

REBALANCING WRONGS: TOWARDS A NEW LAW OF REMEDIES FOR AOTEAROA NEW ZEALAND

*Alister Hughes**

Tikanga Māori is a central pillar of Aotearoa New Zealand and the common law is developing to reflect that. A new era of law is emerging, informed by both tikanga Māori and settler law. While this is an important, positive step towards establishing an appropriate domestic jurisprudence of Aotearoa New Zealand, misguided integration, no matter how well intentioned, is harmful. The ongoing collision between tikanga Māori and settler law in a legal context must be navigated carefully. It gives rise to the need for specific examination of different areas of law to consider how the two systems might interact. This article examines the law surrounding remedies and considers whether and how remedial structures in tikanga Māori and settler law might be reconciled. It undertakes a broader structural analysis and a closer examination of the specific aims of each remedial framework. Overall, it argues that, with a shift in underpinning rationale to one informed by tikanga Māori, existing common law remedies may be applied in ways consistent with, and that give effect to, tikanga Māori. Despite tensions between the two frameworks, the flexibility within both tikanga Māori and the settler common law is sufficient to allow them to come together into a new law of remedies in Aotearoa New Zealand.

I INTRODUCTION

Kotahi te kohao o te ngira e kuhuna ai te miro ma, te miro pango me te miro whero.

There is but one eye of the needle, through which the white, the black, and the red threads must pass.¹

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¹ After his coronation, Kingi Potatau te Wherowhero, the first Māori king, offered this whakataukī in response to being told that he and Queen Victoria were "united". It continues to guide the interaction of laws in Aotearoa New Zealand, referred to by Natalie Coates in submissions to the Supreme Court: *Ellis v R* [2020] NZSC Trans 19 at 6.

It is no longer a controversial proposition that tikanga Māori forms part of the fabric of Aotearoa New Zealand's common law. This is the result of a long, ongoing journey of evolution and reconciliation within our legal landscape. With respect to the role of tikanga Māori, our law stands at a new beginning.² A new law of Aotearoa New Zealand is emerging,³ informed by both the first law of Aotearoa, tikanga Māori,⁴ and the second law of New Zealand, settler law.⁵

The emergence of a new era of law raises the question: what might a law of Aotearoa New Zealand look like? Justice Joe Williams has offered that it may be "predicated on perpetuating the first law, and in so perpetuating, it [will] change both the nature and culture of the second law".⁶ In this, a new law need not closely resemble either of its predecessors. Instead, it will be "a thing distinct from its parents, with its own new logic".⁷

While there has been some consideration of tikanga Māori's role in privacy law,⁸ employment law,⁹ family law,¹⁰ land and trust law,¹¹ and intellectual property law,¹² the law of remedies remains largely unexamined. This is despite remedies' centrality to dispute resolution. They are how a system adjusts what *is* to reflect its judgment of what *ought to be*,¹³ and are integral to both tikanga Māori and settler law. Just as it is foundational in tikanga Māori to be able to say "kua ea", a sequence is

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- 2 Jacinta Ruru "First Laws: Tikanga Māori in/and the Law" (2018) 49 VUWLR 211 at 211.
 - 3 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern new Zealand Law" (2013) 4 Wai L Rev 1 at 11; and Ruru, above n 2, at 218.
 - 4 Williams, above n 3, at 2; and Ruru, above n 2, at 217.
 - 5 Williams, above n 3, at 11; and Ruru, above n 2, at 218.
 - 6 Williams, above n 3, at 12.
 - 7 At 12.
 - 8 See Khylee Quince "Māori Concepts and Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) 29.
 - 9 See Christina Inglis, Chief Judge of the Employment Court of New Zealand "The lens through which we look: Employment Law and Practice: Part 1 – What of Tikanga?" (speech to the Victoria University of Wellington and Otago University Employment Law Classes, 11 May 2021); and Ani Bennett and Shelley Kopu "Applying the duty of good faith in practice, in a way consistent with Te Ao Māori, Treaty, and employment law obligations" [2020] ELB 114.
 - 10 Te Aka Matua o te Ture | Law Commission *Dividing relationship property – time for change? Te mātatoha rawa to tokorau – Kua eke te wā?* (NZLC IP41, 2017).
 - 11 See Te Ture Whenua Māori Act 1993; and Māori Land Court *Māori Land Trusts: A guide Te Ture Whenua Māori* (Department for Courts, Wellington, 2002).
 - 12 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).
 - 13 Rafal Zakrzewski *Remedies Reclassified* (Oxford University Press, New York, 2005) at 10.

settled,¹⁴ settler law militates against *damnum absque injuria*, a wrong without remedy.¹⁵ It is not just the substantive content of what wrongs are recognised by a new law that must reflect tikanga Māori, but its provision of remedies in response to those wrongs, too.

