

From Equal Treatment to Appropriate Treatment: What lessons can Canadian Equality Law on dignity and on reasonable accommodation teach the UK?¹

GAY MOON, Head of the Equality Project, JUSTICE²

In this article Gay Moon considers the Canadian anti discrimination provisions that are largely based on the concept of human dignity. She considers whether this has any application for the UK. She also looks at the way that Canadian law uses the concept of reasonable accommodation asks whether the UK can learn any lessons from this.

Introduction

UK equality laws have become extremely complex. It is widely accepted that there is a need to simplify them, particularly now that the Government is setting up a single Commission for Equality and Human Rights to cover all the prohibited grounds for discrimination as well as human rights. Key issues include the form of any single consolidated equality legislation and what should be its content.

In this paper I shall draw some conclusions for this debate from experience in Canada, which provides some interesting comparisons. Thus Canada has unified Commissions, and a unified equality law. Its equality law has been transformed since the introduction of the Canadian Charter of Rights and Freedoms in 1982 (hereafter ‘the Canadian Charter’), which provided much the same stimulus for reform in Canada as EU legislation is now doing for the UK. During the course of this article I will address three questions that focus in on the role of dignity and the concept of reasonable adjustment in Canadian law. These are:

- What can be learnt about the use of the concept of *human dignity* in order to achieve substantive equality in the application of equality laws?
- Could the concept of *reasonable adjustment* be used for other grounds of discrimination and not limited to the field of disability? and
- Would the assessment of the impact of some impugned act or omission on a person’s *dignity*, help either to determine what reasonable adjustment should be made and/or to resolve the inevitable clashes that arise between different equality rights?

The first part of the article considers the use of human dignity as a concept for defining discrimination. The second part looks at the way that the concept of ‘reasonable adjustment’ is used in the Canadian context and considers whether the Canadian’s use of ‘reasonable adjustment’ as a tool to counter discrimination is possibly relevant to the UK.

Human dignity in Canadian Equality Jurisprudence: the key to the Canadian Approach

Dignity is at the very heart of the jurisprudence developed by the Canadian Supreme Court in relation to discrimination when giving effect to the Canadian Charter to control inferior laws and rules.³ The functional appeal of dignity to Canadian judges in trying discrimination cases has been succinctly summarised by Chief Justice McMurtry, Chief Justice of Ontario thus:

¹ The views expressed in this article are those of the author and should not be taken to represent the views of any other body.

² I would like to acknowledge the help of a number of people in preparing this article, in particular Robin Allen QC who read and commented on a number of drafts, Caroline Gooding who asked me to write the first version of this article for the Disability Rights Commission and the JUSTICE Equality Advisory Panel. I am particularly grateful to the Chandaria and Chandran families of Toronto for their hospitality and kindness in arranging contacts, also to Béatrice Vizkelety for the many contacts that she gave me when I was researching Canadian law as well as Professors Colleen Sheppard and Denise Réaume as well as Pierre Bosset.

³ See Schedule B to the Constitution Act 1982.

... it permits distinctions that are based on merit to escape equality provisions and binds together the different grounds for discrimination.⁴

These are two good reasons why it is particularly interesting to consider the Canadian jurisprudence. Indeed they reflect the reasons for a judicial speculation that something equivalent to this part of the Canadian Charter might be enacted in the United Kingdom.⁵

As a federation of provinces, Canada has a rich seam of equality law as a result of legislation at both the federal and the provincial levels. It places these equality laws in human rights legislation. At the zenith, at the federal level this is in the Canadian Charter of Rights and Freedoms ('the Charter') and the Canadian Human Rights Act 1985 ('CHRA'). While the Charter operates to limit all provincial and national legislation⁶, the CHRA has a limited application to federal institutions and federally *governed* institutions such as the federal government, banks, airlines and the Canadian armed forces. Beneath the federal level, each province has a Human Rights Act and/or Charter that specifically enacts equality law. There are slightly different provisions from province to province.

The most important sections of the Canadian Charter are sections 1 and 15. Section 1 states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 15 gives further effect to this by providing:

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

While particularising some grounds, section 15 is also open-ended. In total eleven grounds of discrimination have been recognised so far; those grounds, which are additional to the current grounds enacted into UK law, are marital status, family status and conviction for an offence for which a pardon has been granted, though this last ground only applies to employment cases.

⁴ Personal discussions between the author, Robin Allen QC and Chief Justice McMurtry, Spring 2005.

⁵ Thus Ward L.J. in the powerful dissenting judgment in the Court of Appeal in *Fitzpatrick v. Sterling Housing Association* [1998] Ch. 304 he expressed his enthusiasm for an earlier strain of this jurisprudence at page 337 'We do not have (or should I say we do not yet have?) the equivalent of the Canadian Charter Rights which enables the judges to strike down offensive discriminatory legislation. I must, therefore, be faithful to Parliament's sovereign will. Nevertheless, I am entitled to presume that Parliament always intends to conform to the rule of law as a constitutional principle and accordingly to respect the constitutional rights of the individual to enjoy equality under the law. I agree with the majority of the Canadian Supreme Court in *Egan -v- Canada* at p. 631 where L'Heureux-Dube J. said:- 'Equality, as that concept is enshrined as a fundamental human right within section 15 of the Charter, means nothing if does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second - class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.' In the House of Lords, the approach of Ward L.J. was largely adopted: [2001] 1 AC 21.

⁶ See *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

The same provisions and defences apply to each ground for discrimination; these include a duty to make *reasonable accommodation* for the person in question, to the point of *undue hardship*. *Bona fide occupational requirements* or *bona fide justifications* can be taken into account, although, in practice, their application varies depending on the discriminatory practice in question.

The Canadian Human Rights Act 1985 (CHRA), of course operates under the Charter, in its application to public authorities. The CHRA sets out its purpose and scope in section 2 as follows:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

As with European human rights legislation, Canadian jurisprudence treats these equality laws as being fundamental in nature with a consequential primacy over other legislation. This quasi-constitutional status has led the Courts to say that this legislation must be interpreted in a 'purposive' way.⁷

On its face section 15(1) of the Canadian Charter provides a fairly standard equality guarantee. It does not refer to dignity. Section 15(2) on the other hand is of greater apparent interest since it addresses the possibilities of special measures, and clarifies the relationship such measures must have to the first subsection. The importance placed by the Charter on the amelioration of conditions of disadvantage is undoubtedly greater than in any statement of European law.⁸

Any application of section 15 now tends to start with the judgments of the Supreme Court in *Law v. Canada (Minister of Employment and Immigration)*⁹ when they set out a new¹⁰ test for discrimination based on the following three questions:

- Does the law impose differential treatment between the claimant and others, in purpose or effect?
- Are one or more explicitly protected or analogous grounds of discrimination the basis for the differential treatment? and
- Does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

The Supreme Court explained the last of these questions as being directed to whether the identified differential treatment discriminates by imposing a burden upon, or withholding a benefit from, the claimant, in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of

⁷ E.g. *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 – para 1 – ‘a purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realisation of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.’

