TAKAMORE V CLARKE: AN APPROPRIATE APPROACH TO THE RECOGNITION OF MĀORI CUSTOM IN NEW ZEALAND LAW?

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This article reads as an extended case note on the majority judgment of the 2011 Court of Appeal decision, Takamore v Clarke. *This case highlighted the tension between the application of the common law relating to burial and the application of Māori custom, and presented the Court of Appeal with difficult questions regarding the recognition of Māori custom by the common law. The majority treated Māori custom as analogous to English local custom, calling for the custom to meet a list of requirements in order to be recognised as part of the New Zealand common law. The Court held that Tūhoe burial custom did not meet all of the requirements for recognition and so could not be recognised. Nevertheless, with the view that custom should still be taken into account, the Court proposed a "more modern" approach to customary law. This article begins by considering the appropriateness of the analogy drawn by the Court to English local custom, with reference to the historical judicial application of Māori custom in New Zealand. It then critically analyses the application of the authorities cited by the Court. Finally, this article explores the effect of the majority's "more modern" approach on the treatment of Māori custom in New Zealand law. The article contains a postscript pertaining to the Supreme Court's more recent decision.*

I INTRODUCTION

Upon one's death, statute law is silent in regard to the disposal of the body. Ordinarily, common law applies. However, when the deceased is of Māori descent, and has whānau who practice Māori burial custom, tension between the application of the common law and that custom is evident. *Takamore v Clarke* (*Takamore*) has highlighted this tension and presented difficult questions relating to the recognition of Tūhoe burial custom by the New Zealand common law.[1] In *Takamore*

* This article was submitted as part of the LLB(Hons) programme at Victoria University of Wellington. I would like to thank my supervisor, Carwyn Jones, for his invaluable guidance and support. In 2012 an essay taken from part of this paper won the Sir Edward Taihakurei Durie student essay competition sponsored by

v Clarke, the majority of the Court of Appeal treated Māori custom as analogous to English local custom by applying the criteria by which local custom is recognised by the English common law.[2] The Court[3] held that Tūhoe burial custom could not be recognised as part of the New Zealand common law as the custom did not meet all of the requirements for recognition.[4] Nevertheless, with the view that burial customs should still be taken into account, the Court proposed a "more modern" approach to customary law involving the integration of Tūhoe burial custom into the common law relating to burial.[5]

This article begins by considering the appropriateness of the analogy drawn by the Court, with reference to the historical judicial application of Māori custom in New Zealand. It argues that the approach taken by the High Court in *Public Trustee v Loasby* (*Loasby*) would have been more appropriate in New Zealand circumstances.[6] This article then analyses the application of the authorities cited in applying the requirements for recognition. Central to this analysis is a critique of the Court's application of the reasonableness criterion, which decided the outcome of this case. This article concludes that the Court correctly applied the authorities it cited, but failed to distinguish adequately between Tūhoe custom allowing for the taking of the body and other Tūhoe burial customs. While the custom allowing for the taking of the body failed the reasonableness requirement, it could be argued that the Tūhoe custom providing for burial decisions to be made collectively by whānau pani, the bereaved family, could fulfil the requirements for recognition and be recognised by the common law.

Finally, this article considers the "more modern" approach devised by the Court of Appeal, evaluating its effect on the treatment of Māori custom in New Zealand law. It questions the effectiveness of the "more modern" approach, casting doubt on whether it could be applied to benefit any party asserting Māori custom in any future litigation. This article argues that the suggested approach merely pays lip service to Māori custom by reinforcing the duty the executor already has to consider the wishes of the deceased's family. This article also recognises that the custom at issue in *Takamore* could never have been accommodated by the "more modern" approach.

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the Māori Law Review. An edited version of that essay has subsequently been published in (2013) February Māori LR.

1 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.

2 At [121]–[175].

3 All references to the Court in this article pertain to the majority judgment.

4 *Takamore v Clarke*, above n 1, at [175].

5 At [254].

6 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

II TAKAMORE

In 2007 Mr Takamore died in Christchurch where he had been living for 20 years with his de facto partner, Ms Clarke, and their children. He was of Tūhoe descent. As the sole executrix of Mr Takamore's will, Ms Clarke intended to bury his body in Christchurch. Contrary to her wishes, her partner's sister and other Tūhoe members took Mr Takamore's body from Christchurch to the Bay of Plenty, to be buried in the urupa at his whānau marae.

The High Court held that this taking of the body was unlawful.[7] As the executrix of Mr Takamore's will, Ms Clarke was entitled under the common law to make the final decision about her partner's burial.[8] The appeal of this decision by Mr Takamore's sister was founded on the premise that the taking of Mr Takamore's body was in accordance with Tūhoe tikanga – a notion that the Court of Appeal did not dispute – and that such Māori custom is part of the New Zealand common law.

The central issue for the Court of Appeal was whether Tūhoe burial custom has any effect on the common law duties of an executor. In deciding this, the majority of the Court treated Māori custom as analogous to local custom in England, applying the criteria upon which such local custom is recognised by the English common law.[9] If the burial custom at issue fulfilled this common law test, it could be recognised as part of the New Zealand common law. That test requires the custom to be reasonable, and it is on this requirement that the burial custom failed.[10] However, with the view that the custom should, nevertheless, be taken into account, the Court proposed a "more modern" approach to customary law involving the integration of Tūhoe burial custom into the common law relating to burial.[11] Under this approach, Ms Clarke would be required to take Tūhoe burial custom into account as a relevant cultural consideration when determining the method and place of her partner's burial.[12] This would require her to facilitate a culturally appropriate process of discussion and negotiation, providing the opportunity for full participation by whānau members, in an attempt to reach a consensus.[13] Ms Clarke would then be required to bury the deceased in accordance with

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7 *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [90].

8 At [48].

9 *Takamore v Clarke*, above n 1, at [121]–[175].

10 At [175].

11 At [254].

12 At [255].

13 At [255].

the consensus reached.[14] However, if a consensus was not reached, the common law position would prevail and she, as the executrix, would be entitled to make the final decision.[15]

The Court considered that this approach was not feasible in these circumstances because Mr Takamore's sister and whānau members were not open to negotiation, and did not fully explain their cultural values to Ms Clarke.[16] As the Tūhoe burial custom could not be recognised as part of the common law and the "more modern" approach was not applicable in the circumstances, the Court concluded that there was no legal authority for Mr Takamore's whānau to take the body.[17] Ms Clarke, as the executrix, was entitled to possession of her partner's body and to make the final decision as to its burial.[18] The appeal was dismissed.

III MĀORI CUSTOM AS LAW

In its narrow and legal sense, Māori "custom law", or "customary law", refers to Māori customs that have met specific legal tests so are enforceable in the courts.[19] However, Māori custom law can be used in a broader sense to describe the body of rules developed by Māori to govern their societies.[20] In the context of *Takamore*, the Court had to determine whether Tūhoe burial custom,[21] which was considered custom law in the broader sense by the Takamore whānau, could be said to constitute custom law in the legalistic and narrow sense, allowing it to be enforceable in the courts.

