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Laidlaw Scholars Leadership and Research Programme
- **Research Paper**

**CAN CONTRACT LAW BE UTILISED TO FURTHER SOCIAL
EQUALITY?
AN ANALYSIS OF THE USE OF CONTRACT REMEDIES TO
TARGET LGBT+ INEQUALITY**

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Introduction

Private law is often ignored as a method for achieving social justice for disadvantaged groups¹. Breaking a contractual obligation can also have a disproportionate negative impact on these groups². Breach of contract has a variety of impacts, yet its remedies almost wholly target economic harms. Simultaneously, traditional Public law anti-discrimination measures can be insufficient in rectifying non-financial impacts of breach. In the United Kingdom, cases of direct discrimination are dealt with using human rights law³, or through the Equality Act 2010 – which provides its own remedies⁴. Beyond this, cases involving private law matters, such as contracts, are largely ignored. With English contract law providing minimal and relatively fixed remedies for non-pecuniary loss, breach may affect someone excessively due to personal characteristics and go unresolved. Some scholars – particularly those in the United States – have pointed to the use of unorthodox areas such as contract law to further rights equalities⁵. This post focuses on a set of English contract law cases where unresolved, identity-related harms may have occurred. It critiques available remedies as limited in their ability to address social inequalities through private law remedies. It also assesses whether English contract law should indeed encompass a broader set of non-pecuniary losses to address aggravated harms felt by disadvantaged groups whilst contracting.

Current law

Public law

Before assessing the role that contract law could assume in providing a solution to inequalities for LGBT+ people, it is necessary to understand the public law protections and remedies available.

One major way that LGBT+ people, among other groups, are protected is through what are described as ‘constitutional rights’⁶. These are given both by the common law as developed over time, and by purpose-built legislation such as the Human Rights Act 1998 and the Equality Act 2010. These rights are positive – afforded by legislation and not implied - and as

¹ LRIRE, ‘Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South’ (*UCLA Law Review* 28 November 2022) <<https://www.uclalawreview.org/breach-by-violence-the-forgotten-history-of-sharecropper-litigation-in-the-post-slavery-south/>>. 680

² Jackson Springer, ‘CONTRACTS and HOMOPHILE LEGAL STRATEGY’ (2024) 124 *Columbia Law Review* 459 <<https://www.jstor.org/stable/27305116>>.

³ Human Rights Act 1998, s.1

⁴ Equality Act 2010, s 119

⁵ *Supra*, no. 2

⁶ Elliott and Thomas

such the government may need to take action in order to enforce them. ‘Prohibition of discrimination’, an HRA afforded convention right, has been interpreted by UK courts to include sexual orientation and gender. Importantly, the HRA has allowed courts to read and apply legislation as non-discriminatory towards LGBT+ people, embedding LGBT inclusion into all areas legislated on by Parliament. In the *Ghaidan* case, the courts effectively expanded the Rent Act 1977 to allow succession of tenancy for homosexual couples. However, this simultaneously demonstrates a key limitation of statutory protections. The HRA provides a piecemeal, reactive solution to individual issues – in this case tenancy agreements. These are further diluted by judicial discretion. The mechanisms under the HRA to resolve discriminatory law also place a responsibility on the government to legislate, although not a legal duty. These piecemeal solutions – rather than an encompassing piece of legislation to prohibit all areas of discrimination – evidence the gaps in protections that public law can leave⁷. Legislation such as the HRA and the Equality Act have allowed rights to progress considerably in the UK, placing among the best in the world for LGBT+ people⁸. Despite this, limitations in protections remain, suggesting the need for other robust inequality measures.

Direct remedies afforded by this legislation are also limited. The HRA provides that remedies can only be offered if it is absolutely necessary to provide ‘just satisfaction’ to the victim. This is determined based on principles applied by the European Court of Human Rights. It has been noted that ‘mere[ely] finding the breach’ will often be sufficient in providing just satisfaction, and that awarding damages is rare⁹. The determining principles have been described as ‘sparse’¹⁰ and damages that are awarded to victims based on ECHR guidance are frequently low, and rarely account for non-financial loss¹¹. The Equality Act provides remedies for discrimination, however these are based on a stringent test for recoverability. This involves finding that losses must arise ‘naturally and directly’ from the discrimination, and damages for indirect discrimination must only be given where there are no other alternatives¹². This places focus almost entirely on terms. It creates a gap in protection and remedy awarded for harms flowing from breach, experienced to an excessive extent due to identity. While the act makes discriminatory terms of contracts void in section 10, breaches that have a discriminatory or excessive effect are given no remedy by the Act¹³.

