

# The problem with e-mail

Are your employees exposing your business to libel by abusing e-mail? *Bottom Line* explores the downside of super-fast business communication.

By Matthew Taylor

E-mail is a boon for businesses — but while bosses benefit from faster information dispatch they are also now opening themselves up for a world of pain when employees abuse the technology.

Sure, e-mail allows complex information to be sent in seconds, eliminating the need for time consuming and costly face-to-face meetings.

But when bored workers start firing off libelous missives on work machines the companies can be held responsible.

The use and abuse of electronic communication have been starkly laid bare in Bermuda in recent months.

First, there was an infamous Bermuda case where a customer sent a hoax e-mail falsely claiming a restaurant served dishes containing rats. A furious shareholder said business had taken a nosedive after thousands of people saw the message that rodents were being fried and served up instead of chicken. He tracked down the alleged hoaxer by working his way backwards through the e-mail chain and contacting its recipients until he got to the source. Legal action was being considered.

A few weeks later Bermudians were urged to stop conducting a ‘trial by internet’ of a man accused of killing Rhiana Moore, a Bermudian teenager. A Facebook group called ‘Hang Rhiana’s Murderer’ attracted more than 700 members — more than one percent of Bermuda’s population. Many made allegations about the suspect’s life and actions. Even before the suspect was charged his photograph and name were being e-mailed among friends and colleagues alleging him as the killer. Not surprisingly, lawyers feared it could derail a future murder trial as the speculation could unfairly prejudice potential jurors.

The traditional media has to stick by the rules banning them from discussing the circumstances or the defendant in detail because of the risk it will prejudice people who will make up the jury. However, the common man can bypass such restrictions simply by pressing a ‘forward’ button on their e-mail, presumably with little thought as to the consequences.

Lawyer Juliana Snelling, a partner at Mello Jones and Martin, said the laws of libel do apply to e-mails and people need to be more careful. While she is not aware of any published judgments in Bermuda concerning a libelous e-mail



Illustration by David Skinner

there have been several out-of-court settlements. One Bermuda case involved Professional Man A in one firm e-mailing Professional Man B in another firm making defamatory statements about B’s secretary, saying he should “fire the whore/choke, splutter, spit”. B was silly enough to send the e-mail to his printer and the defamatory e-mail was discovered. Another case that was settled involved a businessman posting defamatory statements about a competitor on a Yahoo! Messenger Board. Yet another settled case involved a reporter sending defamatory e-mails about the quality of sports reporting by staff members of a broadcasting station.

Mrs. Snelling said the law of libel — the written aspect of defamation — applies to all defamatory statements about another person that have been published. Defamatory publications include website postings as well as e-mails. There have been some large payouts overseas because of e-mail libels, said Mrs. Snelling. She recalled the 2001 English case of *Takenaka (UK) Ltd. v Corfe & Frankl*, where the defendant was ordered to pay damages of £26,000 to his former employers in the first UK case on committing libel by anonymous e-mail. He also faced paying legal costs of up to £100,000. The High Court in London found that Mr Frankl, a

former employee of construction company Takenaka (UK) Ltd., sent three e-mails to his former bosses from a Hotmail account using the false name of Christina Realtor.

The e-mails defamed the company referring to its hypocrisy, double standards and callousness. They also defamed its managing director alleging that he had had an affair and was refusing to pay child support for an illegitimate son. The court ordered Mr Frankl to pay the Company damages of £1,000 and damages of £25,000 for the ‘much graver’ libels made against his former boss. Although Mr Frankl denied the charges against him, the Court found that he had authored the libels after Takenaka obtained court orders to force Microsoft and ISP CompuServe to co-operate in tracing the defamatory e-mails to a laptop used by him at his subsequent place of work.

Britain has provided other examples of e-mail gone wild including the notorious Norton Rose case, said Mrs. Snelling. More than a million people are thought to have seen an e-mail that originated when a woman sent a racy message to her boyfriend — a newly qualified lawyer at this London law firm, in which she complimented him on an aspect of their personal relationship that they had enjoyed the previous evening.

Mrs. Snelling explained: “Feeling quite proud of himself, he forwarded the email on to six friends in the office adding his own comment, ‘now THAT’s a nice compliment from a lass, isn’t it?’ One of the friends forwarded it to 12 others with the comment, ‘Beggars belief. I feel honour-bound to circulate this.’ From there, the e-mail message gained momentum being forwarded to countless computers throughout the UK and beyond. The employees of Norton Rose who had forwarded the e-mail were all severely disciplined for their actions.”

For Mrs. Snelling the moral of the story is clear: “Don’t send any e-mail that you don’t want the world to read. Think hard before you press ‘send’.” The consequences of ignoring that advice can be quite severe — up to two years in jail for criminal libel — if it’s proved the offender knew that what he was publishing was false.

Mrs. Snelling said more commonly plaintiffs pursue their civil remedy for libel and, if successful, they are awarded damages — with no maximum cut-off point. The amount depends on several factors such as how egregious was the conduct of the plaintiff. The questions asked include: was it published maliciously, how awful the defamatory statements were, the extent of publication — (website publication is far worse than sending a letter to someone), and the offer or refusal on the part of the defendant to retract the statement or make an apology.

