Maine Law Review

Volume 41 | Number 1 Article 10

January 1989

Maine Civil Remedies by Andrew M. Horton & Peggy L. McGehee

Eric R. Herlan
University of Maine School of Law

BOOK REVIEW

MAINE CIVIL REMEDIES. By Andrew M. Horton[1] & Peggy L. McGehee.[2] Portland, ME: Tower Publishing Co., 1988. $90.00.

Reviewed by Eric R. Herlan[3]

If there is any ongoing dispute within the legal community that one could properly characterize as a Great Debate, that dispute concerns the nature and sources of judicial power. Most recently that debate has manifested itself in nuanced and subtle disagreements about how a court ought to interpret enacted law, whether found in statutes or written constitutions.[4] That argument about judicial interpretation, and more precisely about the philosophical possibility of correct textual interpretations, is itself simply a more scholarly manifestation of an earlier dispute over whether judges should "legislate" when they resolve difficult legal issues, or should instead constrain themselves to a "strict construction" of the law.[5]

This debate about judicial power, so resistant to clear answer when directly addressed, has been helped along recently by Andrew M. Horton and Peggy L. McGehee in their 1988 treatise entitled *Maine Civil Remedies*.[6] The authors, two well-known civil litigators in Portland, Maine, do not articulate in their preface a desire to wrestle with that lofty jurisprudential issue; rather, they seek more modestly to provide a "book [that] will be helpful to members of the bench and bar in their daily work."[7] Horton and McGehee have succeeded wonderfully in their intended purpose—as a practitioner's treatise, *Maine Civil Remedies* is of such distinct scope and quality that it will surely become a fixture on the shelves of attorneys and judges across the State.

In addition, however, the authors' careful and detailed discussion

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1. Partner, Verrill & Dana, Portland, Me.

2. Partner, Perkins, Thompson, Hinckley & Keddy, Portland, Me.

3. Associate, Drummond Woodsum Plimpton & MacMahon, Portland, Me. B.A., University of Maine (Orono); Ph.D., Columbia University; J.D., University of Maine School of Law.

4. *See, e.g.*, R. DWORKIN, LAW'S EMPIRE 45-86 (1986); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Wroth, *The Constitution and the Common Law: The Original Intent About the Original Intent*, 22 SUFFOLK U.L. REV. 1201 (1989).

5. *See generally*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977); J.H. ELY, DEMOCRACY AND DISTRUST 1-9 (1980).

6. A. HORTON & P. MCGEHEE, MAINE CIVIL REMEDIES (1988). The steep price of the treatise ($90.00) is somewhat offset by the book's looseleaf format, allowing for updates and expansions by the authors without necessitating that their readers purchase a new book.

7. *Id.* at xi.

of the civil remedies available to persons drawn into court sheds crisp light on the nature of judicial power, and primarily on the *particularity* and *historicity* of judicial power. In other words, a reading of *Maine Civil Remedies* makes clear that judicial power is best understood not as some overarching jurisprudential concept amenable to precise definition, but instead as the sum of a multitude of particular judicial powers, each having its own scope and limits. Furthermore, the character or scope of judicial power is seen not simply in the particular listing of powers that may be accurate at a given time, but also in the historical development of those powers over time, as seen in the unfolding of statutory and case law. Thus the nature of a judge's authority is found in the collection of particular judicial powers available for his use, and that collection is itself historically defined and therefore always in a process of change or development. Given the historicity and particularity of judicial power, a treatise on civil remedies (rather than a study of hermeneutics, for example) is the best place to begin grappling with the law's Great Debate. *Maine Civil Remedies* is more than just an excellent practitioner's manual; it also brings to light much of what is the essence of Maine courts.

Dean L. Kinvin Wroth, in his forward to the work, notes that remedies as a distinct subject of study is of relatively recent vintage.[8] Yet when viewed broadly, the subject quickly subsumes much of what is civil law in the Anglo-American legal tradition and in that sense has been with the bar from its beginning. The link between substantive rights and judicial remedies is such a close one, that any expansive treatment of the latter must necessarily include much of the former. It might even be said that the most accurate definition of an individual's legal rights is to be found in a treatise on the remedies the he has available to him in a court of law. Thus a treatise on civil remedies transcends the sharp divisions of law into its various substantive categories, and provides us instead with the core concept of any understanding of the law.

