REPUTATION AND THE TORT OF SLANDER

*By Marlene P. Malahoo**

INTRODUCTION

The law of defamation with particular reference to slander, in its present form, does not conform to a theory of justice which will effectuate its purpose[1]. As it stands, the law contains too many loopholes and anomalies in its application. The loop holes and inadequacies allow for one individual to injure another in his reputation with impunity.

Slander and libel are two subheads of defamation. The essence of the distinction rests upon the requirement for proof of special damage for slander[2], while for libel, once the legal requirements are met[3] damage is presumed. Judges of great eminence have repeatedly confessed that the law of slander rests upon several wholly artificial distinctions which cannot be justified on any principle.

The canonical roots of defamation go back at least to the times of William the Conqueror, who established separate church courts to administer the canon law remedy of defamation which was predicated upon the "sin" of bearing false witness. It is impossible to define, and difficult to define and describe with precision, the two forms of defamation. Oral defamation is tortious if the words fall within a limited class of cases in which the words are actionable *per se*[4]. For over two centuries the common law has maintained the distinction for defamation

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1 The tort of defamation protects a person's interest in his reputation.

2 Except in four cases where it is actionable *per se*:

(a) Where a crime punishable by imprisonment or corporal punishment;

(b) Where the defendant alleges that the plaintiff has contracted a venereal disease, or possibly, leprosy or any contagious skin disease caused by personal uncleanliness;

(c) Where the defendant disparages the plaintiff in his profession, trade, business or calling;

(d) Where the defendant imputes 'unchastity' to a woman (e.g. Defamation Act, Guyana S.6).

3 In order to succeed in a defamation action the plaintiff must prove that the words were defamatory, that they referred to him and that they were published.

4 See n. 2 *supra*.

on the basis of mere form. Yet no respectable authority has ever attempted to justify the distinction on principle; and in modern times, with discovery of new methods of communication, many courts have condemned the distinction as harsh and unjust.

This unique and anomalous distinction is in fact a survival of historical exigencies in the development of the common law jurisdiction over defamation.[5] At the end of the 16th Century the common law courts had absorbed most of the ecclesiastical jurisdiction in these cases. The common law offered the only remedy then available, an action on the case for words. Certain consequences followed inevitably from the nature of the remedy. Damage, not insult, was the gist of the action; publication to a third person was essential, and truth was a defence. The defamation then dealt with was almost without exception oral, and hence the designation of the wrong as slander.

The kinds of oral defamation actionable *per se*, as we know them, were not developed on theoretical grounds of principle, but merely as practical expedients in extending the jurisdiction of the common law courts. These were the classes of slander that the common law courts found it possible to wrest from ecclesiastical jurisdiction. This resulted in certain types of slander, having certain characteristics and consequences, coming within common law jurisdiction, and the remaining types staying within the ecclesiastical jurisdiction.

In light of this, those who instituted the law seemed incognizant of its moral foundation. For the concept that a person's reputation is precious and should not be injured with impunity had been well established since ancient times, and rests upon a certain conception of personhood.

The focus of this paper then, is to develop a moral and constitutional theory of tort liability in order to explain why the status of the law with respect to slander is inadequate. In attempting to so do, the case of *Sunanansing v. Ramkerising*[6] will be used as illustration.

The objective, therefore, is simply to address this concept of moral basis of tort liability by articulating a constitutional and moral theory on which tort law is founded. For if one were to critically analyse tort law in general, it will become immediately evident that the law incorporates all rights which are fundamental. In other words, it is only too obvious that there is, in fact, a special morality of tort law. A basic tort like

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5 Previously the law of defamation fell within the ecclesiastical jurisdiction of the English courts.

6 (1897) 1. Trin. L.R. 54, Court of Appeal, Trinidad and Tobago. (unreported).

false imprisonment, for example, is aimed at protecting one from arbitrary arrest or detention;[7] and others like assault and battery, the inviolability of one's person. The right to one's person being inviolable is not a right which is posited, *i.e* created by any political institution, but simply one which is recognised as inalienable, and hence recognised in Tort, as in Criminal Law.

