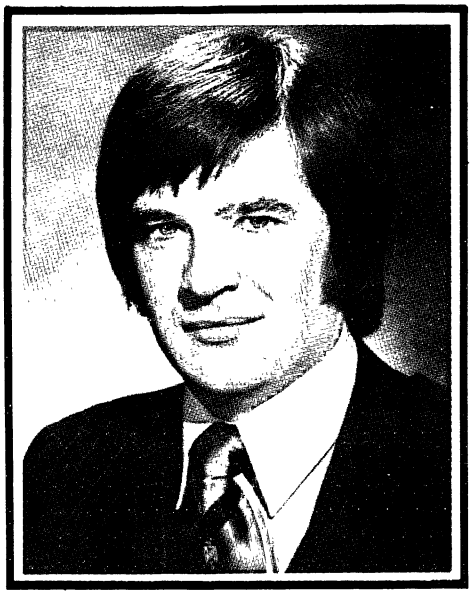

*A DAY IN THY COURTS

(The Role of the Lawyer in France and Victoria Compared)

By DR. JOHN F. WALSH of Brannagh, J.P.

**A day in Thy Courts is better than a thousand in my chamber. — Psalm 83.11.*

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In these days of the global village and transnational marketing it is more than likely that our lawyer in Victoria will arise in the morning to the same gloomy news or raucous music, wash with the same soap and shave with the same disposable shaver as will a lawyer in France.

At breakfast our man in Victoria will be as likely to have corn flakes or the English shredded wheat as will the modern Frenchman. If he is running late he may well opt for the Continental coffee and bun on the way to court or office.

However, notwithstanding the international marketeers and the influence of le television, our man in Victoria will go to a different court and walk in to a very different legal system than will his counterpart in France.

Whilst driving through the traffic (getting almost as bad in Melbourne as it is in Paris) our man may well reflect on his early legal training and education. Like most legal practitioners in Victoria he is a university man with a law degree behind him. He went to a State university for four years and graduated as a Bachelor of Laws (though he could have elected to take a five-year course and come out with two degrees — but he was anxious to get into practice, and family finances would be hard pressed if he took another year). In Victoria, as in France, only state universities can issue law degrees, which is different from what he found when he visited America last year.

Some of his older colleagues became lawyers by working as articled clerks and passing the required professional examinations, but the modern trend is for those wishing to enter the profession to take a full-time law degree before receiving any practical training. Our man is not quite sure that this is a good thing, but the few articled clerks using the old method now have to go to the university for their lectures as their old classes have been closed down. There had been talk that this had been as a result of pressure from the two universities, but this aspect of legal training had not affected our man.

His French parallel also went to the university for four years. At the end of this time he obtained his first degree, the licentiate. But, whereas for our man the obtaining of his degree was almost the end of his academic training, not so for the Frenchman. Although the law course at French universities has grown from two years to four years, there is still more to be done before the French graduate can call himself a lawyer.[1]

And it is at that stage that the Frenchman has to make a decision as to what branch of the law he will go into. He can, and must, decide whether to be a judge, a prosecuting attorney, a government lawyer, a barrister (avocat), a solicitor (avoue), a notary or a law teacher.[2]

Whatever he chooses there will be a period of professional training and then further examinations. If he has had particularly good results he may be tempted to take his doctorate and become a law professor. Academics in France carry more weight and have more prestige than their counterparts in Australia. If he feels a flair for advocacy he may elect to become an avocat. This requires a further state examination followed by two years working with a senior member. But all this hard work will be well worth it. Avocats have special prestige and command high fees. And if our French lawyer wants to enter politics he will find that many of his fellow avocats have preceded him.

If he has a liking for drafting and recording he may decide that the life of a notary (which is not at all similar to our notary public) is for him. It also carries a fair bit of local influence with the fees he will earn. If he likes the security of the position and the thought of representing the state he may choose to become a prosecutor. This can be a little broader than the common law prosecutor for in France the prosecutor has the power to represent the public interest in judicial proceedings between private individuals.[3]

But then being an avoue is not a bad life. Plenty of money and little competition, caused by the fact that only a limited number of appointments are allowed in each area, and this often by purchase. Perhaps it is not all that easy to get in, but once started the future looks pretty rosy.

