SEX DISCRIMINATION IN MACDONALD AND PEARCE: WHY THE LAW LORDS CHOSE THE WRONG COMPARATORS

FOR AT least thirty years, academic commentators and litigants in the United States, Canada, and the United Kingdom have argued that almost all discrimination against lesbian, gay and bisexual individuals and same-sex couples is, if properly analysed, not only sexual orientation discrimination but also a form of sex discrimination.1 Yet, even though this “sex discrimination argument” is irrefutable as a matter of legal logic and social reality (if not specific legislative intent), the vast majority of judges who have considered it have rejected it. On 19 June 2003, in MacDonald v Advocate General for Scotland and Pearce v Governing Body of Mayfield School,2 five Law Lords joined this majority by holding unanimously that the dismissal of a gay member of the Royal Air Force (RAF), and a state school’s failure to deal with the harassment of a lesbian teacher by her students, did not breach the employment provisions of the Sex Discrimination Act 1975 (SDA). Were MacDonald and Pearce attempting to “abuse” the SDA? Was the Law Lords’ choice of comparators for identifying sex discrimination correct? If not, what explains judicial resistance to the sex discrimination argument? And is there any point in pursuing it in future cases?

WHY THE SEX DISCRIMINATION ARGUMENT IS MADE

Judges and academic commentators who reject the sex discrimination argument often seem to perceive it as a “trick”, or even as an “abuse” of constitutional and statutory prohibitions of sex discrimination. These prohibitions were adopted primarily to protect heterosexual women, not lesbian women, and certainly not gay and bisexual men. Even Professor William N. Eskridge, Jr, of Yale Law School, the leading scholar in the field of sexual orientation law in the United States, has expressed some scepticism about the argument. In 1996, he wrote that “[t]here is a transvestite quality to the [sex discrimination] argument . . .. It dresses a gay rights issue up in gender rights garb”.3

I would not accept that there is anything deceptive or otherwise illegitimate about a lesbian, gay or bisexual individual, or a same-sex couple, invoking a prohibition of disproportionate

1. E.g. Student Note, “The Legality of Homosexual Marriage” (1973) 82 Yale L J 573; Singer v Hara 522 P 2d 1187 (Wash Court of Appeals 1974); Re Board of Governors of the University of Saskatchewan (1976) 66 DLR (3d) 561 (Sask QB); DeSantis v Pacific Telephone & Telegraph Co 608 F 2d 327 (9th Cir 1979); X & Y v UK (No 9569/81) (1983) 5 ECHR 601 (Eur Comm HR).
2. [2003] UKHL 34, [2003] IRLR 512. Space does not permit me to discuss the Law Lords’ treatment of the two sexual harassment issues: the need for a comparator, and employer liability for harassment of an employee by a third party (who is neither an employee nor an agent of the employer).
affected group) often falls within two grounds of discrimination, where use of one ground is permitted and use of the other ground is prohibited. There is nothing wrong with a victim of discrimination invoking the prohibited ground in order to obtain a judicial remedy.

For example, in *Mandla v Dowell Lee*, the refusal of a private Christian school to allow a Sikh boy to wear a turban could be characterised as (indirect) discrimination based on religion (a permitted ground in Great Britain in 1983) or ethnic origins (a prohibited ground in 1983). Few would argue that the Law Lords were “tricked” into holding that Sikhs are not only a religious minority but also an ethnic minority, that the *Mandla* decision was an “abuse” of the Race Relations Act 1976, or that Sikhs (or Jews) should have had to wait for an express prohibition of religion-based discrimination against pupils in private primary education (which has still not been enacted 20 years later). Similarly, EC, Canadian and US courts have found that the prohibited ground “sex” could cover discrimination based on the (not mentioned and therefore permitted) grounds “pregnancy” or “gender reassignment”, and that the prohibited ground “disability” could cover discrimination based on the permitted ground “asymptomatic HIV infection”.

The sex discrimination argument assumes greater importance in the context of a statutory prohibition of discrimination with a closed list of prohibited grounds to which courts are not free to add (the situation in *MacDonald and Pearce*), than in the context of a constitutional prohibition of discrimination with an open-ended list (or no list) of prohibited grounds. In the constitutional context, judicial recognition of “sexual orientation” as a separate prohibited ground can make the sex discrimination argument unnecessary (if sex does not trigger stricter judicial scrutiny than sexual orientation). However, in the statutory context, judges generally do not have this option. If the legislation mentions only “sex” and not “sexual orientation”, and judges cannot see the validity of the sex discrimination argument, they will be forced to deny any remedy to a lesbian, gay or bisexual complainant for whom they might have great sympathy, and who would be unlikely to obtain retroactive relief from the legislature. This was what the Law Lords felt obliged to do in the cases of Roderick MacDonald and Shirley Pearce. Were they correct in concluding that the SDA could not apply?