⁷ The need for the Employment Equality (Sexual Orientation) Regulations Act is an example of this – protections which should have already been afforded by the HRA

⁸ For 2024 global rankings, see: <https://www.equaldex.com/equality-index> (United Kingdom ranked 29th out of 197 countries for LGBT+ equality). Although note the UK’s LGBT+ equality ranking has fallen significantly in recent years, according to European metrics, see: <https://rainbowmap.ilga-europe.org/>

⁹ Dominic McGoldrick, ‘The United Kingdom’s Human Rights Act 1998 in Theory and Practice’ (2001) 50 *The International and Comparative Law Quarterly* 932 <<https://www.jstor.org/stable/761519>>.

¹⁰ *Ibid*

¹¹ Alastair R Mowbray, ‘The European Court of Human Rights’ Approach to Just Satisfaction’ (1997) *Winter Public Law* 651.

¹² Anthony Robinson, David Ruebain and Susie Uppal, *Blackstone’s Guide to the Equality Act 2010*. (Oxford Univ Press 2021) 195–208.

¹³ *Ibid*

The gaps left by public law create opportunity to investigate how private law mechanisms could be adapted to enable better protections. Remedies such as damages in contract law could offer targeted remedies to breaches which may place excessive harm on LGBT+ people. Moreover, these remedies would work by default through a defined doctrine, rather than be applied in a reactionary and undependable way under legislation such as the HRA and Equality Act as they are currently.

Damages and non-pecuniary harms

It is also necessary to identify *how* contract law remedies could be expanded to overcome shortcomings of public law mechanisms. Contract primarily offers remedies for financial loss, largely through expectation damages. These aim to put the claimant that suffered the breach in the financial position they would have expected to be in had the contract been fulfilled.. However, financial inequalities tied to identity are poorly evidenced and vary on an individual basis¹⁴. This points to non-financial and wider social-based inequalities as a more suitable target for potential remedies.

Non financial losses are only recoverable to a limited extent but have been expanded over time¹⁵. While initially no non-financial (non-pecuniary) losses were recovered by damages, a specific set of instances have emerged. Mental distress resulting from physical inconvenience of the breach, loss of enjoyment or amenity where this is a ‘major and important’ point of the contract are recoverable losses. Losses are in principle recoverable for stigma, loss of financial reputation, and where protection of reputation is the purpose of the contract are recoverable¹⁶. Damages are not available for losses attributable to the manner in which a contract is broken¹⁷.

These specific sets of recoverable losses can perhaps be explained by philosophical underpinnings of English contract law. A focus on corrective rather than distributive justice¹⁸ has resulted in a low willingness of courts to place liability on a contracting party for personal disadvantages which manifest in non-financial losses. For instance, a mental condition that is worsened by breach - resulting in exceptional loss of professional reputation – has been seen not to be recoverable¹⁹.

¹⁴ See: ‘An Examination of Poverty and Sexual Orientation in the UK – Institute for Social and Economic Research’ (*Institute for Social and Economic Research (ISER)*2022) <<https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-02>> accessed 16 July 2025. It is important not to qualify suffered economic inequalities as insignificant, however extreme variation and dependence on high amounts of external factors limit the causal link between personal identity and economic disadvantage.

¹⁵ Mindy Chen-Wishart, *Contract Law* (7th edn, OUP 2022) ch 13

¹⁶ Edwin Peel, *The Law of Contract*, vol. 16 (GH Trietel ed, Sweet & Maxwell, Thomson Reuters 2025) ch 20

¹⁷ *Addis v Gramophone Co Ltd* [1909] AC 488

¹⁸ Andrew Botterell, ‘Corrective Justice and Contract Law’ [2025] Edward Elgar Publishing eBooks 101.

¹⁹ *Johnson v Unisys Limited* [2001] UKHL 13

This puts no liability on an individual in a contract for the others' wider disadvantages and has meant non-financial damages are the 'exception to the rule'. The historical approach suggests any change to the law to encourage distributive justice – in this case for the benefit LGBT+ people – would need to be justifiable as placing minimal liability on individuals while also providing a benefit for those experiencing excessive non-financial loss.

