

BOOK REVIEW

Safeguarding the Worker, by Neil Gunningham, Sydney, The Law Book Company Limited, 1984, xxiv + 426 pp. \$42.

This is an extraordinarily satisfying discussion of the problem of making law for the safeguarding of the worker—satisfying because it treats so thoroughly the politics and the social technicality of the problem, and does so with all due scepticism of the preoccupations of employers who have hardly led the workers out of danger into the promised land.

The legacy today of the law-making in the past directed at factories and industrial safety may be reckoned in terms of an increasing cost of lost production, waste of resources, burdensome compensation and care, coupled with the suffering, death, disease and incapacity on the human, the flesh and blood side of the equation. There remains demonstrable inadequacy in the response of our laws to the risks of production in the modern mode. Yet despite all that, as Mr. Gunningham argues, law-making remains the best, although not the entire means of social defence and counter-attack upon the cost of our losses from the application of horsepower and chemicals to the satisfaction of our received needs.

We are, perhaps, entering upon a new era of industrial injury—and that at a point in time when we have barely absorbed the significance of our past industrial experience. This began with the application of heat, gears and levers to the raw materials of nature which had hitherto been fashioned by mankind with a modest fire and a few hammer blows, or the comfortable treadling of a spinning wheel and the push and pull of a domestic shuttle. Now we seem to be entering upon an age of repetition injury brought on by plucking chickens and electronic data processing, an age of irradiation and chemical injury which can come upon a life insidiously, long unsuspected and detected too late—as in the case of asbestosis, a stark example from the past. Yet the industrial environmentalists continue to be charged with standing in the way of human progress and of economic growth, as if the price we paid and pay is insignificant.

The author begins his study with an account of the circumstances that gave rise to the first Factory Act, the Health and Morals of Apprentices Act 1802 (U.K.).¹ It was concerned with the physical and moral health of factory children,

. . . who were used extensively both because their size enabled them to work in spaces too small for an adult, and because their wages were low. At the close of the 18th century it was not uncommon for small children to be employed in factories for 12 to 16 hours daily, seven days a week. . . . Mortality was high, and many were in a stunted and wretched condition.²

¹ 42 Geo. III, c. 73.

² N. Gunningham, *Safeguarding the Worker* (1984) at 37.

The new law restricted the employment of pauper children in mills and factories to 12 hours daily, six days a week. Some clothing was to be provided and a rudimentary education given daily. The Act failed. Enforcement was put in the hands of magistrates already compromised by their class instincts and loyalties. The indifference engendered by the cultural values of the day stayed the hand of those who knew the law. Moreover, steam in the towns came to replace the power of the rural water mill and in the towns there were children enough who did not have the status of pauper. Nevertheless, the enactment established the precedent of parliamentary intervention in industry. The social problem persisted, and so did the reformers. Several new Acts were passed over the next 30 years, with increasing attention given to efficacy and enforcement. It is the problem of efficacy and enforcement which bedevils safety legislation even today. We continue to quail before the priorities of property and the perceived necessities of managers.

Employers were determined not to fence dangerous machines. It was costly and added nothing by way of extra production. The control of dangerous trades should be left to "market forces". The damage done in the market place could be tolerated out of the moral comfort induced by the payment of higher wages. Beyond the market some saw a case for a control upon the instinctive greed of the entrepreneurs, in political self-interest. In 1844 an editorial in *The Times* warned legislators:

. . . of the infallible result of their not carrying out the protective charter of government. They may think there is danger in restricting labour; but there is certainly more danger in telling labour to shift for itself. Tell the British labourer that he must fight all his battles and make all his own conditions without help from the State, and what sort of feeling is he likely to have towards that State, towards its head, and towards its aristocracy.³

For all this, what is striking about the history of factory legislation is the small influence upon its origin and its course by the victims it was intended to serve, the employees themselves. The first meeting of the Tolpuddle Martyrs was about money, and so it has been more or less ever since. Fewer hours matter more than fencing. The relative indifference of the organisations of the Australian working class to safety contrasts with the attention given to their "economic" demands.

