Working Paper 6

Safety, Courts and Crime
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In Australia annually 23 million working days are lost as a result of work-related injury and disease, a statistic that far exceeds lost time through strikes and other forms of industrial action. The costs to employers, workers and the community of workplace illness and injury is estimated at more than $20 billion each year.

Since the Factory and Shops Act 1885, the Victorian parliament has responded to this problem by enacting statutory standards regulating workplace hazards. These statutory standards have been enforced by a state inspectorate, which has used a variety of enforcement strategies ranging from informal methods, such as advice, persuasion, education and warnings, to formal invocation of the criminal law before the Magistrates' Courts (and since 1985, the County Court), as a last resort. Since the 1830s in Britain, and the 1880s in Australia, the Magistrates' Courts have played a major part in the process of examining, constructing and adjudicating all aspects of the OHS offences, particularly the determination of whether an offence has in fact been committed, and the level of punishment to be exacted.

Despite the importance of prosecution in an occupational health and safety (OHS) regulatory regime, and the disquiet at the clear inadequacies of prosecution of those contravening OHS statutes, there has been little research into the way in which the courts hear OHS prosecutions. This study aims to fill this gap, and to build my own study of OHS prosecutions in Victoria from 1885-1979. The paper reports on an empirically-based examination of the manner in which the Magistrates' Courts in Victoria, Australia, construct OHS issues when hearing prosecutions for offences under the OHS legislation (the Industrial Safety, Health and Welfare Act 1981 (Vic) (ISHWA) and the Occupational Health and Safety Act 1985 (Vic) (OSHA)). The study covered the period 1983-1999. The data was drawn from observations of prosecutions, interviews with inspectors,
prosecutors and magistrates, participant observation of inspectors and prosecutors, and
the statistical analysis of case reports.8

Introduction: The Legal Framework and Historical Approach to Enforcement

The traditional approach to OHS regulation

Since the Victorian Factory and Shops Act 1885, and in common with most of Europe
and North America, Australian state parliaments have responded to the problem of
workplace illness, injury and death by enacting statutory standards regulating certain
workplace hazards. Until the 1970s and 80s, these standards have been extremely detailed
and technical, focusing mainly on specifying machinery guarding measures to be adopted
to prevent injury to workers operating dangerous machinery. These statutory standards
have been enforced by state inspectorates, which have used a variety of enforcement
strategies ranging from informal methods, such as advice, persuasion, education and
warnings, to, as a last resort, formal invocation of the criminal law through prosecution.
Building upon the British model upon which they were based, these statutes relied on
magistrates’ courts as the primary venue for OHS prosecutions. Accordingly these courts,
at the lowest level of the Anglo-Australian court hierarchy, have played a major part in
the process of examining, constructing and adjudicating all aspects of the OHS offences,9
particularly the determination of whether an offence has in fact been committed, and the
level of punishment to be exacted.

A notable feature of the early history of Anglo-Australian OHS regulation was the
manner in which the OHS offences in the OHS statutes were tacked on to the existing
criminal justice system, without any consideration of whether the criminal justice system
and its procedures, which developed in pre-capitalist Britain to regulate the behaviour of
individuals, needed to be reconstructed to suit the requirements of an OHS regulatory
system aiming to regulate business organisations. A further tension was in the reliance of
the British Factories Acts from 1844,10 and all of the subsequent Victorian OHS statutes,
on strict liability obligations, which signalled to a magistracy steeped in traditional
criminal law notions of intention (mens rea) that OHS offences were not “real crime”.
This mindset, of course, mirrored the inspectorate’s historically developed views on the
“ambiguity” of OHS crime.

Elsewhere I have argued that the early Victorian OHS regulators were the heirs of a
particular form of OHS legislation, and an enforcement tradition, that stretched back to

8 Ibid chapter 1.
9 Since the 1980s higher-level courts, the intermediate level County Court of Victoria, and the Industrial
Relations Commission of New South Wales, have heard more serious OHS prosecutions in Victoria and New
South Wales respectively. Nevertheless, the vast majority of OHS prosecutions in Australia are still conducted
before magistrates.
10 See WG Carson, "The Conventionalisation of early Factory Crime" (1979) 7 International Journal of the
Sociology of Law 37, 53-54; W G Carson, "Hostages to History: Some Aspects of the Occupational Health
and Safety Debate in Historical Perspective" in W B Creighton and N Gunningham (eds) The Industrial
mid-nineteenth century Britain. Prosecution was infrequently used by an inspectorate, which followed strongly an approach of negotiated compliance through the use of education, advice and persuasion. Carson\textsuperscript{12} has vividly described this preference for informal action for detected contraventions as “the conventionalisation” of OHS crime, where offences “are accepted as customary, are rarely subject to criminal prosecution and, indeed, are often not regarded as really constituting crimes at all”. Further, he used the expression “ambiguity” of factory crime to describe the discontinuity between factory crime and “real crime”.\textsuperscript{13} This distinction between "crimes" and "quasi crimes" or "regulatory crimes" relies upon and reinforces popularly held assumptions about the centrality of the market as a private, autonomous arena in which social relations are governed by voluntary agreements between formally equal individuals, rather than by formal legal rules. The enforcement of OHS standards ultimately rests on the threshold of voluntary compliance within the marketplace, rather than on the threat of externally imposed legal sanctions, which are used as a last resort.\textsuperscript{14}

When prosecution was the favoured approach in Victoria, the statutory focus on requiring dangerous machines to be guarded meant that machinery guarding offences resulting in serious injuries were the most likely to go before the courts. The prosecution statistics in Victoria for the period 1885 to 1979 suggested that the ambiguity and conventionalisation of factory crime not only permeated the inspector's decision-making processes, but also proceedings before magistrates. Even though the maximum fines available for offences under the OHS provisions were very low during the period 1885 to 1979 (in 1979 the maximum fine was $2000), the fines imposed by the courts averaged 25 per cent of the maximum fine in the period 1900-1919, and between 10 and 15 per cent of the maxima in the following six decades.

\textbf{The Late Twentieth Century Reforms}

Reflecting the wave of OHS regulatory reform that swept through Australia from the mid-1970s, in 1985 the Victorian \textit{Occupational Health and Safety Act} (OHSA) was enacted, and replaced the traditional style \textit{Industrial Safety, Health and Welfare Act} 1981. Reflecting the British Robens Report,\textsuperscript{15} the OHSA enacted broad general duties on

- employers to employees and persons other than employees,
- self-employed persons,
- occupiers of workplaces,

\begin{flushleft}

\textsuperscript{12} W G Carson, "The Conventionalisation of early Factory Crime" (1979) 7 \textit{International Journal of the Sociology of Law} 37


\textsuperscript{15} \textit{Report of the Committee on Safety and Health at Work} 1970-72, HMSO, London, 1972
\end{flushleft}
designers erectors and installer of plant, and manufacturers, suppliers and importers of plant and substances; and
employees.

These general duties were “fleshed out” by regulations and codes of practice that initially simply reproduced the detailed technical machinery guarding and other standards in the old Factories and Shops and Labour and Industry Acts and regulations. Beginning in 1988, however, regulations and codes generally abandoned technical, detailed, specification standards, and instead used a mix of general duties of care, performance standards (where a goal or target was set, and the duty holder could decide how most effectively to meet the target) and process standards. The latter prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS generally. They generally set out hazard identification and risk identification, assessment and control procedures.

The OHSA also made provision for the election of OHS representatives and the introduction of OHS committees.\(^\text{16}\)

The OHSA gave OHS inspectors additional enforcement powers, in the form of improvement and prohibition notices, and made provision for the prosecution of directors and senior managers where a corporate offence against the OHSA was committed with their consent or connivance, or was attributable to their wilful neglect. The maximum penalties for offences were significantly increased to $25,000 for a corporation, and $5,000 for an individual. These maxima were increased to $40,000 and $10,000 respectively in 1990. In 1997 the maximum for contraventions committed by corporations was increased to $250,000. In addition, under the general sentencing legislation, courts were empowered to adjourn matters once the charges were proved, and, without convicting the defendant, require the defendant to be of a recognizance to be of good behaviour, and to fulfil other specified conditions, for a specified period. From 1991 courts were also able to impose fines without convicting the defendant.\(^\text{17}\)

It is notable that the general duties, particularly the employer’s duties, appear to be capable of broad interpretation, and in particular, could be interpreted to require courts to examine all aspects of the work process in determining whether an employer has complied with the duty.\(^\text{18}\) Further, the OHS offences differ from “the typical” crime, in that they are “inchoate” offences, because they require no specific harm to be proven, but rather contemplate the possibility or risk of harm.\(^\text{19}\) In other words, whether a system of work is safe and without risks to health is an objective question of fact, and does not require proof of an injury. These duties are also examples of the way in which contemporary regulatory law relies on a mix of constitutive and constraining regulation

\(^{16}\) OHSA Part IV.

\(^{17}\) Sentencing Act 1991 (Vic) ss 7(f) and 8.


\(^{19}\) R v Australian Char Pty Ltd (1996) 64 IR 387 at 400; and Haynes v C I and D Manufacturing Pty Ltd (1995) 60 IR 149 at 158.
to achieve its ends. Constitutive regulation is a form of regulatory law which attempts to use legal norms to constitute structures, procedures and routines which are required to be adopted and internalised by regulated organisations, so that these structures, procedures and routines become part of the normal operating activities of the organisation. The aim is for legal norms to infiltrate deep into the organisation to require the organisation, and the individuals within it, to act responsibly. Where this fails, the law has the option of intervening more overtly, through external regulation and sanctions (restraining regulation).

In principle, then, the OHSA had the potential to mandate that employers and other duty holders adopt and implement the key principles of effective OHS management, which are generally agreed to be:

- demonstrated senior management commitment to OHS;
- the integration of OHS management into core management and work activities;
- the adoption of a systems approach to OHS management, involving risk assessment processes and an audit system to identify all risks and to determine which require urgent attention;
- the ability of the OHS management system to accommodate to change, particularly changes to work methods, systems and processes, changes to substances, plant and equipment, and changes to the workforce; and
- valuing worker input to the OHS management system.

How did the Victorian OHS inspectorate use its enforcement powers to enforce these potentially broad provisions?

The Enforcement of the OHSA

The study of OHS enforcement in Victoria from 1983 to 1999 confirms that the contemporary Victorian OHS inspectorate, consistent with all of the other Australian OHS inspectorates, has continued the British tradition of enforcement through persuasion, advice and education. Table 1 provides data from the Victorian inspectorate’s annual reports in relation to the OHSA. Only in a small proportion of visits were improvement and prohibition notices issued. Even then, improvement and prohibition notices far outnumbered prosecutions.

Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Inspection Visits</th>
<th>Written Observations</th>
<th>Improvement Notices</th>
<th>Prohibition Notices</th>
<th>Cases Prosecuted</th>
</tr>
</thead>
</table>


22 These figures only include the number of cases brought, not the total number of informations issued.
<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
<th>N/A</th>
<th>Violations</th>
<th>Fines</th>
<th>Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987/8</td>
<td>20307</td>
<td>N/A</td>
<td>1358</td>
<td>350</td>
<td>45</td>
</tr>
<tr>
<td>1988/9</td>
<td>11597</td>
<td>2878</td>
<td>1421</td>
<td>337</td>
<td>42</td>
</tr>
<tr>
<td>1989/90</td>
<td>16331</td>
<td>3177</td>
<td>2375</td>
<td>1034</td>
<td>45</td>
</tr>
<tr>
<td>1990/91</td>
<td>36868</td>
<td>N/A</td>
<td>3343</td>
<td>1647</td>
<td>76</td>
</tr>
<tr>
<td>1991/2</td>
<td>45363</td>
<td>N/A</td>
<td>3012</td>
<td>1655</td>
<td>119</td>
</tr>
<tr>
<td>1992/3</td>
<td>58746</td>
<td>2777</td>
<td>2851</td>
<td>1004</td>
<td>68</td>
</tr>
<tr>
<td>1993/4</td>
<td>70208</td>
<td>1586</td>
<td>1798</td>
<td>870</td>
<td>64</td>
</tr>
<tr>
<td>1994/5</td>
<td>48374</td>
<td>N/A</td>
<td>1481</td>
<td>822</td>
<td>64</td>
</tr>
<tr>
<td>1995/6</td>
<td>44661</td>
<td>N/A</td>
<td>2001</td>
<td>975</td>
<td>76</td>
</tr>
<tr>
<td>1996/7</td>
<td>44703</td>
<td>2281</td>
<td>3219</td>
<td>1040</td>
<td>57</td>
</tr>
<tr>
<td>1997/8</td>
<td>N/A</td>
<td>2569</td>
<td>3410</td>
<td>1242</td>
<td>84</td>
</tr>
<tr>
<td>1998/9</td>
<td>N/A</td>
<td>N/A</td>
<td>1735</td>
<td>1059</td>
<td>78</td>
</tr>
</tbody>
</table>

Sources: Annual Reports and Industry Commission, 1994, Tables J8, J11, J12 and J20, and Industry Commission, 1995, Tables M17, M19, M22 and M23. Where there were differences in the data, the figure in the Annual Report was preferred. This table was first prepared for publication in R Johnstone, Safety, Courts and Crime, Federation Press, Sydney, in press.

This enforcement profile reflected the Victorian OHS inspectorate’s 1985 Prosecution Guidelines, which were operative until the end of 1997. The guidelines specified that the "principal instruments" to ensure compliance with the OHSA were to be improvement and prohibition notices. If alleged offences could be remedied by the use of notices, "further legal proceedings will not be instituted in the Courts." A failure to comply with a notice "will be viewed as a serious matter" and would generally lead to prosecution. The guidelines set out six other circumstances in which prosecutions will generally be taken:

(i) Where the alleged breach has resulted in a fatality or "serious accident";
(ii) The wilful repetition of the same offence;
(iii) Non-compliance with a Provisional Improvement Notice;
(iv) Offences in relation to inspectors under section 42;
(v) Discrimination against an employee under section 54; and
(vi) "Where the issue of notices is not considered appropriate for ensuring compliance..."23

Not only did these guidelines institutionalise the inspectorate's longstanding practice of pursuing an enforcement strategy which resorted to prosecution as a last resort, but the

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23 The 1990 Prosecution Policy (see below) interpreted this sixth limb to include prosecutions for serious incidents with the potential for causing death and injury. See Creighton and Rozen, 1997: 116.
focus of the guidelines on prosecution for breaches resulting in fatalities and "serious accidents" institutionalised the event-focused nature of prosecution. The inspector's attention was immediately drawn away from an examination of the broader context of the event, generally the system of work, to focus on the details of the event itself. From 1983 to 1999, 87 per cent of OHS prosecutions conducted in Victoria were the result of an injury or fatality. Interestingly, in the period 1983-1991 only 21 of the 594 cases (under 4 per cent) prosecuted involved a fatality. The vast majority of cases prosecuted (67 per cent) involved incidents where fingers or hands were amputated, lacerated or otherwise injured. In the period 1992-1999 just over 20 per cent of cases prosecuted involved fatalities. About 30 per cent of cases involved hand injuries and there were far more prosecutions for burns (6 per cent) and harm from chemical exposure (2 per cent).

Turning to the types of matters prosecuted, in the 1980s about 90 per cent of cases prosecuted involved injuries or fatalities which took place on machines. Not surprisingly, in about 75 per cent of cases prosecutions were taken under the machinery guarding provisions. In addition, the majority of general duty prosecutions were also machinery guarding cases. The majority of the remainder of cases were prosecutions for failure to report accidents to the inspectorate. What would explain this prosecution profile? Until the 1980s the inspectorate was traditionally recruited from male engineering sector apprentices, whose worked revolved around machinery. The traditional regulatory focus, as noted earlier, had also been on dangerous machinery, and the result was that a significant focus of the enforcement culture was on dangerous machinery.

In the 1990s, the vast majority of prosecutions (about 90 per cent) have been taken under the employers’ general duty to employees. Nevertheless, even after the recruitment of new inspectors, including women, from a wider range of occupations, and a concerted attempt to broaden the range of prosecutions to include non-machinery issues, still about 40 per cent of cases up until the end of 1999 involved machinery guarding. The two types of prosecution that increased the most during the 1990s were falls (mainly in the construction industry) (15 per cent), workers being hit by flying objects (8 per cent), electrical hazards (5 per cent), explosions (4 per cent) and exposure to chemicals (4 per cent). This approach to prosecution had significant gender implications. In a sample of 100 cases in the period 1997-98, in 84 per cent of cases the injured person was male, in 6 per cent of cases at least one of the injured persons was a woman, and in 10 per cent of cases, there was no injury. In the six cases where a woman was injured, four involved injuries on machines. This data suggests that OHS enforcement is skewed towards hazards that affect men, rather than women. Jamieson’s research in New South Wales yielded an even bleaker finding: in 1996, 24 out of 228 cases (10.52 per cent) prosecuted in New South Wales involved a woman as an injured person, and in 1997, 63 out of 510 (12.32 per cent).

Further, 85 per cent of defendants have been corporations, the remainder comprising individual proprietors, partners, workers and corporate officers. Despite the possibility of

prosecuting general duty prosecutions in the next level of Victorian court, the County Court, in the vast majority of cases, the parties chose to have prosecutions heard before a magistrate. Until 1991 there were only two cases where prosecutions were conducted before the County Court. Since then the number has increased marginally, so that in recent years nearly half a dozen cases are conducted each year before the County Court. A couple of cases, including the prosecution of ESSO Pty Ltd in 2001 as a result of a major gas explosion at the ESSO Longford plant, have been prosecuted in the Supreme Court. In addition, it should be noted that the vast majority of defendants plead guilty to OHS offences in the magistrates' courts. For example, from 1990 to 1998 of the pleas entered during that period, 83 per cent were guilty pleas. The matter then usually proceeded by the prosecutor giving an event focused summary of the facts from the bar table.

This prosecution profile suggests that the typical OHS prosecution in Victoria is the result of a serious injury to a male worker, involving inadequately guarded machinery, or a fall from height in construction work. It involves a plea of guilty in proceedings before magistrate, where evidence of the contraventions was provided through the prosecutor’s summary from the bar table of the circumstances surrounding the incident. In the vast majority of cases, the court found the charges proved. The central issue was, then, the penalties imposed by the courts.

The Sentencing Process

The Victorian OHS statutes left the courts with a broad discretion to determine the appropriate penalty for an OHS prosecution. The only significant limit was the maximum penalty, and the usual sentencing principles developed by the courts. Given the Anglo-Australian tradition of limiting the role of the prosecutor in the sentencing process to raising the appropriate sentencing principles, and testing sentencing facts raised by defendants, defence counsel tended to control sentencing proceedings. The research showed that the most commonly raised factors were the defendant's safety record, attitude to safety, and co-operation; the role in the accident of the worker or other workers; the suggestion that the inspectorate had overlooked the hazard in a previous visit; the fact that the accident occurred in unusual or unforeseeable circumstances; and the fact that after the accident the defendant looked after the injured person and/or remedied the hazard. What De Prez observes in relation to environmental prosecutions in Britain, is also true of OHS prosecutions in Victoria, namely that the

choice of terminology and style of mitigation surely demonstrates ... what the legal profession and its clients have assumed to be most likely to influence the bench. ... Such arguments are therefore clearly important in analysis of the social construction of these offences, for they are designed to refute and neutralize the criminalisation of the defendant’s activities. ... The defence, therefore, have the upper hand in being able to reinforce their favoured view of environmental offences.

How successful were these strategies? Table 2 outlines the range of sentencing outcomes imposed by magistrates from 1983 to 1999 on defendants once charges under the *Industrial Safety Health and Welfare Act* 1981 and *OHSA* had been proved. The table shows the number of informations adjourned without conviction with the defendant placed upon a recognizance to be of good behaviour (and occasionally required to make a payment into the court box or to a charity of the magistrate's choice), the number of fines without conviction (only available to the court after 1992), the number of recorded convictions, and the average fine for offences under each of the *ISHWA* and *OHSA* during the period of this study. The table also expresses the annual average fine in terms of a percentage of the maximum available fines.

