

# SUPREME COURT OF QUEENSLAND

CITATION: *Erickson v Maguire & Anor* [2005] QCA 89

PARTIES: **FRANK WILLIAM ERICKSON**  
(plaintiff/appellant)  
v  
**ERROL MAGUIRE**  
(first defendant/first respondent)  
**E.J. MAGUIRE PTY LTD** ACN 010 404 323  
(second defendant/second respondent)

FILE NO/S: Appeal No 7661 of 2004  
SC No 7272 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 8 April 2005

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2005

JUDGES: McPherson JA and White and Douglas JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION  
FOR NEGLIGENCE – STANDARD OF CARE –  
PARTICULAR PERSONS AND SITUATIONS – OTHER  
CASES – where appellant failed to prove negligence in  
surgical treatment for a hernia at first instance – where  
alleged negligence was the possible misplacement of tacks  
used to attach mesh used in the treatment – whether the trial  
Judge was entitled to reach the decision that the appellant had  
failed to prove any negligence or breach of contract in the  
performance of the procedure  
  
*Devries v Australian National Railways Commission* (1993)  
177 CLR 472, followed  
*Fox v Percy* (2003) 214 CLR 118, cited  
*X and Y (by her tutor X) v PAL* (1991) 23 NSWLR 26, cited

COUNSEL: G R Mullins for the appellant  
D K Boddice SC for the respondents

SOLICITORS: Ruddy Tomlins & Baxter for the appellant  
Flower & Hart for the respondents

- [1] **McPHERSON JA:** I agree with the reasons Douglas J has given for dismissing this appeal.
- [2] **WHITE J:** I agree with the reasons given by Douglas J that this appeal should be dismissed.
- [3] **DOUGLAS J:** In 1997 Mr Erickson, the appellant, was a 60 year old tiler suffering from a hernia. He sought treatment from the first respondent, Dr Maguire, who operated on him on 27 May 1997. After the operation he continued to suffer pain. At the trial before McMurdo J he failed to establish the causes of action he alleged against the respondents, not proving to his Honour's satisfaction that the cause of his continuing problems was the location of a tack or tacks placed in his body by Dr Maguire during the procedure conducted on 27 May 1997. In this appeal Mr Erickson seeks to establish that his Honour should have found that the evidence established more probably than not that the cause of his problems was the location of such a tack or tacks placed improperly by Dr Maguire.
- [4] His is a difficult task, given the nature of the learned trial judge's factual findings and his acceptance of Dr Maguire's evidence. As Brennan, Gaudron and McHugh JJ said in *Devries v Australian National Railways Commission*<sup>1</sup>:

“... a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge ‘has failed to use or has palpably misused his advantage’ or has acted on evidence which was ‘inconsistent with facts incontrovertibly established by the evidence’ or which was ‘glaringly improbable’.”

*The operation and its aftermath*

- [5] On 27 May 1997 Dr Maguire performed laparoscopic surgery to place mesh across the defect from which Mr Erickson suffered. The mesh was fixed internally by eight tacks. They are shown on a diagram traced by a Dr Avramovic from an x-ray taken on 2 June 1997. A copy of the diagram is attached to these reasons to help explain some of the evidence.
- [6] Mr Erickson suffered pain after the surgery which led to his readmission to hospital and further surgery on 6 June 1997. During that operation Dr Maguire removed two tacks closest to the obturator and femoral nerves because of the views of two nerve specialists who had examined Mr Erickson that his pain could be caused by some impact upon one or other of those nerves. He also inserted four new tacks. Although the plaintiff's condition improved after that procedure he continued to suffer significant pain. Dr Avramovic later operated on him on 6 February 1998 to remove the mesh from the hernia site; that alleviated the pain further.

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<sup>1</sup> (1993) 177 CLR 472, 479. See also *Fox v Percy* (2003) 214 CLR 118, 124-129 at [20]-[31]

*The appellant's argument*

- [7] The path to the conclusion urged by the appellant begins with the proposition that the tacks placed in Mr Erickson's abdomen by Dr Maguire were placed intentionally. It was then submitted that they were not misplaced, and were in a position that put the nerves at risk of injury. It was further submitted that, after the tacks were removed on 6 June 1997, Mr Erickson's symptoms improved to the extent that the inference could be drawn that their removal demonstrated that one or both of them caused impingement of a nerve.
- [8] As will become clear I am not satisfied that tacks were placed in a position that put the nerves at risk of injury. Nor did the evidence require his Honour to draw the inference that the consequences of the removal of the two tacks by Dr Maguire demonstrated that one or both of them had caused impingement of a nerve.

