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A FRAMEWORK FOR POSTHUMOUS DEFAMATION

Ellis v R, tikanga and the impetus for abolishing s 3(1) of the Law Reform Act 1936

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Abstract

This paper considers whether the continued existence of the maxim actio personalis moritur cum persona *within s 3(1) of the law Reform Act 1936 should be abolished in light of the Supreme Court's judgment in* Ellis v R. *It finds that reputational harm in common law and tikanga endure beyond a plaintiff's death. It explores whether the majority's judgment offers a legal avenue for justice to be sought in any posthumous action. Furthermore, the paper discovers that the section's historical use, its rationale and the courts of its jurisdictional neighbours all largely support abolishing the antiquated rule. It is suggested that the* Ellis *judgment can form a framework which is to be applied in posthumous defamation actions. Overall, it is argued that the judgment is plainly contradictory to the principles beneath s 3(1) and it should be repealed as it no longer is in line with New Zealand's legal reasoning.*

Subjects and Topics

Torts-Defamation-Tikanga-Death,

Law Reform Act 1936,

Actio personalis moritur cum persona,

Defamation Act 1992,

Ellis v R [2022] NZSC 114.

I Introduction

It is well founded that you cannot defame a dead person.[1] It seems logical, a dead person's reputation dies with them and so they cannot be defamed. This premise has become a relic of the common law and is said to originate from the *actio personalis moritur cum persona* maxim.[2] In defamation law the maxim forms an unquestioned status quo of the action, largely due to its express survival in New Zealand's law under s 3(1) of the Law Reform Act 1936. Section 3(1) states that:[3]

> "on the death of any person … all causes of action … shall survive against or … for the benefit of his estate … provided that this subsection shall not apply to causes of action for defamation"

Nonetheless, and specifically in the wake of the Supreme Court's judgment in *Ellis v R*, it is apparent this section no longer makes sense in the New Zealand legal context, as the majority's judgment plainly disagrees with s 3(1) and the principles its based upon.[4] In their judgments, the Supreme Court has clearly shown that they no longer reason in a way compatible with the section. Reputation (or rather mana), and proving its survival beyond death, is a necessity for the success of Peter Ellis' action. Accordingly, the majority has to finesse its legal reasoning to avoid doing anything more than distinguishing Ellis' scenario from one that would affront s 3(1) directly.[5] This results in a judgment that, when its logic is applied to posthumous defamation, will (in certain and meritorious cases) leave injustices unaddressed.

Ultimately, this essay concludes with a critique of the majority in *Ellis*, finding that their judgments conflict with s 3(1)'s existence and so they should have expressly called for its

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[1] Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Street & Maxwell, London, 2013) at [8.11].

[2] Oxford English Dictionary "actio personalis moritur cum persona" <www.oxfordreference.com>. The maxim means that actions of tort or contract are destroyed by the death of either the injured or the injuring party.

[3] Law Reform Act 1936, s 3(1).

[4] *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239; Law Reform Act, s 3(1).

[5] Law Reform Act, s 3(1).

abolition where relevant.[6] Most specifically, Part II of this essay outlines defamation principles generally as relevant to the latter parts of the essay. Part III looks to the majority in *Ellis* and highlights its incompatibilities with s 3(1).[7] Part IV takes a look to the principles and legal history underpinning the section itself. Part V compares the approaches taken by the courts of our jurisdictional neighbours when questioning their equivalents of the section. Finally, Part VI of this essay poses a framework in light of this essay's previous findings.

II Defamation (generally)

As much of the essay presupposes this knowledge, it is important to give a brief but necessary description of defamation and how it can be successfully argued (or defended) in a New Zealand court.

Defamation is the tort which protects a person's reputation against an unjustifiable attack.[8] In New Zealand a successful claim in defamation requires the plaintiff to establish that:[9]

(a) A defamatory statement has been made;
(b) The statement was about them (the plaintiff); and
(c) The statement has been published by the defendant.

Accordingly, s 4 of the Defamation Act 1992 does not distinguish between slander or libel (ie written or spoken defamatory statements), nor does it enforce a damage or harm threshold for the tort.[10] There is no proviso for what makes a statement defamatory. Broadly speaking, a statement will be defamatory when it has lowered the reputation of the defamed in the eyes of the "right-thinking persons generally".[11] However, it must be noted that the

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[6] *Ellis v R*, above n 4; Law Reform Act, s 3(1).
[7] *Ellis v R*, above n 4; Law Reform Act, s 3(1).
[8] Ursula Cheer *A to Z of New Zealand Law* (online ed, Thomson Reuters) at [59.16.1].
[9] Cheer *A to Z of New Zealand Law*, above n 8, at [59.16.2].
[10] Defamation Act 1992, s 4.
[11] Mullis and Parkes *Gatley on Libel*, above n 1, at [2.1].

statement itself must contain a statement of fact or imputation which has this effect to be found as defamatory.[12]

Protection of one's reputation finds itself at the core of both defamation law and, as will be drawn out throughout the following sections, the *Ellis* judgment.[13] However perversely, this core interest is largely undefined in the common law.[14] Reputation typically based itself on ideas such as honour, dignity and property; however recently it has resurfaced as a quintessentially public and rights based concern, basing itself in the intrinsic values underpinning the common law.[15] It is on this newfound flexible understanding of reputation which the majority used to its advantage in respect of continuing the *Ellis* judgment in the pursuit of justice.[16] It is on that flexible interpretation which allows the argument to be made that s 3(1) no longer is compatible with the reputational values of a New Zealander and their whānau.[17]

As defamation actions try to find the balance between freedom of expression and protection of reputation, the defendant in an action has a number of recognised defences to apply in a courtroom – these are honest opinion, truth, privilege, consent and public interest communication.[18] For brevity's sake, this essay considers these defences at face value. However, it is important to note that establishing any of these will stop a plaintiff's action in defamation.