⁸ See Case C-319/03 *Serge Briheche v. Ministre de l'Intérieur, Ministre de l'Éducation Nationale and Ministre de la Justice*, Judgment of the European Court of Justice of 30 September 2004.

⁹ [1999] 1 SCR 497.

¹⁰ Although the prior case law on section 15 had provided the path to this development.

perpetuating or promoting, the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian Society, equally deserving of concern, respect and consideration.

This is a somewhat wordy passage but it can be seen immediately that this is all about dignity. Rather more succinctly, it is said that discrimination depends on whether the claimant's dignity has been imperilled by the action in question.

The Canadian courts' approach is to use an objective assessment of what dignity means in the subjective experience of a particular individual.¹¹

One immediate point of distinction with the UK will be apparent. In the UK, discrimination law in respect of sex, race, sexual orientation or religion or belief is essentially symmetrical. By contrast, it is notable that the Canadian concept of discrimination is much less so. The Canadian definition of discrimination primarily focuses on, or assumes, a history of disadvantage and protects or benefits those who are disadvantaged in a specific context. The investigation of the impact on a person's dignity of a potentially discriminatory act is therefore critical. In Canada where adjustments have to be made as a result, the assessment of impact on dignity, helps to resolve some of the difficulties encountered in cases of intersectional discrimination, which is, of course, necessarily not symmetrical. This points to a real advantage of this approach. (Although it may be said that it shifts difficult questions to a later stage in the enquiry).

The Purpose of Section 15 – To Prevent Violations of Dignity

It can be justly said that the Supreme Court in *Law*¹² placed the concept of human dignity at the centre of any equality rights analysis. The Supreme Court stated first that respect for dignity is a predominant consideration in testing for discrimination, and conversely action to remedy a previous lack of respect is unlikely to be discrimination. In Canadian law respect for dignity therefore entails positive action.

*It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration...Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.*¹³

¹¹ See *Law*, *ibid*, paras 59-61 – 'the focus of the discrimination inquiry is both subjective and objective: subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances. The objective component means that it is not sufficient, in order to ground a s. 15(1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law ... the relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. Although I stress that the inquiry into whether legislation demeans the claimant's dignity must be undertaken from the perspective of the claimant and from no other perspective, a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation. All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.'

¹² [1999] 1 SCR 497.

¹³ *Ibid*, para 51.

The Supreme Court emphasised that self-determination, respect and esteem all need to be assessed in order to arrive at an objective/subjective approach to dignity:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.¹⁴

The relationship between fairness and dignity must also be examined:

Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? ... The equality guarantee in s. 15(1) of the Charter must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.¹⁵

Application of the dignity analysis in Law

It is worth noting how this approach worked out in *Law*. *Law* concerned a 30-year-old widow without dependent children or a disability, who was denied survivor's benefits under the Canadian Pension Plan. Only people over the age of 35 or those who have dependent children or have a disability are entitled to survivor's benefits after the death of their spouse. Ms Law challenged her exclusion from entitlement to this benefit. The Court first stated that they were going to adopt a purposive and contextual approach to the problem; they then ruled that the concept of human dignity was central to this. They acknowledged that the allocation of survivor's benefits did make a distinction on grounds of age; there was therefore an inequality in the distribution of these benefits. However, they considered that adults under the age of 35 had not been consistently and routinely disadvantaged in the same way that could be said for other minorities protected by section 15(1).

Hence, the Supreme Court held that her human dignity had not been violated by the refusal of this benefit even though she had been subjected to discrimination. As a result they concluded that this discrimination was not unlawful because the differential treatment of younger people does not reflect or promote the notion that they are less capable or less deserving of concern, respect and consideration. The Court contrasted the disadvantage of young and old, and considered that the clear ameliorative purpose of the pension scheme for older surviving spouses was another factor supporting the view that the impugned pension provisions do not violate essential human dignity. They concluded that there was no violation of human dignity in this case, the distinctions in the pension provisions did not stigmatise young persons or perpetuate the view that younger surviving spouses were less deserving of concern, respect or consideration than others.

It is interesting to compare how this might be approached in the UK. UK lawyers might have argued for the same result by a different analysis by acknowledging the prima facie

¹⁴ Ibid, para 53.

¹⁵ Ibid, paras 53-54.

discrimination, but asserting that the result was justified by the ameliorative purpose of the pension provisions.

How to assess whether dignity has been demeaned

Importantly, in *Law*, the Supreme Court set out some of the contextual factors that are influential in determining whether in any particular case, dignity had been demeaned. They did not consider that this was a closed list and they emphasised that it was not always necessary to show all four factors in every case.¹⁶

A context of disadvantage

The starting point is whether there can be shown to be a pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The Court clarified that when considering whether there was a pre-existing disadvantage, stereotyping or prejudice a claimant's association with an historically more disadvantaged or advantaged group is not necessarily determinative of an infringement, although the existence of this factor will help to establish a finding of a breach of s15 (1).¹⁷

Need, capacity and circumstance

Secondly, the correspondence, or lack of correspondence, between the ground on which the claim is based and the actual need, capacity or circumstances of the claimant or others must be considered. The court also held that the failure of the provision in question to take these into account would not always have to be established in order to show discrimination. Rather, the greater the extent that the law does take into account the claimant's actual needs, capacity or circumstances in a manner that respects their value as human beings and as members of Canadian society, the less likely it is that discrimination will be established. This certainly seems to accord with a common understanding of respect for dignity.

Relating to others

Thirdly, the ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group in society has to be considered. An ameliorative purpose or effect which is in line with the purpose of s 15(1) of the Charter is likely not to violate the dignity of more advantaged individuals or groups where the exclusion of these more advantaged people largely corresponds to the greater need or different circumstances experienced by the disadvantaged group being targeted by the legislation. This, too, seems sensible and according with a common conception of dignity.

Scrutinising impact

Fourthly, the nature and scope of the interest affected by the impugned law may be relevant, as the more severe and localised the consequences of the legislation for the affected group the more likely that the distinction responsible for these consequences will be found to be discriminatory. In one sense this seems like a simple merits test but as such it may well be determined differently according to the Judge's point of view.

Is this approach restrictive?

¹⁶ *Ibid*, paragraph 62.

¹⁷ Thus in *Trociuk v British Columbia (Attorney General)* [2003] 1 SCR 835 where omission of the father's identity on a birth certificate was found to demean his dignity although he could not show historical disadvantage. See further below.

Several cases since *Law* have been criticised as using the concept of ‘human dignity’ to restrict the remit of the equality provisions. Foremost amongst these is *Gosselin v Quebec*,¹⁸ a case in which a welfare recipient aged less than 30 years old was ineligible for higher rate benefit unless she was on an educational or work experience programme. Ms Gosselin brought an action on her own behalf and on behalf of others in the same class as herself.