**WHY THERE WAS SEX DISCRIMINATION IN MACDONALD AND PEARCE**

Three Law Lords rejected the sex discrimination argument without significant analysis. Lord Nicholls gave the standard response: the armed forces’ policy “discriminated between people solely on the ground of their sexual orientation, not on the ground of their sex. The policy was gender neutral, applicable alike to men and women . . .”.  

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5. The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), regs 17 and 20, cover institutions of further and higher education but not schools.
10. *MacDonald (HL)*, above n2, [6].
The appropriate comparator for a “homosexual” (attracted-to-men) man like MacDonald was a “homosexual” (attracted-to-women) woman, who would also have been dismissed, not a heterosexual (attracted-to-men) woman, who would not have been dismissed. For a “homosexual” (attracted-to-women) woman like Pearce, it was a “homosexual” (attracted-to-men) man, who would also have been harassed, not a heterosexual (attracted-to-women) man, who would not have been harassed.\(^\text{11}\)

The illusion\(^\text{12}\) of symmetry of treatment (a refusal to employ same-sex-attracted persons but not different-sex-attracted persons is not sex discrimination because individuals of both sexes are denied the opportunity of a same-sex relationship) was sufficient for Lord Nicholls,\(^\text{13}\) even though he rejected this illusion of symmetry in the context of race\(^\text{14}\) and in the context of religion.\(^\text{15}\) In the race and religion examples, Lord Nicholls implicitly recognised that the opportunity denied is dining in a restaurant with a person of a specific race (if a black woman may not dine with a white man but a white woman may do so, it is irrelevant that the white woman may not dine with a black man), or working in a pub with a clientele of a specific religion (if a Roman Catholic bartender may not work in a Protestant pub but a Protestant bartender may do so, it is irrelevant that a Protestant bartender may not work in a Roman Catholic pub).\(^\text{16}\)

The reasoning of Lords Scott and Hobhouse was similar to that of Lord Nicholls. For Lord Scott, the sex discrimination argument: \(^\text{17}\)

is . . . fallacious. The fallacy . . . is produced by an unjustifiable re-writing of the reason for the dismissal [i.e. treating “homosexual”, in the case of a man, as meaning “sexually attracted to men”]. A homosexual is a person who is sexually attracted to those of the same sex as himself or herself. . . . [T]he reason for the dismissal is the employee’s homosexuality. The reason would apply indiscriminately to men or to women. It is a gender neutral reason. To treat the homosexuality reason as being gender specific is to treat it as something that it is not.

Lord Hobhouse attempted to demonstrate the irrelevance of sex as follows: \(^\text{18}\)

Suppose that an employer advertises a vacancy saying—‘the job is suitable for either a man or a woman but anyone who is a homosexual [has sexual partners

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11. MacDonald (HL), above n2, [9].
14. A restaurant’s refusal to serve different-race couples but not same-race couples is discrimination based on race, not “racial orientation”, despite the fact that individuals of all races are denied the opportunity of a different-race relationship.
15. A refusal to employ Roman Catholic bartenders in Protestant pubs in Northern Ireland and vice versa, i.e. a refusal to employ “different-religion” bartenders but not “same-religion” bartenders, is discrimination based on religion, not “religious migration”, despite the fact that individuals of all religions are denied the opportunity of working in pubs outside their religious neighbourhoods.
16. The only significance of the use of “on grounds of her [or his] sex” in section 1 of the SDA, as opposed to “on racial grounds” in section 1 of the Race Relations Act 1976, or “on the ground of religious belief” in Article 3 of the Fair Employment and Treatment (Northern Ireland) Order 1998, is that MacDonald and Pearce had to establish that the difference in treatment was based on their own sex, rather than on the sex of their actual or hypothetical same-sex partner. My argument is that they could easily do this.
17. MacDonald (HL), above n2, [13]–[14].
18. MacDonald (HL), above n2, [108].
inappropriate to their sex] will not be considered. Or, suppose that a personnel manager simply receives a letter which does not disclose the sender's gender but does disclose that he or she is a homosexual [has sexual partners inappropriate to their sex], and replies refusing employment. In neither case can the discrimination have been on the ground of sex since the person, in the latter example, did not know the inquirer's sex and, in the former, expressly excluded the relevance of sex.

As will be demonstrated below, the problem with this analysis is the assumption that there is no connection between the word “homosexual” and the “homosexual” individual’s sex. Regarding the appropriate “comparator”, Lord Hobhouse observed:\textsuperscript{19} 

The common factor is homosexuality, being attracted to members of the same sex as oneself. The argument of the appellants has attempted to discard the common factor and, by redefining it, construct another in order to contradict it. A homosexual man [MacDonald] is not the same as a heterosexual woman [MacDonald's proposed comparator] and it is surprising that the argument that he was should have persuaded anyone.

