By Fiona Robertson

AWAY from the WRIT, TOWARDS the LIGHT

The author takes you on an irreverent voyage, using her early years in defamation pre-publication work as a guide to starting your own practice in this exciting area of law.

Experienced practitioners of defamation law will tell you that eventually your instincts alert you when a story is defamatory. They say that an initial reading of an article or a script or a book will send signals, a feeling in your stomach that just tells you that this one is not going to make it. As a young practitioner advising authors or publishers on pre-publication in defamation, I was desperate to acquire that premonitory sort of stomach. Being a practical person, I thought I could speed up the acquisition. To save new practitioners the energy I wasted on that process, I am pleased to share my path to pre-publication perfection!

IS IT ME?

My first thoughts when I started looking at material in the early days was to ask myself, 'how would I feel if this was said about me?' I tried this for a while. 'Bob was a serial womaniser.' Well, I thought to myself, that wouldn't bother me if I was Bob. I would probably be quite proud of that. Defamatory statements came and went and my stomach was indeed telling me that something was wrong. I realised quickly that the most important aspect of defamation was missing in this subjective test; I was not Bob.

One of the greatest pitfalls in assessing any material for defamation before publication is the fact that you do have to place yourself, as a person not as a lawyer, in the shoes of the person who is being discussed. You simply cannot ask yourself, 'how do I feel about this statement?' You have to ask yourself, 'how does Bob feel about this statement?' To assess material about a person you've never met, whose lifestyle you know nothing about, is next to impossible.

BRING ON THE AUTHOR

Once I had established that I was not Bob – a surprisingly simple task once I put my mind to it – I had the thought that perhaps I should just get to know Bob. Short of knocking on Bob's door (and given that he is a serial womaniser, this might have been a risky proposition), it seemed logical to ask the author of the material what they know about Bob.

Conversations with authors are always terribly interesting, filled with all the things that they really wanted to include in their work but couldn't because, even as journalists, they knew that it was defamatory. I could listen for some time as Bob's character was discussed, his wife, his children, his job, his school, his university, his best friend, his drug of choice. Suddenly, you get a feeling that you know Bob; no, you *really* know Bob. And again you read the material, and you can then ask yourself would I, as Bob, find this material defamatory?

Of course, there is one problem with this approach. Even after discussing this issue with the author of the material, you still cannot know much more about Bob. What you have now come to know is a third party's *perception* of Bob. It is incredibly important to remember, when assessing whether materials are defamatory or not, that authors, no matter how much they protest the fact, are never impartial.

Authors invariably immerse themselves in the story, and human nature dictates that they will form an opinion. Despite the best efforts of even the most professional authors, an element of subjectivity and opinion will inevitably slip into any article. It is, therefore, imperative when checking any aspect of a story with the author to keep this in mind. Asking questions that go to the very heart of the story ('so who do you think did it?') will give you an immediate idea about where the author's views stand on Bob.

So, if I can't be Bob, and the author can't give me Bob, where did my search as a young lawyer take me next?

BACK IT UP

Clearly, I was going to have to use some lawyers' tools. This means turning to the extrinsic materials supporting the story in order to get a proper view of Bob and his life. So instead of talking to the author, I decided to ask the author for his sources. Asking authors for sources to verify their

work makes you feel like the high school teacher checking their essays. And no one has fond memories of high school teachers! Initially, before your instinct tells you where the problems in a story may lie, it is absolutely vital that you understand all of the facts and background materials. This not only gives you a comprehensive view of Bob and his position in life but his capacity, ability and inclination to sue for defamation. It also lets you know if the story has any factual errors that are going to make litigation so much easier for Bob.

It may sound like the basis for an urban legend, but I have had a journalist tell me that the primary source for his story was a daily tabloid newspaper.[1] It is certainly not my place to comment on the standards of journalism involved in this practice, but as a lawyer trying to get to the heart of a potentially defamatory story, it is less than satisfactory. Primary source material is vital for establishing matters in a defamation case, just as it is in any other litigation. Past publication in another forum may assist if you are dealing with defamation litigation, but as far as you are concerned as a pre-publication lawyer, it is best ignored.

After the author has had his temper tantrum in your office because you refused to clear the story without primary sources, it is time to speak to the publisher. Do not forget that, in the law of defamation, the publisher is liable for all of the material that is published. Further, as the entity with the most money, the publisher is far more likely to be sued for the material. So it is likely to be their interest that you are protecting. The publisher will either seek to verify the facts that the author has presented in the story, or may decide to publish and take the risk. You will no doubt enjoy the gloating of the author as s/he announces the publication is continuing despite your negative opinion, and the further gloating that may come a few months after publication when no defamation action has been commenced.

It can be very easy to fall into the trap of telling your authors and publishers that 'if they haven't sued the tabloid, they probably won't sue you either!' This information, while useful in guiding the publisher in relation to publication, must be very carefully presented as commercial advice. And commercial decisions are of course best left to the publisher.