I.

At the foundation, which is to say, at the level of the constitution, law is very much a matter of political mortality. That is to say, it is about the basic arrangements of political authority that takes a certain view of human nature, and purports to treat the citizens in a particular way. In other words, the constitution of a well ordered state is presumed to rest upon certain principles of justice, or import certain moral ideals and could not properly be understood in absence of these ideals.

As Dworkin postulates, a major interpretative task of constitutional adjudication, must indeed be to articulate a conception of justice that explains and justifies the most basic arrangements of political power in the community, and the system of rights the citizens have under the constitution.

The fundamental basis of the law of defamation in Spain, for example, may be said to be based on Art. 18 of the new Constitution of 1978, which provides:

> "1. The right to honour, to personal and family privacy and to personal reputation is guaranteed.
> 2. The home is inviolable. No entry or search may be made without the consent of the occupant or under legal warrant, except in cases of *flagrante delicto*.
> 3. Secrecy of communication is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights."[8]

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[7] Cap. III S.15 Jamaica Constitution.

[8] Art. 18 of Spanish Constitution of 1978, *Carter Ruck on Libel and Slander* (3rd edn.), p. 343

This article, it will be noted, also covers the basis of protection of the privacy of the private individual.

On the other hand, in the Commonwealth Caribbean Constitutions the right to an individual's reputation falls within the broader fundamental rights and freedom of the individual. The embodying clause within the Jamaica constitution,[9] for example, reads:

> "Whereas every person in Jamaica is entitled to the Fundamental rights and freedom of the individual, that is to say, has the right, whatever has race, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely -
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> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
> (c) respect for his private and family life
>
> the subsequent provision in this chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest"[10]

If one were to closely examine the two sets of provisions within which the individual's right to protection of his reputation is guaranteed, it will be seen that the Spanish Constitution makes explicit and concrete mention, by its choice of words, to that particular type of right which is being secured while the Jamaican Constitution is not as precise in its language. However, the absence of such explicit expression in the Jamaica Constitution, as is present in the Spanish Constitution, does not, and ought not to make for fundamental differences; precisely because there is a moral basis for tort liability which gives the individual a guarantee to such right irrespective of the presence of any specific words

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9 Cap. III (Fundamental Right and Freedoms), s. 13 of the Jamaica Constitution.

10 *Supra* n. 10.

(such as 'honour' and 'right to reputation'). One therefore will be able to read in such rights, from the nature of the constitution.[11]

This right which protects one's reputation, is a moral natural right, and so, is derived from, and parasitic on, a more fundamental right: a right to the integrity of personality. To use Rawlisian terms, it is a right that 'people in the original position' would choose. And so it is not created, but deemed as one which any just constitution would protect. It therefore exists prior to any political institution and becomes a means by which the political community is judged. This right to reputation has its basis in that kind of fundamental right, so in the absence of the constitution saying it, it could be reasoned from the constitution.

When the United States Supreme Court attempts to characterise the nature of a state's interest in protecting reputation, it frequently relies upon a passage in Justice Stewart's concurring opinion is *Rosenblatt v. Baer*:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of essential dignity and worth of every human being - a concept at the root of any decent system of liberty. The protection of private personality, like the protection of life itself is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."[12]

The rhetorical power of the passage is undeniable. It has proved enormously influential, and can fairly be characterised as an authentic contemporary expression of [U.S] common law understanding of defamation.[13]

The interest at stake, when dealing with the protection of one's reputation can hardly be overstated. The reason being, we deal with people at their most vulnerable point when we deal with those matters that impinge upon 'personality' - "the outward representation of one's

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11 In general, Caribbean Commonwealth Constitutions are Republican type constitutions.

12 383 U.S. 75, 92 (1966), (Stewart J., concurring).

