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JUSTICE GODFREY AND THE RULES: PROCEDURE AS SUBSTANCE

*L. Kinvin Wroth**

Godfrey has always preferred to get to the substance of things. Thus only about ten percent of his Law Court opinions can be classified as "procedural," and in that limited selection of his judicial work product there are few lengthy discourses expounding the purposes and policies of the Rules of Civil Procedure for their own sake. Rather, Godfrey's opinions reflect the reasonable view that procedure is meant to serve a larger end—the attainment of a just resolution of the dispute before the court. Yet, as he wrote recently in these pages, achieving that end

> requires, among many other things, that there be impartial tribunals, accessible to all, for fairly and promptly resolving disputes based on claims of right and for carrying out the resulting resolutions . . . .
>
> . . . Regardless of the substantive justice of the laws, it seems fairly certain that a breakdown of institutional arrangements for deciding disputes and carrying out judicial decisions would lead to grave social disorder; widespread despair of getting institutional justice would lead to epidemic civil violence.[1]

In other words, the integrity and consistent operation of the judicial institution, including the rules by which it operates, must be maintained if the courts are to serve their intended public function.

These seemingly disparate attitudes mean that Godfrey's procedural opinions are a continuing tight-wire act in which the balance between the need to achieve an individually and socially fair and wise outcome and the need for integrity in the operation of the system are precariously maintained. This balancing act may be seen in three types of cases: those in which busy trial judges who have failed to understand and apply the rules are gently corrected; those in which a rule or procedural statute with some measure of elasticity is stretched to assure, or to prevent appellate frustration of, a fair outcome; and those in which a lawyer's sins, whether of omission or commission, may be visited upon an unlucky client.

In some cases in the first category, the correction of judicial error was for the purpose of protecting the Law Court from the perils of improvident decision. Thus, in *Giles v. Maine Fidelity Life Ins. Co.*,[2] the report of a question of law under Rule 72 of the Maine Rules of

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1. Edward S. Godfrey, *Structure of the Maine Court System, 1956-1991*, 43 ME. L. REV. 353 (1991).
2. 402 A.2d 473 (Me. 1979).

Civil Procedure was discharged. The action was a claim for damages against a disability insurer for nonpayment of benefits under a policy issued in connection with the installment purchase of a new truck repossessed by the seller. Plaintiff's motion to amend the complaint to include a demand for punitive damages was denied because the original claim did not sound in tort. Three years later, on the eve of trial, the plaintiff moved under Rule 72(c) for report of that ruling to the Law Court. While that motion was pending, the parties agreed to a dismissal of all claims except the potential claim for punitive damages. The trial judge then reported the case.

Justice Godfrey treated the report as made under Rule 72(a), which permits a report by agreement where a dispositive question of law is of sufficient importance *or* doubt to justify the report.[3] In interpreting this provision, he applied the standard developed under the parallel Rule of Criminal Procedure, that the question must be one of both importance *and* doubt.[4] In reporting the action the trial court had found only that the matter was "of sufficient doubt."[5] Noting that the question of the availability of punitive damages in such a case might be both doubtful and important in the abstract, Justice Godfrey concluded that the issue must be of importance to the parties in the resolution of the particular controversy as well. "Otherwise, the report would amount to little more than a request for an advisory opinion."[6] In this case there was no finding of the requisite concrete importance by the trial judge and its presence on the record was doubtful given the parties' settlement of all other claims. Moreover, the confused procedural circumstances of the stipulated dismissal raised serious questions as to whether a decision of the case "would be consistent with Court's basic function as an appellate tribunal."[7]

In other instances Justice Godfrey's judicial corrections were aimed at procedural errors at trial. For example, in *Cyr v. Cyr*[8] the trial judge, after granting custody of two minor children to the wife, denied the husband's request for specific findings of fact and conclusions of law, particularly as to the reasons for selecting the wife as