As for who can bring an action in defamation, any individual can as their reputation is considered a part of their personal rights.[19] However, this also means that a person's

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[12] Mullis and Parkes *Gatley on Libel*, above n 1, at [2.1].
[13] Mullis and Parkes *Gatley on Libel*, above n 1, at [1.4]; *Ellis v R*, above n 4.
[14] Mullis and Parkes *Gatley on Libel*, above n 1, at [1.4].
[15] Mullis and Parkes *Gatley on Libel*, above n 1, at [1.1-1.4].
[16] *Ellis v R*, above n 4.
[17] Law Reform Act, s 3(1).
[18] Cheer *A to Z of New Zealand Law*, above n 8, at [59.16.7].
[19] Rosemary Tobin and David Harvey *New Zealand Media and Entertainment Law* (Thomson Reuters, Wellington, 2017) at 211.

reputation dies with them and so does their right to sue for defamation.[20] This abatement is true for the defendant as well.[21]

III Ellis v R

A History

Peter Ellis became an infamous household name after being accused of bizarre and inhumane offences such as satanic rituals, torture and sacrifice of preschoolers during his time working at the Christchurch Civic Creche in 1991.[22] Following on from this Ellis would be found guilty in June of 1993 after a six-week trial.[23] He would be convicted of 16 charges of child sex abuse against seven children (of which he was acquitted on 12 different counts) and sentenced to 10 years imprisonment.[24] Ellis would then go on to appeal the decision to the Court of Appeal in September of 1994.[25] There he would raise issues on the reliability of children's evidence, retraction of one child, adequacy of interview process, validity of expert evidence, verdict's inconsistencies and the Judge's rulings on inadmissibility.[26] This first appeal would be dismissed with all criticisms of the previous judgment rejected, ruling that there was no evidence that could render the children's accounts as improbable or unworthy of belief.[27]

Following that, in 1997, Ellis would be unsuccess in an application for the Royal prerogative of mercy, however it would result in the Government re-opening his case referring it back to the Court of Appeal.[28] This appeal would be dismissed again due to, in the Court's view "an absence of significant 'newness' in the additional evidence to show

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[20] Law Reform Act, s 3(1).
[21] *Hagaman v Little* [2017] NZCA 447, [2018] 2 NZLR 140 at [9].
[22] Melissa Nightingale "Peter Ellis saga explained: The twists and turns of Christchurch Civic Creche sex abuse case" (7 October 2022) NZ Herald <www.nzherald.co.nz>.
[23] Ministry of Justice "PETER ELLIS CASE – A COMMISSION OF INQUIRY?" <www.justice.govt.nz>.
[24] Nightingale, above n 22.
[25] Ministry of Justice, above n 23.
[26] Ministry of Justice, above n 23.
[27] Ministry of Justice, above n 23.
[28] Ministry of Justice, above n 23.

there were serious flaws or problems which were unknown or unappreciated."[29] Ellis would then present another application for a Royal prerogative of mercy, aiming for a free pardon or a Royal Commission of Inquiry into his case.[30] Although unsuccessful again, the Government would once again re-open his case focusing on the adequacy of interviews in respect of development of expert opinions since 1993.[31] In doing so the Government appointed Sir Thomas Eichelbaum to conduct a ministerial inquiry, where he would find no issue and so upheld the guilty verdicts in March of 2000.[32] Ellis had been released just one month earlier, after serving 7 years total of his sentence.[33]

In the years thereafter, Ellis did not stop fighting for his innocence. In June 2003 a presentation was made to Parliament requesting a Royal Commission of Inquiry to investigate his case.[34] Nonetheless, in 2005 the Justice and Electoral Committee tabled a report on the petition did not recommend an inquiry.[35] Years later in July of 2019, Ellis filed for and was granted an extension of time to apply for leave to appeal to the Supreme Court and for leave to appeal on the basis of new expert evidence on the interviewing techniques used on child witnesses, providing potential for the contamination of evidence.[36] Tragically, he would go on to pass away from cancer in September of 2019 before his third appeal could be heard.[37]

Despite his death the Court would go onto have two hearings to determine whether the appeal should continue, in 2019 and 2020.[38] The majority Judges were Glazebrook and Williams JJ and Winkelman CJ, whereas the minority were O'Regan and Arnold JJ.

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[29] *R v Ellis* (1999) 17 CRNZ 411, [2000] 1 NZLR 513 at [56].
[30] Ministry of Justice, above n 23.
[31] Ministry of Justice, above n 23.
[32] Ministry of Justice, above n 23.
[33] Martin van Beynen "Christchurch Civic Creche accused Peter Ellis dies while appealing conviction" (4 September 2019) Stuff NZ <https://www.stuff.co.nz>.
[34] Beehive "Timeline of the peter ellis case" <www.beehive.govt.nz>.
[35] Ministry of Justice, above n 23.
[36] *Ellis v R*, above n 4.
[37] At [1].
[38] At [2].

B Glazebrook J

Both parties agreed that the Supreme Court had the jurisdiction to continue the appeal, and that this was a case where discretion to continue could be applied via Rule 5(2) of the Supreme Court Rules 2004.[39] In the first judgment, Glazebrook J used the factors set out by the Canadian Supreme Court in the case of *R v Smith* as guidance on how to exercise this discretion.[40] In respect of the discretion, she acknowledges that her judgment is not one limited to Ellis' facts, and recognises its potential to be applied to different cases as the determining factors are largely based in the interests of justice.[41] This is the first indication that there is a principled approach to resolving posthumous injustices that is currently limited by s 3(1).[42]

1 R v Smith

Following on from that starting point, Glazebrook J then looked to *R v Smith* specifically, where the general test for discretion postulates that "there are 'special circumstances' that make it 'in the interests of justice'" to allow a continuation of an appeal.[43] Justice Glazebrook would then add two more considerations to the Canadian Supreme Court's principles and modify one for its use in New Zealand's unique legal setting.[44] The first addition allows the interests of the families of victims to be a distinct and important factor which requires its own consideration; the second looks to the wishes and reputational issues of the deceased appellant.[45] At face value, these additions affront the principles preserved by s 3(1).[46] As for the modification, she simply revised the first part of the third *R v Smith* factor to focus on the "public or private interest in the continuation of the

[39] At [44].
[40] *R v Smith* 2004 SCC 14, [2004] 1 SCR 385 at [50].
[41] *Ellis v R*, above n 4, at [48].
[42] Law Reform Act, s 3(1).
[43] At [49] citing *R v Smith*, above n 40, at [50].
[44] At [51].
[45] At [56].
[46] Law Reform Act, s 3(1).

appeal".[47] This combines to change the *R v Smith* test for continuation from situations of "special circumstances", to situations where it would be in the interests of justice.[48]

At a very broad level, Glazebrook J's judgment is one that calls for strong injustices be resolved. Consequently, this is directly supportive of s 3(1)'s abolition, as for as long as it stands the section expressly prohibits justice being resolved in posthumous defamation.[49] For that reason, it is surprising Glazebrook J has expressly considered the effect of familial and reputational considerations in a continuation context without directly confronting its compatibility with s 3(1).[50] Reputation underpins defamation; if it is a consideration for Ellis here, then it is surely incompatible with s 3(1).[51] Therefore, when applied prima facie it seems her two additions to *R v Smith* collide with the existence of s 3(1) of the Law Reform Act.[52]

2 *The Footnote*

Justice Glazebrook was aware of the above, and so to minimise any confliction, she attempts to distinguish it through the footnote:[53]

> "I am conscious that actions for defamation do not survive death, although most other actions do survive for the benefit of the estate: Law Reform Act 1936, s 3(1). I do not consider this stops reputational issues being taken into account in this context which is criminal and not civil and where it is accepted that criminal appeals can continue after death (unlike defamation actions)."