The background to her case was that during a recession in the 1980s eligibility requirements for federal unemployment insurance benefits were tightened up so that those under 30 years old only received one third of the amount paid to those over 30, unless they were on one of the government work or training programmes. There was said to be an unprecedented increase in the number of young people capable of working who were claiming benefits. The government therefore set up a number of work and training programmes in order to encourage them to return to the jobs market.

It should be noted that welfare benefits were set at a minimum level to ensure survival, so that the payment of one third of this amount to younger claimants meant that they were being expected to survive on one third of a subsistence level payment. Additionally, there was a continuing debate about the number of places on the government schemes. It was pointed out that there were 30,000 places for the 85,000 single people eligible to take them up;¹⁹ however, at an early stage in the proceedings the trial judge rejected the argument that there were insufficient places to meet the need as being unsubstantiated by the evidence, so he concluded:

*There is no indication in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment.*²⁰

Additionally, the schemes were of variable length and had differing entry criteria so that it was not possible for everyone to remain continuously engaged in one of them.

The majority of the Supreme Court concluded that the findings of the trial judge and the evidence did not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognised as fully participating members of society. The court focussed on whether those under thirty were being treated as less worthy of respect than those over 30; they said that as a group they had not suffered a pre-existing disadvantage and stigmatisation because of their age and they contrasted this with people of an advanced age who are often presumed to lack abilities that they do in fact possess. The majority of the Supreme Court did not consider the lack of dignity that would follow for someone under the age of 30 who is trying to exist on one third of a subsistence payment.

The need for a comprehensive assessment

Gosselin may be contrasted with *Trociuk v British Columbia (Attorney General)*²¹ a case concerning the omission of an estranged father’s name on his children’s birth certificate. The Supreme Court held that he could not show a history of pre-existing disadvantage, however, they concluded that his dignity had been demeaned because normally the only occasions on which a father’s name was omitted from a children’s birth certificate was when the birth was as a result of rape or incest. Moreover, the omission of his name prevented his access to

¹⁸ [2002] 4 SCR 429.

¹⁹ *Ibid*, paragraph 283.

²⁰ *Ibid*, paragraph 47.

²¹ [2003] 1 SCR 835.

further rights such as the naming of the child and rights in relation to adoption. The Supreme Court commented:²²

Although the Court in Law held that historical disadvantage is ‘probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory’ (para. 63), it does not follow that the absence of historical disadvantage is a compelling factor against a finding of discrimination. Moreover, it is settled law that neither the presence nor absence of any of the contextual factors set out in Law is dispositive of a s. 15(1) claim²³ ... This is so because no single factor can determine, in all circumstances, whether a reasonable claimant would perceive that an impugned distinction infringes his or her dignity.

*Canadian Foundation for Children, Youth and Law v Canada*²⁴ provides further insight into this approach. Here the Supreme Court had to consider whether a provision (section 43 of the Criminal Code) permitting the ‘reasonable use of force by way of correction by parents and teachers against children in their care’ endangered children’s dignity. The majority held that:

... a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child’s dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child’s sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child’s mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child’s crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children.²⁵

By contrast Descamps J. giving a minority judgement considered that:

*By condoning assaults on children by their parents or teachers, s. 43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security are to be sacrificed to the will of their parents, however misguided. In the words of Dickson J. (as he then was) in *Ogg-Moss v. The Queen*,²⁶ s. 43 creates a category of ‘second-class citizens’ that must suffer a ‘consequent attenuation of [their] right to dignity and physical security’. Far from corresponding to the actual needs and circumstances of children, s. 43 compounds the pre-existing disadvantage of children as a vulnerable and often-powerless group whose access to legal redress is already restricted.²⁷*

Criticism of the Canadian Use of Dignity

²² *Ibid*, paragraph 20.

²³ *Law*, at paragraph 62; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429, 2002 SCC 84, at paragraph 126, per L’Heureux-Dubé J.

²⁴ [2004] 1 SCR 76.

²⁵ *Ibid*, paragraph 68.

²⁶ [1984] 2 S.C.R. 173, at p. 187.

²⁷ *Ibid*, paragraph 231.

There are a number of critics of the development of the dignity analysis within Canada, that help to point up some of the difficulties with this approach. Emily Grabham has criticised it as having:

*... no coherent internal dynamic, [as being] fundamentally a 'shell concept' open to diverse, but usually majoritarian interpretations.*²⁸

She has claimed it can:

*... serve to reinforce the oppressive norms which the Canadian concept of substantive equality has, so far, attempted to subvert.*²⁹

However, this is by no means the only view and is certainly contrary to that already referred to of Chief Justice McMurtry. Denise Réaume has gone further. She has taken the criticism that:

*Dignity is said to be vague to the point of vacuous and, therefore, too easily useable to dress up decisions based on nothing more than conservative gut reaction or excessive deference to Parliament.*³⁰

and met it head on. She asserts that there are three key factors that make up the concept of dignity. These are prejudice, stereotyping and exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions for a life with dignity.³¹ She considers that dignity in this latter sense is not dependent on an individual's merit or particular achievements; it is ascribable to all as a basic condition for being a member of society.

It is her suggestion of a third limb to the meaning of dignity – that of exclusion from benefits or opportunities – that is particularly significant. She argues that access to such benefits or opportunities constitutes part of the minimum conditions for a life with dignity. This is the most important development of current thinking, since as she suggests, it is a way forward to eliminate what many jurists see as the limitations of the definition of dignity within the Canadian jurisprudence.

She notes that:

*the more important a particular benefit is to one's ability to participate fully in society, or the more it is a marker of true belonging in society, the more one should worry that exclusion from it will carry the connotation that members of the excluded group deserve less respect.*³²

In this sense, a question whether something is demeaning to dignity will depend on the extent to which it excludes.

Intersectionality

Another criticism made by Grabham is her view that multiple, interlocking identities:

²⁸ E Grabham, *Law v Canada: New Directions for Equality Under the Canadian Charter?*, Oxford Journal of Legal Studies, Volume 22, Number 4 (2002), page 654. This article cites many of the Canadian critics of *Law*.

²⁹ *Ibid*, page 655.

³⁰ D Réaume, *Discrimination and Dignity*, Louisiana Law Review, vol 63, Spring 2003, no 3, page 248.

³¹ *Ibid*, page 672.

³² *Ibid*, page 695.

... sit uneasily alongside [this] concept of human dignity.

In my view this does not stand up to close examination: there is no reason why the concept of human dignity is any less applicable in cases of multiple discrimination. A black disabled woman subjected to discrimination is no less likely to experience a violation of her human dignity than a white disabled man; on the contrary we consider that it is quite consistent with a proper respect for dignity to insist that a person is seen as a whole, and an analysis based on her entitlement to respect for her dignity is likely to be more penetrating than one which seeks to fit her into some predetermined and limited legal categorisation.