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3. *Id.* at 475 (citing ME. R. CIV. P. 72(a)).
4. *Id.* at 475 (citing State v. Plazcek, 380 A.2d 1010, 1014 (Me. 1977) (construing the identical language of ME. R. CRIM. P. 37A(a))). The Criminal Rule was amended, effective April 16, 1979, to conform to the decision in *Plazcek* by substituting "and" for "or." *See* Order of March 21, 1979, and Advisory Committee's Note, Me. Rptr., 396-400 A.2d XXXIX, XLIII, LII (1979). A comparable amendment has not been made to ME. R. CIV. P. 72(a).
5. Giles v. Maine Fidelity Life Ins. Co., 402 A.2d at 475.
6. *Id.*
7. *Id.* (quoting State v. Foley, 366 A.2d 172, 173 (Me. 1976)). *See also* Winchenbach v. Steak House, Inc., 430 A.2d 45 (Me. 1981) (Godfrey, J.) (report discharged where amount of settlement depended on how Law Court ruled on reported question and "procedural anomalies" left issue presented in doubt).
8. 432 A.2d 793 (Me. 1981).

the custodial parent. The judge had asserted that his order contained sufficient findings, but Justice Godfrey noted that there was no consideration of "the critical finding in a custody decision"—whether the choice was in the best interests of the children.[9] This finding was critical for two reasons that spoke with special force in custody cases. A finding is essential for effective appellate review, because independent review by the Law Court is particularly inappropriate given the difficult choice that most cases present between two equally fit parents. "To choose the greater of two goods is admittedly no easier than to identify the lesser of two evils. Nevertheless, the judge is obliged to make the choice"[10] in furtherance of the best interests of the child. Secondly, findings are essential to the determination of subsequent modification proceedings, serving "a critical function as the bench-mark from which later change in circumstances may be measured."[11] Justice Godfrey concluded that the record must show that the trial judge considered the factors pertaining to best interest and that there must be "sufficient factual findings in the custody order to allow the appellate court to determine the grounds for the justice's decision and whether that decision was supported by competent evidence."[12] The case was accordingly remanded for entry of specific findings and conclusions based on any further proceedings deemed necessary to assure that the findings were current.[13]

In a second group of decisions Justice Godfrey cut through procedural barriers to assure a fair outcome. In *Reynolds v. Hooper*,[14] after judgment for the defendants on a referee's report, the plaintiffs failed to file a timely notice of appeal but filed a motion under Rule 73(a) for an extension of the appeal period on grounds of excusable neglect. After the motion had been noticed for hearing, but before the hearing date, the trial judge granted the motion. Four days later he retired from the bench. The plaintiffs then filed a notice of appeal from the original judgment. A second judge held a hearing on the defendants' Rule 60(b) motion to set aside the first judge's order and on the plaintiffs' original motion. The second judge granted the defendants' motion, denied the plaintiffs' motion, and dismissed their notice of appeal. On appeal to the Law Court, Justice Godfrey

9. *Id.* at 795-96.

10. *Id.* at 796.

11. *Id.* at 797.

12. *Id.*

13. *Id.* at 797, 799. *See also* Merrill v. Merrill, 449 A.2d 1120 (Me. 1982) (neither marital property statute, ME. REV. STAT. ANN. tit. 19, §§ 721, 722-A, 752 (West 1981 & Supp. 1994) nor ME. R. CIV. P. 60(b) permits divorce court to modify original division of marital property); Knowlton v. Rhodes, 413 A.2d 546 (Me. 1980) (after grant of post-judgment motion to amend complaint to conform to evidence, trial court ordered entry of second judgment in same amount as original judgment; docket would be corrected to reflect that original entry was sole judgment).