TRUTH IS BEAUTY

As a young lawyer it is very easy to get excited about the prospect of your defences. Admittedly, while I grappled with the cause of action for the first few months, I completely ignored their existence, particularly the tricky ones, but once the young lawyer discovers the defences, life becomes very exciting. Even more exciting is the time when your author discovers the defences! If I had a dollar for every time I have heard 'But truth is a defence!' I would be rich indeed. Yes, truth is a defence. When I first started practising as a young lawyer in NSW, it was not a complete defence, however, requiring the added touch of 'public interest'. The meaning of this term eluded me as a young lawyer … as indeed it eluded many other young practitioners and not a few of the older ones. There was a collective sigh of relief, I am sure, when the legislators dropped this element of the truth defence with the introduction of the uniform defamation code in Australia. These days, the courts only make you prove that the allegations are true.

So how hard can it be? And if I am just the pre-publication lawyer, can't I just leave this to the litigators anyway? Tempting as this might sound, there can be no greater thrill as a young lawyer than allowing the publication of defamatory material because you know without any doubt that the entire story is true. It puts a spring in your step.

But, to be in this thrilling position entails returning to the issue of primary sources. We must also consider truth in the *complete* sense, rather than just in the context of the statement that we are making. So, for example, let's say that the statement 'Bob takes drugs' can be proved to be true in relation to his consumption of prescription drugs in a controlled environment under the care of his doctor. Quite clearly it doesn't take Lord Denning to realise that making the statement 'Bob takes drugs' without the proper qualification is going to be hard to defend in a court anywhere. The issue is often complicated because the truth can become elusive when submerged in the beautiful language of an author. My job as a young lawyer was to find what the author has actually said. And then to convince the author that my interpretation was valid and was indeed what s/he had said. Diplomacy and subtlety are needed in order to deal with the delivery of such news.

A final note to keep in mind is that, while defamation in >>

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Australia is a civil matter, the standard of proof required in presenting a truth defence is generally high. If your client complains that it's unfair that they have to produce that level of proof, you might gently remind them that defamation in Dubai (where I currently work) is a criminal matter. The publisher will simply be put in jail until the truth can be proven to the usual criminal standard. This certainly adds heightened interest to providing pre-publication advice as a lawyer as well.

DON'T SAY IT WITH FLOWERS

As a young lawyer, I spent a few months working out how to spell that nasty little word 'imputation'. With the unified code coming in some years ago, I dared to hope that the concept of imputations would immediately dissolve from the judicial processes associated with defamation, like fairy floss in a three year old.

I was out of luck.

A potential plaintiff in a defamation act is still able to claim meanings not intended by the author, but which are by their nature defamatory statements.[2] Saying that 'Bob takes drugs' without clarifying that you mean prescription drugs in a controlled manner is just sloppy journalism. But saying that 'Bob really likes Charlie' will perhaps lead people to believe that Bob takes drugs, even though the author is merely referring to his affection for his next door neighbour.

The practical difficulty in finding these secondary meanings as a pre-publication lawyer is that, once you have placed a context or story around the material you are checking, it can be difficult or even impossible to see alternative meanings in the words. So not long after beginning my work in pre-publication advice – and some time after I realised that authors were not Bob – I stopped discussing the material with the authors before I read the material. This discipline removes any potential for overlooking a secondary meaning that would have been plain had you not had certain facts at your disposal. Going back to our friend Bob, the statement 'Bob is a drug-user' could conceivably be masked within the story about prescription drug abuse. If you already knew some of Bob's background, and his perfectly legal drug use, you could easily overlook a small statement in the middle of one paragraph that states that he is a drug-user. But I can assure you that Bob, as a potential litigant, will not.

Anyone who lets the statement 'Bob really likes Charlie' go to press is asking for trouble.

There is no doubt that the author of any material (and possibly the publisher) will want to talk to you before you read their material. However, I strongly advise you to consider whether this is wise and whether the conversation could alter your perception of the material that you are reading at the very time when your mind should be clear of influences or agendas.

POLLY WANT A CONTEXT?

As a young lawyer, I was of course obsessed with the concept of Polly Peck.[3] It was mostly because it was just cool to say out loud. But what did it really mean? And how could I really use it? In a nutshell, Polly Peck tells me that if I have multiple imputations that all have a common sting, I need not prove each imputation to be true in order to effectively defend each imputation within the publication. Its position in Australian law remains unclear.[4]

Similarly, the contextual truth defence[5] says that although I may say you are an adulterer and a drug-user, IF I can prove those statements, it does not particularly matter when I mention that you have not lodged your tax return.[6]

Complex and, at times, elusive, an understanding of these two defences, and the contextual truth defence in particular, could make a difference to your author and your publisher.

INSERT OPINIONATED COMMENT HERE

Authors and publishers will occasionally try to push you to authorise the publication of potentially defamatory material because the defamation is defendable on the basis of fair comment or opinion[7]. And it is true that this defence is available. As a young lawyer, however, I was quite excited by the prospect. 'Fair and genuinely held opinion!' I would cry. But please note that many commentators lament the passing

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of the defence in practical terms.[8]

There are three aspects to the defence, as set out in the relevant section:[9]

'(a) the matter was an expression of opinion of the defendant rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material'.

