

## The SCC and DLW: An Example of Judicial Restraint in Difficult Circumstances?

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**Warning: This Blog contains graphic depictions of real events**

Was the Supreme Court of Canada's ("SCC") decision in *R v D.L.W. (DLW)* appropriate? In deciding *DLW* the SCC determined the definition of bestiality within s. 160 of the *Criminal Code of Canada*. The definition may be unsatisfactory and unsavory for many given the circumstances of the case. The cases' dissent upon each level of appeal is evidence of that reality. A summary of the facts of the case followed by a brief analysis of the courts' conclusion will be given to better understand how the SCCs' decision, although it may be difficult to stomach, might have been the right decision.

The *DLW* case involved a stepfather who had sexually assaulted his stepdaughters on numerous occasions over an extended period of time. The stepfather was found guilty of multiple counts of sexual assault and was found guilty of one charge of bestiality. The charge of bestiality stemmed from multiple occasions in which the stepfather had placed peanut butter on the eldest stepdaughter's vagina and had the family dog lick it off while the stepfather photographed and videotaped the events.

The stepfather was appealed the finding of the trial judge arguing that the definition of bestiality under s. 160 of the *Criminal Code* had a well understood legal meaning which required penetration as an element of the offence. The trial judge was satisfied that the actions were orchestrated for a sexual purpose and adopted an interpretation of bestiality which did not require penetration as an element of the offence. Opting instead to "interpret the elements of bestiality so that they would reflect the current views on what constitutes prohibited sexual acts."<sup>1</sup> The British Columbia Court of Appeal ("BCCA") overturned the trial judge's decision. The BCCA was not inclined to broaden the definition of the trial judge and confirmed the that strict common law understanding of bestiality which required penetration as an essential element was still the legal definition.

The decision was appealed to the SCC where a near unanimous court decided that the common law, requiring penetration, should be used in establishing the criminal liability of the offence. The court determined that it was not their responsibility to expand the scope of liabilities that had been established by legislative bodies, that; "absent clear parliamentary intent to depart from the clear legal definition of the elements of the offence, it is manifestly not the role of the courts to expand that definition."<sup>2</sup> The majority reasoned that an overhauling of the sexual assault provisions in 1983 and 1988 which left the bestiality requirements untouched was not accidental and confirmed the intended meaning of bestiality.

Justice Abella argued, in her dissent, that the common law definition of bestiality was a relic and that the term had not been interpreted by a legislative body. Justice Abella suggested that bestiality and buggery, buggery being the term which absolutely involves penetration, were distinguished by parliament when new animal cruelty legislation was introduced. Perhaps one of the most convincing arguments made by Justice Abella was amendments made to the *Criminal*

*Code* in 1988 when “the offence of “bestiality” was extended to include those who compelled its commission or who committed it in the presence of a child”<sup>3</sup> should be seen as an intent by legislature to expand the definition of the to protect children from more than just the penetration of animals. That legislature would have intended the provisions to protect children from witnessing sexual acts with animals, and not only those acts that included penetration. The majority were not swayed by Justice Abella’s arguments, and found that there were separate provisions in place elsewhere in the *Criminal Code* which protect children from circumstances like those in the instant case.

The disturbing facts *DLW* may have made it difficult for the judiciaries deciding the case to arrive at a just conclusion capable of satisfying lay readers of the decision. The majority determined that it was inappropriate for them to make interpretations that effectively expand legislation; a responsibility that should be left to Parliament. The decision may be unsatisfactory for the general public, and may be difficult for the judiciary to make, but may have been the only appropriate action available. The court should not step into the role of legislators. There is a possibility Parliament did not think to include an amendment to the definition of bestiality in the *Criminal Code* when it amended sexual assault in 1983 and 1988, however, it is not the judiciary’s responsibility to make such determinations. Judicial restraint may have been the appropriate response in *DLW* and given the unsettling nature of the facts may have proven to be an impressive test of said restraint.

<sup>1</sup> *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15991/index.do>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*