Despite this, private law has been used in the UK to remedy inequalities. In a fundamental Contract and torts case, *Constantine v Imperial Hotels*²⁰, the wider reaching benefits of applying private rights against discrimination can be clearly seen. A black man was refused his room on the grounds of his race, in breach of contract and a tort right that a man cannot be denied accommodation without just cause. The complainant won and successfully challenged discrimination in a time when protections were not afforded by means of public law rights. Scholars in favour of remedying wider injustices in private law argue this has and can be achieved further across contract²¹.

The most suitable approach is likely therefore to identify particular non-pecuniary disadvantages for LGBT+ people that can be experienced (perhaps to a lesser extent) by any person, cause real loss to be suffered, whilst not pushing excessive liability on those who breach. This also aligns with a non-punitive tradition within English contract law²².

Investigation

Disadvantages experienced by LGBT+ people are varied and extensive. While there is evidence of economic disadvantages, these are less consistently experienced and have less of a direct link to identity alone²³. A widely experienced disadvantage is high rates of depression and anxiety among members of the LGBT+ community. Rates of depression are over 40% higher than in the general population²⁴ according to some studies, and experiences of hate crimes are higher and more severe for LGBT+ people²⁵.

²⁰ *Constantine v Imperial Hotels Ltd* [1944] KB 693

²¹ Megan Richardson, 'Contract Law and Distributive Justice Revisited' (1990) 10 *Legal Studies* 258.

²² S Rowan, 'Punitive Damages - Elgar Encyclopedia of Comparative Law' [2023]

²³ *Supra*, no.16

²⁴ Stonewall, 'LGBT in Britain - Health (2018)' (*Stonewall* 7 November 2018)

<<https://www.stonewall.org.uk/resources/lgbt-britain-health-2018>>.

²⁵ Hannah Clayton, 'Why Is the LGBTQ+ Community Disproportionately Affected by Mental Health Problems and Suicide?' | News and Events' (*Greater Manchester Mental Health NHS FT8* October 2020)

<<https://www.gmmh.nhs.uk/news/why-is-the-lgbtq-community-disproportionately-affected-by-mental-health-problems-and-suicide-4240/>>.

The issue with using metrics such as these along with selecting economic statistics, however, is that when exploring available remedies in contract law, they will most likely not apply to every complainant, and could apply to anyone regardless of sexual orientation or gender identity. Instead, disadvantages that should be focused on are those which are specific to LGBT+ people when they experience a breach of contract, and that are not currently covered by contract remedies. To identify these, this study researched cases involving breach of contract and sexual identity to find common harms.

How the cases were identified and analysed

This study first sought to identify cases in which harms relating to LGBT+ identity were experienced as a result of breach of contract. Suitable cases are those which do not mainly involve direct discrimination dealt with through public law measures. Instead, suitable cases are those where breach of contract has caused excessive harm attributed to identity.. These harms fall are unresolvable through current public law remedies, and can be best targeted by potential contractual remedies.

To identify these cases two major legal databases – Westlaw UK and Lexis+ - were used. Keyword search using all relevant terms including “breach of contract” or “breach” and “sexuality”, “gender” or “LGBT+” were combined in order to refine results. The highest detail level on search was used, ensuring cases including irrelevant terms such as ‘Gay’ in the context of the name were filtered out. For unreported cases, a light search of LGBT+ databases²⁶ was conducted with the same search terms.

Once these searches were conducted, all cases were ranked using a traffic light system to determine their relevance. Red ‘Irrelevant’ cases were those that did not involve breach of contract or were wholly concerning cases of direct discrimination. These were discarded from analysis. Amber (partially relevant) and Green (relevant) cases were included in analysis, and included cases either directly addressing issues within the gap described above, or involved these issues in addition to direct discrimination. The sorting of cases in this way ensured any gaps in contract remedies could be identified in relevant cases.

By examining these 10 ‘partially relevant’ and ‘relevant’ cases, two major patterns of loss or harm were identified.