Mrs. Snelling said people can be held liable for forwarding defamatory e-mails since the law regards each ‘forward’ as a fresh publication of the original libel. A common law defense of ‘innocent dissemination’ is available if the defendant can show that he had no knowledge of the contents of what he was forwarding, in other words, that he did not know that the document contained a libel, but he will have the burden of proving this.

“Not removing a publication can also amount to publication of a libel,” said Mrs. Snelling. In 1999 the English Courts for the first time faced a defamation case involving the internet — *Godfrey v Demon Internet Ltd*. In that case the defendants, an internet service provider, received and stored on their news server an obscene article that was defamatory about the plaintiff. The article had been posted by an unknown person using another service provider. The plaintiff informed the defendants that the article was defamatory and asked them to remove it from their news server. The defendants refused to do so and the article remained available on the server for some ten days until its automatic expiry. The Court held that since the defendants’ business was to transmit postings received and stored by them via the internet to news subscribers, they were publishers of the defamatory statements and were therefore guilty of libel. The Court reasoned that they were no different from a bookseller who sold a book that was defamatory about someone.

With most modern companies equipping their employees with both internet and e-mail, what risks are bosses under if wayward employees use company equipment to send libelous e-mails?

Mrs. Snelling has some sobering words. “Companies run the risk of being held vicariously liable for libelous e-mails sent by their employees in the course of their employment.” The arguments in these cases will turn on whether the employee was acting in the course of his or her employment at the time that he sent the e-mail which would make the company liable or whether he was off ‘on a frolic of his own’ sending e-mails for personal use in which case the company would not be liable. She added: “If the e-mails were sent on company equipment from a company e-mail address during working hours, the company may have difficulty making the ‘personal use’ argument.”

In certain circumstances companies are entitled to go after the employee for an indemnity in the event that the company has had to fork out for an employee’s actions so the careless employee could risk a lot more than the sack.

For psychologist Philip Brownell, e-mail and its more modern offshoots such as texting, is a double-edged sword for human communication, in the business environment and elsewhere. He admits to e-mailing colleagues who sit ten steps away because it is convenient. It offers more control with a receipt of transaction.

The advantages are obvious as it allows really quick transfer of information with files attached.

“You can get a lot of business done. I work for a professional organisation and every two years we meet up on a conference and we do all the planning on e-mail. It’s the only way we could do it, otherwise we would all have to meet someplace — it would be just impossible. e-mail affords business a great tool.

“But when you get into using e-mail heavily there’s the danger of being misunderstood because there is no tone and no visual — e-mail can be like walking through a minefield.”

Dr. Brownell, of Benedict Associates Ltd., said the tone of voice was a vital component in understanding a verbal message — but it’s not there in e-mail. “People project on the words another meaning. They actually hear a tone that is not really there, they just make it up.” He recommends directions for reading e-mails such as ‘please read with a warm friendly tone,’ so people can imagine in their ‘mind’s ear’ what they are reading and not take unnecessary offence.

When e-mail goes wrong in the professional environment it can be bruising for all concerned. Flame wars began in the early 1990s where people would provoke others with outrageous comments. There seemed to be no price to pay, said Dr. Brownell. “People could be as outrageous as they could be. I can remember a discussion group that is still going on — on creative problem solving — where we used to go at each other so much it would get to the point where people

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would say: ‘Well, yeah, let’s meet and I am going to punch you in the face.’ We called them flame wars. After a while we realised what was going on, and mostly the internet has grown up and that kind of thing doesn’t happen so much, but it still happens a little bit.”

Then there’s the ‘trolling’ phenomenon — where people go into an established online group they are not normally involved with and intentionally get people fighting and then pull back. “It is like entertainment — they will watch the war going on; they call them trolls.”

He said if business is going to rely on an e-mail to get things done it really ought to have some classification on how to use e-mail, not just the rules about not wasting time by doing private e-mails, but also about how to avoid situations like flame wars.

Dr. Brownell also counsels plenty of youngsters for whom too much texting is harming normal interaction. “In my practice I have been amazed how much texting is done. They are constantly texting. They are tuned into the text device and whenever a message comes in, will divert their attention from the face-to-face people they are actually with. It’s got a connecting and disrupting affect at the same time.

“The adolescents I deal with — their social life is so keyed into the technology. It poses a challenge to parents who are trying to keep tabs on who their kids are hanging out with. The parents have much less control over who their kids are talking to and connecting with and hanging out in virtual space with.”

It is not just teens whose relationships are being harmed by technology. Dr. Brownell counsels couples where one partner is up at all hours e-mailing. “I have had several couples where one partner has established an e-mail friendship with someone in another part of the world. They are not chatting face to face, but there is jealousy between the partners because someone has established an internet relationship.”

The straying partner will claim their relationship is just friendship, but it is a threat to the primary relationship. “When the person is taking away from the face-to-face relationship of people they would say are important to them in order to be on the e-mail or texting, it’s distracting and it’s a negative influence on that otherwise important relationship,” said Dr. Brownell. “It doesn’t have to be overtly sexual, when one partner starts to have an emotional relationship dependence or interest.”

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