

HEALTH AND SAFETY AT WORK ACT 1974, HSE PROSECUTIONS AND SENTENCING, & METHODS OF MITIGATION



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INTRODUCTION

The Health and Safety Executive ('HSE') have powers to prosecute employers who are found to have breached their duties under various pieces of legislation including but not limited to:

- Personal Protective Equipment at Work Regulations 1992
- Manual Handling Operations Regulations 1992
- Provision and Use of Work Equipment Regulations 1998
- Lifting Operations and Lifting Equipment Regulations 1998
- Management of Health and Safety at Work Regulations 1999
- Control of Substances Hazardous to Health Regulations 2002
- Work at Height Regulations 2005

Most minor accidents would not be on the radar of the HSE, however if there is a serious injury or fatality which is reportable under Reporting of Injuries, Diseases and Dangerous Occurrences ('RIDDOR') it may result in an investigation and eventual prosecution.

Most organisations will have what is known as a 'competent person' responsible for all things Health & Safety or may outsource this to a consultant or adviser. This person should have the skills, knowledge, and experience to be able to recognise hazards and put sensible controls in place to protect works and others from harm.

However, accidents do happen, and the volume of legislation can be quite daunting. If a formal claim is made, the claimant's solicitors will often list a whole raft of reasons why they believe your company has been negligent, which will likely include an allegation of a breach in one or several of the regulations listed above.

An insurance company will investigate the claim and collect information and documentation from you to be able to determine whether you have indeed breached any regulations or in fact you have taken all reasonable precautions, in which case the claim may be defended.

This guide will focus primarily on key factors of the **Health and Safety at Work Act 1974 ('HSWA')**, include a case study, provide insight into sentencing guidelines in the event of a prosecution, and finally touch upon the subject of 'legal privilege'.

A man in a white shirt and tie is holding a clipboard. The image is overlaid with a semi-transparent blue filter. The word "LEGISLATION" is written in white, bold, uppercase letters in the lower right quadrant.

LEGISLATION

Section 2 – General duties of employers to their employees

This section stipulates your duty to your employees: that you have a non-delegable duty of care to ensure their safety whilst at work.

“It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.”

– (<https://www.legislation.gov.uk/ukpga/1974/37/section/2>)

An employer’s duty is wide ranging but as an example it includes.

- The provision and maintenance of plant and systems of work
- To provide instruction/training
- To maintain a safe working environment
- To have a H&S policy and to ensure this is continually reviewed, kept up to date, and that the measures are effective.

Section 3 – General duties of employers and the self-employed to persons other than their employees

Employers have a duty to reduce the risks to the health and safety of members of the public under Section 3 of the HSWA. This is an extension of Section 2 and will be applicable in Public Liability claims.

Section 7 – General duties of employees at work

This places obligations on employees to take reasonable care for the health and safety of themselves and others who may be affected by their acts or omissions at work. This can be used to charge an employee personally for being directly responsible for a serious injury to another member of staff.

Section 37 – Offences by bodies corporate

This section of the legislation allows the governing body to extend any prosecution to the negligent individual (director, manager, secretary, or other similar officer) and allow action to be taken against them personally as well as the company they work for, the ‘body corporate’.

CASE STUDY

Santiago (45), an employee of Hemingway Ltd, was electrocuted whilst using machinery in the course of his employment. The accident could have been avoided.

Santiago suffered burns to his right hand and is now partially sighted. As a result of the incident, he was unable to attend his youngest daughter's wedding or enjoy the company of his new grandson. He will never work again, suffers from depression and his marriage is now in difficulty.

His wife was told by voicemail that her husband had died and had to call local hospitals to be informed he had actually survived. She now also suffers from PTSD.