Indeed, the judgment in *Law* does not seem to bear this criticism out, thus the Supreme Court held:

*Legislation which affects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds.*³³

Groups and individuals

Grabham also criticises the concept as being:

... an inherently individualistic concept.

In answer it may be said that the descriptions in *Law* of the circumstances in which the dignity analysis is undertaken expressly reflect the needs of both individuals and groups:

*Human dignity means that an individual or group feels self-respect and self-worth ... Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and it is enhanced when laws recognise the full place of all individuals and groups within Canadian society.*³⁴

Of course, whichever concept of human dignity is brought to bear on situations in which there is no substantive equality it should include a consideration of whether there has been prejudice, stereotyping, historic disadvantage or the exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions for a life with dignity.

An end to comparability?

Canada's concept of discrimination has evolved into a less comparative form than that of UK law. In some ways the Canadian concept of discrimination is closer to our concept of harassment than to our concepts of direct and indirect discrimination (a distinction that they have now eroded). The UK is constrained in the ways that it develops its discrimination laws by the European directives which would prevent our adopting legislation on the Canadian model even if it were desirable. For now, outside harassment, a comparison must remain necessary. However, as explored elsewhere aspects of their use of the concept of dignity could still be useful to the UK.³⁵ A general duty clause setting out the objectives of the CEHR in section 3 of the Equality Act 2006 will help to determine the parameters of the work of the new Commission. A similar clause in relation to the purpose of a single Equality Act

³³ Ibid. paragraph 51, emphasis added.

³⁴ Ibid. paragraph 53, emphasis added.

³⁵ See *Dignity Discourse in Discrimination Law: A Better Route to Equality?* Gay Moon and Robin Allen QC, EHRLR,p

making reference to the need to test any exercise of discretion against the goal of achieving human dignity could help to resolve difficult cases.

Reasonable adjustment

The dignity analysis readily leads to a further imperative to secure these fundamental rights. If there is a real or perceived obstacle to providing a non-discriminatory outcome it has to be asked what can be done about it.

This section of the article considers the development of an imperative to make reasonable accommodation in order to avoid discrimination and the extent, if any, this has implications for the development of UK law. It is necessary to identify the domestic constraints on such development to inform an analysis of the relevance of Canadian law.

In considering the applicability of the concept of 'reasonable adjustment' within the UK clearly the starting point must be that there should be no reduction in the strength of the current reasonable adjustment provisions in relation to disability if the concept were widened to apply other grounds for discrimination. With this in mind, I will consider whether *reasonable adjustment* provisions would be useful for *some* of the current prohibited grounds. More specifically I shall consider whether *reasonable adjustment*, which certainly works particularly well in relation to disability, does so because, unlike other grounds such as gender, it is a non-symmetrical ground for discrimination.

Constraints

The most significant restraint is the need to comply with European law and in particular the terms of the various EC Directives that define unlawful discrimination. These Directives have to be adhered to until changed and further change is currently unlikely although the operation of the Directives is periodically reviewed by the European Commission.

The Employment Directive,³⁶ which makes specific provision for reasonable accommodation in relation to disabled people in Article 5, provides a paradigm. It says 'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities reasonable accommodation shall be provided...'

Yet the assertion in this Directive that reasonable accommodation is necessary 'to guarantee compliance with the principle of equal treatment' in the case of disabilities may be taken to *suggest*, at the least, that it may assist compliance with the principle of equal treatment in other cases. As I shall show, such a reading of the Employment Directive would be consistent with the approach taken in Canada, where reasonable accommodation has developed into a very useful tool for securing substantive equality. The aim of securing 'full equality in practice' provides an important link with European law.

These 'full equality in practice' provisions may be found in a number of different places in European Law.³⁷ Thus, in Article 7 of the Employment Directive it is said that

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds' covered by the Directive.

³⁶ Directive 2000/78/EC

³⁷ See also Article 5 of the Race Directive, 2000/43/EC which makes similar provision in relation to race, Article 141(4) and also Article 2(8) of the Equal Treatment Directive 76/207/EEC as amended by European Parliament and Council Directive 2002/73.

Plainly disabled persons may suffer specific disadvantages linked to their disability but so also may those of a special race or ethnic origin, or a particular age, or gender and so on. Providing *reasonable accommodation* in such a case would seem to be lawful to the extent that it was consistent with Article 7 by preventing or compensating disadvantages linked to the relevant ground. Yet this apparent licence is better seen now as a qualified constraint.

At present the interpretation by the European Court of Justice, of what is permissible positive action with a view to ensuring full equality in practice, is quite restricted.³⁸ However, while the Court of Justice has been relatively restrained, Advocate – General Poireres Maduro has provided reason to believe that this qualified constraint is to a degree pliable. He has said³⁹ that the provisions of Article 141(4) EC, (which are very similar to those of Article 7 of the Employment Directive), are capable of being read

*... as meaning either that the need to compensate for past or existing social inequalities can justify favouring individuals in those groups at the expense of discriminating against members of the over-represented groups or that the adoption of measures of a compensatory type is necessary in view of the fact that the non-discriminatory application of the current societal rules is structurally biased in favour of the members of the over-represented groups.*⁴⁰

This statement of the purpose and limits to European ‘full equality in practice’ provisions may be transferable to the reasoning for requiring reasonable accommodation in disability cases. So it is arguable that though there are constraints inherent in the Court of Justice’s approach to ‘full equality in practice’ the positive action provisions in European discrimination law are not wholly inconsistent with a wider use of reasonable accommodation beyond disability.

Current position in the UK

Although in the UK the only statutory provisions requiring reasonable adjustments to be made are within the disability field, the Court of Appeal has also invoked this concept in a case concerning an employee’s rights to manifest his religion or belief under article 9 ECHR. The case concerned a practising Christian whose shift pattern was changed in such a way that it conflicted with his belief that he should not work on a Sunday. Mr Justice Rix considered that an employer:

*may be acting unfairly if he makes no attempt to accommodate his employee’s needs... In any event, it seems to me that if respect for the right to manifest one’s religion is to have meaning in a democratic society, it is not possible to say that an employer who, in the given situation, would simply ignore any need to seek a reasonable accommodation would be acting fairly.*⁴¹

Although he went on to conclude that the employers had not failed to make reasonable accommodation for this particular employee the consideration of the need for a reasonable adjustment in this context is a further development of UK jurisprudence.

Canadian equality law on reasonable adjustment

³⁸ See Case C-319/2003 *Serge Briheche v Ministre de l’Intérieur, Ministre de l’Éducation Nationale and Ministre de la Justice* judgment 3rd July 2004.

³⁹ See *Briheche*.