14. 407 A.2d 312 (Me. 1979).

treated the hearing before the second judge as having been conducted pursuant to Rule 63, which provides for disability of a judge. While noting that a successor judge does not ordinarily have power to set aside orders of a predecessor, Justice Godfrey concluded that such a power does exist "when unusual circumstances indicate that an injustice would otherwise result."[15] Finding that failure to hold a hearing constituted such a circumstance, he upheld the second judge's order that set the first order aside.[16]

Bowman v. Dussault,[17] an automobile passenger's negligence action for personal injury, raised issues in the tangled area of prejudgment attachment procedure. At the commencement of her action for $256,000 in damages, plaintiff sought a real estate attachment in the amount of $100,000. After a hearing, the Superior Court approved the attachment on the basis of the pleadings and the parties' affidavits as to liability and damages. Justice Godfrey held that the trial judge's finding of a "reasonable likelihood" of recovery as required by Rule 4A was not clearly erroneous in light of the specific facts pleaded and set forth in the affidavits. He nevertheless ruled that the attachment was invalid because the affidavits as to the amount of damages claimed did not meet the requirement of specificity set forth in Rule 4A(h). Because "prejudgment attachment may operate harshly on the party against whom it is sought," it was not sufficient that the plaintiff's injuries be described in general and subjective terms. To support her claim that her career as a model and dance instructor was impaired by her injuries, the plaintiff should have offered "photographs or at least particular descriptions of her injuries and scars and statements from which some informed projection could be made" as to lost earnings.[18]

In *Akins v. Firstbank, N.A.*[19] the beneficiary of a testamentary trust sued the trustee for an allegedly fraudulent sale of assets occurring while she was a minor. The sale had been approved in probate court without notice to her or her guardian. The superior court treated the complaint as a probate appeal and dismissed it as barred by the one-year statute of limitations for such appeals that raised defects of notice.[20] Reading the complaint as alleging a cause of action for fraud and nondisclosure, however, Justice Godfrey held

15. *Id.* at 313.

16. *Id.* at 314.

17. 425 A.2d 1325 (Me. 1981).

18. *Id.* at 1329. The Law Court recently distinguished *Bowman* in Jacques v. Brown, 609 A.2d 290, 292 (Me. 1991), holding that such specificity was not required where the claimed injuries were "mental and emotional flowing from unlawful sexual attacks upon her." The court did not have to determine whether the change in 1992 of the Rule 4A standard to "more likely than not" affected the nature of the showing required. *Id.* at 292 n.2.

19. 415 A.2d 567 (Me. 1980).

20. ME. REV. STAT. ANN. tit. 14, § 403 (West 1979).

that it was governed by the six-year discovery statute of limitations applicable to such actions.[21] Finding that the statute of limitations issue could not be determined on the face of the pleadings, he vacated the judgment of dismissal.[22]

In the third category of decisions—those involving errors by lawyers who should have known better—Justice Godfrey tended to insist upon strict compliance with the Rules. This tendency appears most clearly in cases where the lawyer's own interests were directly affected. Thus, in *Bramson v. Richardson*[23] the plaintiff, a lawyer representing himself in a forcible entry and detainer action, sought money damages, rather than possession, in the complaint. Justice Godfrey held that the defendant's appeal from the grant of summary judgment "for plaintiff as prayed for" must be dismissed for want of jurisdiction because no valid judgment had been entered. The entry of judgment on the docket did not specify the relief to be awarded and thus did not satisfy the requirement of Rule 79(a) that the notation indicate the nature and substance of the judgment.[24] The case could not merely be remanded for entry of a proper judgment, however, because there were two further problems. The only remedy available under the statutory forcible entry and detainer action was possession.[25] Hence the grant of summary judgment for the relief prayed for was an improper disposition of the motion. More important, the plaintiff's purported affidavit on which the grant of summary judgment was based was not sworn and, in any event, taken with the pleadings, did not rebut the equitable defense offered by the defendants in an affidavit that was also unsworn.[26] The opinion does not determine the effect of these considerations, but concludes, "[W]e merely observe that if the issues that seem to be involved in this case are ever properly litigated to a valid judgment, the decision of the Superior Court should be supported by careful analysis as a basis for appellate review."[27]

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21. Akins v. Firstbank, N.A., 415 A.2d at 569 (citing ME. REV. STAT. ANN. tit. 14, § 859 (West 1980 & Supp. 1994-1995)).