[47] At [56].
[48] At [56].
[49] Law Reform Act, s 3(1).
[50] At [56], n 64; Law Reform Act, s 3(1).
[51] Law Reform Act, s 3(1).
[52] *R v Smith*, above n 40; Law Reform Act, s 3(1).
[53] At [56], n 64.

This has the effect of limiting *R v Smith* and the discretionary power to criminal appeals, striking out its use in defamation actions.[54] This is sound from the standpoint of blackletter law, as after all parliament has expressly rejected continuation for defamation.[55] Nonetheless, the distinction is unconvincing because if reputational considerations are found to be relevant for an action's continuation here, it seems arbitrary to ignore them in certain cases purely because of its civil context. An illustrative argument on this would be that considerations of reputational harm have an equal or stronger basis for consideration when they are upset by a sufficiently defamatory statement. This is because justice and the clearing of one's name can only be sought through the civil process, of which s 3(1) currently prevents from happening.[56] Conversely, the wrongfully accused will always have the chance to clear their name in a criminal court. Therefore, if reputation is a just consideration in the criminal context, then this would support abolishing s 3(1) as otherwise the application seems inconsistent for capricious reasons.[57]

Another interpretation of the footnote's rationale would be that Glazebrook J was plainly aware of the obvious implications that her judgment has on s 3(1) and so has to strike out any argument.[58] Doing so makes sense due to this case's incredibly unique facts. However, by avoiding reputational considerations in civil suits, it would have been logical to expressly support s 3(1)'s abolishment as her judgment has clear conflictions with the principles underpinning the section.[59]

Nonetheless, when one reads her judgment as a whole, the footnote seems to be justified as her main concern is always that continuation is in the pursuit of justice. She is plainly aware that any reputational considerations in posthumous actions support s 3(1)'s abolition and so she had to focus the judgment on justice instead.[60] Therefore, she shifts the paradigm

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[54] At [56], n 64; *R v Smith*, above n 40.
[55] Law Reform Act, s 3(1).
[56] Law Reform Act, s 3(1).
[57] Law Reform Act, s 3(1).
[58] Law Reform Act, s 3(1).
[59] Law Reform Act, s 3(1).
[60] Law Reform Act, s 3(1).

of *R v Smith* to focus on justice more so than reputation to avoid the plainly obvious affects the case has on s 3(1).[61] Furthermore, its use was only ever intended to aid the exercise the discretionary power of continuation generally and so she can rightfully limit its application here.[62] Additionally, the power which the Supreme Court can continue case under does not provide support either which way.[63]

Assuming this interpretation to be true, the footnote should not rule out an argument for abolition as fallible. Rather, it must be understood that Glazebrook J's distinction was borne out of a need for practicality in the context of this already immense judgment. This footnote and its reasoning is all that is relevant from Glazebrook J's judgment, and for that reason the following judgment by Winkelmann CJ should aid further arguments on the issue.

C Winkelmann CJ

In her affirming judgment, Winkelmann CJ focuses upon continuation in respect of what is in the interests of justice.[64] In doing so, she looks to tikanga, existing common law principles and approaches taken in our neighbouring jurisdictions.[65] Of which I will examine the former two, however on the latter it is important to note that Winkelmann CJ disagrees with Glazebrook J's use of *R v Smith* finding that the "listed matters add little if anything to the principles [she identifies] as relevant".[66]

3 Tikanga Principles

In respect of allowing continuation the Chief Justice looked to the relevant values in tikanga and common law.[67] Of which, the most important is the value of ea which is roughly

[61] *R v Smith*, above n 40; Law Reform Act, s 3(1).
[62] At [44].
[63] Supreme Court Rules 2004, r 5(2).
[64] At [184].
[65] At [184].
[66] At [207].
[67] At [186].

equivalent to the common law ideas of justice and finality. A state of ea is achieved when an injustice is resolved and is able to restore its balance.[68] In respect of Mr Ellis, she found that a state of ea was not present and this imbalance not only exists for and relates himself, but for his whānau too.[69] Hara is important here too, and is equivalent to the western idea of harm.[70] Here, Mr Ellis' passing did not eliminate the hara against him, and in relation to mana, Mr Ellis and his broader whānau's mana was affected by the unfounded allegations.[71] It was also concluded that the complainant and their whānau have mana.[72]

Chief Justice Winkelmann then considered that these tikanga values and concepts provided her a framework for considering the issue of continuance.[73] Leaving the hara unaddressed and the imbalance that would exist if no appeal took place were her main reasons for continuing the appeal through the lens of tikanga.[74] Furthermore, she uses the specific concepts of mana tuku and mana tangata to confirm that hara exists and persists beyond the life of a party to an action.[75] These principles directly support s 3(1)'s repeal, as when you apply the framework to a defamatory hara on a deceased plaintiff's whānau, it is apparent that a resulting imbalanced ea is currently unable to be restored due to the section's existence.[76]

4 Common Law Principles

Chief Justice Winkelmann then shifts her focus to the common law, and specifically to the personal and public interest in addressing the potential miscarriage of justice pertaining to Mr Ellis.[77] The main determination here was whether continuation is relevant where there

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[68] At [185].
[69] At [186].
[70] At [185].
[71] At [186].
[72] At [186].
[73] At [187].
[74] At [187].
[75] At [187].
[76] Law Reform Act, s 3(1).
[77] At [190].

has been a miscarriage of justice; to which Winkelmann CJ considered the answer to be obvious – "we as a society acknowledge that conviction and its consequences should only follow after a fair trial."[78] She also rules out that this personal interest might cease on death, despite what the phrase's connotation might suggest. To do so she points out that in New Zealand, where a family has a financial interest in the outcome of the appeal, it weighs in favour of continuation.[79] She also highlights a variety of posthumous pardons enshrined in legislation.[80] This reasoning, if applied at its widest, is incongruous to s 3(1) as the section expressly stops justice from being sought where the defamed person is deceased.[81]