(The argument did persuade Lord Prosser in the Inner House of the Court of Session\textsuperscript{20} and Lady Justice Hale in the Court of Appeal,\textsuperscript{21} but for binding precedent.)\textsuperscript{22} 

Lord Hope and Lord Rodger took the sex discrimination argument more seriously and discussed it at considerable length. Lord Hope cited my 1997 attempt to demonstrate the logical error in the standard response to the sex discrimination argument: if a gay man (a man with or desiring a male partner) is treated as badly as a lesbian woman (a woman with or desiring a female partner), there is no sex discrimination. Lord Hope quoted from my article as follows:\textsuperscript{23} 

This comparison avoids a finding of direct sex discrimination by changing not only the sex of the man, but also the sex of his partner. Yet for a valid sex discrimination analysis, the comparison must change only the sex of the complaining individual, and must hold all other circumstances constant. Otherwise a change in some other circumstance (such as the complaining individual’s qualifications, their choice of job or the sex of their partner) could hide the sex discrimination. If an employer refused to hire a woman with the required university degree, her comparator would not be a man without the required university degree. . . . If a man wanting to be a nurse challenged a rule that only women could be nurses and only men could be doctors, his comparator would not be a woman wanting to be a doctor. . . . If the sex of the man [with or desiring a male partner] is changed, but the sex of his [actual or hypothetical] male partner is held constant, the man’s comparator is a woman with [or desiring] a male partner and the direct discrimination.

\textsuperscript{19} MacDonald (HL), above n2, [109].  
\textsuperscript{20} MacDonald [2001] IRLR 431 (Inner House, Ct of Sess).  
\textsuperscript{21} Pearce [2001] IRLR 669 (CA).  
\textsuperscript{22} Smith v Gardner Merchant Ltd [1998] 3 All ER 852 (CA).  
\textsuperscript{23} MacDonald (HL), above n2, [69], citing R Wintemute “Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation, and Dress Codes” [1997] 60 MLR 332, 347–8.
sex discrimination is clear. If the sexes of both the man and his partner are changed, the man’s comparator becomes a woman with a female partner and the direct discrimination disappears with a wave of the magician’s wand.

Lord Hope found the following flaw in the quoted passage:\(^2\)

But the key to the whole argument is Dr. Wintemute’s proposition that, in the example which he gives of the man with a male partner, the correct thing to do is to change the sex of the man only and not that of his partner. What this does, in effect, is to break the rule which he himself has recognised, namely that for a valid sex discrimination analysis the comparison must change only the sex of the complaining individual. It does not only change the sex of the complaining individual. It changes his sexual orientation too. The woman with whom his case is compared is a woman with a different sexual orientation from his. She is attracted to persons of the opposite sex, while he is attracted to persons of the same sex. So analysed, the proposition breaks the rule which section 5(3) lays down that the cases of the man and the woman must be the same. . . .

. . . Mr. MacDonald’s sexual orientation was the critical factor in this case that led to his being dismissed. In Ms. Pearce’s case it was the critical factor that led to the abuse which she received, both in words and behaviour. Their sexual orientation was plainly one of the relevant circumstances which, if the rule laid down by section 5(3) is followed, must be same in the case of their comparators.

Lord Nicholls took a similar view of section 5(3) of the SDA:\(^3\)

[The] appropriate comparison [in MacDonald] is with a homosexual woman. Otherwise one would not be comparing like with like. Comparison with . . . a heterosexual woman would not be a comparison where the circumstances of one case are materially the same as the other, as required by section 5(3).

With the greatest respect, the error in the reasoning of Lords Hope, Nicholls, Scott and Hobhouse lies in their application of the concept of “relevant circumstances” in section 5(3) to the facts of MacDonald and Pearce. By providing that “[a] comparison of the cases of persons of different sex . . . must be such that the relevant circumstances in the one case are the same, or not materially different, in the other”, section 5(3) contemplates three categories of circumstances: (1) the sexes of the two compared persons; (2) the irrelevant circumstances in each person’s case; and (3) the relevant circumstances in each person’s case. In category (1), the sexes of the two compared persons need not be the same; indeed they must be different in order to establish that the difference between their sexes was the cause or reason for the difference in the treatment they received. In category (2), the irrelevant circumstances need not be the same. For example, the persons’ names, ages, addresses, hair colours, and favourite desserts will generally be irrelevant. It is only category (3) circumstances, the “relevant circumstances”, that must be the same. “Relevant circumstances” include job

\(^2\) Macdonald (HL), above n2, [70] and [71].