²⁶ See:

<https://www.proquest.com/lgbtma?accountid=14511&parentSessionId=Wg4J2kSq9vIScJSSr%2B1d%2BFfzgcP8mzrMn4cWaRT86pc%3D> (LGBT Magazine Archive), and https://go-gale-com.libproxy.ucl.ac.uk/ps/start.do?p=AHSI&u=ucl_ttda&aty=ip (Archives of Sexuality and Gender)

Analysis of cases and identified potential harms

Loss of dignity

In some cases, experiences that occurred as a result of a breach of contract appeared to amount to what this study will describe ‘loss of dignity’. Dignity has a variety of historical definitions; for simplicity here, Baertschi offers the following description drawing these definitions:

“To instrumentalize or degrade a human being manifests a lack of respect for that being; i.e., for his or her intrinsic value,” and that “human dignity is “an intrinsic value of the person capable (at least potentially or as a member of natural kind) of reflection, sensitivity, verbal communication, free choice, self-determination in conduct and creativity” ”.²⁷

By this definition, a loss of dignity would constitute a reduction of a person’s ‘intrinsic value’²⁸. In relation to LGBT+ people, this could be where they are made to feel ‘less worthy’²⁹ due to their sexuality. This definition aligns with experiences in these two exemplar cases identified during the study:

Hargreaves v Wright Foundation Research Limited

In this case, the claimant was dismissed from her role as a health lecturer on the alleged bases of non-completion of work, following her submitting a grievance related to discrimination against her based on her sexuality. This constituted a breach of her employment contract, namely dismissal without notice.

While the breach itself did not constitute direct discrimination, a result of the breach was that the claimant’s experiences of discrimination and bullying from peers based on her sexuality were ignored. This is demonstrated clearly from evidence in the judgment, where colleagues said, ‘*Oh god I couldn't be one of those, we don't like people like that*’. In ignoring the grievances filed based on these issues, and then dismissing the claimant, the breach significantly damaged her self-worth. She felt ‘victimised’ and submitted further claims against the person who originally made the homophobic comments. While these claims

²⁷ Bernard Baertschi, ‘Human Dignity as a Component of a Long-Lasting and Widespread Conceptual Construct’ (2014) 11 Journal of Bioethical Inquiry 201
<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4061478/>> accessed 26 October 2020.

²⁸ Ibid

²⁹ A term used by scholars and within jurisdictions’ legal texts, see: Michèle Finck, ‘The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective’ (2016) 14 International Journal of Constitutional Law 26.

failed, it is apparent here that loss of dignity, heightened by the claimant's sexuality, has occurred. The issues identified in the case were given partial remedy under section 27 of the Equality Act covering unlawful victimisation.

This provides two points for discussion. One is that despite a clear loss of dignity flowing from breach of contract, there is no direct remedy for this. While a successful claim under s.27 was made, this public law remedy has little connection to the experience and loss to dignity that was suffered. In this way, a potential can be seen for compensation attached to loss of dignity.

Another point is that loss of dignity can be heightened due to issues undetachable from sexuality. The loss of dignity in this case resulting from wrongful dismissal was attached to complaints made of harassment because of sexuality. In this case, she felt 'goaded into disclosing information about her sexuality'. The wrongful dismissal could be viewed as a reaffirmation and extension of harassment in a way that other wrongful dismissals may not be. Therefore, it would follow that the claimant's sexuality had at least an enhancing effect in the final loss of dignity experienced.

On the other hand, loss of dignity is already dealt with in law relating to harassment due to sexuality. This is seen in the case and could suggest that expanding Contract law is unnecessary. In Section 26 of the Equality Act, claims of harassment can be remedied by the court if the harassment '*violates B's dignity*'. However, this attaches violation of dignity exclusively to the harassment. In doing so, this excludes loss of dignity by other means. . In this case, loss of dignity also flowed from the breach itself, heightened by the claimant's sexuality, and went unresolved. Moreover, as discussed previously, public law remedies are rarely sufficient in value and subject to judicial discretion. . This case, therefore, seems to affirm the need for an additional type of loss attached to the breach itself.

Hall v Bull

In this case, a same-sex couple were denied a room they had booked at a hotel in Cornwall. In the case it is unclear if this constituted a breach of contract. This is because a clause which prohibited couples out of wedlock was not discussed over the phone, potentially making the term unincorporated in the contract. This study analysed it as if there was a breach in order to determine potential remedies.

