likewise in *Perry's* case, a Western Australian case,[59] the process server went to Perry's residence to serve two local court summonses, one on Perry and one on Perry's wife. Perry threatened the process server with violence. It was held by the Supreme Court of Western Australia —

[55] *Re Dunn; Re Aspinall* [1906] V.L.R. 493.
[56] *Cooper & Sons v. Dawson* [1916] V.L.R. 381.
[57] *John Fairfax & Sons Pty. Ltd. v. McRae* 93 C.L.R. 351, esp. at p.364 per Dixon C.J., Fullagar, Kitto, and Taylor JJ.: 'The Supreme Court of New South Wales has power to deal summarily with contempts of inferior Courts of New South Wales . . . '.
[58] *R. v. Wright* (No. 1) [1968] V.R. 164.
[59] *In re Perry; ex parte Griffith and Another.* (1931), 34 W.A.L.R. 66.

1. That interference with a process server was contempt of the local Court, and,
2. that the Full Court of the Supreme Court of Western Australia had power to deal with contempt of an inferior Court.

This power to protect process servers has not to my knowledge been used in Victoria. With the continued prevalence of assaults and abusive language on process servers, there would seem to be considerable justification for the use of this contempt power of the Supreme Court with its attendant publicity and *ad terrorem* value.

Process Servers' Association

Over the last 12 or so years there have been two attempts to get an Association operating but with little success. The present President of the Federation of Private Investigators (F.P.I.) stated that the first Association received little co-operation from the Law Department or the Chief Secretary's Office and ceased to function in 1968-9. In 1973 there was a second attempt to 'reform the dormant Private Investigators and Process Server's Association of Victoria'.[60] The initiators circularized the majority of the licensed process servers but received few answers. Thus the F.P.I. which included not only process servers, but also licensed private investigators and guard agents, is to all intents and purposes practically defunct. This is due partly to the attitude of process servers who are by and large part-time short term operators and partly to the fact that the organisers of the F.P.I. are in fact employers, while the bulk of their potential members would be employees. There have been on the part of the F.P.I. some thoughts about Federal registration, but nothing has yet been started. It seems unlikely that significant improvements in the process servers' position will be achieved by organization.

Status of Process Servers

The Private Agent's licence does not confer upon the process server any additional powers or status.[61] He is not, it would seem, an officer of the Court. Certainly the Private Agent's Act 1966 does not regard him as such.[62] It has been suggested that if process servers were Court appointed officials with the status of, say, assistant bailiffs, they could be more easily supervised and protected. Payment on a good living salary basis, plus commission would help to eliminate the temptation to take short cuts in service and the commission could keep efficiency at a high level.

[60] Letter of Federation of Private Investigators (Vic.) F.P.I. to all licensed process servers (1973).
[61] The Private Agent's Act 1966 s. 21(1) states this explicitly.
[62] *Ibid.* s. 4(1)(f) in exempting any officer of any court from the necessity for being licensed, infers that the licensed process server is not an officer of the Court.

Bailiffs are used for service of summonses in other States, and in Western Australia and South Australia particularly, the system seems to operate with a good degree of efficiency.[63]

Police who are engaged in the execution of warrants of distress have stated that among debtors the County Court Bailiff has a very definite status and the title Bailiff commands extra respect. The same cannot be said of the word 'process server'. The Bailiffs who have been recently appointed to execute warrants of distress in the Magistrates' Courts have been given statutory protection. The Magistrates' Courts (Jurisdiction) Act 1973 states:

> A person shall not assault, resist, interrupt or obstruct a bailiff in the exercise of any of his powers authorities, duties or functions under this or any Act, or rescue or attempt to rescue any property seized or taken by a bailiff.
> Penalty: $500, or imprisonment for six months, or both.[64]

This kind of statutory protection exercisable by the Magistrates' Court would be most beneficial to the person serving summonses. It would be a comparatively simple amendment of the Magistrates' Courts Act to broaden the powers of bailiffs to include the service of summonses, as is done under the County Court Act.[65]

Such bailiffs or assistant bailiffs as employees would be covered by Workers' Compensation. Being attached to Courts, they would in the event of any queries have access to information and advice in the way they do not now.