As a prerequisite to any legal recognition of custom, the court must establish the existence of the custom alleged.[22] This requires proof of that custom by evidence. Despite some uncertainty over the means and standard of proof necessary, it appears that the New Zealand courts have treated Māori custom as analogous to foreign law, requiring proof by way of appropriately qualified experts.[23]

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14 At [255].

15 At [258].

16 At [261].

17 At [262].

18 At [262].

19 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [4].

20 At [4].

21 See *Takamore v Clarke*, above n 1, at [92]–[94] for a description of Tūhoe burial custom based on expert evidence before the Court.

22 Richard Boast "Māori Customary Law and Land Tenure" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at ch 2.2.5.

23 At 2.2.5. See *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) where evidence was supplied by a senior lecturer in Maori studies at Canterbury University and a local kaumātua. In *Arani v Public Trustee of New Zealand* [1920] AC 198 (PC) published decisions of the Maori Appellate Court were relied upon, as well as information given by a distinguished New Zealand chief.

Such experts have included senior university lecturers in Māori studies, respected Māori elders, distinguished Māori chiefs, and the Māori Appellate Court.[24]

IV THE HISTORICAL APPLICATION OF *MĀORI* CUSTOM BY THE NEW ZEALAND COMMON LAW

A Māori Custom and the Common Law

The fundamental basis for the recognition of Māori custom by the common law is the presumption of continuity. In the foundational decision on the presumption of continuity *Campbell v Hall* Lord Mansfield pronounced that "the laws of a conquered country continue in force, until they are altered by the conqueror".[25] Under this doctrine Māori custom, and the customary rights it gives rise to, is cognisable at common law until lawfully extinguished. The New Zealand courts have fairly consistently[26] applied this presumption.[27]

The Crown's introduction of the judiciary saw the extinguishment of Māori custom and the introduction of English law to govern Māori in all of their criminal relations and their civil disputes with settlers.[28] However, Māori custom was left to govern any civil relations and matters between Māori such as marriage, adoption, succession and title to land and other property.[29] As Paul McHugh notes:[30]

> English law was only applicable to the extent it was suitable to the local circumstances. It could hardly have been applied suitably to the family matters and ownership rights of the Māori.

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24 Boast in Boast and others, above n 22, at ch 2.2.5; *Te Weehi v Regional Fisheries Officer*, above n 23; *Arani v Public Trustee of New Zealand*, above n 23.

25 *Campbell v Hall* (1774) 98 ER 848 (KB) at 895.

26 The few judges who did not apply the presumption of continuity have been regarded as being "idiosyncratic" in their departure from proper common law principles (see Boast in Boast and others, above n 22, at ch 2.2.4 and Mark D Walters "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L J 711 at 721). Included in this minority is Prendergast CJ, who notoriously pronounced that Māori were "savages" unable to form "any kind of civil government" or any "settled system of law" in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS 72 (SC) at 77–79, with similar dicta in *Peti v Te Paku* (1888) 7 NZLR 235 (SC) at 239.

27 *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577–578; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [34]; *Te Weehi v Regional Fisheries Officer*, above n 23, at 687; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 215.

28 Paul McHugh "The Aboriginal Rights of the New Zealand Māori at Common Law" (PhD Dissertation, University of Cambridge, 1987) at 184.

29 At 184.

30 At 184.

However, where there is a dispute between existing Māori custom and the English common law, the courts have to decide on the applicability of that custom in New Zealand law. To date, little case law has concerned the application of Māori custom in respect of matters such as marriage and adoption, as the focus has been on title to land and other property.[31]

Richard Boast notes that it is now well established that indigenous customary law relating to native title to land is part of the common law and cognisable and enforceable by the courts.[32] However, he argues that while it appears that Māori custom that does not relate to native title to land can still form part of the common law and be enforceable, this recognition is "very limited and constricting".[33]

B Māori Custom and English Local Custom

Boast focuses on the courts' treatment of Māori custom as analogous to English local custom, citing Cooper J's decision in the High Court in *Loasby*.[34] In determining whether the estate of a deceased rangatira was liable for the expenses of the tangi the Judge had to consider the applicability of Māori custom. Cooper J believed the custom to be proved; that the expenses of a tangi are paid out of "the property of the dead chief in whose honour the tangi is being held."[35] Stating that decisions made by the English courts could not be "directly in point", his Honour developed three questions to be considered by the Court in determining whether the Court could recognise the Māori custom at issue.[36] The first was a "question of fact whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Māori race".[37] Following this, the Court needed to consider whether the custom was "contrary to any statute law of the Dominion".[38] Finally, the Court was to consider whether the custom was "reasonable, taking the whole of the circumstances into consideration".[39]

This test has been cited with approval in later decisions. In *Huakina Development Trust v Waikato Valley Authority*, upon stating the test set out in *Loasby*, Chilwell J concluded that "thus it

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31 See *Nireaha Tamaki v Baker*, above n 27; *Attorney-General v Ngati Apa*, above n 27; *Te Weehi v Regional Fisheries Officer*, above n 23; *Huakina Development Trust v Waikato Valley Authority*, above n 27.

32 Boast in Boast and others, above n 22, at ch 2.2.2.

33 At ch 2.2.4.

34 At ch 2.2.4.

35 *Public Trustee v Loasby*, above n 6, at 806.

36 At 806.

37 At 806.

38 At 806.

39 At 806.

may be said that customs and practices which include spiritual elements are cognisable in a court of law provided they are properly established, usually by evidence".[40] In *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority*, Harrison J referred to Cooper J's three questions as "criteria for qualification [of Māori custom] as a part of the law of New Zealand".[41] In the High Court judgment in *Clarke v Takamore* Fogarty J also recognised the ability of the New Zealand courts to recognise Māori custom as part of the common law using the *Loasby* test.[42] However, Fogarty J did not have to apply that test and decide the content of Tūhoe burial custom or whether it was part of the New Zealand common law because of his interpretation of the facts.[43]

C Summary

This Part has outlined the historical application of Māori custom by the New Zealand common law. It began by acknowledging the presumption of continuity as the legitimate basis for recognising Māori custom and proceeded to detail the historical recognition of custom that does not relate to native title to land, setting out Cooper J's three part test in *Loasby*. This test has been seen as an implied analogy with English local custom, and been cited with approval in subsequent decisions. However, this test was not applied by the Court of Appeal in *Takamore*.

V THE APPROPRIATENESS OF THE MAJORITY'S ANALOGY WITH ENGLISH LOCAL CUSTOM

A The Majority's Analogy

Where the English common law conflicts with an alleged local custom, the courts will recognise local custom as law for a borough or local area as long as certain set criteria are met. These criteria, initially set out in the *Tanistry Case*,[44] are firmly established.[45] To be valid, a custom must be immemorial, have continued as of right and without interruption since its immemorial origin, be

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40 *Huakina Development Trust v Waikato Valley Authority*, above n 27, at 215.