13 View expressed by Robert C. Post (Acting Professor of Law, Boatt Hall School of Law, University of California, Berkeley) in "The Social Foundations of Defamation Law: Reputation and the Constitution", (1986) 74 *California Law Review* 691.

innermost self".[14] Because of this, some writers regard the law of defamation as a troublesome area for those who maintain that the law of Tort is all about compensation. The general requirement in tort liability that there must be 'injury', immediately poses a problem when dealing with damage to one's reputation. In other words, one cannot bring an action in tort unless there is injury; and our conceptualization of this injury is a loss capable of pecuniary admeasurement. This is not surprising, since we mostly know of loss in physical or economic terms. Although Hobbes had, by the seventeenth century, already equated reputation with monetary value by contending that 'the value or worth of a man is, above all other things, his price; and the manifestation of the value we set on one another, is that which is commonly called 'honouring' and 'dishonouring'. To value a man at a high rate is to 'honour' him; and at a low rate, is to 'dishonour' him - there is undoubtedly a difference between the reputational right, and the other property rights protected by tort law in general.

The next step, therefore, is to examine the morality of tort law, by attempting to address the theoretical foundation in which it is grounded. And more importantly, to locate tort of defamation within this broader tort liability. The task thus becomes one of addressing the adequacy of such theory is dealing with tort liability.

II.

There is a morality latent in the structure of tort law which is not reflected in the instrumentalism of economic analysis and non-instrumental account. It is a morality, according to Weinrib[15], which reflects the distinctive relationship of doing and suffering. This morality - first formulated by Aristotle's discussion of corrective justice and elaborated by Kant - treats doing and suffering as an integrated normative unit that allows the court to fulfil a properly non-instrumental adjudicative function. Corrective justice thus illuminates the coherent normative structure of tort law and provides an internal stand-point for the critique of tort doctrine.

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[14] Kartz - "The Doctrine of Moral Right and American Copyright Law", (1951) 24 S. Cal. L. Rev. 375, 401.

[15] E. Weinrib, "The Special Morality of Tort Law" (1989) 34 *McGill Law Journal* 403.

Tort law itself gives evidence of its special moral character. Although concerned with culpability, it judges this culpability objectively and thus sets standards that may be beyond the capacity of particular defendants. A finding of liability can even be accompanied by an acknowledgement that the defendant is in no way morally to blame.[16] Some have concluded form this, that tort law can make no moral sense. Howeve, writers, like Weinrib maintain that tort law exhibits a special moral sense.

The question, "What is the moral significance of tort law?", can be equated to: "How can tort law be conceived as non-instrumentally normative?" Because we are seeking a morality that captures and reflects the special character of tort law. An adequate answer is not, therefore, dependent upon merely understanding morality. Instead, at stake is our perception of tort law. What, then, do we mean by tort law? In order not to pre-judge the moral issue, Weinrib proposes that a minimal view as possible be taken, by concentrating on aspects of tort law that are indispensable to its intelligibility, as a distinctive mode of legal ordering. There are certain constitutive features of tort law, in the absence of which we are precluded from identifying what remains as tort law at all. Therefore, whatever the morality of tort law is, it is necessarily the morality of these constitutive features.

Causation is one such feature. We would not identify as tort law a mode of ordering that systematically exacted damages regardless of whether the defendant caused the injury that the damages were to repair. Although causation is under attack in American tort law to a degree unimaginable a generation ago, the attacks do not undermine the conceptual centrality of causation in tort law. Not only do they identify the tort law whose morality is being sought, but they also provide a foremost explanation for seeking it. By isolating a relationship of two litigants, these features cut off the comprehensive consequentialism of instrumentalist and economic inquiry. Tort law is characteristically concerned with the defendant's doing and the plaintiff's suffering the same harm. The special morality of tort law, accordingly, is the morality that pertains to this relationship of doer and sufferer. In attempting to conceive of this relationship non-instrumentally, it must be seen as having in, and by itself, a normative dimension that tort law reflects. It follows, therefore, that the doing and suffering of harm is not the occasion to promote an independently justifiable goal, such as deterrence, compensation, or wealth maximization. Because the

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[16] *Roberts v. Ramsbottom* [1980] 1 W.L.R. 823.

normative dimension is intrinsic to the doing and suffering, the tort relationship in not a means to an end. Rather, each harm done, and suffered, is the core of a single transaction that relates this doer to this sufferer, and each such transaction is a discrete unit of normative significance.

