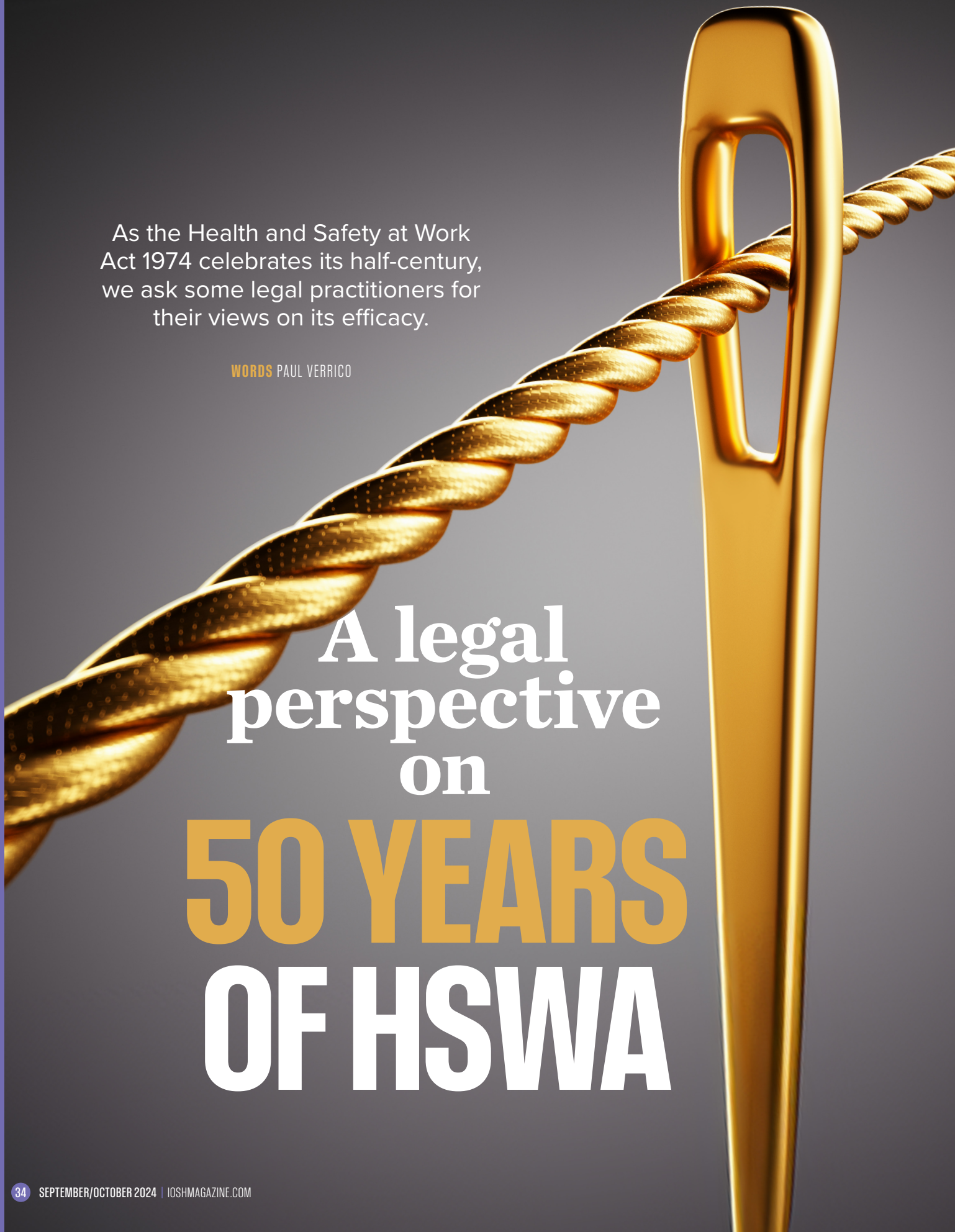


As the Health and Safety at Work Act 1974 celebrates its half-century, we ask some legal practitioners for their views on its efficacy.

WORDS PAUL VERRICO

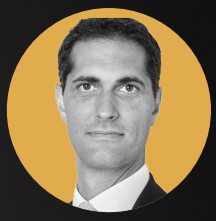
A legal perspective on 50 YEARS OF HSWA


GERARD FORLIN KC


JOHN COOPER KC


BEN COMPTON KC


STEPHEN HOCKMAN KC


JAMAS HODIVALA KC


SARAH VALENTINE, PARTNER


DOMINIC ADAMSON KC


PRASHANT POPAT KC


PAUL VERRICO, PARTNER

Gerard Forlin KC, do you think the HSWA achieved what it set out to do?