41 *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 (HC) at 206.

42 *Clarke v Takamore*, above n 7.

43 At [88].The Judge concluded that on the evidence provided Mr Takamore had chosen to live outside of tribal life and the customs of his tribe. He was entitled to expect that choice to be respected by the executrix of his will, especially as the executrix he had chosen was his lifelong partner. Mr Takamore had personal rights under the common law as a New Zealand subject, and unless he had made it clear during his life that he lived in accordance with Tūhoe tikanga, that custom could not be imposed on his executrix, and over his body and personal rights.

44 *Tanistry Case* (1608) Sir John Davis Rep 29 at 32.

45 "Custom and Usage" in *Halsbury's Laws of England* (4th ed, reissue, 1998) vol 12(1) at [606].

reasonable, and be certain in its terms, in respect of the locality to which it obtains and the persons whom it affects.[46] Further, the custom cannot be extinguished by statute law to the contrary.[47]

The majority in *Takamore* listed these criteria as the requirements for local custom to be recognised by the common law of England, and then proceeded to discuss the presumption of continuity. Following this discussion, the Court stated:[48]

> Customary laws of indigenous peoples were recognised according to principles analogous to those used to recognise customs in England, although with some modifications. Dr P G McHugh notes that "[i]n general terms the colonial tribunals required proof of a consistent, long-standing practice not 'repugnant to justice and morality'".

McHugh's statement was true of some colonial tribunals, but it is not clear that New Zealand courts were included in his analysis. To support this statement, McHugh cited Allot's *New Essay's in African Law* and Derrett's "Justice, Equity and Good Conscience in India".[49] It appears that the New Zealand courts had yet to make this link between English custom and indigenous custom. This observation is reinforced by the limited case law available in which the New Zealand courts have considered the applicability of Māori custom.[50] Within this, no New Zealand court prior to the Court of Appeal in *Takamore* has explicitly stated their treatment of Māori custom as analogous to that of local English custom, and applied such a direct analogy. The closest New Zealand analogy appears to be an implied one in *Loasby*, where commentators have interpreted Cooper J's analysis as implicitly assuming the link between local custom and indigenous custom.[51]

B Loasby – *A Distinct and More Appropriate Test?*

While it is true that the requirements for recognition of local custom set out in *Halsbury's Laws of England* are similar to those identified by Cooper J, there are some crucial differences. The tests are framed differently, but in substance are similar in that they both contain extinguishment and reasonableness requirements. Under the *Loasby* test, a custom cannot be recognised if it is "contrary

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46 At [606].

47 At [646]. See [607]–[618] for a detailed account of what is required under each criterion as the English courts have developed them post-*Tanistry Case*.

48 *Takamore v Clarke*, above n 1, at [121].

49 McHugh, above n 28, at 182.

50 As discussed above, the test for the recognition of Maori custom in *Public Trustee v Loasby*, above n 6, has been adopted in *Huakina Development Trust v Waikato Valley Authority*, above n 27, *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority*, above n 41, and *Clarke v Takamore*, above n 7.

51 See Mei Lin Ng "In Search of the 'Golden Thread': Common Law Interactions with Indigenous Law in Canada, Australia and New Zealand" (PhD Dissertation, Griffith University, 2006) at 445; Boast in Boast and others, above n 22, at ch 2.2.4; Law Commission, above n 19, at [35].

to any statute law of the Dominion".[52] Likewise, the English test requires that the custom cannot have been extinguished by a contrary statute.[53] In regard to reasonableness, both tests contain a reasonableness standard. In *Loasby*, the custom must be "reasonable, taking the whole of the circumstances into consideration",[54] whereas English common law requires the custom to be "reasonable".[55] This article will consider whether there are any fundamental differences between the two tests as regards reasonableness.[56]

Those similarities encompass two of the three criteria set out by Cooper J in *Loasby*. The final criterion is a "question of fact whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Māori race".[57] This is effectively the requirement of proof,[58] which the New Zealand courts have required prior to any consideration of Māori custom. This limb was discussed in *Takamore* as Ms Clarke's submissions required the Court to consider the meaning of the phrase "general custom".[59] In *Takamore*, the Court commented that this phrase did not mean that the custom had to be general rather than iwi-specific to achieve recognition at common law, but that the custom must be general in that it is a custom of an identifiable group, not just a practice between individuals.[60] In this sense it accords with the meaning and scope of custom, as per the English test for recognition, in that a custom "imports some general rule applying within the district where it operates, and cannot therefore arise from a few mere private acts of individuals".[61]

It may be argued that the requirements of longevity and continuity are also requirements of proof of the existence of a custom, and so the tests are similar in this respect. However, there are issues surrounding longevity and continuity that do not arise with proof of existence. The requirements of longevity and continuity have required adaptation to apply outside of Britain. Where English local customs required proof of existence since time immemorial,[62] indigenous

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52 *Public Trustee v Loasby*, above n 6, at 806.

53 *Halsbury's Laws of England*, above n 45, at [646].

54 *Public Trustee v Loasby*, above n 6, at 806.

55 *Halsbury's Laws of England*, above n 45, at [606].

56 See Part VI of this article.

57 *Public Trustee v Loasby*, above n 6, at 806.

58 See Part III of this article.

59 *Takamore v Clarke*, above n 1, at [171].

60 At [173].

61 *Halsbury's Laws of England*, above n 45, at [601].

62 At [607].

customs have been said to require proof of a "consistent, long-standing practice"[63] that demonstrates "continuity with a preceding legal system".[64] These requirements were identified by the Court as being problematic as they are not easily satisfied in the New Zealand context.[65] This issue does not arise when requiring proof of existence, which demonstrates the significant difference between these requirements in the two tests.

The requirement of certainty in the English test was also held to be problematic by the Court in *Takamore*,[66] but is not required by the *Loasby* test. Without this requirement, Cooper J's test can be seen as distinct from the English test, and is arguably more appropriate for application in the New Zealand context.

Although the custom in *Takamore* failed on the reasonableness criterion, and could fail on this criterion on application of the *Loasby* test,[67] that test is arguably a distinct test from the one used by the English common law courts; one that was created in a New Zealand context and is more appropriate for application by the New Zealand courts. However, by sitting in the Court of Appeal, the majority in *Takamore* was not bound to follow the decision of the High Court in *Loasby*, regardless of whether or not a distinct test was created by Cooper J.

Interestingly, the majority in *Takamore* took a different approach from the test in *Loasby*, without expressly overruling that test. In fact, they did not recognise the *Loasby* test as being an implied analogy or a separate test, despite commentary to the contrary.[68] The majority describes Cooper J's test, but only in response to a submission by Ms Clarke that the custom at issue had to be a general Māori custom.[69] The majority also used the dicta in *Loasby* in their analysis of the reasonableness requirement for recognition.[70] Overall, the treatment of *Loasby* by the majority in

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63 McHugh, above n 28, at 182.

