LAW AND CHANGE

THE CORPORATE VEIL, CRIME AND PUNISHMENT

*THE QUEEN v DENBO PTY LTD AND TIMOTHY IAN NADENBOUSCH**

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[This paper critically discusses corporate criminal liability in the light of the first Australian conviction of a corporation for manslaughter. It argues that the uncritical insertion into the criminal law of a corporate criminal subject (epitomised in The Queen v Denbo Pty Ltd*) both fails on its own terms as a means of deterrence and exposes crucial gaps in our understanding of the rule of law. These theoretical issues must be taken seriously before we can meaningfully consider the more practical issues of procedure and punishment that dominate mainstream consideration of this issue.]*

INTRODUCTION

> The great object of penal law is to deter men from violating the law by holding out privation and suffering as the consequences of transgression.
>
> Criminal Law Commissioners, 1843[1]

> An earth-moving company yesterday received a $120,000 fine, which will never be paid, over the manslaughter of an employee who died in a truck accident.
>
> *The Age* (Melbourne), 15 June 1994[2]

The first Australian conviction of a corporation for manslaughter was greeted with minimal media coverage or critical discussion. When Mr Justice Teague of the Victorian Supreme Court fined the earth moving contractor Denbo Pty Ltd $120,000 for its criminal negligence in causing the death of Anthony Krog three years earlier, there appeared to be little that was controversial about the case: the company pleaded guilty to the charge, the applicability of the offence of manslaughter had previously been accepted in the United States[3] and England[4]

* Supreme Court of Victoria, Teague J, 14 June 1994 (*Denbo*).

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1 Criminal Law Commissioners, *Seventh Report*, Parliamentary Papers XIX (1843) cited in Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (1993) 198.

2 Peter Gregory, '$120,000 fine for company over death', *Age* (Melbourne), 15 June 1994, 7.

3 *Illinois v Film Recovery Systems Inc*, Nos 83-1109 and 83-5064 (Circuit Court, Cook County, Illinois, Banks J, 1985); see now *People v O'Neil* 550 NE 2d 1090 (1990) especially 1098-9. For a discussion of the earlier Ford Pinto case, in which the Ford Motor Company (USA) was

and was not contested here, nor was the financial penalty challenged. But *Denbo* is interesting precisely because of what was *not* said, what was assumed about the law in relation to occupational health and safety, and in particular concerning the applicability of traditional criminal law doctrine to corporate defendants.

Despite the fact that *Denbo* represents no authority whatsoever in the essentially positivist discourse of *stare decisis*, it is worthy of critical discussion because it has the capacity to set the context for future prosecutions of corporations for manslaughter[5] and other criminal offences. The general principles of corporate criminal liability have been discussed elsewhere,[6] but *Denbo* specifically raises two issues crucial to this development of the criminal law. The first relates to the use of prosecutorial discretion in determining the party against whom charges are laid: though both the company and one of its directors were committed for trial for manslaughter, the director's charges appear to have been dropped in exchange for the guilty plea of the company. Secondly, *Denbo* demonstrates that fines against corporations may be manifestly inadequate in achieving the criminal law's stated aim of deterrence — particularly if the amount imposed is either small or cannot be enforced — when compared with the threat of a prison term for company directors or alternative penalties, premised more explicitly on the need for a public denunciation of the act.

Through its silence on these issues, *Denbo* represents a very ad hoc first step into the realm of corporate manslaughter by both occupational health and safety authorities and by the courts. Such a prosecution raises the spectre of a corporate criminal regime in which the soft option of accepting corporate responsibility is preferred to a fight for individual culpability, and where fines dispersed throughout a company are equated with prison terms.