\(^3\) Macdonald (HL), above n2, [9].
qualifications which, if they were not the same, would provide an explanation for the
difference in treatment that does not involve the difference in sex.

There is no formula for defining “relevant circumstances” for every case. But it is
absolutely clear that a “relevant circumstance” must not be linked in any way to the
sex of the complaining individual. If this were the case, it would destroy the validity
of the comparison, which is a test to prove whether or not the difference in sex caused
the difference in treatment, and which depends on sex being the only variable and
appearing only once in the equation. If a person of different sex, for whom all “rele-
vant circumstances” (excluding sex and any circumstances connected with sex) were
the same (the comparator), was treated in exactly the same way as the complaining
individual, then there was no direct sex discrimination.

However, if a “relevant circumstance” incorporates the sex of the complaining indi-
vidual, the “controlled experiment” is fatally distorted. For example, in James v Eastleigh
Borough Council,26 the correct comparator for a man aged 60 to 64 (not of pension-
able age and therefore liable to pay 75p to swim) was a woman aged 60 to 64 (of
pensionable age and therefore able to swim for free), not a woman aged 59 or less
(not of pensionable age and also liable to pay 75p). The “relevant circumstance” that
had to remain the same was the “age” of the comparator, rather than her “not being
of pensionable age”. “Not being of pensionable age” could not be a “relevant circum-
stance” because it is itself defined by reference to sex; in 1990, “pensionable age” meant
60 and over for women and 65 and over for men. Thus, for the 60–64 age group, “not
being of pensionable age” meant “being a man”, and “being of pensionable age” meant
“being a woman”.

Lords Hope, Nicholls, Scott and Hobhouse did not consider the fact that, like
pensionable age in James, “homosexuality” or sexual orientation is itself a sex-based
criterion because, as I wrote in the same article in 1997, “an individual’s sexual ori-
entation can only be defined by reference to the sex of the individual”.27 This means
that an individual’s attraction to, or conduct with, persons of a particular sex cannot
be classified as same-sex or different-sex without knowing the individual’s sex. If X is
attracted to men, is X’s attraction same-sex or different-sex? Lord Prosser, who dis-
sented in MacDonald in the Inner House of the Court of Session, recognised the inher-
ent connection between sexual orientation and sex (using the converse situation of
employees X and Z of known sex and a partner, Y, of unknown sex):28

If a male officer X wished or had a partner Y, and indeed if a female officer Z
wished or had that same partner Y, the Royal Air Force would require to know
the gender of Y before it could say whether that was an acceptable partner for
X or an acceptable partner for Z. However one describes the policy, they would
in fact discriminate between X and Z on the basis of the male gender of X and
the female gender of Z, and in each case on the basis of whether Y’s gender
related to X’s or Z’s by being the same or the opposite.

28. MacDonald (Inner House), above n20, [36].
Having recognised this connection, Lord Prosser eliminated sexual orientation (and therefore sex) from the “relevant circumstances” and chose the correct comparator: “Mr. MacDonald is attracted by males. He should be compared with a woman who is attracted by males.”

The analysis of the fifth Law Lord, Lord Rodger, was inconsistent with James in a different way:

[I]f a male officer in the RAF had said to his commanding officer that he was attracted to Evelyn, the commanding officer would have had to discover Evelyn’s gender simply in order to know whether the RAF’s homosexuality policy applied. Had a female officer said the same thing, the commanding officer would have had to ask exactly the same question for the same reason. The fact that these questions had to be asked does not mean that the RAF . . . were discriminating on the ground of sex, by favouring women over men or vice versa . . . Since the RAF Policy was designed to treat homosexual men and homosexual women equally, it is not to be compared with the racial discrimination legislation which the United States Supreme Court struck down in Loving v Virginia . . . The intention of the Virginian legislature was to maintain white supremacy by preventing a white person from marrying an ‘inferior’ black person . . . Since in adopting their policy the RAF’s aim was not to treat persons of one sex less favourably than persons of the other, it is legitimate . . . to have regard to the fact that a female homosexual was to be dismissed just like a male homosexual.

With the greatest respect, Lord Rodger should not have been looking for any intention on the part of the discriminator to treat women as a group less favourably than men as a group (or vice versa). In James, the House of Lords clearly established that the SDA does not require any such intention, but only the objective use of sex as a distinguishing criterion. In any case, Lord Rodger could easily have found the intention he thought necessary. He rejected what is known in the US as the “miscegenation analogy”, i.e. the analogy, based on Loving v Virginia, between discrimination against different-race relationships and discrimination against same-sex relationships. Yet, the analogy’s leading exponent, Professor Andrew Koppelman of Northwestern University School of Law, has forcefully demonstrated that the intention underlying discrimination against lesbian, gay and bisexual individuals and same-sex couples is the maintenance of male supremacy, by preventing men from acting like “inferior” women with other men, and women from attempting to escape their “inferior” status by living with other women independently of men.