This case was dealt with as a discrimination case under the Human Rights Act, however due to the previously discussed shortfalls of public law remedies, this analysis attempts to find a justification for the use of a new contractual loss.

In this case, although the potential breach constituted direct discrimination, it is evident that in and of itself the breach resulted in an excessive loss of dignity. Whilst the refusal of the

couples booking was ‘*not done in a demeaning manner*’, the couple were ‘*very hurt*’ after being told by the owners that they ‘*did not believe*’ in their relationship as it stood as a civil partnership. The comparison and degradation of the couple’s relationship as lesser than that of a heterosexual couple, regardless of intent or manner, represents a clear loss of intrinsic value and self-worth from the breach. This is exemplified by the couple’s ‘hurt’.

Moreover, regardless of the couple’s action to find new accommodation and acceptance that the refusal statement was not meant to demean, the public refusal statements’ sexuality related reasoning explicitly shows that the loss was enhanced by the breach’s intrinsic connection to their sexuality. It was not merely a refusal to provide service that any couple could receive – for instance, if rooms had been oversold. The issues in this case were found not to constitute discrimination under the Human Rights Act.

One issue in determining the need for a contractual loss of dignity in this case is that of mitigation. Economic losses compensable by damages in contract law are reduced when action is taken to mitigate them. In this case, the fact that the couple accepted the refusal was not meant to demean. Moreover, they found alternative accommodation meaning some loss of dignity was potentially mitigated. In relation to the definition above, since the couple were able to mitigate a potential loss to intrinsic value that the refusal presented, the actual loss is more minimal. For instance, not being able to find another accommodation may have made the couple feel more isolated due to their sexuality, and in turn take on a greater loss of dignity. If loss of dignity can always be easily mitigated, it may suggest there is little need for the law to recognise it as a contractual loss.

Issues with mitigation also relate to the valuation of dignity. As discussed above, public law remedies fall short when calculating the value of any remedy given. In order to be effective, any recognised loss of dignity would instead need to offer a precise way to measure the value of the loss. Definitions of ‘dignity’³⁰, and the effect of the loss on different people vary. This may present significant difficulties with calculating loss in individual cases. Calculation is further complicated by mitigation.

This may suggest the need for a recognised contractual loss of dignity is limited as it would be extremely difficult to put a monetary measure on loss of dignity or, for mitigating the loss³¹, a duty on people to ‘lose less dignity’. Ultimately, regardless of this, it is evident a significant loss of dignity has been suffered, and this alone may provide the need for a new contractual loss – particularly due to the failure of public law remedies as occurred in this case. There remains a clear need to identify a suitable monetary measure of this loss.

³⁰ *Supra*, no.29

³¹ *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673

Loss of access to services

In other cases, potential breach of contract appeared to result in a loss of access to services, enhanced due to sexuality or gender identity. This aligns with data that suggests LGBT+ people experience difficulty accessing public and private services.

Access to amenities including transport and shops has a meaningful contribution to well-being³², and studies have shown access to better services has a positive economic impact³³. In these cases, the significance of wellbeing and economic loss is analysed to determine the suitability of creating a new contractual loss.

Lee v Ashers Baking Company

In this case, a gay man ordered a cake from a Christian-owned bakery which was to be decorated stating 'support gay marriage'. The order was subsequently cancelled and payment refunded due to the baker's disagreement with the statement. It is unclear if this act resulted in a breach of contract directly. Arguments were put forward based on the Human Rights Act and Northern Ireland Act 1998.

In the event that a breach did occur, a loss of access to service was clearly experienced. The impact of the breach was also enhanced due to the claimant's sexuality. The activist himself stated after the judgment that he now felt 'uncertain' about his ability to use businesses due to his sexuality³⁴. In this sense, singling out of identity as a part of the breach may have had a greater impact than merely declining the order without reason.

One issue with a potential expansion of loss in this case is that it is arguable that the loss did not significantly impair his ability to order a cake from another supplier. Indeed, the bakers themselves admitted they did not refuse the order due to the complainant's sexuality but instead the statement on the cake. The loss of access to service in this case can be seen as minimal as the claimant could access the same service from another supplier

This variable significance presents a problem with calculating value of any damages awarded for the loss. One potential method could draw comparison from the calculation of damages

³² Blomquist, G. C, 'A Companion to Urban Economics' (Google Books 2025) <https://books.google.tt/books?id=8edDYXZ2VbAC&printsec=frontcover&source=gbs_vpt_read#v=onepage&q&f=false> accessed 31 July 2025.