**Table 2**


<table>
<thead>
<tr>
<th>Year and Act</th>
<th>Good behaviour bond (GBB)</th>
<th>GBB and payment into court</th>
<th>Fine without conviction</th>
<th>Total convictions</th>
<th>Total charges proved</th>
<th>Average fine</th>
<th>Percentage of maximum fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983 (I)</td>
<td>10</td>
<td>3</td>
<td>-</td>
<td>66</td>
<td>79</td>
<td>$294.32</td>
<td>14.45%</td>
</tr>
<tr>
<td>1984 (I)</td>
<td>17</td>
<td>5</td>
<td>-</td>
<td>62</td>
<td>84</td>
<td>$367.58</td>
<td>19.19%</td>
</tr>
<tr>
<td>1985 (I)</td>
<td>10</td>
<td>13</td>
<td>-</td>
<td>111</td>
<td>134</td>
<td>$426.04</td>
<td>21.96%</td>
</tr>
<tr>
<td>1986 (I)</td>
<td>8</td>
<td>1</td>
<td>-</td>
<td>90</td>
<td>99</td>
<td>$402.56</td>
<td>20.94%</td>
</tr>
<tr>
<td>1986 (O)</td>
<td>11</td>
<td>2</td>
<td>-</td>
<td>11</td>
<td>24</td>
<td>$1368.18</td>
<td>10.27%</td>
</tr>
<tr>
<td>1987 (I)</td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1987 (O)</td>
<td>14</td>
<td>11</td>
<td>-</td>
<td>56</td>
<td>81</td>
<td>$956.61</td>
<td>7.29%</td>
</tr>
<tr>
<td>1988 (I)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>$500.00</td>
<td>25.00%</td>
</tr>
<tr>
<td>1988 (O)</td>
<td>5</td>
<td>1</td>
<td>-</td>
<td>43</td>
<td>49</td>
<td>$2046.00</td>
<td>9.63%</td>
</tr>
<tr>
<td>1989 (O)</td>
<td>15</td>
<td>5</td>
<td>-</td>
<td>53</td>
<td>73</td>
<td>$2181.13</td>
<td>13.28%</td>
</tr>
<tr>
<td>1990 (O)</td>
<td>2</td>
<td>7</td>
<td>-</td>
<td>96</td>
<td>105</td>
<td>$2835.94</td>
<td>22.92%</td>
</tr>
<tr>
<td>1991 (O)</td>
<td>4</td>
<td>3</td>
<td>-</td>
<td>147</td>
<td>154</td>
<td>$3659.86</td>
<td>31.03%</td>
</tr>
<tr>
<td>1992(O)</td>
<td>3</td>
<td>1</td>
<td>-</td>
<td>109</td>
<td>113</td>
<td>$4248.17</td>
<td>25.5%</td>
</tr>
<tr>
<td>1993(O)</td>
<td>-</td>
<td>-</td>
<td>6</td>
<td>68</td>
<td>74</td>
<td>$6037.82</td>
<td>29.0%</td>
</tr>
<tr>
<td>1994(O)</td>
<td>4</td>
<td>1</td>
<td>6</td>
<td>75</td>
<td>86</td>
<td>$7808.41</td>
<td>22.4%</td>
</tr>
<tr>
<td>1995(O)</td>
<td>2</td>
<td>6</td>
<td>10</td>
<td>84</td>
<td>102</td>
<td>$6585.07</td>
<td>19.7%</td>
</tr>
<tr>
<td>1996(O)</td>
<td>1</td>
<td>3</td>
<td>8</td>
<td>89</td>
<td>101</td>
<td>$7793.26</td>
<td>20.9%</td>
</tr>
<tr>
<td>1997(O)</td>
<td>1</td>
<td>4</td>
<td>6</td>
<td>88</td>
<td>99</td>
<td>$7954.56</td>
<td>21.1%</td>
</tr>
<tr>
<td>1998(O)</td>
<td>-</td>
<td>-</td>
<td>19</td>
<td>73</td>
<td>92</td>
<td>$8123.29</td>
<td>20.9%</td>
</tr>
<tr>
<td>1999(O)</td>
<td>2</td>
<td>-</td>
<td>17</td>
<td>101</td>
<td>120</td>
<td>$14 673.27</td>
<td>26.7%</td>
</tr>
<tr>
<td>Total</td>
<td>111</td>
<td>66</td>
<td>72</td>
<td>1423</td>
<td>1669</td>
<td></td>
<td>21.6%</td>
</tr>
</tbody>
</table>

This table was first prepared for publication in R Johnstone, *Safety, Courts and Crime*, Federation Press, Sydney, in press.

Table 2 shows that where the charges were proved in prosecutions under the *ISHWA* and *OHSA* a conviction and fine was imposed in just over 85 per cent of charges. The average fine over the period of the study was just over 21 per cent of the maximum available fine.

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27 Prosecutions under the *ISHWA* are denoted by (I), and under the *OHSA* by (O).
The percentage of cases resulting in good behaviour bonds from 1983 to 1992 was just over 17 per cent, and over the whole study it was 10 per cent. Given that prosecutions were only launched for what the inspectorate considered to be the most serious cases, and that sentencing law stated that good behaviour bonds were not an appropriate form of disposition for offences under the OHS legislation involving serious injury, the number of charges resulting in good behaviour bonds would seem to be remarkably high. If fines without conviction are included in the analysis, the percentage of cases over the entire study where charges are proved but the defendant is given a disposition which does not involve a conviction is just under 15 per cent. Table 2 suggests that fines without conviction are replacing good behaviour bonds as the disposition magistrates prefer to use to express their ambivalence about the true “criminality” of OHS offences. In the period 1993 to 1999 fines without conviction were imposed in just over 10 per cent of cases where charges were proved.

Clearly magistrates’ ambivalence about the criminality of OHS prosecutions influenced their approach to sentencing. But there was far more to the sentencing process than simply an expression of taken-for-granted ideas, or deep-seated ideologies, about corporate crime.

The Dynamics of Sentencing, and “Pulverisation”

In his study of OHS in the North Sea, Mathiesen noted that "when lives are lost, fundamental questions concerning the activity ... are often raised" by "conditions which were earlier seen as isolated being placed in relation to each other", for example the relationship between the profit motive and the lack of safety measures or the pace of oil extraction/coal mining. For example, sociological explanations, focusing on the work process and the organisation of work, raise these issues in relation to most OHS issues. As Mathiesen notes, when many people perceive such a totality or context, the activity itself begins to be threatened. It then "becomes important for the representatives of the activity to pulverize the relationships which people begin to see." An effective method of pulverizing revealing relationships is to isolate the event which was the point of departure from the rest of the activity of which the event is part - to "cut the event out of the fabric in which it exists". Just as Mathiesen demonstrates that politicians and businesspeople

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engage in this process in response to macro workplace disasters, so I argue that the sentencing process plays a similar role in OHS prosecutions.

Three samples (1986-87, 1990-91 and 1997-98) of 200 cases prosecuted in Victoria provide strong evidence that during OHS prosecutions, the offences and the facts which constitute them are decontextualised or ripped out of the fabric within which they are embedded. Mathiesen describes a number of "isolation techniques" that can be used to fulfil this purpose, and I have adapted these to show how pulverisation principally takes place in the sentencing process, through arguments raised by defence counsel.

(a) The Splintering of the Event

The most important isolation technique is to split up or splinter the event. It is isolated from its context by "splitting or dividing the event into its more or less free-swimming and unrelated bits and pieces". By splitting up the event, the context within which the event has occurred fades and recedes into the background at the expense of the unrelated questions of detail which are in focus. As demonstrated earlier in this paper, the OHS prosecution process institutionalises this splintering of the event into minor details, because it invariably focuses on a particular incident giving rise to an injury or fatality. The prosecution procedures and practices institutionalise this splintering of the event into minor details, because invariably there was a focus on an event leading to injury or death. In all of the 1980s prosecutions involving machinery guarding the court focused in minute detail on the technical aspects of whether or not there was a guard, how it worked, what the worker did, and so on. This in turn facilitated scrutiny of factors which were irrelevant to the offence, such as the injured or deceased worker's behaviour in the events leading up to the incident, a particular malfunction, or the problems faced by the employer at a particular time.

A 1988 Victorian Supreme Court case further narrowed the possible use of the employer’s general duty to employees in section 21 of the OHSA. Section 21(1) sets out the general duty, and section 21(2) purports, in five paragraphs (a) to (e), to provide illustrations of the general duty. The Court held that section 21(1) did not create a continuing offence of allowing to subsist a particular proscribed environment, but rather created a large number of offences (sections 21(2)(a)-(e)) each consisting of some identifiable act or omission which constituted a failure to comply with the general duty of care. The case was decided in the context of the rule against duplicity - an information setting out charges against a defendant may not include more than one offence. Consequently no single information could include more than one of the matters listed in section 21(2) of the OHSA, which hitherto had been seen as merely providing examples of the operation of the overall general duty. In other words, the ruling effectively prevented a single information specifying an all encompassing offence of establishing a dangerous work process. Importantly, the case not only decontextualised each resulting offence by limiting the elements that need to be proved to found the offence, but it also

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facilitated the splintering of the different aspects of the work process, so that they are seen as discrete items.

(b) **Blameshifting**

A major consequence of splintering was the close scrutiny of the details of the event, which in turn almost inevitably led to an analysis of culpability based on individualistic notions of causation and the allocation of blame. There were a number of blameshifting techniques used.

The most common was to *blame the worker*. When I interviewed magistrates about OHS prosecutions in 1988, each indicated that the moral culpability of an employer for an offence would be reduced if there was evidence that the worker had contributed to the accident. This factor was often used in mitigation by defence counsel, despite the fact that the alleged carelessness of the employee has very little to do with the offence of failing to provide a safe workplace.

Another frequently used blameshifting technique was to transfer the blame onto the state - in the guise of the inspectorate. In mitigation a common factor raised was that the inspectorate had previously inspected the plant without commenting on the hazard under scrutiny. This argument is deeply rooted in dominant ideologies about the role of the state in the prevention of workplace illness and injury. A third blameshifting technique argued in mitigation that the supplier of plant and equipment had, for example, supplied the employer with unsafe equipment and was, therefore, responsible for the hazard, rather than the employer.

(c) **The Good Corporate Citizen**

The most basic and widespread plea in mitigation was that the defendant had an excellent safety record and an exemplary attitude to safety, so that the defendant was portrayed as a "responsible" company or person. The plea turned the court's attention away from the event itself, and away from the organisation of work, to concentrate on the reputation and attitude of the defendant. It was clear that magistrates accepted that the employer's "good record" (usually meaning that they had no, or very few, previous work related illnesses or injuries) was an important factor in reducing the defendant’s culpability. Most defence counsel in the sampled cases had no difficulty in painting their clients as responsible organisations. Virtually every plea in mitigation involved the defendant claiming a good safety record, and a good attitude to safety.

(d) **Individualising the Event**

Fourth, as Mathiesen points out, the event may be individualised, by making it into "something unique, something incomparable, something quite special, individual, atypical." Such a presentation ensures that far reaching conclusions or generalisations cannot be drawn from the event, because it is far too exceptional, unique or abnormal. For example, workplace injuries can be typified as "freak accidents", "catastrophes" or
"tragedies", signifying that the event is something unusual and unexpected, because, in the words of Mathiessen, “if one all the time had to expect tragedies, the activity as a whole ... would ... not be initiated in the first place." Further, if an event is unusual, both the severity of the contravention itself, and the culpability of the defendant must be reduced, and hence there is less need for the sentencing court to be concerned with punishment, rehabilitation or deterrence. This plea was usually built onto a "good corporate citizen" plea, to emphasise the unusual nature of the incident giving rise to prosecution. In other words, the defendant tried to show that usually it had an unblemished approach to OHS, but that on this particular occasion the exceptional had occurred. An important aspect of the technique was that there be highly detailed scrutiny of the event, without any reference to a systematic management approach to OHS. By focusing on the event, and not the underlying system, defence counsel was able to argue that the exact circumstances of the event were unforeseeable, rather than allowing the situation to be portrayed as one where the focus was on the system, in which case the fact that there would be resulting injuries or illnesses would be foreseeable.