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29. MacDonald (Inner House), above n20, [37].
30. MacDonald (HL), above n2, [173]–[174].
32. 388 US 1 (1967).
In my opinion, there was no avoiding the conclusion that the correct comparators were an attracted-to-men (heterosexual) woman for the attracted-to-men (“homosexual”) man in MacDonald, and an attracted-to-women (heterosexual) man for the attracted-to-women (“homosexual”) woman in Pearce. Describing the reason for the dismissal (or the harassment leading to constructive dismissal) as “attraction to men” in MacDonald and “attraction to women” in Pearce, instead of “homosexuality”, is not “an unjustifiable re-writing of the reason for the dismissal”, as Lord Scott put it. Rather, it is a necessary reformulation of the reason in order to exclude the complaining individual’s sex from the “relevant circumstances”, as required by section 5(3) of the SDA. The “homosexual” comparators selected by the Law Lords in MacDonald and Pearce are simply wrong, and their equivalents (“heteroracial” or “heteroreligious” comparators) were not selected for the restaurant and pub hypotheticals the Law Lords discussed. In particular, the Law Lords did not say that the comparator in the restaurant hypothetical must have the same “racial orientation” as the complaining individual (which would make the race of the complaining individual, in relation to the race of their dinner guest, a “relevant circumstance”), or that the comparator in the pub hypothetical must have engaged in the same “religious migration” as the complaining individual (which would make the religion of the complaining individual, in relation to the religion of the pub’s customers, a “relevant circumstance”).

The following tables illustrate how the Law Lords chose the correct comparators (right side of each table) in their restaurant and pub hypotheticals and in James (by excluding the complaining individual’s race, religion or sex from the “relevant circumstances”), but the wrong comparators (left side of each table) in MacDonald and mutatis mutandis in Pearce (by including the complaining individual’s sex in the “relevant circumstances”). An easy way to determine whether the wrong comparator is being used is to note whether the modifiers “same-”, “different-”, “homo-” or “hetero-” are attached to “race”, “religion” or “sex” in defining the comparator. If so, the race, religion or sex of the complaining individual has been made a “relevant circumstance”, contrary to section 5(3) of the SDA (and the corresponding provisions on race and religion). The answers (“Yes” or “No”) in bold indicate how choosing the wrong comparator hides discrimination, and choosing the correct comparator reveals it.

If the Law Lords had chosen the correct comparators in MacDonald and Pearce, it would have been absolutely clear that there was prima facie direct sex discrimination (i.e. less favourable treatment on grounds of MacDonald’s sex or Pearce’s sex in relation to dismissal from employment). Given that no specific exception in the SDA permitted the less favourable treatment, the only way to avoid the conclusion that the SDA had been breached (putting aside the problem of employer liability for harassment by students in Pearce) would have been to conclude that Parliament could not have intended this result when it enacted the SDA in 1975. But this would mean “freezing” the impact of the SDA as it was understood in 1975, and refusing to apply it to new situations that have become better understood in the intervening years. Instead, UK courts should give effect to the general principle in section 1 of the SDA: there must be no less favourable treatment of a woman on grounds of her sex, compared with a man for whom the “relevant circumstances” (excluding sex or any characteristic linked to the sex of the woman) are the same, and vice versa.
Restaurant refuses to serve black diner with white guest

Wrong comparator: discrimination based on “racial orientation” not race (comparator for black diner with different-race guest is white diner with different-race guest)

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<tr>
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<th>blacks</th>
<th>whites</th>
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<tbody>
<tr>
<td>same-race guest</td>
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<td>Yes</td>
</tr>
<tr>
<td>different-race guest</td>
<td>No</td>
<td>No</td>
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</tbody>
</table>

Correct comparator: discrimination based on race (comparator for black diner with white guest is white diner with white guest)

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<th></th>
<th>blacks</th>
<th>whites</th>
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<tbody>
<tr>
<td>black guest permitted?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>white guest permitted?</td>
<td>No</td>
<td>Yes</td>
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</tbody>
</table>

Protestant pub in Northern Ireland refuses to hire Roman Catholic bartender

Wrong comparator: discrimination based on “religious migration” not religion (comparator for Roman Catholic in Protestant or “different-religion” pub is Protestant in Roman Catholic or “different-religion” pub)