64 Walters, above n 26, at 719.

65 See Part V of this article.

66 See Part V of this article.

67 The reasonableness requirement in *Loasby* is discussed in Part VI of this article. Cooper J's problematic reasoning and Fogarty J's subsequent interpretation of the requirement have resulted in its unclear scope. It is unclear how this requirement would be applied by the New Zealand courts.

68 Boast in Boast and others, above n 22, at ch 2.2.4; *Clarke v Takamore*, above n 7, at [81]–[83]; *Huakina Development Trust v Waikato Valley Authority*, above n 27, at 215; *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority*, above n 41, at 206. The first three of these authorities were cited in the majority judgment.

69 *Takamore v Clarke*, above n 1, at [170].

70 At [115] and [125].

the Court of Appeal is at odds with the treatment of that case by previous courts, including the High Court in *Clarke v Takamore*.[71]

C The Appropriateness of the Court of Appeal's Approach

The Court of Appeal's approach involves an explicit statement that Māori custom is to be treated as analogous to local English custom, a statement of the English common law requirements for recognition, and a stepwise approach in which those requirements are applied to Tūhoe burial custom. The appropriateness of using this analogy in New Zealand circumstances has been questioned.

The Privy Council in *Arani v Public Trustee of New Zealand* (*Arani*) questioned the appropriateness of comparing Māori custom to English local custom due to a fundamental difference between the two: the customs' ability to be modified.[72] Lord Phillimore stated:[73]

> It may well be that this is a sound view of the law, and that the Māoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi legislative internal authority that can modify it.

Lord Phillimore recognised that Māori custom is inherently dynamic. Unlike local custom, culture is forever a living, changing thing.[74] The dynamism of Māori custom was considered problematic by the majority in *Takamore* in respect of the longevity/continuity and certainty requirements for recognition.[75]

For an English local custom to be recognised, it must have existed from time immemorial (the commencement of Richard I's reign in 1189), or circumstances proved must raise a presumption that the custom existed at that time.[76] This standard is impracticable for indigenous custom. McHugh writes that indigenous customs have required proof of a "long-standing, consistent practice" to be recognised by colonial courts.[77] However, this modified test is still unsuitable for Māori custom. Tikanga is dynamic, and has the capacity to change to adapt to new circumstances.[78] It is not fixed.

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71 See Part VI of this article.

72 *Arani v Public Trustee of New Zealand*, above n 23.

73 At 204–205.

74 Law Commission, above n 19, at [9]–[11].

75 *Takamore v Clarke*, above n 1, at [122]–[123] and [132].

76 *Halsbury's Laws of England*, above n 45, at [607].

77 McHugh, above n 28, at 182.

78 See Law Commission, above n 19, for examples of the adaption of tikanga to new circumstances.

If the courts are to recognise Māori custom in its true form, such custom could never meet the modified test. In support of this argument, the Law Commission noted, in its 2001 report *Māori Custom and Values in New Zealand Law*, that:[79]

> Tikanga Māori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present … There is a continuing need to maintain and adapt tikanga in a dynamic process. There is value in looking to the past; but only to the extent that it sheds light upon the present and the future.

The Law Commission also referred to the internal self-governing power of Māori acknowledged by the Court in *Arani*.[80] Similarly, in response to the modified test for the longevity/continuity requirement, the Court in *Takamore* cited *Arani* and referred to the dynamic nature of Māori customary law.[81] The majority implied the unsuitability of the test in their citation of authorities, but disregarded that lack of suitability and applied the modified test regardless. They did not propose an additional test that addresses the concerns expressed. The application of the modified test was straightforward in this instance, as the Court approved Fogarty J's finding of fact in the High Court.[82] They held that the longevity/continuity requirement had been met, as expert evidence had proven that the taking of the body by whānau is a custom that has long existed, and has been and continues to be actively practised.[83] As a result of this approach the future application of this test to a custom that has evolved considerably over time is problematic, as the test does not recognise the dynamic nature of Māori custom.

Linked to this issue are the concerns raised by the Court in *Takamore* in regard to the certainty requirement. The certainty requirement for the recognition of English local custom requires that a custom be certain in its terms, in respect of both the locality where it obtains and the persons whom it affects.[84] The custom must be able to be applied to the circumstances of a particular case in a way that the rights given by that custom in that case may be shown with certainty.[85] After providing such detail of the certainty requirement, the majority concluded that:[86]

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79 Law Commission, above n 19, at [10] and [19].

80 At [41].

81 At [123].

82 At [136].

83 At [136].

84 *Halsbury's Laws of England*, above n 45, at [606].

85 *Halsbury's Laws of England*, above n 45, at [615].

86 At [132].

> Given that Māori customary law has its basis in broad values, and its capacity for change and variations between iwi and hapu, the certainty criterion cannot apply with the same rigour as it does in relation to English customs.

The majority recognises the difficulty in applying this requirement to Māori custom, as does the Law Commission. The Law Commission has warned that:[87]

> Certainty cannot be so paramount that past understandings of tikanga Māori should be adopted, along the lines of common law precedents, without continually being tested by the practical jurisprudence of Māori communal decision-making.

While not at issue in this case, as the recognition of Tūhoe burial custom by the common law failed on the reasonableness requirement, the majority noted that the burial custom that allows for the taking of the body would have also failed the certainty requirement.[88] This failure would have been based on the burial custom providing an uncertain process for debate and negotiation, rather than a clear allocation of legal rights to the body.[89] The Court commented that ultimate certainty would be required for the custom to be recognised.[90] However, ultimate certainty would require courts to modify an uncertain custom, which would result in the failure of the common law to recognise Māori custom in its true form. Comment on the merit of this outcome is unnecessary, but it is important to recognise that because the approach taken by the majority requires significant modification in order for it to apply to Māori custom, it may not be an appropriate approach to apply in the New Zealand context.

VI APPLICATION OF THE REQUIREMENTS FOR RECOGNITION IN TAKAMORE

A Purpose of this Part

As the Court was entitled to treat Māori custom as analogous to English local custom, this Part is focused on critically analysing the application of the authorities cited by the majority, and on the majority's application of the reasonableness requirement. It was because of the failure of Tūhoe's burial custom to meet this requirement that the Court decided the custom could not be recognised by the common law.

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87 Law Commission, above n 19, at [18].

88 *Takamore v Clarke*, above n 1, at [167].

89 At [167].

90 At [167].

B Longevity/Continuity and Certainty

While the majority held that the longevity/continuity requirement was satisfied and the certainty requirement did not need to be decided as the custom was unreasonable, there are issues regarding the ease with which these requirements could be satisfied in future cases.[91] As these requirements were not crucial to the outcome of this case, further discussion of them is unnecessary.

