CASES

From Need to Choice: *R(A)* v *Lambeth LBC; R(Lindsay)* v *Lambeth LBC*

Dave Cowan and Alex Marsh*

In the housing Green Paper, published in 2000, it was suggested that many of the ills of social housing could be alleviated by changing the way it is allocated – from a system based upon a bureaucratic assessment of housing need to one which respects and prioritises customer choice.[1] It was suggested that the government wanted local authorities 'to see themselves more as providers of a lettings service which is responsive to the needs and wishes of individuals, rather than purely as housing "allocators" '.[2] In 2001, the government funded a pilot programme of 27 schemes implementing choice-based lettings.[3] The Government has announced that, by 2005, it expects 25 per cent of local authorities to let properties on a choice basis, to increase to all local authorities by 2010, although it is not prescriptive as to how that should be done and further guidance awaits the results of the evaluation of the pilot programme.

Lambeth LBC was not one of the pilots funded under the Government programme, but, perhaps sensing the way the wind was blowing, elected to develop its own brand of choice based letting scheme. The Court of Appeal has now determined that Lambeth's scheme is unlawful because it did not give a 'reasonable preference' to those households required by legislation.[4] The judgment poses questions regarding the legality both of the models of choice based lettings developed as part of the pilot programme and of schemes developed elsewhere. This doubt is not materially affected by the implementation of the Homelessness Act 2002. Thus, despite considerable financial resources ploughed into the pilots and other local authority housing capital resources,[5] a discursive and ideological

* University of Bristol.

1 DETR, *Quality and Choice: A Decent Home for All*, the Housing Green Paper, (London: DETR, 2000), paras 9.5–7. The subsequent White Paper stated that the government 'remained firmly of the view' that choice should be explicitly incorporated into allocations policies, as it would help to create sustainable communities and make better use of the national housing stock. It was, however, less prescriptive about how local authorities might incorporate choice in lettings: DETR, *Quality and Choice: A Decent Home for All* (London: DETR, 2000), para 6.4.

2 Para 9.3; it should be noted that the government saw this as primarily a shift in emphasis: the local authority's role as allocator would remain, but be more sensitive to customer-expressed choice.

3 The pilot programme ran from April 2001 to March 2003. The report of the evaluation of the programme is due to be published in late 2003. The authors are members of the research team responsible for the monitoring and evaluation of the choice-based lettings pilots on behalf of the ODPM. The views expressed herein are those of the authors and should not be ascribed to the ODPM.

4 *R(A)* v *Lambeth LBC; R(Lindsay)* v *Lambeth LBC* [2002] HLR (57) 998

5 Recent guidance developed by the ODPM in collaboration with the Chartered Institute of Housing concerning the housing investment programme, the mechanism for bidding for capital finance, gives considerable prominence to choice: ODPM & CIH, *Effective Housing Strategies and Plans* (London: ODPM, 2002).

(2004) 67(3) MLR 478–507

Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

shift amongst social housing providers,[6] together with political rhetoric about the value(s) of choice, legal issues remain to be worked through.

THE FACTS AND JUDGMENT

In two cases at first instance, Lambeth's choice-based lettings scheme was examined and found wanting as a matter of law. In *'A'*, the applicant, who suffered from physical and mental disabilities, and her daughter were living in a single room in a hostel. She had been referred to the housing department by the social services department. In *Lindsay*, the applicant was a single man who did not have a priority need under the homelessness legislation. He lived with friends and family or slept rough. The complaint of both was that the lettings policy of Lambeth operated against their interests.

Lambeth's lettings policy came into effect in July 2000, after a lengthy gestation period. The policy combined a bureaucratic assessment with customer choice. The former assessment placed each household on its housing register into one of seven broad groups.[7] Each group was given a proportion of available properties as they arose. The choice element was that applicants were able to choose the area or areas in which they would accept a property. The broader the area, the more likely the applicant would be offered a property quickly. As the allocations policy put it, 'Applicants balance their housing need against their preference: those who feel their need is pressing will widen their choices; those prepared to wait can be more selective.'[8] Computer programmes demonstrated the length of time applicants would have to wait in each particular area. Applicants were then offered properties on the basis of date order – first come, first served within their group.

The policy was successfully challenged on two grounds. First, it was said that the categories to which the legislation prescribed a 'reasonable preference' on the housing register were not provided for in the policy. The Housing Act 1996 prescribed nine categories of persons entitled to such preference.[9] The seven groups in Lambeth's scheme were differently framed. In itself, that was not the central problem. The real problem was that around four per cent of those on Lambeth's housing register were not entitled to a reasonable preference. They were mixed in with those who were so entitled. Previous cases had suggested that a household entitled to a reasonable preference should be given a 'reasonable head start' over those not entitled to such preference.[10] The problem with Lambeth's scheme

6 See Centre for Comparative Housing Research, *'How to Choose Choice': Lessons from the First Year of the ODPM's CBL Pilot Schemes – A Guide for Social Landlords* (London: ODPM, 2002); cf P Somerville, 'Allocating housing – or 'letting' people choose?', in D. Cowan and A. Marsh (eds), *Two Steps Forward: Housing Policy into the new Millennium* (Bristol: Policy Press, 2001).

7 The groups were those tenants with a right to return to their property having been moved out; emergencies; supply transfers; mainstream allocations; homeless households; referrals; incoming nominations from other social landlords. The central point, discussed below, was that these groups were *different* from the legislative categories of persons to whom a reasonable, and additional, preference was owed.

8 Para 4.

9 S 167(2); as amended by SI 1997/1902.

10 *R* v *Wolverhampton MBC ex p Watters* (1997) 29 HLR 931, 937, *per* Judge LJ.

was that all applicants in the same group 'who are not entitled to preference are able to compete on equal terms with those who are'.[11] The choice element of the scheme did not prevent it from being unlawful as it did not affect this principal problem.

Second, it was said that those who fall within more than one of the reasonable preference categories were not able to achieve a greater priority. Previous cases had held that the reasonable preference categories are cumulative, not mutually exclusive, so that applicants in more than one category may have greater need than those in just one.[12] Lambeth's group scheme did not allow for such an assessment to be made because of its reliance on allocation according to date order within groups. The choice element again did not affect this conclusion because 'the individual is inevitably concerned only with his or her own situation and may not on any reasonably objective view have greater need … this seems to me to be altogether too haphazard.'[13]

The Homelessness Act 2002 alters the landscape of social housing allocations. However, it has retained the concept of reasonable preference,[14] reducing the categories of households entitled to it to five and giving power to determine priorities on three express grounds (financial resources, previous behaviour, and local connection) as well as others.[15] Nevertheless, the result in the Lambeth case would undoubtedly have been the same whichever legislation was in play at the time. Indeed, the current Code of Guidance,[16] to which local authorities are required to have regard[17] and which emphasises the choice-based lettings policy, may prove problematic for local authorities implementing the 2002 Act.[18] The Code offers the Secretary of State's opinion that there is sufficient flexibility in the statutory framework to enable housing authorities to offer applicants a choice of accommodation while continuing to give reasonable preference to those in urgent housing need. It suggests, for example, that local authorities could use a system of 'priority cards' to ensure that the requirement to give reasonable preference is met. The discussion in the next section examines the possible problems that choice schemes adopting such an approach might encounter.

The 2002 Act draws a distinction between providing households with a choice of housing accommodation and providing the opportunity to express preferences about the accommodation to be offered to them.[19] This may prove a subtle, but important distinction and will undoubtedly be important in determining the range of allocation schemes that are seen as addressing the government's choice agenda. Lambeth operated the latter approach: they were not offering a choice of

11 Para 16, *per* Collins J.
12 *R* v *Islington LBC ex p Reilly & Mannix* (1998) 31 HLR 651; *R* v *Westminster CC ex p Al-Khorsan* (1999) 33 HLR 77.
13 Para 20, *per* Collins J.
14 S 16(3), 2002 Act, inserts a new s 167(2) into the 1996 Act.
15 S 167(2A), 1996 Act, inserted by s 16(3), 2002 Act. These three categories are not exhaustive, although there may be a question about whether other allowable criteria must be *sui generis*.
16 ODPM, *Allocation of Accommodation: Code of Guidance for Local Housing Authorities*, November 2002 (London: ODPM, 2002).
17 S 169, Housing Act 1996.
18 See, in particular, paras 5.10–12.
19 S 169(1A), 1996 Act, inserted by s 16(1), 2002 Act.

particular accommodation but the opportunity to express an area preference, which in turn would impact upon the time the applicant would have to wait to be rehoused. Different models employing the principles of choice do exist – for example, many providers operating choice-based lettings have a system under which applicants bid for properties in response to adverts. Nonetheless, the analysis in the next section raises general questions of principle that apply equally to these models.

'CHOICE'

In itself, a policy of choice is hardly novel in housing or welfare terms.[20] For example, applicants for social housing have always been able to choose the types of areas in which they want to live. What is novel about the policy, however, is its shift away from systems of allocation – such as points schemes or similar mechanisms – which tended to rely on bureaucratic judgment to determine which household was offered a particular property. Since at least 1969, points schemes have been the acceptable and generally accepted method of prioritising households applying for social housing.[21] Under these schemes, local authorities give households points on the basis of different indicators of housing need. Allocations of property are then matched, by computer or by hand, to those households with the most points for the particular type of property and its location.

These schemes were lauded as being objective, but subsequent research demonstrated that they were subject to criticism on the grounds of subjective and institutional racism.[22] The problem was framed as one of discretion,[23] and, during the 1980s and 1990s, many local authorities sought to reduce discretion in the system. At the same time, they tried to 'reflect the range of nuances of housing need', made possible by new computerised systems developed in the late 1970s.[24] The rules which were produced out of this period were often complex, obscure, and unclear both to those implementing them and those subject to them. Thus, a problem of transparency and accountability arose. Equally, it was suggested that allocation schemes were sometimes responsible for creating stigmatised estates, and perpetuating them, precisely because they lacked sufficient discretion to be sensitive to the needs of certain estates (for example, relating to levels of child density on estates).[25]

20 See, for example, J. Cullingworth, *Problems of an Urban Society*, Vol 2: the Content of Planning, (London: Allen & Unwin, 1973), 54, referring to LAC 41/67 in which the Ministry of Housing and Local Government suggested that tenants should 'so far as possible be offered a choice of accommodation at varying rent levels'.