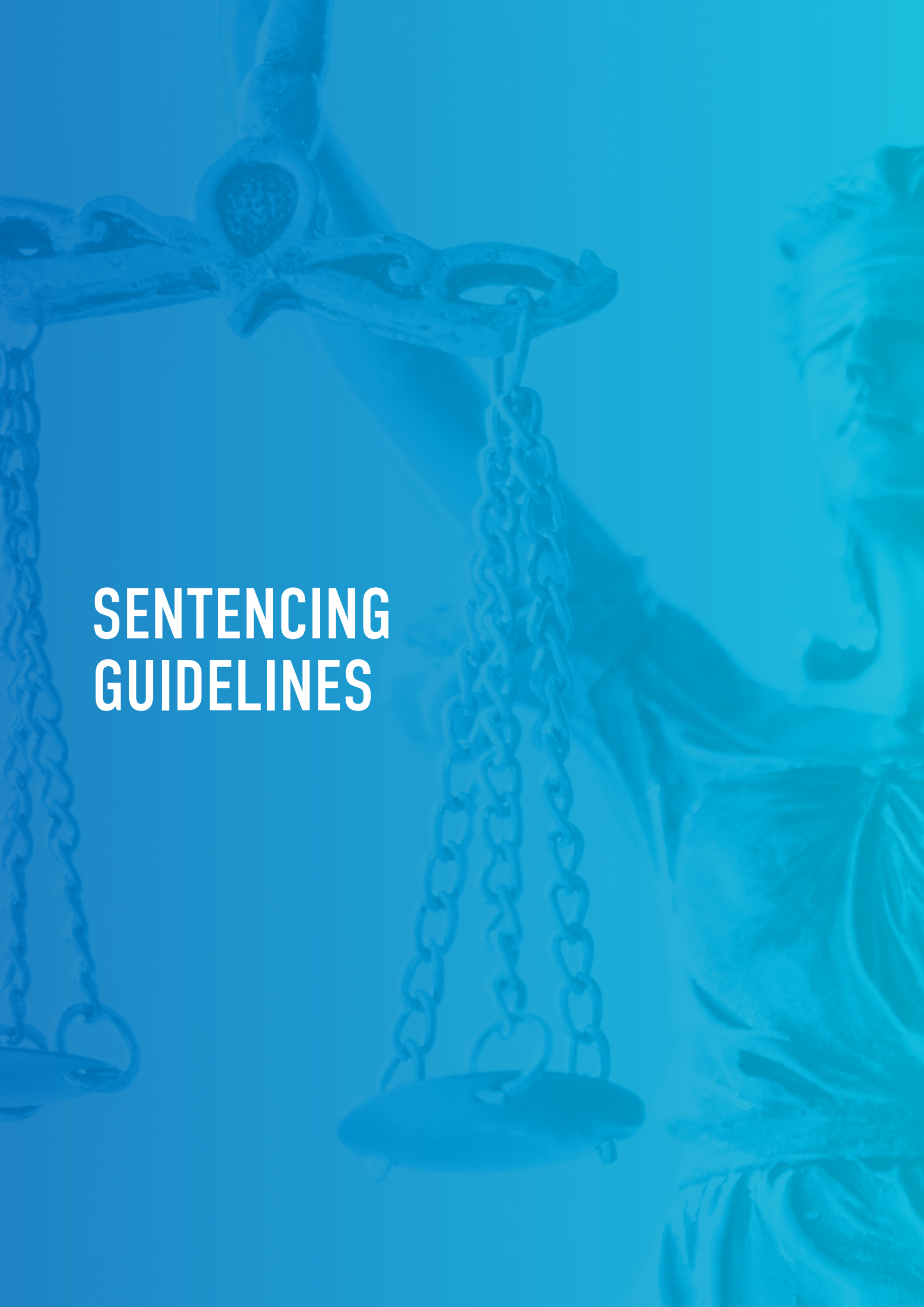
Investigations found that a director of the company, Mr Strong, had a hunch that the equipment may have been faulty as there had been similar near misses and the reports were not reviewed in detail. The checks carried out were seen as a 'tick box' exercise.

Staff were found to have given false accounts to the police and evidence was destroyed by the company. Mr Strong tried to blame employees without investigating properly and failed to take any accountability.

Outcome: Hemingway Ltd were charged under Section 2 (keeping employees safe – Santiago) and Section 3 (keeping others safe – Santiago's wife) of the HSWA as well as Working at Height regulations. The fine was £2.4m.

Mr Strong was personally charged under Section 7 and 37 and of the HSWA and was sentenced to 19 years in jail.