C Reasonableness

1 Determining the reasonableness of a custom

(a) English common law

Halsbury's Laws of England clearly sets out the reasonableness requirement for the recognition of a custom by the English common law.[92] For a local custom to be recognised, the party asserting the custom does not have to prove that it was reasonable. Rather, the custom will be rejected only if a court considers it to be unreasonable.[93] A custom can be recognised so long as there is no good legal reason against it, regardless of whether there is any good legal reason for it.[94] "Reason", in this sense, is artificial and is legal reason warranted by authority of law.[95] The length of time a custom has been in use is not a factor that can negate its unreasonableness.[96]

A custom can be considered unreasonable on both procedural and substantive bases. Procedurally, a custom has been held to be unreasonable if it raises an implication that it resulted from accident or indulgence, or from an arbitrary use of power, or if it indicates a rebuttal of the presumption of immemorial user by common sense.[97] In other cases, the courts have held a custom to be unreasonable if the custom itself is not sufficiently precise.[98] Substantively, customs have only been held to be unreasonable if they are inconsistent with general principles of the common law that lie at the root of the legal system, or are contrary to first principles of justice.[99]

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91 See Part V of this article.

92 *Halsbury's Laws of England*, above n 45, at [609].

93 At [609].

94 At [609].

95 At [609].

96 At [609].

97 At [609].

98 At [609].

99 At [609].

(b) New Zealand common law

There has been only one instance in which a New Zealand court has had the opportunity to consider the reasonableness of a Māori custom.[100] However, commentary on this task suggests that where a custom is not an English one, but of a different culture and/or religion, tests of reasonableness must be considered from a different angle to what would be seen as appropriate in English circumstances.[101] This is consistent with dicta in the Court of Appeal decision *Attorney-General v Ngati Apa*, where the Court discussed New Zealand's inheritance of the English common law upon acquisition of sovereignty. Elias CJ and Keith and Anderson JJ emphasised that the English common law only applied "so far as applicable to the circumstances" of New Zealand, and was "adapted to reflect local custom".[102] Tipping J supported this principle by deliberately referring to the "common law of New Zealand" to explicitly distinguish it from the common law of England, as the latter does not contain any components concerning indigenous custom.[103] In light of this commentary and dicta it is appropriate that the reasonableness requirement should reflect New Zealand circumstances.

Loasby has been the only New Zealand case to explicitly consider whether a Māori custom is reasonable.[104] This case was discussed by Fogarty J in *Clarke v Takamore*, and its dicta used in *Takamore.* In his judgment Cooper J reinforced the above commentary on the applicability of English common law by emphasising that English decisions could not be "directly in point".[105] The question to be answered was whether the custom was "reasonable, taking the whole of the circumstances into consideration".[106]

Pertinent to Cooper J's decision was the judgment of *Mullick v Mullick (Mullick)* where the Privy Council had to decide what was a reasonable sum to be spent on obsequies and religious acts desired by a Hindu testator in accordance with Hindu custom.[107] The Court directed that a reasonable sum would be the usual sum spent on a person of the same rank and fortune of the deceased.[108] Lord Wynford observed that:[109]

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100 *Public Trustee v Loasby*, above n 6.

101 CK Allen *Law in the Making* (6th ed, Oxford University Press, London, 1958) at 154–155.

102 *Attorney-General v Ngati Apa*, above n 27, at [17] and [134].

103 At [212].

104 As discussed in this section, *Public Trustee v Loasby* has been the only case to explicitly consider the reasonableness of a Māori custom.

105 *Public Trustee v Loasby*, above n 6, at 806.

106 *Public Trustee v Loasby*, above n 6, at 806.

107 *Mullick v Mullick* (1829) 1 Knapp 245 at 247.

108 At 247.

> … the interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government; and no person can be happy whose religious feelings are not respected.

Cooper J considered these principles should be applied in determining the reasonableness of the deceased's estate paying for tangi expenses.[110] Although not explicit in his judgment, it appears that Cooper J reasoned that prohibiting tangi expenses from being paid out of the deceased's estate could risk the failure of a tangi being held, expecting that this would "seriously [wound] the feelings not only of the relatives of the deceased chief, but of, at any rate, a considerable proportion of the race."[111]

Cooper J's interpretation of *Mullick*, and the resulting analysis, is problematic. Lord Wynford's observation drew attention to the fact that this case was between two Hindu litigants and not between Hindu and English litigants.[112] His Lordship's concern was that if this case did involve the latter, the Court would be reluctant to decide the case without the assistance of people knowledgeable about Hindu customs. Lord Wynford required:[113]

> … persons from India who are acquainted with the usages of that country with regard to the ceremonies that ought to be observed, and the works that ought to be performed on the death of an opulent native; for we should fear, lest by the judgment which we might advise his Majesty to pronounce, the feelings of the people of Hindostan might be wounded.

As this was not the case, and the litigants were Hindu family members, the Court did not need to decide whether a custom could be recognised (which could have required determining whether the custom itself was reasonable). Having already recognised the custom, the Court only needed to decide whether the sum to be spent was a reasonable amount. Although Cooper J stressed that *Mullick* was "merely indirectly an authority in the present case",[114] the principles he sought to apply are not on point with what had to be decided.

Fogarty J discussed this requirement of Cooper J's test in *Clarke v Takamore.* Although he did not have to apply this test,[115] his dicta concerning the test are interesting. Fogarty J stated:[116]

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109 At 247.

110 *Public Trustee v Loasby*, above n 6, at 806.

111 At 806.

112 *Mullick v Mullick*, above n 107, at 247.

113 At 247.

114 *Public Trustee v Loasby*, above n 6, at 807.

115 *Clarke v Takamore*, above n 7, at [87]–[89].

116 At [83].

> Whenever any local custom is recognised in common law there must inevitably be a question as to whether or not the custom is consistent with other principles of common law. For any legal system, including common law, has to be internally consistent. I would interpret the third consideration of Cooper J to be similar to the second consideration and thus put a limit on the reasonableness. It is not for the Court to judge the reasonableness of the custom, given that the Court does not have the power to decide the content of the custom. But what the Court does have is the power of the extent of recognition of the custom as part of the common law. In exercising this power it is inevitable that the Court must take into account whether it is reasonable to fit it in and accommodate it with other principles of common law.

Fogarty J's interpretation is inconsistent with the English common law, where judges have recognised that customs are by definition inconsistent with the common law, so are not invalid merely because they are contrary to common law principles. Substantively, customs have only been held to be unreasonable if they are inconsistent with general principles of the common law that lie at the root of the legal system, or are contrary to first principles of justice.[117] If Fogarty J is correct in his interpretation, the scope of the requirement in *Loasby* is wider than that of the English common law. It is more likely a custom would be considered unreasonable under Fogarty J's interpretation as the custom is unreasonable if it is inconsistent with "other principles of the common law", not only the principles that lie at the root of New Zealand's legal system.[118]

Finally, *Loasby* was the only New Zealand case to be cited by the majority in *Takamore* as regards the reasonableness requirement. The Court's citation was limited to a statement that there is:[119]

> No objection to a custom founded, as this is, on immemorial usage that it is not conformable to the common law of the land, for it is of the very essence of the custom that it should vary from it.