This article argues that, with a shift in the principles that inform their application, existing remedial structures equip the courts with the necessary tools to uphold the principles of tikanga Māori. However, this article addresses neither the precise form remedies should take in response to particular wrongs, nor possible development of *sui generis* remedies predicated on tikanga Māori. Rather, it undertakes a foundational analysis to show how remedial frameworks may be reconciled.

To that end, Part II outlines how tikanga Māori might be understood for the purpose of this discussion. Part III canvasses historic progressions of common law, its interaction with tikanga Māori and concerns raised by this interaction. Part IV compares structures of dispute resolution in tikanga Māori and settler law. Part V undertakes a closer analysis of settler law's aims and approaches to remedies, highlighting their possible interactions and tensions with tikanga Māori. It considers how tikanga may reify, deconstruct or reconstruct current positions and provide coherency currently lacking.

II THE BUILDING BLOCKS OF TIKANGA MĀORI

Re-envisioning the law of Aotearoa New Zealand requires understanding its distinct sources. While current dominant approaches to remedies reflect settler law, it is necessary to consider tikanga Māori in its role as a separate, independent system of rights, obligations and law.¹⁶

At its core, tikanga Māori embodies "values, standards, principles, or norms to which the Māori community generally subscribed for the determination of appropriate conduct",¹⁷ and can be variously understood as tools for thought and understanding,¹⁸ a means of social control that provides templates

14 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 31.

15 Marcus Pawson *Laws of New Zealand Damages* (online ed) at [3]; and Charles Ricketts *Laws of New Zealand Equity* (online ed) at [16].

16 Ani Mikaere "Tikanga Māori as the First Law of Aotearoa" (2007) 10 *Yearbook of New Zealand Jurisprudence* 24 at 25; and Ngā Pae O Te Māramatanga *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree – Phase One: Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Michael and Suzanne Borrin Foundation, 2020) at 37.

17 ET Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 *Otago Law Review* 449 at 452; and *Ellis v R* Agreed Statement of Facts Filed Pursuant to s 9 of the Evidence Act 2006 Appendix 1: Statement of Tikanga SC49/2019, 31 January 2020 at [36].

18 Hirini Moko Mead "The Nature of Tikanga" (paper presented to the Mai I Te Ata Hāpara Conference, Te Wānanga o Raukawa, Ōtaki, 11–13 August 2000) at 4.

for actions,¹⁹ a view of ethics,²⁰ a sanction-backed legal system²¹ and a normative system that regulates behaviours.²² It is a set of "beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual"²³ which helps to "organise behaviour and provide predictability".²⁴ Derived from what is "tika" – what is right – tikanga allows understanding and maintenance of correctness and justice, outlining what *should* be done, *how* and *why*.²⁵

Tikanga Māori comprises foundational principles – te mātauranga – and practice – te whakahaere.²⁶ Justice Joe Williams observed that tikanga Māori is "primarily value-based, rather than prescriptive"²⁷ and the "underlying values" matter more than the "surface directives".²⁸ Together, they form a whole where the "principles ... inform the practical operation and manifestation of the rule".²⁹

The distinction between principle and practice influences this article's discussion. While tikanga whakahaere undoubtedly have a place in a law of Aotearoa New Zealand, they vary regionally³⁰ and

19 Mead, above n 18, at 3–4. See also Mead, above n 14, at 13 and 26.

20 Mead, above n 14, at 14; and Discussion with Bishop Manuhua Bennett (Te Aka Matua o te Ture | Law Commission, towards NZLC SP9, Rotorua, 19 February 2001) as cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [70].

21 Mead, above n 14, at 14; Joseph Williams "He Aha Te Tikanga Māori" (unpublished paper for Te Aka Matua o te Ture | Law Commission towards NZLC SP9, 1998) at 8 as cited in Te Aka Matua o te Ture | Law Commission, above n 20, at [75]; and Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 39.