22. *Id.* *See also* Ireland v. Galen, 401 A.2d 1002 (Me. 1979) (request for production in conjunction with motion for support arrearages held effective though served prior to valid service of motion because court had continuing jurisdiction of divorce proceedings); Nisbet v. Faunce, 432 A.2d 779 (Me. 1981) (client's petition for fee arbitration under ME. BAR R. 9 could be withdrawn despite incorporation in Bar Rule of Uniform Arbitration Act provision that arbitration agreement is irrevocable; to hold otherwise would defeat purpose of rule to encourage informal resolution of fee disputes).

23. 412 A.2d 381 (Me. 1980).

24. *Id.* at 382-83. *See* ME. R. CIV. P. 79(a).

25. ME. REV. STAT. ANN. tit. 14, § 6006 (West 1980 & Supp. 1994-1995).

26. Bramson v. Richardson, 412 A.2d at 383-84.

27. *Id.* at 384.

In re Dineen[28] was an information brought in the Law Court by the Attorney General for discipline of an attorney. On appeal from the order of a single justice suspending him from practice for four months, appellant challenged the refusal of the justice to dismiss one count of the information that appellant claimed involved unresolved legal issues in an action then on appeal to the Law Court. Appellant, after judgment and while the appeal was pending in that action, had seized assets of the defendant under a writ of attachment issued nearly a year earlier. Although Rule 4A required that any attachment must be made within thirty days of the order approving it, appellant acted on the basis of his "good faith belief and 'feeling'" that Rule 62(f), providing for the continuance of an attachment during the pendency of an appeal, authorized his action.[29] Justice Godfrey adopted the ruling of the single justice that the text of the rule, the Reporter's Notes, and subsequent commentary "delineate in language clear beyond any possibility of reasonable doubt" that Rule 62(f) served only to continue existing valid attachments pending appeal.[30]

In other cases the same insistence on strict application of the rules had the immediate effect of forcing the client to suffer the consequences of a lawyer's procedural error. *Reynolds v. Hooper*,[31] discussed earlier, illustrates this point. Plaintiffs' counsel had originally stated in his motion to extend the time for appeal, and had testified at the hearing on the motion, that the failure to file the appeal was the result of various problems in communicating with his clients, who resided in England. In the brief on appeal, however, counsel stated that the failure was occasioned by a miscalculation of the appeal period. Rejecting the contention that any of these circumstances constituted "excusable neglect" under Rule 73(a), Justice Godfrey looked to the identical language in the federal rule on which the Maine rule was based and to the strict view of the Federal Advisory Committee that an extension on this ground should be granted "only in extraordinary cases where injustice would otherwise result."[32] Federal cases holding that neither communication difficulties with mobile clients nor failure to note the running of the time for appeal constituted "excusable neglect" supported his ruling sustaining the second judge's rejection of plaintiff's motion for extension of the appeal period.[33] The clients thus lost their opportunity to appeal.

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28. 380 A.2d 603 (Me. 1977).
29. *Id.* at 605.
30. *Id.*
31. 407 A.2d 312 (Me. 1979). *See also* Cyr v. Cyr, 432 A.2d 793, 797 (Me. 1981).
32. Reynolds v. Hooper, 407 A.2d at 314 (citing Federal Advisory Committee's Note to 1966 amendment of former FED. R. CIV. P. 73(a)).
33. *Id.* at 314 (citing Winchell v. Lortscher, 377 F.2d 247 (8th Cir. 1967) and Maryland Casualty Co. v. Connor, 382 F.2d 13, 16-17 (10th Cir. 1967)).