Some of his fellow students are thinking of becoming judges. This will require a further three years training and a further examination. Although being a judge does not carry the same prestige as it would in England or Australia it does suit those who like to combine power with security. The French judge is independent, and the weight of responsibility is not all that heavy as he usually sits with one or more judicial colleagues. The judge is a specialist right from the beginning and because of this should be better at the job. However, the judiciary does not always attract the very best minds.

Whatever our French analogue decides it is very much a permanent decision. The lateral mobility of the common law world is unknown to him.[4]

When our man left university he spent twelve months in articles — that is, twelve months working as a graduate clerk articled to a solicitor. During that time he attended some lectures and passed a few more examinations to complete his admission requirements. After his twelve months he attended a brief ceremony at the Supreme Court and was admitted as a barrister and solicitor.

The two professions have been fused in Victoria since 1891, but most practitioners practise as either barristers or as solicitors. Our man may have heard that in France the avocats and avoues were fused by the Reform Act of 1971, but that many have elected to continue as a divided profession. However, the effect of the change was to allow the public to be able to deal directly with the avocats, which position is quite different from that in Victoria where all approaches must be made through a solicitor. One similarity which may interest our man is that avocats were unable (until 1957) to sue for their fees.[5]

On completion of his articles our man was offered a position with his employing solicitor. However, notwithstanding the prospect of real money after five years of impecuniosity, our man decided that he wanted to be a barrister more than anything else, so he opted to read with a senior barrister for a period of six months — pupillage. At the end of that

time our man became a barrister-at-law. He signed the Roll of Counsel and undertook not to practise as a solicitor.

He does not have the security of an employed solicitor or even the more steady income of a self-employed solicitor, but he does have a lot more interest and excitement, and some weeks he makes a great deal of money. He has not thought much about becoming a judge as he is still relatively junior in the profession. That may come in the future, and our man is consoled by the thought that judges are chosen from only the ranks of the barristers (numerically much smaller than the solicitors).

Some of his colleagues from time to time act as Crown Prosecutors, but this is not regarded as a lifetime career as it is in France. In the magistrates courts where our man appears frequently the prosecution is handled by a police officer.

He did not think much of becoming an academic, although his results were good enough. It would mean starting as a tutor and then undertaking postgraduate work in order to obtain any worthwhile promotions. No, he felt that the call of freedom and challenge which is part of the barrister's life was for him.

Sometimes he wishes that the public knew a little more of the law, not only to make conferences easier but also to make for more interesting dinner conversation. He would feel envious of his correlate in France where law is much more a part of general education and many more educated people understand its provisions and function.

When our man first started at the Bar he did a fair bit of Legal Aid work, some of it not very well paid. This helped get him started and now seems to be becoming an accepted way to launch a career; which is greatly similar to the position in France where the new avocat will cut his teeth on the problems of the poor and indigent.[6]

This morning, however, our man is appearing for three paying clients at a suburban magistrates' court. These are all criminal cases, but not of a grave nature. When he first started our man would be lucky to have one case a day, but now he often has more than that, and today they are all in the one court (which, with today's traffic problems, is almost necessary).

The three clients came through one firm of solicitors who have sent a fair bit of work his way since he won a rather difficult case last year. Though the fact that our man will, if possible, have a conference beforehand with each client to discuss the case may very well be a factor. He knows that many of his colleagues charge the same fees as he does, and then see their client for the first time at ten o'clock on the day of the trial. This does not happen quite so much now in France because the client approaches the avocat direct and there is more opportunity for pre-court discussion of the case.[7]

His clients are already at the court so our man approaches the clerk of courts to ascertain when his cases will come up on the list. He is told that one will be heard first, after the drunks and the immediate arrests; this a dangerous driving and driving under the influence; and this will be heard in the first division of the court. This court, like most suburban courts, operates on crime days in two divisions. The first division is manned by a stipendiary magistrate. The other two cases, one a theft matter and the other an assault by kicking on a police constable, are to be heard by the justices in the second division.