In general, the HSWA has stood the test of time. However, in my view it is beginning to creak at the edges. One example is in relation to the reverse onus presumptions and the perceived unfairness, especially in relation to individuals being prosecuted under the Act. In an age where the golden thread of justice is perceived as 'innocent until proven guilty', that is a massive aberration.

John Cooper KC, what's your view?

In the Robens report, the intention of those members of the 1972 committee (CMND 5034) indicated that the use of criminal proceedings should be rare. The committee was more concerned that 'the real need is for a constructive means of ensuring that practical improvements are made and preventive measures adopted'. The way that the HSWA has been used goes far beyond these original intentions, in my opinion.

Ben Compton KC, can you give us your thoughts?

I agree with John that the end result is different from the first concept of the legislation. The Robens report envisaged the use of prohibition and improvement notices as the main weapon against acts and omissions under the new Act. Prosecutions for section 2 and section 3 were seen as a last resort and only to be reserved for the most heinous breaches. However, health and safety enforcement in 2024 is far removed from those early principles, with a much looser approach to charging section 2 and section 3 offences.

Having said that, the HSWA has been in force for 50 years and was clearly a very clever piece of drafting, simplifying as it did the existing tangle of statutes and regulations and replacing them with a single Act that applied to all workers. The core concept of placing the onus on the employer to show that it has taken all reasonable steps was an innovative one in 1974 and is as relevant today as it was then. I believe that the HSWA has achieved what it set out to do.

Stephen Hockman KC, has it become harder for defendants to prove reasonable practicability as a defence?

Yes, I think it has. Certainly, since R v Davies [2002] EWCA Crim 2949, approved in R v Chargot [2008] UKHL 73 and more recently R v (1) AH Ltd and others [2021] EWCA Crim 359, there is no prospect of arguing (for the time being) that the reverse burden of proof is unfair.

In addition, with the wealth of health and safety measures that can now be taken, there is increasing difficulty in proving that it was 'not practicable or not reasonably practicable to do more than was in fact done' (see section 40 of the Act). Unless the defendant can persuade the jury that it took all measures that were reasonably practicable, they are likely to be convicted. This very high bar is a principal reason why it is rare that a defendant will mount their whole defence on proving reasonable practicability.

IMAGE: ISTOCK

Jamas Hodivala KC, what do you think?

It has always been hard to prove that a faceless company (that juries know is only going to be fined) has done everything it could to avoid a worker's death. As the fines are so large, and there is now no prospect of recovering legal fees in the event of an acquittal, I think most companies are looking for a commercial resolution to any criminal investigation nowadays, let alone a GB Health and Safety Executive (HSE) investigation. Taken together, I think those two factors may create a perception that it's becoming harder to establish reasonable practicability, but in reality I'm not so sure it has changed.

John, in a world that considers the 'new view' of safety focused on system failures, is it wrong to have a punitive set of sanctions for individuals embodied in the HSWA?

I feel very strongly about this. If an individual has been trained and is competent in the safety systems that are required for a business – and personally plays a significant part in a failure of an undertaking's safety systems (a failure consistent with section 37 or section 7 of the HSWA) – then the 'new view' does not change the logic of individual enforcement. The extent to which such enforcement is required is a wider issue given the increased use of individual prosecutions with custodial sanctions, and is one that deserves greater consideration.

Sarah Valentine, partner, what's your experience?

If you look at James Reason's 'just culture' model, which became popular in the late

INDIVIDUAL CLIENTS ARE TERRIFIED OF BEING PROSECUTED, BUT THE DATA SUGGESTS VERY FEW ARE CONVICTED

1990s, there was a big drive to look at system failure rather than personal error when organisations were investigating incidents. Later safety scholars such as Dekker and Conklin have continued to try and separate the actor from the incident, going beyond blame to look at the wider factors.

I think the HSWA should really focus on egregious breaches (in the way that gross negligence manslaughter does) rather than on neglect, which is the section 37 test, or failure to act 'reasonably', the section 7 test. Individual clients are always terrified of prosecution, even though the statistics suggest very few individuals are actually charged or convicted – the weight of an investigation can really hang heavily.

Dominic Adamson KC, have you ever felt one of your clients was persecuted rather than prosecuted?

