1. Introduction

THE ENQUIRY

Defamation law is often portrayed as managing two opposing interests. On the one hand there is the publisher’s right to free speech, on the other the plaintiff’s interest in reputation. Generally, the debate focuses on the conditions in which the law should, and should not, permit defamatory material. In such discussions, freedom of speech is generally recognized as paramount. The question then becomes how to tailor defences to defamation so as to best protect that liberty, while also acknowledging interests in reputation.

Less regard is given to the simple observation that those defences only become relevant once a work has been deemed defamatory. The question of what is defamatory is sometimes passed over as a relatively straightforward threshold issue warranting little attention. But what many authors find ruinous is not that they lack a defence, but the emotional and financial cost of establishing one. In many cases those burdens will remain relatively unaltered, whatever fine-tuning we give to the defences. What matters more to publishers is if someone, somewhere, decides that it is worthwhile arguing that their work meets the legal definition of defamation. It is only then that the publisher’s problems begin.

Conversely, terrible suffering and loss can result from the published word. But if a publication is not thought to be defamatory then there may well be no redress, regardless of how damaging or upsetting it might be.

Of crucial importance, then, are the perceptions of courts, lawyers and the lay public in terms of what constitutes a defamatory publication. This book is an empirical exploration of the process by which those perceptions are formed. While the legal definition of defamation has been the subject of some theoretical analysis, little attempt has been made to examine, by means of quantitative research methodologies, precisely what happens

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1 The term ‘plaintiff’ is used in preference to ‘claimant’, the term applied in England and Wales since 1999 (Civil Procedure Rules 1998). The terms can be understood as synonymous.
when courts, lawyers or their clients weigh up whether a defamation has been published. This book is an attempt to redress that omission.

The central enquiry is into the practical workings of the common law when it comes to deciding whether or not a publication is defamatory. My task is all the harder because there is no simple formulation of the test the law uses in reaching that determination. In the absence of a universally accepted formula, the law’s precise aims remain unclear. An obvious question is whether the law is meeting its objectives, but that cannot be answered until some understanding can be reached of what the law is trying to do. As a result, the first part of this book is devoted to a doctrinal analysis of how the common law defines defamation.

My conclusion is that the test for defamation is inherently ambiguous. If we cannot satisfactorily define what kinds of material defamation law aspires to regulate, how can we know whether it operates successfully? My argument is that, despite its ambiguity, the law can be said with considerable certainty to overreach. By this I mean that the law, besides penalizing defamers, operates to inhibit publications that should properly be considered non-defamatory, thus unnecessarily and unintentionally silencing speech.

Hence the subtitle of the book, which, quite clearly, is a play on a generally accepted statement of the test for defamation. A simplified definition of a defamatory publication is that it is one that would damage someone’s reputation in the eyes of ‘ordinary reasonable people’. Put at its briefest, this book seeks to demonstrate the potential for the hypothetical arbiter of defamation to be, in practice, the ordinary unreasonable person. What I mean is that, because of the means used to determine what is defamatory, the law often fails to reflect the views of ordinary people, but instead reflects attitudes that are irrational at best, bigoted at worst. While the aims of defamation law cannot be stated with precision, representing such views is most definitely not among them.

METHODOLOGY

Part I of this book is entitled ‘Asking the defamation question’, the question being: what constitutes a defamatory publication? This part of the book tries to identify the precise content and aims of the legal test for defamation, so that the second part can ascertain whether those aims are being met. Part II does so by means of various quantitative and qualitative attitudinal research methodologies, including:
interviews with eight judges, as well as 28 lawyers specializing in defamation law, drawn from four jurisdictions; 2
• eight focus groups consisting of a total of 64 Australian residents who were neither lawyers nor employees of the media, held in four state capitals as well as regional Australia; 3
• phone surveys conducted among a randomly selected sample of 4,040 adult residents of Australia; and
• a number of quantitative surveys conducted among 300 undergraduates studying in three universities selected from two Australian states. 4

As a vehicle for the research I used descriptions of 15 hypothetical media reports, all of which are potentially defamatory. These relate to some of the areas of shifting and contested morality that most preoccupy contemporary societies: racism, homosexuality, abortion, drink and drugs, premarital and extramarital sex, relationships with authority and criminality. I ask how these issues have been addressed through the prism of defamation law. I seek to contribute to a body of knowledge on public attitudes to these matters, throwing light on how the public sees itself when it comes to sexual norms, intoxication, reproduction, criminality and other areas of public and private life that are often classed as ‘moral issues’. But more centrally, I aim to explore the operation of defamation law by a study of real and hypothetical publications relating to these areas.