This Article, after briefly outlining the facts of the case, will consider these two issues in turn, with particular emphasis on the need to reconcile the utilitarian application of the criminal law as exemplified by *Denbo* with the theoretical and philosophical tenets that legitimate it. In the absence of such a reconciliation, the attribution of criminal liability to corporations should be recognised and maintained as an anomaly and last resort — prosecuted with the understanding

indicted in 1978 on three counts of reckless homicide after a Ford vehicle exploded upon a rear-end collision, see V L Swijert and R A Farrell, 'Corporate Homicide Definition Processes in the Creation of Deviance' (1980-81) 15 *Law and Society Review* 161.

[4] In *R v H M Coroner for East Kent; ex parte Spooner* (1989) 88 Cr App R 10, 16, Bingham LJ tentatively put forward the proposition that was more confidently adopted by Turner J in *DPP v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73, 84:

> [W]here a corporation, *through the controlling mind of one of its agents*, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter. (Emphasis added.)

[5] The multinational corporation A C Hatrick Chemical Pty Ltd (trading as 'Hercules Chemicals Australia') and two senior employees have recently been charged with manslaughter and other charges in relation to the death of contract welder Bill Akras in November 1992: *Age* (Melbourne), 26 July 1994, 5. Committal proceedings are scheduled to commence on 9 January 1995 at the Melbourne Magistrates' Courts.

[6] See generally B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993); Brent Fisse, *Howard's Criminal Law* (5th ed, 1990) 589-621; Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 974-7; Andrew Ashworth, *Principles of Criminal Law* (1991) 81-8.

that the goal of deterrence does not necessarily correspond with more abstract notions of justice — and the penalties imposed should reflect this accordingly.

BACKGROUND TO THE CASE

Facts

The charges laid against the company and its directors arose following the death of Anthony William Krog on 12 February 1991. Mr Krog was an experienced plant operator employed by Denbo Pty Ltd to work on the construction of the Western Ring Road in Broadmeadows, Victoria. He died when the brakes of a dump truck he was driving failed as it descended a steep track on the work site. The truck hit an embankment and overturned, pinning him under the door of the cabin. Extensive tests on the truck showed that 'the braking defects were very obvious and very bad.'[7]

The truck was one of two recently purchased by Denbo, and which its de facto director,[8] Timothy Nadenbousch, knew to have defective brakes. However, because work was behind schedule, maintenance of the vehicles and training of their drivers were placed second to getting the trucks out and working. Justice Teague stated that there was 'criminal negligence' on the part of the company in failing to establish an adequate system of maintenance and training, and in creating a situation where a dump truck with 'grossly defective brakes' was allowed onto a track on which it was not capable of being controlled.[9]

Committal

At the time of the incident, Denbo Pty Ltd was involved in a number of major road building contracts in Victoria. Timothy Nadenbousch and his father, Ian, were sole shareholders and effectively ran the company, with Timothy being responsible for the Western Ring Road project.[10] Charges were laid against the Nadenbousches and Denbo Pty Ltd for breaches of the Occupational Health and Safety Act 1985 (Vic),[11] and both Timothy Nadenbousch and the company were charged with manslaughter. Ian Nadenbousch, Managing Director of Denbo Pty Ltd but rarely present at the Western Ring Road project, was acquitted, but in February 1994 both Timothy Nadenbousch and the company were committed for trial in the Victorian Supreme Court. Mr Nadenbousch was released on bail

[7] *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch* (Supreme Court of Victoria, Teague J, 14 June 1994) Trial Transcript, 37-8 (Teague J) ('Trial Transcript').

[8] In the facts as agreed by counsel, his position was effectively that of a director: ibid 3-4.

[9] Ibid 38 (Teague J).

[10] Ibid 35 (Teague J).

[11] Both Timothy and Ian Nadenbousch and the company were charged under ss 21(2)(a) and (e) of the Occupational Health and Safety Act 1985 (Vic) for failing to maintain a safe working environment and failing to provide adequate training and information. Section 52(1) of the Act provides that an officer of a body corporate which is found to have committed an offence may also be guilty of that offence if it is attributable to any wilful neglect on the part of that person.

on his own undertaking — it was determined that bail was not applicable for the corporation. Pleas (for Denbo, by its Managing Director) were reserved.[12]

Trial

By the date of the trial, four months later, circumstances had changed somewhat. The corporation pleaded guilty to the charge of manslaughter and Timothy Nadenbousch to the two charges under the Occupational Health and Safety Act, apparently in exchange for which the Crown dropped the other charges, in particular that of manslaughter against Timothy Nadenbousch.[13] As a result, he received a $10,000 fine (of a maximum $20,000[14]).