In Victoria a classic example of this isolation technique was the Simsmetal prosecution in the Victorian County Court.32 The charges arose out of an incident in which one of the company's furnaces exploded, killing four workers, and severely injuring another seven. The explosion occurred because the company's chemical handling procedures were so defective that sodium nitrate was stored in unlabeled bags in a shed in which potassium chloride was usually stored. A forklift driver transported the sodium nitrate to the smelter believing it be potassium chloride, an accepted and safe fluxing agent. The court, in sentencing, referred to the storage of sodium nitrate in the shed as "evil chance" and the mix up as the "intervention of malevolent chance". The explosion was portrayed as being the result of bad luck, rather than the inevitable consequence of bad work procedures and practices.

(e) Isolating the Present from the Past and Future

Fifth, Mathiesen argues that to form a total or over-all understanding of an event, it is important to perceive the past, present, and future of the event. A total perspective is avoided by isolating the past, the present, and the future of the event from each other. The previous isolation techniques illustrate how this is done - if the event is split up, the past and contextual present are removed from the analysis. If the event is individualised, the event's past is replaced by the mythical past contained in the "good record" and "good attitude".

In sentencing pleas, defence counsel often isolated the event in the present. For example, often maximum emphasis was placed on the human or humanitarian aspects of the case in the present, by asserting that the employer has looked after the injured worker. In the sampled cases examples ranged from taking the worker to hospital after the injury, visiting the worker in hospital, re-employing the worker afterward, assisting with the worker’s rehabilitation and so on. In virtually every case a key factor in mitigation was

32 R v Simsmetal Limited, unreported, County Court of Victoria (Villeneuve-Smith J), Melbourne, 9 March 1989.
that after the incident and before the prosecution proceedings the employer had rectified
the situation, for example the employer had guarded the machine as required by the
inspectorate. As one magistrate commented to me in an interview, "the courts have to
give credit to people who have done the right thing."

Another isolation technique involved isolating the event from its context by relegating it
more or less to an outmoded past. This is an extremely common mitigating technique,
and was usually always accepted by the court. Examples included assertions that the
company had replaced the offending machine, had engaged a new management team, or
had employed an OHS consultant, since the "accident", or had introduced a new OHS
program. The suggestion was that the old work method is old fashioned. By relegating
the event to an outmoded past, the event was made untransferable to other parts of the
work process.

(f) Anthropomorphising the Defendant

Even though some defendants relied heavily on the corporate veil to reduce the impact of
prior convictions on the assessment of penalty in the particular case, in many other cases
a tactic used by the defendant was to fuse the characteristics of the personnel running the
 corporation with the corporation itself, so that the corporate defendant could result the
exculpating benefit of the admirable human characteristics of its management or
directorship. On other occasions, defence counsel gave the corporation human
characteristics and qualities, to ensure that the fictional corporate entity received the
benefits of a sentencing system which had developed around an assessment of the
character of the human defendant.

For example, defence counsel were sometimes careful to ensure that the court was aware
of the defendant corporation's role in the community - its charitable works and so on. On
other occasions, the awards received by personnel within the corporation were attributed
to the corporation. Sometimes the fact that the managing director was hard working and
concerned for the welfare of workers was raised as a factor. On one extraordinary
occasion in 1986, defence counsel referred to the fact that the managing director's
daughter was a member of the Victorian bar, and obviously respectable and law abiding.

These, then, are the isolation techniques, used by defence counsel to transform and
individualise the already decontextualised event in the sentencing process. Victorian
OHS prosecutors gradually developed strategies to counter these arguments, but were
never able to fully prevent the transformation of the issues.

The Development of OHS Sentencing Principles in Victoria and the Isolation
Techniques

One strategy was for the prosecutor to play a greater role in sentencing, primarily by
ensuring that their summaries from the bar table outlined defects in overall system of
work, and provided as much context as possible. They also made greater use of their right
to challenge the submissions put to the court by the defendant, and to emphasise the
sentencing principles that had been developed by the courts. To support this strategy, the inspectorate sought to ensure that inspectors collected relevant sentencing material (such as evidence of contraventions discovered, and action taken, during previous visits, and the defendant’s accident record) during their investigations. There was also much evidence that as the OHS inspectorate’s competence in investigation improved during the 1990s, the sentencing outcomes improved.

It was also clear that, over time, magistrates became hardened to the mitigating factors raised by defendants, particularly the blaming-shifting arguments, and unsubstantiated assertions of good corporate citizenship.

This section of the paper analyses the sentencing principles developed by the County Court of Victoria during the period 1989 to 1999, to investigate whether these sentencing principles in any way countered to isolation techniques outlined in the previous section of the paper.

The first County Court case to establish sentencing principles for OHS prosecutions was *R v Simsmetal Limited*, the first case taken to the County Court on indictment. The court recognised that, in sentencing, it must give effect to the clear legislative intent set out in the *OHSA*, including its objects in section 6. The court stated that “the aspect of deterrence, even if it is thought in this context somewhat artificial, is the one most likely to promote and enhance the reason d’etre for the legislation …” The maximum penalties, however, were traditionally reserved for the worst offending, that is to say

> those who behave with deliberate, wilful or reckless disregard for the safety of others, and for those whose conduct had in the past attracted prior convictions and punishment, and who were still offending nevertheless.

This principle is interesting because, despite the fact that the OHS offences are absolute or strict liability offences qualified by “practicability”, for sentencing to approach the maxima, some *mens rea* in a traditional sense was required. The court also countenanced that a defendant should have a proven criminal record before heavy

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33 Together with a few cases decided by the Supreme Court of Victoria.
34 The New South Wales Industrial Relations Commission has also developed OHS sentencing principles, but these are only considered in passing in this paper.
35 *Unreported, County Court of Victoria (Villeneuve-Smith J), 9 March 1989.*
36 *See also DPP v Ancon Travel Towers Pty Ltd*, unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998 at 8, where Judge Mullaly notes that the objects clause “reveals a preventative focus”; and *Datsparres Toyaparts Pty Ltd v DPP*, unreported, County Court of Victoria (Judge Walsh), 12 May 1999.
37 *Ibid.* See also *Pacific Dunlop Limited v Ian Camburn*, unreported, County Court of Victoria (Nixon J), 21 January 1994; *R v Natra Pty Ltd*, unreported, County Court of Victoria (Judge Nixon), 27 June 1995; *DPP v Feltonhouse Holdings Pty Ltd*, unreported, County Court of Victoria (Judge Harbison), 11 June 1996; *R v Abbe Corrugated Pty Ltd, R v John O’Sullivan*, unreported, County Court of Victoria (White J), 12 December 1997; and *R v Tormey*, unreported, County Court of Victoria (Morrow J), 5 September 1995.
38 *R v Simsmetal* at 10.
39 See *WorkCover Authority of NSW (Insp Gordon) v Shortland Electricity*, unreported, 5 May 1995, Industrial Court of New South Wales, where Marks J at 12 observed that the maximum fine is reserved for cases involving "...blatant, wilful or reckless disregard of obligations under the Act."
penalties would be imposed, even though the OHSA in section 53 makes express provision for additional fines for repeat offenders.\textsuperscript{40} The court stated that it had to balance the factors raised by counsel to determine the penalty, which included many of the traditional isolation techniques (in this case the good corporate citizen, individualization and isolation in the present techniques). The court acknowledged the difficulty of trying to balance up these factors, a task made even more difficult by the fact that the defendant was a corporation.

From time to time corporations were vested by law with the status of legal personae, difficulties having been experienced in satisfactorily fitting them into the scheme of things, more especially in relation to criminal law and punishment. Anomalies and artificialities tend to arise and proliferate in the world of the artificial.\textsuperscript{41}

Finally the court noted that guilty pleas, “which reflect the concern and dismay of those who guide the affairs of the company at the occurrence of the disaster, and which exhibit an appropriate reaction to it”, are a factor in mitigation of sentence.\textsuperscript{42}

A year later, in \textit{R v Wiltshire and Rattray Haynes Industries Pty Ltd}\textsuperscript{43} the County Court accepted that the "Act is intended to be strict and tough." A sentence had to be imposed to reflect the serious nature of the breach, and to prevent [the defendant] from falling short of safety standards and also, a sentence which will serve to deter other employers from risking the health and safety of other employers.\textsuperscript{44}

The financial difficulties experienced by the defendant was an issue to be dealt with by an application for further time to pay the fine. The issue was not considered in the context of the level of penalty itself. Finally, the court accepted that a further mitigating factor was the remorse and distress of those involved in the incident.\textsuperscript{45} Once again, the court uncritically accepted a number of isolation techniques, particularly the good corporate citizen and the "anthropomorphisation" process (“the genuine distress expressed by the owner of the company”).

Subsequent decisions have built upon the principles established in these two cases.\textsuperscript{46}

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\textsuperscript{40} But see \textit{R v Civil and Civic Pty Ltd}, unreported, County Court of Victoria (Crossley J), 15 December 1992, discussed below.

\textsuperscript{41} \textit{R v Simsmetal at 11.}

\textsuperscript{42} See also \textit{DPP v Ancon Travel Towers Pty Ltd}, unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998; \textit{Pacific Dunlop Limited v Ian Camburn}, unreported, County Court of Victoria (Nixon J) 21 January 1994.

\textsuperscript{43} Unreported, County Court of Victoria, Criminal Jurisdiction, (Dee J), 29 November 1990.

\textsuperscript{44} \textit{Ibid 3. The importance of deterrence was also emphasised in \textit{DPP v Pacific Dunlop Tyres Pty. Ltd. and Goodyear Tyres Pty. Ltd., trading as South Pacific Tyres}, unreported, County Court of Victoria (Fricke J), 22 November 1991 at 41-42.}

\textsuperscript{45} See also \textit{R v AC Hatrick Chemicals Pty Ltd & Ors}, unreported, Supreme Court of Victoria, Criminal Division (Hampel J), 8 December, 1995. In \textit{DPP v Feltourn Holdings Pty Ltd}, unreported, County Court of Victoria, 11 June 1996 Judge Harbison noted that a guilty plea saved the court time in dealing with what were otherwise notoriously time-consuming and expensive OHS prosecutions.

\textsuperscript{46} For a discussion of sentencing principles in New South Wales, see W Thompson, \textit{Understanding New South Wales Occupational Health and Safety Legislation}, 3\textsuperscript{rd} ed, Sydney: CCH, 2001: 53-64.
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v Ancon Travel Towers Pty Ltd,\(^{47}\) which was the most significant sentencing decision in the late 1990s in Victoria,\(^{48}\) Mullaly J confirmed that “deterrence, both general and specific, is the principal purpose that must be served by a penalty imposed for an offence under the [OHS].” Yet the courts seem unable to state with precision the purpose of sentencing. For example, in \textit{R v AC Hatrick Chemicals Pty Ltd},\(^{49}\) the Supreme Court accepted that the main sentencing consideration in the OHSA is “general deterrence”, which must be balanced against other factors, such as the “rehabilitation” of the company, in the sense of the development of further safety systems and methods for supervision and enforcement.