While this principle accords with dicta from the English courts, it is interesting to note that Cooper J did not discuss this in relation to reasonableness.

2 Parties' submissions

Ms Clarke relied on English case law in her submissions to the Court of Appeal. *Wolstanton Ltd v Newcastle-under-Lyme Corporation (Wolstanton Ltd)*[120] was used to argue that Tūhoe burial

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117 *Halsbury's Laws of England*, above n 45, at [609].

118 *Clarke v Takamore*, above n 7, at [83].

119 *Takamore v Clarke*, above n 1, at [125].

120 *Wolstanton Ltd v Newcastle-under-Lyme Corporation* [1940] AC 860 (HL) [*Wolstanton Ltd*]. In *Wolstanton Ltd*, a custom of mining which caused subsidence and damage to bordering land and buildings was held to be unreasonable. Viscount Maugham compared this custom to one held to be unreasonable in *Broadbent v Wilks* (1742) Willes 360 which provided for the Lord and his tenants of colliers to lay piles of rubbish near pits on copyhold lands.

custom is unreasonable as it was based on usurpation, not voluntary consent.[121] The majority rightly distinguished this case, reinforcing *Wolstanton Ltd* as authority for customs established by, rather than providing for, usurpation being unreasonable.[122] *Kuar Sen v Mamman (Kuar Sen)*[123] supported Ms Clarke's submission that a custom based on violence, force or stealth is per se unreasonable.[124] Again, the Court confirmed *Kuar Sen* as authority for customs established by, rather than providing for, force or stealth being unreasonable.[125]

Ms Clarke also submitted that, following *Johnson v Clark*,[126] Tūhoe burial custom was unreasonable as it directly contradicted her free will to alienate any property or custodial right or carry out a trustee obligation.[127] Further, she argued that Tūhoe burial custom was more unreasonable than the custom held to be unreasonable in *Fryer v Johnson*.[128] As above, the majority provided sound reasons for distinguishing *Johnson v Clark* and *Fryer v Johnson*.[129]

3 *Individual autonomy*

In defining the reasonableness criterion, the Court of Appeal limited itself to one of the substantive grounds of unreasonableness defined by the English courts: a custom will be considered unreasonable if it is contrary to principles at the "root" of the legal system.

Ms Clarke submitted that the custom of taking the body of the deceased without consultation was contrary to the principle of individual freedom and autonomy. This was the principle relied on by Fogarty J in *Clarke v Takamore*.

The majority dedicated much of their judgment to discussion of the facts, particularly whether Mr Takamore's burial wishes could be determined. The three different approaches taken by the

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121 *Takamore v Clarke*, above n 1, at [140].

122 See *Wolstanton Ltd*, above n 120, at 878 and *Takamore v Clarke*, above n 1, at [142]–[143].

123 *Kuar Sen v Mamman* (1895) IRL 17 All 381.

124 *Takamore v Clarke*, above n 1, at [140].

125 See *Kuar Sen v Mamman*, above n 123, at 384 and *Takamore v Clarke*, above n 1, at [142]–[143].

126 *Johnson v Clark* [1908] 1 Ch 303.

127 *Takamore v Clarke*, above n 1, at [141].

128 At [14]; *Fryer v Johnson* (1755) 2 Wils KB 28 concerned the custom of being allowed to bury a relative as near as possible to one's ancestors.

129 *Takamore v Clarke*, above n 1, at [144]–[145]. The Court was correct in deciding that the customs at issue in *Johnson v Clark* were not analogous, there being a difference between property rights in land and any rights the executor may have over the body, where there are no such property rights. Likewise, the Court was correct in holding that *Fryer v Johnson* concerned the certainty element of the test for recognition, not the reasonableness element.

judges deciding this case have all been influenced by the answer to this question.[130] Fogarty and Chambers JJ both concluded that Mr Takamore had disassociated himself from Tūhoe culture, therefore enforcing the application of Tūhoe burial customs would be contrary to the principle of individual freedom and autonomy.[131] Alternatively, the majority decided that this disassociation was unclear, and that in any event, this is not an area of the common law in which individual autonomy reigns.[132] Their reasoning is sound, for it would be nonsensical to disregard Tūhoe burial custom on the basis that it does not respect individual autonomy when the common law in this area does not do so.

For the purposes of this article it is inappropriate to draw conclusions as to what Mr Takamore's burial wishes were. However, deciding this case based on the Fogarty J's interpretation of the facts narrows the analysis of this custom to the facts of this particular case, and draws attention away from the substance of the custom itself. The custom is considered unreasonable only because it is being applied in that particular instance, regardless of what it provides for. Deciding this case based on the majority's interpretation of the facts would provide for an analysis of the substance of the custom.

4 "Right not might"

The Court of Appeal also had to consider whether the Tūhoe custom of taking the body without consultation was contrary to the principle of "right not might"; that is, whether resorting to the use of physical force to settle private disputes is repugnant to the rule of law.

The Court's discussion is short, but accurate; resorting to the use of physical force to settle private disputes is contrary to the rule of law. The majority cites the *Tanistry Case* as an example of a case where the English courts have refused to recognise a custom based on its incompatibility with the principle of "right not might".[133]

However, the Court should not have stopped its analysis there. While the custom of taking the body without consultation cannot be recognised as it is unreasonable, other aspects of Tūhoe burial custom, particularly who is entitled to decide the place of burial, have the potential to be recognised. The dispute in *Takamore* centred on the custom of the taking of the body, but Mr Takamore's sister and whānau could alternatively have argued that the Tūhoe burial custom providing for the decision to be a collective one to be made by whānau pani, where whānau pani form their conclusion by considering where the deceased's whānau, hapu, and iwi are, could and should be recognised by the

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130 Fogarty J in *Clarke v Takamore*, above n 7, Chambers J (minority) in *Takamore v Clarke*, above n 1, and Glazebrook and Wild JJ (majority) in *Takamore v Clarke*, above n 1.

131 *Clarke v Takamore*, above n 7, at [88]; *Takamore v Clarke*, above n 1, at [322].

132 *Takamore v Clarke*, above n 1, at [211]–[218].

133 At [164].

common law. It is difficult to see how the majority, applying the common law test for recognition they set out, could consider that custom to be unreasonable.

A custom that provides for a collective decision-making process by whānau members instead of the executor is not against the general principles of the common law that lie at the root of the legal system. In particular, it is not against the principle of "right not might". Such a custom merely shifts the decision-making power from one person to a group of others. Recognising that particular custom in *Takamore* would provide a means to prevent future "body-snatching" by grieving whānau members. In cases where there is dispute as to burial and the deceased is of Māori decent and has whānau members who practise Māori burial custom, the decision would be one made by whānau, not the executor. However, issues with this result arise where the deceased does not wish to be bound by Tūhoe custom. If the majority had reconsidered the scope of the custom at issue, and reached this alternative conclusion, it would have been their duty to consider its implications.