The only penalty that could be imposed on the corporation itself was a fine of not more than $180,000.[15] However, as Teague J commented, the fine itself was an 'academic exercise',[16] since Denbo Pty Ltd went into liquidation less than a month before the trial.[17] On the estimates of the receiver and manager appointed by secured creditors, more than $2,000,000 would still be owed to secured creditors after realisation of the company's assets. As his Honour concurred, this meant that any amount set by him would 'impose no burden on anyone as it will not be paid.'[18] He was nevertheless of the opinion that the fine should be fixed at an amount appropriate if the company had remained as profitable as it was in February 1991 (notwithstanding the provisions of the Sentencing Act which provide that the financial circumstances of the offender must be taken into account[19]). Of paramount importance to his Honour was a concern that

> the amount of the fine ought to be substantial because it ought to be directed at achieving a generally deterring effect .... [T]he safety of its employees must be given the highest possible priority by every employer. If it is not, *the employer should have to pay dearly.*[20]

[12] *The Police v Denbo Proprietary Limited, Ian Reginal Nadenbousch and Timothy Ian Nadenbousch* (Melbourne Magistrates' Court, Magistrate P Couzens, 16 February 1994).

[13] Peter Gregory, 'Guilty plea by company charged over man's death', *Age* (Melbourne), 3 June 1994, 3.

[14] Section 47(2)(b) of the Occupational Health and Safety Act 1985 (Vic) prescribes a maximum fine of 100 penalty units for non-corporate persons found guilty of an offence under the Act for which no penalty is expressly provided. (One penalty unit currently equals $100: Sentencing Act 1991 (Vic) s 110.)

[15] Crimes Act 1958 (Vic) s 5 provides that '[w]hosoever is convicted of manslaughter shall be liable to level 3 imprisonment [up to 15 years] or to a fine in addition to or without any such other punishment as aforesaid.' Section 109(3)(a) of the Sentencing Act 1991 (Vic) provides that an offence 'that is punishable by a term of imprisonment (other than life) is, unless the contrary intention appears, punishable (in addition to or instead of imprisonment) by ... a maximum fine of the number of penalty units that is 10 times more than the maximum number of months imprisonment that may be imposed'. That is, 1,800 penalty units or $180,000. (This is reaffirmed by s 52.)

[16] Trial Transcript, 20 (Teague J). Counsel for Denbo Pty Ltd likened it (somewhat tenuously) to imposing multiple life sentences on a convicted person: Trial Transcript, 20.

[17] See ibid 18.

[18] Ibid 40 (Teague J).

[19] Sentencing Act 1991 (Vic) s 50(1).

[20] Trial Transcript, 40 (Teague J, emphasis added).

The amount was fixed at $120,000.[21]

The net result of Australia's first conviction of a corporation for manslaughter was therefore minimal publicity, a $10,000 fine against one of the directors, and a more substantial fine against the corporation itself which, as the Court acknowledged, will never be paid.

THE (VEILED) CORPORATE SUBJECT

> I'm Lingley of Lingley Ltd. Not one of you can touch me. I turned myself into a company years ago.
>
> Sutton Vane, *Outward Bound*[22]

Perhaps the first observation to be made concerning *Denbo* is that it demonstrates that the conceptual problems previously seen as a bar to corporate criminal liability appear to have been overcome. Traditional reservations arising from the nature of a corporate entity as being a creature of law with no physical existence[23] and the difficulty of establishing the requisite *mens rea* to attribute criminal liability[24] were largely avoided by the legal and factual circumstances of the case: the applicability of the charges were not contested, and the attribution of *mens rea* was simplified by Timothy Nadenbousch's position as effective director and manager of the Western Ring Road project.[25] More complex sociological and philosophical issues concerning the construction of the artificial person as 'killer'[26] and the contradiction that emerges when it is inserted into a legal system premised on liberal individualism[27] did not arise at all.