The definitional centrality of remedies to the law becomes quickly apparent on a reading of Horton and McGehee's *Maine Civil Remedies*. The work begins with a helpful discussion of the necessary legal prerequisites for having one's day in court: the claim presented must be justiciable rather than moot, and the plaintiff must have standing to sue, however that concept may be defined in the various contexts in which it arises.[9] In that discussion, as throughout the treatise, the authors have thoroughly grounded their explanations in

8. *Id.* at xv.

9. *Id.* § 1.2-1.5. When Maine law does not specifically provide an answer on a particular point, the authors rely primarily on the *Restatement*, a source frequently used by the Law Court. *See, e.g.*, Rosenthal v. Rosenthal, 543 A.2d 348, 355 (Me. 1988).

Maine case law and statutes. *Maine Civil Remedies* is in that sense invaluable to the practitioner, who on a daily basis must support his motions, briefs, and legal opinions not with vague generalities, but with legal principles drawn from those cases and statutes. Horton and McGehee's extensive footnoting provides the authority necessary to avoid offering a court or client legal propositions unsupported by Maine law.

After their discussion of the prerequisites to a legal claim, the authors then move on to explain the statutory remedy of declaratory judgment, available before a wrong has occurred if the parties otherwise have standing and a justiciable controversy.[10] *Maine Civil Remedies* then addresses in turn the standard legal remedy of money damages, and the various forms of equitable relief available to a wronged party—injunctions, specific performance, restitution, equitable accounting, and constructive trusts.[11] For each remedy, Horton and McGehee provide not only the general principles underlying the forms of relief, but also the procedure and pleading requirements that must be met before a plaintiff can win the relief sought. Not ignoring the defendant in such claims, the authors set forth the defenses that can defeat the requested remedy.[12]

The treatise next turns to an examination of the remedies available in a great variety of contractual and quasi-contractual circumstances. *Maine Civil Remedies* briefly addresses the elements necessary for creation of a contract as well as the rules recognized for construing a contract once formed.[13] The authors correctly set forth the often obscured distinction between contracts implied in fact and those implied at law,[14] and then move on to discuss the complex formation and remedy principles specific to building, employment, and real estate contracts.[15] Having finished with contracts, Horton and McGehee turn to torts, as if determined to make clear that the study of remedies does in fact thoroughly underpin an understanding of civil law in general. *Maine Civil Remedies* has chapters on torts generally, and on negligence, assault and battery, conversion, interference, and defamation.[16] The treatise describes for each tort the elements necessary to its occurrence, the defenses available, and any relevant pleading or procedural techniques specific to a given tort.

In the negligence discussion, the authors detail the distinctions between contributory and comparative negligence and the effect of

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10. A. HORTON & P. MCGEHEE, *supra* note 6, § 3.1-3.4.
11. *Id.* §§ 4-9.
12. *See, e.g., id.* § 6.4.
13. *Id.* § 10.3-10.4.
14. *Id.* § 11.1.
15. *Id.* §§ 12-14.
16. *Id.* §§ 15-20.

Maine's comparative negligence statute on those doctrines.[17] In the section on negligence, as throughout the book, the authors have been careful to incorporate the Law Court's most recent decisions, as seen in the discussion of *Gammon v. Osteopathic Hospital* and its effect on the tort of negligent infliction of emotional distress.[18] Lacking in this section, however, is a discussion of the difficult area of liquor liability, with the authors noting only tangentially the Law Court's 1988 decision of *Trusiani v. Cumberland and York Distributors*,[19] and making no mention of Maine's new Liquor Liability Act.[20] The treatise's section on "Miscellaneous Subject Areas of Negligence" also would have benefited from a brief discussion of the special requirements under the Maine Tort Claims Act for successfully bringing a claim against governmental entities or employees. The authors did, however, provide such a discussion on the subject of medical malpractice claims.[21]

Finally, *Maine Civil Remedies* ends with four sections loosely lumped under the title "Provisional Remedies: Securities." These sections, which may prove to be the most frequently consulted in the treatise, cover attachments, trustee process, liens, and the enforcement of money judgments.[22] These sections each address judicial powers available to secure a plaintiff's potential interest in a defendant's property based upon an outstanding legal claim or judgment against the defendant. With the exception of trustee process, the authors discuss each subject fully and in exceptional detail.[23] Given the vast number of lawsuits filed in Maine, whether or not those suits ever reach a court judgment, it is clear why an understanding of the character and procedural requirements of these provisional remedies is so essential to an attorney's day-to-day practice. These sections in *Maine Civil Remedies* fully provide the practitioner with the basic information he or she would need on those topics.