Unless you are doing pre-publication advice to somebody who clearly has an op-ed column in a newspaper, or is otherwise involved in the business of serious political discussion, AND the opinion that they are espousing could reasonably be held upon the facts that were known, I simply would not consider approving publication if this were the only defence available. Like marriage, it probably needs truth to prop it up!

NOTHING TO BREAK

Often when the authors are trying to talk you around to agree to publish the story, they say that the subject of the material has 'no reputation'. This defence puzzled me as a young lawyer because, whenever I waded through the *Defamation Act* of the time,[10] I simply could not find a defence that said that it was ok to defame a subject who was simply not a good bloke. But it needed investigation if only to give me a reply when it was raised by authors. Why would authors consider some people to be fair game?

If you could show that Bob, a non-lodger of tax returns, was also a known adulterer and drug-user, would it help your cause? Firstly, remember that in defending a defamation on this flimsy pretext, you would still have to have evidence. Sure, a string of prior convictions will be of assistance, but anything short of that will leave you vulnerable in defence.

It took me years to work out that when authors say that the subject of the material has no reputation, what they are actually saying is that s/he is unlikely to sue. The author's theory is that if a person is laundering money, killing wives and harming young puppies, they are unlikely to sue you for mentioning the tax returns. On a purely risk-based analysis, this argument has some merit. However, in developing my stomach for defamation, I quickly ascertained that it was not my decision to make. By all means, provide this commercial guidance to the publisher. Similarly, if you are aware that a particular subject is in fact regularly threatening defamation litigation, you should certainly alert the publisher. Even in doing so, the wisest course is to point out the defamatory materials, point out the difficulty of defending the case and let the publisher decide.

It may feel, in providing this sort of advice, that you are falling short of the role expected of the pre-publication lawyer. However, it cannot ever be said with certainty that a person is unlikely to sue in defamation. Authors also often use this tactic when there has been a prior publication about the same subject. My response to that has always been clear – if things do not go the way you expect, at least we will have company at the Supreme Court!

IN SUMMARY

So, for all lawyers out there considering a move into pre-publication advice, here are my tips.

1. Beware of subjective analysis – both yours and the authors!
2. Have a clear head when you read anything for the first time and look carefully for hidden meanings.
3. Trust only primary sources when analysing facts, particularly when analysing potential truth defences.
4. For all other defences, don't be too clever, be too careful…

Defamation, like many areas of law, unquestionably requires a comprehensive level of understanding of the law that you are dealing with and the way in which it is litigated.[11] You will also need to develop a strong sense of the processes involved in creating material, while also struggling with the hefty pressure that an author can exert in relation to its publication. And that pressure can be enormous. I have been badgered, I have been bullied and I once had a telephone thrown at my head. A journalist once threatened to quit because I refused to clear a story for publication. In all of this, I have worked hard to develop and maintain an instinct only for what can and cannot be published. And, finally, if you are seeking to develop this area as part of your practice, even if you do develop a wonderful relationship with the author and publisher alike, you should still duck when they reach for the phone. ■

Notes: **1** Source to remain nameless to protect their identity. **2** The (no longer) new *Defamation Act 2005* (NSW), for example, is littered with the word. For example, s8 states '[a] person … a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter'. Section 14 talks about how 'imputations of concern' must be notified to the publisher. **3** *Polly Peck PLC v Trelford* [1986] QB 1000. **4** http://www.law.unimelb.edu.au/cmcl/malr/butler-polly.pdf has nice commentary about the awkward history of Polly Peck in Australia, although it is a little dated now. http://www.law.usyd.edu.au/slr/slr29_4/Kenyon.pdf is worth reading for more recent views. **5** Now enshrined in s25 of the *Defamation Act 2005* (NSW) **6** The words in s265 are clear: 'It is a defence to the publication of defamatory matter if the defendant proves that: (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations ("contextual imputations") that are substantially true, and (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.' **7** Section 31 of the *Defamation Act 2005* (NSW) **8** The most quoted would be Steven Rares, 'No Comment: The Lost Defence' (2002) 76 *Australian Law Journal* 761, but there are several, including some comment within the Kenyon article, supra 4. **9** Section 31(1) of the *Defamation Act 2005* (NSW). **10** This was in the days of the *Defamation Act 1974* (NSW). **11** *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 is a worthy recent case about the way the High Court looks at defamation law. It lists all of the cases leading to today's position.

Fiona Robertson *has worked as in-house counsel for 15 years for production houses and a major broadcaster, during which time she annoyed many producers and journalists by saying 'no'. She also annoyed several members of the general public and a couple of bikers by saying 'yes'. Despite this, she claims that no story that she has cleared has ever ended in litigation. Fiona recently moved to Dubai, where she is working at therightslawyers, a boutique media and entertainment law firm that services the Middle East.*

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