22 Williams, above n 21, at 8; Mead, above n 14, at 14; and Jones, above n 21, at 40.

23 Mead, above n 18, at 3–4.

24 At 13–15.

25 Williams, above n 3, at 2; Te Aka Matua o te Ture | Law Commission, above n 20, at [72]; and Mead, above n 14, at 13.

26 Te Aka Matua o te Ture | Law Commission, above n 20, at [75] and [121]; Mead, above n 18, at 3 and 5–7; *Ellis v R*, above n 17, at [27]; and Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 331.

27 Williams, above n 3, at 5.

28 At 3.

29 *Ellis v R*, above n 17, at [27]. See also Williams, above n 3, at 3; and Joan Metge "Commentary on Judge Durie's Custom Law" (unpublished paper for the Te Aka Matua o te Ture | Law Commission towards NZLC SP9, 1996) at 6 as cited in Te Aka Matua o te Ture | Law Commission, above n 20, at [121].

30 Te Aka Matua o te Ture | Law Commission, above n 20, at [122]; Mead, above n 14, at 15; *Ellis v R*, above n 17, at [17]; and Linda Te Aho "Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence 10 at 11.

are more readily "a matter of debate" that "cannot be resolved without some difficulty".³¹ To the extent variations of tikanga whakahaere cannot be reconciled, the judiciary in its current form is the wrong adjudicator to assess the comparative preference for differing, but equally legitimate, whakahaere. At best, it would leave tikanga Māori susceptible to misapplication. At worst, it would provide avenues for cynical misappropriation of tikanga Māori.³²

By contrast, there is substantial consensus around te mātauranga, leaving it less liable to misapplication or misappropriation.³³ Despite some variation, it is largely accepted that tikanga Māori reflects a mosaic comprising whanaungatanga, whakapapa, mana, tapu and noa, wairua, take, utu and ea, kaitiakitanga, manaakitanga, and aroha.³⁴ While each element is distinct and brings additional understanding, no principle stands alone.³⁵ Instead, they exist together, as "an interconnected matrix" that forms a whole.³⁶

Mead notes that tikanga, as performed, is not always pono – the true or "ideal manifestation of tikanga".³⁷ It follows that building an understanding of tikanga Māori by observation of practice not only neglects the knowledge base that is an essential underpinning of those practices, but also brings the risk of being misdirected. Building an understanding from te mātauranga, however, provides a fuller understanding of tikanga.³⁸ It allows decision-makers to look to what people should aspire to,

31 Mead, above n 14, at 19.

32 See *Raharaha v Police* HC Whangarei CRI-2008-488-23, 31 July 2008. Mead considered a similar case, indicating that the defendant claiming the protection of tikanga Māori might be "absolutely right" on a specific directive of tikanga but "found wanting on other aspects of tikanga". See *Totorewa v Robinson* FC New Plymouth FAM-2006-019-1746, 21 October 2008, where the applicant attempted to rely on selective tikanga to justify "vindictive and arrogant" actions, but naturally fell afoul of other principles of tikanga raised by the respondent; and Mead, above n 14, at 185, where Mead acknowledges "stupid" arguments raised by some in misguided and cynical attempts to co-opt tikanga Māori to justify domestic violence.

33 *Ellis v R*, above n 1, at 17; Te Aka Matua o te Ture | Law Commission, above n 20, at [31]; Te Aho, above n 30, at 11; and Mikaere, above n 16, at 25.

34 While different groups and individuals have proposed different configurations of those principles considered most central, with differing emphasis placed on various principles, the list above reflects a consolidation of those common themes and collates those different collections. For different configurations and definitions of respective terms, compare Te Aka Matua o te Ture | Law Commission, above n 20, at [124]–[166]; Mead, above n 14, at 20 and 29–34; *R v Ellis*, above n 17, at [29]; Ruru, above n 2, at 217–218; Williams, above n 3, at 3; Williams, above n 21, at 8; Jones, above n 21, at 38; and Mikaere, above n 16, at 24.

35 Te Aka Matua o te Ture | Law Commission, above n 20, at [126].

36 *Ellis v R*, above n 17, at [30]. See also Te Aka Matua o te Ture | Law Commission, above n 20, at [126] where tikanga Māori is described as "a koru or spiral of ethics".

