Sometimes judicial reasoning is for The Birds—as demonstrated by the fowl attack of a supposed Canadian decision: Regina v. Ojibway, 8 Criminal Law Quarterly 37 (Ontario Supreme Court 1965).

The facts, as usual, were undisputed. Fred Ojibway, an Indian, was riding his pony through Queen's Park on Jan. 2, 1965, sitting on a downy feather pillow instead of his saddle (which he had pawned). The pony fell and broke a leg, so Ojibway shot the pony and ended its misery. Although he was following Indian custom, Ojibway was promptly charged with a violation of § 2 of the Small Birds Act (Rev. Stat. Ontario 1960, chap. 724, §2), which provides:

"Anyone maiming, injuring or killing small birds is guilty of an offence and subject to a fine not in excess of two hundred dollars."

The magistrate acquitted Ojibway, holding that “he had killed his horse, not a small bird,” and had not violated the Small Birds Act even though the pony had been fortuitously saddled with a feather pillow. The Crown, of course, appealed. And, Justice Blue of the Ontario Supreme Court reversed: In light of the Act’s definition of “bird”—“a two legged animal covered with feathers”—“there can be no doubt that this case is covered” by the Small Birds Act.

Justice Blue’s “well-reasoned” opinion first addressed “several ingenious arguments” raised by counsel for the accused: that even though the animal in question happened to be covered with feathers when shot, it was actually a pony and not a bird; that no bird could neigh like the pony; that the accused could not have ridden a bird, as he did the pony; and that no bird could wear horse shoes. These “ingenious arguments” were given Short Shift, Indeed:

"Counsel also contended that the neighing noise emitted by the animal could not possibly be produced by a bird. With respect, the sounds emitted by an animal are irrelevant to its nature, for a bird is no less a bird because it is silent."

"Counsel for the accused also argued that since there was evidence to show accused had ridden the animal, this pointed to the fact that it could not be a bird but was actually a pony. Obviously, this avoids the issue. The issue is not whether the animal was ridden or not, but whether it was shot or not, for to ride a pony or a bird is of no offence at all. I believe counsel now sees his mistake."

"Counsel contends that the iron shoes found on the animal decisively disqualify it from being a bird. I must inform counsel, however, that how an animal dresses is of no concern to this Court."

"Now, with the underbrush thus cleared, Justice Blue was able to dispose of the major issues: was the pony not covered by the Small Birds Act because either (the pony or the Act) were too large or because the pony had four legs:

"Counsel finally submits that the word ‘small’ in the title Small Birds Act refers not to ‘Birds’ but to ‘Act,’ making it The Small Act relating to Birds. With respect, counsel did not do his homework very well, for the Large Birds Act, R.S.O. 1960, c. 725, is just as large as the Small Loans Act, R.S.O. 1960, c.727, which is twice as large as the Large Birds Act."

"It remains then to state my reason for judgment which, simply, is as follows: Different things may take on the same meaning for different purposes. For the purpose of the Small Birds Act, all two-legged, feather-covered animals are birds. This, of course, does not imply that only two-legged animals qualify, for the legislative intent is to make two legs merely the minimum requirement. The statute therefore contemplated multi-legged animals with feathers as well. Counsel submits that having regard to the purpose of the statute only small animals ‘naturally covered’ with feathers could have been contemplated. However, had this been the October 1982 Texas Bar Journal 1345
intention of the legislature, I am certain that the phrase 'naturally covered' would have been expressly inserted just as 'Long' was inserted in the Longshoreman's Act.

"Therefore, a horse with feathers on its back must be deemed for the purposes of this Act to be a bird, and a fortiiori, a pony with feathers on its back is a small bird."

Ojibway's attorney tried to salvage the case with a rhetorical question: "If the pillow had been removed prior to the shooting, would the animal still be a bird?"

So, Judge Blue's opinion in Regina v. Ojibway ends with a rhetorical answer: "Is a bird any less of a bird without its feathers?"

Hon. Jerry Buchmeyer

1. This opinion is not officially reported, but it appears in 8 Criminal Law Quarterly 137 (Canada Law Book Co., 80 Cowdray Ct., Agincourt, Ontario). A couple of staff members of the Quarterly wrote the humorous opinion—and then the Editor decided to publish it without indicating that it was a joke.

2. And also the Code of the West; see any Grade B Western Movie (circa 1945-1951), particularly those starring Lash La Rue, Don "Red" Barry, or Bob Steele.

3. Ojibway's attorney also "relies on the decision in Re Chicadee, where he contends that in similar circumstances the accused was acquitted. However, this is a horse of a different colour. A close reading of that case indicates that the animal in question there was not small bird, but, in fact, a midget of a much larger species. Therefore, that case is inapplicable to our facts."

4. Regina v. Ojibway is cited, with Obvious Approval, in United States v. Byrnes, 644 F.2d 107, 112 at fn. 9 (2d Cir. 1981)—a marvelous opinion which is the Swan Song of Judge Mulligan of the Second Circuit (and which will be the subject of a future et cetera).

Buchmeyer's Book

A collection of Judge Buchmeyer's "et cetera" columns is available from the Dallas Bar Foundation. To obtain a copy of this assemblage of legal satire and wit, write the Dallas Bar Foundation, 2101 Ross Avenue, Dallas, TX 75201. The cost is $19.95 for the book, $1 tax, and $1.05 for postage and handling.

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