As \textit{Simmsmetal} shows, the courts since 1989 have been careful to stress that the OHS offences are serious criminal offences.\(^{50}\) Some judges have been mindful of the differences between OHS crime and other criminal offences. For example, Rizkalla J in \textit{Singleton v Fletcher Construction Australia Ltd},\(^{51}\) remarked that the OHSA’s “emphasis on prevention, and the role of enforcement procedures in securing prevention, does distinguish the sentencing process in these matters, from those in the ordinary criminal jurisdiction”.\(^{52}\) One example of the courts tailoring sentencing principles to OHS offences might be found in \textit{WorkCover Authority of NSW v Waugh}\(^{53}\) where the Full Court of the Industrial Court of New South Wales stated that:

> When considering a statute giving expression as a matter of public policy to standards of safety, management has a positive obligation of informing itself of circumstances of safe working. ... The Act and commonsense require that managements who employ persons daily in an admittedly dangerous industry do know elementary facts about guarding dangerous parts of machines and safe working. Ignorance of this kind is not only not an excuse, it amounts to an aggravation of the offence.

Yet apart from these occasional statements which recognize the atypical elements of OHS offences when compared to traditional criminal offences, the sentencing principles

\(^{47}\) Unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998, at 11.
\(^{48}\) See, for example, \textit{Singleton (VWA) v Fletcher Construction Australia Ltd}, unreported, County Court of Victoria (Rizkalla J), 26 February 1999, where Rizkalla J accepts that Ancon sets out the relevant sentencing principles. See also \textit{Akan Packaging Pty Ltd v Arnott}, unreported, County Court of Victoria (Judge White), 18 June 1999 and \textit{R v Natra Pty Ltd}, unreported, County Court of Victoria (Judge Barnett), 6 July 1999
\(^{49}\) Unreported, Supreme Court of Victoria, Criminal Division (Hampel J), 8 December, 1995 at 5 and 6. See also \textit{DPP v Pacific Dunlop Ltd}, unreported, County Court of Victoria (Mullaly J), 28 June 1994, and \textit{DPP v ESSO Australia Pty Ltd} (2001) 107 IR 285 at 291; and \textit{R v Denbo and Nadenbousch}, unreported, Supreme Court of Victoria (Teague J), 14 June 1994.
\(^{50}\) See Mullaly, 1999, at 692-3. See also \textit{Stratton v Bestaburgh Pty Ltd}, unreported, Supreme Court of Victoria (Hansen J), 9 September 1994 which emphasised the seriousness of the offence of contravening a prohibition notice.
\(^{51}\) \textit{Singleton (VWA) v Fletcher Construction Australia Ltd}, unreported, County Court of Victoria (Rizkalla J), 26 February 1999. See also \textit{DPP v Ancon Travel Towers Pty Ltd}, unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998, at 9; \textit{Datspares Toyaparts Pty Ltd v DPP}, unreported, County Court of Victoria (Judge Walsh), 12 May 1999.
\(^{52}\) See \textit{WorkCover Authority of NSW (Inspector Ankucic) v McDonald’s Australia Ltd & Another} (1999) 95 IR 383 at 427, where Walton J suggested that the purposes of criminal punishment under the Occupational Health and Safety Act 1983 (NSW) included retribution and “reform”. The “principal and particular purpose” was the protection of workers from breaches of the Act and to compel employer attention to OHS.
\(^{53}\) \textit{WorkCover Authority of NSW v Waugh} (1995) 59 IR 89 at 100.
actually stated by the Victorian courts in OHS cases appear simply to apply normal sentencing principles without a coherent attempt to address the special features of OHS crime.

Section 50 of the Sentencing Act 1991 (Vic) requires the sentencing court to take into account the financial circumstances of the offender in determining the level of fine. The courts have applied this provision in a number of OHS prosecutions, and have indicated that the court may require proof of the financial circumstances of the defendant. The court will not, however, be influenced by the affluence of the offender.

The Victorian courts emphasise that the penalty for OHS offences must reflect the gravity of the offence, what the New South Wales Industrial Relations Commission describes as the “objective factor” in sentencing. Importantly, during the 1990s, the courts began to emphasise that in sentencing OHS offenders, the courts had to have regard to the nature of the breach rather than the consequences of that breach. This principle has been most clearly stated in DPP v Ancon, where Mullaly J stated:

Offences under the [OHSA] are not defined in terms of consequential injury or death, but rather in terms of a failure to fulfil a positive duty under the Act. Thus, the seriousness of an offence under the Act is not determined by the result of the offence but by the seriousness of the failure to take measures that might reduce or eliminate the risk of accidents occurring and the injuries that flow therefrom. Nonetheless, the degree of the risk of injury or death arising from the unsafe system of work is relevant. The fact that there is great inherent danger in a system or course adopted is an aggravating factor.

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54 For example, R v Tormey, unreported, County Court of Victoria (Morrow J), 5 September 1995; R v Moore, unreported, County Court of Victoria, 24 February, 1995. For the English position, see R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249.

55 R v Moore, unreported, County Court of Victoria, 24 February, 1995; R v John Vardy Transport Pty Ltd, unreported, County Court of Victoria (Stott J) 30 August 1999.

56 DPP v Pacific Dunlop Ltd, unreported, County Court of Victoria (Mullaly J), 28 June 1994.

57 See DPP v Pacific Dunlop Ltd., unreported, County Court of Victoria (Mullaly J), 28 June 1994 at 93.

58 See WorkCover Authority (NSW) (Inspector Page) v Walco Hoists Rentals Pty Ltd (No 2) (2000) 99 IR 163 at 185. The “objective” factor includes “the nature and quality of the offence, and the clear policy of the Act in relation to the establishment of safe standards and the protection of the workforce.”

59 See DPP v Ancon Travel Towers Pty Ltd, unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998 at 9. See also Mullaly, 1999, at 694-696; and OPP v Swan Hill Rural City Council, unreported, County Court of Victoria (Judge Walsh), 25 October 2001, where it was held that the standard which is set is not to be determined by the conventional criteria in the law of negligence. The New South Wales Industrial Relations Commission has also emphasised this principle in cases like Hannah v Ricegrowers Co-operative Ltd, unreported, Industrial Commission of New South Wales, 20 November 1990, per Fisher P, at 8; WorkCover Authority of NSW v Waugh (1995) 59 IR 89 at 96-97; Independent Cargo and Wool Services P/L v Inspector Mingare, unreported, Industrial Court of New South Wales, Full Court (Fisher CJ, Glynn and Peterson JJ), 10 March 1994; and Haynes v C I & D Manufacturing Pty Ltd (1995) 60 IR 455; WorkCover Authority of NSW v Waugh (1995) 59 IR 89 at 96.

60 In OPP v Swan Hill Rural City Council, unreported, County Court of Victoria (Judge Walsh), 25 October 2001 it was held that in each case the question was “whether the duty had been breached and if so the nature and gravity of the breach.” The court also held that it should take into account the “vulnerability of employees and their lack of full capacity to deal with the workplace situation.”

61 See also DPP v Feltourn Holdings Pty Ltd, unreported, County Court of Victoria (Judge Harbison), 11 June 1996, and R v Civil and Civic Pty Ltd, unreported, County Court of Victoria (Crossley J), 15 December 1992.
Regard may be had, in assessing the seriousness of the failure of the Act to the consequences of the offence where injury or death result.62

Nevertheless, as cases like Simsmetal, Wiltshire and Rattray Haynes and Ancon show,63 when assessing the seriousness of the breach, the courts take into account the fact of death or injury as indicating the gravity of the breach. Consequently, Victorian courts have taken into account victim impact statements when assessing penalties for OHS breaches.64 Further, the Supreme Court in R v AC Hatrick Chemicals Pty Ltd65 held that the fact that proven breaches of the OHSA did not cause the death or serious injury resulting from the incident tended to reduce the sentence.

This analysis suggests that the sentencing principles developed by the appellate courts, particularly the County Court, appear not to have restricted the use of most of the isolation techniques. The County Court, for example, has stated that the unusualness of a task, in the sense that it was not anticipated, does not exculpate the defendant, but it is a matter which can be taken into account when determining penalty.66

The County Court has, in some measure, restricted the ability of the defendant to splinter itself and argue that prior offences were committed by another, separate, part of the organisation, and should not be considered to be blemishes on the defendant’s record. For example, in Nylex Corporation Limited67 the court held that “it is the conduct, practice, culpability and criminal history of the company, and not that of its administrative parts, which is relevant” to penalty.

The County Court has also outlined principles limiting blameshifting.68 It has held that where an employer has breached its obligations under the OHSA, “the fact that the responsibility was spread over other persons does not … significantly alter the position so far as concerns the responsibility” of the defendant company.69 In Singleton (VWA) v Fletcher Construction Australia Ltd,70 Rizkalla J rejected any suggestion by the

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62 See also Datspares Toyaparts Pty Ltd v DPP, unreported, County Court of Victoria (Judge Walsh), 12 May 1999., Watson v Southern Asphalters Pty Ltd, unreported, Industrial Court of New South Wales (Hungerford J), 21 March 1996 and Watson v Southern Asphalters Pty Ltd, unreported, Industrial Court of New South Wales (Hungerford J), 21 March 1996. The English Court of Appeal, in R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249, regarded death resulting from a contravention as an aggravating factor in sentencing.

63 See also R v Civil and Civic Pty Ltd, unreported, County Court of Victoria (Crossley J), 15 December 1992.

64 See, for example, R v AC Hatrick Chemicals Pty Ltd & Ors, unreported, Supreme Court of Victoria, Criminal Division (Hampel J), 8 December, 1995 at 6; Young v Public Transport Corporation, unreported, Melbourne Magistrates Court (Mr P Muling) 26 March 1996 at 3-4.

65 Unreported, Supreme Court of Victoria (Hampel J), 8 December 1995 at 4.

66 See Mullaly, 1999, 695; R v Granowski, unreported, County Court of Victoria, 23 February 1996

67 Unreported, County Court of Victoria (Judge Hassett), 24 November, 1997.

68 But see R v Natra Pty Ltd, unreported, County Court of Victoria (Judge Barnett), 6 July 1999, where the court appears to accept that penalty might be mitigated where a machine has been inspected without comment by the OHS inspectorate.

69 DPP v Melbourne Excavations and Demolitions Pty Ltd, County Court of Victoria (Judge Howse) 20 November 1996. For a discussion of the application of the principle of parity in sentencing OHJS offenders in New South Wales, see Thompson, 2001: 61.

70 Unreported, County Court of Victoria (Rizkalla J), 26 February 1999 at 5.
defendant that the possibility that other persons should have been charged over the incident could have a direct bearing on the penalty imposed on the offender before the court. Likewise, in *DPP v Pacific Dunlop Ltd* Mullaly J stated that the worker’s familiarity with the machine was not relevant in determining the seriousness of the offence, and the sentence because the legislation was designed to protect those for whom familiarity breeds a cavalier attitude. Yet blamesshifting in a more subtle form has been institutionalised in *Stratton v Bestburgh Pty Ltd,* where the Supreme Court indicated that it favoured a lesser penalty when the person injured is an independent contractor who has more control over the work than an employee. Similarly in *Granowski* in imposing the fine the court took into account the fact that the unsafe work was undertaken by a skilled tradesperson.

