

The E-Mail Problem

Ursula, a Lecturer in Law at Stepford University, applied for a position as Professor of Tort Law at Walford University. Clive, the Professor of Public Law at Walford University, was in charge of the applications process. Seeking to obtain an independent assessment of Ursula's abilities, he e-mailed George – a Law Professor at Redbridge University – to ask him to provide a reference for Ursula. George e-mailed back to say, "I'm surprised that a reputable university such as Walford would even consider employing someone like Ursula. I hear she's as dishonest as Staplethorpe – for example, I've heard that she once used funds which were given to her for the purpose of employing a research assistant to take a holiday in Turkey". In fact this was untrue though there was a rumour going round in academic circles that Ursula had done such a thing. At the same time, Ursula was convicted when she was a student of stealing a law book from a shop – something which Ursula had managed successfully to conceal from her employers. "Staplethorpe" is a law academic who was recently sacked after it was discovered that he had misrepresented his A-level grades on his c.v. in applying for a job. Clive and Ursula were both subscribers to an on-line discussion group on the liabilities of public authorities which was run by Harold. The day after he received the reference from George, Clive saw that Ursula had e-mailed an observation on the liabilities of public authorities to the discussion group. He pressed the "Reply?" option beneath Ursula's contribution and wrote an e-mail to Ursula – to which he attached George's e-mail – saying "I thought you had better see the attached reference from George. Are his allegations true?". He then sent the e-mail to Ursula but accidentally pressed "Yes" when he was asked "Reply to all users?" with the result that his e-mail to Ursula was sent to every member of the liabilities of public authorities discussion group. Ursula e-mailed Clive to say "You can safely ignore what George has to say. He's had it in for me ever since I slept with Davina, one of his students whom he fancied". In fact, Davina had rejected Ursula's advances and George had never had any feelings for Davina. Nigel was one of the members of the discussion group who received Clive's e-mail to Ursula and, having opened the attachment out of curiosity, forwarded it to Burt saying, "Aren't you considering whether to give Ursula some money to fund her taking a year off to compare tort law in England and Australia?" On receiving the e-mail, Burt turned down Ursula's application for funding though he would probably have turned it down anyway on its merits. Ursula was in the end turned down for the Professorship in Law at Walford University; George's reference played no part in the decision.

Advise the parties.

Model answer

Taking each possible claimant in turn –

Ursula

Claim in libel against George

Ursula may want to sue George for libel based on what he said about her in his reference. What George wrote about Ursula was undoubtedly defamatory. But can George raise a defence to Ursula's claim? Taking the defence of justification first,

George made two defamatory allegations about Ursula in his reference – (1) that she is dishonest; and (2) that she misused funds given to her for the purpose of employing a research assistant. He may be able to raise a defence of justification in relation to (1) given that Ursula once stole a book from a shop – though to justify (1) he may have to show a pattern of dishonest behaviour on Ursula’s part. To justify (2), it will not be enough for him to show that he actually did hear that Ursula had embezzled funds; he will have to show that Ursula actually did embezzle funds – the repetition rule will apply. George will not be able to do this so he will not be able to raise a defence of justification in relation to (2). However, if Ursula sues George for libel based on what he said about her in his reference, he will probably be able to raise a defence of qualified privilege to her claim. The duty-interest test will apply: if what he said had been true, he would have had a duty to tell Clive and Clive would have had an interest in hearing what he said. George will not, however, be able to raise a defence of qualified privilege to Ursula’s claim if he acted maliciously in writing the reference – that is, if he made his allegations knowing that they were untrue or not caring whether they were true or if he made his allegations for some improper purpose such as taking revenge on Ursula for some slight. If George cannot raise a defence of qualified privilege to Ursula’s claim, then Ursula will almost certainly be entitled to sue him for libel – at least in relation to allegation (2).

Claim in negligence against George

Ursula might alternatively bring a claim in negligence against George on the basis that he owed her a duty to write her reference with a reasonable degree of care and skill: *Spring v. Guardian Assurance*. However, even if Ursula could establish that George breached that duty (by failing to take reasonable steps to check out the truth of the allegations about Ursula before writing the reference), her claim in negligence against George would fail for lack of any proof that she suffered any kind of loss as a result of George’s negligently prepared reference – while Ursula failed to get the job as Professor of Tort Law, the problem makes it quite clear that George’s reference played no part in that decision.

Claim in libel against Clive

Could Ursula bring a claim in libel against Clive for publishing George’s e-mail to all the users of the discussion group of which she and Clive were members? It seems that she can. Clive published the e-mail to the other members of the discussion group – albeit unintentionally – and it is no defence for him to say that he only intended to publish to Ursula and that he could not have been sued for libel by Ursula if he had only published the e-mail to Ursula (no claim in libel can be brought in respect of a publication to the claimant). Like George, Clive may be able to raise a defence of justification in respect of the first allegation in the e-mail – that of dishonesty – but will have no defence of justification in respect of the second allegation – that of embezzling funds. The publication to the other members of the discussion group will not be privileged. So it seems that Ursula will be able to sue Clive for libel in respect of at least the second allegation contained in the e-mail that he published to the other members of the discussion group.