In *Peaslee v. Pedco, Inc.*[34] involving an even more egregious lapse by counsel, the impact again fell on the client. In proceedings before a referee, appellant's counsel had requested a continuance based on the absence of a material witness without offering a supporting affidavit. Counsel then did not appear either to argue for the continuance or to present appellant's case on the merits. Finding that counsel had notice of the date of the hearing, Justice Godfrey upheld the Superior Court's acceptance of the referee's report favorable to appellee, despite appellant's claims that holding the hearing without counsel present was both constitutional and procedural error.[35]

Similarly, in *Allis-Chalmers Corp. v. Hadley*,[36] counsel for appellant, not having caught up with an amendment to the appellate provisions of the Maine Rules of Civil Procedure adopted more than a year earlier, filed the "Designation of Contents of Record on Appeal" required by the former rule, rather than the order for transcript, statement of issues, and record appendix as required by amended Rules 74 and 74C. Rule 73(a) required dismissal of the appeal for failure of timely compliance with these requirements, unless the Law Court found that failure was excused by "exceptional circumstances." Justice Godfrey ruled:

> Appellant in this case has not only failed to take many steps within the time prescribed, he has failed to take the steps entirely.... There being no exceptional circumstances to excuse this failure to perfect the appeal by compliance with the Rules of Civil Procedure, we must dismiss the appeal.[37]

In a sharp dissent in *Martel v. Inhabitants of Town of Old Orchard Beach*,[38] Justice Godfrey chastised his own colleagues for a decision that seemed too forgiving of a lapse by counsel. Plaintiff had sued the York County resort town for an injury allegedly caused by a highway defect. Suit was brought in Androscoggin County, where she resided, in reliance on the general venue statute, which was applicable to actions under the Maine Tort Claims Act.[39] Her counsel overlooked a section of that Act saving the provisions of other waiver of immunity statutes, which included a separate provision for highway defect actions against a town.[40] The statutory venue for such actions was limited to the county where the town was located.[41]

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34. 388 A.2d 103 (Me. 1978).
35. *Id.* at 105-06.
36. 413 A.2d 934 (Me. 1980).
37. *Id.* Former ME. R. CIV. P. 73(a), without the "exceptional circumstances" provision, is now found in ME. R. CIV. P. 73(g).
38. 404 A.2d 994, 999 (Me. 1979).
39. *Id.*; ME. REV. STAT. ANN. tit. 14, §§ 8101-8118 (West 1980).
40. ME. REV. STAT. ANN. tit. 14, § 8113(2) (West 1980). *See* ME. REV. STAT. ANN. tit. 23, § 3655 (West 1992).
41. ME. REV. STAT. ANN. tit. 14, § 505 (West 1980).

When the town moved for dismissal on the ground of improper venue, the trial court ordered the motions granted unless plaintiff moved to transfer venue to York County within ten days.[42] Instead of taking up that offer, plaintiff appealed from the resulting final judgment. The majority of the Law Court, noting that Maine statutory provisions concerning transfer of venue were at best incomplete, held by analogy to the statutory change of venue provisions in force in most states that the superior court in such a case should exercise its inherent common law power to transfer the action to the proper venue automatically if the interests of justice so required.[43] Justice Godfrey, in dissent, pointed out that the superior court

> gave plaintiff an opportunity to change venue, and she did not avail herself of it. Plaintiff has offered no excuse for her failure to act. . . . I do not understand why that was not an entirely correct way of handling the problem in view of the fact that our rules and statutes provide no express mechanism to effect transfer of venue.[44]

The results in these cases seem to have a harsh impact on the client, who suffers substantial detriment as a result of a lawyer's technical error. Such a result, however, reflects two legitimate policy considerations. The first is that, in the moral free market, holding individuals accountable for the results of their freely made choices is a reasonable working proposition. The client is bound by the results of his or her chosen instrumentality. The second consideration is that the ultimate effect of such decisions is to render lawyers accountable for their errors. Whether simply as a matter of exposure and chastisement before bench and bar or through the sanctions of malpractice liability or professional discipline for incompetence, the lawyer who has erred is the ultimate recipient of the court's message. Relaxation of the rules for the sake of the client's immediate interest would let the lawyer off the hook.