**THE CONVICTION
RATE FOR ALL CASES
BROUGHT BY THE HSE
AGAINST COMPANIES
AND INDIVIDUALS IN
2020/21 WAS 95%
(185 AND 199 CASES).**

The background of the page is a monochromatic blue-tinted image of a classical statue of Lady Justice. She is depicted from the waist up, wearing a flowing robe and a blindfold. Her right arm is raised, holding a pair of scales of justice, while her left arm is extended downwards. The scales are suspended by a chain and have a circular weight hanging from them. The lighting is soft, highlighting the contours of the statue's face and the texture of her clothing.

SENTENCING GUIDELINES

When deciding on the sentence of a company, turnover is the starting point when coming up with a figure. Larger firms are sentenced larger amounts as a proportion of their turnover (Note: profit is not a factor, so a low profit company can be hit disproportionately harder).

After this, they look at the level of culpability, which is either **Very High, High, Medium, or Low**. The sub-category of Harm dictates the bracket i.e., what is the level of harm caused to the individual affected?

Fig 1 – culpability categories

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by:

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- failing to make appropriate changes following prior incidents(s) exposing risks to health and safety
- allowing breaches to subsist over a long period of time

Serious and/or systemic failure within the organisation to address risks to health and safety

Medium

Offenders fell short of the appropriate standard in a manner that falls between descriptions on 'high' and 'low' culpability categories

Systems were in place but these were not sufficiently adhered to or implemented

Low

Offender did not fall far short of the appropriate standard; for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk to health and safety

Failing were minor and occurred as an isolated incident

Fig 2 – harm categories

Seriousness of harm risked			
	Level A	Level B	Level C
	<ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy 	<ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer’s ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	<ul style="list-style-type: none"> • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Fig 3 – Example of the sentencing bracket of a medium-sized company with a Turnover of £10m - £50m

Medium Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,600,000	£1,000,000 - £4,000,000
Harm category 2	£800,000	£400,000 - £2,000,000
Harm category 3	£400,000	£180,000 - £1,000,000
Harm category 4	£190,000	£90,000 - £500,000
High culpability		
Harm category 1	£950,000	£600,000 - £2,500,000
Harm category 2	£450,000	£220,000 - £1,200,000
Harm category 3	£210,000	£100,000 - £550,000
Harm category 4	£100,000	£50,000 - £250,000
Medium culpability		
Harm category 1	£540,000	£300,000 - £1,300,000
Harm category 2	£240,000	£100,000 - £600,000
Harm category 3	£100,000	£50,000 - £300,000
Harm category 4	£50,000	£20,000 - £130,000
Low culpability		
Harm category 1	£130,000	£75,000 - £300,000
Harm category 2	£40,000	£14,000 - £100,000
Harm category 3	£14,000	£3,000 - £60,000
Harm category 4	£3,000	£1,000 - £10,000