Persecuted is a strong word and I would not go so far. I was involved in a case where my clients ran a care home and were prosecuted by a local authority. My clients did not incorporate and so ran their business as sole traders. They were prosecuted in their personal capacity. The local authority placed a service user in my clients' care home but did not provide important information that was in their possession about the risks he would pose to himself. The local authority was therefore – in my clients' view – culpable for the subsequent incident that gave rise to the prosecution. I argued that the prosecution was an abuse of process in part because of the conflict of interest. It succeeded at first instance but was overturned on appeal to the court of appeal. My clients were subsequently acquitted at trial. It was the right result, although it took a long time to get to it.

Prashant Popat KC, have you ever had that feeling of unfairness?

I have been involved in over a hundred investigations, with dozens of trials, yet have only had that sense twice.

In one case, it felt like the prosecution unnecessarily went after defendants who had not really done anything wrong. Yet they were served with thousands of pages of evidence and a 50-page case summary. The jury convicted both defendants on all charges, and it was the only case I can recall where I felt the jury's decision was inexplicable.

In the other case, the sense of persecution came from the conduct of the judge. He determined from the outset that the defendant was guilty, and he repeatedly intervened to make his views known. At the close of the prosecution case, he even questioned, in front of the jury, whether the defendant would really continue to defend the case. The defendant was unsurprisingly convicted and, for the only time in over 30 years of practice, I drafted grounds of appeal that attacked the judge's conduct and apparent bias. Before the appeal could be heard, the judge determined the sentence

– it was so low that the defendant decided to abandon the appeal against conviction.

Stephen, does there need to be a different approach to enforcement to break the fatality plateau, or are we going to be stuck at 120/130 fatalities for workers in the UK?

I fear that, like many other aspects of our legal system, the issue lies in resourcing. For example, in 2022/23, the HSE completed 216 criminal prosecutions, a significant decrease from the 290 criminal prosecutions in 2021/22. This may not be entirely the result of funding constraints, but certainly lack of funding will result in less enforcement action. The prosecution figure may fall again as the HSE gets to grips with its new role as the Building Safety Regulator. In my view, the only way the plateau is going to be overcome is with increased resources for the regulator so that they can increase their compliance monitoring and enforcement action.

Dominic, what's your view?

Standards have improved since the 1970s and 1980s. Unpalatable though it may seem, wherever humans are involved, there is human frailty and accidents will happen. Increasing automation seems more likely to make a difference than a different approach to enforcement.

Ben, how have you seen the regulator change during your time in practice?

I believe we have lost the 'minister of justice' approach in our regulators. It is all about getting the highest sentence and recovering costs. When does an HSE prosecutor ever accept that a company's culpability falls into the low category? This is so different from the earlier days, and I think this is one of the biggest problems we face. I am currently instructed in cases where counsel is specifically instructed by the HSE because they are known to be aggressive in court and incapable of conceding anything. It may be cosmetically pleasing for the HSE inspectors, but I am not sure it contributes anything to our system of justice.

Prashant – you defend against other regulators. Is it the same story?

I think over the years the Office of Rail and Road has changed from taking an aggressive approach to something more conciliatory and seeking to work with industry. It is probably now just changing again, so that we have seen much greater enforcement activity than in the preceding 10 years.

The HSE has largely been the same, though I think budget reductions may have impacted its enforcement activity in recent years.

I haven't seen any material change in the approach of local authority regulators.

Jamas, do you think the HSWA should be amended or new regulations brought in to encompass a wider duty for employers relating to mental health, stress and inclusion?

No. I think most employers would argue that health and safety requirements are currently onerous but would, at least privately, acknowledge that the purpose of the legislation is generally to provide a safe workplace that is free from injury and death. Those aims can be objectively monitored by defined criteria and statistics. Mental health, stress and inclusion are such contentious and subjective criteria that I think most employers would struggle to see the justification for the additional bureaucracy, viewing it as legislation supportive of labour rights rather than workplace safety. The HSE would struggle to objectively monitor them.

Gerard, what are your thoughts?

This is already beginning to occur as there is more enforcement in these general areas. I have worked in over 80 countries and am beginning to see much more general enforcement in other jurisdictions, especially Australia, that utilise both the domestic legislation and the various ISO standards and other material.

In my view, I do not think there needs to be new legislation.

John, what's your opinion?

I am not sure such regulations are required over and above the wide-ranging legislation that already exists. It is a very important topic, but those in the workforce would probably benefit more through training initiatives than legislative change. I appreciate that in this area the HSE has recognised concerns at an early stage and has consistently promoted consideration of such issues.