³³ 'How Does the Amenity Offer Differ across Cities? - Centre for Cities' (Centre for Cities 2019) <<https://www.centreforcities.org/reader/whats-in-store/how-does-the-amenity-offer-differ-across-cities/>> accessed 1 August 2025.

³⁴ Owen Bowcott, 'UK Supreme Court Backs Bakery That Refused to Make Gay Marriage Cake' (*the Guardian* 10 October 2018) <<https://www.theguardian.com/uk-news/2018/oct/10/uk-supreme-court-backs-bakery-that-refused-to-make-gay-wedding-cake>>.

for loss of amenity. In *Ruxley v Forsyth*³⁵, full compensation was not awarded as the value would impose loss on the promisor beyond the expected gain of the promise from the contracted work. A discretionary amount was awarded to reflect the loss of amenity in proportion to the loss. Loss of access to service could mirror this approach. This would likely involve providing a discretionary amount proportionate to the significance of the loss of access. Under this, it could be said that awarding damages at all in the case of *Lee* would be disproportionate to the experienced loss. This could, though, present the further challenge that introduction of a recognised loss is unnecessary if damages are rarely awarded.

Further, compensating for this type of loss conflicts with the common law right to refuse service, except under specific circumstances. This also conflicts with current discrimination legislation. The Equality Act sets out that refusal of service is unlawful when it is discriminatory against protected characteristics³⁶. This includes indirect discrimination where it has the same effect as if it were direct³⁷. Therefore, the legislation only impedes on the common law where it dictates a substantial harm – that of strictly defined discrimination under the Equality Act – has been suffered.

The fact that these limitations to the common law right are so limited suggests severely impeding on it by awarding damages for a recognised harm of loss of access conflicts too heavily with existing legal principles. In this case, loss of access to service was not so severe as if the business had outright refused service due to sexuality. This may show recognising this specific loss is inappropriate in its impediment of the common law right.

It is likely any recognition of the loss would need to be restricted to retain free contracting rights. One way to determine where compensating for the loss is appropriate could be an inequality or inclusivity assessment conducted by the court. The Government publishes frameworks for businesses to ensure best practice for inclusivity of their employees. Applied to breach of contract, a framework could be assessed to determine severity of the denial of service against services commonly less accessible to LGBT+ individuals.

Restrictions on denial of service aren't without precedent. The Hotel Proprietors Act 1956³⁸ (HPA) requires hoteliers to offer a room to all guests barring those unable to pay or in an unfit state. Whilst it would likely be morally challenging to expand this to all businesses and cases, further research could be conducted into services most inaccessible. Denial of service could then be limited in those areas similar to the HPA.

³⁵ [1995] UKHL 8

³⁶ *Supra*, no.4

³⁷ *Supra*, no.4 s.19

³⁸ s.1 (3)

On the other hand, placing this restriction holds businesses accountable for actions of others that cause inequalities. While outside factors can determine extent of many types of loss, they rarely determine if the type of loss should or should not apply as in this case.

Another issue is that it is unlikely compensating for the loss of access in this case would profoundly target potential inequalities in access to services experienced by LGBT+ people. Inequality in access has been found to lie within public and health services (where needs of LGBT+ people may be underserved)³⁹, in addition to access to LGBT+ community spaces. In this case, loss of access to a room at a specific hotel is not an inequality – as anyone may choose to or not to stay at that hotel. Instead, an expansion of recognised harms to satisfy the limitation of other rights again likely needs to be substantial. This may mean that for loss of access to service to qualify as substantial it must affect access for a large group of people and not just the individual. This would likely best compensate for inequalities. This may also be difficult to justify in individual contract law cases whereby determining community impact would need to be done using an objective test to ensure equality of outcome.

South West Trains cases

In this case, a lesbian train worker was unable to access a travel pass for her female partner that was part of her employment contract. This was despite the employer holding an equal opportunities policy under which it stated it would not discriminate ‘based on sexual orientation’. This could have constituted a breach of contract if the equal opportunities policy was found to be binding.