21 See Central Housing Advisory Committee, *Council Housing: Purposes, Procedures, and Priorities* (London: HMSO, 1969).

22 See J. Henderson and V. Karn, *Race, Class and State Housing: Inequality and the Allocation of Public Housing* (Aldershot: Gower, 1987).

23 N. Lewis, 'Council housing allocation: problems of discretion and control', (1976) 11 *Public Administration* 147; cf R. Sainsbury, 'Administrative justice: discretion and procedure in social security decision-making', in K. Hawkins (ed), *The Uses of Discretion*, (Oxford: OUP, 1992).

24 H. Pawson and K. Kintrea, 'Part of the problem or part of the solution? Social housing allocation policies and social exclusion in Britain', (2002) 31 *Journal of Social Policy* 643, 648.

25 See, for example, the Social Exclusion Unit's Policy Action Team 7 report, *Report by the Unpopular Housing Action Team* (London: DETR, 1999).

The solution to these problems identified by the Green Paper was quite radical. Points schemes were not regarded as 'an ideal way of ensuring that social housing lettings meet need in a sustainable way' because 'assessments take little account of people's own "felt needs" '.[26] Instead, a simple, broad brush banding scheme was recommended which would be less complex and more transparent.[27] Within each band, it was suggested that 'waiting time would become the "currency" that those in the social sector could use to optimise their own decisions about where to live, taking into account all their needs and aspirations'.[28] Choice schemes involving advertising available properties to let, based upon a model originally devised in Delft and implemented in a high profile pilot in Market Harborough, were particularly highlighted (although not part of the Lambeth scheme).[29]

It is apparent that the three core elements of Lambeth's brand of choice based letting – grouping,[30] date order, and self-assessment – are present elements of the approach favoured by the Green Paper and a number of the government-funded pilots. Analysing each of the elements of Lambeth's scheme in turn in relation to the current legislative framework, the result is hardly favourable. The failure of the Lambeth scheme to pass muster is, therefore, potentially problematic for the policy generally. From this general proposition, however, one must distinguish areas where there is low demand for social housing. In such areas it is not a question of 'reasonable preference' but, rather, a question of finding willing takers for the social housing stock. If a move to choice in lettings increases demand in those areas, as is implied in the policy, then that is all to the good; and most choice schemes in these areas should be compliant with the law as there is little competition for accommodation. The legal problems for choice schemes arise in high demand areas and, most acutely, in areas such as London where that demand comes from households entitled to reasonable preference.

Banding

Grouping, or banding, is potentially problematic if it operates independently of 'reasonable preference'. The Green Paper suggested that schemes could operate with just three bands reflecting different levels of need, but it is, as the Court of Appeal suggests, difficult to see how that type of banding can equate with the reasonable preference categories, or indeed accord the required cumulative preference to some households. The Green Paper recognised, however, that in high demand areas, the highest need band may need to be separated 'to differentiate between demand priorities', although on this formulation 'the principle of giving

26 *Quality and Choice*, para 9.18.
27 Banding schemes were not *per se* novel because a small number of social landlords were experimenting with them prior to the Green Paper. The novelty lay in the government's promotion of this approach.
28 Para 9.21.
29 Paras 9.37–9; see also T. Brown, R. Hunt and N. Yates, *Lettings: A Question of Choice* (Coventry: CIH, 2000), but cf J. Kullberg, 'Consumers' responses to choice-based letting mechanisms', (2002) 17 *Housing Studies* 549.
30 Grouping seems to be the equivalent of 'banding' in this context.

priority according to the time spent in housing need remains valid'.[31] When this issue is raised in the Code of Guidance there is no discussion of the number of bands that it would be appropriate to use.[32] A key question for the legality of choice-based lettings schemes that use bandings is whether they incorporate sufficient bands to account for reasonable preference. Yet, quite how many bands that would require is by no means certain and is likely to depend heavily on the housing market context.

Some choice-based lettings schemes solve the problem of reasonable preference by operating a system in which most applicants are prioritised on the basis of waiting time but those regarded as being in the greatest housing need are given 'priority cards'. These cards usually enable the holder to 'trump' other households as regards certain properties. On one level, these cards do give the 'reasonable head start' required, but, unless there are different types or 'values' of card for people in different circumstances, they lack sensitivity to the degree of individual housing need. So, for example, there must still be some mechanism, on the basis of the *Lambeth* case, to discriminate between different levels of housing need among those holding a priority card, such as those in more than one reasonable preference category. Conversely, if there are several different types of priority card of different values circulating within a system then effectively it is a banding system.

Priorisation of those holding a priority cards on the basis of date order is then, arguably, not in line with the *Lambeth* judgment if it does not also allow for some other consideration of relative housing need. If the local authority does allow for such a further assessment, then practically it has returned to a points scheme anyway.

Indeed, if the purpose of choice based lettings is – in either its banding or priority card form – to increase the transparency of the system and its simple exposition to households, then the proliferation of bands and the use of one or several priority cards clearly acts to frustrate this purpose. In the limit, the currency that households bid with will effectively be the number of points they are awarded on the basis of their circumstances.

Date order

One of the central problems of points systems was that they encouraged what housing officers refer to as 'points chasing'. Households were effectively encouraged by the system to claim higher degrees of housing need, including often making a homelessness application, in order to obtain a greater number of points and, hence, swifter allocation of property. Banding with allocation in date order within bands should in principle root out that problem. There are two analytical issues here. First, if bands are hierarchical, then it might be supposed that households in lower bands will seek to 'band chase' to move up the order. Second, pure date order schemes run foul of the *Lambeth* case. Date order schemes are simple to explain and understand, but their fundamental flaw is that they do not cater

31 Para 9.23.
32 Para 5.11.

adequately for the different levels of housing need expressed in the reasonable preference categories.

At this stage, it must be suggested that the history of judicial encounters with local authority housing allocation systems would hardly have suggested this result. Early cases suggested that local authority discretion in this area was regarded with deference by the courts in tune with the 'wider norms regulating central-local government relations between 1945 and 1975'.[33] Date order schemes, which predominated during this period, were never regarded as anything but lawful against a similar set of legislative provisions. Indeed, it has always been clear that, as the previous Code of Guidance put it, '[a]uthorities have a general duty to manage the resources at their disposal prudently. They may wish to take into account the characteristics of the people they select as tenants, both individually (as potentially good tenants) and collectively'.[34] Thus, their role as landlord and public resource holder must be balanced. It might plausibly be argued that a date order scheme does accomplish this purpose, particularly through its transparency.

Subsequent judicial decisions, whilst being more willing to intervene, hardly suggested great judicial activism in this area – indeed, in the *Watters* case which set out the 'reasonable head start' principle, the Court of Appeal upheld a scheme which excluded a household from appearing on the list despite having a reasonable preference. This was justified on the basis that a local authority is a public resource holder with duties to the public purse: '… the council has a duty to have regard to the financial consequences of its action and to the need to balance its housing revenue account.'[35] The household in that case received its reasonable preference through consideration of their case by an internal appeals panel.

The judicial activism in the *Lambeth* case was unexpected then, despite lip service being paid to the incredibly difficult job faced by Lambeth and the imperfections inherent in any scheme based upon comparative assessments of housing need.[36] Cowan, for example, suggested that the general policy of the courts had been to downgrade the concept of reasonable preference so as to 'disallow any persons from gaining priority in the queue for housing, believing this to be inequitable'.[37] Yet, in the *Lambeth* case, Collins J, in an awkward phrase, went much further and arguably gave greater weight to the 'reasonable head start' principle than previous judicial decisions:

> Unless it is clear that no applicants who are not entitled to preference are able to compete on equal terms with those who are, the scheme cannot secure that the necessary head start is given.[38]

The date order allocation, without exception, in each group was therefore held unlawful as bands included all households, whether or not they were entitled to reasonable preference.

33 I. Loveland, *Housing Homeless Persons* (Oxford: OUP, 1995), 21.
34 DoE, *Code of Guidance on Housing Act 1996, Parts VI and VII* (London: DoE, 1996, rev'd 1997), para 5.6.
35 *R* v *Wolverhampton MBC ex p Watters* (1997) 29 HLR 931, 936.
36 See paras 11 and 20, *per* Collins J.
37 *Housing Law and Policy* (Basingstoke: MacMillan, 1999), 237–238.
38 Para 16.

Date order schemes were regarded, in any event, as appropriate only 'where there is no real housing problem', but even then only where reference was 'made to, or account being taken of, the degree of housing and social need'.[39] Indeed, date order schemes and other schemes which prioritised waiting time were regarded as producing discrimination against incomers.[40] Subsequent studies have shown how ability to wait produced discriminatory effects on an institutional basis in Lambeth and Haringey because ethnic minority households were disproportionately amongst the homeless and poorly housed, and transfer applicants were overwhelmingly white households which were able to obtain the best quality accommodation (because their current housing situation enabled them to wait longer for the better quality accommodation).[41] This problem might be addressed by the requirement that transfer applicants and 'new' households are both now subject to the same selection and allocation provisions as a result of the Homelessness Act 2002. However, in practice, the local political priority in favour of transfer applicants may override this apparent equality. [42]

Choice exacerbates this dilemma, particularly on the Lambeth model. Allocation systems have always, it might be said, favoured the local authority's own tenants because of political realities in implementation. As Clapham and Kintrea note,

> In essence then, 'allocation according to need' is always likely to be a slogan rather than an actuality because, in practice, it is tempered by the requirements of political compromise and administrative efficiency. However, compromise tends to lead to an allocation system with a variety of aims, some of which may be unstated. These systems tend to be difficult to understand and often produce an outcome which is difficult to justify according to any conception of fairness.[43]

In this context, there must be a concern that not all approaches to choice-based lettings can be squared with local authority and Housing Corporation obligations to eliminate unlawful racial discrimination under the Race Relations (Amendment) Act 2000.[44] Indeed, the best that two leading authors in the housing studies tradition could say about choice on this point was that: 'it is perhaps unlikely that choice-based systems will lead to *more unequal* outcomes and at least they have the advantage of greater transparency'.[45]

39 Cullingworth report, para 128.
40 Cullingworth report, esp ch 9.
41 S. Jeffers and P. Hoggett, 'Like counting deckchairs on the Titanic: a study of institutional racism and housing allocations in Haringey and Lambeth', (1995) 10 *Housing Studies* 325.
42 See D. Clapham and K. Kintrea, 'Housing allocation and the role of the public rented sector', in D. Donnison and D. Maclennan (eds), *The Housing Service of the Future* (London: Longman, 1991), where the local political climate was said to have created the pressure in favour of transfer applicants. Of course, it is also true to say that rehousing a transfer applicant frees a property to be let to a new households. But that does not address the point about the *quality* of accommodation being offered to the new household.
43 D. Clapham and K. Kintrea, 'Housing allocation and the role of the public rented sector', in D. Donnison and D. Maclennan (eds), *The Housing Service of the Future* (London: Longman, 1991), 62.
44 S 2 and Schedule 1A.
45 Pawson and Kintrea, *op cit* n 23, 661.