37 Mead, above n 14, at 36; and Mead, above n 18, at 12.

38 Mead, above n 14, at 23; and Williams, above n 3, at 3.

not just to "that which is sometimes done".³⁹ It starts from the framework against which actions are assessed, providing greater confidence that the proper conception of the relevant tikanga will be applied.⁴⁰

Additionally, a principled starting point provides a framework from which practices may emerge and grow. In that way, te mātauranga provides an organic point of reconciliation. Sir Edmund Thomas observed that:⁴¹

As tikanga are essentially principles rather than rules, and those principles are not static, tikanga Māori could readily be absorbed into the common law of this country. ... [T]here is no reason why judges should not assimilate its principles in the development of the law generally so as to develop an endemic jurisprudence ...

As in settler law, "[w]hen a new matter or issue arises for resolution, recourse is always had to the fundamental principles that underlie tikanga".⁴² A new law, grounded in principle rather than practice, rests on a foundation that enables growth and reflection of the everchanging landscape of Aotearoa New Zealand.

III TIKANGA MĀORI'S ROLE IN AOTEAROA NEW ZEALAND

Tikanga Māori was the first law of Aotearoa.⁴³ It has existed "since mai rā anō ... since forever"⁴⁴ and has always regulated Māori behaviour in Aotearoa New Zealand.⁴⁵ It arrived with Kupe and Toi, on the first waka, and grew in response to demands from the land⁴⁶ as a "highly workable and adaptable system of law"⁴⁷ which formed part of the social fabric of Aotearoa New Zealand.⁴⁸

39 Te Aka Matua o te Ture | Law Commission, above n 20, at [120]; Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 27; Mead, above n 14, at 15; and Mead, above n 18, at 12.

40 Mead, above n 14, at 27.

41 EW Thomas "The Treaty of Waitangi" [2009] NZLJ 277 at 280.

42 *Ellis v R*, above n 17, at [33].

43 Williams, above n 3, at 2; Mikaere, above n 16, at 36; Ruru, above n 2, at 218; and *Ellis v R*, above n 17, at [22].

44 *Ellis v R*, above n 1, at 17.

45 Mikaere, above n 26, at 330; Williams, above n 3, at 1; *Ellis v R*, above n 1, at 14; and *Ellis v R*, above n 17, at [40].

46 Williams, above n 3, at 2.

47 Mikaere, above n 16, at 25.

48 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 196.

A *Eclipse*

Tikanga's prominence and primacy were, however, displaced with the arrival of settler law.⁴⁹

To the extent that early iterations of settler law acknowledged tikanga, at times carving out space reserved for it,⁵⁰ the recognition was temporary and assimilatory. Tikanga was recognised only to the extent necessary to extinguish it.⁵¹ Denial replaced recognition,⁵² suppression replaced toleration⁵³ and assimilation replaced autonomy.⁵⁴ Resources to which tikanga Māori applied were stripped.⁵⁵ Colonial laws were geared towards the extinguishment of te ao Māori.⁵⁶

At the peak of this denial, in a judgment echoing through time, Prendergast CJ held that "on the foundation of this colony [of New Zealand], the aborigines were found without any kind of ... settled system of law".⁵⁷ It was on this basis that he infamously concluded that "the pact known as the 'Treaty of Waitangi' ... must be regarded as a simple nullity".⁵⁸ In the ultimate act of selective memory, settler law closed its eyes to tikanga Māori's existence.

Just 24 years later, the Privy Council in *Nireaha Tamaki v Baker* held that such a position "goes too far", recognising that it was "rather late in the day" to argue there was "no customary law of the Maoris [sic] of which the Courts of Law can take [cognisance]".⁵⁹

49 Ruru, above n 2, at 217; Williams, above n 3, at 5; and Mikaere, above n 26, at 330 and 334–339.

50 Te Aka Matua o te Ture | Law Commission, above n 20, at [81]–[92]; Williams, above n 3, at 9; and Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 *Waikato Law Review* 74 at 75 and 77–79. See Native Exemption Ordinance 1844; Resident Magistrates Courts Ordinance 1846; and New Zealand Constitution Act 1852.

51 Williams, above n 3, at 12; and Te Aka Matua o te Ture | Law Commission, above n 20, at [93].

52 Whaimutu Dewes "Māori Custom Law: He Kākano I Ruia Mai I Rangiātea, e Kore e Ngaro" (unpublished paper for the Te Aka Matua o te Ture | Law Commission towards NZLC SP9, 1996) as cited in Te Aka Matua o te Ture | Law Commission, above n 20, at [99]; and Michael Belgrave "Māori Customary Law: from Extinguishment to Enduring Recognition" (unpublished paper for the Te Aka Matua o te Ture | Law Commission towards NZLC SP9, 1996) as cited in Te Aka Matua o te Ture | Law Commission, above n 20, at [101]–[106].