5 Defamation and its Interests

Under the guise of personal interest, she then turns her eyes to a familiar consideration, being whether continuation here is coherent with other areas of law, specifically defamation.[82] In regard to this, citing *Hagaman v Little* and s 3(1) of the Law Reform Act, she states that:[83]

> "In the law of defamation, the plaintiff's interest in their reputation is said to end with their death, such that their personal representatives may not then continue or commence the action in defamation. While first appearances may suggest that the harm to the whānau of a convicted person is similar to the harm caused to the whānau of a person who is defamed (in that it is harm flowing out of damage to the reputation of the deceased person) there are differences that justify a different approach. Civil defamation is different in kind to the harm caused to reputation and to an individual's mana by a wrongful conviction, in that in the latter case it is the State that has caused

[78] At [191].
[79] At [191].
[80] At [192]. See Pardon for Soldiers of the Great War Act 2000, Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 | Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) 2013, and Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana 2019 | Rua Kēnana Pardon Act 2019 | Ngāti Rangiwewehi Claims Settlement Act 2014 | Criminal Records (Epungement of Convictions for Historical Homosexual Offences) Act 2018.
[81] Law Reform Act, s 3(1).
[82] At [194].
[8383] At [194], citing *Hagaman v Little*, above n 21; Law Reform Act, s 3(1).

> the damage to the reputation. Secondly the harm caused by the miscarriage of justice will usually be different in magnitude given the very considerable stigma that society attaches to criminal conviction. I consider these differences justify a different approach in the area of criminal appeals."

This is a very important passage, as like Glazebrook J, this is Winkelmann CJ's way of justifying the different approach in the area of criminal appeals. The Chief Justice's justification requires a look through a lens of harm (or hara) and at how it flows through to a whānau's mana.[84] In doing so she acknowledges defamation's relevance at first glance and weighs up whether the harm of a wrongly convicted person can be equated to the harm flowing out of the damaged reputation of a deceased person. Nonetheless, she is able to distinguish Ellis' situation from one that conflicts with s 3(1) due to a difference in stigma when the harm is caused by a wrongful conviction.[85] This difference is how she justifies distinct approaches criminal and defamation hearings.[86] Nonetheless, the distinction does not entirely work to distinguish s 3(1)'s incongruity here. Using the Chief Justice's own reasoning, damage to reputation seemingly exists in both circumstances and so it seems unjust to arbitrarily decide when it can be addressed based off whether it was caused by wrongful conviction or not. After all, if reputational harm is her focus and if it can be ostensibly found, it should be addressed regardless of how it arises.

Regardless of why and how the Chief Justice was able to focus on harm to find an applicable distinction, I find this passage misguided. This is because when one takes a closer look to actions in defamation, harm (or rather damage to reputation) is presumed by the Court.[87] Also, harm is not something prescribed by our Defamation Act, or by the *Sim v Stretch* test which places its focus on words that "lower the plaintiff in the eyes of right-thinking members of society generally".[88] So why make harm the focus here? It seems

[84] At [194].

[85] At [194]; Law Reform Act, s 3(1).

[86] At [194].

[87] *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] 2 WLR 387 (CA) at [72].

[88] Tobin and Harvey, above n 19, at 183, citing *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240. The authors note that this is commonly supplemented with other tests, such as the "hatred, ridicule or contempt" test

incongruous but in actuality it is for good reason. The focus on harm is used find a way to distinguish the reasons for Ellis' continuation from one that undermines the rationale of s 3(1).[89] To take the argument away from affected personal reputations (ie defamation considerations) and onto harm itself, Winkelmann CJ has effectively removed any considerations on what her judgment has on the s 3(1) provision.[90] This is the Chief Justice's way, like Glazebrook J before her, to avoid any unnecessary discussion of defamation in case where it is otherwise irrelevant.

This approach however careful, is still afflicting to s 3(1)'s existence.[91] This is because if we were to focus on the harm aspect of a defamatory statement, and that harm is great enough to affect the mana of the whānau, the Chief Justice's judgment should still apply. This is because in that situation, logic would say that the hara remains unaddressed and the imbalance of ea persists onto the whānau, resolved only by continuation of a defamation action (which is obviously precluded by s 3(1)). [92] Accordingly, the resultant fallacy in the judgment is due to the impasse created by s 3(1)'s invariability and her legal reasoning which undermines the section's basis.[93]

She then turns her eye to public interest and makes the plain argument that there will always be a public interest in correcting a miscarriage of justice, even if posthumous action needs to be taken.[94] This conclusion is in line with the societal and judicial standards of New Zealand and is mostly relevant to Ellis' particular appeal. She also considers the principle of finality, which she finds is easily sidelined by the very high value miscarriages of justice have placed upon themselves by the judicature.[95] This combines to form a judgment that,

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Parmiter v Coupland (1840) 6 M & W 105, 151 ER 340 (Exch)) and the "shun and avoid" test (*Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581 (CA) at 587).

[89] Law Reform Act, s 3(1).

[90] Law Reform Act, s 3(1).

[91] Law Reform Act, s 3(1).

[92] At [187]; Law Reform Act, s 3(1).

[93] Law Reform Act, s 3(1).

[94] At [196].

[95] At [199].

in its narrowest reading, plainly avoids any contemplation of s 3(1) related issues, and at its widest, gives the basis for an argument to repeal the provision.[96]

6 Framework for Decision

In contemplation of the above, and in respect of continuation, Winkelmann CJ determines that there are four key considerations to be had.[97] These are any practical considerations, the interest in finality in litigation, the interest in having a miscarriage of justice addressed through the appellate process and the public interest in addressing a miscarriage of justice.[98] Following on from that she highlights that the strength of the grounds of appeal will be of utmost concern in respect of personal and public interest concerns.[99] She concludes with a statement about her framework, (which will become exceptionally relevant later), that it could be simply expressed as "which course of action is most likely to restore ea."[100]

That concluding sentence conjures an idea not too dissimilar from this essay's thesis, and that is whether is it *truly* just to prohibit continuation in defamation actions where it is clear there are situations where ea would remain imbalanced? While it can be appreciated that the Chief Justice's framework is for use in the appellate process, and this argument is much more wide reaching, her focus on ea is one that fundamentally disagrees with s 3(1).[101] Therefore, the point remains that her ea-focused approach should have been used to highlight s 3(1)'s redundancy in relation to New Zealand's modern legal reasoning landscape.[102]

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[96] Law Reform Act, s 3(1).
[97] At [210].
[98] At [210].
[99] At [211].
[100] At [212].
[101] At [10]; Law Reform Act, s 3(1).
[102] Law Reform Act, s 3(1).