D Extinguishment

Laws of New Zealand provides detailed commentary on the duties of persons disposing of bodies and addresses Māori custom.[134] It is made clear in this commentary that this area of the law is primarily governed by common law, with minor exceptions. Statutory provisions in this area relate to matters of health, safety, or necessity.[135] This notion was reinforced in *Public Trustee v Kapiti Coast Funeral Home* where MacKenzie J held that "[t]here is … no general statutory obligation on a personal representative to dispose of the body. That obligation is imposed under the common law."[136] There is minimal legislation concerning the disposal of a body, and there is also minimal legislation concerning Māori custom in relation to burial. On analysis of relevant legislation,[137] the Court in *Takamore* was correct to hold that there was no clear and unambiguous statutory provision extinguishing Māori customary law.

VII A "MORE MODERN" APPROACH?

A The Executor's Duty

This article has a limited scope, focusing only on the recognition of Māori custom by the New Zealand common law, and so it is unnecessary to carry out an analysis of the authorities cited by the Court of Appeal in regard to the executor's duties. However, to enable discussion of the "more modern" approach, it is necessary to summarise the Court's assessment of the executor's duties.

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134 *Laws of New Zealand* Burial, Cremation and Cemeteries (online ed) at [3]–[8] and [95]–[99].

135 See the Health Act 1956, s 86(2) and the Civil Defence Emergency Management Act 2002, s 85(1)(g).

136 *Public Trustee v Kapiti Coast Funeral Home Ltd* [2004] 3 NZLR 560 (HC) at [12].

137 The author has examined the Wills Act 2007, the Administration Act 1969, the Health Act 1956 and the Burial and Cremation Act 1964.

The Court summarised the executor's duties as regards the disposal of the body to include the right to make funeral arrangements and determine the method and place of final disposal.[138] In doing so, the executor is expected to consider the wishes of the deceased and other stakeholders.[139] These stakeholders include the surviving spouse or partner, children, other relatives and, where appropriate, friends or confidants of the deceased.[140] Those wishes, including those of the deceased, are not binding on the executor, who is entitled to make the final decision.[141]

However, the Court considered the New Zealand Bill of Rights Act 1990, and the International Covenant on Civil and Political Rights upon which it is based, as well as the judiciary's increasing willingness to have regard to international instruments in the development of the common law.[142] The majority commented that the human rights jurisprudence suggests that the rights to privacy and freedom of thought, conscience and religion may allow greater effect to be given to the cultural, spiritual and religious beliefs, practices and traditions of the deceased and their family.[143] The common law has developed, or is developing, to a stage where executors should consider indigenous practices relating to burial.[144] Further, the Treaty of Waitangi and international human rights covenants to which New Zealand is a party, including the United Nations Declaration on the Rights of Indigenous Peoples, led to the conclusions that the common law should be developed consistently with the Treaty so far as reasonably possible, and that recognising the collective nature of indigenous culture is important.[145] These conclusions reinforced the need for the executor to take into account indigenous burial practices in decision-making.[146] This reasoning led the majority in *Takamore* to develop a "more modern" approach to the treatment of Māori custom that involves the integration of custom into common law where possible, "rather than relying on the strict rules of colonial times".[147]

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138 *Takamore v Clarke*, above n 1, at [236].

139 At [237].

140 At [237].

141 At [237].

142 At [238]–[242].

143 At [238].

144 At [16] and [238].

145 At [254].

146 At [254].

147 At [254].

B The "More Modern" Approach

Under the "more modern" approach, if the deceased was Tūhoe and at least one family member was also Tūhoe, the executor would be required to take Tūhoe burial custom into account as a relevant cultural consideration when determining the method and place of burial.[148] This would require the executor to facilitate a culturally appropriate process, providing for the opportunity of full participation by all whānau members, in an attempt to reach a consensus, even when the deceased has expressed burial wishes.[149] This is because in neither Tūhoe custom nor the common law are those wishes binding.[150] Within this process of discussion and negotiation, members of the deceased's whānau would have an obligation to fully explain the cultural values they are asserting to the executor to allow those values to be taken into account.[151] When a consensus is reached, the executor would be required to bury the deceased in accordance with that consensus as the decision would be considered unreasonable if they refused to do so, although it may not be considered unreasonable if it accords with the express wishes of the deceased.[152] However, if a consensus is not reached, the common law position prevails and the executor is be entitled to make the final decision.[153] The Court considered this approach to be a "workable compromise" between the common law and custom.[154]

However, the Court considered that this approach was not feasible in the circumstances of *Takamore* because Mr Takamore's sister and whānau members were not open to negotiation, and did not fully explain their cultural values to Ms Clarke.[155] Ms Clarke, in her position as executrix, was not at fault. As the Tūhoe burial custom could not be recognised as part of the common law and the "more modern" approach was not applicable in the circumstances, the Court concluded that there was no legal authority for Mr Takamore's whānau to take the body.[156] Ms Clarke, as the executrix, was entitled to possession of her partner's body and to make the final decision as to its burial.[157]

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148 At [255].

149 At [255]–[256].

150 At [256].

151 At [261].

152 At [255]–[256].

153 At [258].

154 At [255].

155 At [261].

156 At [262].

157 At [262].

C The Effect of the "More Modern" Approach on the Treatment of Māori Custom in New Zealand Law

Where two parties are in conflict over the disposal of the deceased's body, due to tension between Māori custom and the common law, the "more modern" approach serves to reduce the risk of their dispute proceeding to litigation. However, it is not helpful where litigation is already underway. At the time a conflict reaches litigation, because no consensus can be reached by discussion and negotiation (usually because the custom and the common law are irreconcilable), it is for the Court to decide whether the custom can be recognised by the common law. The "more modern" approach proposed by the majority cannot act as an alternative to "relying on the strict rules of colonial times" and does not eliminate the need for a common law test for recognition.

The "more modern" approach does have a positive effect on the treatment of Māori custom in New Zealand law by increasing the chance that the executor will consider the wishes of the deceased's family by explicitly ensuring that those wishes are fully explained and discussed, that all stakeholders have the opportunity to be involved, and that the executor is open to negotiation. However, this effect is marginal, as these requirements are already implicit in the executor's duty under common law. The executor is already expected to take into account the wishes of the deceased's family, which would include considering the application of a custom. An executor cannot have taken into account the wishes of the deceased's family if they have not given all stakeholders the opportunity to explain their wishes, and if the executor is not open to the possibility of those wishes being taken into account. The Court's "more modern" approach purports to provide for a way of recognising Māori custom when the common law test for recognition fails, but it does not have this practical effect and merely pays lip service to Māori custom.

