

# Access to health and access to justice – the erosion of public entitlements

Rena Gertz, Research Fellow in Law and Public Health Policy, Edinburgh University

Allyson Pollock, Professor of International Health Policy, Edinburgh University

David Brown, Solicitor, Drummond Miller, Glasgow

In 2003, the UK government and the British Medical Association finally agreed a new UK-wide GP contract. Its key feature was to end the GP monopoly of delivery of public health care and in particular it introduced new contracting forms, which, for the first time, included a commercial contract and the facility to open GP services to large health care corporations.<sup>1</sup> In England, unlike Scotland, the process of commercialisation and privatisation is now very advanced with a growing number of international companies running services and employing GPs. This process has been highly controversial with the public, not least because of failings on the part of government to consult with local people. As a result there have been a number of judicial reviews challenging the process of consultation.<sup>2</sup> In Lanarkshire, the public successfully campaigned against the Harthill practice being awarded under commercial contract to facilities management company SERCO.<sup>3</sup> Indeed, no commercial contracts have been awarded to date in Scotland. However another aspect of the GP contract was the break up of services as part of the process of commodification and commercialisation. In particular, GPs no longer had an open-ended, 24-hour duty of care and these services could either be transferred to health boards to manage, contracted out to NHS 24 or handed back to GPs. Although many practices had been opting out of out-of-hours services, GPs had retained control by running highly efficient cooperatives which continued to provide 24 hour cover for all patients.

The new contract made provision for any practice to opt out of their previous commitment to provide out-of-hours cover regardless of whether there was adequate GP cover, subject to health board agreement. This has had a particular impact on remote and rural areas where the GP is the only point of access to medical services. In 2004, the GP practice in the remote, rural area of Kinloch Rannoch and Tayside Health Board applied to Tayside Health Board for permission to stop providing out-of-hours service. The Health Board refused for safety and quality reasons and delayed its decision. To cut a long story short, the practice appealed against the decision and an independent panel was convened comprising a LMC representative, a lay member and the chairman. The chairman, the chief executive of NHS Orkney, overruled the Health Board's decision. The flawed basis of the decision is the subject of another report<sup>4</sup> but the effect was to allow the practice to permanently opt out of the out-of-hours service. The result is that residents now have to travel many miles across difficult terrain with journey travel times in excess of an hour in the winter. For many medical emergencies the time to access health care is vital and a recent research report has highlighted how travel time and distance is related to mortality risks for some conditions.<sup>5</sup>

The local community in Kinloch Rannoch was unhappy not least because they had not been consulted and in their view the proposed substitute services were not safe. One local resident was particularly concerned and applied for legal aid to appeal against the decision. The Scottish Legal Aid Board

(SLAB) decided that it was 'unreasonable to grant legal aid in the circumstances.' It argued that the applicant had a joint interest with others regarding the matter in question, citing Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002.

Regulation 15 provides as follows:

Where it appears to the Board that a person making an application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied that-

- (a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or
- (b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.

The SLAB Guidance<sup>6</sup> on providing civil legal assistance in Regulation 15 cases states that decisions on whether to grant legal aid are made according to the information submitted in the applications and assessment of these submissions. The assessment is then made on the basis of whether the applicant has probable cause and whether it is reasonable to grant legal aid. For the determination of probable cause, two criteria must be fulfilled: the applicant must demonstrate that a sound legal basis exists for the proposed action; and he/she must provide information to establish jurisdiction and right, title and interest to raise proceedings. In cases such as the Kinloch Rannoch case, determining reasonableness is a futile effort, as the second part of the probable cause condition refers us to section 13 of the Handbook, where, under 13.77, 'wider public interest' is discussed. There we are taken back to Regulation 15 and told that 'we must refuse the application if the tests in regulation 15 are met.'

In England and Wales, the Civil Legal Aid (General) Regulations 1989 – the equivalent of Regulation 15 in Scotland – were abolished in 2000 and the basis for granting legal aid is now the Legal Service Commission's Funding Code.<sup>7</sup> In Part C, 'Guidance', C18 stipulates that contributions from other persons or sources are considered. One of those sources may be other individuals who would benefit from a positive outcome of the case for a contribution: the Legal Services Commission's approach is to expect these individuals to fund half the likely costs of the case at first instance, although the proportion can be varied according to such circumstances as the size of the group and the financial situation of the

individuals.

Further, Part C explains public interest in detail. There, it says that 'public interest' means the potential of the proceedings to produce real benefits for individuals other than the client, other than benefits to the public at large.<sup>8</sup> Four categories of real benefits have been identified: protection of life or other basic human rights; direct financial benefits; potential financial benefits; cases concerning intangible benefits such as health, safety or quality of life. However, to have an impact on funding, wider public interest must be significant. The Legal Services Commission has a special panel for public interest cases. This panel examines cases and provides both the Legal Services Commission and client with an opinion on the public interest of the cases. Significant cases are graded 'exceptional', 'high' or generally 'significant'. According to Criterion 5.7.5 of the General Funding Code, the case then needs to be subject to a cost benefit test, i.e. the benefits to the applicant and the others concerned must justify the likely costs.

Looking beyond the UK's borders to other European countries such as Germany where legal actions are divided into areas of law, a case against a health insurance provider would lead to a legal action under the Social Welfare Act and would be cost free in the first two instances. Representation through a solicitor is not required. If an individual engages a solicitor, legal aid can be applied for. Aspects to be considered are financial eligibility and difficulty of the matter. Whether the case is in the public interest and others are affected is of no concern. Similarly in Canada, until recently, special funds were laid aside for public interest cases.

The erosion of health care rights and entitlements to access health care under the new GP contract are a serious cause for concern. The SNP have signalled that they will be prepared to

review and renegotiate the GP contract for Scotland and similar moves are afoot in Wales - neither administration is following the market route. Access to health and access to justice go hand in hand and an urgent review of mechanisms for strengthening public and parliamentary accountability in the public interest are long overdue. It is notable that between 13 May 2005 and 16 August 2007, 4972 applications for legal aid falling under Regulation 15 were received by SLAB. Of those, 2983 were granted and 1421 were refused with a number of decisions still outstanding. A third of all applications have been refused.

Currently, the residents of Scotland have fewer legal rights than those of England, including decisions which involve the commercialisation and privatisation of clinical health services. This is a serious cause for concern because, in this instance, the denial of access to justice equates to the denial of access to out-of-hours emergency medical care.

- 1 A. Pollock, D. Price, E. Viebrock, E. Miller and G. Watt (2007) 'The Market in Primary Care' 335 *British Medical Journal* 475.
- 2 Available at [www.keepourhspublic.com](http://www.keepourhspublic.com).
- 3 [www.theherald.co.uk/news/news/display.var.1152251.0.0.php](http://www.theherald.co.uk/news/news/display.var.1152251.0.0.php).
- 4 Available via [www.health.ed.ac.uk/CIPHP/publications](http://www.health.ed.ac.uk/CIPHP/publications).
- 5 L. Nicholl, J. West, S. Goodacre and J. Turner (2007) 'The Relationship Between Distance to Hospital and Patient Mortality in Emergencies: an Observational Study' 24 *Emergency Medical Journal* 665.
- 6 Scottish Legal Aid Board (2007) *Scottish Legal Assistance Handbook*, ch 12, available at [www.slab.org.uk/profession/handbook/index.htm](http://www.slab.org.uk/profession/handbook/index.htm).
- 7 Available at [www.legalservices.gov.uk/civil/guidance/funding\\_code.asp](http://www.legalservices.gov.uk/civil/guidance/funding_code.asp).
- 8 Op cit, at page 119