[21] Ibid.

[22] Cited in Williams, above n 6, 969.

[23] See, eg, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane). One leg of this bar to corporate responsibility specifically concerned the penalty that could be imposed following conviction. Clearly, a crime punishable only by imprisonment (or death) could hardly be attributed to a corporation without a substantial change to our conception of sentencing: *R v I C R Haulage Ltd* [1944] KB 551, 554.

The absence of an alternative penalty to imprisonment is arguably still a bar to convicting a corporation of murder in Victoria: Chris Corns, 'The Liability of Corporations for Homicide in Victoria' (1991) 15 *Criminal Law Journal* 351, 354. Under s 109(3) of the 1991 Sentencing Act, however, fines may substitute for any penalty other than life imprisonment — the penalty for murder is presently life imprisonment or 'imprisonment *for such other term* as is fixed by the court': Crimes Act 1958 (Vic) s 3 (emphasis added). Cf Crimes Act 1914 (Cth) s 4B(2A).

A second consideration relates to certain crimes which are considered to be of a nature that only a human could commit them (eg, sexual offences, bigamy and, arguably, perjury): see, eg, *Dean v John Menzies (Holdings) Ltd* [1981] SC (JC) 23, 35 (Lord Scott). Cf Fisse, above n 6, 609.

[24] For an overview of the English case law and its attempts to deal with the question of the corporate mind, see *DPP v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73, 74-83 (Turner J).

[25] Though it was not an issue in the proceedings, the inference of *mens rea* would also have been from his position as a 'directing mind' acting on Denbo's behalf: *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; *Hamilton v Whitehead* (1988) 166 CLR 121, 127-8. For recent UK authority on this point, see *Warwickshire County Council v Johnson* [1993] 1 All ER 299; *Tesco Stores Ltd v Brent London Borough Council* [1993] 2 All ER 718.

[26] For a brief discussion of the linguistic and cultural barriers to the acceptance of a corporate manslaughterer, see Corns, above n 23, 352. Cf Celia Wells, 'The Decline and Rise of English

There are, of course, numerous policy reasons why these largely theoretical objections should not prevent the conviction of a corporation for offences such as manslaughter.[28] Particularly with regard to work-related deaths, existing occupational health and safety legislation is often perceived as a regulatory (as opposed to criminal) regime,[29] with the result that a large number of homicides go unrecognised and/or unpunished.[30] The argument (which appears to have been accepted by the Crown in *Denbo*) is that by making an example of certain companies through the more public forum of a trial for manslaughter, occupational health and safety law in general will be enhanced.[31] This is almost certainly the case where the alternative is a lesser penalty, or less public denunciation of the corporation's conduct, but the issue is far less clear when one considers that in *Denbo*, the corporation was convicted *rather* than the individual.

Denbo may prove to represent an unusually explicit instance of such prosecutorial discretion. The decision to accept the corporation's plea of guilty and drop the charges against its director was presumably a pragmatic one — saving time and money while still making an example of the corporation[32] — but it is difficult to see how the liability of the corporation could be distinguished from that of its de facto director. Timothy Nadenbousch, one of only two shareholders

Murder: Corporate Crime and Individual Responsibility' [1988] *Criminal Law Review* 788, 799-800.