Although France abolished its juges de paix in 1958,[8] in Victoria the Justices of the Peace still play a significant role, more particularly in the criminal area. Our man has had both good and bad experiences before both stipendiaries and lay magistrates, and has no particular views on the retention of the lay magistracy. Some of his colleagues, he recalls, are opposed in principle to laymen deciding cases, but then many of them are equally against stipendiary magistrates, feeling that all benches should be manned by lawyers. Our man remembers that justices have been around for six hundred years and are such an essential and integral part of our common law heritage that we may tamper with them at our peril.

The stipendiary is perhaps closest to the French idea of a professional judge. But this stipendiary, like most, did not attend the university, obtain a degree, become a lawyer, and then become a magistrate. Rather he started working as a clerk in the courts some twenty years previously, passed the nine subjects required, and, after serving as a clerk in charge of a court for ten years, was appointed a stipendiary magistrate. Although he may not have a full degree (and the newer appointments do have this) our man feels that the very real and practical training received before a stipendiary is appointed is of much more value than any extended period in the removed atmosphere of a university law school.

The first case (the dangerous driving and the driving under the influence) gets underway. These are serious driving charges, and even for a first offence can carry up to twelve months imprisonment. The defendant has a prior conviction for a drink driving offence and this worries our man a little. However, the magistrate does not know this, because in Victoria (as throughout the rest of Australia) the judge or magistrate cannot be told of prior offences until after the case is determined against the accused. Not so in France, where the judge knows of the defendant's history before the case proceeds.[9]

The defendant appears relatively at ease, though it must be admitted that in the magistrates' courts, where wigs and robes are not worn, it is not quite as uncomfortable for the uninitiated as in the higher courts. In France, although wigs are not worn in any of the courts, the judges are robed, and the judge's role in the case makes it more frightening for the accused.[10]

In Victoria the system is accusatorial as opposed to the inquisitorial system of France. The magistrate will act as the umpire as it were, leaving it to the prosecution and the defence to bring out all the relevant points. The prosecution case relies, in this instance, entirely on police evidence. Two police officers, in a marked police car, followed the defendant for a distance of two miles (the police cannot get used to metrics either) and observed him weaving in and out of traffic at an excessive speed. When the defendant was stopped he was observed to be extremely drunk.

After the first police witness has given his evidence our man starts his cross-examination. This goes on for twenty-five minutes, and there is no interruption whatsoever from the magistrate. The French lawyer would, in a similar case, have just had to sit and listen to the judge ask the questions. Counsel for the defence is not heard until it is time for the defence closing speech. Questions can sometimes be asked, but these are asked through the judge (or president of the court, as there is invariably more than one judge sitting), and then only with permission.[11]

Our man has made a dent in the prosecution case, and this is unable to be rectified by the prosecutor in his re-examination. The second police witness gives his evidence, and our man puts him through a stiff cross-examination. There is no re-examination, and the magistrate asks just one question to clarify a point. The magistrate states, at the end of the prosecution case, that there is a case to answer (which is what our man expected). Our man elects to put his client in the witness box to give sworn evidence. He tells his story, but he has little to say about the drinking. He is guided by his counsel, who extracts all that is favourable to his case. Then it is the turn of the police prosecutor to cross-examine. He has done this before and trips the defendant up on one point. Our man tries to retrieve the situation on re-examination, but only partly succeeds.

The magistrate asks no questions of the defendant at all. In France the judge would have carried out the examination of the accused himself. The French judge plays a different, and more forceful, role from that of his Victorian equivalent. It is said that the French lawyer feels for the man, while the English barrister feels for the case, and this is understandable in a country where defence counsel must sit and watch the judge probe his client to ascertain the truth of the matter, and most probably lose his case for him.[12]

The hearing over, the magistrate gives a brief summary of his findings. He has a doubt that the driving was dangerous, but he finds it was extremely careless, so he finds a charge of careless driving proved (no prison term here); and he also finds the driving under the influence proved. At this stage our man puts a plea in mitigation of sentence. The prosecutor does not contribute to this part of the case, his role being over. The magistrate asks a few questions. On the careless driving charge the defendant is fined $200. On the drink driving charge the fine is also $200 and the defendant is disqualified from obtaining a licence for four years. The magistrate points out that it is a second offence (the prosecutor is allowed to allege prior convictions after the case is proved) and that he could have sent the accused to prison.