Choice

What is so damning about the Court's decision in the *Lambeth* case, quite apart from the rejection of the banding and date order schemes, is the comments made (probably as *obiter dicta*) about choice as implemented by Lambeth. If these comments are subsequently developed then it could have far-reaching consequences for the way choice can be offered in lettings while remaining within the ambit of the law.

Lambeth's policy essentially required households to self-assess their own housing need through their willingness and ability to wait. The longer households were willing to wait, the choosier they could be. This is an explicit, common element of many choice-based lettings schemes in that waiting time is the currency commonly employed, as suggested in the Green Paper. In an area where there is a high demand for social housing, but low supply, the Court of Appeal recognised the difficulties of designing a defensible allocation scheme. However, they raised two concerns about including a mechanism of 'choice' within the scheme.

First, the Court of Appeal made clear that, as has been suggested in homelessness cases,[46] the assessment of need is for the local authority to make. Lambeth's self-assessment approach was deprecated because, for Collins J, the individual has their own interest at heart and Lambeth's scheme was 'altogether too haphazard'.[47] Similarly, Pill LJ made the following observation:

> I fail to see how permitting an applicant to assess his need so highly that he accepts inferior accommodation amounts to conferring a preference on him. The two concepts are different and the right to choose does not amount to a preference within the meaning of the section.[48]

This represents a significant problem for the rationale of choice schemes, many of which incorporate a self-assessment element. Yet, it is difficult to see how this element of self-assessment differs from previous, assumed lawful practice in which applicants chose areas usually knowing that some were more popular than others (and, therefore, they would have to wait longer). All Lambeth's policy did was formalise that process so that its applicant households made their judgments on the basis of full knowledge. What seems important after the *Lambeth* case is that the local authority makes a final judgment on the basis of its knowledge.

Second, the argument was put to the Court that 'choice' was a bureaucratically rational policy in that the average rate of refusals (that is, the average number of refusals for any particular property) had reduced considerably after the implementation of the self-assessment element of the allocations scheme, and thus impacted upon longer term community stability. Although there are assertions here about the importance of sustainable communities, the argument can be resolved to a purely financial one – which might be expected to find favour on the principles previously enunciated. Essentially, the more refusals a property gets, the longer it remains unoccupied which impacts adversely on the rental income stream (and

46 See, for example, *R* v *Brent LBC ex parte Puhlhofer* [1986] 1 AC 484, 518.
47 Para 20.
48 Para 38.

has an adverse impact on the housing revenue account); furthermore, if a property proves unpopular, that can be a factor which tips an estate into being regarded as unpopular, with a more significant impact on rental income streams.[49]

Collins J made a number of points to rebut the success of the scheme to choice-based lettings, in the course of which he made the following observation about the Lambeth scheme:

> What has helped is not necessarily choice but a greater knowledge of what an applicant was prepared to accept. Furthermore, in many ways the policy provides the antithesis of choice. A realisation that what would otherwise be regarded as substandard accommodation in an unwanted area can be the only way of avoiding an unacceptably long wait is hardly what most would regard as a real choice. It is not the sort of choice which the Green Paper seems to me to be advocating.[50]

The final sentence can be disputed. The Green Paper makes clear that '*Choice should be well-informed*: People should understand what housing is available and what their chances are of getting it.'[51] The sort of choice being advocated is one in which the lack of supply is made crystal clear to applicants. Providing this information can in itself lead applicants to seek housing solutions elsewhere.

Implementing a choice-based lettings scheme in a high demand area, fundamentally, involves 'customers' making choices about the acceptable type and area of property. One of its precepts is that the social sector should mirror a model of the private sector in terms of bargaining ability. In a high demand area, good quality, well-managed, cheap private sector accommodation is hard to come by. Many have to accept 'substandard accommodation in an unwanted area' because they are unable to bargain for the best quality accommodation. They can wait for decent quality accommodation in a more desirable area to become available, but the reality is that, if it does, there is intense competition for it. Lambeth's scheme effectively mirrored that position through the medium and bargaining chip of waiting time.

The comments of Collins J here hark back to understandings of choice in liberal contract theory: in a situation of market equilibrium the individual customer has some considerable power. However, assumptions that markets are in equilibrium do not represent the reality of city living, nor the reality of applying for social housing. In fact, the differences between the Lambeth scheme and what had gone on before were largely cosmetic. Households have always had the choice of whether to accept *any* property in *any* area, and thus be rehoused quickly, or to narrow their search, and risk a lengthy period on the housing register. Households who were in desperate circumstances, such as in bed and breakfast accommodation, would be encouraged by the bureaucracy to opt for accommodation in any area within the authority's boundary, and do so willingly. Choice-based lettings schemes formalize this process by emphasizing the provision of information that allows 'customers' to assess the popularity of different properties/areas and

49 See Social Exclusion Unit, Policy Action Team 7, *Unpopular Housing* (London: SEU, 1999); cf S. Damer, 'Wine alley: the sociology of a dreadful enclosure' (1974) 22 *Sociological Review* 221.

50 Para 13.

51 Para 9.17, original emphasis.

make decisions accordingly. The more desperate, as careful research has demonstrated, are always more willing to widen their areas of choice (leading to concerns about institutional racism).[52] Choice-based lettings encourages such active 'choice' through its transparency – households receive a message regarding how long they will have to wait. However, that information has always been available since the introduction of computer modelling of supply-demand for social housing in the mid-1980s and, often, is used by housing officers in advising applicants.[53] Indeed, social housing providers that do not operate choice generally use this method as rational planning. On Collins J's understanding, all such schemes operate at the margins of legality.[54]

GOVERNING ALLOCATIONS

Choice-based lettings schemes operate at the juncture of neo-liberal and neo-conservative ideology – it is no surprise that they were welcomed on all political sides.[55] In place of dependency they advocate self-reliance and personal responsibility on the part of 'homeseekers'; they seek to mirror the market in terms of bargaining ability; they harness technology and statistics in an attempt to increase transparency; and, of course, they affirm the importance of individual choice, however limited that may be, and regard to the interests of the individual over the collective.[56] Indeed, these schemes have all the hallmarks of the linguistic turn and programmatic shift in government from welfarism to 'advanced liberalism'.

The logic of social housing allocation had been governed by the state through its bureaucratic arm; choice implies a new relation between individual household (*qua* consumer) and state (*qua* facilitator). Households are no longer regarded as passive recipients of welfare, but active, autonomous and responsiblised customers of the housing service.[57] The discursive shift from 'client' to 'customer' in the modern housing service is, it is suggested, significant in this context, implying a new 'specification of the subject of government'.[58] Choice embodies the maxim, 'to govern better, the state must govern less'[59] because consumers become free to make their own choices about their future homes; and those choices are designed to mirror the market. This is government not of households, but through their

52 See Jeffers and Hoggett, *op cit* n 41.
53 See D. Cowan and S. Halliday, with C. Hunter, P. Maginn and L. Naylor, *The Appeal of Internal Review* (Oxford: Hart, 2003), chs 3 and 4.
54 See, however, the assertion that the courts 'only deal with specific complaints about the lawfulness of an individual scheme' – para 32, *per* Judge LJ – an assertion which hardly reflects the tone of the rest of the judgment in which the individual circumstances are marginalised against a close assessment of the Lambeth scheme.
55 For discussion of this juncture in criminal justice, see P. O'Malley, 'Volatile and contradictory punishment', (1999) 3 *Theoretical Criminology* 175, esp 183–189.
56 See, similarly in the context of un/employment, W. Walters, *Governing the Unemployed* (Cambridge: CUP, 2000).
57 For discussion, see N. Rose, *Powers of Freedom* (Cambridge: CUP, 1999), ch 2; M. Dean, *Governmentality* (London: Sage, 1999), 164–171.
58 N. Rose, 'Government, authority and expertise in advanced liberalism', (1993) 22 *Economy and Society* 283, 296.
59 N. Rose, *op cit* n 57, 139.

regulated choices; for example, by setting out the 'options' available so that individual households can choose the most appropriate solution to their housing problem (if any). Thus, individuals become self-determining, responsibilised, and entrepreneurial in their choices. The bureaucracy must change 'from one dictated by the logics of the system to one dictated by the logics of the market and the demands of the customers'.[60] Developments in computer technology makes this shift possible.[61]

Yet, despite this apparent historical conjunction of the 'now' in social housing allocations and broader shifts towards advanced liberalism, it has already been noted above that 'choice' can hardly be described as novel. It has always been apparent in allocation schemes in ways similar to those in which the Lambeth scheme operated – and the discursive shift probably started in the mid-1980s as a result of (post-)Thatcherite housing policy and practice.[62] On this basis, the policy of choice is not a historical break in social housing allocation policy but, rather, a continuation of previous themes. In other words, there has always been an interplay between need and choice, which the new schemes rebalance.

What *is* different, however, is the significant discursive shift in social housing policy in which the ideals of choice have overtaken the ideals of need. That is not to say that need has no remaining role. Indeed, most social housing providers would say that they allocate on the basis of need. More significantly, the legislation has remained the same, with preference given to groups regarded by policy makers as more needy than others. Yet, 'choice' has undoubtedly become more prominent and formally integrated into policy than before. The requirement to ensure that housing need is met is now perhaps best viewed as a constraint upon the extent to which choice can be offered, rather than the overriding logic driving the system.