This loss of access to service is made explicit by the fact that the exact same service could be used by fellow colleagues of the claimant. Unlike in *Lee*, it was also made evident in the judgment that if the case was lost by the couple, it could have wide ranging impacts on treatment in the workplace for LGBT+ people.

One major issue highlighted in this case is a potential issue in creating a loss under contract which could be determined under a judge’s discretion. Before the case had started, the sitting judge Mr Justice Curtis labelled the couple ‘two spinsters’. This language highlights the potential prejudice of individual judges that could limit the effectiveness of expanding compensable losses. Unlike public law remedies, which set out specific instances of compensable discrimination, any potential contract remedies would be at the discretion of an individual judge.

On the other hand, the scale of loss in this case can be seen to be significant and worthy of expansion of the law. The value of the pass that eligible heterosexual couples could access totalled £10000 and the worker’s exclusion from the service encouraged workplace discrimination. In terms of the type of loss, according to the couple it ‘always affects

³⁹ Supra, no.26

everyday life'. This perhaps provides a substantial argument for including a potential loss of access to service.

Issues with abstraction in legal reasoning and reporting

A major issue identified during the course of the research was a lack of identifiable cases. Unlike similar studies in the U.S, very few cases directly intersected sexuality or gender identity and breach of contract.

One significant reason for this could be a tradition of anonymity or abstraction within English law. The objective and anonymised 'reasonable person' is commonly used and frequently has 'little connection to reality'⁴⁰ in terms of the experiences of diverse individuals.

In practice, use of the 'reasonable man' in legal tests applied in contract are not treated as affecting people with different needs or experiences differently. The 'reasonable and prudent man' in *British Westinghouse Electric Co v Underground Electric Railways Co of London*⁴¹ may easily fulfil their duty to mitigate losses arising out of breach, for instance. In contrast, disadvantaged groups may struggle to take steps due to a variety of factors – including inequalities deriving from the harms identified above. Here, failing to take into account the characteristics of the person affected when it impacts their loss results in inability to distinguish the excessive loss actually experienced.

Another reason is a lack of judicial activism, as seen in the United States. Use of private law mechanisms could perhaps be seen as a route to substantial change, explaining more identifiable cases in studies such as Springer's⁴². The use of judicial activism in the U.S is well established and noted by scholars⁴³.

Ultimately, regardless of factor, lack of inclusion of identity in judgments likely presents a large problem with compensating losses detailed above. Without suitable recognition of a person's identity's role in the experience of non-pecuniary loss, there is unlikely to be sufficient evidential nor philosophical justification for expanding a set of rules based historically on corrective justice principles.

⁴⁰ Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) 14 Lewis & Clark Law Review 1233

<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/lewclr14&div=50&id=&page=>>.

⁴¹ Supra, no.30 319

⁴² Supra no. 2

⁴³ Arthur Hellman, 'Judicial Activism: The Good, the Bad, and the Ugly' (2002)

<https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1255&context=fac_articles>.

Conclusion

It is evident that public law mechanisms provide incomplete and insufficient solutions to the reality of harms experienced in contracting for LGBT+ people. While traditional philosophical underpinnings of English contract law limit the extent to which non-financial loss can be recognised, expansions of the law have and could continue to occur.

From the limited data analysed in this study, it is evident that there are significant harms not currently addressed or adequately compensated by public or private law. Loss of dignity - as seen in *Hargreaves* and *Hall*, is evidently significant and experienced at an enhanced rate due to sexuality. The loss is significant, yet likely does not place excessive liability on the contract-breaker. Troubles lie in calculation of the loss. Further, the argument for an inclusion of this loss is though somewhat limited by the rule in *Addis v Gramophone Company*, which does not award damages for manner of breach. Nonetheless, the case that breach alone can result in loss of dignity can be evidenced strongly in *Hall*, demonstrating the need for inclusion of this harm.

The loss of access to service is perhaps harder to justify. While it is significant and experienced to an enhanced extent by LGBT+ people, cases of loss of access where loss is most significant is covered by direct discrimination. Moreover, recognising a loss of access to service ignores long standing freedom of contract principles that permit the contract breaker to refuse service to anyone. Ultimately, it is unlikely to be practicably included as a compensable non-pecuniary loss.