How have the courts developed principles pertaining to the defendant’s OHS record? The County Court has clearly established that the defendant’s good OHS history and the absence of prior convictions (what the New South Wales courts refer to as “subjective factors”) will reduce the level of fine. The Victorian case law shows that the courts have looked to a number of factors in assessing the character of an organisation in relation to OHS. The factors include the length of time the organisation had been in operation, the manner in which the organisation has responded to past OHS incidents, the history and extent of the organisation’s co-operation with employees in relation to OHS, and with the OHS inspectorate; the care (or lack of concern) the organisation shows to its workers; whether the defendant puts profits ahead of worker safety; and

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71 Unreported, County Court of Victoria (Mullaly J), 28 June 1994.
72 Mullaly, 1999, at 697.
73 *Stratton v Bestburgh Pty Ltd*, unreported, Supreme Court of Victoria (Hansen J), 9 September 1994.
74 *R v Granowski*, unreported, County Court of Victoria, 23 February 1996. See also *DPP v Pacific Dunlop Tyres Pty Ltd. and Goodyear Tyres Pty. Ltd., trading as South Pacific Tyres*, unreported, County Court of Victoria (Fricke J), 22 November 1991.
76 See *R v Wiltshire and Rattray Haynes Industries Pty Ltd*, unreported, County Court of Victoria, Criminal Jurisdiction, (Dee J), Wangaratta, 29 November 1990; *DPP v Ancon Travel Towers Pty Ltd*, unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998 at 10; *R v Civil and Civic Pty Ltd*, unreported, County Court of Victoria (Crossley J), 15 December 1992; and *DPP v World Services and Constructions Pty Ltd* (County Court of Victoria (Dixon J), 9 August 1995, unreported. See also *R v Simsmetal Limited*, unreported, County Court of Victoria (Villeneuve-Smith J), Melbourne, 9 March 1998, and *R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249*.
77 See Mullaly, 1999, at 699.
78 *R v Simsmental Limited*, unreported, County Court of Victoria (Villeneuve-Smith J), Melbourne, 9 March 1989; *DPP v Feltonau Holdings Pty Ltd*, unreported, County Court of Victoria (Judge Harbison), 11 June 1996; *R v Granowski*, unreported, County Court of Victoria, 23 February 1996.
80 *R v Demac Foundry Pty Ltd*, unreported, County Court of Victoria (Judge White), 14 December 1996; *Pacific Dunlop Limited v Ian Camburn* unreported, County Court of Victoria (Nixon J), 21 January 1994; *R v Natra Pty Ltd*, unreported, County Court of Victoria (Judge Nixon), 27 June 1995; and *R v Granowski*, unreported, County Court of Victoria, 23 February 1996.
81 *R v Natra Pty Ltd*, unreported, County Court of Victoria (Judge Nixon), 27 June 1995; *R v Granowski*, unreported, County Court of Victoria, 23 February 1996.
82 *Pacific Dunlop Limited v Ian Camburn*, unreported, County Court of Victoria (Nixon J), 21 January 1994.
whether there is a wilful neglect of employee safety. A failure to take remedial action after a prior incident of a similar nature leading to injury or death will constitute an aggravating factor. Likewise, the gravity of an offence will be illustrated where a simple procedure with minimal cost would have prevented the incident. As the County Court illustrated in *R v Natra*, the ease of measures to avoid repetition of the incident can indicate the gravity of the offence.

How has the court regarded defence council’s attempt to mitigate penalty by pointing to the defendant’s conduct since the commission of the offence? In *R v Simsmetal*, *R v Natra* and *R v Granowski* the County Court made it clear that the court could regard as a mitigating factor the remedial steps taken by the defendant subsequent to the incident to ensure a safe and healthy working environment.

In relation to individuals convicted of OHS offences, the court will regard as factors in mitigation of penalty the fact that the individual is hard working, and the impact of the conviction and fine on family life. Where the company and a director are both charged, and the relationship between the two is such that the acts of the director are effectively the acts of the company, the courts regard the company as having the primary obligation, and bearing the greater responsibility and subject to greater penalties.

A further significant sentencing factor for individual defendants is the period of time over which the defendant has had charges hanging over their heads. The Court in *Ancon*, following *DPP v Feltourn Holdings Pty Ltd*, stipulated that in determining penalty, the court should not have regard to any civil issues or matters for monetary compensation.

In *R v Simsmetal* the court had expressly stated that the highest penalties were to be reserved for those with criminal records. In *R v Civil and Civic Pty Ltd*, however, Crossley J, while affirming the sentencing principles in *Simsmetal*, stated a new principle, namely that in imposing a fine, the court should bear in mind the provisions of section 53 of the *OHSA*, which provided "different maximum penalties for different levels of

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83 *R v Denbo and Nadenbousch*, unreported, Supreme Court of Victoria (Teague J), 14 June 1994
84 *R v Natra Pty Ltd*, unreported, County Court of Victoria (Judge Nixon), 27 June 1995
85 *DPP v Melbourne Excavations and Demolitions Pty Ltd*, County Court of Victoria (Judge Howse) 20 November 1996
86 *R v Simsmetal Limited*, unreported, County Court of Victoria (Villeneuve-Smith J), Melbourne, 9 March 1989
87 *R v Natra Pty Ltd*, unreported, County Court of Victoria (Judge Nixon), 27 June 1995
88 Unreported, County Court of Victoria, 23 February 1996
89 See *R v John Vardy Transport Pty Ltd*, and *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249.
90 *R v Tormey*, unreported, County Court of Victoria (Morrow J), 5 September 1995
91 *R v Dynamic Demolitions Pty Ltd (in liquidation)*, unreported, Supreme Court of Victoria (Hampel J), 8 December 1997.
92 *Dynamic Demolitions Pty Ltd (in liquidation)*, unreported, Supreme Court of Victoria (Hampel J), 8 December 1997.
93 Unreported, County Court of Victoria, 6 November 1996. See also *Datspares Toyaparts Pty Ltd v Director of Public Prosecutions*, unreported, County Court of Victoria (Judge Walsh), 12 May 1999. But CF OPP v *Swan Hill Rural City Council*, unreported, County Court of Victoria (Judge Walsh), 25 October 2001.
94 Unreported, County Court of Victoria (Crossley J), 15 December 1992.
criminal history. That is, the fact of no prior convictions has been taken into account by the legislature in fixing the maximum penalty of $25 000."

Thus, the severity of a sentence will be greater where the defendant has prior convictions under the OHSA, especially when the convictions related to incidents of a similar nature to the immediate offence.95 The court will assess the prior convictions in the context of the length of time the company had been in operation, the size of its operations, the number of employees, and the number and geographical location of plants.96 The older the prior conviction, the less weight is attached to it.97 Prior convictions not relevant to the matter charged may be disregarded.98 Prior convictions in relation to environmental matters are, however, relevant and may lead to a higher level of fine.99

Subsequently, the County Court was called upon to interpret the operation of the provisions for additional penalties for repeat offences in section 53 of the OHSA. Section 53 provides that where a defendant had previously been convicted of an offence under the OHSA, the court “may, if it considers it appropriate to do so, impose in addition to the penalty it imposes for the present offence” a penalty of up to $250,000 with a minimum of $5,000 (in the case of a corporation). In Pacific Dunlop Limited v Ian Camburn100 Nixon J, while accepting that the defendant had prior convictions which could trigger the operation of section 53, held that the court had a discretion as to whether it invoked the provisions of section 53, and on the facts before it, decided not to do so. This approach was confirmed in DPP v Pacific Dunlop Ltd,101 where Mullaly J stated a two-step process for sentencing102 where section 53 applied:

The use of the words “addition” and “further” indicate to me that the sentencing process involves first, the imposition of an appropriate proportion of the penalty for the instant offence, and then if judicial discretion is exercised, a further penalty.

In exercising this discretion, the court should have regard to the circumstances of the immediate offences, the nature of the past offences compared to the immediate offences, the number of previous offences compared with the extent of the defendant’s total operations and the steps taken by the defendant to ensure a safe working environment.

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95 R v AC Hatrick Chemicals Pty Ltd, unreported, Supreme Court of Victoria, Criminal Division (Hampel J), 8 December, 1995.
96 DPP v Pacific Dunlop Ltd, unreported, County Court of Victoria (Mullaly J), 28 June 1994
97 R v Natra Pty Ltd, unreported, County Court of Victoria (Judge Nixon), 27 June 1995; R v Pierce Philip Gage and Don Watson Pty Ltd, unreported, County Court of Victoria (Judge Hassett), 11 August 1999.
98 DPP v Pacific Dunlop Ltd, unreported, County Court of Victoria (Mullaly J), 28 June 1994; Ray Brooks Pty Ltd v McElhinney, unreported, County Court of Victoria (Judge Kelly), 15 July 1996.
99 R v Natra Pty Ltd, unreported, County Court of Victoria (Judge Nixon), 27 June 1995; but Cf R v Natra Pty Ltd, unreported, County Court of Victoria (Judge Barnett), 6 July 1999
100 Unreported, County Court of Victoria (Nixon J), 21 January 1994.
101 Unreported, County Court of Victoria (Mullaly J), 28 June 1994 at 93.
102 This two step approach was adopted in Young v Public Transport Corporation, unreported, Magistrates Court 26 March 1996; and R v Nylex Corporation Limited, unreported, County Court of Victoria (Judge Hassett), 24 November, 1997.
In *DPP v ESSO Australia Pty Ltd*, Cummins J held that section 53 does not increase the maximum penalty for any particular offence the subject of present conviction; rather it empowers the imposition of an additional penalty. … The further penalty is not a second penalty for the prior conviction. Rather it is a further penalty for the present conviction by reason of the existence of the prior conviction. The further penalty marks the seriousness of the present offences in the context of an offender who has previously offended. …

Circumstances justifying the operation of s 53 are the nature and number of prior convictions, their proximity or remoteness in time to the present office, their relevance, the character otherwise of the offender, and whether the combination of prior convictions and present conviction demonstrates systematic failure by the offender or a longitudinal, general or flagrant failure to fulfil the lawful obligations of safety in employment.

These cases suggest that while it is clear that since the late 1980s the courts have developed a number of principles in sentencing OHS offenders, these principles have been extremely broad, have been based in general sentencing principles, and have not countered the isolation techniques outlined earlier in this paper. Some, indeed, have reinforced the isolation techniques. To a large extent the sentencing principles merely reiterate the rhetoric that OHS offences should be taken seriously, while failing to counter the very process that ensures that they are not taken seriously - the accumulative use of the various isolation techniques by defence counsel to mitigate the culpability of OHS offenders.