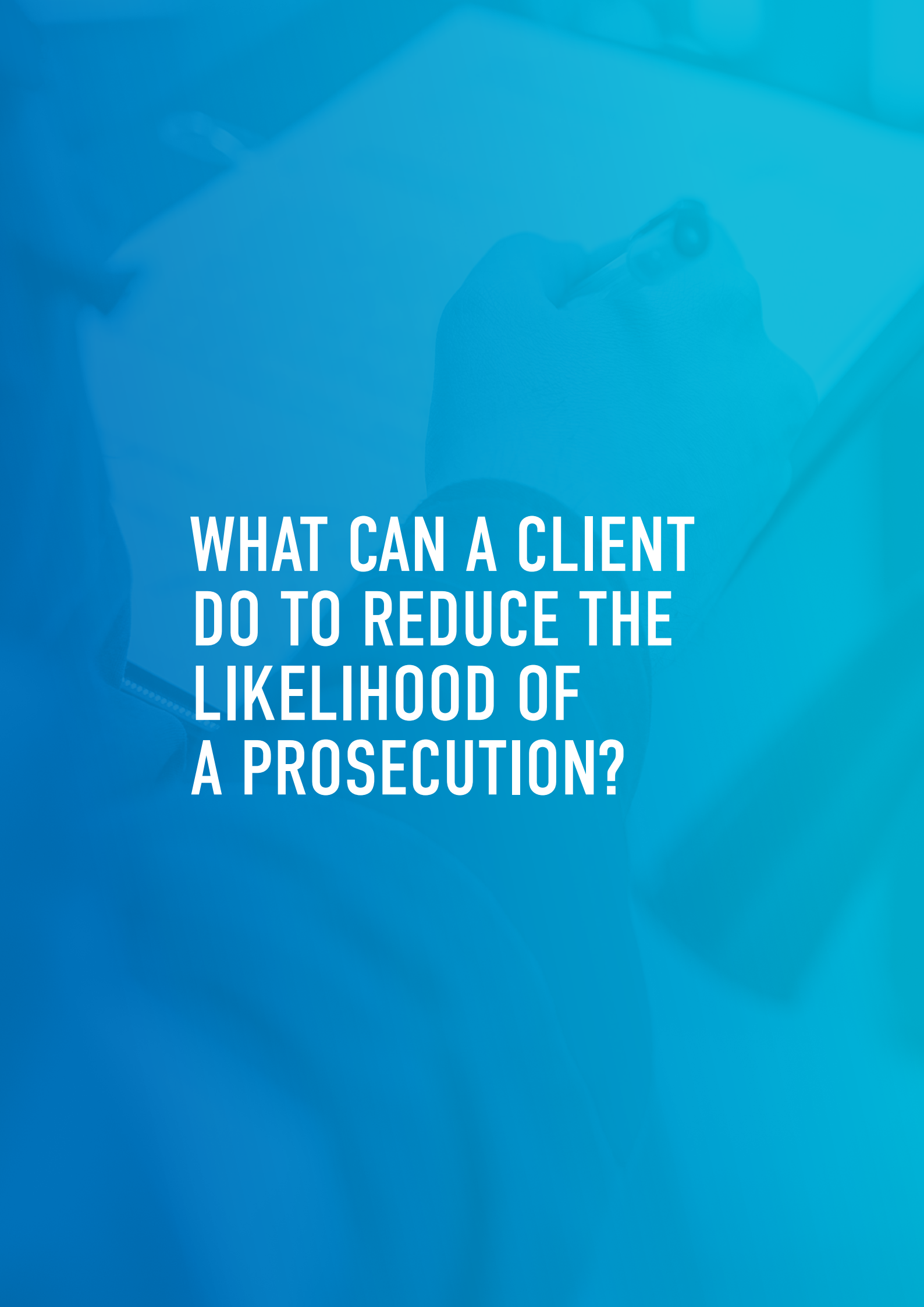
A small company with a turnover of £2m - £10m could be fined up to £1,600,000 for a Very High/Harm category 1 sentence. A large company with a turnover of £50m and over could result in a maximum fine of £10,000,000.

Finally, it is important to review aggravating or mitigating factors. The following list is non-exhaustive.

Fig 4 – factors increasing or reducing seriousness

Factors increasing seriousness	Factors reducing seriousness or reflecting mitigation
<p>Statutory aggravating factor:</p> <p>Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction</p>	<p>No previous convictions or no relevant/recent convictions</p>
<p>Other aggravating factors include:</p>	<p>Evidence of steps taken voluntarily to remedy problem</p>
<p>Cost-cutting at the expense of safety</p>	<p>High level of co-operation with the investigation, beyond that which will always be expected</p>
<p>Deliberate concealment of illegal nature of activity</p>	<p>Good health and safety record</p>
<p>Breach of any court order</p>	<p>Effective health and safety procedures in place</p>
<p>Obstruction of justice</p>	<p>Self-reporting, co-operation and acceptance of responsibility</p>
<p>Poor health and safety record</p>	
<p>Falsification of documentation or licences</p>	
<p>Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities</p>	
<p>Targeting vulnerable victims</p>	

It is important to note that this is simply a guideline; on the day a judge could quite easily double the sentence if they wish depending on the specific factors of the case.



**WHAT CAN A CLIENT
DO TO REDUCE THE
LIKELIHOOD OF
A PROSECUTION?**

DIRECTORS BEING SENT TO PRISON IS ON THE INCREASE AND IN THE EVENT OF A FATALITY THIS IS QUITE LIKELY. AS WELL AS A PRISON SENTENCE, DIRECTORS CAN ALSO BE FINED ON A PERCENTAGE OF THEIR WEEKLY INCOME.