27 See, eg, H L A Hart who describes the *intrinsic* connection between criminal punishment and individual justice:

> [T]he principle that punishment should be restricted to those who have voluntarily broken the law ... incorporates the idea that each individual person is to be protected against the claim of the rest for the highest possible measure of security, happiness or welfare which could be got at his expense by condemning him for a breach of rules and punishing him. For this a moral licence is required in the form of proof that the person punished broke the law by an action which was the outcome of his free choice ... *it is a requirement of justice.*

H L A Hart, *Punishment and Responsibility* (1968) 22. Cf Attorney-General's Department, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) 17-8. For critical analyses of this premise, see Norrie, above n 1, 12-4; Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' [1993] *Criminal Law Review* 551, 552.

28 See, eg, Note, 'Can a Corporation Commit Murder?' (1986) 64 *Washington University Law Quarterly* 967, 976-84.

29 Prosecutions largely take place in the Magistrates' Courts without the involvement of police, limited sentences are imposed and few are appealed against: see Corns, above n 23, 364; Celia Wells, *Corporations and Criminal Responsibility* (1993) 23-6.

30 Victorian Law Reform Commission, *Homicide*, Report No 40 (1991) 7; Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) para 286.

31 See, eg, Garth Magnum, 'Murder in the Workplace: Criminal prosecution v Regulatory enforcement' (1988) 39 *Labor Law Journal* 220, 230. Cf *Victorian Occupational Health and Safety — An Assessment of Law in Transition*, The La Trobe/Melbourne Occupational Health and Safety Project (1990) 147.

32 Counsel for Denbo Pty Ltd made much of this (Trial Transcript, 21):

> [Denbo's] plea of guilty in the circumstances where it becomes the first company to plead guilty to a charge in this particular context of occupational health and safety, brings it under the watchful eye of the press that are gathered and will no doubt have much to say about a company pleading guilty ... to an offence for which it does not have any precedent in terms of penalty .... The plea of guilty ... has, obviously, saved the community a very long and complex trial and probably complex appeals as well, because it has pleaded guilty on the basis of criminal negligence rather than any specific intent.

in the company, was the sole representative on the site and the criminal negligence attributed to the company related solely to his acts and omissions.[33] Moreover, in relation to the charges under the Act, Teague J stated that there had been 'wilful neglect' on his part in relation to maintenance and training on the site.[34] The effect of this decision by the Crown was therefore to equate the punishment of the corporation with that of the individual, and proceed with charges against the corporation as the path of least resistance.[35]

It is here that we get to the heart of the matter. For there is a disturbing contradiction in the adoption of the corporate entity as an individual disciplinary subject of criminal law if this is to result in the exculpation or absolution of the directors who define its legal personality under existing legal doctrine. This may be considered on two levels.

The attribution of criminal liability to a corporation reveals the criminal law at its most utilitarian: steeped in the logic of Law and Economics, it seeks an efficient means of deterrence from undesirable conduct.[36] Accepting this basic rationale for the development of the law, its application must be consistent with this. One must therefore question the elevation of such a pragmatic resolution to the point where a fine dissipated throughout the corporate entity is seen as a just substitute for the incarceration of an individual. In more practical terms, the bargaining process by which Denbo Pty Ltd was convicted but its director went free seriously undermines the claims to deterrence implicit in the decision of the Crown and fundamental to Teague J's reasoning in passing sentence.[37] If company directors are able to reallocate liability during pre-trial negotiations onto a corporation, dispersing any penalty amongst the shareholders of the company, this not only diminishes the deterrent effect of the punishment,[38] but may ultimately shift it onto those who may be entirely innocent.[39]

One of the reasons for the inconsistencies that emerge here is the avoidance of issues of theory; this was apparent in *Denbo* in the compliance of the Crown in receiving the proffered head of the corporation, and the silence of the Court in accepting it. An approach to corporate manslaughter driven by atheoretical

[33] See ibid 35-8 (Teague J).

[34] Ibid 38 (Teague J).

[35] Cf *Wattle Gully Gold Mines NL* [1980] VR 622, 624.