7 Concluding on Winkelmann CJ

The strength of Winkelmann CJ's judgment on these facts is praiseworthy, particularly in respect of its use of tikanga to recognise harm and injustice transcends the individual in severe cases.[103] In doing so, she nearly calls for s 3(1)'s abolition, as for reasons already clear, an approach focusing on hara, the restoration of ea, injustice and mana persisting onto the whānau undermines it.[104] One could argue for all the same reasons that the Chief Justice did here, that reputational damage transcends one's lifespan and so has the right to exist beyond the life of the affected. This reasoning makes it clear that the Chief Justice distinguishes Ellis' situation from s 3(1) for jurisdictional reasons and not one that negates an argument for its abolition.[105]

D Williams J

Williams J delivers the final majority decision but does so with regret as he acknowledges the potential implications the continuation a case of these facts has on every person involved.[106] In coming to his decision he looks at two factors, the first being what principles should guide the Court in determining whether the appeal continues, and the second being what role should tikanga Māori play in that determination.[107]

8 The Principles

Like his peers before him Williams J acknowledges that the jurisdiction for continuation originates in r 5(2) of the Supreme Court Rules and even so, he says that the approach to "promote the ends of justice" would be an instinctual reaction for the Court.[108] On this point, I will point out that like Williams J, the basis for the argument against s 3(1)'s existence too comes from the same instinct for justice.[109] As it stands, in a case of good

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[103] At [228].
[104] Law Reform Act, s 3(1).
[105] Law Reform Act, s 3(1).
[106] At [274].
[107] At [231].
[108] Supreme Court Rules 2004; *Ellis v R*, above n 4, at [233].
[109] Law Reform Act, s 3(1).

merit, a deceased plaintiff's whānau is not afforded the ability to have posthumous defamation action brought in front of a Court in order to "promote the ends of justice".[110]

Following on from that, Williams J considers the approach taken by Glazebrook J and that more principled approach taken by the Chief Justice; ultimately preferring the latter.[111] On this approach he only finds it necessary to make a few comments.[112] The first is that the issue of posthumous continuation of appeals should be placed within a context in which the ends of justice is the touchstone.[113] This again raises the familiar concern – being that there are instances of defamation where this touchstone cannot be reached due to s 3(1).[114]

Much of Williams J's other comments follow on from that of the Chief Justice's and accordingly do not need to be investigated in detail. However, a point of interest is Williams J's look at finality, and why the exception was afforded to Mr Ellis. Justice Williams acknowledges that in most cases the delay in bringing the application to the Court (1999 to 2019) would have been too great for Mr Ellis, regardless of his death.[115] Following on from that, he states that it was the real merit in the appeal that allowed his exception.[116] Applying this approach to an action of defamation, particularly one of 'real merit', is simply not possible due to the bar found in s 3(1).[117] The section's existence ultimately kills justice being sought in this situation, which seems incongruous to the reasoning behind Williams J and the other majority judgments.

Justice Williams then turns his eye to tikanga and determines that its guidance helps continue a case like Mr Ellis'.[118] In doing so, the focus is again placed on the hara and the outstanding imbalance of ea at the present day continuing on beyond the death of a

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[110] At [233].
[111] At [236]. As it reflects how the Court determines what can promote the ends of justice more transparently.
[112] At [239].
[113] At [239].
[114] Law Reform Act, s 3(1).
[115] At [241].
[116] At [241].
[117] Law Reform Act, s 3(1).
[118] At [245].

person.[119] His reasoning here almost demands that s 3(1) is repealed.[120] Justice Williams states that "death does not extinguish mana because […] mana is not an individualistic phenomenon."[121] The same can be applied to personal reputation, as personal reputation at its face value is inherently personal, but in reality, is very far from that. One can imagine many an example where the reputation of your whānau affects you, and vice versa. This reputation can be offset by acts of an individual that (whether positive or negative) affects your whole whānau's reputation, much like mana. It is these situations and their recourse which is prohibited by s 3(1)'s existence.[122] He then looks to ea, equating it to common law ideas of justice and finality, stating that tikanga too has no time for a process without end.[123] Taken together, Williams J's incorporation of tikanga and common law is a welcome one in as it seems its values demand that s 3(1) be abolished.[124]

Much of the remaining part of his judgment looks further into the role tikanga plays in the common law and is mainly irrelevant to the points relevant in this essay. In fusing principles like ea, with common law values such as justice and finality, Williams J considers his (and Winkelmann CJ's) as a "tikanga-as-an-ingredient" approach.[125] This approach is wholly incompatible with s 3(1) as it is clear that tikanga demands vindication of reputation, especially beyond one's death.[126] This is evident through ea, hara and mana transcending onto whanau and so thus contradicting s 3(1)'s basis.[127] Again, it should be noted that as a court they are bound by Parliamentary Sovereignty. Nonetheless, Williams J could (and should) have taken the step to state the obvious incongruity as when this is done a legislature will struggle to ignore its Supreme Court.

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[119] At [249].
[120] Law Reform Act, s 3(1).
[121] At [251].
[122] Law Reform Act, s 3(1).
[123] At [253].
[124] Law Reform Act, s 3(1).
[125] At [187].
[126] Law Reform Act, s 3(1).
[127] At [269]; Law Reform Act, s 3(1).

E Minority Judgment(s)

In their minority judgments O'Regan and Arnold JJ agree with the majority in relation to the test for continuance and of the relevance of tikanga.[128] Their main point of disagreement comes to the application of these on the facts pertaining to Mr Ellis.[129] Accordingly, for the purposes of this essay, their judgments do not require any more scrutiny than I have applied to the majority judgments. At large my same criticisms will apply so a comprehensive look to their judgments is unnecessary.