⁴⁰ *Ibid*, para 49. This is at the core of the critiques made of formal equality which is said to reinforce discrimination existing in society.

⁴¹ *Copsey v WWB Devon Clays Ltd* [2005] IRLR 811, paras 71-72.

Reverting to Canadian law, it is therefore interesting that Canada makes much use of *reasonable accommodation* in its equality jurisprudence, it uses *accommodation* to determine how a discriminatory situation should be resolved. Canadian law acknowledges that the rights and freedoms of the complainant are inseparable from the rights and freedoms of others and the common well being. Consequently a consideration of the relationship between those different persons' rights and freedoms is required. *Accommodation* encompasses the adjustment of a rule, practice, condition or requirement so as to take into account the specific needs of an individual or group.

In *Ontario Human Rights Commission (O'Malley) v Simpson Sears* the Supreme Court explained this point succinctly as follows:

*In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others*⁴².

This limit to the interference that the exercise of fundamental rights might otherwise impose has led to the development of the principle that individuals have the right to have their needs *accommodated* to the point of *undue hardship* to other persons. Thus, in section 15(2) CHRA there is an express requirement that in order to establish the defences of *bona fide occupational requirement* and *bona fide justification* it must first be established that further accommodation of the needs of the individual (or class of individuals) affected would impose *undue hardship* on the person who would have to accommodate those needs.

Undue hardship is the only check on the duty to accommodate imposed on the employer or service provider. However by merely describing the limits of the duty to accommodate in this way, the actual boundary at which undue hardship occurs is not much illuminated. Guidance from the courts has developed this concept extensively, providing European readers with a much better 'feel' for the reach of this new concept.

The parameters were first set out in 1990 in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*⁴³ a case concerning a dairy worker who wished to take off Easter Monday as a religious holiday. The Court concluded that a reasonable accommodation should be made for the complainant. In forming its judgement the Court set out a non-exhaustive list of criteria to be considered, which included financial cost, disruption to a collective agreement, problems of morale for other employees and the interchangeability of workforce and facilities.

In an interesting passage the Court noted:

*the size of the employers operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case*⁴⁴.

Since 1990 the test has been narrowed, now employers and service providers must demonstrate that they have made every effort to accommodate an employee and that it

⁴² [1985] 2 SCR 536, p 554-555.

⁴³ [1990] 2 SCR 489

⁴⁴ *Ibid* para 6.

would be impossible to modify or eliminate a particular requirement without incurring undue hardship.

The utility of expressing the limit to the non-discrimination obligation in this way was exemplified in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (known as the *Meiorin* case).⁴⁵ This case concerned a woman, who having worked as a fire fighter for three years, was subjected to a new aerobic assessment.

In the assessment she was required to demonstrate that she could run 2.5 kilometres in 11 minutes. However she missed the mark by 49.4 seconds. Perhaps unsurprisingly, these new aerobic requirements for fire fighters were shown to be sex discriminatory. Quite simply as a generality, it was clear that women could not physically achieve the same aerobic rating as men. The question then was whether the new rules on aerobic capacity could be shown to be a genuine occupational requirement, if not they had to be altered to accommodate this difference.

In its judgment the court set out the test for establishing whether a particular requirement is a bona fide occupational requirement. It held that the employer must show that the requirement in question, was adopted for a purpose rationally connected to the performance of the job, that this standard was adopted in an honest and good faith belief that it was necessary for the fulfilment of a legitimate work related purpose, and that the standard was reasonably necessary to the achievement of a legitimate work-related purpose.

The last point was key. Thus the court held that to show that a requirement was necessary; an employer had to show that the accommodation of the individual in question was impossible without imposing undue hardship on the employer.

This test seems recently to have become stricter. Employers now have to show that they have made every possible effort to accommodate the employee and it would be impossible to modify or eliminate the requirement in question without incurring undue hardship.⁴⁶

This approach is also taken in cases concerning the provision of goods, facilities and services: *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (also known as *Grismer*)⁴⁷.

Grismer concerned an application for a driving licence by a man having only limited peripheral vision. The adjustment required was that he should be tested to see whether this affected his ability to drive safely, rather than automatically refusing him a driving licence. The court said

'Accommodation' refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided. In Meiorin, the government failed to demonstrate that its standard was sufficiently accommodating, because it failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire fighting). In Mr. Grismer's case, a general connection has been established between the standard (a certain field of peripheral vision) and the purpose or goal of reasonable highway safety. However, the appellant argues that some drivers with less than the stipulated

⁴⁵ [1999] 3 SCR 3.

⁴⁶ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (also known as *Grismer*) [1993] 3 SCR 868

⁴⁷ [1993] 3 SCR 868.

field of peripheral vision can drive safely and that the standard is discriminatory because it does not provide for individualized assessment. Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship...This case deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's licence. It merely establishes that he had a right to be assessed. That was all the Member found and all that we assert. The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety. This decision stands for the proposition that those who provide services subject to the Human Rights Code must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship. It does not suggest that agencies like the Motor Vehicle Branch must lower their safety standards or engage in accommodation efforts that amount to undue hardship⁴⁸.

Is this idea transferable?

The assessment of *reasonable accommodation* and *undue hardship* has been very important in Canada; it applies to all the prohibited grounds of discrimination. Although such cases are most frequently found in the fields of disability and religious discrimination there are also a few cases where it has been used in a gender or race context.

The Discrimination Law Review could usefully consider whether and how far these concepts could be utilised in a new single Equality Act to ensure that the appropriate adjustments are made for all grounds of discrimination.

It is worth noting that the current provisions in the UK protecting pregnant women actually amount to a statutory reasonable accommodation. It may be commented that provisions in relation to genuine occupational requirements are already in place for all grounds, except disability where because of its asymmetric structure it is not necessary. By imposing this limitation on the way in which genuine occupational requirements are to operate it could provide a reasonably simple common standard which was readily understood by all. Of course, there would still be arguments about what was undue hardship but the context for such a dispute would come much closer to the common understanding of all that give and take is necessary in every society.

Examples of the accommodation rule in practice

To see how transferable this approach might be it is worth considering some other examples of its application.

Disability

Perhaps, the most well known case is *Eldridge v British Columbia (Attorney General)*⁴⁹ which concerned the need for provision of sign language interpreters for deaf patients as part of the publicly funded health care scheme. The appellants were Robin Eldridge and John and Linda Warren, all of who were born deaf and whose preferred language of communication was sign language. The problem was that none of their doctors knew sign language. When

⁴⁸ Ibid, paras 22 and 44.

