The Breathalyser Problem

Roger, a lorry driver, was driving home one night from the pub (where he drank nothing but orange juice all night) when he was pulled over by Nobbie, a policeman, for breaking the speed limit. While reprimanding Roger, Nobbie thought that he could smell alcohol on Roger's breath; he therefore asked Roger to blow into a breathalsyer, manufactured by Hi-Tech Enterprises plc. The breathalyser was faulty and as a result its reading indicated that Roger was driving around with twice the permitted level of alcohol in his breath. Nobbie arrested Roger and took him down to the police station where he was charged with having committed an offence under section 5 of the Road Traffic Act 1988 (driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit). No attempt was made at the police station to measure the level of alcohol in Roger's blood (contrary to the established practice at the station) because the police station was short-staffed at the time. In court, Roger's barrister, Sally, failed to question the reliability of the breathalyser reading despite the fact that a recent article in a prominent law journal had reported a drink-drive case in which a defendant had successfully proved that a breathalyser manufactured by Hi-Tech Enterprises plc had given a faulty reading of the level of alcohol in his breath. Roger was found guilty as charged and was disqualified for 12 months. As a result, he lost his job as a lorry driver. A few months later, Roger's conviction was reversed as unsafe and unsatisfactory when the breathalyser used on him by Nobbie was found to be defective in a routine audit.

Advise Roger.

Model answer

Roger may want to sue the following people:

Hi-Tech Enterprises plc

Claim under the Consumer Protection Act 1987

It is doubtful whether Roger can sue Hi-Tech Enterprises plc ("Hi-Tech") under the Consumer Protection Act 1987 for damages to compensate him for the losses he suffered as a result of being wrongfully convicted of driving with excess alcohol in his breath. While the breathalyser with which he was tested was defective it is unlikely that it counts as "defective" for the purposes of the Act. Under the Act (section 3) a product is to be regarded as "defective" if its "safety is not such as persons generally are entitled to expect". The breathalyser was not actually unsafe – in the sense of in a condition where people's property or persons were endangered by the breathalyser.

Claim in negligence

Roger might be able to sue Hi-Tech for damages in negligence to compensate him for the losses suffered by him as a result of being wrongfully convicted. It may be noted straightaway that as Roger's conviction has already been overturned, there is no possibility that a claim in negligence against Hi-Tech would be struck on the ground

that it amounted to an abuse of process – an illegitimate attempt to bring the correctness of his conviction into question.

To successfully bring a claim in negligence against Hi-Tech, Roger will have to show: (1) that Hi-Tech owed him a duty to take care that the breathalyser that was used on Roger did not leave its hands in a defective condition; (2) that the breathalyser used on Roger was defective because Hi-Tech breached that duty of care. Both are difficult to establish.

There is no authority either way on whether (1) is true. If we apply the *Caparo* test for determining whether a duty of care was owed in any given situation, it is strongly arguable that Hi-Tech did owe Roger a duty of care in manufacturing the breathalyser that was used on him. It was reasonably foreseeable that Roger might be wrongfully convicted if Hi-Tech failed to take care in manufacturing the breathalyser that was used on him and, given the effects that a criminal conviction can have on someone's life and career, there is little question that it would be "fair, just and reasonable" to find that Hi-Tech owed Roger a duty to take care to ensure that the breathalyser that was used on him did not leave its hands in a defective condition. On the other hand, it might be argued that finding that Hi-Tech owed Roger a duty of care would result in manufacturers of breathalysers being exposed to liabilities which are indeterminate in extent. But such a consideration did not prevent the House of Lords from finding in *Donoghue* v. *Stevenson* that a manufacturer will owe the ultimate consumers of his goods a duty to take care that those goods do not leave his hands in a dangerously defective condition; it is difficult to see why the law should treat the manufacturers of breathalysers more indulgently.

We do not have enough information to evaluate whether (2) is true – it is not clear, on the face of the problem, whether the breathalyser was defective because of some carelessness in its manufacture or whether the breathalyser was defective because of something that happened to it after it left Hi-Tech's hands. This is not a case, it is submitted, where the maxim *res ipsa loquitur* can be applied – it cannot be said that, in the normal course of things, we would not expect the breathalyser to be defective had care been taken in its manufacture; there are too many things that could have happened to the breathalyser after it left Hi-Tech's hands for that to be the case. So, it is submitted, Roger will have to prove that the breathalyser was defective because there was some carelessness in the way it was manufactured.

If (1) and (2) can be made out then Roger will be entitled to sue Hi-Tech in negligence for damages to compensate him for the loss of income that he suffered as a result of his losing his job as a lorry driver on being disqualified; it cannot be argued that that loss of income is too remote a consequence of Hi-Tech's negligence (if negligence is established) to be actionable; it was reasonably foreseeable that Roger would suffer that kind of loss if Hi-Tech were negligent in manufacturing the breathalyser that was used on him. It is submitted that the damages will *not* be reduced on the ground that Roger was contributorily negligent in driving too fast (the event which caused Nobbie to pull him over and which led to his being wrongfully convicted in the first place) – the reason why Roger should not have driven too fast had nothing to do with the reason why he was convicted and lost his job as a lorry driver: *Westwood* v. *Post Office*.