<table>
<thead>
<tr>
<th></th>
<th>Roman Catholic bartenders permitted?</th>
<th>Protestant bartenders permitted?</th>
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<tbody>
<tr>
<td>same-religion pub</td>
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<td>Yes</td>
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<tr>
<td>different-religion pub</td>
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<td>No</td>
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Correct comparator: discrimination based on religion (comparator for Roman Catholic in Protestant pub is Protestant in Protestant pub)

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<th></th>
<th>Roman Catholic pub</th>
<th>Protestant pub</th>
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<tr>
<td>Roman Catholic bartenders permitted?</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Protestant bartenders permitted?</td>
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<td>Yes</td>
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Man aged 60–64 denied free admission to swimming pool

<table>
<thead>
<tr>
<th>Correct comparator:</th>
<th>men granted free swim?</th>
<th>women granted free swim?</th>
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<tbody>
<tr>
<td>discrimination based on sex (comparator for man aged 60–64 is woman aged 60–64)</td>
<td>men granted free swim?</td>
<td>women granted free swim?</td>
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<td>(Law Lords)</td>
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<tr>
<th>pensionable age</th>
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<th>Yes</th>
<th>age is 65 or over</th>
<th>Yes</th>
<th>Yes</th>
</tr>
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<tbody>
<tr>
<td>not of pensionable age</td>
<td>No</td>
<td>No</td>
<td>age is 60–64</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>age is 59 or less</td>
<td>No</td>
<td>No</td>
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Man attracted to men dismissed from UK Armed Forces (before 27 September 1999)34

<table>
<thead>
<tr>
<th>Correct comparator:</th>
<th>men</th>
<th>women</th>
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<tr>
<td>discrimination based on sex (comparator for man with same-sex attraction is woman with same-sex attraction) (Law Lords)</td>
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<td>(Law Lords)</td>
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<tr>
<td>different-sex attraction permitted?</td>
<td>attraction to women permitted?</td>
<td>Yes</td>
</tr>
<tr>
<td>same-sex attraction permitted?</td>
<td>attraction to men permitted?</td>
<td>No</td>
</tr>
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</table>

34. The dismissal policy was suspended and later abolished after Smith & Brady v UK (1999) 29 EHRR 493 (Eur Ct HR).
What if there are exceptions that Parliament would have written into the SDA had it foreseen the possible application of the SDA to discrimination against lesbian, gay and bisexual individuals and same-sex couples? The short answer is that, after a judicial determination that the general principle of section 1 of the SDA applies to such discrimination, Parliament determines that exceptions need to be added to the SDA, it is free to do so, subject to the (now considerable) constraints of the case-law of the European Court of Human Rights, and Council Directive 2000/78/EC. With regard to the most frequently litigated issue, rights and benefits for same-sex partners, neither the European Convention nor the Directive would permit an exception with regard to the rights and benefits of unmarried different-sex partners. As for the rights and benefits of married different-sex partners, if their denial to same-sex partners were characterised as prima facie indirect sex discrimination, an employer or other respondent could seek to justify the denial under the existing provisions of the SDA. If the denial of such rights and benefits were characterised as prima facie direct sex discrimination under James, because the criterion “being married” itself discriminates against same-sex partners on the basis of sex, a specific exception could be inserted.

WHY FEW JUDGES ACCEPT THE SEX DISCRIMINATION ARGUMENT

The sex discrimination argument has now “gone down in flames” before the European Court of Justice in Grant v South-West Trains, and before the House of Lords in MacDonald and Pearce. Of the 17 appellate court judges in the UK who have considered it, only two have been persuaded. In the context of a prohibition of sex discrimination in a constitution or an international human rights treaty, the argument has been accepted in the marriage case of Baehr v Lewin by the Supreme Court of Hawaii (which has since made it clear that sexual orientation could be argued instead of sex), in the criminalisation case of Toonen v Australia by the United Nations Human Rights Committee (which gave no reasoning and has also said subsequently that sexual orientation is available), and in the criminalisation case of Lawrence & Garner v Texas by a three-judge panel of the Texas Court of Appeals (whose decision was vacated by the full Court and whose sex discrimination reasoning was not invoked).

35. See Smith & Grady, above n34 (no exception for armed forces); Karner v Austria (24 July 2003), available online at http://www.echr.coe.int/hudoc.htm (probably no exception for rights and benefits of unmarried different-sex partners).
37. At most, Recital 22 of the Directive might permit an exception for the rights and benefits of married different-sex partners.
38. Case C–249/96 [1998] ECR 1–621 [27]–[28]. The ECJ did not explain why Lisa Grant’s choice of comparator, a man with a female partner, was wrong, and the ECJ’s choice of comparator, a man with a male partner, was correct.
39. MacDonald (HL), above n2, [17], [18], and [19].
41. Baehr v Miike 994 P.2d 566 (Table) (1999), fn 1, reprinted in Wintemute, above n33, 175, n 21.
44. The reasoning of the panel’s majority of two (unpublished decision of 8 June 2000) is preserved as a dissent at 41 SW 3d 349 (Tex Ct App 14th District 2001).
by the convicted same-sex partners before the US Supreme Court). In the context of a statutory prohibition, the argument has only been accepted in the services case of *Engel v Worthington* by the California Court of Appeals.