⁴⁹ [1997] 3 SCR 624,

they were able to, the appellants hired sign language interpreters to go to the doctor with them. The facts were somewhat different between the two cases. Ms Eldridge was financially unable to hire a sign language interpreter for every medical visit, and as a result, she found visits to a doctor without a sign language interpreter stressful and confusing. Her doctor testified that he was satisfied with the communication when a sign language interpreter was present but in the absence of an interpreter he was unsure about the accuracy of the information he was receiving. John and Linda Murray were both born deaf. Their case concerned Linda's premature labour with twins. Her doctor testified that communication by notes was time-consuming, impractical and had the potential to cause harm. She pointed out that adequate communication was particularly critical in childbirth.

The court said

In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the 'accommodation of differences . . . is the essence of true equality'. This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons...in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone...Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an 'ancillary' service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population⁵⁰.

It is perhaps cynical to note that the Court was clearly influenced by the risks of medical negligence where a doctor is unable to receive adequate instructions and information from the patient. The court added

The centrality of communication to the delivery of medical services is particularly evident in the context of negligence law. The duty of disclosure commands physicians to inform patients fully of the risks involved in treatment and answer their questions regarding such risks...Physicians cannot discharge this obligation without being able to communicate effectively with their patients. In the absence of sign language interpretation, there may well be cases where it will be impossible for doctors to treat deaf persons without breaching their professional responsibilities⁵¹.

Hence the Court then concluded that:

the failure to fund sign language interpretation is not a 'minimal impairment' of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a 'reasonable accommodation' of the appellants' disability.

⁵⁰ Ibid paras 65, 66 & 71.

⁵¹ Ibid para 70.

In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of 'undue hardship'⁵².

Other cases have concerned the provision of access for wheelchair users to the premises of a private art gallery⁵³; staffing the entrance of a cinema so that persons using wheelchairs do not have to gain access through a separate, locked entrance which required them to use an intercom system from outside the building, and waiting for an employee to come downstairs to let them in⁵⁴; modifying procedures for determining who was eligible for licences to drive taxis and buses⁵⁵; and the provision of transportation subsidies to persons receiving social assistance who have disabilities which prevent them from using public transport that is equivalent to the transportation subsidy provided to those who can use public transport⁵⁶.

These cases are similar to those that have been observed in the UK under the reasonable adjustment provisions of the Disability Discrimination Act 1995.

Gender

Examples in the field of gender include modifying aerobic requirements for women fire fighters⁵⁷; altering a federal government 30 week limit 'no-stacking rule' to permit women to receive both maternity benefits and sickness benefits⁵⁸; altering a rotating shift pattern so that a female employee with a small child might work straight day shifts⁵⁹; and enabling a pregnant female spray painter to move temporarily to a position in the packing area away from paint fumes⁶⁰;

The first three examples would be dealt with in the UK as cases of possible indirect discrimination. The fourth example would be dealt with by the UK health and safety provisions for pregnant employees.

The United Kingdom does have a number of provisions that could be seen as statutory reasonable accommodation provisions; thus the Management of Health and Safety at Work Regulations 1999 set out particular duties in respect of pregnant or breast-feeding women. These require the alteration of working conditions or hours of work where it is necessary to avoid health and safety risks to the pregnant or breast feeding woman. The Employment Rights Act 1996 makes provision for pregnant employees to receive reasonable paid time off for ante natal care as well as a right to alternative work or paid time off on health and safety grounds.

Race

⁵² Ibid para 94.

⁵³ *Ripplinger v. Ryan* (1996), 24 C.H.R.R. D/435 (Sask. C.A.)

⁵⁴ *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).

⁵⁵ *Hussey v. British Columbia (Ministry of Transportation and Highways)* (1999), 36 C.H.R.R. D/429 (B.C.H.R.T.)

⁵⁶ *Chipperfield v. British Columbia (Ministry of Social Services) (No. 3)* (1998), 33 C.H.R.R. D/340 (B.C.H.R.T.)

⁵⁷ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (known as the Meiorin case)* [1999] 3 SCR 3.

⁵⁸ *McAllister-Windsor v. Canada (Human Resources Development)* (2001), 40 C.H.R.R. D/48 (C.H.R.T.)

⁵⁹ *Brown v. M.N.R., Customs and Excise* (1993), 19 C.H.R.R. D/39 (C.H.R.T.).

⁶⁰ *Emrick Plastics v. Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/300 (Ont. Ct. (Gen.Div.))

Examples of cases include the provision of documentation to verify family status for immigration purposes⁶¹; the need for Sikhs to wear protective headwear (this could also be religious discrimination – see below); as well as the Crown's duty to consult and accommodate Aboriginal peoples prior to making decisions that may adversely affect their as yet unproven Aboriginal rights and title claims⁶².

There seem to be very few cases where the reasonable accommodation provisions have been used in relation to race discrimination. This makes it hard to reach any conclusions on the basis of Canadian experience of the use, or potential misuse, of these provisions.

Research into the incidence of race discrimination shows that racism is still widely experienced by many ethnic minority people in the UK. In the field of employment repeated studies show that although, generally speaking, people from ethnic minorities are finding it easier (but still not as easy as for white people) to get jobs, studies of promotion records show a widening gap. People from ethnic minorities experience significant differences in their progression within job hierarchies. Thus, in considering the roots of racism in the UK, Bhavnani, Mirza and Meeto observe:

*Promotion procedures are also arguably becoming more objective in assessing those with management potential. However, research continues to show slower progress of minorities in organisations and a greater tendency for minorities to receive lower evaluations of competence than their white peers. Organisational cultures continue to disadvantage minorities.*⁶³

This suggests that provisions for reasonable accommodation might be useful in advancing the progress of ethnic minorities within hierarchies.

The inclusion of a reasonable accommodation principle within UK race discrimination law could also affect the outcome of race discrimination complaints by putting an emphasis on requiring the discriminator to put in place provisions to accommodate the affected person. *Noone v N W Thames Regional Health Authority (no 2)*⁶⁴ provides an example of the possibilities. In this case Dr Noone was repeatedly subjected to discrimination in her application to become a Consultant. The Court of Appeal ruled that the Employment Tribunal could not recommend that the hospital authority seek the authority of the Secretary of State to dispense with its statutory obligations governing the appointment of consultants by not advertising its next vacancy for a consultant's post similar to that for which Dr Noone had unsuccessfully applied and offering it to Dr Noone instead. If the law had permitted reasonable accommodation then this course of action would have been allowed.

Religion

There are numerous Canadian examples of reasonable accommodation being made for religious belief (they do not appear to extend to 'belief' alone). These include the modification of shift hours to accommodate religious observance⁶⁵; accommodation of religious holidays⁶⁶; accommodation of dress codes⁶⁷; the provision of an alternative to union contributions for employees – where religion forbade membership of unions – employers

⁶¹ *Canada v Menghani* [1994] 21 CHRR 427

⁶² *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.

⁶³ *Tackling the Roots of Racism: Lessons for Success*, R Bhavnani, H S Mirza & V Meeto, 2005, the Policy Press, p93.

