Bestiality: A Discussion on *DLW*

***DLW*: The avoidance of a harm-based test and avoidance of an expansion of animal rights**

The decision in *DLW* reflected the majority of the court not wanting to open the door to new expansive animal rights law rather than truly believing that bestiality has always included penetration.[1] Two major discussion points support this claim. First the major flaws in the majorities reasoning as pointed out in Abella's dissent and second the analysis by *Jochelson & Gacek* of what it would have looked like if they had attempted a *Labaye* harm test for the offence of bestiality.[2] Below is a brief procedural history of *DLW*.

Procedural history *DLW*

DLW faced charges on numerous sexual offences as well as a bestiality charge in relation to placing peanut butter on one of the children's vaginas for the dog to lick off. He also took videos and pictures. The trial judge in *BCSC DLW* concluded that the accused was guilty of bestiality and stated the following

> In my view, "bestiality" means touching between a person and an animal for a person's sexual purpose. This is reflected in the numerous guilty pleas entered on charges under s. 160 where the bestiality consists of an animal licking a person's genitals.[3]

At the Court of Appeal the majority allowed the crowns appeal and stated that If Parliament had intended in the 1954 Amendment or the 1985 Amendment to sever bestiality from its historical foundation (that being penetration as part of the offence), they would have done so directly, using clear and specific language.[4]

On appeal at the Supreme Court of Canada the majority framed the issue of penetration as an element of the offence of bestiality into two parts. First if bestiality had a well understood legal meaning in common law, and second whether Parliament intended to depart from that meaning when it used the word without further definition in the English version of the *Code*.[5] The majority ruled that bestiality did have a well-established legal meaning of vaginal or anal penetration of human animal sexual intercourse.[6] They decided that, at least until 1955, the offence of buggery with animals/la bestialité continued to have the same elements that it had in the English 1861 Act.[7] On the second issue they ruled that there was no express or implied intent to depart from the legal meaning of the term bestiality. The Court refuted the crown's argument that the two legislative changes from 1955 and 1988 showed a clear intention to expand the offence of sexual intercourse between a human and an animal to an offence proscribing all human-animal sexual activity.

Flaws in the majorities reasoning as stated in the Dissent

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[1] *R v DLW,* 2016 SCC 22 [*DLW*].
[2] Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective* (Bradford: Demeter Press, 2019) at 242-245.
[3] *R v DLW*, 2013 BCSC 1327 para 312 [*BCSC DLW*].
[4] *R v DLW*, 2015 BCCA 169 para 38 [*BCCA DLW*].
[5] *Criminal Code*, RSC 1985, c C-46; *DLW, supra* note 1 para 11.
[6] *DLW, supra* note 1 para 22.
[7] *Ibid* para 50.

Abella comments on the age and unreliability of ascertaining such specific intent (penetration as element of offence) to such an old offence. Abella in her dissent states that there are scarcely any cases dealing with the offence, let alone whether it required penetration[8]. She states that the only two appellate cases in Canada involved penetration, but she questions whether this means they were required elements of the offence and that these cases occurred before the 1955 code amendments.[9] Abella argues the creation of a distinct offence of bestiality in 1955, the same year the animal cruelty provisions were expanded to protect more animals from more exploitative conduct, reflected Parliament's intention to approach the offence differently.[10] Parliament's purposes would have been inconsistent if the animal cruelty protection in the Code would now cover all birds and animals, but the bestiality provision would be limited to those animals whose anatomy permitted penetration. Requiring penetration for the offence of bestiality, technically left as legal all sexually exploitative acts with animals that did not involve penetration, which completely undermined the concurrent legislative protections for animals from cruelty and abuse.[11]

The offence of "bestiality" was also extended in 1988 to include those who compelled its commission or who committed it in the presence of a child. It was difficult to accept that Parliament intended to protect children from seeing or being made to engage in sexual activity with animals only if it involved penetration. Parliament must have intended protection for children from witnessing or being forced into any sexual activity with animals.[12]

Abella states that the absence of a requirement of penetration did not broaden the scope of bestiality, and should be seen as a reflection of Parliament's common sense assumption that since penetration is physically impossible with most animals and for half the population, requiring it as an element of the offence eliminates from censure most sexually exploitative conduct with animals. Acts with animals that have a sexual purpose are inherently exploitative whether or not penetration occurs, and the prevention of sexual exploitation is what the 1988 Code amendments were about.[13]

These arguments are very hard to ignore and I suggest that the majority ignored them intentionally as their desired outcome was for Parliament to define bestiality in modern terms and that the majority interpreted bestiality in the manner that they did to avoid creating a harm based test that involved animals and sexual relations.

Avoiding Harm based test and the expansion of animal rights

Why not create a harm based such as the *Labaye* test and use the creative powers of the court to redefine Victorian era offences such as they did with obscenity and indecency?.[14] As stated by *Jochelson and Gacek* the court faced real legal limits and would not have been interested in using a similar analytical approach.[15] The obscenity and indecency laws utilized a community standard test that was a long-time arbiter of criminality for these offences.[16] In contrast bestiality did not have a

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[8] *Ibid* para 134.
[9] *Ibid* para 135.
[10] *Ibid* para 141.
[11] *Ibid* para 142.
[12] *Ibid* para 148.
[13] *Ibid* para 149.
[14] *Supra* note 2 at 242.
[15] *Ibid* at 243.
[16] *Ibid.*

long-term judicial history.[17] Moreover, harms articulated by the *Labaye* test only contemplated harms to humans. Without formal constitutional or otherwise legislative recognition for the sentience of animals, understanding similar harms for animals would be a major philosophical leap for the court.[18] By not applying a similar harm test the court was avoiding dealing with the expansion of animal rights and passing the proverbial buck to Parliament to define bestiality for the modern era.

[17] *Ibid.*
[18] *Ibid*.