53 Te Aka Matua o te Ture | Law Commission, above n 20, at [107]–[109].

54 At [110]–[113].

55 At [115].

56 At [93].

57 *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur (NS) 72 (SC) at 77.

58 At 78.

59 *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577.

Despite this, Prendergast CJ's prejudices lingered in the culture of the settler law.⁶⁰ Ongoing "denial, suppression, assimilation and co-option put Māori customs, values and practices under great stress",⁶¹ and tikanga Māori was eclipsed as the dominant legal structure of Aotearoa New Zealand.

B Re-Emergence

In spite of this hostility, tikanga Māori survived. The eclipse is ending. In response to a wider project of decolonisation, social and political landscapes are increasingly infused with tikanga Māori.⁶² Aotearoa New Zealand's "reluctant search for itself" has begun a long-overdue journey towards recognising tikanga Māori as part of the fabric of the legal system.⁶³ The legal structures once used to extinguish tikanga Māori have "rediscovered" it,⁶⁴ with tikanga Māori increasingly recognised as part of a new, burgeoning law, unique to this moment in Aotearoa New Zealand.⁶⁵ Sir Hirini Moko Mead wrote "[tikanga Māori's] time has come".⁶⁶ Truthfully, it has come *again*.

This rediscovery recognises that tikanga Māori has always been part of Aotearoa New Zealand and ought always to have informed how law developed.⁶⁷ It is increasingly settled that tikanga Māori is part of Aotearoa New Zealand's common law, at times without contest before the courts.⁶⁸ It has fundamentally shaped judicial proceedings.⁶⁹ "Orthodox reasoning" has brought Aotearoa New Zealand here in a painfully slow journey.⁷⁰ Nevertheless, the discussion's tenor is changing. Questions

60 Williams, above n 3, at 9. See *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) at 596–597, holding that rights under The Treaty of Waitangi cannot be enforced directly by the Courts; and as late as *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), where *Wi Parata v Bishop of Wellington* was raised in argument. *Ngati Apa v Attorney General* was a final conclusive discreditation of *Wi Parata* as a proposition of law that was "wrong" even in its own time.

61 Te Aka Matua o te Ture | Law Commission, above n 20, at [98].

62 Williams, above n 3, at 11–12; *Ellis v R*, above n 17, at [41]; and *Ellis v R*, above n 1, at 14.

63 Williams, above n 3, at 11.

64 At 11.

65 At 11.

66 Mead, above n 14, at 12 and 278.

67 *Takamore v Clarke* [2011] NZCA 587, [2009] 1 NZLR 573 at [94]; Williams, above n 3, at 15; and Ruru, above n 2, at 218.

68 *Ellis v R*, above n 1, at 6, where all parties acknowledged and accepted the role that tikanga Māori plays in the common law, with the dispute focusing on the implications of that role in the particular case.

69 See *Ellis v R* [2019] NZSC Trans 31 at 54, 56–57, 67–68 and 72.

70 Williams, above n 3, at 17. For criticism of this current position and this mechanism of recognition, see Elliott Harris "Interrogating *Ellis v The Queen*: Tikanga Māori in the common law of Aotearoa New Zealand" (2021) February – Hui tanguru Māori LR 3.

of *whether* tikanga Māori is relevant are succeeded by questions of *how* that relevance might be given effect to.

Questions of sovereignty raise questions of the appropriateness of reconciliation and integration rather than recognition. Scholars such as Ani Mikaere, Moana Jackson and Carwyn Jones call for discussions around more fundamental shifts in constitutional arrangements and legal pluralism.⁷¹ Mikaere argues that tikanga Māori is the supreme law of Aotearoa and that all other law should be negotiated subject to that understanding.⁷² The discussion proceeds on the basis that current constitutional arrangements should be re-negotiated so that tikanga Māori is recognised as valid in its own right and not simply as legitimised by the settler legal system.⁷³ This is one possible response to the question: how can a constitutional framework recognise equally legitimate rights of Māori to tino rangatiratanga and the Crown to governance?⁷⁴

Similar considerations arise when asking whose tikanga is to "have and hold".⁷⁵ Tikanga comes "from the accumulated knowledge of generations of Māori and [is] part of the intellectual property of Māori".⁷⁶ Where tikanga is based on mātauranga, and occupies a significant space in te ao Māori, ought it be reserved for Māori people, or is it appropriate that tikanga be made more widely accessible?