IV Section 3(1) and its Rationale

The rationale for s 3(1) originates from the maxim *actio personalis moritur cum persona.* In its most literal translation, the maxim translates to mean that a personal right of action dies with the person concerned.[130] Its origin has been attributed to Roman law which allowed early judges in the English Courts to decide off its strength alone.[131] Although there is some debate as to the specifics, it is common belief that the Kings Bench first used the maxim in the case of *Cleymond v Vincent* in 1520.[132] After this the maxim's use was not recorded until it was popularised by Edward Coke in *Pinchon's case* in 1611.[133]

As its existence presupposes English society its basis (and thus the rationale underpinning s 3(1)) has been subject to much scrutiny throughout history.[134] Lord Justice Bowen thought of the maxim as an 'antiquity as great as that of the English common law itself'.[135] The maxim's ancient nature and apparent injustices have led many, like the great Sir Frederick Pollock, to label the rule as "barbarous" and to be one of the least rational parts of English Law.[136] Most recently, Viscount Simon has described the maxim as "a confusing

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[128] At [17] and [19].
[129] At [17].
[130] Oxford English Dictionary, above n 2.
[131] Henry Goudy "Two Ancient Brocards" in Sir Paul Vinogradoff (ed) *Essays in Legal History* (Oxford University Press, Oxford, 1913) at 216.
[132] *Cleymond v Vincent* (1520) YB 12 Hen VIII f 11, at pl 13.
[133] *Pinchon's Case* (1611) 9 Rep 86 87a (KB).
[134] Law Reform Act, s 3(1).
[135] *Phillips v Homfray*, 1883, LR 24 Ch Div 439 (CA).
[136] Pollock, Sir. The Law of Torts (4th Ed, Stevens and Sons, 1886) at 56.

expression, framed in the solemnity of the Latin tongue, in which the effect of death upon certain personal torts was inaccurately generalised."[137] This would suggest that despite the maxim's claim as a stalwart in English legal thought, its absolute nature and unbridled application has lead its rationale to be questioned for the same reasons s 3(1) is.[138]

Putting the maxim's questionability aside, when the English Laws Act was introduced into New Zealand, it too brought *actio personalis moritur cum persona* with it.[139] This meant that transmissibility in New Zealand law applied prima facie as it had in England for centuries foregone. Nonetheless, in 1936 the Law Reform Act was enacted to clarify and curtail the maxim's application in New Zealand law.[140] As already clear, the 1936 Act had the effect of meaning the maxim only applied in situations of defamation, which is still true at present.[141] This piece of legislation closely mirrored that of the 1934 English Law Reform Act where the maxim's use was abolished but for situations of defamation and seduction.[142]

Section 3(1) and the maxim's place in New Zealand Law was questioned most recently addressed by our Court of Appeal in the 2018 case *Hagaman v Little* where Kós P directly addresses the 1936 Act abolishing our maxim but for cases of defamation.[143] There he quite poignantly concluded that the rationale behind s 3(1) sparing defamation is because "no one but the defendant can give reliable evidence to rebut an allegation of ill will."[144] However, in the following sentence he directly acknowledges that these reasons "might not seem all compelling today, particularly when injurious falsehood is not similarly excepted."[145] This is important as the tort of injurious falsehood can sometimes be pleaded

[137] *Stewart v London, Midland and Scottish Railway Co*, 1943 SC (HL) at 26.
[138] Law Reform Act, s 3(1).
[139] English Laws Act 1858.
[140] Law Reform Act, s 3(1).
[141] Law Reform Act, s 3(1).
[142] Law Reform (Miscellaneous Provisions) Act 1934 (UK).
[143] Law Reform Act, s 3(1); *Hagaman v Little*, above n 21, at [9].
[144] At [9].
[145] At [9].

alongside defamation where it protects the disposability of the plaintiff's property, products or business.[146]

His criticism aids the case against s 3(1) and the maxim's survival for defamation, as the argument can be made that in any action brought after (contractual, tortious, or criminal) there will always been an evidential burden on behalf of the deceased plaintiff.[147] In this respect, and while some actions will be easier to argue than others, President Kós almost accepts that s 3(1) creates an arbitrary distinction on the basis that defamation hinges solely upon considerations related to one's reputation.[148] Nonetheless, the distinction between actions where s 3(1) applies and does not, can be traced to the difference between actions *in personam* and *in rem* from Roman Law.[149] President Kós' comments essentially mirror the reasoning of a Roman lawyer he essentially says that should a person's estate be affected by the action, it shall survive.[150]

President Kós' judgment is in line with the general principles behind defamation laws too, as if the defamed person is not alive to determine the meaning of the statement, then instinctually it is assumed the sting cannot be measured and so the statement in question cannot be defamatory.[151] However, and as we have seen, this instinctual reaction against attempting to measure a defamatory 'sting' posthumously is something that can actually be achieved post *Ellis v R* through its use of tikanga.[152] Therefore, it seems that if Kós P had the chance to redecide *Hagaman v Little* now it is likely that he could have gone further than to point out the rationale behind s 3(1) was no longer compelling, and rather outright called for its abolition under the same principles *Ellis v R* was decided upon.[153]

[146] Tobin and Harvey, above n 19, at 222.
[147] Law Reform Act, s 3(1).
[148] Law Reform Act, s 3(1).
[149] Law Reform Act, s 3(1); Goudy, above n 131, at 218.
[150] Goudy, above n 131, at 218.
[151] Tobin and Harvey, above n 19, at 177.
[152] *R v Ellis*, above n 4.
[153] *Hagaman v Little*, above n 21; Law Reform Act, s 3(1); *Ellis v R*, above n 4.

Taken-together, it seems that the *actio personalis moritur cum persona* maxim has become muddled throughout its development in common law and legislation. This has resulted in a provision which enforces a maxim of which its basis has become lost on the modern lawyer. Its statutory survival means that the courts and lawyers alike cannot question its use in law in any effective way. However, after the *Ellis v R* judgment, these remarks should amount as aid in arguments to abolish s 3(1).[154]

V Comparative Jurisdictions

F England

The Courts of England rarely question their equivalent of s 3(1).[155] In the 2009 case *Ashley v Chief Constable of Sussex Police* questions on it were quickly dismissed through the help of the 1937 case *Rose v Ford*.[156] In *Ashley*, the Court explained that its application remains consistent due to the 'particularly' personal nature of the wrongs.[157] At the time of *Rose v Ford* these included defamation, seduction, enticing away a spouse or adultery; however today, it is only defamation that remains to be an exception.[158] This longstanding precedent, and express parliamentary intention, meant that the Court was unwilling to entertain departure from its rule.[159]

Aside from *Ashley,* the more 2013 English case *Smith v Dha* also brought the section into play.[160] However, much like *Ashley* it too relied on the *Rose v Ford* judgment and does so with little to no room for an argument.[161] The Court there states that despite the *Rose v Ford* judgment acknowledging the provision's unsatisfactory nature, its existence makes sense as in actions of defamation only the claimant can give reliable evidence about his or

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[154] Above n 4.
[155] Law Reform (Miscellaneous Provisions) Act 1934 (UK), s 1(1).
[156] *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 (HL) citing Lord Wright in *Rose v Ford* [1937] 3 All ER 359 (HL).
[157] At [28].
[158] At [28], citing *Rose v Ford*, above n 156.
[159] At [28].
[160] *Smith v Dha*, [2013] EWHC 838 (QB).
[161] *Rose v Ford*, above n 156; *Smith v Dha*, above n 160, at [13].

her feelings/distress.[162] This seems to indicate that New Zealand is unlike the United Kingdom in that the introduction of tikanga gives our courts an avenue to depart from precedent and evolve its legal landscape. In this way, New Zealand courts would not be trapped in following a rule that no longer makes sense as the UK seems to be.