How then does the *Lambeth* case fit into this reshaped (or, at least, reshaping) paradigm of social housing allocation? Perhaps strangely, the Court of Appeal judgment reflects a rather different paradigm in which the choices are made by the local authority, which has the requisite knowledge and can balance the interests of all its applicants. By contrast, it is regularly asserted that judicial reasoning is often closely associated with the individual's freedom within the domain of liberal thought.[63] Davina Cooper, for example, has demonstrated how the judicial reliance on the individual local taxpayer is successfully deployed to express 'a normative paradigm of local government's relationship to its constituency, with

60 N. Rose, *op cit* n 57, 150. Cf Pawson and Kintrea, *op cit* n 23, 661: 'the active (rather than passive) role that Delft-style approaches involve for applicants will fundamentally alter the remote, paternalistic and arguably disabling nature of the allocations process. This underlines the significance of the DETR's terminological switch from the *dirigiste* language of "allocations" to the more neutral "lettings" '.

61 *Op cit* n 23.

62 See, for example, A. Murie, R. Forrest, M. Partington and P. Leather, *The Consumer Implications of the Housing Act 1988*, School for Advanced Urban Studies (University of Bristol) Working Paper No 77, (Bristol: SAUS, 1988); A. Stewart, *Rethinking Housing Law* (London: Sweet & Maxwell, 1996), 165 *et seq.*

63 See the analysis of contract law cases presented by Pat O'Malley: 'Uncertain subjects: risks, liberalism and contract', (2000) 29 *Economy and Society* 460.

neo-liberal and neo-conservative implications'.[64] The New Labour policy of choice in access to social housing fits neatly with those understandings of the pattern of judicial decision-making in public law and beyond. As L. B. Lambeth argued, 'an individual's assessment of his or her own housing need is as reliable as that made by a third person'.[65] However, the judgment in the *Lambeth* case clearly favours 'big' government in this respect and runs counter to the significant literature in this area – the self-interest of individuals cannot override the importance of bureaucratic decision-making because only the bureaucracy has the level of knowledge to reconcile competing objectives and has the requisite interest in the broad community of potential households on the housing register. Thus, the path from need to choice, from welfarism to advanced liberalism, has become rockier in the most unlikely of locales – the courts.

CONCLUSIONS

Choice in lettings has a high profile in central government policy, having been placed at the forefront of the housing Green Paper in 2000 and reinforced in subsequent policy statements. The ODPM's choice based lettings pilot schemes carried with them £13 million of central government funding.[66] It is believed that allowing applicants choice will have a curative effect on some of the more intractable problems of social housing (such as image, sustainability, transparency), although it is equally recognised that choice alone cannot be a full answer to those problems.

The Court of Appeal in the *Lambeth* case has, however, raised a number of questions about the lawfulness of schemes seeking to implement the choice model. The Homelessness Act 2002 does not assist with a solution to these questions because it tinkered with the previous law, without taking into account the potential problems that law may pose for choice schemes. Chief amongst these questions are the proper role for the individual household in the social allocations process. The ideal of choice is that individuals take responsibility for their own housing solutions within a range of possibilities. That implies a new relation of customer and facilitator, rather than passive client and bureaucrat. The *Lambeth* case, on the other hand, seems to require local authorities to exercise its own judgment, presumably countermanding individual choice if that is in the interests of the broader community of applicants for housing. Whilst we sometimes neatly counterpose 'welfarism' and 'advanced liberalism', it seems that the path from one to the other is rather fuzzier.

64 'Fiduciary government: Decentring property and taxpayers' interests', (1997) 6 *Social and Legal Studies* 235, 237; see also P. Fennell, '*Roberts* v *Hopwood*: The rule against socialism', (1986) 13 *J Law Soc* 401.

65 Para 20.

66 The original bidding guidance for the pilots (http://www.housing.odpm.gov.uk/information/cbaselet/bidding/guidance.htm) (last visited 9 March 2004) required that 'local authorities satisfy themselves that the proposals which are contained in their bids meet the current statutory requirements. We take the view that authorities have considerable flexibility within the current framework to pursue innovative choice-based lettings approaches.'

Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness

Kumaralingam Amirthalingam*

The House of Lords has recently reiterated its preference for a purely subjective doctrine of mens rea by overruling the *Caldwell* test of recklessness. It is argued that while the subjective basis of mens rea is essential to ensure that it is the accused's culpability that is being judged, courts must be prepared to accept that there is a residual objective element that is part of mens rea and it is that which determines whether the accused is morally blameworthy. Unless this is formally accepted, mens rea will never be restored to its proper normative role; that of determining whether the 'mens was rea'.[1]

INTRODUCTION

The oft-cited maxim *actus non facit reum nisi mens sit rea*, was recently reaffirmed by the Senior Law Lord as a 'salutary principle' of the criminal law.[2] The thrust of the maxim is that criminal culpability requires proof of a 'guilty mind,' which according to conventional modern criminal law theory is either intention or recklessness.[3] Courts and leading commentators have emphasised the subjective aspect of mens rea to ensure individual responsibility for criminal conduct. In the zeal to ensure 'individual' responsibility the normative aspect of ensuring fair attribution of blameworthiness has been compromised. This task is often left to the 'common sense' of juries or to be reflected in the sentencing process.[4] The insistence on subjectivism is particularly problematic in the case of recklessness, which often finds itself on the precarious cusp that divides subjective and objective liability.

Recklessness is the critical mental element in the Criminal Damage Act 1971. Ten years after its enactment, the House of Lords in *R* v *Caldwell*[5] controversially interpreted recklessness objectively and recognised inadvertence as a mental state. Another ten years later, the House of Lords attempted to salvage *Caldwell* by reinterpreting it in *R* v *Reid*;[6] and on cue, at the end of the following decade, the

* LLB (Hons), PhD (ANU). Associate Professor, Faculty of Law, National University of Singapore.

1 *DPP* v *Beard* [1920] AC 479 at 504 per Lord Birkenhead: '… a person cannot be convicted of a crime unless the mens was rea.'
2 *R* v *G & Anor* [2003] UKHL 50 at [32] per Lord Bingham of Cornhill.
3 G. Williams, *Criminal Law: The General Part* (London: Stevens, 1953) 29; J. C. Smith, *Smith & Hogan Criminal Law* (London: Butterworths, 10th ed, 2002) 69–70.
4 Lord Steyn expressed his unease with leaving the fundamental question of moral blameworthiness to be ameliorated at the sentencing stage: 'The only answer of the Crown is that where unjust convictions occur the judge can impose a lenient sentence. This will not do in a modern criminal justice system.' *R* v *G & Anor* [2003] UKHL 50 at [52]. See also Lord Bingham at [33].
5 [1982] AC 341.
6 [1992] 1 WLR 793.

House of Lords in *R* v *G & Anor*[7] finally decided to consign *Caldwell* to history. While the outcome in *R* v *G* is welcome, it is suggested that the crux of the matter – the nature of our doctrine of mens rea – remains in an unsatisfactory state. There remains a blind adherence to subjectivism, often resulting in a disparity between the legal test of mens rea and the community's sense of moral wrong. The House of Lords in *R* v *G* recognised that the legal test for recklessness under *Caldwell* was no longer tenable because it 'offended the jury's sense of fairness … [which is] … the bedrock on which the administration of criminal justice … is built.'[8]

R v *G's* restoration of recklessness to its subjective roots may have been justified on the facts, but the doctrine of mens rea itself needs to be restored to its normative roots of attributing blameworthiness. By emphasizing blameworthiness and the community's sense of fairness but juxtaposing that with subjective mens rea, *R* v *G* was a wrong step in the right direction.

RESTORING RECKLESSNESS

The facts in *R* v *G* were that the defendants, two young boys aged 11 and 12 respectively, lit some newspapers and threw them under a rubbish bin in the back yard of a shop. The fire spread and damaged the shop and adjoining buildings. They were charged under s 1 (1) and (3) of the Criminal Damage Act 1971. The prosecution rested its case on recklessness as there was no evidence that the boys intended to cause damage. It was also accepted on the evidence that the defendants had not appreciated that there was any risk of the fire spreading in the way that it eventually did. The trial judge directed the jury in accordance with Lord Diplock's ruling in *Caldwell*, which is set out below for convenience:

> In my opinion, a person charged with an offence under s 1(1) of the Criminal Damage Act 1971 is "reckless as to whether any such property would be destroyed or damaged" if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.[9]

Caldwell had adopted an objective test of recklessness and extended mens rea to include inadvertence. The problem with this approach was that it ran counter to the orthodox subjective approach to mens rea and brought recklessness within the fold of negligence.[10] The issue on appeal to the House Lords, directly challenging the *Caldwell* ruling, was whether a conviction could be upheld when the defendant 'gave no thought to the risk but, by reason of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it.'[11]

7 [2003] UKHL 50.
8 ibid at [33].
9 *R* v *Caldwell* [1982] AC 341 at 354.
10 The Law Commission when drafting the Criminal Damage Act 1971 had decided against having an offence of negligent damage to property. See, G. Williams, 'Intention and Recklessness Again' (1982) 2 LS 189.
11 *R* v *G & Anor* [2003] UKHL 50 at [1].

Caldwell recklessness – history and issues

The Criminal Damage Act 1971 was intended to simplify and modernise the Malicious Damage Act 1861. A critical feature was the replacement of the mental state of 'maliciously' with intention and recklessness. Cases decided under the Malicious Damage Act 1861 had consistently adopted a subjective interpretation of 'maliciously' and had excluded inadvertence.[12] The Law Commission had intended to retain the subjective approach to recklessness in the Criminal Damage Act 1971,[13] and indeed the early decisions did continue with a subjective interpretation.[14]

Lord Diplock in *Caldwell* took the view that the accused in that case was morally blameworthy, even though lacking orthodox subjective mens rea. In order to bridge the gap between moral blame and legal guilt, his Lordship extended recklessness by applying an objective test of what a reasonable person would have contemplated. This extension may have been defensible given the particular facts in *Caldwell*. The accused had had a falling out with his former employer and took revenge by getting drunk and setting fire to his erstwhile place of employment. The *Caldwell* ruling should have been confined to cases where the accused had the capacity to consider the risks and through his or her own conduct chose not to do so or deprived him or herself of the capacity to do so.

The rule is indefensible in cases where the accused simply did not have the capacity to foresee risk through no personal fault;[15] the classic examples being cases involving young or mentally deficient offenders.[16] Uncomfortable with *Caldwell*, courts restricted its impact by refusing to apply it to cases other than criminal damage.[17] It is suggested that focusing on the category of the offence as a means of containing *Caldwell* is misplaced. The focus should be on the criminal culpability of the accused; mens rea should not shy away from 'objective assessment' as long as it fairly attributes blameworthiness to the accused.