Our man asks for a few minutes to seek instructions from his client, in case he wishes to appeal. The defendant is happy to pay the $400, and does not want to run the risk of a longer disqualification period in the County Court (or perhaps a gaol sentence), so our man announces that his client will pay the fine. Just before leaving the court the defendant is warned by the magistrate not to drive during the period of disqualification otherwise he will assuredly go to prison.

Our man then moves to the second division where, after sitting through two short matters, his theft case is called. The bench consists of two Justices of the Peace, one of whom our man has come across recently in a committal hearing. The defendant pleads not guilty to stealing the item in question. The police prosecution puts forward the person from whom it is alleged the item was stolen, and a police officer who interviewed the defendant. The same process of examination-in-chief, cross-examination and re-examination is followed with both witnesses. The Justices ask a few questions. Our man moves that there is no case to answer, but the Justices rule that there is. Our man puts his client in the witness box, and her story comes out very well, and stands up to the cross-examination of the prosecutor.

Our man then argues on a point of law, namely the element of dishonesty required for the crime of theft. He cites case law, and as there is little Victorian law on this point he refers to two Court of Appeal

decisions. The prosecutor argues that the court is not bound by English Court of Appeal decisions. However, the Chairman of the Bench states that the English legislation is very similar to the Victorian (the Victorian statute being modelled on the English Theft Act) and that the Court of Appeal, although not part of the court hierarchy in Victoria, still had great persuasive weight. In Australia courts rely very much on reported decisions, whereas in France the Code is all important and the writings of learned academics. Although our man has a number of text books on the law he rarely cites them in court. Both judges in the higher courts, and magistrates in the lower courts, prefer to base their decisions on case law rather than on opinions of academics (no matter how eminent).[13]

After a brief discussion between the two Justices the Chairman announces that they have doubt as to whether there was dishonesty and the case is dismissed. The defendant is delighted, and our man secretly hopes that she does not find herself in court again one day.

As it is almost one o'clock the clerk announces that the court will adjourn for lunch and will reconvene at two o'clock. This seems to be the traditional time for lunch for all courts in Victoria. In France there seems to be some concern at getting all the parties back after a break in the middle of the day so the French judges and lawyers often have an early lunch (at about eleven o'clock or so) and commence the cases in the very early afternoon.[14]

At two o'clock the first case to be called is that of the assault by kicking on the police constable. Although this is a summary offence it carries a penalty of two years imprisonment. The earlier case of theft, being an indictable offence, has a penalty of ten years; but when it is heard in a magistrates' court the maximum penalty that can be imposed is twelve months. With the theft charge the defendant was asked if she consented to the Justices hearing the case, for she could have insisted on trial by judge and jury in the County Court. With this case the defendant, although he can receive two years imprisonment, cannot object to the jurisdiction. Our man has told him that if the case goes badly he can appeal and have a complete rehearing.

Although the defendant pleads not guilty and our man puts up a spirited defence he is not surprised when the justices find the case proved. There are some prior offences relating to assaults and wilful damage, so our man puts in a strong plea for clemency and puts two character witnesses into the box to support his plea. These are asked questions by the prosecutor and the Justices. The Justices retire and when they return they announce that they are imposing a prison sentence of three months. The Chairman adds that the defendant was lucky not to have been charged with assault occasioning actual bodily harm and sent to a higher court.

Although our man had been told by his client not to object if the sentence is less than six months he checks just to make sure. The defendant says he does not want to appeal (where he may get the maximum) and will go to prison. The court makes no award to the policeman to cover the clothing which was torn and for the medical expenses he has incurred. There is one type of assault on police where this can be done, but not this one. The policeman can take civil action if he wishes, but he will not bother. In France the police officer could joint in a constitution de partie civile and receive damages from the defendant, but this procedure is unknown in our system.

Our man has finished his appearances for the day, but not his work, for now he will return to his chambers to prepare for the morrow. On his way to the city he may well reflect that, although all his clients that day had fairly serious charges facing them, all had been free pending the hearings, the three of them having been released on bail. Persons in similar positions in France may not have been so lucky.

Our man may travel to France one day, and, although he may fall in love with the country, it is unlikely he would want to exchange legal systems. Like our language, our history and our parliaments, our legal system is part of our heritage and our culture. It is part of what we are.

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3. *Ibid.*
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