*Intentional placement of the tacks*

- [9] The evidence relevant to the intentional placement of the tacks by Dr Maguire appears at p. 163 of the appeal book where he related his observations on the second procedure conducted by him on 6 June 1997 when he removed the two tacks. He said that he did not observe any haematoma or infection and took out the two tacks closest to the obturator nerve and the femoral nerve. His evidence was that during that procedure he looked at both sites to make absolutely certain that he had not misplaced a tack, said that he had not done so, but took out the two tacks that were closest to those two nerves just in case. He said one tack was in the inguinal ligament laterally and one would have been "one of the medial ones I probably put in the bone to anchor the mesh". He added that neither of them seemed to involve a nerve at all.<sup>2</sup>
- [10] In this context, the word "medial" means closer to the midline of the body, the area to the left of the attached diagram. The word "lateral" is used in the opposite sense to medial, further from the midline, and is used here to indicate the right side of the diagram. The approximate position of the inguinal ligament is shown on the diagram as a dark diagonal line rising from the lower left of the page to the upper right and is referred to as a blue line in the accompanying text on that page.
- [11] As Mr Mullins submitted it seems clear that Dr Maguire placed the tacks intentionally.

*Were the tacks placed in a position that put the nerves at risk of injury?*

- [12] The next step in Mr Mullins' argument for the appellant was that there was evidence that Dr Maguire had placed tacks in an area that exposed the nerves to a risk of injury. He relied upon Dr Avramovic's evidence to argue that it was unacceptable to place tacks in an area below the inguinal ligament and lateral to the vas deferens and the epigastric vessels on the basis that that would run the risk of major vascular injury. Dr Avramovic also said that placement of tacks in that area involved the risk of nerve injury.<sup>3</sup> The epigastric vessels and the vas deferens are roughly central to

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<sup>2</sup> AB163 ll.5-30

<sup>3</sup> AB200 ll.11-12

the attached diagram. The epigastric vessels are described by reference to the “red line” which rises up from the “blue line” referred to earlier.

- [13] There was clear evidence from Dr Maguire that his practice was to secure the mesh to the pubic bone using one or two tacks below the inguinal ligament.<sup>4</sup> The pubic bone was medial to the inferior epigastric vessels. That would place those tacks to the left side of the diagram and in a position that conformed to accepted practice.

- [14] Dr Avramovic’s evidence on this issue was confusing, partly because of an initial misreading by him of a passage in a medical text by a Dr Edward Phillips dealing with complications of laparoscopic hernioplasty. The text said:<sup>5</sup>

“Staples should not be placed in this area [between the vas deferens and spermatic vessels] nor in the area below the inguinal ligament *and* lateral to the vas deferens.” (My emphasis.)

- [15] He had originally read that passage so that the word “and” which I have italicised should be read as “or”. He had concluded at first, therefore, that tacks should not be placed below the inguinal ligament, a proposition which he withdrew later when he accepted that it was common practice to secure the mesh immediately to or near the pubic bone and Cooper’s ligament.<sup>6</sup>

- [16] In his evidence in chief Dr Avramovic did say that he saw tacks inferior to the inguinal ligament when he conducted open surgery on 6 February 1998, but that was after the occasion on 6 June 1997 when Dr Maguire had removed the two tacks closest to the obturator and femoral nerves. The case proceeded on the basis that the negligence alleged occurred at the time of the first operation, 27 May 1997. There was no complaint about Dr Maguire’s second procedure on 6 June. When Dr Avramovic observed tacks “inferior to the inguinal ligament” on 6 February 1998 it was after a further four tacks had been inserted by Dr Maguire on 6 June 1997 although Dr Maguire’s evidence was that they were placed well away from the obturator and femoral nerves.

- [17] Dr Avramovic also said in his report of 18 April 2002 that the x-ray, which was not available for the trial, but from which he made the attached diagram, showed “staples both below the inguinal ligament ... and lateral to the epigastric vessels.” He went on to say: “These lateral staples may have caused a partial injury to the ilio-inguinal nerve, but this was not the opinion of clinicians consulted at the time.”<sup>7</sup> When one examines the diagram, however, it is impossible to conclude that it shows any tacks that meet both descriptions of being below the inguinal ligament and lateral to the epigastric vessels. The two half-shaded tacks below the inguinal ligament are medial to the epigastric vessels. Neither they nor any other tacks are in a position referred to in the written report that could be both below the inguinal ligament and lateral to the epigastric vessels.<sup>8</sup>

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<sup>4</sup> See AB129 11.22-25

<sup>5</sup> AB239

<sup>6</sup> AB197 11.40-43

<sup>7</sup> AB235. See also AB197-198. He appears to have used the word “staple” interchangeably for the tacks referred to earlier.

<sup>8</sup> AB235

- [18] In this context it is important to note that Dr Avramovic's written report of 18 April 2002 also betrayed the same wrong assumption about the meaning of Dr Phillips' medical text to which I have already referred. Dr Avramovic said this about it:<sup>9</sup>

“Dr Edward Phillips, a recognized world leader in laparoscopic hernia repair, emphasizes that nerve injuries can be avoided by placing no staples lateral to the epigastric vessels, *or* below the inguinal ligament ...” (My emphasis.)