G Australia

The very recent 2022 Federal Court case of *Herron v HarperCollins Publishers* considered whether s 10 of the Australian Defamation Act prevented appeal of a primary judge's orders to dismiss the previous defamation hearing due to the death of one of the joint applicants.[163] Section 10 is the New South Wales' equivalent of New Zealand's s 3(1).[164] The contention was that s 10 stops anyone from "asserting, continuing or enforcing" the deceased's cause of action for defamation in the appeal, and it relied on the 2012 case of *Shiels v Manny* where exactly that was held.[165] Interestingly, the Court found that s 10 does not affect any defamation action that the deceased may have been able (if they were alive) "to assert, continue or enforce."[166]

Although these decisions do not draw on the same principles that allow continuation for the majority in *Ellis*, it is clear that their judiciary was willing to acknowledge and workaround the injustices cause by a strict bar against posthumous defamation actions.[167] This strengthens the case for s 3(1)'s abolition as, even without using the same approach, Australia's equivalent judiciary wants to depart from a strict rule in favour of the pursuit of justice.[168]

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[162] At [13].

[163] *HERRON and Another v HARPERCOLLINS PUBLISHERS AUSTRALIA PTY LTD (ACN 009 913 517) and Another* (2022) 400 ALR 56 [*Herron v HarperCollins Publishers*] (FCR), at [8]; Defamation Act 2005 (NSW), s 10.

[164] Defamation Act 2005 (NSW), s 10; Law Reform Act, s 3(1).

[165] *Herron v HarperCollins Publishers*, above n 163, at [201] citing *Shiels v Manny* [2012] ACTCA 22, (2012) 263 FLR 61 (CA) at [52]–[55].

[166] At [214].

[167] *Ellis v R*, above n 4.

[168] Law Reform Act, s 3(1).

H Canada

Part of the judgment in the 2017 case of *Lougheed Estate v Wilson* explores the case for posthumous defamation and states that it has long "lamented [the idea] as being irrational."[169] The judgment then points out that there are two independent pieces of legislation that form the basis of its application; these being the 1886 Ontario legislation and the 1934 English Legislation.[170] The former, expressly ensure its survival in actions of defamation and libel under s 23.[171]

The judgment then looks for guidance in its own state's jurisdictions. In doing it finds that the s 23 thinking is mirrored in the jurisdictions of Manitoba, Newfoundland, and the Northwest Territories.[172] In British Colombia the case of *M. (L.N.) v Green* explored the application of the rule to find that despite its many exceptions, its application nearly always seemed to survive in defamation.[173] In Ontario, the case of *Charlton* found that, despite its exceptions, the posthumous bar survives for slander and libel actions.[174] In light of this analysis, the Supreme Court finds that actions of defamation will not survive death.[175] However, this conclusion is largely based upon the continued history of statutory bars ensuring the maxim's survival across all jurisdictions in Canada. Nonetheless, the Court does acknowledge the rule and its express survival's irrationality.[176]

This leaves Canada in a position mixed between that of the UK. On one hand, like New Zealand and Australia, the courts there want to identify injustices caused by the bar against posthumous defamation. Nonetheless, like the UK, the courts find themselves stuck by precedent and an unbending parliamentary intention against any such action.

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[169] *Lougheed Estate v Wilson* [2017] BCJ No 1544, 2017 BCSC 1366 at [578].
[170] Statute Amendment Act O 1886 c 16, s 23; Law Reform (Miscellaneous Provisions) Act 1934 (UK).
[171] Statute Amendment Act O, s 23.
[172] At [582].
[173] At [583] citing *M. (L.N.) v. Green* (1995) 11 BCLR (3d) 374 (CA).
[174] At [591] citing *Charlton v. Co-operators* 1999 BCCA 35 at [44].
[175] At [609].
[176] At [161].

I Taken-together

The comparative analysis fundamentally supports an argument for abolition. It is clear two of New Zealand's three closest jurisdictional neighbours have identified the injustices a bar against posthumous defamation actions can create. It is these same injustices that form the basis of the *Ellis* judgment and the argument against s 3(1).[177] Ultimately, though it must be acknowledged that the Canadian and Australian courts are limited to obiter statements or case-by-case exceptions to the rule's place in their law.

VI A Framework for Change

As alluded to throughout the essay, the law behind s 3(1) is antiquated and in the wake of *Ellis v R* this is even more apparent.[178] In their judgments, Winkelmann CJ and Williams J have laid the framework for what could be used in place of the provision. This is largely through their focus on the idea of restoring ea through continuation.[179] Therefore, it is only logical to say that there are situations of defamation that are so strong that this framework could provide justice and balance to ea, that has been disrupted by a defamatory attack.

The framework's main determination looks at which course of action best "promotes the end of justice".[180] This is the "touchstone" for continuation, and it should become the touchpoint and operative question underpinning a framework for its application in defamation.[181] With this in mind, the framework needs to be embedded with tikanga values so that it provides a principled approach with justice at the forefront of its result. In essence, this means that the framework should use the tikanga-as-an-ingredient approach to ensure that the intersecting values of tikanga and common law are accounted for.[182] Personally, I would also like to acknowledge, as Williams J did, that this framework will not be

[177] *Ellis v R*, above n 4; Law Reform Act, s 3(1).
[178] Law Reform Act, s 3(1); *Ellis v R*, above n 4.
[179] At [10].
[180] *Ellis v R*, above n 4, at [223]
[181] At [239].
[182] At [269].

applicable in a way that is straightforward as it may seem, nor do I claim it is the definitive way for reformation. [183] Rather such a framework is necessary to make practical sense of this essay's argument.