Despite what Lord Rodger described as the “impeccable” logic of the sex discrimination argument, most judges simply do not like it. This is partly because it is too powerful. Lord Rodger noted that:

> If sound, the appellants’ approach is undoubtedly far-reaching… [I]t would turn every claim for discrimination on the ground of sexual orientation into a claim for discrimination on the ground of sex under the [SDA]. Which . . . might be thought to run counter to Parliament’s intention.

The argument applies not only to discrimination against lesbian, gay and bisexual employees, but also to exclusion of same-sex couples from civil marriage, and (perhaps most disturbingly of all for the heterosexual majority of society) to employers’ sex-specific dress codes. At the hearing in *MacDonald* on 22 January 2003, one Law Lord asked whether the sex discrimination argument meant that a man would have to be permitted to wear a female flight attendant’s uniform, because a woman is allowed to do so. My answer would have been “yes”. (It struck me then that perhaps the most fundamental aspect of a man’s social duty not to be “feminised”, even more fundamental than not being sexually penetrated by another man or not marrying another man, is that he must not wear women’s clothing!)

Apart from fear of the argument’s potential implications, another major factor influencing the outcome in *MacDonald* and *Pearce* was that UK legislation on sexual orientation discrimination in employment was in the process of being adopted. The Law Lords saw no reason to give the SDA a novel interpretation if separate legislation would provide relief in future cases (but not those of MacDonald and Pearce). On 26 June 2003, one week after the Law Lords’ judgments in *MacDonald* and *Pearce*, the Employment Equality (Sexual Orientation) Regulations 2003 became law. From 1 December 2003, the Regulations will implement Council Directive 2000/78/EC by prohibiting discrimination and harassment because of sexual orientation in employment and post-secondary education in England, Wales and Scotland (separate regulations will apply to Northern Ireland). However, their material scope is much narrower than that of the SDA, which also covers primary and secondary education, housing, and the provision of goods and services.

Perhaps the greatest difficulty facing the sex discrimination argument is that most judges simply do not see any problem with the standard response to it, which uses the “homosexual” comparator. Having accepted that the phenomenon of sexual orientation exists, and that it can be used (crudely) to classify human beings as heterosexual, bisexual, lesbian and gay, most judges are unwilling to shift from a “sexual

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46. 23 Cal Rptr 2d 329 (1993).
47. *MacDonald* (HL), above n2, [166].
48. *MacDonald* (HL), above n2, [149].
orientation discrimination analysis" to a “sex discrimination analysis”, which would permit them to see that sexual orientation is itself defined by reference to sex.

In the case of race, this resistance to an “analysis shift” is extremely unlikely. Although, as the first table above suggests, one could construct a concept of “racial orientation” and classify human beings as “heteroracial” (attracted only to persons of a different race), “polyracial” (attracted to persons of any race) or “homoracial” (attracted only to persons of their own race), few judges would be distracted by this analysis. Instead, they would have no trouble seeing that an individual’s “racial orientation” can only be defined by reference to their own race. Nor would they be likely to accept the existence of a social phenomenon of “racial orientation”. They would be more likely to believe that most individuals are “polyracial” to some degree, in that they would not exclude the possibility of a relationship with a person of their own race, or with a person of a different race.

When the Loving v Virginia51 analogy is made between discrimination against different-race relationships and discrimination against same-sex relationships, most judges cannot make the “analysis shift” from sexual orientation discrimination to sex discrimination. Lord Prosser was exceptional in doing so, in a passage52 which Lady Justice Hale (now the first Law Lady) described as making an “extremely powerful point”:53

[A] veto on mixed marriage can scarcely be justified by saying that black and white are treated alike because each is permitted to marry a person of the same, or their own, colour. There is discrimination on the ground of colour in such a situation despite the ‘equal’ treatment of persons of either colour. And that would not be altered by recourse to linguistic obfuscation, by inventing concepts of homoethnicity or heteroethnicity. . . . Similarly in [MacDonald], it appears to me that one must consider whether the man and the hypothetical woman are in fact being allowed to do the same thing. To say that they are allowed . . . to do some equivalent or analogous thing is in my opinion to import a test which is not that required by section 5(3). Indeed, that kind of comparison, with supposedly equivalent but objectively different circumstances, is in my view likely to be destructive of one of the fundamental aims of the [SDA]—that women should be able to do things previously or traditionally or conventionally regarded as the preserve of men, and vice versa.