I offer this book as a contribution to our understanding of defamation law, particularly the common law, but also other systems of law. I hope it will throw light on the way in which those laws operate in jurisdictions worldwide, as well as have ramifications for law reform. But I also offer it as a contribution to individual and social psychology, the way in which people see themselves, particularly in relation to others. It is an attempt to foster further interdisciplinary approaches to legal scholarship, in particular the vexing question of how legal and social norms interrelate. Ultimately I hope to show that the common law results not only in the unnecessary silencing of non-defamatory speech, but also that it inhibits societal progression towards tolerance and inclusion.

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2 New South Wales, Victoria, Queensland and South Australia.
3 One meeting was held in New South Wales (in Guildford, western Sydney), two in Victoria (in Moe, eastern Victoria and in central Melbourne), one in South Australia (in Black Forest, Adelaide), three in Queensland (in Ipswich, Cairns and central Brisbane) and one in the Northern Territory (in Alice Springs).
4 University of New South Wales, University of Sydney and Victoria University.
EMPIRICISM IN DEFAMATION LAW

The objection might be raised that the question of what is defamatory cannot be approached empirically because of the essential nature of that question. Just as the validity of a contract is a question of law, not fact, so too is the question of what is defamatory, at least in part. To measure by means of a survey whether a publication is defamatory might seem rather like conducting a poll in order to determine whether a contract is enforceable. Such a survey, even if limited to specialists in contract law, will only reveal what most lawyers think. It does not answer whether the contract is valid.

In support of the proposition that the same principle can be applied to defamation law, attention might be drawn to a question which often precedes any enquiry into whether a publication is defamatory: is the publication capable of being defamatory? The question of capacity has the hallmarks of a legal question. For example, judicial decisions on capacity form binding precedents.

The status of the question of defamation is less straightforward. For instance, while the issue of capacity is left to a judge, the question of whether a publication is in fact defamatory has traditionally been one for the jury. In other areas of law it is jurors rather than judges who are charged with answering the types of question which lend themselves to empirical analysis, such as who did what and when. What is more, and as will be explored at length below, primary and secondary legal sources are replete with references to community attitudes and standards, which social science methodologies have long claimed to measure. To the extent that defamation law is concerned with how real people respond to certain stimuli, empiricism has a role.

Empiricism in US Defamation Litigation

Whatever the potential for empirical measurements, the classification of publications into defamatory and non-defamatory is a legal process. Although social sciences have a part to play, it is necessarily limited. The point can be illustrated by a rare American experiment in admitting empiricism into the defamation courtroom. In 1979, Barron’s Business and

5 In recent times there has been a tendency towards having judges determine not only the question of capacity but also whether a particular publication is in fact defamatory, but it is generally understood that the essential nature of the two questions remains unchanged, with the judge acting as a pragmatic substitute for the jury.
Financial Weekly published a letter from singer Frank Sinatra’s lawyer, Milton Rudin, under the heading ‘Sinatra’s mouthpiece’. Rudin complained to Dow Jones, Barron's publishers, that the term ‘mouthpiece’ was defamatory. Barron's promptly published a statement to the effect that no aspersions had been intended, but this did not mollify Mr Rudin, who issued proceedings.

Rudin’s argument was that ‘mouthpiece’, particularly when used to refer to an attorney, might suggest the abdication of the kind of independent judgement professionally expected of lawyers. Rudin also argued that, when used to describe an attorney, the term connoted involvement in criminality, something exacerbated by popular associations of Sinatra with organized crime. The court accepted these arguments to the extent that it thought the publication was at least capable of being defamatory. But this did not answer whether it was in fact defamatory. That fell to Lasker DJ to decide.