[36] Williams, above n 6, 974. On the general principles of Law and Economics reasoning, see generally Richard Posner, *The Economic Analysis of the Law* (3rd ed, 1986). Given the commercial environment in which corporate entities exist, the principles of Law and Economics — premised as they are on the concept of 'man [*sic*] as rational maximizer of his [*sic*] self-interest' — may indeed be more applicable to corporations than they are to humans generally. Cf Herbert Hovenkamp, 'Positivism in Law & Economics' (1990) 78 *California Law Review* 815. See also below n 50 and accompanying text.

[37] Trial Transcript, 38, 40 (Teague J).

[38] See, eg, Celia Wells, *Corporations and Criminal Responsibility* (1993) 135-8. Similar concerns arise when enforcement agencies negotiate *internal* disciplinary action in pre-trial settlements with corporate defendants: cf Fisse and Braithwaite, above n 6, ch 7.

[39] See, eg, D J Reilly, 'Murder, Inc.: The Criminal Liability of Corporations for Homicide' (1988) 18 *Seton Hall Law Review* 378, 403-4. Given the position of Timothy and Ian Nadenbousch as sole shareholders the issue was not crucial in this instance, though it remains a valid one when contemplating future prosecutions. Cf Judith Freedman 'Small Businesses and the Corporate Form: Burden or Privilege' (1994) 57 *Modern Law Review* 555.

considerations of efficiency and deterrence, without a re-evaluation of the legal theory that supports them will be necessarily piecemeal,[40] and open to results such as occurred in the instant case — the punishment of manslaughter by a $10,000 fine.

This is further complicated by the fact that in the attribution of *mens rea* to a corporation, courts continue to seek some form of individual moral responsibility on the part of those who constitute the corporate mind.[41]

At a deeper level then, the criminal law as it applies to corporations must be reconsidered not merely in its practical application to artificial persons constructed by law, but in its very conception of what constitutes a disciplinary subject *of* law: attributable with *actus reus* and *mens rea*; susceptible to punishment and deterrence. The insertion of such a 'corporate subject' at once unitary (before the law) and plural (before the tribunal of fact) is premised on the undertheorised principle of anthropomorphism by which it is directly substituted for the human (abstract individual) subject.[42] A meaningful reconciliation of the contradictions to which this gives rise may be possible if a reformulation of the corporate subject encapsulates its multifarious actors by reference to a conception of the corporation's organisational structure,[43] or alternatively if the abstract individual at the heart of the criminal law is itself reconstructed.[44]

The completion, or even a realistic beginning of either project is clearly beyond the scope of this Article, however it is submitted that in the absence of such a theoretical framework it is unwise to presuppose a simplistic analogy between the criminal law as it relates to persons artificial and 'real'.[45] This can only be

[40] Cf John E Stoner, 'Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behaviour?' (1985) 38 *Southwestern Law Journal* 1275, 1296.

[41] See, eg, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170 (Lord Reid); *R v Andrew-Weatherfoil Ltd* [1972] 1 All ER 65, 70 (Eveleigh J); *Hamilton v Whitehead* (1988) 166 CLR 121, 127-8. Cf *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 514 (Brennan J): 'A corporation has no hands save those of its officers and agents; it has no mind save the mind of those who guide its activities.' And see also Wells, 'Corporations: Culture, Risk and Criminal Liability' above n 27, 560-1.

[42] Cf Norrie, above n 1, 95-7; E Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle' (1985) 76 *Journal of Criminal Law and Criminology* 285, 295-324; Celia Wells, *Corporations and Criminal Responsibility* (1993) 90-3 (discussing a similar issue in terms of a concept of 'juristic personhood'); Pasquale Pasquino, 'Criminology: the birth of a special knowledge' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (1991) 244-7 (discussing the historical and ideological context of '*homo criminalis*').

[43] See Norrie, above n 1, 98; cf Stewart Field and Nico Jörg, 'Corporate Liability and Manslaughter: Should we be going Dutch?' [1991] *Criminal Law Review* 156, 163-71 (considering the Dutch conception of 'organisational criteria' as the basis of corporate liability).

[44] See, eg, Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1977) 101-3, 192-4.