- [19] His conclusion in his written report, therefore, that the x-ray showed “staples both below the inguinal ligament ... and lateral to the epigastric vessels”, when considered with his diagram of the x-ray results and his misunderstanding of Dr Phillips' text, is more likely to mean that, on his observation, there were staples below the inguinal ligament and *other* staples lateral to the epigastric vessels. Both of those individual observations were true, at least from the evidence of the diagram, but it was not true that there were staples that each met both of those descriptions. If there were, Dr Avramovic did not record their presence on his own diagram of the x-ray. For that reason there is no reliable evidence that Dr Maguire placed any staples in the “danger area”, below the inguinal ligament *and* lateral to the vas deferens.
- [20] Mr Mullins criticised his Honour's reasons at para [50] where he said: “If any tack was placed too close to a nerve, it is not shown to have been placed where Dr Maguire intended.” The criticism was based on the evidence that Dr Maguire placed the tacks where he intended. Certainly, as I have discussed above, he did say that.<sup>10</sup> But the submission ignores the assumption explicit in his Honour's sentence. The evidence is not sufficient to establish that Dr Maguire placed any tack too close to a nerve.
- [21] The evidence, after Dr Avramovic had clarified his earlier views based on his misunderstanding of Dr Phillips' text, was that the tacks were placed in the area of the accepted practice. The tacks placed below the inguinal ligament were medial to the vas deferens. Nor was his Honour persuaded that there was evidence that the tacks were placed in an area that exposed nerves to a risk of injury. There was no objective evidence of any nerve injury or loss of nerve function.<sup>11</sup> In those circumstances it seems clear that his Honour was justified in concluding that Dr Maguire had not placed tacks in an area that exposed the nerves to a risk of injury.

*Effect of the removal of the tacks on 6 June 1997*

- [22] Dr Avramovic said that the inference could be drawn that the tacks were the cause of the loss of function and some of the pain, after he was asked about the return of function of the left leg after the surgery on 6 June 1997 when two tacks were removed and four more tacks were inserted.<sup>12</sup> That evidence is not so strong as to suggest that such a conclusion had been established on the balance of probabilities, given the competing inferences that were available and his Honour's analysis of the evidence.<sup>13</sup>

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<sup>9</sup> AB235

<sup>10</sup> AB163 ll.17-20

<sup>11</sup> AB186 ll.5-6 in Dr Brown's evidence.

<sup>12</sup> AB198-199

<sup>13</sup> See, for example, *X and Y (by her tutor X) v PAL* (1991) 23 NSWLR 26, 48-49

- [23] Here, the evidence as a whole suggested that there was no indication of inappropriate positioning or depth of penetration of the tacks in the original operation.<sup>14</sup> Dr Maguire's own operation records for 6 June 1997 found no nerve involvement in respect of the removal of the tacks and no obvious cause of the patient's pain.<sup>15</sup>
- [24] There was, also, evidence that the pain suffered by the appellant may have been caused by the mesh placed by Dr Maguire rolling up.<sup>16</sup> No negligence was asserted in respect of the possibility that rolling up of the mesh had caused the appellant's problems.
- [25] His Honour's conclusion at para [51] of his reasons that it was not established that, more probably than not, the cause of Mr Erickson's problems was the location of a tack or tacks is, therefore, supported by the evidence. His conclusion that the problem appeared to be related to the rolled edge of the mesh is also supported by both Dr Brown and Dr Avramovic.<sup>17</sup>

### *Conclusion*

- [26] Accordingly, his Honour was entitled to reach the conclusion that the appellant had failed to prove any negligence or breach of contract in the performance of the procedure. In fact the evidence supports the conclusion that Dr Maguire was not careless. In my view, therefore, the appeal should be dismissed with costs.

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<sup>14</sup> See the joint opinion of Dr Brown and Dr Avramovic at AB245.

<sup>15</sup> AB168 ll.30-36 from a note by the registrar who assisted him.

<sup>16</sup> AB186 ll.15-25 and AB208, 214-216 and 245

<sup>17</sup> See again AB245

**Mr Frank Erickson**  
**X-ray of left hip, AP, 2/06/97**

The X-ray traced below shows the position of the staples (circles) used to hold the mesh. The blue line represents the approximate position of the inguinal ligament and the red line the approximate position of the inferior epigastric vessels. The shaded circles represent the position of staples placed in the 'safe area' as described by Phillips. The half shaded circles represent the position of staples placed inferior to the ligament. The unshaded circles shows the position of staples placed lateral to the inferior epigastric vessels. The shaded space is the obturator canal.