It is worth considering in turn each category of evidence presented by Rudin, the plaintiff, in support of the proposition that the publication was defamatory of him. Each category illustrates a role empiricism could play in a defamation trial, if the law were to permit it. First, Rudin called three prominent attorneys to testify as to how they understood the publication. All three supported Rudin’s defamatory interpretation of ‘mouthpiece’. But this is not the same as evidence that the plaintiff’s reputation had been harmed. Indeed, two of the witnesses had previously been acquainted with Rudin, yet neither said their regard for him had declined. One described the plaintiff as ‘a man of known integrity, honor and ethics’, while the other remained of the view that Rudin’s conduct ‘exemplifies the sense of indepedent judgment … central to an attorney’s proper role’. The witnesses supported Rudin’s case as to what ‘mouthpiece’ denotes, i.e. lack of professional disinterest, but not what it connotes about him, namely that he is accordingly deserving of less respect.

In this book I shall continually distinguish between denotative and connotative meaning. By the first term I refer to interpretation of the publication, particularly with regard to what it has to say or imply about its subjects’ actions, thoughts or circumstances. Determining denotative meaning is what defamation lawyers generally have in mind when they speak of the issue of meaning. Denotative meaning is also what the parties

7 557 F Supp 535, 539 (Lasker DJ).
8 Ibid.
will try to capture in their pleaded imputations. When dealing with a straightforward, direct allegation (for instance a publication that simply states ‘P is a thief’) the denotative meaning and pleaded imputation are likely to be identical to the publication’s literal meaning (‘P is a thief’). Alternatively, the literal and denotative/pleaded meaning may be quite different. For instance, the literal meaning might be that P had fingers in the till, but still the pleaded imputation would be that P is a thief. Denotative meaning is subjective: it is likely to vary from one person to another and, in the case of a verbal communication, will depend largely on individual readers’ understanding of the vocabulary and syntax used in the message, as well as the manner and context of its utterance.

In contrast with denotative meaning, I adopt the term ‘connotative meaning’ to refer to what the publication connotes about the moral worth of its subjects, given what it has denoted about their actions or circumstances. Again this is defined subjectively and will depend first on each audience member’s denotative interpretation of the message, secondly on whether the audience member accepts or rejects the veracity of the denotative meaning and thirdly on the audience member’s values. For instance, a statement that individuals are gay might be taken to denote that they are attracted to, and possibly sleep with, certain members of their own sex, while it might connote, at least to the homophobe, that they are less worthy of respect.

Returning to Milton Rudin’s case, the value of the lawyers’ testimony to his case was that they confirmed his argument as regards the publication’s denotative meaning. Their evidence did not directly relate to the publication’s connotative meaning, it being assumed, no doubt, that once the argument on denotative meaning was won then the publication’s connotative meaning would be self-evident. In this respect Rudin’s case is typical of many: disputes tend to revolve around denotative meaning, with connotative meaning generally assumed to follow as a matter of course.

It should be noted that the lawyers Rudin called did more than give evidence of their own interpretation of the article’s denotations. They also gave testimony as to how lawyers generally would understand the term ‘mouthpiece’. To this extent they were giving what might be termed expert testimony, expertise based in part on their own legal backgrounds and partly on their discussions with other lawyers. Countering the lawyers’ testimony, the publishers called an expert of their own, a prominent journalist, to attest to the fact that the use of the word ‘mouthpiece’ was consistent with the principles of responsible journalism and that the
original story had been ‘indisputably a newsworthy event’. Dow Jones also produced instances of the use of ‘mouthpiece’ in other newspapers and media, although Rudin countered with other examples. Then came a different sort of expertise, this time into meaning: dictionary and thesaurus entries were presented to the court.