The decision in *R* v *G and Anor*

The House of Lords, in unanimously overruling *Caldwell*,[18] has merely restored the law to its originally intended position. In support of his view that *Caldwell*

12 *R* v *Pembliton* (1874) LR 2 CCR 119; *R* v *Welch* (1875) LR 1 QBD; *R* v *Harris* (1882) 15 Cox CC 75; *R* v *Child* (1871) LR 1 CCR 307; *R* v *Faulkner* (1877) 13 Cox 550. The same approach to 'maliciously' was taken with respect to the Offences Against the Person Act 1861. See *R* v *Cunningham* [1957] 2 QB 396; *R* v *Mowatt* [1968] 1 QB 421.

13 Law Commission, *General Principles: The Mental Element*, (Working Paper No 31, June 1970); *Report on Offences of Damage to Property* (Law Com No 29, July 1970).

14 *R* v *Briggs (Note)* [1977] 1 WLR 605; *R* v *Parker* [1977] 1 WLR 600; *R* v *Stephenson* [1979] QB 695.

15 See D. Birch, 'The Foresight Saga' [1988] CLR 4; S. Field and M. Lynn, 'The Capacity for Recklessness' (1992) 12 LS 76.

16 *Elliot* v *C* [1983] 1 WLR 939; *R* v *Stephen Malcolm R* (1984) 79 Cr App 334; *R* v *Coles* [1995] 1 Cr App R 157.

17 See J. C. Smith, *Smith & Hogan Criminal Law* (Croydon: Butterworths Tolley, 10th ed, 2002) 83–84 for cases rejecting *Caldwell* in other areas.

18 The leading opinion was given by Lord Bingham of Cornhill, with Lords Brown-Wilkinson and Hutton agreeing; Lords Steyn and Rodgers of Earlsferry gave concurring opinions although Lord Rodgers expressed considerable misgivings about overruling *Caldwell*.

had wrongly interpreted recklessness, Lord Bingham of Cornhill held that *Caldwell* violated the fundamental maxim *actus non facit reum nisi mens sit rea* and led to manifest unfairness, with the possible exception of cases involving self-induced intoxication.[19] His Lordship reinforced the orthodox subjective approach to mens rea by holding that recklessness required a positive mental state of actual awareness both of the existence of the risk and of the unreasonableness of taking the risk;[20] inadvertence was not sufficient.

A modified objective test for children, where the question would be whether a reasonable person of similar age would have considered the risk to be an obvious one, was considered and rejected. The rejection of this approach is questionable given that the courts have recognised that the reasonable person may be modified in cases of professionals or experts.[21] Lord Steyn referred to the *Convention on the Rights of the Child* and held that it provided a compelling argument to reject *Caldwell* as the Convention required a child's age to be taken into account in criminal matters.[22] However, that surely does not prevent the child's age being taken into account in an objective sense. The considerable experience of the tort of negligence suggests that such modifications to the reasonable person test are not only permissible but necessary.[23]

A 'subjectivised' form of inadvertence, suggested by Glanville Williams,[24] whereby an accused could be held reckless if the risk would have been obvious to the accused had he or she – and not the reasonable person – given any thought to the matter was also rejected. In Lord Bingham's view, juries could decide whether a defendant possessed the requisite mens rea, but it would be too speculative for a jury to decide whether a defendant *would* have considered a risk to be obvious *if* he or she had thought about the risk.[25] Be that as it may, the proper question in any case is not whether the defendant *would* have considered the risk but whether the defendant, having chosen to act in that way, *should* have considered the risk. This is a normative question that determines whether the 'mens was rea' and juries are eminently capable of making such decisions.[26]

MENS REA, INADVERTENCE AND BLAMEWORTHINESS

An assumption in this paper is that criminal liability requires moral blameworthiness, which is provided by proof of mens rea. It is beyond the scope of a case note to expand on this argument, which although not universally accepted

19 ibid at [32]–[33].
20 ibid at [41].
21 See M. Jefferson, 'Recklessness: The objectivity of the *Caldwell* Test' (1999) 63 Journal of Criminal Law 57 at 61, referring to the unreported decision of *R* v *Stanley* (unreported, 10 October 1990) and *R* v *Adomako* [1995] 1 AC 171, although it should be noted that *Adomako* was concerned with gross negligence not recklessness.
22 *R* v *G & Anor* [2003] UKHL 50 at [53].
23 The test for liability of children in the tort of negligence is based on a modified objective test, where age is relevant: *Mullins* v *Richards* [1998] 1 WLR 1304; *McHale* v *Watson* (1966) 115 CLR 199.
24 G. Williams, 'Recklessness Redefined' (1981) 40 CLJ 252 at 270–271.
25 *R* v *G & Anor* [2003] UKHL 50 at [38].
26 Lord Steyn implicitly recognizes this by acknowledging the 'robust common sense' of juries, ibid at [58].

nevertheless commands some support.[27] Briefly, blameworthiness goes beyond mere conduct responsibility; it is a normative inquiry as to whether the person deserves to be labeled and punished as a criminal. The blameworthiness of an accused is not determined merely by inquiring whether there existed a 'subjective' mens rea; it requires an additional crucial step of asking whether the 'mens was rea'. This inquiry involves an 'objective' element and includes inadvertence within mens rea.

Even if one does not accept the moral blameworthiness thesis and adopts Hart's view that mens rea is merely about ensuring that the accused had a fair opportunity to exercise his or her physical and mental capacities to avoid infringing the law, a similar conclusion as to inadvertence is reached. As Hart himself says, 'it does not appear unduly harsh, or a sign of archaic or unenlightened conceptions of responsibility, to include gross, unthinking carelessness among the things for which we blame and punish.'[28] Criminal fault is a composite of subjective and objective elements. Orthodox theory however insists on an artificial bifurcation and the inquiry into blameworthiness is hijacked by the futile exercise of labeling fault as subjective or objective. *R* v *G* regretfully preserves this unhelpful predilection.

The earlier mens rea term of 'maliciously' was inherently normative as it connoted wickedness or wrongfulness.[29] Thus, a person who acted maliciously could be fairly said to be blameworthy or culpable. The modern subjective concepts of intention and recklessness however are in reality limited to attributing the conduct, not blameworthiness, to the accused.[30] One cannot determine blameworthiness or culpability without reference to some external standard. This calls for a degree of objective evaluation, which is shunned by the subjectivists. The exclusion of objective fault from mens rea is based on the misguided belief that there is such a thing as purely subjective fault.

> That the law has never attempted anywhere a purely subjective test is at once apparent. If we speak of legal fault, we mean only that the actor's conduct has departed from the standards of the community because the actor is different from others in one of two respects. He may differ from the community in his ideas of the relative

27 See for example, J. Hall, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 2nd ed, 1960); G. P. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978); M. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997). See also, for judicial support *R* v *Creighton* [1993] 3 SCR 3 at 54 per McLachlin J: '… the question is not whether the general rule of symmetry between mens rea and the consequences prohibited by the offence is met, but rather whether the fundamental principle of justice is satisfied that the gravity and blameworthiness of an offence must be commensurate with the moral fault engaged by that offence.'

28 H. L. A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968) 136.

29 Mens rea originated as an ethical or moral concept. See G. O. Mueller, 'On Common Law Mens Rea' (1958) 42 Minnesota Law Review 1043 at 1057–61. See also F. B. Sayre, 'Mens Rea' (1932) 45 Harvard Law Review 974. Institutional writers embraced normative descriptions of mens rea; for example, Bracton's 'corrupt intention' (see J. M. B. Crawford and J. F. Quinn, *The Christian Foundations of Criminal Responsibility* (New York: Edwin Mellen Press, 1991) 122–123) or Blackstone's 'vicious will' (see W. Blackstone, *Commentaries on the Laws of England*, vol 4 (New York: Legal Classics Library, first published 1769, reprint 1983) 21).

30 In most cases there will be a coincidence between conduct responsibility and moral blameworthiness, but in many circumstances there will not be. Classic examples would be intoxication and mistake cases.

> values of different interests, or may fall below the community standard in the exercise of his will. … Thus "fault" becomes a failure to exercise the will or the improper exercise of it with reference to a standard will and a standard valuation of desirables and undesirables. There is no subjective legal fault.[31]

What often escapes the subjectivists' consciousness is the fact that objective evaluation of blameworthiness is an integral part of the criminal law; it is just dealt with separately in the form of various defences such as mistake, duress, provocation, self defence and necessity.[32] It is when these 'excusing' factors overlap with mens rea that courts are forced into a subjective approach, thus disabling the normative subjective/objective balance that has been developed within the existing structure of the criminal law. Incorporating an objective evaluation of blameworthiness within the doctrine of mens rea need not be seen as a radical proposition.

Mens rea is presently treated as a unitary concept, which is wholly subservient to subjectivism. It is suggested that a dualistic model be preferred, where the 'mens' and the 'rea' are separate. The 'mens' is the subjective mental element that attributes responsibility for the conduct and consequence to the accused; and the 'rea' is the normative evaluation of that mental element, which attributes moral blameworthiness to the accused. Instead of asking whether there was 'mens rea', the question would be whether the 'mens was rea'.

With recklessness, the 'rea' question in many cases will be whether the accused should have foreseen certain additional consequences of his intentional or foreseeable conduct. Andrew Ashworth has argued that every individual has certain duties of citizenship,[33] one of which is to abide by the law and to know and understand the law. The theory was offered to recognise certain mistakes of law as capable of excusing the accused;[34] in such cases one could fairly say that the 'mens' was not 'rea'. Similarly one can argue that as members of a community, there is a duty to consider obvious risks attending one's conduct. A failure to advert would therefore be culpable and an accused could not argue that his mental state was free from blame; in such cases the 'mens' would be 'rea'.