In conclusion, despite these important strategies developed by prosecutors to try to prevent the operation of the isolation techniques, it was clear that the isolation techniques were difficult to counter. Consequently, OHS prosecution proceedings inevitably failed to connect the event under scrutiny to the totality of which it was part. This is not to deny that prosecution plays a crucially important part in the enforcement of OHS statutes, or that over time, OHS fines increased dramatically in Victoria (see again Table 2). Indeed, as new post-1997 maximum penalties took effect, in 2000 and 2001 the maximum penalties imposed by the courts continued to rise significantly, and there was much anecdotal evidence that increased fines were having a deterrent affect and motivating at least some employers to rethink their attitudes and approaches to OHS. Rather the point here is that the individualistic form of the criminal law not only reduced the level of actual fines imposed when compared to the maxima available, but also played an important role in sanitising OHS offences. The remainder of this paper develops this argument.

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104  See also Thompson, 2001: 58.


The Form of the Criminal Law

The ISHWA and OHSA were criminal statutes grafted onto the existing rules pertaining to criminal procedure and sentencing. They were principally concerned with the mechanics and details of standard setting, the establishment of the inspectorate, and, in the case of the OHSA, the functions and powers of OHS committees and representatives. Apart from the penalty structures in the Acts, all other provisions governing the procedural and sentencing aspects of prosecutions were contained in the statutory and common law provisions in the mainstream criminal law. There are a number of consequences arising from an unchallenged adoption by OHS regimes of the processes and procedures of the mainstream criminal justice system.

The Event Focused Nature of the Criminal Justice System

The large majority of prosecutions within the criminal justice system are event focused – whether they be traffic offences, theft, burglary, possession of illegal drugs, domestic violence, assault, sexual assault, murder or any other of the many statutory or common law offences. The rules of criminal procedure have evolved around, and consequently institutionalised, this event-focused nature of criminal procedure. As I argued earlier in this paper, OHS offences differ from most criminal law offences in that they are both constitutive and inchoate. In OHS crime the actual injury is a consequence of a work process that has not been organised, structured and monitored so as to ensure that that it is safe and without risks to health. At a deeper level, the issue is the control of the work process by the employer to the detriment of the employee, the prevalence of other organisational objectives (such as short term or long term profitability, increased market share, productivity, increased utilisation of capital, longer production runs and so on) over OHS objectives, and the failure to practise systematic OHS management.

Despite the inchoate and constitutive nature of OHS standards, OHS prosecutions invariably focused on events. It is far easier for the prosecution to prove that the facts constituting an event are in breach of the statutory provisions than it is to prove that management has failed to organise work so that it is safe and without health risks for workers, or even that a system of work is inherently hazardous, regardless of whether or not ill-health has resulted. The important point is that this bias towards events and incidents is a direct result of the form of the criminal law, in particular the rules of evidence and procedure, and the fact that most criminal prosecutions are event-focused.

The legal form, deeply rooted in individualistic notions of responsibility, is preoccupied with events and details, and with scrutinising individual actions.

There is, therefore, an institutionalised drift towards constructing OHS issues by focusing on the detailed actions of the actors during the event, rather than focusing on the overall system of work surrounding the event, or the underlying organisation of work at the workplace. Hale argues that the purpose of legal investigation and prosecution in relation to workplace injuries is to

unearth points in the chain of events leading to the damage at which the duty of care was breached. … Th[e] punitive orientation to the investigation gives it both its direction and
the rules for how far it goes. It is directed at uncovering the truth; something which is seen as objective and of which there is only one version, though what that version is may be disputed. It stops when the culpable actions are found and does not bother to dig deeper to find out why they were carried out.107

**The Nature of the Trial**

In the criminal trial in an adversarial legal system, the competing subjects are the state and the defendant, the latter conceptualised formally as an individual. This form of the trial has the "effect of abstracting the legally relevant 'facts' from their complex social reality, thereby depoliticising the issue before the court."108 McBarnet notes that "[t]he facts of a case – a case of any sort – are not all the elements of the event, but the information allowed in by the rules, presented by the witnesses, and surviving the credibility test of cross examination."109 Not only is the law event focused, but its view of the event is partial. This partial focus is endemic to law. The adversarial nature of the trial emphasises a legally constructed contest between the prosecutor's and defence counsel's version of reality, with little room for the experience of the victim (or indeed the collective issues facing workers) whose interests, different to those of the prosecutor, are marginalised.110 Even with the introduction of provisions for Victim Impact Statements in 1994, the victim’s interests are simply represented in terms of pain and suffering, rather than more broadly as a participant in workplace processes. As a result the case is depoliticised, so that the parties are unable to show the social, economic or political issues underlying the act in question.111 This characteristic of abstracting "the facts of the case" from the social, economic and political context is basic to the form of the criminal law used in contemporary Australia. Law, as Hunt observes, plays an important ideological role in individualising and decontextualising the experience of social relations under capitalism.112 Not only are issues decontextualised, but they are then recontextualised

"in terms recognizable to the legal gaze, ... into the form of an individual moral actor for the purpose of fitting the corporate persona into the discourse of criminal law conceptions of responsibility and sanctioning."113

I demonstrated earlier how the investigation and prosecution of OHS offences have transformed OHS issues into "terms recognizable to the legal gaze", Not only is the prosecution process event-focused and abstracted or decontextualised, but the sentencing

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113 Sargent, 1990: 106.
process is extremely open-textured, with very little constraint on the discretion exercised by the court in the sentencing process. There is a significant tension in the legal form between the open texture of the rules of sentencing and the magistracy's need to particularise the sentence to the facts of the case at hand. This enables defence counsel and the court both to enunciate the rhetoric of the importance of OHS and deterrence, but at the same time chip away at the defendant's liability by transforming the nature of the issue until it is more in line with individualistic notions of culpability implied in the criminal law. In the Anglo-Australian adversarial system, the parties are largely in control of the process. I have already argued that at the sentencing stage, control of the process passes to defence counsel, so that, in an adversarial system dealing with OHS offences, defence counsel can further decontextualise and individualise OHS issues, and then recontextualise matters within taken-for-granted ideas about the workplace. The result is a divergence or gap\textsuperscript{114} between the rhetoric of the seriousness of OHS and the importance of deterrence, and the individual case based reality of the process of decontextualisation and individualisation, without undermining the value of the rhetoric as ideology.

\textbf{The Individualistic Criminal Law and the Ideological Role of Mens Rea}

A further characteristic of the form of the criminal law is that it has developed over the centuries in the context of traditional street crime committed by individuals. The vast majority of defendants in the criminal justice system are natural persons. But most defendants in OHS prosecutions are corporations. The criminal justice system, however, has assimilated business organisations by regarding them as individual moral actors, in the same way as it deals with natural persons. The criminal law applies individualistic models of liability to corporations, rather than attempting to adapt the legal system to accommodate the collective nature of organisational behaviour. It has applied the normal sanctions to corporations where appropriate (for example, fines), has discarded others considered to be inappropriate for corporations (imprisonment), but has failed to explore new forms of sanctioning.

The abstracted, event-focused and individualistic nature of the criminal law contributes towards another characteristic of the criminal law – its emphasis on traditional notions of mens rea as the central component of criminal liability. It certainly makes some sense for a criminal justice system focusing on events perpetrated by individuals to focus on an individualistic notion of culpability having at its core the intention, in a broad sense, to perpetrate the event in contravention of the law. But it does not make sense to transfer these notions to OHS crime, where strict liability can be justified because illness and injury is an inevitable consequences of work systems organised in a manner that do not take into account OHS considerations.

Sargent\textsuperscript{115} has argued that the notion of mens rea is important on the level of rhetoric in that it legitimises and reinforces the individualistic distinction between "real crimes"

based on the violation of accepted social values and mere regulatory, or public welfare, 
offences which are seen as morally opprobrious. This perpetuates the relative immunity 
of corporate offenders, as I argued, with reference to Carson's work earlier in this paper.

The OHS general duty provisions do require the prosecutor to discuss fault by showing 
that practicable measures were not taken. The strict or absolute provisions coupled with 
the notion of practicability, however, limit the prosecutor to having to prove fault as 
negligence without, as is the case in traditional criminal law thinking, having to 
demonstrate full criminal intention or recklessness. The relative brevity of the 
prosecution’s summary in unconstested cases further limits the prosecutor’s ability to 
highlight the defendant’s culpability. At the same time, the broad sentencing discretion 
given to the court invites defence counsel to mitigate strongly by suggesting that fault is 
absent, or at least minimal. As I have already demonstrated, sentencing procedure and 
practice strongly support defence counsel’s efforts to reconstruct the offence so as to 
minimize culpability. In her study of environmental prosecutions, De Prez\textsuperscript{116} observes 
that the strict liability provisions in environmental regulation:

act as a cloak for many defendants, for as the prosecutor is not required to prove ‘fault’, 
this leaves defence counsel plenty of room to deny culpability in order to attract the 
sympathy of the bench.

This neutralising of the culpability of OHS offenders must be seen in the context of the 
discretion to prosecute. In most cases, prosecutions are taken because the matters 
represent more serious contraventions, where the defendant has demonstrated clear moral 
culpability.\textsuperscript{117} The prosecution process itself systematically denies that seriousness.\textsuperscript{118} 
Yet it is difficult for the prosecution to reproduce before the court the factors that may 
have led the inspector to construct moral blameworthiness.

The form of the criminal law enables defence counsel to reproduce individualist 
arguments about criminal liability, and to transform issues of culpability from the 
systematic focus so important in the nature of OHS, to an event-focused "every case is 
decided on its facts" approach, with factors to be weighed up against each other. These 
factors, together with the open texture of sentencing procedure, facilitates, indeed 
institutionalisues, an approach in which culpability can be decontextualised, transformed 
and individualised.

\textit{Trivialising Occupational Health and Safety.}

The problems raised for the regulation of OHS offences by the individualistic, event- 
focused form of the criminal law are exacerbated by the venue of the vast majority of

\textsuperscript{116} De Perez, 2000: 67-8. See also Croall’s work in relation to consumer prosecutions: H Croall, H., "Mistakes, 
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\textsuperscript{117} See W G Carson,"White Collar Crime and the Enforcement of Factory Legislation" (1970) 10 British Journal of 
Criminology 383; W G Carson, "Some Sociological Aspects of Strict Liability and the Enforcement of 

\textsuperscript{118} Croall, 1989: 312-3.
OHS prosecutions, the magistrates' courts. McBarnet119 observes that there is an ideology of the "triviality" of the matters coming before the magistrates' courts, which are seen to deal with "trivial", everyday matters, with low penalties, and little public scrutiny. The magistrates courts are at the lowest level of the judicial hierarchy, and have traditionally adjudicated "petty crime". Cases are decided quickly and routinely, with the minimum of fuss. A magistrate could hear up to 20 cases in a normal day. Within this setting, how can magistrates fail to individualise OHS offences and regard them as not being at the upper level of egregiousness? Not only are the magistrates' courts geared for fast summary justice, but the emphasis on guilty pleas, and the fact that most cases are indeed guilty pleas, institutionalises an analysis of culpability that is primarily based on magistrates' common sense opinions of OHS, and the briefly constructed facts put to the court by the prosecutor and reinterpreted by defence counsel. Most important of all, magistrates are just not used to imposing large penalties on corporations. Most offences prosecuted have maxima below those in the \textit{OHSA}, and most of their penalties are imposed on individuals with low capacity to pay. The defence strategy of transforming, decontextualising and individualising the issue, indeed, of "pulverising" the facts, was aimed at trivialising the charges. The setting of the prosecutions, in the magistrates' courts, ensured that the triviality of the offences was always an issue, and a continual matter for contest.