Justice Godfrey, in another of his rare dissents, recognized limits to the notion that considerations of personal responsibility and professional competence demand strict accountability for procedural error. In *Laurel Bank and Trust Co. v. Burns*[45] he took his colleagues to task for insisting on a strict application of Rule 60(b) in a case involving lawyer error. The issue arose in a suit by the bank against three defendants to recover $50,000 due under a chattel security agreement and for conversion of the goods. While the civil

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42. Martel v. Inhabitants of Old Orchard Beach, 404 A.2d at 995-96.

43. *Id.* at 997-98.

44. *Id.* at 999. *See also* Cates v. Farrington, 423 A.2d 539 (Me. 1980) (failure of represented party to request electronic recording of District Court trial precluded appellate review of denial of motions for new trial and other relief under Rule 59, as well as of the merits; with no verbatim record, appellant did not meet burden of showing prejudicial error).

45. 398 A.2d 41, 45-49 (Me. 1979).

action was pending, two of the defendants were convicted of criminal charges arising out of the same situation. In the criminal proceeding one of the defendants was represented by the same lawyer who represented all three defendants in the civil action. More than two years after it was commenced, the civil action was placed on a trial list. The bank then initiated settlement negotiations with the attorney, which resulted in entry of a judgment of $50,000 against all three defendants. Several months later, defendant Burns, the member of the trio who had escaped criminal prosecution, moved to have the judgment against him vacated on the grounds that it was entered as a result of the lawyer's mistake, inadvertence, or excusable neglect. In fact, the lawyer admitted that he had "forgotten" that Burns was a party. On appeal the majority of the Law Court upheld the trial court's denial of the motion. The court first held that Burns could not raise the lawyer's lack of express authority because he had not presented that ground to the trial court. Holding that, whether the lawyer's error was mistake or neglect, the movant had the burden of showing that the action was excusable, the court found that in the circumstances there was no basis for saying that the lawyer, who had participated in various pretrial proceedings and had signed the agreement for the docket entry, had engaged in excusable conduct.

Justice Godfrey's dissent explored authorities interpreting Federal Rule 60(b), upon which the Maine rule was based, and noted factors that had sustained findings that neglect was "excusable," emphasizing particularly that this judgment had been entered without any examination of the merits of plaintiff's claim, including the amount of actual damages. He pointed out the anomaly that, if Burns had been defaulted, Rule 55(b) would permit him to be heard on the amount of damages. The conclusive argument was that

> [i]t is unconscionable to permit the appellee bank to execute on a $50,000 judgment inadvertently confessed, where there has been no inquiry whatever into the nature or amount of the injury, if any, sustained by the appellee as a result of appellant's attorney's careless act. Justice clearly required that appellant's motion be granted in order that the merits of the case could be heard and determined.[46]

Thus, even the need to enforce individual responsibility and professional integrity must give way in a situation where strict construction of the rules would result in an unconscionable windfall for a third party.

Taken together, Godfrey's procedural decisions suggest an effort to strike a balance in the doing of justice that accords with a more fundamental ethical position that he recently expressed. Professing admiration—"up to a point"—for Nietzsche's efforts to find a hu-

46. *Id.* at 49.

manistic basis that would foster "virtues like magnanimity, creativity, and leadership," Godfrey turned for a more practical rule of conduct to the Confucian precept, "Do not do to others what you do not like yourself." Godfrey's balance of firmness and flexibility is reflected in his conclusion: "If Nietzsche will let me tag along with Confucius from here on, I can get along with Nietzsche."[47]

47. Edward S. Godfrey, Getting Along with Nietzchse, Address Before the University of Maine School of Law Alumni Annual Dinner (Nov. 6, 1993), *in* J. ME. LAW SCH. ALUMNI QUARTERLY No. 50, Winter 1993.