Others, however, do believe it is time for tikanga to form part of the common law,⁷⁷ on the proviso that the common law may not assimilate it freely.⁷⁸ Common law must employ processes and practices to preserve the integrity of tikanga Māori.⁷⁹ This proviso reflects the concern of many Māori

71 See *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, 2016).

72 "We need to be clear and unapologetic about this: in this country, tikanga is 'the law': Ani Mikaere "How will the future generations judge us? Some thoughts on the relationship between Crown law and tikanga Māori" (paper presented at the Ma te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework, Te Wānanga o Raukawa, Ōtaki, 2006) as cited in Natalie Coates "Me mau ngā ringa Māori i ngā rākau a te Pākehā? Should Māori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago – Te Whare Wānanga o Ōtākou, 2009).

73 Coates, above n 72, at 9. See also Ngā Pae O Te Māramatanga, above n 16, at 31.

74 Moana Jackson "Where does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, 2000) 197; and Jones, above n 21, at 42.

75 Mead, above n 14, at 13.

76 Mead, above n 18, at 5.

77 *Ellis v R*, above n 17, at [50] and [52].

78 At [52] and [54].

79 At [52].

scholars, judges and counsel who have "reservations about taking tikanga into the court".⁸⁰ Such an exercise is "dangerous" and "difficult".⁸¹

Tikanga Māori has historically been afforded limited weight, if considered at all. While at times motivated by aims of "limit[ing] the impact of minority rights and interests on ... majority sensibilities",⁸² questions might reasonably be asked of the judiciary's ability to understand and apply tikanga Māori appropriately, even without intentional constraints imposed on tikanga's role. Current institutional limitations mean courts struggle to understand, credit and weigh tikanga Māori.⁸³ As questions of willingness fade, questions of competency arise.⁸⁴

Even well-intentioned courts have struggled to engage adequately with tikanga Māori. In 1994, Chief Judge Durie, writing extra-judicially, observed that even the Māori Land Court, which many "assumed [to] have a specialist knowledge of Māori custom", struggled.⁸⁵ In fact:⁸⁶

... the specialist knowledge the Māori Land Court possess[ed] [was] not a knowledge of custom ... Some knowledge of customary preference inevitably [rubbed] off through the Judges' long association with Māori people; but the experience so gained [was] anecdotal and not founded in scholarship.

The courts' colonising history of appropriation, abrogation and assimilation, combined with tikanga Māori's significance to all parts of te ao Māori, means reconciliation is fraught. It may be that this discussion is premature, but it is part of the work necessary to prepare participants. Collisions are harmful if not navigated carefully.

This article acknowledges that, in some ways, it sidesteps those more fundamental considerations, proceeding instead from a pragmatic recognition that "the courts have, for better or worse, incorporated tikanga into the common law of New Zealand".⁸⁷ Rightly or wrongly, the common law is developing into a new law.⁸⁸ The courts have decided that Pākehā and the common law may draw

80 Stephanie Milroy "Ngā Tikanga Māori and the Courts" (2007) 10 Yearbook of New Zealand Jurisprudence 15 at 22.

81 At 22.

82 Williams, above n 3, at 33.

83 At 33. See also *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* EnvC Auckland A067/2004, 18 May 2004.

84 Williams, above n 3, at 33.

85 ET Durie "Custom Law: Address to the New Zealand Society for Legal & Social Philosophy" (1994) 24 VUWLR 325 at 325.

86 At 326.

87 Te Aho, above n 30, at 10.

88 See Williams, above n 3.

on tikanga Māori,⁸⁹ arguing that it plays a "valued and relevant role today for both Māori and non-Māori" alike.⁹⁰

Additionally, Māori are subject to settler law. Professor Jacinta Ruru wrote that "[i]f settler legal systems wish to realise aspirations for legal reconciliation with Indigenous peoples, then an important component of this is to recognise Indigenous peoples' laws."⁹¹ Where "a legal system which is out of step with the value of the people it affects is incapable of achieving justice for those people",⁹² tikanga Māori must be allowed to take its place as a central pillar of the legal landscape. Until such time as the law of Aotearoa New Zealand reflects, grows and develops with meaningful reference to tikanga Māori, it cannot be said to be fit-for-purpose in Aotearoa New Zealand's unique domestic context.