\textbf{The Implications of Decontextualisation and Individualisation.}

The matters discussed in this paper have a number of important implications for the regulation of OHS. This section discusses those implications.

\textit{Explaining Low Penalties.}

All these factors explain why fines for OHS offences tend to be low, and thus not a serious punishment or deterrent to employers. Magistrates tailor the sentence to the culpability of the defendant. They have difficulty conceiving these offences to be truly criminal, they are susceptible to careless worker and other blameshifting arguments, and the key isolation techniques operate to reduce their perception of the defendant's blameworthiness. Once the facts are decontextualised and individualised, and the defendant's good record, co-operativeness, remorse and subsequent improvement of OHS performance are put to the court, it is not surprising that penalties are moderate when compared to the available maxima.

\textit{Reproducing a Narrow Vision of OHS and Obscuring the Origins of Occupational Illness.}

On another level, this study suggests that even though the OHS legislation has the potential to enforce a broad construction of OHS issues, the models of injury causation and OHS management reproduced by the prosecution process is very narrow. This has important implications for the use of the criminal law in stigmatising dangerous workplace structures. If prosecution is to have the desired impact of improving working

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conditions, it must be clear to employers that they need to organise the work process differently to avoid legal liability. There needs to be an emphasis on developing an organisational culture and ongoing organisational processes that envisage OHS as an interdisciplinary and broad, systems-based management activity. It is not sufficient, therefore, merely to change the rhetoric of the law and the content of the substantive legal rules in order to optimise the law’s role in preventing workplace illness and injury through criminal regulation. The form of the criminal law used needs to be examined, and transformed, to ensure that the desired approach is constructed at all stages of the process.

Defusing Occupational Health and Safety as an Issue.

I argued earlier in this paper that this study supports the observations that law plays an important role in individualising and decontextualising the experience of social relations under capitalism. The conflictual nature of work relations are obscured by the decontextualised and individualised nature of the trial, which provides no scope to link particular hazards with the nature of capitalist work relations. The individualistic criminal law form effectively decriminalises OHS and prevents the criminal justice system from treating equally all forms of socially deviant behaviour. The criminal law and concepts of sentencing are not empty vessels that can be filled with whatever content society chooses. In OHS offences not only do the elements of the offence decontextualise issues of OHS, to the benefit of the defendant, but the sentencing process further transforms and individualises the offence, and enables the culpability of the defendant to be further sanitised.

At the deepest level, then, the courts' reconstructions of OHS issues play an important role in defusing OHS as a social, political and industrial issue. The state is heavily dependent on the process of the private accumulation of capital, and must create and sustain the conditions of accumulation. The state must not just be seen as an instrument acting on behalf of the dominant capitalist classes. Its legitimacy depends on it at least giving the appearance of transcending the interests of particular capitalists. It also has to respond to pressures "from below" to maintain the social conditions necessary for capitalist accumulation. Recent critical legal theory has attempted to explain the consensual nature of law, in particular the manner in which it functions to reproduce ideologies supporting capitalist and patriarchal relations of production. This in turn has led to a greater examination of the role of law as an institutional site for the production

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120 See Fricke, Jensen, Quinlan and Withagen, 2000; and Bohle and Quinlan, 2000.
and dissemination of ideologies that reproduce consent for unequal relations within capitalism. Ideologies play a role in defining the way in which social relations are lived and experienced, and in the manner in which political and social conflicts are identified and resolved.125

Workplace fatalities, injuries and disease are potentially disruptive of the social order and to the ongoing process of capital accumulation. Carson and Henenberg argue that

The relative centrality of work to human experience and the potentially egregious demonstration of stark domination or exploitation represented by occupational health and safety issues cannot but have rendered them one of the most likely locations in which fatigue fractures or pressure cracks could have appeared in the fragile edifice of consent.126

Carson and Henenberg argue that the fact that such breaks in the hegemonic processes have not occurred is due in some measure to the ideological role played by the early factory legislation, and reproduced in OHS legislation in Britain and Australia in the following 150 years.127 Central to these ideologies is the ambiguity and conventionalisation of OHS crime and the fundamental acceptance that OHS is the responsibility of the state, and not part of the industrial relations process. These ideologies are reinforced by dominant workplace ideologies based on the acceptance of the overriding importance of private property; the belief that workplace illness and injury is an inevitable by-product of industrial progress and the technological imperative, and therefore beyond human control; and workplace ideologies stemming from a unitary view of workplace relations.

The evidence in this study suggests that the courts themselves play an important role in reproducing consent for key conceptions of OHS, and a narrow model of injury causation. Key “taken-for-granted” ideas or ideologies have permeated proceedings before the courts, and have severely restricted the courts’ examination of OHS issues. The ideologies work in two closely related dimensions. At one level the key legal actors, the inspectors, prosecutors and especially the defence counsel and the magistracy, are informed by ideologies which have their origins outside the law, but have become an integral part of legal proceedings, legislation and legal doctrine so that they become virtually unquestioned. The ideologies of the careless worker, of the inevitability of accidents, and of the managerial prerogative are intrinsic to the law, as well as consistent with the way workers and managers experience work. They are taken for granted by defence counsel, magistrates, and by some inspectors and prosecutors. Court proceedings then become the medium through which these are reproduced and disseminated.

On a second level, I have already argued that the form of law itself plays a crucial role in decontextualising and individualising the experience of social relations under capitalism. Once the OHS issue is isolated as a disembodied event, and recontextualised within the

notion of the defendant's good corporate citizenship, and the dominant ideologies of the careless worker, the inevitability of accidents, and the central responsibility of the inspectorate to discover hazards, the court's understanding of the incident is transformed and individualised and the courts' perception of the defendant's liability severely reduced. The process of decontextualisation and the infiltration of dominant ideologies is not a "passive process", where magistrates simply use their taken-for-granted notions of OHS. Rather, they are actively encouraged by defence counsel to isolate the event, abstract it from its context, and recontextualise it within the dominant ideological framework. It is not only in the interests of defence counsel to pulverise the event in question, but their training, steeped in legal individualism, reinforces their perceptions of the justness of their case. The court, as I have shown, became the venue of an ideological contest once the prosecutors took up the challenge. The court, therefore, becomes an important site in which meanings of the social world are constructed, contested and disseminated.128

The isolation techniques discussed earlier enable the courts to play a role in repairing threats to the "fragile edifice of consent". The focus of the prosecution on a particular employer and a particular event suggests that what the court is dealing with are isolated instances of unsafe work practices in an otherwise safe industrial world, rather than as an example of a more deep-seated problem concerning the priorities given to the provision and maintenance of working environments that are safe and without risks to health. Once again this is a characteristic of the capitalist legal form. The focus is always on individual legal subjects – in this case individual defendants, not on the nature of work organisation in general. The events themselves are explicable through a series of blame-shifting and isolation techniques, and the defendant is usually represented as having dealt with the problem. In fact the process of pulverisation of the defendant's liability often goes further to suggest to the court that if these are the worst instances, then things cannot be too bad. The event-focused nature of prosecutions, (and their location in the magistrates' courts) also suggests that even if the prosecution, or indeed the magistrate, challenges the defendant's construction of its own liability, the challenge itself is isolated to this particular defendant and the particular circumstances.

The court is seen to be dealing with the issue, and convicting offenders, but at the same time sanitising the issues so that the underlying activity, the production of goods and services, is not threatened. In other words, the court plays a major legitimating role in OHS, but the underlying issues are largely untouched. Of course, to maintain legitimacy, the law must appear to be just and effective.

This explains why, from the late 1980s in Victoria, harsh criticisms of magistrate's penalties for OHS offences were met by the government increasing penalties, discussing the possibility of creating an industrial magistracy,129 and considering the use of the "criminal law proper" to prosecute offenders.130

129 See Industrial Relations (General Amendment) Bill 1988, ss 22 and 23; Industrial Relations Bill 1990, Part 11.
130 See Department of Labour, Occupational Health and Safety Division, Central Investigation Unit, Prosecution Policy, 25 June 1990; and the Bill brought before the Victorian Parliament in 2001 to introduce the crime of corporate manslaughter.
It has also ensured that there have been occasional significant and highly publicized prosecutions in the intermediate and superior courts. In each of 1989 to 1992 there was a single County Court prosecution, and two in 1994. From 1995 there have been four to six prosecutions annually. Only one of these cases has been well publicised, and attracted a large fine. In 1989, after an explosion which killed four workers and injured seven others, the highly publicised prosecution of Simsmetal\(^{131}\) in the Victorian County Court resulted in a total fine of $48,000 for three charges, by far the largest penalty in the 1980s. But as the discussion of Simsmetal earlier in this paper showed, the County Court did nothing to counter the major isolation techniques.

Prosecutions at the level of the Supreme Court have been even rarer. In 2001, again as a result of a highly publicised gas explosion which killed two workers and injured eight others seriously injured brought the State of Victoria to a standstill, the Victorian Supreme Court in \textit{DPP v ESSO Australia Pty Ltd}\(^{132}\) imposed a total of $2 million for 11 contraventions of the OHSA, including a number of maximum penalties to some of the charges.

While both of these prosecutions were extremely important, and showed the potential of highly publicised proceedings in higher level courts. Both to some extent appeased critics of the OHS regulatory authorities’ benign approaches to OHS enforcement. But both cases were unusual multi-victimized and highly publicised explosions, and both had environmental impacts upon the public. While such cases undoubtedly have an important deterrent role, their rarity suggests one of the dangers of these highly publicised “show trials”. During the period 1983 to 1999 there were 1100 prosecution cases in Victoria, and in each the processes described in this paper were operative, resulting in inadequate fines and a decontextualised understanding of OHS. The Simsmetal and ESSO cases, while providing valuable publicity and something of a general deterrent effect, did little to establish sentencing principles which challenged the isolation techniques outlined earlier in this paper. They were so unusual as to be in danger of providing unwitting legitimacy for an OHS enforcement system in which OHS court prosecution which does not focus sufficiently on a systemic approach to OHS management, and falls far short of a minimal role for OHS prosecution as the “benign big gun” beneath which OHS regulators encourage voluntary compliance from duty holders.\(^{133}\)

\(^{131}\) \textit{R v Simsmetal Limited}, unreported, County Court of Victoria (Villeneuve-Smith J), Melbourne, 9 March 1989.

\(^{132}\) \textit{[2001]} VSC 263 (Cummins J).