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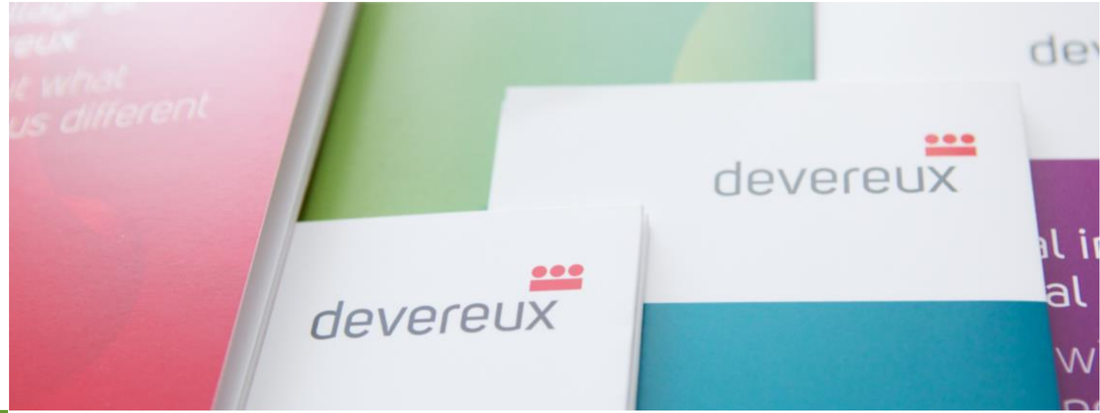

Our legal specialists review the latest developments in personal injury law and offer a practical insight on how these may affect you and your clients.

Practical difficulties in applying Montgomery
by Robert Glancy QC

The Montgomery case is now almost exactly one year old but a number of issues remain to be worked out and the precise way in which the case will be applied is still unclear. Some of the issues that have caused problems in cases that I have been involved with in the last year are as follows:

(1) Amending existing cases particularly where a trial date has been set

The danger here is jeopardising the trial date which the Courts are always reluctant to do. In the case of Jones v Royal Wolverhampton NHS Trust [2015] EWHC 2154, Green, J. decided that if everyone got on with it then the trial date could be held even with the introduction of the amendment. However in Georgiev v King's College Hospital NHS Foundation Trust [2016] EWHC 104, Master Cook refused permission to amend because the application had been made at a time when he did not feel that the trial date could be held. This was overturned on appeal by May, J. who agreed with the learned Master that the trial date could not be held if the amendment were to be allowed but nevertheless allowed the Claimant's appeal essentially on the ground that the injustice to the severely injured Claimant outweighed any delay, inconvenience or prejudice that might be caused to the Defendant by having to investigate new facts and losing the trial date. The moral of this story is to make your application as quickly as possible so as to avoid losing the trial date if possible. Bear in mind the significant delays in obtaining a hearing before the Court and issue before a High Court Judge rather than a Master if the trial date is in jeopardy.

(2) Is expert evidence needed in support of a Montgomery argument?

Different views have been expressed on this. The SC held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant treatments. Does this not require expert evidence as to what risks were material in a given situation and why they were to be regarded as material and what "reasonable" alternative or variant treatments were available? For example in Georgiev, was there any enhanced and material risk in a home birth as opposed to birth in hospital? Does the mother need to be warned about possible harm coming to the baby as a result of any delay in transfer to hospital should things go wrong in labour? In the case of A v East Kent Hospitals NHS Foundation Trust [2015] EWHC 1038, it was held that a risk of 1 in 10,000 was not a material risk so does that not imply that there must be expert evidence to state what the risk is? A risk should not be reduced to percentages according to

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the SC so is it right to state that the percentage chance of the risk materialising is determinative of whether it is a "material" risk or not?

(3) Does the Montgomery decision extend to the patient being allowed to choose which procedure should be followed in a given situation?

For example, is a mother in the course of labour entitled to request a caesarean section and must the doctors and midwives comply with her choice? In Montgomery at paragraph 115, Lady Hale said that the medical profession must respect the mother's choice unless she lacks the legal capacity to decide and this applies where the mother is prepared to forego the joys of natural childbirth in order to avoid some not insignificant risk to herself or her baby. But she then qualified this by stating she cannot force her doctor to offer treatment which he or she considered futile or inappropriate. Does this apply to the situation in the course of labour where risks appear to arise as a result of say fetal stress? In those circumstances, caesarean section can hardly be regarded as futile but could it be regarded as inappropriate? At that stage, does the doctor or midwife have to warn the mother about the possible risks of carrying on with the labour ending in natural childbirth or should they offer caesarean section? Alternatively, if the mother requests a caesarean section, are they not under an obligation then to give full warning of the risks of a caesarean section (to the mother very small and to the child virtually non-existent) as opposed to proceeding with natural childbirth where indications of fetal stress might suggest that further problems will occur?

(4) Does the doctrine of informed consent extend to the choice of the surgeon?

In the case of Jones v Royal Devon & Exeter NHS Foundation Trust, an experienced Recorder, David Blunt QC found that it did. This was despite the Claimant signing a consent form which stated that there was no guarantee as to the identity of the surgeon who would perform the operation. Mrs Jones wanted a consultant surgeon to perform her operation and had waited for that to occur but in the event only found out that a surgical fellow was to carry out the operation when she was already at the "point of no return". The learned Recorder found that the patient's decision to allow the operation to go ahead and thus her consent to it was not freely taken and therefore the Defendant was in breach of its duty of care to her.

(5) What is the precise scope of the "therapeutic exception" referred to by the SC in Montgomery at paragraph 85?

This is where the doctor reasonably considers that it would be detrimental to the health of the patient to give a particular warning or give information about alternative treatments. Could this be relied on, for example, in the situation where the mother asks for a caesarean section in the course of labour but the doctor takes the view that it would be preferable for her to carry on trying to give birth naturally or is this the old doctrine of medical paternalism reasserting itself?

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