This non-instrumental conception of tort law has certain important dimensions. Firstly, each transaction is a discrete unit and therefore tort law is not an ordering over an aggregate of transaction. Accordingly, it does not seek to combine or average utilities, however defined, across transactions. Tort justification is therefore not geared to the desirable consequences of transactions in the aggregate, but to the entitlement of the doer and sufferer in each transaction. Secondly, the treatment of each proceeding as a unit implies that its elements are internally integrated. If the harm constitutes an integrated relationship of doing and suffering, the respective parties cannot be considered independently of each other. Normative considerations that are unilaterally applicable either to the doer or to the sufferer, are therefore out of place.

Thirdly, if the integration of the doer and sufferer is to count as a moral relationship, the parties must stand on equal footing. This is where Rawls 'original position', for example, becomes critically important. This 'original position' is a state of equality, that is to say, each having moral equal worth. Doing and suffering is not a merely natural phenomenon beyond the range of morality; it has an intrinisally normative dimension. Equality as between doer and sufferer is the only conception internally available to define the relationship's normative character.

Fourthly, when the doer violates this equality, for instance, by acting negligently or inflicting an intentional harm, he/she wrongs the sufferer. On a more pertinent note, when one slanders, one demeans. The accompanying wrong is not that it has certain consequences that utilitarianism speaks of. But it is because in so doing (slandering), the equal right to the slandered individual is being denied. A tort is an act that wrongs the victim. The defendant owes the plaintiff a duty, operative at the moment of the action, to abstain from committing such an act. The obligation to compensate is the juridical reflex of an antecedent obligation not to wrong.

Lastly, attention to the stand-point internal to the relationship of doer and sufferer, allows the court to fulfill a properly adjudicative function. The court's task is to decipher and to specify what is required by the normative dimension of this relationship in the context of a particular dispute. This point serves to reiterate the importance of equality, indispensable to relationship being characteristically normative.

Precisely because, if it is to be used as the ultimate adjudicative principle, then a set of rights which gives expression to this fundamental moral equality must be articulated at the conventional state. Then, when these rights are read together, they give expression to this moral equality. Rawls equal liberty of all thus becomes the evidence of this rock-bottom premise.

If one accepts this kind of reasoning, it immediately becomes evident just how preposterous it is to sanction utilitarianism - which is concerned with aggregate maximum utility; and which treats individuals as means to an end, rather than as ends in themselves - as an adequate theory of justice on which to ground tort liability. Moreso, because utilitarianism is preoccupied with consequences, and hence only treats an action as morally wrong if it does not maximise social utility, it allows for injury to go by with impunity.

With the exceptions where slander is actionable *per se*, demeaning words spoken are not litigable unless the applicant can prove that she has suffered special damage, i.e. damage capable of pecuniary admeasurement. Special harm, in its origin, goes back to the ancient conflict of jurisdiction between the royal and the ecclesiastical courts, in which the former acquired jurisdiction over some kinds of defamation only because they could be found to have resulted in "temporal" rather than spiritual damage. The limitation has persisted in the requirement that social harm, to serve as the foundation of an action for slander not actionable *per se*, must be "temporal", material, or economic in character.

This historical development of common law jurisdiction over defamation, resulted in an incognizance by those who administered the law of slander, of the moral foundation in which the right to one's reputation is grounded. This reputational right is derived from a more fundamental right: a right to the integrity of personality: And so, itself, becomes fundamental. Individuals do not exist in isolation; but live in societies. The reputational right is emphatically stressed, because in adequately addressing and understanding it, we thus become aware of the kind of personal and communal attachments which enable us to complete our well-being and human flourishment. Therefore, reputation is not something to be dispensed with.