Perjury — Swearing of false affidavits of service

The process server is paid on his word — and he has taken the job, which is difficult and dangerous — for the money. The default summons procedure which is the bulk of the ordinary process server's work, presumes that most defendants will not go to Court; it is unlikely that the defendant will complain to the authorities about non-service or incorrect service of default summonses. There is, moreover, virtually no supervision by the Registrar of Private Agents and the Police will readily admit that it is remarkably difficult in such cases to gain a conviction for perjury especially when the relaxed requirements for service of default summonses enable a process server accused of perjury to swear that he served it on some unnamed male or female apparently above the age of 16 and apparently living there. Even the summons which has been left in the mail box or slipped under the door could have been put there by such unnamed male or female apparently over the age of 16. In the circumstances, with

[63] For Western Australia, see Local Courts Act 1904-1970; for South Australia see Local and District Criminal Courts Act 1926-74.
[64] s. 6(1); The Magistrates' Courts Act 1971, s. 31C.
[65] The County Court Act s. 24.

little risk of being caught and an incentive to make more money, there is clearly a high temptation to falsify affidavits of service.

In certain States of America where process servers work under roughly the same conditions as Victoria, a number of studies have indicated that the practice of 'sewer service' has become very widespread. Sewer service has been defined as 'the fraudulent service of a summons or summons and complaint usually either by destroying it, by leaving it under the door or mail box, or by leaving it with a person known not to be the defendant; and then executing an affidavit stating that the summons was personally delivered to and left with the defendant.'[66] Thus it has been stated that 'evidence uncovered by the United States Attorney's Office for the Southern District of New York as a result of an investigation of sewer service indicates that it is very likely that at least half of all the default judgments entered in the civil court for the County of New York are based on false affidavits of service'.[67]

Given similar conditions, human nature and overseas experience point to the likelihood of such abuse; but what hard evidence in fact do we have for the existence of such abuse? The rate of conviction for perjury for the swearing of false affidavits[68] is very low. At Police Records, the number of reported cases involving process servers is so miniscule that they are not given a separate classification despite the large numbers of classifications of various offences. There are virtually no hard statistics. One is forced to circumstantial evidence and informed opinion to fill out the picture. An experienced Clerk of Courts at Melbourne Magistrates' Court could recall two convictions over the last eighteen months for swearing of false affidavits. There have been also, in the same period, two or three other process servers committed for the same offence whose cases were thrown out at the committal stage.

Magistrates at the Melbourne Magistrates' Court have directed over the last few years at least, in perhaps six cases each year, that inquiries be made *re* allegations of incorrect service of documents. Likewise, in applications for re-hearings of oral examinations (there were 114 in the first three months of this year) in perhaps a quarter to one third of these applications, the reason given was non-service of the subpoena, and in many instances, the Magistrates are, at the least, sympathetic to their claim. In the period from September 1972 to September 1974, the Registrar of Private Agents received four complaints which could have involved perjury; in all cases these complaints were handed over for investigation

[66] 'Abuse of Process — Sewer Service' (1967) 3 *Columbia Journal of Law and Social Problems* p.17 n.2.
[67] Frank M. Turkheimer *op.cit.* p.849.
[68] The Crimes Act 1958 s. 314.

by the Police who reported that there was insufficient evidence to justify any action. This however, possibly points more to the difficulty of obtaining a conviction than to the incorrectness of the complaint.

A number of process servers with whom I have spoken have admitted that there is a certain amount of perjury. Thus it is not uncommon to alter the date of service so that, say for a special default summons which was served only 20 clear days before the Court hearing, the affidavit of service states that is was served 21 clear days before the Court hearing. One process server stated that this practice was 'quite common'. It is also not uncommon for Clerks of Court to note that on the affidavit of service the claim made for mileage is incorrect. Some Clerks believe that this is not a mistake.

The attitude of those who employ process servers ranges predictably from the ostrich 'if it's served, it's served' to the self-righteous 'we would never employ a process server who'd do such a thing'. However, the employers also admit to sacking certain process servers for such blatantly illegal behaviour as posting summonses; they also admit that there have been problems with false affidavits in the area of fraud summonses which require personal service and where there is a probability of gaol for the defendant if he does not appear in Court. In other words, where the possibility of detection is higher there have been problems. Likewise, the surveys conducted by some process serving agencies indicate a strong probability of perjury. If a survey has indicated that the average rate of successful service in a certain geographical area is say 40% and a new process server is achieving a success rate of say 80%, there would seem *prima facie* evidence of either remarkable skill, incredible enthusiasm or perjury. This has happened.