[45] See, eg, *DPP v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73, 84 and Turner J's highly legalistic formulation of the issue of corporate criminal liability:

> Once a state of mind could be effectively attributed to a corporation, all that remained was to determine the means by which that state of mind could be ascertained and imputed to a non-natural person. That done, the obstacle to the acceptance of general criminal liability of a corporation was overcome. *Cessante ratione legis, cessat ipsa lex.*

Cf *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 198-9 (Lord Diplock) (in the context of civil liability) and the application of Lord Diplock's formula in relation to a criminal offence: *Seaboard Offshore Ltd v Secretary of State* [1994] 2 All ER 99, especially 104 (Lord Keith of Kinkel).

situated (uncomfortably) within existing paradigms if corporate liability is clearly identified as a high profile form of regulation and deterrence, where — in the absence of any real probability of convicting an individual — the corporation is targeted as the culpable party.[46]

Such a scenario may be conceivable in the context of a large corporation where a criminal act may be truly the result of an 'aggregation' of acts and omissions (as perceived under extant doctrine), but appears hardly appropriate when addressed to a company of the size and structural simplicity of Denbo Pty Ltd.[47]

NO SOUL TO BE CONDEMNED

> Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.
>
> Edward, 1st Baron Thurlow[48]

As with the underlying rationale of the liability of corporate entities, the use of pecuniary penalties with which to punish them is rooted in utilitarianism. On the assumption that the initial conceptual leap to the notion of corporate criminal capacity is valid, it is a far easier step to accept that the penalty should be framed in the language of corporations. Now that the first leg of that argument has been problematised, there is more space for critical analysis of the second. Specifically, having challenged the construction of the corporation Denbo Pty Ltd as a subject of criminal law, the effectiveness of a fine can be reassessed in those terms, retaining Teague J's touchstone of deterrence as the basis of its legitimacy. Obviously, this is an issue of law reform that could not be considered in the context of the case, but its relevance lies in the challenge it makes to the Court's assumptions concerning the potential impact of a fine in influencing the future conduct of corporations (and employers) generally.

Even disregarding the dollar value ($120,000) that was placed on a human life, other issues arise as to the effectiveness of a fine in 'achieving a generally deterring effect'.[49] Given that deterrence is contingent on the classical utilitarian

[46] An alternative is the joint prosecution of both corporation and individual — the imposition of liability on one does not bar liability on the part of the other: *Hamilton v Whitehead* (1988) 166 CLR 121, 128. However, the US experience of jointly charging and trying corporations and individuals has seen inconsistent verdicts where juries have convicted only the corporation: see A Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct' (1990) 78 *California Law Review* 1287, 1290-1.

[47] Under existing doctrine, however, the larger and more diffuse the company structure, the more difficult it may be to attribute responsibility for the acts of semi-autonomous managers: Celia Wells, 'Manslaughter and Corporate Crime' (1989) 139 *New Law Journal* 931; cf Field and Jörg, above n 43, 158-9.

[48] Cited in Angela Parthington (ed), *The Oxford Dictionary of Quotations* (4th ed, 1992) 697. Cf Lord Denning's oft-quoted dictum that a corporation 'has no body to be kicked or soul to be damned': *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1127.

[49] Trial Transcript, 40 (Teague J).

formulation of the knowledge of penalties and its impact on decision-making,[50] the amount must be substantial enough to attract publicity and to be a factor in future decisions made by corporations and individuals alike. At present, the maximum financial penalty for manslaughter in Victoria is $180,000,[51] an amount which may be considered relatively small when compared, for example, with comparable Commonwealth legislation with a maximum fine of one million dollars.[52] And yet the issue cannot be resolved simply by raising the stakes, as it were. For in opposition to this is the consideration that when punishing corporations, the real burden is likely to fall upon shareholders — many of whom may well be entirely free of any criminal liability themselves — and, if the fine is enough to cripple the company, it is ultimately the employees who may suffer. Any pecuniary penalty, therefore, must balance the need to appear 'substantial' against the concern that it cannot be so large as to do any real damage to the company.[53]