When finishing a work filled with as many nuggets of wisdom as has *Maine Civil Remedies*, any reader is bound to look back and think of various issues that could have been included but were not. I suggest two, the first being a discussion of when a party aggrieved

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17. *Id.* § 16.4.

18. *Id.* § 16.5 (discussing Gammon v. Osteopathic Hosp., 534 A.2d 1282 (Me. 1987)).

19. 538 A.2d 258 (Me. 1988).

20. *See* ME. REV. STAT. ANN. tit. 28-A, §§ 2501-2519 (1988). For the best discussion of Maine's Liquor Liability Act, see Comment, *From "Maine Law" to Model Act: Liquor Liability in Maine*, 39 MAINE L. REV. 149 (1987).

21. A. HORTON & P. MCGEHEE, *supra* note 6, § 16.6-1, at 16-19-20.

22. *Id.* §§ 26-29.

23. In their section on trustee process, the authors keep their discussion brief and refer the reader to 1 R. FIELD, V. MCKUSICK & L. WROTH, MAINE CIVIL PRACTICE § 4B.1-4B.26 (2d ed. 1970) [hereinafter MAINE CIVIL PRACTICE].

by a governmental action may have recourse to judicial review of that action, and the second being when a party aggrieved by the decision of a judicial tribunal may have recourse to review by the Law Court. Both of these issues may at first glance appear more appropriately dealt with in a book on procedure rather than on remedies. Yet when the study of remedies is understood broadly to include the study of those judicial powers available in particular circumstances for the resolution of individual controversies, then the right to review and ultimate resolution by a higher tribunal would seem to be a remedial power of central importance to the legal system. This observation would appear to be even more accurate when the right to review is not available simply as a matter of course but only when the controversy for which review is sought meets certain statutory conditions.

In the case of review of governmental actions, a discussion of the situations in which Rule 80B of the *Maine Rules of Civil Procedure* is available would have been of great help to the bar. That discussion, of course, would not simply set out the conditions found in Rule 80B itself for obtaining review. As the Law Court made clear in *Lyons v. Board of Directors of School Administrative District No. 43*,[24] Rule 80B does not expand a person's right to review of governmental action, but simply establishes the procedural framework to be followed when review is "provided by statute or is otherwise available by law."[25] Review is otherwise available by law only when "formerly available under the common law extraordinary writs, such as certiorari, mandamus or prohibition, adapted to current conditions."[26] A discussion of those extraordinary writs would have been helpful to the practitioner, revealing the parameters of Rule 80B review, and it would have been interesting for the student of remedies, showing again the essential historicity and particularity of judicial power.

Similarly, the authors could have briefly discussed the availability of review by the Law Court of judicial decisions.[27] The Maine Supreme Judicial Court when sitting as the Law Court, an appellate tribunal, may review the decisions of other Maine courts only when authorized by statute.[28] That general reviewing authority is set forth

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24. 503 A.2d 233 (Me. 1986).

25. M.R. Civ. P. 80B.

26. Lyons v. Board of Directors of School Admin. Dist. No. 43, 503 A.2d at 236.

27. *Maine Civil Practice* provides an overview of the Law Court's jurisdictional limitations. *See* 2 Maine Civil Practice, *supra* note 23, at § 72.2-72.4b. Nevertheless, since a broad view of judicial remedies would include appeal to the Law Court, an updated discussion of those limits would have been appropriate in *Maine Civil Remedies*. The authors do discuss briefly the Law Court's equity jurisdiction. *See* A. Horton & P. McGehee, *supra* note 6, § 5.10-1.1.

28. *See, e.g.*, State v. Heald, 382 A.2d 290, 299 (Me. 1978); Gerrish v. Lovell, 146 Me. 92, 95, 77 A.2d 593, 594 (1951) (quoting Carroll v. Carroll, 144 Me. 171, 174, 66

in title 4, section 57 of the Maine Revised Statutes Annotated.[29] As an appellate court, the Law Court has no jurisdictional authority to make findings of fact,[30] thereby limiting a party's right to review of factual findings to the question of whether they were clearly erroneous.[31] Under that standard, only when "there is no competent evidence" in the record to support a factual finding[32] would a question of fact before the trial court become a question of law subject to the Law Court's appellate jurisdiction.