Caldwell fell into error by using an objective test to determine the existence, rather than the quality, of the relevant mental state. This was flawed because it was not the accused's mental state that was being judged. A subjective test is necessary to establish the existence of a relevant mental state – the 'mens'. This ensures individual responsibility; it takes into account the accused's personal capacity so it cannot be said that the accused him or herself did not have a fair opportunity to avoid criminal liability. It is only in determining the blameworthiness of the accused's mental state – the 'rea' – that some objectivity is necessary. This approach still honours the goal of subjectivism, as it is the accused's mental state that is at issue; unlike liability for negligence, where it is purely the

31 W. Seavey, 'Negligence – Subjective or Objective?' (1927) 41 Harvard L Rev 1 at 4.

32 It should be noted also that often much of the objective evaluation of fault is externalized in practice either at the prosecutorial discretion stage or at the sentencing stage. See A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Weidenfeld and Nicolson, 1993) 78–80. Rather than leaving it to discretionary justice, it would be better to internalize these objective standards.

33 A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 4th ed, 2003) 239.

34 A. Ashworth, 'Excusable Mistake of Law' [1974] Crim L Rev 652.

accused's conduct that is at issue.[35] Expanding negligence is not appropriate because it does not reflect the 'evil mind' that is the touchstone of criminal liability and that which distinguishes it from civil liability.

The House of Lords in *R* v *G* was willing to overturn an established, time-tested authority in order to nurture a criminal law doctrine of fault that fairly attributes blameworthiness to the accused and accords with the community's sense of fairness and justice. On the facts, the purely subjective approach to mens rea was apposite, but it would be a mistake to pretend that a purely subjective doctrine is the salve to our mens rea woes. Lord Rodger of Earlsferry acknowledged this in his opinion where he expressed the view that Lord Diplock's broader concept of recklessness, encompassing an objective element was not undesirable in terms of legal policy;[36] and further, held that inadvertence need not necessarily be excluded from recklessness.[37] This observation is especially relevant to recklessness in the context of sexual offences.

Sexual assault and inadvertence

In line with the highly controversial House of Lords decision in *DPP* v *Morgan*,[38] the mens rea for rape, in terms of recklessness, has been held by the Court of Appeal to cover situations where the accused displays an attitude of 'could not care less' or 'indifference'.[39] The burning question is whether this interpretation of recklessness allows for inadvertence.[40] In *R* v *Pigg*,[41] after a considered analysis of *Caldwell* and *Lawrence*, Lord Lane CJ appeared to have applied *Caldwell* inadvertence to rape, holding that an accused was reckless if he 'was indifferent and gave no thought to the possibility that [the victim] might not be consenting in circumstances where, if any thought had been given to the matter, it would have been obvious that there was a risk that she was not consenting …'[42] In *R* v *Satnam, R* v *Kewal*,[43] the Court of Appeal retracted the *Pigg* test, holding that it was the subjective, positive mental state of the accused that was at issue. However, Bristow J went on to state that if the risk would have been obvious to the reasonable person,

35 Some scholars take the view that once the emphasis is placed on the normative aspects of criminal culpability, the rigid distinction between intentional and negligent wrongdoing is no longer critical. See Fletcher, n 27 abc 509.

36 *R* v *G & Anor* [2003] UKHL 50 at [69].

37 ibid, referring to H. L. A Hart, 'Negligence, Mens Rea and Criminal Responsibility' in Hart, n 28 above, 136.

38 [1976] AC 182 at 215. Lord Hailsham described the mens rea for rape as 'the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no.'

39 *R* v *Taylor* (1985) 80 Cr App R 327; *R* v *Breckenbridge* (1984) 79 Cr App R 244; *R* v *Satnam, R* v *Kewal* (1983) 78 CR App R 149; *R* v *Kimber* [1983] 1 WLR 1118; *R* v *Bashir* (1982) 77 Cr App R 59; *R* v *Pigg* [1982] 1 WLR 762.

40 See J. C. Smith, *Smith and Hogan Criminal Law* (London: Butterworths, 10th ed, 2002) 472, who concludes that recklessness as interpreted in the sexual assault cases is a purely subjective test satisfied only by knowledge or awareness of a possibility.

41 [1982] 1 WLR 762.

42 ibid at 772.

43 (1983) 78 CR App R 149.

then the jury might infer that it was obvious to the accused.[44] This is merely a surreptitious method of applying an objective test in the guise of a subjective one. Cynics might say this is judicial acknowledgement of the failure of the subjective test, whereby courts apply an objective test in subjective clothing.

That a person can be absolved from criminal liability for sexual assault because he did not consider the possibility that the victim may not be consenting offends against general sensibilities.[45] As Kirby P put it in the Australian decision of *R* v *Tolmie*,[46] such an approach 'would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to … victims.'[47] *Tolmie* recognised inadvertence as recklessness, but qualified the *Pigg* test of obviousness by requiring that the risk be 'obvious to someone with the accused's mental capacity if they had turned their mind to it.'[48] This is similar to Glanville Williams' qualified subjective approach to *Caldwell*, which was rejected by the House of Lords in *R* v *G*.[49]

Applying the dualistic concept of mens rea to *Tolmie*, it can fairly be said that the accused intended to have sexual intercourse with the victim; that attributed responsibility for the conduct to him. Whether he was blameworthy depended on an evaluation of his mental state and the answer to that lies in the normative question as to whether he *should* have considered the critical issue of consent, which characterised the wrongfulness of his conduct. His failure to so consider made his *intention* to act a culpable one. On this analysis, one can say that the accused acted with a culpably inadvertent mind that goes beyond mere negligence.[50] The question of objective mental states or non-existent mental states is avoided.

Only Lord Steyn referred to sexual assault cases, although his Lordship did so in the context of the defence of mistake. Having noted that the trend in the criminal law in modern times was towards a subjective approach, Lord Steyn observed that the House of Lords had, in two recent decisions involving sexual offences against minors, reiterated the orthodox subjective mens rea doctrine and held that an honest, albeit unreasonable, mistake was sufficient to negative mens rea:[51] 'Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief.'[52] The experience in the sexual assault cases however, shows that in many instances inadvertence is culpable and should be sufficient to attribute a guilty mind to the accused.

44 ibid at 154.
45 See C. Wells, 'Swatting the Subjectivist Bug' [1982] CLR 209; J. Temkin, 'The Limits of Reckless Rape' [1983] CLR 5.
46 (1995) 37 NSWLR 660.
47 ibid at 670.
48 ibid at 672. An appeal to the High Court of Australia was dismissed: *Tolmie* v *The Queen* S148/1995 (15 March 1996) and *Tolmie* has been approved and applied in recent New South Wales Court of Appeal cases: *R* v *Mitton* [2002] NSWCCA 124 at [28]; *R* v *Porteus* [2003] NSWCCA 18 at [6]; it has been referred to in the Australian Capital Territory in *R* v *Ardler* [2003] ACTSC 24.
49 [2003] UKHL 50 at [38].
50 Hart, n 28 above, 148: 'Crudely put, "negligence"; is not the name of "a state of mind" while "inadvertence" is.'
51 *DDP* v *Morgan* [1976] AC 182; *B (A Minor)* v *DPP* [2000] 2 AC 428; *R* v *K* [2002] 1 AC 462.
52 *R* v *G & Anor* [2003] UKHL 50 at [55], quoting Lord Nicholls of Birkenhead in *B (A Minor)* v *DPP* [2000] 2 AC 428 at 462.

The legislature has recognised this and reformed the sexual offences laws, especially the fault element.[53] Some outcomes of the reform include a positive consent requirement, the shifting of the burden of proof to the defendant where mistake is raised and the requiring of the defendant to take reasonable measures to determine whether consent existed. The mens rea for rape under the Sexual Offences Act 2003 s1(1) is intention to commit the act and absence of reasonable belief that the victim is consenting. Inadvertence is clearly part of the fault element of rape and various other sexual offences under the new Act. Where an accused claims to have mistakenly believed in consent the law no longer permits a subjective belief, no matter how unreasonable, to exculpate. The legislative trend is thus in stark contrast with the judicial.

In a scathing criticism of the House of Lords' decision in *B (A Minor)* v *DPP*,[54] Jeremy Horder described it as acquitting an accused who had behaved in a manner 'outside the bounds of what humane and decent people regard as tolerable' and laid the blame for the outcome squarely on the orthodox subjectivist approach to mens rea:

> The decision of the House of Lords, a decision that flies in the face of Legislation and case law across much of the rest of the common law world, can be attributed more or less directly to the pervasive influence of a subjectivist understanding of the so-called "correspondence principle" in criminal law theory.[55]

Conclusion

The House of Lords approach to criminal blameworthiness is unduly constrained by its adherence to subjectivism. As Lord Bingham put it:

> But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R* v *Majewski* [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of these failings should expose him to conviction of serious crime or the risk of punishment.[56]

It is wrong to assume that intoxication is the only instance when inadvertence may be culpable. It is simply an obvious example;[57] the real reason is much

53 See Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (London: Home Office, 2000); Sexual Offences Act 2003, c 42. See A. Ashworth, Principles of Criminal Law (Oxford: Oxford University Press, 4th ed, 2003) 347–348 who supports the 'objectivisation' of recklessness in rape cases as an exception to the rule. For a critique of the Home Offices Review, see N. Lacey, 'Beset by Boundaries: The Home Office Review of Sex Offences' [2001] CLR 3 at 12 expressing a preference for a 'reasonableness-based standard of belief in consent', P. N. S. Rumney, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn?' (2001) 64 MLR 890 for a critique of the reform, focusing on the actus reus issues.

54 [2000] 2 AC 428. This was a sexual assault case involving a child.

55 J. Horder, 'How Culpability Can, and Cannot, be Denied in Under-age Sex Crimes' [2001] CLR 15 at 16.

56 *R* v *G & Anor* [2003] UKHL 50 at [32].

57 Even Sir John Smith, a trenchant critic of *Caldwell* agreed that it made sense in intoxication cases. J. C. Smith, 'Criminal Damage' [1981] CLR 392 at 395.

broader. Inadvertence may qualify as a culpable mental state in circumstances when a person *ought* to have adverted. Treating as acting with an absent mental state a person who has acted intentionally but without adverting to a risk when he or she should have is like treating the failure to apply brakes while driving a motor vehicle as a pure omission rather than a dangerous act of driving. In a civil society there should be certain minimum duties of citizenship and every individual should have a responsibility to advert to relevant risks when actively engaging in certain conduct. Failure to live up to that can fairly be labelled culpable. This is not an objective test in the sense of ignoring the accused and asking what the reasonable person would have foreseen. The focus remains on the accused and the question is simply whether his or her mind should have been attuned to the risk.