(An additional concern is the temporality of the corporation as artificial construction of law. Once a corporation has dissolved, it cannot be held liable for offences committed before or after that dissolution. The situation in *Denbo* was analogous — no penalty can be effectively imposed on a company in liquidation.[54])

Obviously, these issues are not entirely resolved by the application of penalties other than fines — ultimately, the corporate structure links the individuals who control its actions (and those who do not) through financial ties so even such penalties as corporate probation[55] or punitive injunctions and adverse publicity orders[56] would in effect only impact on the corporation itself by causing a drop in profits (similar problems also arise if the company is wound up prior to sentencing). However, by focussing on the importance of deterrence, an adverse publicity order may be more effective in bringing the issue of workplace safety to public attention, and consequently more efficiently prevent future undesirable conduct than would a fine — particularly one which is reported in the media as one never to be paid.

[50] See, eg, Criminal Law Commissioners, above n 1. Cf Jeremy Bentham, *Théorie de Peines et des Récompenses* (1811) cited and critically discussed in Pasquino, above n 42, 239-40. Cf Norrie, above n 1, 199-200.

[51] See above, n 15.

[52] Crimes Act 1914 (Cth) s 4B(3). (The maximum penalty for a corporation for breach of the Occupational Health and Safety Act 1985 (Vic) is $250,000.)

[53] See J C Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problems of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 389-93. Cf *Wattle Gully Gold Mines NL* [1980] VR 622, 623-4 (citing with approval Williams, above n 6).

[54] Trial Transcript, 40 (Teague J). However, where a corporation incurs a fine which it is unable to pay, and immediately prior to the offence there were 'reasonable grounds to expect that the body would not be able to meet any liabilities it incurred at that time', directors may be held jointly and severally liable for the payment of the fine: Sentencing Act 1991 (Vic) s 50(6).

[55] See, eg, Australian Law Reform Commission, above n 30, paras 291-307. Cf Richard Gruner, 'To Let the Punishment Fit the Organisation: Sanctioning Corporate Offenders through Corporate Probation' (1988) 16 *American Journal of Criminal Law* 1.

[56] See, eg, Celia Wells, *Corporations and Criminal Responsibility* (1993) 30-8; Fisse and Braithwaite, above n 6.

CONCLUSION

> [T]he power relation that underlies the existence of punishment begins to be duplicated by an object relation in which are caught up not only the crime as fact to be established according to common norms, but the criminal as an individual to be known according to specific criteria...
>
> Michel Foucault, *Discipline and Punish*[57]

The very fact that *R v Denbo Pty Ltd* was accepted so easily into Victorian criminal law is perhaps the most important reason why critical evaluation of this case is required. When viewed as a progression, the historical moves towards holding corporations liable for offences such as manslaughter — the pragmatic justifications offered at each step — all appear both reasonable and necessary. Neither the Crown, nor Magistrate, nor Judge questioned the applicability of the law of manslaughter to Denbo Pty Ltd. The only available penalty of a fine was imposed with little comment.

This Article has argued that by failing to address the larger theoretical issues raised by the attribution of quasi-human criminal liability to a corporate entity (the corporate subject), and by the equation of a financial sanction with the incarceration of an individual, the criminal law not only fails in its stated aim of deterrence as enunciated by Teague J, but also produces counter-currents in the philosophical and ideological premise of individualism that provides legitimation for the Western understanding of criminal law itself.

In the absence of an alternative, it was accepted that holding corporations liable for criminal offences such as manslaughter may be preferable to leaving them unpunished. However, this must be viewed as a purely utilitarian measure, not laying claim to abstract notions of justice, but focussing on deterrence. As such, the penalties imposed on corporations should reflect this, with publicity and reform being paramount. For this purpose a fine will oftentimes be inadequate.

[57] Foucault, above n 44, 101-2.