Many of the police, especially those concerned with the execution of warrants of distress, believe that there is a large amount of perjury by process servers. The standard remark made to the police when they come to execute a warrant of distress is 'but I never got the summons'. Such a remark, even if true, does not mean perjury as in a number of cases a summons correctly served on the wife of the defendant might not be passed on to him, perhaps because the wife is afraid; at any rate, the experienced policeman has become quite sceptical of such claims of non-receipt of summonses. Nevertheless, police in executing warrants of distress have often come upon situations which suggest very strongly that there has been a false affidavit sworn by the process server.

Such instances occur when a person who is claiming that he did not receive the summons is the kind of person who has never been in contact with the police before even for driving or parking offences. In these situations, it is a case of the police reliance on their nose for honesty.

Even more compelling evidence occurs when the person can produce receipts showing that he has paid the alleged debt and stating that if he had received the summons he would have shown the receipts. Likewise, when the policeman comes to execute a warrant of distress and finds that the address is a vacant block of land which has been vacant for at least 10 years, there is a strong presumption that the process server has sworn a false affidavit of service; such is also the case when the policeman finds that the defendants have left the address six years, or in some cases more, before the summons was served.

Then there are the occasions when the new occupant of a flat which has been vacant for two or three weeks finds anything up to half a dozen summonses slipped under the door and brings them down to the Police Station. Estimates by police who have had experience in this area vary, but all agree that there is a significant amount of perjury. Most would place the figure at over 10% and some would go as far as to state that the percentage of perjured affidavits of service ranges from 20% up to, in certain localities, close to 50%. There is little criminal action taken by police in this matter because they believe justifiably that there is very little chance of gaining a conviction.

It is very difficult to come to any hard and fast conclusion; however, the estimates of police and others connected with process serving, the comments of process servers themselves and human nature, all lead to a strong belief that there is a substantial amount of swearing of false affidavits occurring in Victoria. Quite apart from the disrepute that it throws on the legal process, it is quite evident that such perjury can render very substantial injustice to a debtor. The problem is on any count a most serious one, and what evidence there is indicates that the criminal sanction of perjury is ineffective. The remedy lies in removal or diminution of the temptation — that is by better recruitment, training, pay and supervision and perhaps by changes to the system of service.

Service of Default Summonses by mail

It has been suggested that all default summonses both ordinary and special be served initially by certified mail; if the summons is returned unclaimed, it can then be served in the normal way for default summonses. There seems much merit in this suggestion. At present certified mail costs 30c more; in Tasmania[69] where such a system is operating, about 40% to 45% or less of summonses are returned unclaimed. Clearly, on this figure it is more economical to use certified mail than a process server. With the small number of unclaimed default summonses needing to be served by process servers, and these in many cases more difficult to serve,

[69] See the Local Courts Act of Tasmania.

it would be both economical and appropriate to pay the process server more for his service. This arrangement could easily be tied in with the use of bailiffs or assistant bailiffs.

SUMMARY OF RECOMMENDATIONS

Mode of Service

The use of certified mail for summonses seems very desirable.

Status and calibre of process server

1. The task of process serving could be entrusted to Court appointed bailiffs or assistant bailiffs.
2. A far more thorough system of training needs to be employed
   (a) The booklet containing the summary of requirements as to service of documents should once again be given to all process servers when they receive their licences.
   (b) There should be a genuine examination by the Magistrate at the licence hearing to determine if they do understand the basic rules of service.
   (c) An intensive course run by the Law Department and held perhaps every three months would be invaluable.
3. There should be much more supervision by the Registrar of Private Agents who should be given sufficient staff to engage in spot checks of affidavits of service and registers of summonses served.
4. There should be significant pay increases, along the lines recommended in the article.
5. Service of summonses on Sunday should be allowed.
6. Exemplary use of the Supreme Court contempt power in one or two notorious instances would be highly desirable.