The two children in *R* v *G* were not blameworthy because it was not reasonable to expect an eleven or twelve year old to advert to the risk that materialised. Had they instead been two drunks, it is unlikely that *R* v *G* would have overruled *Caldwell*. For now, *Caldwell* is dead, although it lingers on as a ghost of *Reid*.[58] A preferable course of action in *R* v *G* would have been for the House of Lords to have endorsed an overt normative concept of recklessness by refining Glanville Williams' (an avowed subjectivist) proposed modification of *Caldwell* along the lines suggested here. This would allow courts to evaluate the blameworthiness of the accused's mental state according to prevailing ethical standards and distinguish between individuals who act out of 'stupidity or lack of imagination', and those who act 'outside the bounds of what humane and decent people regard as tolerable'.

Shareholders' Remedies Reassessed

Jennifer Payne*

The primary remedies available to minority shareholders with a grievance are a derivative action or a claim under section 459 of the Companies Act 1985. The relationship between these two remedies, and in particular whether section 459 can be used to 'outflank'[1] the derivative action, has been a topic of debate for some time. The judgment of the Court of Appeal in *Clark* v *Cutland*[2] goes some way towards resolving this debate.

Mr Clark and Mr Cutland were equal shareholders in a company and its sole directors. Mr Cutland misappropriated more than £500,000 from the company

* Travers Smith Braithwaite Lecturer in Corporate Finance Law, University of Oxford and Fellow of Merton College, Oxford.

58 The correctness of *R* v *Lawrence* [1982] AC 510 and *Reid* were not doubted and the decision in *R* v *G* was strictly limited to the Criminal Damage Act 1971.

1 *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14, 18 *per* Hoffmann LJ.
2 [2003] EWCA Civ 810; [2003] 4 All ER 733.

without Mr Clark's knowledge and had in addition taken from the company without authority other large payments by way of salary, pension contributions and other benefits. When Mr Clark discovered this he began a derivative action on behalf of the company, and then later an action under section 459. The two actions were consolidated and the judge treated the section 459 petition as if it were a derivative action. The judge acknowledged that there was a wide jurisdiction under section 461 to grant the same relief as would have been granted in the derivative action and made an order under section 461 for Mr Cutland to repay to the company over £1.1 million. The Court of Appeal addressed a number of issues, including whether the company was entitled to trace the payments of the pension fund contributions which Mr Cutland had made into the pension fund assets. However, in relation to the issues raised in this note only Arden LJ made any comment, and she did so in only a few lines. She accepted that under section 461 Mr Clark could obtain a substantive remedy for the company, and that this remedy could include proprietary elements. However, she went further. In derivative actions the court may order the company to indemnify the claimant against the costs reasonably incurred in bringing the action.[3] This has not previously been the case in section 459 actions. However Arden LJ stated that 'although the relief sought is claimed under section 461, it is sought for the benefit of the company and that it is, therefore, open to Mr Clark to seek an order against the company for payment to him of any costs incurred by him on this appeal (and, possibly, with respect to the issue in the court below).'[4] As a result of this judgment it seems that minority shareholders can now make use of section 459 to obtain a substantive remedy for the company in relation to a wrong done to the company as well as, or possibly even instead of, obtaining a remedy for themselves personally. In addition, they can get a costs order so that the company and not the petitioner funds this claim. In small private companies it is difficult to see why a derivative action will ever be used again, although it will remain a theoretically useful device in companies such as public companies in which section 459 is effectively unavailable.[5] The ramifications of this decision require some thought.

Arden LJ gives no reasons for her expansion of the role of section 459 in *Cutland*. However, some strong arguments do exist to support this decision. The pre-*Cutland* line drawn by the judges allowed section 459 actions to be brought where a wrong is done to the company but only in order to support a claim for personal relief for the petitioner.[6] However, this approach is not necessitated by the terms of section 459 and there is nothing within the legislation to prevent Arden LJ's

3 *Wallersteiner* v *Moir (No 2)* [1975] QB 373.

4 n 2 above, at [35].

5 *Re Astec (BSR) plc* [1998] 2 BCLC 556 and see J. Payne, 'Section 459 and Public Companies' (1999) 115 *LQR* 368.

6 See eg *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760, 784 *per* Millett J. These cases undoubtedly blur the classic distinction between personal wrongs and corporate wrongs, and raise some potentially difficult questions about the ability of shareholders to recover reflective loss, but they do not infringe the principle of collective enforcement of directors' wrongs because of the personal nature of the remedy involved. See eg J. Poole and P. Roberts, 'Shareholder Remedies – Corporate Wrongs and the Derivative Action' (1999) *JBL* 99; H. Hirt, 'In what circumstances should breaches of directors' duties give rise to a remedy under ss 459–461 of the Companies Act 1985?' (2003) 24 Co Lawyer 100, 109.

approach. Indeed section 461(2)(c) provides that a corporate remedy may be awarded by the courts, albeit via the commencement of a new piece of litigation in the company's name. In circumstances where a wrong is done to the company and corporate relief is sought by a petitioner it is difficult to see why the cost and inconvenience of two sets of proceedings should be preferable to the court awarding corporate relief directly under section 461.[7] The chances of a petitioning shareholder wishing to undertake a second piece of litigation are also extremely unlikely given the fact that in most circumstances they are seeking to exit the company by obtaining a buy out order. Unsurprisingly section 461(2)(c) has been little used in practice.

In addition, as between these two forms of shareholder remedy, section 459 has been in the ascendant for some time. The law regarding the ability of a minority shareholder to bring a derivative action has long been criticised as being 'complex and obscure'[8] which, coupled with the significant procedural barriers to bringing a claim, mean that very few derivative actions are actually brought. The Law Commission recognised its severe limitations and recommended its replacement by a new statutory derivative action,[9] a suggestion which was endorsed, with relatively minor modifications, by the Company Law Review Steering Group.[10] These proposals were not, however, included in the DTI's recent White Paper on company law reform[11] and any wholesale legislative overhaul of company law seems to be on hold. By contrast section 459 is generally regarded as a flexible remedy for shareholders which they are actually likely to use. In addition, any package of reforms for shareholders' remedies which were to emerge based on the Law Commission's proposals would also presumably reform section 459 as per its recommendations. These tackle the most serious problems to do with section 459 at present, namely the length of proceedings and their consequent cost,[12] and such reforms would only be likely to increase the attractiveness of section 459 to disgruntled minority shareholders.[13] All in all, section 459 is, and is likely to remain, a far more attractive and convenient remedy for shareholders.

Why, then, has it taken the courts so long to make use of section 459 to provide a substantive remedy to the company in relation to corporate wrongs, and why was the assimilation of these two remedies actively resisted by the Law Commission when it investigated the issue of shareholders' remedies?[14] There are good reasons for this reticence. The rule in *Foss* v *Harbottle*,[15] which stresses that in relation to a wrong done to the company the company is the only proper plaintiff, emphasises the collective nature of the process of enforcing directors' duties. As a

7 See eg *Re A Company (No 005287 of 1985)* [1986] 1 WLR 281.
8 Law Commission, *Shareholders' Remedies* (Law Com CP 142, 1996) para 6.6.
9 Law Commission, *Shareholders' Remedies* (Law Com 246, 1997).
10 See *Modern Company Law for a Competitive Economy: Developing the Framework*, URN 00/656 (London: DTI, March 2000), *Completing the Structure*, URN 00/1335 (London: DTI, November 2000) and the *Final Report*, URN 01/942 and 943 (London: DTI, June 2001).
11 *Modernising Company Law,* Cm 5553-I and Cm 5553–II (London: DTI, July 2002).
12 See n 9 above, para 1.6 and fn 14.
13 *ibid.* part 2. Case management powers have been subsequently provided by the Civil Procedure Rules (SI 1998/3132).
14 n 9 above, para 6.11.
15 (1843) 2 Hare 461.

rule shareholders agree to subordinate their individual interests by joining the company and this explains why as a starting point directors' duties are owed to the shareholders as a whole, at least in a solvent company. It is generally the shareholders as a whole that have the decision whether to enforce them. If a minority shareholder wishes to enforce these duties alone then the collective nature of this process is clearly in evidence in the only true exception to the *Foss* v *Harbottle* rule, namely the fraud on the minority exception. The shareholder must show that the wrong is unratifiable ie the shareholders acting together can't ratify it; that the wrongdoers are in control – if not the collective decision making of the shareholders continues to trump the individual shareholder; and finally that the majority of the minority wish the action to proceed.[16] The collective nature of the process is further emphasised by the decision in *Wallersteiner* v *Moir (No 2)*[17] that the company and not the individual shareholder should bear the costs of the action in appropriate circumstances. As the Court of Appeal in *Prudential Assurance Co Ltd* v *Newman Industries Ltd (No 2)*[18] stated, the individual shareholder will not always be in the best position to judge whether or not to commit the company's resources to the costly process of litigation. The commencement of litigation can cause a substantial diversion of management time and resources, quite apart from the financial drain that may occur. As a result the occasions on which the derivative action should be available to a minority shareholder are tiny.[19]

Under a derivative action the claim against the wrongdoers belongs to the company and should be treated as being equivalent to a claim by the company itself. First and foremost the issue for the court is doing justice to the company ie the shareholders as a whole in a solvent company, and not to the petitioning shareholder. This means that a shareholder should not have an indefeasible right to bring an action on the company's behalf.[20] If a shareholder has a unique interest in bringing the petition which is not shared by the other shareholders and if a majority of those are opposed to the action then it is right and proper that the derivative action should be denied.[21] In *Barrett* v *Duckett*[22] a derivative action was brought by a shareholder against a director for diverting company money into bank accounts held by him for himself and his wife jointly. However, this action was complicated by the fact that the plaintiff's daughter was engaged in a bitter matrimonial dispute with the defendant. The court refused to allow the derivative action since this claim was not being pursued 'bona fide on behalf of the company'.[23] Even where the individual shareholder is not motivated by malice or per-

16 *Smith* v *Croft (No 2)* [1988] Ch 144.
17 [1975] QB 373.
18 [1982] 1 All ER 354.
19 The reform proposals for the derivative action put forward by both the Law Commission and by the Company Law Review Steering Group continue to envisage the derivative action as a remedy of last resort and therefore the reforms do not aim to increase the use of the remedy, but merely to put it on a sounder and more coherent footing (n 9 above, para 6.4; *Modern Company Law for a Competitive Economy: Developing the Framework,* URN 00/656 (London: DTI, March 2000) para 4.112 *et seq.*).
20 J. Payne, 'Clean Hands in Derivative Actions' [2002] CLJ 76.
21 *Smith* v *Croft (No 2)* [1988] Ch 144.
22 [1995] 1 BCLC 243.
23 *ibid.* 256 *per* Peter Gibson L.J.

sonal factors, that shareholder may simply misjudge the issue of whether a piece of litigation is in the company's best interests. There is no denying that the current derivative action jurisdiction is complex and obscure. However, some of the hurdles facing minority shareholders which make the derivative action cumbersome are there to perform a vital function, namely to protect the company against the single irritated shareholder who though malice or misjudgement will waste the company's time and money if allowed to litigate on the company's behalf. Reducing the encumbrances attached to the derivative action procedure would undoubtedly be beneficial, but not at the expense of this protection. If the main vehicle for allowing minority shareholders to remedy corporate wrongs is to be switched from the derivative action to section 459 for reasons of convenience, this does not alter the company's need for protection against the single malicious or misguided shareholder. It is inappropriate to allow a shareholder such as that in *Barrettt* v *Duckett* to circumvent the procedural hurdles designed to protect the company by bringing a section 459 claim to right the same wrong.