But more interesting was the use of expert evidence of another kind. Rudin called psychologist Dr Robert Buckhout, whom he had commissioned to conduct two surveys. The first was intended to contrast readers’ impressions of an attorney referred to as ‘spokesman’ with responses to one identified as a ‘mouthpiece’. The second was meant to compare reactions when these spokesmen/mouthpieces were said to belong to Sinatra as opposed to ‘John Doe’. Buckhout asked respondents to rank the various spokesmen and mouthpieces on scales relating to whether they were perceived as just or unjust, honest or crooked, etc. Based on surveys of subjects intended to reflect Barron’s readership, Buckhout found that those lawyers described as a ‘mouthpiece’ were rated significantly more negatively than those referred to as a ‘spokesman’, although it made no difference whether either term was ascribed to a lawyer for John Doe or one for Sinatra.

The publishers responded with empirical research of their own, engaging a psycholinguist, Dr Douglas Herrmann, to survey 500 randomly selected readers of Barron’s. With 134 usable responses, Herrmann testified that most of the ‘dimensions’ between which Buckhout’s subjects had been required to choose (e.g. just/unjust, etc.) were considered irrelevant to the meaning of ‘spokesman’ and ‘mouthpiece’ by over half the respondents.

But most interesting of all is the judge’s response to these empirical studies. He considered them ‘intriguing as examples of psycholinguistic research’, but that they provided ‘ambiguous evidence at best’ on the question whether Barron’s readers were likely to have perceived the caption as defamatory. When considered together, he thought the surveys tended to discredit Dow’s assertion that ‘mouthpiece’ is no more than a synonym for ‘spokesman’. Even so, to prevail in defamation it is necessary, according to the judge, ‘to demonstrate not only that the term applied to the plaintiff was more negatively regarded than a possible alternative, but also that the word actually used was understood by the reader in the defamatory sense alleged by the plaintiff’.

9 Ibid. 543 (Lasker DJ).
11 557 F Supp 535, 544 (Lasker DJ).
In other words, while it may have caused Rudin more harm to be called a ‘mouthpiece’ than a ‘spokesman’, this did not answer whether the publication was defamatory. A court needs to be convinced that a publication is defamatory in some absolute sense, not just in comparison with others. What is more, it is the law that will determine the dividing line between a defamatory and a non-defamatory publication, not empirical research. Lasker DJ concluded that Rudin had not sustained his burden of establishing that that line had been crossed and he lost the case.\(^{12}\)

One other American case is worthy of note, since it illustrates an American willingness to admit empirical evidence, although in this case it is in relation to intended, as opposed to conveyed denotative meaning. In 1982 the Supreme Court of Hawaii considered an appeal in an action brought by Hiram L. Fong.\(^ {13}\) While Fong was standing for re-election to the State House of Representatives, a local steelworker, Ken Merena, displayed outside his home a sign which read:

USHIJIMA/FONG
VOTED “YES”
PENSION/PAY RAISE

Apparently Merena had intended to convey that Ushijima had voted in favour of a pension bill while Fong had voted for a pay raise bill, both proposals having recently been the subject of widespread public opposition. Fong accepted that he had supported the proposed pay raise, but objected on the grounds that the sign wrongly suggested that he had voted for the pension bill, a measure which had attracted particular controversy. Merena offered testimony from a linguistic expert to the effect that the virgules (diagonal slashes) meant that the sign would be understood in the way Merena intended. The trial court had refused to permit such evidence. On appeal the Supreme Court thought that the expert’s testimony should have been permitted, although only as evidence relating to Merena’s intentions regarding the sign (intended meaning being rather more determinative under America’s defamation laws than those found in many other common law jurisdictions).

These two cases indicate some willingness by the US legal system to incorporate social scientific methodologies into the process by which vital issues in defamation are decided. Even so, while the tactic of offering testimony of psycholinguists and other experts enjoyed some success in the

\(^{12}\) Ibid.