Sally

Roger may be able to sue Sally in negligence to be compensated for the losses suffered by him as a result of being wrongfully convicted of driving with excess alcohol on his breath. (Again there is no question of a claim against Sally being struck out on the ground that it amounts to an abuse of process.) It is, now, well-established that Sally owed Roger a duty to conduct his case in court with reasonable skill and care: *Hall* v. *Simons*. Did she breach that duty? It depends on whether she could have been expect to know about the report in the prominent law journal which suggested that Hi-Tech's breathalysers might be not be reliable. If there she had no reason to be aware of the report then her failure to bring into question the reliability of the breathalyser reading in Roger's case would not be culpable; in that case, she would no reason to think that the breathalyser reading should be brought into question. If she ought to have known of the report in the prominent law journal, then Sally was negligent in conducting Roger's case – a barrister conducting Roger's case in a professional manner would have known of the report and would have questioned the reliability of the breathalyser reading in Roger's case. Ought Sally to have known of the report? It depends. If Sally was a top barrister then undoubtedly she ought to have known of the report. If, on the other hand, she was swamped with loads of cases with little time to prepare any of them and even less time to read recent law journals then perhaps her failure to know about the report in the law journal can be excused: see the remarks of Mustill LJ in the *Wilsher* case.

Even if Roger can establish that Sally was negligent in conducting his case, he will only be entitled to sue Sally for damages to compensate him for the losses suffered by him as a result of being wrongfully convicted if he can show that, had Sally not been negligent in conducting his case, he would not have been wrongfully convicted. This should not be hard to show – had the reliability of the breathalyser been brought into question, it probably would have been tested and found to be defective, as happened a few months after Roger was convicted.

So – if Roger can establish that Sally was negligent in conducting his case, he will probably be entitled to sue her for damages in respect of the loss of income suffered by him when his wrongful conviction led to his losing his job as a lorry driver. Again, it is submitted that Sally will not be able to raise a defence of contributory negligence to Roger's claim.

The police

Can Roger sue the police (or, more accurately, the police authority in charge of the police station where Roger was charged) in negligence for damages to compensate him for the losses suffered by him as a result of being wrongfully convicted? The answer is no: see the *Calveley* case. Two reasons can be given for taking this view. The first is doctrinal: the tort of malicious prosecution would be completely overthrown if claims in negligence could be brought in these sorts of situations. The second relies on public policy: if a claim in negligence could be brought against the police in a case such as Roger's, the police would not charge a suspect until they had assured themselves beyond any doubt that he was guilty. Before charging a suspect, they would think: "If we charge him and he turns out not be guilty, he may sue us in negligence, claiming that we owed him a duty to take reasonable steps to assure ourselves that he was guilty before charging him and that we breached that duty; so

we had better make sure before we charge him that he is actually guilty." As a result, excessive amounts of police time and resources would be expended on making absolutely sure that arrested suspects were guilty before charging them – time and resources that might be better spent on investigating different crimes and arresting more people.

Comments on the model answer

(1) Notice the sparse use of cases in this answer. Only bring in cases when you need to do so – either to back up a proposition of law which is new or which some people might be unfamiliar with or find controversial. You don't need any invoke any case to support the proposition that for A to be able to sue B in negligence, A will have to show that: (1) B owed A a duty of care; and (2) B breached that duty of care. That's what is sometimes called *trite law* – so obviously true that you don't need to back it up. (There is a school of thought that says that there's no such thing as trite law – that it's not ever possible to say for certain what the law says on a particular issue. I don't agree and neither should you. If this school of thought were correct then our law would be in terrible shape – it would be incapable of performing its primary function; that of guiding us as to what we should do. Fortunately our law is in not such bad shape and while it is uncertain in many respects, in other areas it is perfectly clear.) Some teachers are a quite strict and demand that their students back up every proposition of law they set down with supporting authority. This is tough to do in an exam when you only have limited time to do an answer. So I remain of the view that the best policy is only to bring in cases to back up new, unfamiliar or controversial propositions of law.

(2) In this problem, for convenience's sake I used the term "Hi-Tech" to describe "Hi-Tech Enterprises plc". This is fine. Some students would have gone further and just used the acronym "HT" in their answer to denote "Hi-Tech Enterprises plc". This is okay as well – but a problem answer which is littered with the letters "HT" is likely to be a little less readable than the problem answer set out above. Show consideration for your examiners – try to keep your answers neat and readable. Good style will put the examiner in a good mood and make him/her more disposed to give you a good mark. Pursuing that point, don't ever write your answers to problems or essay questions in note form unless you are in absolutely dire time trouble – as a general rule, note form answers do not go down well with examiners.

(3) Note that in considering Hi-Tech's liability to Roger, I dealt with its possible liability under the Consumer Protection Act 1987 first, before going onto its possible liability in negligence. The reason for this is simple – it's easier to establish liability under the Act. Why go through all the hoops of duty and breach if you can make out a case for liability under the Act? Consider the Act first and only if there is no liability under the Act should you go on to consider negligence liability. If your defendant (here Hi-Tech) is liable under the Act then there'll be no need to consider his/her/its possible liability in negligence.