⁶⁴ [1988] IRLR 530

⁶⁵ *Central Okanagan School District no 23 v Renaud* [1992] 2 SCR 970 and *Gohm v Domtar (no 4)* (1990) 12 CHRR D/161.

⁶⁶ *Commission Scolaire regionale de Chambly v Bergavin* (1994) 22 CHRR D/1 (SCC).

⁶⁷ For example, *Grant v Canada* [1995] 1 FC 158.

permitted an alternative of payment of the equivalent amount to a charity⁶⁸; altering leasehold requirements, subject to no risk to health and safety, so as to permit the building of temporary dwellings on flat balconies by Orthodox Jews, desiring a 'succot' – a temporary dwelling – on their balcony in order to celebrate a Jewish religious festival⁶⁹; altering a no weapons school rule, to permit Sikhs to carry kirpans⁷⁰, and a similar rule in relation to hospital admissions⁷¹; altering a school board's shift schedule to permit an employee whose religious requirements conflict with being assigned to a Friday evening shift⁷²; and requiring a superintendent of motor vehicles to test Sikh applicants for motorcycle driving licences notwithstanding a failure to wear a helmet because of the religious requirement to wear a turban⁷³.

Sexual orientation

I have not found any examples of reasonable accommodation being used in the context of sexual orientation. Sexual orientation as a ground for discrimination is a relatively recent addition to the list of prohibited grounds⁷⁴, this may account for the absence of any case law on reasonable accommodation.

Age

The only example I have found so far in relation to age concerns housing relating to age or the presence of children⁷⁵. Other cases show a refusal to accommodate, some of which have been widely criticised. In the *Law* case referred to above the Court rejected her claim for age related discrimination and did not consider that a reasonable accommodation for her needs⁷⁶ was required.

In addition, there are a number of cases concerning retirement age. However, in most of these cases a fixed retirement age has been found to be a justifiable bona fide requirement. For example, in *Large v Stratford (City)*⁷⁶ a policeman challenged his mandatory retirement age of 60. He claimed that the mandatory retirement age was not a bona fide occupational requirement; the Board defended the requirement citing scientific evidence of the risk of cardiovascular disease and lack of aerobic capacity for people over the age of 60. Mr Large claimed that he should have been allowed an individual accommodation so that he could be individually tested for these risks. The Supreme Court concluded that there was sufficient scientific evidence to justify the mandatory retirement provisions as reasonable in the light of the duties performed by police officers and hence no accommodation had to be made for Mr Large⁷⁷.

Although these cases do not show the requirement to make accommodation in cases of age discrimination have been well utilised in Canada, it is possible to see that they could be useful in the UK. Such provisions could facilitate those at the beginning and end of their working life being able to reduce their hours, work flexi-time or work in part from home.

⁶⁸ *Kurvits v Canada* (1991) 91 CLLC 17024 (CHRT).

⁶⁹ *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.

⁷⁰ *Pandori v Peel Board of Education* (1990) 12 CHRR D/425 (SCC) – this has been recently re-affirmed by the Canadian Supreme Court in *Balvir Singh Multani and Balvir Singh Multani, in his capacity as tutor to his minor son Gurbaj Singh Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec*, 2006 SCC 6.

⁷¹ *Singh v Workmans Compensation Board Hospital* (1981) 2 CHRR D/459.

⁷² *Central Okanagan School Dist. No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.)

⁷³ *Dhillon v. British Columbia (Ministry of Transportation and Highways)* (1999), 35 C.H.R.R. D/293 (B.C.H.R.T.).

⁷⁴ It was first recognised in *Vriend v Alberta* [1997] 31 CHRR

⁷⁵ *Desroches v Commission des Droits de la Personne du Quebec* [1997] RJQ 1540

⁷⁶ [1995] 3 SCR 733.

⁷⁷ See also *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 on the issue of retirement ages for university staff.

Dignity as a moderator of reasonable adjustment

It is obvious that to a degree the impairment of 'dignity' is at the heart of these decisions; does this make the concept inappropriate here? In my view it does offer real utility. Dignity is not an alien concept. Dignity is already used in the Race and Employment Directives to define harassment as a form of discrimination, so the question is not posed in a barren context⁷⁸. It reflects a common theme in human rights law from the Universal Declaration of Human Rights onwards.

Dignity is not used here in a comparative sense. Unlike the ordinary (non-harassment) definitions of direct and indirect discrimination in the Directives, which do require some comparative assessment of the treatment of others, harassment is not a comparison-based concept⁷⁹. Whilst having a subjective element, the core of the concept of harassment in the Directives is a reference to an objective assessment of the degree of effect on the dignity of the individual in the specific context. It is concerned therefore with society's view (as interpreted judicially) as to when someone is treated sufficiently badly on one of the protected grounds, to require protection. Thus it is an objective/ subjective test.

The merit of a test for discrimination based on the effect of impugned treatment on a person's dignity is precisely that it does not require a strict comparison to be made. Properly applied it therefore has a much greater capacity to entrench social solidarity. The outcome of the case depends not on whether someone has been *comparatively* badly treated on a protected ground but on whether they have been badly treated on such a ground in such a way that affects their dignity in a way that the law must notice.

Conflicting rights

A dignity assessment also helps to resolve conflicts of rights. The impact on dignity is a useful touchstone for determining how far one person should be entitled to advance their rights in relation to another in such a way that impacts on the protected rights of that other.

However, it is clear from the Canadian experience that the use of dignity in this way is not without pitfalls. An objective assessment of what dignity means in the subjective experience of a particular individual has been the approach taken by the Canadian courts⁸⁰.

Canadian courts have addressed clashes between equality rights where a balance between them needs to be reached, and one must provide accommodation to the other. For example, one recent case considered the situation when a print shop owned by an evangelical Christian refused to print letterheads and business cards for the local lesbian and gay centre on the grounds that the printer believed that he should not assist in the dissemination of information that conflicted with his religious beliefs. The Court ordered that the print shop should provide these services; however, there was a limit, which was to be set by reference implicitly to the affect that was acceptable. The print shop could not be asked to print *'material of a nature which could reasonably be considered to be in direct conflict with the core elements of [the owner's] religious belief...'*⁸¹

The Canadian courts have had to deal with cases where a Muslim owned restaurant refused admission to a guide dog on the grounds that dogs are not permitted. This parallels the

⁷⁸ See, for example, Race Directive article 2(3) and the Employment Directive article 2(3).

⁷⁹ Compare *Pearce v Governing Body of Mayfield Secondary School* [2003] IRLR 512 with Race Directive article 2(3) and the Employment Directive article 2(3).

⁸⁰ See *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, paras 59-61

⁸¹ *Scott Brockie and Imaging Excellence Inc v Ray Brillinger & ors (no 2)* (2002) 43 CHRR D/90 (Ontario Supreme Court).

experience of the DRC in GB, which negotiated an accommodation for guide dogs through guidance from Muslim faith leaders. A dignity impact analysis did help to resolve the dispute in the Canadian courts. The owner's upset in being required in limited circumstances to set aside religious scruples and to permit dogs in the restaurant was weighed as less than the blind person's upset at not being permitted supported access to the restaurant.