\(^{13}\) Fong v. Merena, 66 Haw 72; 655 P 2d 875; 1982 Haw LEXIS 255.
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US during the 1980s, the trend in the 1990s was to reject such testimony.14 Certainly such evidence will not be permitted in most common law jurisdictions.15 As has been made clear by the Australian High Court, 'the moral or social standard by which the defamatory character of an imputation is determined is not amenable to evidentiary proof'.16

Empiricism in Other Common Law Jurisdictions

Unfortunately, the fact that most common law jurisdictions reject empirical means of proving or disproving harm to reputation is far more certain than their reasons for doing so. The key to the puzzle lies in the High Court's reference to defamation being determined by some 'moral or social standard'. If defamation depends on social standards then there is a great potential for empirical research in the courtroom. For instance, if the goal of litigation is to establish the meaning attributed to a publication by most of its readership, which seemed to be the case in Rudin, then it should be a relatively simple task to conduct appropriate research using standard scientific methodology. Similarly, social science should be able to tell us whether most readers would, as a consequence of that denotative meaning, think less of the plaintiff and whether they actually acted on that antipathy, for instance by ostracizing his business. Alternatively, if the test were not what the readership thought but what the majority of the population would have thought if they had been exposed to the publication in question, the research tools could easily be modified accordingly.

The position is, of course, totally different if defamation law is to be decided by moral as opposed to social standards, meaning that what matters is not what the publication was actually thought to mean, and what people actually thought of the plaintiff as a result, but what the publication should be thought to mean, and what consequent conclusions people should draw about the plaintiff's moral character. Answering these questions calls for an enquiry into ethics, not a social scientist.

15 These include England and Wales, Australia, Canada and New Zealand.
THE REALIST–MORALIST DEBATE

Herein lies what for me is the great ambiguity of defamation law: the comparative role of moral and social standards. Put at its simplest the question is this: does defamation depend on what people do think, or what they should think? Or does it rely on some combination of the two? It is a debate that rarely comes to the fore in the commentary on defamation law, probably because most people are content that social standards roughly coincide with objective morality. When the issue arises it tends to do so in the context of some area of socially contested morality. Homosexuality is a prime example: should an imputation of homosexuality be defamatory if most people are homophobic, or should it not be defamatory on the basis that sexual orientation does not reflect an individual’s moral worth?

Those who support the first proposition can be conveniently termed ‘realists’, since they are concerned with the ‘reality’ of social values: what people ‘really’ think. In this book I shall speak of ‘realism’, or ‘realist’ interpretations of the law, referring to an understanding of defamation law as being concerned with two questions: first, how a particular audience read the publication in question, or would read that publication if it had been exposed to it, secondly what or how that audience thought of or responded to the plaintiff, or would have thought of or responded to the plaintiff, as a result of being exposed to the publication.

‘Realism’ in Defamation Law

Realism, as I have termed the belief that the question of what is defamatory should be determined by reference to community values and behaviour, promises several advantages. First, it allows for the introduction of empirical methodologies into the courtroom. Deciding what people think about an issue certainly seems more straightforward than determining tricky ethical questions. Secondly, defamation, as realists would no doubt remind

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us, is principally about providing protection from and relief for unjustifiable damage to reputation. On this view it does not matter whether the reader's antipathy is justified or whether it reflects pure bigotry.

Thirdly, by means of the realist claim, courts maintain an appearance of moral neutrality. We are understandably wary of having judges, or even juries, determine moral issues, particularly when the latter are widely contested within society. This caution arises in part from our familiarity with the fallibility of judges and juries in determining relatively simple factual issues, let alone complex ethical and moral questions. One argument is that courts, by unambiguously presenting their findings as a reflection of community standards rather than their own moral pronouncements, diminish the risk of lending curial authority to moral mistakes. More fundamentally, problems arise as to the authority by which a court might pronounce on issues of conscience. If the state derives its right to govern from the people, then is it not appropriate that its courts reflect the views of the people, however unpalatable they might be?

Fourthly, seeking to reflect what people actually think, rather than what they should think, arguably eases the embarrassment that might arise whenever an appellate court overturns a finding in relation to defamation. It is easier to tell junior judges that they do not understand the minds of ordinary people than that they have misapplied objective moral or rational standards.

Fifthly, while it may seem inappropriate for the law to apply attitudes that are bigoted or otherwise irrational, by determining public responses to moral questions, courts can reflect them back onto the community, enabling the latter to take stock of what should and should not matter to reputation. Indeed, if realism were explicit, judges, or even juries, could comment on the appropriateness of those community standards, while nevertheless applying them.