Claim in libel against Nigel

Ursula may want to bring a claim in libel against Nigel for re-publishing George's e-mail to Burt. Like George and Clive, Nigel will not be able to raise a defence of justification in respect of the second allegation in the e-mail. However, he may be able to argue that the re-publication was protected by qualified privilege on the ground that the duty-interest test applies: if the information in the e-mail had been correct (that Ursula had embezzled funds and was generally dishonest), he would have had a duty to tell Burt and Burt would have had an interest in hearing what he had to say. Nigel would of course lose the protection of qualified privilege if he acted maliciously in re-publishing the e-mail but there is no evidence of that here.

Staplethorpe

Claim against George

Staplethorpe may want to bring a claim in libel against George based on the fact that an ordinary, reasonable person who read George's e-mail would gather from it that Staplethorpe is as dishonest as someone who embezzles funds. George would find it difficult to justify this allegation as there is no evidence that Staplethorpe is as dishonest as that – there is a big difference between the dishonesty involved in embezzling funds and the dishonesty involved in misrepresenting one's A-levels on one's cv. If George cannot raise a defence of justification to Staplethorpe's claim then Staplethorpe's claim against him should succeed.

Claim against Clive and Nigel

If Staplethorpe can bring a claim in libel against George, then he should also be able to bring a claim in libel against Clive and Nigel as they re-published George's e-mail which contained the defamatory and untrue allegation that Staplethorpe was as dishonest as an embezzler.

Davina

Davina may want to bring a claim in libel against Ursula arising out of the e-mail that Ursula sent Clive. However, she might find it difficult to establish that Ursula's allegation that she slept with Davina was defamatory. An ordinary, reasonable person reading Ursula's e-mail to Clive might conclude from it that Davina was a lesbian or at least bi-sexual but in this day and age it is hard to say that an ordinary, reasonable person would think any the worse of Davina having drawn that conclusion. If the allegation is defamatory (contrary to the view just expressed), then Davina should be able to bring a claim in libel against Ursula. Ursula would not be able to raise a defence of justification; nor would she be able to claim that her statement about Davina was covered by qualified privilege (on the basis that it was a statement made in self-defence, to rebut the allegations made about her by George) because Ursula must have known that her statement was untrue.

George

George might want to bring a claim in libel against Ursula arising out of the e-mail that she sent to Clive. Her e-mail contained two allegations about George. First, that he was in love with one of his students. This is not a defamatory thing to say and cannot form the basis of a libel action. Second, that George's reference was written to get revenge on Ursula for interfering with his relationship with Davina. This is defamatory and was, presumably, untrue as George did not have any feelings for Davina. However, Ursula might be able to claim that this allegation was protected by qualified privilege. It is well-acknowledged that statements made to rebut an attack on oneself will be protected by qualified privilege. However, Ursula's allegation will not be privileged if it was made maliciously. There is no evidence that Ursula did make her allegation maliciously – though she knew she did not sleep with Davina, she might genuinely have thought that George thought she had, was angry with her, and had written his reference to get some revenge on her. It is submitted that Ursula will not be able to raise a defence of fair comment to defeat George's action against her as her statements were, on their face, statements of fact, not statements of opinion.

Comments on model answer

(1) This answer illustrates the importance of structure in doing problems – it would be very easy to get lost in this problem and miss out possible claims that might be brought without adopting a good structure which separates out the different possible claimants and each of the people each claimant might want to sue. The use of headings makes the problem answer easy to follow – and makes it easy for the writer to see what he or she has done so far and what he or she has still to do.

(2) This problem – unlike the previous problems – finishes by saying “Advise the parties” rather than “Discuss”. There is no significance in the different wording – your problem answer should be done in exactly the same way as it would if it said “Discuss”. Certainly don't start saying in your problem answer “I would advise Ursula that she would have a good claim in libel against...” This is not good style.

(3) As in a previous problem (see The Fireman Problem), there are some claims considered here that would never be brought in real life. Davina would, in all probability, never hear about Ursula's e-mail to Clive, let alone think that it would be worthwhile to bring a claim in libel in respect of it. (The same goes for Staplethorpe and the e-mail from George to Clive.) That doesn't matter: you have to consider all the claims that might theoretically be brought. Particularly poor students take such a 'practical' approach in doing their problem answers that they say such things as ‘I would advise Ursula to ask Clive to delete her e-mail from his system and then deny that she ever said that she slept with Davina’. Don't do this – while such answers provide examiners with a great deal of amusement, they are rewarded with particularly low marks.