However, the effect of the judgment in *Cutland* is that section 459 can be used by a minority shareholder to obtain a corporate remedy in response to a corporate wrong without going through the leave and notice requirements which are in place in a derivative action scenario, and which are in place to deal with the concerns raised in *Prudential*.[24] *Cutland* potentially means that the decision whether to litigate on behalf of the company can be delegated to individual minority shareholders, whether the company likes it or not and whether in the court's view it would be better for the company as a whole for the action be brought or not.[25] Nothing in Arden LJ's judgment in *Cutland* suggests any limits to this principle. This is a very different role for section 459 from that envisaged pre-*Cutland*, in which section 459 was developed by the courts as a personal remedy for shareholders, whether in response to personal wrongs[26] or in relation to corporate wrongs.[27] This change of role should be resisted, for the reasons set out above. If the change of role is to take place then it should only come at a price, the price being a recognition that substantive relief for the company under section 459 must be denied in some circumstances in order to protect the company against malicious or misguided minority shareholders.

If the courts wish to develop principles to deal with these issues – and Arden LJ in *Cutland* was silent on this point – then there are a number of options. Unsurprisingly, the tools which are available to the judges at present to screen out inappropriate actions under section 459 are inadequate for this task. These tools are,

24 One control which would remain in place in s 459 is the need to show that the wrongdoers are in de facto control of the company: *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171.

25 See J. G. MacIntosh 'The Oppression Remedy: Personal or Derivative' (1991) 70. Can Bar Rev 29; L. Griggs and J. Lowry, 'Minority Shareholder Remedies: A Comparative View' (1994) *JBL* 463.

26 When the House of Lords reviewed section 459 in *O'Neill* v *Phillips* [1999] 1 WLR 1092 Lord Hoffmann emphasised this aspect, setting out two broad categories of cases in which section 459 will be relevant: where the company's controllers act in breach of the constitution or where the controllers' behaviour is lawful in the sense that is doesn't breach the constitution but it nevertheless breaches some informal agreement between the shareholders. This was not intended to be an exhaustive list, but nevertheless it is telling that both of these categories involve resolutely personal wrongs to the shareholder.

27 See eg *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14.

first, to require there to have been unfair prejudice to the petitioner and, second, to use their discretion under section 461 if they believe that the collective position has been too heavily compromised.[28] The requirement of unfair prejudice provides a general guide to the court as to when it should exercise its powers under section 461. However, this concept has been developed in a way which focuses very strongly on the petitioner's position and whether his or her rights attaching to shares have been infringed. Lord Hoffmann's speech in *O'Neill* v *Phillips*[29], with its emphasis on contractualism, stresses the fundamentally promissory nature of the basis on which relief may be granted. This makes some sense given the courts, view, pre-*Cutland*, of section 459 as a personal claim to provide personal relief to the petitioner. However, clearly, this focus on inter-shareholder disputes provides no basis for determining whether or not a claim on the company's behalf under section 461 would be in the collective best interests of the shareholders.[30] The judges' discretion under section 461 could be used to refuse a substantive corporate remedy if the shareholder's claim was felt to compromise the collective position, but of course by that point the time and expense of litigation has already been expended.

Instead, new tools will need to be developed to accomplish this task. One obvious source is the derivative action itself. This is problematic for two reasons, one theoretical, the other practical. In a derivative action the concepts which the courts employ to determine what is in the collective interests of the shareholders, namely ratification, wrongdoer control and the views of the independent majority among the minority, are, of course, all founded on the notion of the derivative action as a collective remedy. However, section 459 has been developed as a personal remedy which shareholders pursue on their own behalf. As a result it is difficult to see why the concept of ratification, for example, should have any effect on the rights of the individual shareholder to bring a claim. Nevertheless the decision in *Cutland* places the new section 459 jurisdiction between the two existing remedies, using what is at heart a personal claim to obtain corporate relief, so that an unhappy mixture of personal and corporate issues is inevitable. In the new section 459 jurisdiction envisaged by *Cutland*, the claim is in truth that of the company and therefore shareholders should not have an indefeasible right under section 459 to bring such a claim. Making use of section 459 to obtain a collective remedy should mean that the court will take account of the collective position of the shareholders when determining the ability of the petitioning shareholder to bring the claim. On a practical level, finding the right balance between appropriate and inappropriate claims is not easy and is something which the derivative

28 Presumably the petitioner could also be judged to have lost the right to a costs indemnity order since the Court of Appeal in *Wallersteiner* determined that the right to such an order depends on whether or not the minority shareholder acted in good faith and reasonably in bringing proceedings.

29 [1999] 1 WLR 1092.

30 One effect of the requirement of unfair prejudice may be to prevent some forms of corporate wrongdoing being litigated in some circumstances, for example where there is a breach by a director of his duty of care and skill and no gross mismanagement is involved. However, this operates in a manner unrelated to the issue of potential misuse of the jurisdiction by the petitioning shareholder.

action jurisdiction has struggled with for 160 years, and with which it continues to struggle. There is no magic formula to be adopted and indeed the recommended reforms put forward by the Law Commission and the Company Law Review Steering Group, if introduced, seem unlikely to effect much positive change.[31] Nevertheless a helpful start would be a recognition by the courts that when a shareholder petitions under section 459 for corporate relief the success of the petition will not be based on the personal rights and circumstances of the petitioning shareholder alone but will also take account of the collective position of the other shareholders.

These concepts could be introduced into section 459 in one of two ways, neither of them perfect. An additional procedural hurdle could be added in to section 459 proceedings where corporate relief is sought so that ex ante the court can decide that a shareholder should not be permitted to bring a claim on the company's behalf. The Law Commission did not recommend any procedural restrictions on the bringing of a section 459 claim,[32] which makes perfect sense if section 459 is only a personal form of action, but less sense if section 459 is to be developed as a vehicle for providing corporate relief. This assessment by the court would not be based on any strength or weakness in the petitioner's own personal position, such as whether the petitioner has been unfairly prejudiced, but would concentrate on whether the claim should be allowed to proceed in order to do justice to the company.[33] For this limited purpose factors relevant to the collective process, such as the views of the majority of the other shareholders, would be relevant to the court's determination of whether this particular shareholder should be allowed to undertake litigation on the company's behalf. Undoubtedly adding in this additional stage to a section 459 petition where the petitioner wishes to seek a substantive remedy for the company would add time and expense to the section 459 petition, a process already criticised for being long and expensive, and for this reason is likely to be strongly resisted. Alternatively, the court could expand and adapt the concept of unfair prejudice so that in relation to claims for corporate relief the court assesses the issue with reference to all of the shareholders. This seems more feasible. Section 459 already contains reference to conduct which is unfairly prejudicial to the interests of the 'members generally' and there is no reason why unfair prejudice should not be expanded to take account of a much broader range of issues.[34] This would necessarily involve a consideration of some issues, such as whether the wrong had already been ratified, which had no place in section 459 in the past because of the personal nature of the remedy. However, for the reasons set out above, this may be justifiable. If section 459 is used to obtain a collective remedy then the court should also take account of the collective position of the shareholders when deciding whether to allow the petitioning shareholder to succeed in his or her claim.

31 A. J. Boyle, *Minority Shareholders' Remedies* (Cambridge: Cambridge University Press, 2002) Ch 3.
32 See n 9.
33 The Law Commission looked at introducing a modified leave stage in its suggested statutory derivative action. This effects some improvements on the existing regime but is still open to criticism, see eg n 31 above, Ch. 3.
34 The courts have been open to a broader interpretation of unfair prejudice in the past: *Re A Company* (No 008695 of 1985) (1986) 2 BCC 99 and see n 31 above, Ch 4.

The judgment of Arden LJ in *Clark* v *Cutland* recognises that the role of section 459 actions should expand, to provide a substantive corporate remedy to the company. The cumbersome derivative action procedure is likely to wither in the face of this new development. However, while section 459 is undoubtedly a more convenient remedy for shareholders, some of the procedural hurdles which encumber the derivative action are vital to protect the company in circumstances where the decision whether to litigate on behalf of the company is being delegated to minority shareholders. The company, that is the shareholders as a whole in a solvent company, needs to be protected from the single irritated shareholder, whether acting through malice or misjudgement, who can cause a great deal of trouble and expense for the company if given an absolute right to litigate on the company's behalf, as the Court of Appeal in *Prudential* recognised. If section 459 is to take over this role from the derivative action the courts need to find some way to prevent a similar misuse of the section 459 jurisdiction. This will involve an acceptance by the court that minority shareholders do not have an indefeasible right to obtain substantive corporate relief under section 459 and that some mechanism needs to be put in place to allow the court to screen out inappropriate claims on the company's behalf. Two possible options are put forward in this note. Neither is ideal, in part because they both involve introducing collective concepts such as ratification into what is at heart a personal claim, and in part because those collective concepts are themselves in a state of some disarray. Nevertheless some kind of screening process will need to be put in place, based on collective action principles, if the company is to be adequately protected.