The realist position garners so much support that it can be described as the orthodoxy of defamation law discourse. To cite just a few examples, Fleming, in a leading text on Australian tort law, refers with approval to ‘the ordinary practice of deferring to actual community attitudes however prejudiced’.18 William Lloyd Prosser, probably America's most eminent authority on torts, argued that a court should not be ‘called upon to make a definitive pronouncement upon whether the views of different segments of the community are right or wrong, sound, or morally justifiable’.19 In his 1969 work on defamation law in South Africa and Ceylon (as it then was),

Ranjit Amerasinghe discussed the matter at length and concluded by supporting the view expressed in the South African case of *Brill v. Madeley*, namely that ‘[t]he court is not concerned with the question whether the general opinion today on such matters is right or wrong. We must take public opinion as it exists’.20

‘Moralism’ in Defamation Law

The idea that the law should decide what is defamatory by reference to the ‘reality’ of community attitudes, warts and all, has not passed without challenge. These tend to stem from the observation that the law cannot stand outside of society. Rather it inevitably contributes to the constitution and character of the community whose views it might claim to reflect.

For instance, the law, by deciding to apply perceived community standards, has already adopted a moral position. Awarding damages to heterosexuals because they are wrongly described as gay does not represent neutrality on the moral ‘issue’ of homosexuality, however much the plaintiffs might have suffered as a result of the publication. If homosexuality is immoral and widely recognized as such then it is arguable that people wrongly imputed to be gay deserve compensation. But if sexual orientation is irrelevant to moral character then homophobia is something all citizens should be protected against. On that basis, straight people wrongly identified as gay should be no more deserving of compensation than gay people who prefer not to have their sexuality revealed.

Courts, by awarding remedies on the basis of perceived community values, give the latter more than just an appearance of legitimacy. Society’s moral errors are not simply compounded by, for instance, a finding that an imputation of homosexuality is defamatory. There is also the iniquity that the cost of these errors, rather than being borne by all citizens equally, will fall principally on those already disadvantaged by the same shortcomings in social morality. Thus, in the instance of allowing an individual heterosexual to sue, the price of that person’s protection from homophobia, with the accompanying confusion of homosexuality with immorality, is not borne by society generally but by gay people in particular.

Accordingly an alternative to realism might be offered, which might conveniently be labelled ‘moralism’. If realism is the belief in or practice of determining what is defamatory by sole reference to perceived social values then moralism is the policy of deciding the same questions by giving

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consideration to the moral character of whatever responses to a publication might render it defamatory. One might imagine an extreme form of moralism that takes absolutely no account of how an audience actually responded to, or would have responded to a publication. Accordingly a publication would be defamatory if people should think less of the plaintiff, even though it is patently clear that in fact the person’s reputation was universally enhanced.

More plausibly, given that defamation law is centrally concerned with damage to reputation, not determining moral truths, one might envisage a slightly modified moralism in which an audience’s actual or potential responses are taken into account, but only if those responses meet certain criteria. For instance, it might be decided that a publication to the effect that two men shared a hotel room would be defamatory only if a sufficient number displayed, or would have displayed, a homophobic response, and if it was sufficiently rational and ethical to interpret the article as casting the men in a bad light.

One can envisage many different forms of moralism, just as one can of realism. For instance, some realists might argue that defamation should be determined by whatever views predominate in society generally, while others might wish to take account of the plaintiff’s particular social milieu. In the case of moralists, they might set the ethical and rational bar low or high. For instance, those who generally favour the pro-choice position on abortion but are nevertheless appreciative of alternative viewpoints might argue that it should be considered defamatory to say of doctors that they conduct abortions, as well as to say of them that they refuse to do so, on the basis that both the pro-life and pro-choice positions have some merit. Various moralist and realist positions are explored in this book, but what unites moralists is that they all consider the rationality and morality of a specified response to the publication and, consequently, to the plaintiff, while realists do not.