In the immediate aftermath of a serious incident, it is important to be a calm presence and look out for the wellbeing of anyone involved. Once the area is secure and you know staff are safe, that is when investigations can commence. It is important for the company to:

- Contact any emergency services if not already done so
- Inform the next of kin of those involved
- Run through the basic details i.e., what happened, where and who is involved

If possible, it would be best to attend site in person so that statements can be taken from those who witnessed the accident, photos can be taken, and equipment used can be retained.

It is very important to preserve the area and any evidence and not to move anything until allowed to do so by the authorities. If not already done so, it would be wise to cordon off the area entirely to prevent accidental tampering with the scene. If any items need to be moved, it would be advisable to keep a record so evidence can be produced if questioned by the police or HSE.

If the police request a copy of the H&S file, you do not have to hand over the entire file. You are entitled to seek legal advice and only provide documents that are relevant. The best way out of this scenario would be to ask the police to send an email with a list of exactly what documents they want, so that you appear cooperative without prejudicing your own position.

If the police wish to take the original documents, it is a good idea to take a copy so that you are in the same position as them or the regulator and so a solicitor can provide advice with all of the same information to hand.

It is best to try and get legal support as soon as possible, especially if the police wish to take statements or conduct an interview under caution (PACE). Is the interview as a witness of fact or is the person being treated as a suspect? If the latter, they are entitled to have legal representation present and have the right to remain silent.

A statement of fact is a voluntary process; it is good to be cooperative but also important that the witness knows what to expect and that they do not have an obligation to speculate or fill in any silences which could lead to an over-divulgence of information.

If the witness would like someone with them during an interview, it is important that this person is not a senior manager of the company as any positive comments made may not be believed given the presence of a potential line manager.

Another recommendation is for the business to have an **email shutdown** and ensure that the case is not discussed by email exchange. The police can download all emails exchanged to see if there is any speculation so if there is a shutdown this reduces the risk of saying something which could go against that individual or the company.

A blue-tinted photograph of three people in business attire, with the text 'LEGAL PRIVILEGE' overlaid in white. The image shows the lower bodies and legs of three individuals standing side-by-side. The person on the right is holding a light-colored bag. The overall scene is dimly lit, with the blue tint dominating the color palette.

LEGAL PRIVILEGE

If any information or documentation is subject to legal privilege the company can refuse to send this to the HSE. It is therefore important to restrict circulation of documents to the core investigation team and to be careful when creating new documents post-incident, such as post-accident risk assessments or any amendments to H&S policies.

Documents which are prepared in anticipation of litigation and shared between the company and their legal representative will fall into this category. It is good practice to title any correspondence 'confidential' and 'subject to legal privilege'.

If a document is shared to an expert, including a broker or insurer, this could lose the right to legal privilege. It is important that an insurer is on board with the case if cover is to be relied upon, so if the insurance company instructs a solicitor to act jointly on behalf of both the insurer and the client, legal privilege is maintained.

It may be advisable in the event of a serious incident not to fill out the usual Accident Report Form as this document is frequently used to prosecute companies. A lot of accident report forms contain sections which invite criticisms of existing policies such as corrective actions. Alternatively, it may be preferable to seek legal advice and complete a different kind of report which can be subject to legal privilege, if the document has been created with the view to obtaining legal advice on defensibility.

In summary, if there is a serious incident which is likely to lead to formal investigation by the police and/or regulator it would be wise to seek legal advice on legal privilege and ways to avoid creating any documents which could be used against an individual or the organisation later down the line.

A hand holding a pen over a document, with a blue overlay and a diagonal line.

SUMMARY

At Romero Insurance Brokers we have an experienced team of claims professionals who are on hand to guide clients when the worst happens.

If you find yourself involved in a serious accident involving the police and/or the HSE, you just need to pick up the phone and we will be able to guide you through the process and engage the insurance company/legal experts as soon as possible.

We also work closely with our partners Sentient, who can provide advice on HR, Employment Law, and Health & Safety.



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