Where the law of slander fails, however, is by not paying sufficient attention to these fundamental kinds of concerns. The requirement for special harm results in the superficial attention to these fundamental concepts. A determination that special damage (or 'harm') is required can often be fatal to a claim. Professor Eldredge has observed that,

because of the difficulty of proving such harm and with the requisite specifity, "the result of requiring "special damage" as a necessary element of a cause of action ... is that in a great many cases the defamed plaintiff cannot obtain the public vindication of his good name which is the primary function of a judgement for the plaintiff."[17]

My contention is therefore simply, that, the inability to prove damage having economic or pecuniary value, ought not to preclude a slandered, defamed plaintiff from having recourse. The requirement of proving special damage should be distinguished from the need in certain instances to establish actual injury as an element of the cause of action. Proving damage to the integrity of personality with the requisite specifity for slander, not actionable *per se*, is often difficult, as the case of *Sunanansing v. Ramkerising* will show. But there is still a way of enforcing the law, especially when what is being secured (i.e., reputation) is fully understood.

III.

This case serves to illustrate the inadequate way in which the courts treat the tort of slander. An analysis of the case also shows that a utilitarian based justice does not effectuate the true purpose of the law of slander - that is, vindication of the plaintiff's good name. Although it must be noted that protection of one's reputation goes to something more fundamental than mere good name. The decision of the case in the Trinidad and Tobago Court of Appeal,[18] turned on the ground that the words complained of, as spoken, were not actionable.

At a meeting of East Indians called a "Panchayite", the defendant had made certain imputations to the effect that the plaintiff had cohabited with his sister-in-law and that she had become impregnanted by him. The plaintiff alleged that in consequence of the of these imputations he had been banished from the society of members of his caste. He sued the defendant for slander.

In balancing the evidence presented before him, the trial judge considered that given for the plaintiff as having the merit of possessing the truth. He found himself compelled to go beyond the findings, and found also, malice of a most expressed type evidenced on the part of the defendant towards the plaintiff from the fact that the former forced the

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[17] Eldredge, *Law of Defamation* (1977), p. 320.

[18] 17th December, 1897, (Goldney, C.J. and Nathan, J.), (unreported).

vote of the Panchayite to be taken against the latter, without giving an opportunity of answering the charge laid against him.

Accordingly, the trial judge had no hesitation in finding that substantial damage had been caused to the plaintiff. [Commendably, he seemed quite aware, that before we can pursue our human good, we require a community (Finnis)]. His finding for the plaintiff was reasoned from the fact that in a colony (such as Trinidad and Tobago), where the nationality to which the plaintiff belonged was limited and consequently his friendships fewer than in a large continent such as his native land, to be banished from the society of his fellow-countrymen of his own caste, was proof of damage sufficient to found an action.

However this judgment was appealed against on ground that the 'words complained of, as spoken were not actionable'. Goldney, C.J., in allowing the appeal, was of the opinion that the particulars of the plaintiff's claim disclosed no cause of action. By way of authority, he relied on two *dicta* laid down in previous cases:

> "where words are spoken which are of a defamatory nature, yet such that the law still not imply" (as in this case) "damage from them, still they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognise."[19]

According to the learned Chief Justice, practically all that was attempted to be proved was a loss of a "consortium" "Such a loss is not sufficient, the loss must be pecuniary in its nature, there must be a loss of some temporal benefit."

The Chief Justice went on, by using the words of Lord Herchell:

> "When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions, to meet cases which fall within the same principle; but when you are dealing with such an artificial law as the law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say ... it is the legislature that must make the extension and not the court."[20]

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19 Principle laid down by Baron *Channel* in *Foulger v. Boyd*, L. R. 11 Q.B.D. 415.

20 *Per* Lord Herschell in *Alexander v. Jenkins*, (1892) L.R. 1 Q.B. 801.

Upon those words, he allowed the appeal. Nathan, J, in concurring, expressed his view that slander was proved, but since the requisite actionable damage was not, the law could not be altered. "Hard cases" he said, "make bad law" (On this latter statement the American Realist would have a lot to say!).