Perhaps because *Maine Civil Remedies* does not discuss the jurisdictional limitations on review by the Law Court,[33] Horton and McGehee trip up when they refer to the Law Court's power to render advisory opinions on important questions of law.[34] The Law Court, however, does not have this authority and is limited to hearing actual cases between parties in the circumstances set forth by statute.[35] Advisory opinions, as authorized by the Maine Constitution,[36] are issued by the justices of the Supreme Judicial Court on abstract legal questions presented by the Governor or by one of the houses of the Maine Legislature. Since no parties are before the court seeking a determination of their legal rights, an opinion of the justices is not issued by Maine's highest "court of law" and therefore has no precedential force.[37]

A.2d 809, 811 (1949)).

29. ME. REV. STAT. ANN. tit. 4, § 57 (Supp. 1988-1989). The Law Court's reviewing authority is not simply appellate. The court not only has general authority to hear appeals on questions of law, *id.*, it also has authority in specific circumstances to hear, *inter alia*, cases on report and questions certified by federal courts, *id. See also* M.R. CIV. P. 72, 76B. The Law Court has statutory authority to hear appeals in a number of specific contexts, in addition to the general grant of jurisdiction found in section 57. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 1851 (1980) (civil appeals from the superior court); ME. REV. STAT. ANN. tit. 15, § 2115 (Supp. 1988-1989) (criminal appeals from the superior court).

30. *See In re* Belgrade Shores, Inc., 359 A.2d 59, 64 (Me. 1976). *See also* ME. REV. STAT. ANN. tit. 4, § 57 (Supp. 1988-1989).

31. M.R. CIV. P. 52. *See also* Harmon v. Emerson, 425 A.2d 978, 982 (Me. 1981).

32. *Id.* at 982.

33. The treatise does, however, discuss at numerous points the jurisdictional authority of Maine trial courts. *See, e.g.*, A. HORTON & P. MCGEHEE, *supra* note 6, §§ 1.5-3.4; 5.10-1.1.

34. *Id.* § 1.2, at 1-3.

35. *See generally* ME. REV. STAT. ANN. tit. 4, § 57 (Supp. 1988-1989). Although the Law Court is not limited to hearing appeals, the court's statutory authority to hear cases "as a court of law" seems generally to be limited to circumstances in which there are opposing parties seeking a specific determination of legal rights, that determination then being given the force of law through the court's mandate. Thus whether the case comes to the court on appeal or report, for example, is irrelevant to whether the court sits as the Law Court. *See id.* (granting the Law Court authority to hear cases both on appeal and on report). The central issue would remain whether the court is determining legal rights as between specific parties.

36. ME. CONST. art. VI, § 3.

37. *See* Opinion of the Justices, 437 A.2d 597, 610 (Me. 1981). *See also* Opinion of

The problem with a good practitioner's treatise, and *Maine Civil Remedies* is an excellent one, is that it is usually pulled from the shelf to consult only when a particular problem arises in the course of an attorney's practice. Horton and McGehee's remedies treatise, however, has much more to offer than just consultation services for the attorney's day-to-day problems. Any student of the law, whether an attorney or otherwise, would go far toward an understanding of the legal system in general, and the judicial power at its core, through a careful reading of *Maine Civil Remedies*. It is not that the authors have attempted to paint with such broad strokes in their discussion of judicial remedies. Rather, it is that they have so ably painted with fine strokes the great multitude of powers and attributes that come together to define a court's character.

Courts act daily to resolve the disputes, great and small, that divide individuals and groups from each other. In so doing, courts exercise power in what is essentially a pragmatic or practical manner. Over time they have developed a great variety of means for addressing the wrongs brought before them, and as new problems arise courts modify the means at their disposal so as to provide redress to aggrieved parties within the dictates of our sense of justice. It is through a study of those judicial powers in all their variety, as well as their historical development, that we can best understand the character of our courts. The name of that study is remedies, and in Horton and McGehee's *Maine Civil Remedies* we have a superb beginning text.

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the Justices, 460 A.2d 1341, 1345 (Me. 1982).