THE FUTURE OF THE SEX DISCRIMINATION ARGUMENT

For exponents of the sex discrimination argument, it is frustrating that, no matter how clearly one tries to explain it, no matter how many examples or tables one uses, most judges will not accept it. Is it worth continuing to advance the argument in appropriate cases, or is it better to give up on it and use other arguments in court, while lobbying drafters of legislation for express references to sexual orientation?

It is certainly true that protection against sexual orientation discrimination by a treaty, constitution or statute that mentions sexual orientation, or has been

52. MacDonald (HL), above n2, [39]
53. Pearce (CA), above n21, [23].
interpreted as covering sexual orientation, is preferable to protection through the application of a prohibition of sex discrimination. Recognising sexual orientation discrimination as a distinct social phenomenon, of primary concern to the lesbian, gay and bisexual minority, has symbolic benefits. And arguments of indirect sexual orientation discrimination (e.g., a neutral rule with a disproportionate impact on lesbian, gay and bisexual individuals compared with heterosexual individuals) are much less complicated than comparable arguments of indirect sex discrimination (e.g., a neutral rule with a disproportionate impact on attracted-to-men men compared with attracted-to-men women, and on attracted-to-women women compared with attracted-to-women men).

Thus, in jurisdictions where there is comprehensive (not limited to employment) legislation against discrimination based on sexual orientation or a similar ground (e.g., every state and territory but not the federal level in Australia, the federal level and effectively every province or territory in Canada, Ireland, and New Zealand), there is no need for the sex discrimination argument. It is only worth preserving, perhaps in academic writing, as a reminder of the connections between sexual orientation discrimination against lesbian, gay and bisexual individuals, and sex discrimination against women.

But most jurisdictions throughout the world are not as lucky as those just listed. They often have comprehensive legislation on sex discrimination, but no legislation, or no comprehensive legislation, on sexual orientation discrimination. In these jurisdictions, the sex discrimination argument has a future. The argument can still be made in the UK in cases falling outside the 2003 Regulations: (i) cases not involving employment or post-secondary education; and (ii) cases involving employment or post-secondary education that arose between 2 October 2000 and 1 December 2003. Any cases in category (ii) will require UK courts to reconsider MacDonald and Pearce in light of their obligation under section 3 of the Human Rights Act 1998 to interpret the SDA, so far as “possible”, in a way that avoids sexual orientation discrimination that would violate the European Convention on Human Rights. This obligation (which did not apply in MacDonald and Pearce) will override any concern about the specific intention of Parliament in 1975.

Apart from the UK, the most widespread use of the sex discrimination argument is likely to be in the US, where 36 of 50 states and the federal level have no legislation prohibiting sexual orientation discrimination, and where courts have begun to accept the argument to a limited degree, where a lesbian employee faces discrimination because of “masculine” behaviour, or a gay employee faces discrimination because of “feminine” behaviour. Academic commentators and litigants in the US should therefore note, and take heart from, the dissent of Lord Prosser in MacDonald, and the dissent (but for binding precedent) of Lady Justice Hale in Pearce. Indeed, Lord

56. e.g. Rene v MGM Grand Hotel, Inc 305 F 3d 1061 (9th Cir 2002) and Nichols v Azteca Restaurant Enterprises, Inc 256 F3d 864 (9th Cir 2001), both applying Price Waterhouse v Hopkins 490 US 228 (1989) (sex discrimination where female employee described as “macho” and advised to walk, talk and dress “more femininely”).
Prosser's judgment is one of the most extensive judicial discussions of the sex discrimination argument to date:

[The idea [of the SDA] seems to me to be that a woman should be allowed to go precisely where a man goes, and to do what a man does, and not to be fobbed off by being told that, mutatis mutandis, she has some equivalent for what is permitted to him. As I read the provisions with which we are concerned, and in particular the word ‘same’ in section 5(3), the position is really very simple. If a person of one gender wants to do something which persons of the other gender are allowed to do, the fact of their own gender is not to be seen as a ground for being treated less favourably, and being denied a specific choice which would be open to a person of the other gender. And if the conduct in question involves someone else, then again that person’s gender, whether the same or the opposite, should not lead to a difference in treatment.

The fact that an argument has been (mainly) rejected for 30 years does mean that it is wrong. We are still many years away from comprehensive constitutional and statutory protection against sexual orientation discrimination in every country of the world. Until that happens, the sex discrimination argument will remain an important potential source of legal protection. May the number of judges persuaded by it continue to grow, slowly but surely.58

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57. MacDonald (Inner House), above n21, [40].
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