Clearly it is evident, that the false and malicious words spoken of the plaintiff, (which in effect the learned Judge found them to be), though resulting in his being banished from the society to which he belonged, was insufficient for him to have a final judgment in his favour. From a utilitarian point, if Sunanansingh's expulsion from the Panchayite caused greater happiness to those remaining, then his banishment is justified.

Utilitarian calculation can be ironic in many instances, and so really become inadequate as a groundwork for justice. Little or no consideration is given to the basic fact that each individual must rely on others to complete the picture of himself of which he himself is allowed to paint only certain parts. In protection of reputation, slander protects dignity. Dignity can only be confirmed by the respect that it is due. The dignity that defamation law should protect is thus the respect (and self respect) that arises from full membership in society. Rules of civility are the means by which society defines and maintains this dignity. Enforcing these rules is a matter of safeguarding the public good inherent in the maintenance of community identity.

A word on 'hard cases' - according to American Realism, a demand of decisional responsibility in the hard or unprovided for cases, must be one that a judge is peculiarly sensitive to. For it is when the colours do not match up, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. Dworkin on the other hand, maintains that decision in 'hard cases', are generated by principles and enforcing existing political rights, so that litigants are entitled to the judge's best judgment about what their rights are.

Although this case is an old one[21], and so must necessarily be looked at in light of newer decisions - the examination of it is justified. The modern decisions have shown some tendency to liberalize the old rule, and to find pecuniary loss when the plaintiff has been deprived of a benefit which has a more or less indirect financial value to him. Thus the loss of the society's companionship and association of friends may be sufficient when their hospitality or assistance has been such that it can

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[21] Decided in 1897.

be found to have a monetary value. The tendency has been in the direction of finding the loss of an indirect benefit to be sufficient.

However, my proposition is that, the requirement to prove this special damage in monetary terms should not be mandatory. Bearing in mind though, that the wider tortious liability standard has to be met, where this criterion is not met, to restrict the award of damages to the costs of bringing the action. In addition, at least a declaratory judgment should be given, as it will mean that the plaintiff has been vindicated.

The illustration of the case was therefore to reiterate the point that the possibility of one being slandered, without being able to prove the requisite damage, should not preclude at least a declaration. As a matter of fact, such cases are suitable for punitive damages, because it is a way of punishing the slanderer.

CONCLUSION

The inadequacy of the law of slander stems from the fact that it does not come to grips with a proper conceptualization of tort liability. By securing the fundamental rights, tort law demonstrates that there is, in fact, a special morality to it. By being derived from the more fundamental right to the integrity of personality, the right to reputation itself becomes fundamental. By protecting reputation from unjustified attacks and injury, slander, too, becomes "fundamental".

Because the foundational level (constitution) of law is very much a matter of political morality, the law in question must be justified on grounds of critical morality, that is, by taking account of all the morally relevant circumstances, including the consequences of such legislation.

The right to reputation is considered fundamental because, (like all other rights), it protects an interest deemed to be an essential condition of respect for human personhood: in that it is a right that respects the moral agency of the human person as a being capable of reflective judgment and will. On this view, the protection of the reputation cannot be relegated to the principle of rule by the majority.

In rejecting utilitarianism as an adequate basis for tort liability, I am not unaware of the fact that at some stage utilitarian calculation must be engaged in. This is especially so at the executive and legislative levels, because interests must be weighed and final legislation done for the overall general welfare. However, the judiciary must refrain from the use of utilitarian calculation, because in so doing, it can fall a foul of the fundamental rights.

In attempting to address the question of whether or not the courts are bound to a conception of justice believed to have been upheld by the framers of the constitution, it has to be noted that no conception of justice (a contested concept) exhausts its meaning. However justice is understood, its central concern remains the way in which persons are treated *qua* person; as creatures with commitments and cares.

To adequately effectuate its purpose, the tort of slander must necessarily find its foundation in such a concept of justice - treating persons *qua* person. A theory of justice which treats individuals as means to an end, rather than as ends in themselves cannot be accepted. Justice is the supreme universal concept of political morality; the principal means of unifying a society of autonomous individuals as a whole.