I have adopted the terms realism and moralism from a paper by Leslie Kim Treiger-Bar-Am, who examines a notorious instance in which the UK Court of Appeal allowed a woman to succeed in defamation on the basis that she was imputed to be a blameless victim of rape, a case frequently cited as though supportive of realism. The logic is clear: it is obviously wrongheaded to think less of a rape victim, therefore the woman’s success demonstrates that it is what people actually think that matters.21 Treiger-Bar-Am’s realist/moralist dyad is similar to that of Roger Magnusson, who

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Defamation law and social attitudes

speaks of courts facing ‘a choice between “realist” and “idealist” models of defamation law’.22 A “realist” model, says Magnusson, ‘is a “warts and all” model because courts accept that an imputation is capable of being defamatory, even when based on ill-founded attitudes’. On an ‘idealist’ model, by contrast, ‘courts “screen” the social and moral attitudes of the ordinary, hypothetical people whose attitudes determine whether the imputation is capable of being defamatory’.23 In this way courts could potentially ‘avoid compensating harm based upon prejudice or perverse attitudes’.24 My use of the terms ‘realist’ and ‘moralist’ differs slightly from that of Treiger-Bar-Am, as well as Magnusson’s ‘realism’ and ‘idealism’, but these differences need not presently detain us.

Treiger-Bar-Am accords realism with Patrick Devlin’s view that the ‘morality which the law enforces must be popular morality’. The moralists’ view, on the other hand, is identified as Dworkinian in its belief that ‘the law does, and should, reflect a reasoned, principled morality’.25 Treiger-Bar-Am sees the realist–moralist question as echoing the law and sociology debate as to the role of law in society: ‘[d]oes law reflect the social structure, and function as an aspect of it, or is it an instrument of the state for changing society and social mores?’26 To answer the question, Treiger-Bar-Am draws, like many others, on Robert Post’s characterization of defamation law as concerned with ‘rules of civility’: the means by which society distinguishes members from non-members.27 In these terms a defamation trial can be characterized as an enquiry into who has breached the rules of civility; the defendant by publishing untruths about the plaintiffs, or the plaintiffs who, by reason of the act or condition imputed to them, are to be excluded from the forms of respect that constitute social dignity.28

According to Treiger-Bar-Am, defamation law ‘uses social solidarity to pressure individuals into certain forms of behaviour, and causes the individuals to internalise those norms’.29 Therefore, rather than giving irrational prejudices legal recognition, ‘the law should work to bring reality, the is, in line with the ought, and thus to make the ought real’.30

22 Magnusson, above n. 17.
23 Ibid. 278–9.
24 Ibid. 279.
25 Treiger-Bar-Am, above n. 17, 313.
26 Ibid. 317.
28 Ibid. 711.
29 Treiger-Bar-Am, above n. 17, 317–18.
30 Ibid. 319.
Unlike these writers, my intention is not to site the realist–moralist debate within legal philosophy. I shall argue no principled position as to whether society would be better served if defamation law were applied in accordance with realism or moralism. Nor do I try to suggest that, doctrinally speaking, realism or moralism is the correct interpretation of the law. Answers to these questions have been attempted elsewhere.31

By addressing the debate by means of empirical methodology, I seek what I hope will be a fresh approach. My central enquiry is this: in the exercise of the law of defamation, can it best be characterized as realist or moralist? In answering that question I shall try to challenge some of the assumptions behind the debate, as well as question its authenticity.

Having laid out the basis of the moralist–realist debate, the stage is now set for Part I of this book, in which I embark on a partial survey of legal doctrine when it comes to framing the test for defamation. In particular I shall point to support for the respective positions of realism and moralism. To repeat, I shall not seek any definitive answer to whether the law, when interpreted correctly, requires a moralist or realist approach. I merely try to show that each of these two methodologies is plausible, in the sense that there is a real likelihood that both have their adherents among those concerned with deciding what is defamatory: judges, lawyers, jurors and the lay public generally. The first stage in doing so is to consider the general role of empiricism in the test for defamation. That is the purpose of the next chapter.

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31 For a few examples, see above n. 17.