Additionally, the custom at issue in *Takamore*, the taking of the body without consultation, could never have been accommodated by the "more modern" approach as facilitating a culturally appropriate process of discussion and negotiation among the members of the whānau pani may prevent this custom from being carried out, but does not integrate that custom into the common law.

VIII CONCLUSION

This article considered the appropriateness of the analogy drawn between English local custom and Māori custom, critically analysed the application of the authorities cited by the Court of Appeal in applying the requirements for recognition, and explored the effect of the majority's "more modern" approach on the treatment of Māori custom in New Zealand law.

In considering the appropriateness of the analogy drawn by the Court, this article argued that the approach developed by Cooper J in *Loasby* would have been more appropriate in New Zealand circumstances, but as judges in the Court of Appeal, the majority was entitled to draw the analogy between Māori custom and English local custom. The Court applied the authorities they cited correctly, but failed to distinguish adequately between the Tūhoe custom allowing for the taking of the body and other Tūhoe burial customs. While the custom allowing for the taking of the body

failed the reasonableness requirement, Tūhoe custom providing for burial decisions to be made collectively by whānau pani could be recognised by the common law.

Finally, this article has questioned the effectiveness of the "more modern" approach, casting doubt on whether it can be applied to benefit any party asserting Māori custom in litigation. While it does have a positive effect on the treatment of Māori custom in New Zealand law by increasing the chance the executor will consider the wishes of the deceased's family, this effect is only marginal. The "more modern" approach merely pays lip service to Māori custom by reinforcing the duty the executor already has to consider the wishes of the deceased's family, and the custom at issue in *Takamore* could never have been accommodated by the "more modern" approach.

IX POSTSCRIPT

A The Supreme Court's Subsequent Judgment

In July 2012 the Supreme Court heard an appeal from the Court of Appeal decision. The grounds were whether the Court of Appeal was correct to hold that New Zealand law entitled the executrix[158] to determine disposal of the body of the deceased and whether it was correct to hold that the executrix is entitled to take possession of the body of the deceased notwithstanding its burial.[159]

On 18 December 2012 the Supreme Court released its decision dismissing the appeal.[160] The judges were unanimous in the result, giving Ms Clarke the right to proceed under the exhumation licence to have Mr Takamore reburied in a place of her choosing.[161] The judges were divided as to their reasoning, with Elias CJ and Young J each producing separate reasons, and Tipping, McGrath and Blanchard JJ giving a joint judgment.

This joint judgment analyses the content of the common law of New Zealand in relation to the rights and duties of an executor, confirming that the executor has the right and duty to determine the manner and give effect to the disposal of the deceased's body.[162] They consider this to be well-

158 Consistent with the terminology adopted by the Court of Appeal, the gendered terms 'executor' and 'executrix' are used in this article to discuss the Court's decision. As discussed below, the Supreme Court has extended the rights of the executor to the administrator of the estate, where both are now referred to as the deceased's 'personal representative'. This is consistent with the updated term used in the Wills Act 2007.

159 *Takamore v Clarke* [2012] NZSC 17.

160 *Takamore v Clarke* [2012] NZSC 116. See Natalie Coates "What does *Takamore* mean for tikanga? – *Takamore v Clarke* [2012] NZSC 116" (2013) February Māori LR.

161 At [169] and [170].

162 At [143] and [152].

settled law.[163] They note that the New Zealand common law has not addressed the position where there is an intestacy, and analyse the law relating to this issue in other jurisdictions.[164]

The joint judgment adopts the position of England and Australia, where the duties and rights of the executor are extended to the person with the highest claim to be appointed administrator of the estate.[165] Furthermore, a person aggrieved with the decision of the personal representative can challenge it in the High Court, and the Court must address the relevant view points and circumstances and decide, exercising its own judgment, whether the decision taken was appropriate.[166] In respect to tikanga, Tipping, McGrath and Blanchard JJ decided that personal representatives are required to consider cultural, spiritual and religious values if they form part of the deceased's heritage.[167] If those decisions are challenged, the High Court must also consider tikanga as part of the circumstances of the case.[168]

As a further development of the law in this area, the judges place great weight on the deceased's wishes.[169] These were formerly considered irrelevant.[170] The Supreme Court has decided that the law has moved on from its early rejection of this factor.[171]

The joint judgment concludes, in consideration of all the circumstances of the case, that although Mr Takamore's wishes were unclear on the evidence, his life choices, in relation to living in Christchurch with his partner and adult children, carried the greatest weight and were ultimately determinative.[172] For these reasons Ms Clarke's decision as executrix about the place of burial was an appropriate one.[173]

The Supreme Court focused specifically on the content of the executor's rights and duties in respect to the burial of the body of the deceased at common law. The Court of Appeal had summarised the executor's duties as regards the disposal of the body to include the right to make

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163 At [143].

164 At [143].

165 At [145] and [155].

166 At [160].

167 At [164].

168 At [164].

169 At [168].

170 *Takamore v Clarke*, above n 1, at [207].

171 At [168].

172 At [169].

173 At [169].

funeral arrangements and to determine the method and place of final disposal.[174] In doing so, the executor is expected to consider the wishes of the deceased and other stakeholders.[175] These stakeholders include the surviving spouse or partner, children, other relatives and, where appropriate, friends or confidants of the deceased.[176] Those wishes, including those of the deceased, are not binding on the executor, who is entitled to make the final decision.[177] The Court of Appeal also considered that the hierarchy of those entitled to take out administration should be followed where there is no executor.

This analysis of the law by the Court of Appeal has the same practical effect as the law set out in the joint judgment of Tipping, McGrath and Blanchard JJ in the Supreme Court. The Supreme Court judgment simply emphasises that in considering the wishes of other stakeholders, tikanga must be taken into account, and adds the ability of the executor's decision to be challenged, as well as the circumstances, including tikanga, that the Court must take into account on any challenge.

This article's critique of the Court of Appeal's "more modern" approach applies equally to the judgment of the Supreme Court in respect of the circumstances the personal representative has to consider. However, the Supreme Court does improve the recognition of tikanga in its provision of the circumstances that the Court must consider if the personal representative's decision is challenged. This is because the Court, as an impartial party, has the responsibility of ensuring tikanga has been taken into account.

Tipping, McGrath and Blanchard JJ's joint judgment does not expressly overrule the requirements for recognition of Māori custom by the New Zealand common law set out by the Court of Appeal. To the extent that they comment on the recognition of Māori custom, they state that 'the common law is not displaced when the deceased is of Māori descent and the whānau invokes the tikanga concerning customary burial practices' as consideration of tikanga is required by the common law in this area. This leaves the New Zealand courts open to adopt the requirements for recognition provided by the Court of Appeal in a different subject area where tikanga is sought to be recognised by the common law.

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174 *Takamore v Clarke*, above n 1, at [236].

175 At [237].

176 At [237].

177 At [237].