The lens through which the framework looks needs to focus on an action's objectives (ie what allowing continuation achieves), rather than the likelihood of success in an action in defamation itself. This is because the defamatory claim will be considered under its own well-established common law framework the continuation can be allowed. The resultant inquiry then becomes whether continuation will restore ea for the deceased's whānau. Accordingly, my proposed framework is as follows:

What is the hara? It is important that this limb avoids defamation concerns and focuses on the current state of hara claimed by the plaintiff (ie what harm is caused to the plaintiff and their whānau but for continuation). Under this limb the whānau and the extent of the hara will also be identified. There should be some 'real merit' found here for it to warrant continuation.[184] This limb should weed out any unmeritorious claims where the harm to reputation is trivial.

Is there an imbalance of ea? This limb considers justice and finality.[185] This requires a factual inquiry that looks to the conduct and intentions of the deceased. Considerations relevant here could be whether they had taken any steps or had shown any intention to bring an action in defamation before their death. This is an objective inquiry.[186]

Does the imbalance of ea effect the mana of whanaungatanga? Ea restoration is the objective of the inquiry, and so this limb looks to whether more must be done to restore balance.[187] This consideration roots itself in the fact that "death does not extinguish mana" and so if it can be proved the whānau (or whanaungatanga) need an action brought to

[183] At [223].
[184] At [241].
[185] At [253].
[186] At [254].
[187] At [254].

restore ea, then it should be allowed.[188] It should be noted here that a state of ea does not mean all parties are happy with an outcome.[189] This limb's evidential bar will probably be placed quite high as there are going to be very strong arguments against finding in favour of the deceased here. This high bar is a result of harm to personal reputation where the person is deceased is an inherently difficult idea to establish definitively. Previously this consideration would have been barred by s 3(1).[190]

Taken-together, *is allowing the posthumous action the best way to 'promote the ends of justice'?* This is a wholistic inquiry considering the previous limbs of the framework and any other relevant considerations that relate to justice in the broad sense. If there are other avenues available, especially those non-litigious, those will weigh heavily here. If not, then continuation should be allowed.

When fulfilled a posthumous action can be brought by one or more of the recognised whānau to the courts under the tort of defamation. This becomes a separate action with separate considerations following the well-established defamation tort. Considerations under defamation are not affected by the *Ellis* judgment nor my framework, rather it simply establishes whether an action in lieu of a living plaintiff can be brought in the circumstances. [191]

It is relevant to point out that any criticisms to do with the potential for unduly delayed defamation actions brought in front of a court can be dismissed due to the already established two-year limitation period for defamation claims.[192] Furthermore, defamation itself has several hurdles built within that will stop unmeritorious claims and so the death of the defamed should not be one.[193] These defences would effectively act as a barrier for any unlikely claims clogging the courts in the first place. This exact concern is addressed

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[188] At [251].
[189] At [254].
[190] Law Reform Act, s 3(1).
[191] *Ellis v R*, above n 4.
[192] Limitation Act 2010, s 15.
[193] Tobin and Harvey, above n 19, at [7.5].

in the Chief Justice's judgment, and she actually did not think there would be an increased number of cases as the framework will ensure that actions will only continue where there is good reason.[194] Regardless of these concerns, a court should and would strike out any ill-suited action under Rule 15.1 of the High Court Rules.[195]

Naturally, this framework would raise concerns about finality and how this will affect the integrity of the justice system. However, in light of this concern, it is one that Williams J largely addresses in his judgment.[196] Justice Williams was willing to admit the Courts are innately human and therefore fallible, meaning that there will be times where continuation occur in order to resolve injustices in an action. Ultimately, this framework is based upon that exact sentiment and aims to provide a principled way to achieve justice in the realm of posthumous defamatory harms.[197] This strongly relates to the spine of this essay's argument – being the assertion that there are undeniable and genuine instances of defamation that will harm one's whānau in ways akin to how it would have harmed the deceased person.

VII Conclusion

Taken together it is clear that s 3(1) and the maxim underpinning it has become muddled as a product of its longstanding place in the common law.[198] Although it has been legislated out of use in many areas of the law, this unequivocal rule has remained a cornerstone for preventing defamation actions. As drawn out throughout the essay, this has resulted in a legal rule that has become dated and seems to be misaligned with modern legal thought relating to justice. In this respect, New Zealand is in the unique position where its highest Court has actually implemented a way to measure harms and injustices in a way that forgoes the lifespan of a plaintiff through the application of tikanga in the *Ellis* case.[199]

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[194] At [215].
[195] High Court Rules 2015, r 15.2.
[196] At [242].
[197] At [242].
[198] Law Reform Act, s 3(1).
[199] *Ellis v R*, above n 4.

However disappointingly, this affliction with s 3(1) goes largely unrecognised by the majority there.[200]

In regard to the judgment itself, it is wholly understood that its judgment and concerns far removed from any form of defamation discussion, but equally the effect it could have on this area of the law is plainly obvious. Accordingly, the lack of express acknowledgement of this incongruity from the majority was clearly a conscious choice taken for practical reasons and not reasons that disprove this thesis. Ultimately, *Ellis* was simply not the case to make such express calls, especially considering they lack the jurisdiction to, due to the s 3(1)'s express survival in the Law Reform Act 1936.[201] Conversely, it is apparent upon closer scrutiny that the majority in its judgment laid a framework where ea can be reached in any situation (including defamation). It has to be noted that this is contingent on s 3(1)'s removal and replacement by a tikanga focused principle-based solution to the problem of defaming the dead (similar to what I proposed in Part VI).[202]

Furthermore, New Zealand should take advantage of its unique position, especially when compared to the stances of its jurisdictional neighbours. This is because New Zealand has had the first step toward renouncing the rule taken for us by the majority in *Ellis*.[203] If we do not follow their lead, there is a risk of being trapped by precedent for no good reason like Canada and the United Kingdom have been. Ultimately, the *Ellis* case should have and still could disrupt a rule that is and has been confused since its murky inception into the common law. The majority show that in New Zealand it is clear that there is a favour for decisions that are truly just and not just those that follow precedent. Accordingly, s 3(1) and *actio personalis moritur cum persona* should no longer apply prima facie in defamation cases as it is simply not just nor in-line with our Supreme Court.

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[200] Law Reform Act, s 3(1).
[201] *Ellis v R*, above n 4.
[202] Law Reform Act, s 3(1).
[203] *Ellis v R*, above n 4.

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The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,950 words.

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