An example that has surfaced in the UK recently concerned a paraplegic woman who wanted to have certain intimate services delivered to her only by a woman; the service provider considered this would entail sex discrimination by them in employment since women would have to work to a different rota to men. This conflict is neatly resolved by testing the impact on the dignity of female care staff in being required to a more onerous rota and the dignity of the paraplegic woman in being denied intimate care from female staff.

There are many more potential clashes that will have to be addressed in the coming years both in Canada and the UK where the need for a balance between conflicting human rights will be required. Measuring and assessing the effect on each person's dignity seems to be a good way to address this and to find the right balance.

Cross – strand or Intersectional approaches to discrimination law

As the Canadians have worked with common provisions for each ground of discrimination for some time there is an increasing awareness of the need for an intersectional approach to discrimination in order to address multiple grounds for discrimination. It is highly likely that a similar trend will emerge once the new Commission for Equality and Human Rights is up and running.

The Ontario Human Rights Commission estimated that between April 1997 and December 2000 48% of the complaints that they received included more than one ground. They argue that in cases of discrimination on multiple grounds the discrimination experienced is different from that experienced on any of the individual grounds. So that, for example, the experience of discrimination suffered by a black woman is intrinsically different from that suffered by a black man, or a white woman. This has been described as '*intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone...*'⁸².

Such an approach permits the particular experience to be both acknowledged and remedied. They have pin-pointed difficulties suffered by older people with disabilities, people with disabilities from ethnic minority groups, ethnic minority people who have a particular religion for example. They argue that taking an intersectional approach leads to a greater focus on society's response to the individual and a lesser focus on what category the person may fit into. Again a dignity analysis has its merits here, permitting a more person specific analysis of the effect of impugned treatment and in the case of a conflict of the relative strength of the impact of a specific course of conduct.

The Ontario Human Rights Commission has said

*within the Commission, there is a growing recognition that we can improve our understanding of the impact when grounds of discrimination intersect and that tools for applying an intersectional analysis will be very helpful in the handling of complaints, from inquiries through to litigation, and in our policy work*⁸³.

⁸² M Eaton 'Patently confused, complex inequality and *Canada v Mossop*' (1994) 1 Rev. Cons. Stud.203 at 229.

⁸³ See: An Intersectional Approach to Discrimination: Discussion paper, Ontario Human Rights Commission, 2001.

In fact, all too often a pragmatic decision has been made to proceed on one or the other ground, sometimes based on the availability of evidence, sometimes on the strength of the law in that particular area. An example of such a decision is provided by Professor Carasco who wished to take a discrimination case.

*Proving systemic discrimination based on gender in my case was made possible by the availability of research and statistics relating to women in Canadian universities. Proving systemic discrimination based on the combination of race and gender would have been a lot more difficult simply because of the paucity of women of colour in Canadian universities and the corresponding lack of salary data...As a woman of colour, I could not help wondering if it was indeed necessary to prove that other women of colour had been treated in a similar fashion before my own treatment, as a woman of colour, could be acknowledged.*⁸⁴

An example of the second was provided in the case of *Canada (AG) v Mossop*⁸⁵ when a gay man failed in his claim for bereavement leave in order to attend his partner's father's funeral. At the time that the case was heard sexual orientation was not a prohibited ground for a discrimination claim so it could not be used; however 'family status' was a recognised ground. The case was therefore argued on this ground but lost because the evidence of discrimination on grounds of 'family status' was insufficiently strong. However, Madame Justice L'Heureux Dubé giving a powerful minority judgement said:

*...categories of discrimination may overlap, and...individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals*⁸⁶.

This has rightly been seen subsequently as a highly influential judgement. It is this emphasis on the experience of the individual that is surely so important. Society must respect these experiences where they deserve and need respect by affording legal consequence to them. Reasonable accommodation and dignity are key concepts in that process as the Canadian jurisprudence shows.

Conclusions

There are a number of lessons that can be learnt from the Canadian experience. The reasonable accommodation provisions have enabled the legislation to adopt a certain flexibility to take account of the needs of individuals with the objective of creating a barrier free society. Recognising that in some cases employers and service providers will not accept the rights of others the Canadian jurisprudence has sought to determine at what point that is permissible. In that sense it may be said that the test of *reasonable accommodation* to the point of *undue hardship* provides a degree of predictability of outcome. In so doing the need to be ready to adapt to the diverse situations of people from different backgrounds is also maintained.

In this respect the Canadian process of reasoning certainly provides a useful methodology for testing the extent to which an occupational or service requirement is appropriate and necessary. In some cases where demands are made of large institutions or organisations to

⁸⁴ E Carasco 'A case of double jeopardy: Race and Gender' (1993) 6 CJWL 142 at p 152.

⁸⁵ [1993] 1 SCR 554.

⁸⁶ *Canada (A.G.) v Mossop*, [1993] 1 SCR 554 at p 645.

accommodate the particular situation of members of protected groups, the test of *undue hardship* may seem somewhat personalised. On the other hand the utility of this analytical framework is well established in Canada and from the examples cited above it appears to produce demonstrably acceptable, workable and progressive solutions. So it is arguable that such provisions could provide for a common structure applicable to several or all of the grounds for discrimination without the need for complex statutory exceptions.

Overall it appears that there are some benefits for the use of this analysis for age discrimination as well as religion or belief discrimination. Indeed, in 2000 the Hepple Report recommended that the reasonable adjustment duty should be extended to religion or belief.⁸⁷ In the field of disability there is already a well-established use of reasonable adjustment and its utility is therefore obvious. The benefits are slightly less clear for gender and sexual orientation. It is also less clear whether it is an advance in relation to race discrimination, particularly in view of the scarcity of examples available from Canada. This needs more debate. In order for it to work effectively the access to reasonable accommodation needs to be linked to a past history of disadvantage or discrimination, as can be seen in Canada.

Yet some caution does need to be exercised. Currently the equivalent UK concept of reasonable adjustment for disabled people has worked well in removing the many barriers that people with disabilities experience and the tribunals have made good use of this provision. It would be most undesirable if any extension of this provision to other grounds had the effect of limiting its use in the field of disability. Looking at the Canadian cases concerning disabled people there is no evidence that the use of reasonable accommodation provisions for other grounds has operated to limit the extensive use that has been made of these provisions for the benefit of people with disabilities. Perhaps the principles of reasonable adjustment for people with disabilities are now sufficiently well established that it is unlikely they would be at risk of dilution.

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⁸⁷ See Equality: a new framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, B Hepple, M Coussey and T Choudhury, 2000, Hart, p49, recommendation 21.