It is, however, more than a matter of priority. It is also a matter of power. It is this consideration which subverts any suggestion that the present allocation of liability, compensation and the general burden of the total cost is just, whether the rules are propounded in the courts or in the legislature:

The history of factory legislation should make one aware that preventive legislation . . . will benefit some at the expense of others, and that without an understanding of the relative power and influence of the groups involved, one is unlikely to appreciate fully where the legislative compromise has been drawn and why.⁴

³ *Id.* 51, quoting *The Times* editorial of 9 May 1844.

⁴ *Id.* 74.

The author justifies the attention he gives to the political history of safety-related legislation by remarking that,

. . . a full understanding of the present law is not possible without an appreciation of its 19th century antecedents. Moreover, only by understanding why that legislation took the form it did, how it came to be shaped by particular social forces and to suffer from particular inadequacies, can we fully comprehend the impediments, legal, economic and political, which stand in the way of future reform.⁵

I join with the author in believing that the book should be of interest to a wide audience, including labour and management officials, policy makers and all those who are concerned with the grave human and economic costs of work injury. It will be useful to anyone who is concerned about rights and obligations under the law, to legal practitioners not least.

Lawyers, who sometimes scorn knowledge of the social environment of the law, and who weigh the footnotes in a book to test its gravity, will find citation to some 250 decided cases, some 170 sources of law of a statutory character and a copious bibliography of Australian, English, North American and other international writing of use to one who must persuade another to his cause. As is fitting of the product of research at our national university, the book treats all the systems having statutory support in Australia. It reviews the ideas of common law and statutory negligence, and of absolute and qualified civil and criminal liability. The author's method is firstly expository, then judgmental and reformist: ". . . critical comments have generally been reserved for a separate heading at the end of the relevant sections or chapters".⁶

Several chapters late in the book are given up to guidance through the rocks and shoals of law reform so that we may grope our way out of the present dangers that cause us to cast away some million working weeks a year through "accidents" and 300 lives to boot, to say nothing of an injury rate some five times that of the road toll and losses from disease not yet properly counted. He meets the Chicago School of free-marketeters head-on in his chapter directed to the problem of government intervention and welfare economics, and deals fairly with their analysis that marginal utility is the most potent force available to keep industrial losses at a tolerable level. His own conclusion is trenchant, and in the light of the thoroughness of his whole study, authoritative. Against self-regulation he says:

The subordination of wealth maximisation to other goals should not necessarily be cause for concern The ultimate choice of an occupational health and safety policy is likely to depend on both economic and non-economic considerations and specifically on "the willingness of society to trade-off economic efficiency to pursue justice, equity and distributional objectives" Without some form of compulsion by the state, there is little doubt that employers in a market economy . . . would continue to externalise many of the

⁵ *Id.* 8.

⁶ *Id.* 9.

costs of accidents in the interests of profits and productivity, just as they did under the *laissez-faire* philosophy of the 19th century.⁷

I am grateful to the editor of this journal for having introduced me to this book. It is a valuable conspectus presented with great clarity of exposition. May I promote two other books to be read in conjunction with it? The first originates in an Australian experience under the B.H.P. at Whyalla, and the second in the Toyota works in Japan. I speak of *Working for the Company* by R. J. Kriegler⁸ and of *Japan in the Passing Lane* by Satoshi Kamata.⁹ Both these works show out of the personal experience of workers how management policies for productivity and output can and do generate industrial injury. I would say to those who would restructure our manufacturing industries to compete with Asia, for strength in the export markets, to pay heed to Kamata's purpose in setting down his experience on the Toyota production line:

I wanted to show the inhumanity of it all — not only its inhumanity, but also the unquestioning adherence to such a system. Is the prosperity of a modern, industrial society worth such a cost, such a cruel compulsion of robotlike work? If the production of cars — mere machines — necessitates such a sacrifice of human freedom, just what does this say about the paradox of modern civilisation?

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⁷ *Id.* 296-297, footnotes omitted.

⁸ Melbourne: Oxford University Press, 1980.

⁹ English translation, New York: Pantheon Books, 1983.

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