Discussions of the sort this article aims to undertake are, therefore, rendered necessary, if only to allow some justice in the interim while more fundamental shifts occur.⁹³ To neglect this project in light of current movements would be to allow the risk of co-option, misunderstanding and misapplication of tikanga as it is increasingly engaged with in the courtroom. A framework for the development of a new law is required, even if it is only alongside, and to be subsumed by, the growth of new constitutional arrangements.

The paradigmatic shifts advocated for and occurring within a new law may mitigate some concerns. Current approaches aim to ensure the importance of tikanga Māori is reified. It is no longer treated as something extraneous or additional, to be tacked on but balanced out. The current project does more than try to find room for tikanga Māori in settler law, where the settler law allows. It is more foundational and acknowledges the need for meaningful movement of settler law frameworks. Rather than clashing with an unyielding settler law or being relegated to convenient pockets, tikanga Māori is increasingly recognised on an equal footing.⁹⁴ In this way, the fabric of the law of Aotearoa New Zealand is changing: the whāriki on which the courts sit is increasingly woven from both tikanga and settler law.⁹⁵

89 See *R v Symonds* (1847) 1 NZLR 680 (PC); *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1910) 30 NZLR 343 (SC); *Hineita Rirerire Arani v Public Trustee* [1920] AC 198 (PC); and *Ellis v R* [2020] NZSC 89. In all of the above, tikanga Māori was raised and relied on by Pākehā parties. While there were varying degrees of success, the Courts acknowledged the legitimacy of those arguments and engaged with them on their merits.

90 *Ellis v R*, above n 17, at [40].

91 Ruru, above n 2, at 211–212.

92 Te Aka Matua o te Ture | Law Commission, above n 20, at [371].

93 Mikaere, above n 16, at 28.

94 Ngā Pae O Te Māramatanga, above n 16, at 37–38.

95 *Ellis v R*, above n 1, at 6.

IV TIKANGA MĀORI AND SETTLER LAW – SIDE-BY-SIDE IN TERMS OF REMEDIES

Where tikanga Māori governs all parts of life, it is salient to every corner of law. Despite that, this article does not aim to, nor could it, address all facets of tikanga Māori. Instead, it interrogates the remedial structures and aims of tikanga as a normative system for "correcting and compensating bad behaviour".⁹⁶ It focuses on the responsive aspects of tikanga Māori that are engaged after a wrong occurs.

The remedial approaches of tikanga Māori and settler law are not immiscible. Though underpinned by different rationale, structural similarities mean existing common law remedies might be deployed to uphold and give effect to te mātāuranga that underpins tikanga Māori.

There is sufficient flexibility in both settler law and tikanga Māori to reconcile their tensions. A central tenet of both settler law and tikanga Māori is their ability to flex without shattering. Tikanga Māori is not frozen in time.⁹⁷ It is "adaptable, transferable, and capable of being applied to entirely new situations".⁹⁸ So long as underlying principles are maintained, "there can be diversity in and adaptation of ... tikanga".⁹⁹ Similarly, "the genius of the common law is its dynamism coupled with its stability".¹⁰⁰ It has forever adjusted to changing societal conditions.¹⁰¹ As systems of law, they can grow together towards a new light.¹⁰²

A The Resolution Process: Take-Utu-Ea

The take-utu-ea process shapes dispute resolution under tikanga Māori,¹⁰³ providing a framework for assessing wrongs and restoring balance. It shares structural similarities with settler law. Both

⁹⁶ Mead, above n 14, at 14.

⁹⁷ At 26; Te Aka Matua o te Ture | Law Commission, above n 20, at [9]–[10]; and *Ellis v R*, above n 17, at [32].

⁹⁸ Mead, above n 14, at 258. See also Williams, above n 3, at 5.

⁹⁹ Mikaere, above n 16, at 24.

¹⁰⁰ Te Aka Matua o te Ture | Law Commission, above n 20, at [8].

¹⁰¹ See *Donoghue v Stevenson* [1932] AC 562 (HL) at 619: "[t]he conception of legal responsibility may develop in adaption to altering societal conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life."

¹⁰² Upholding tikanga values through existing legal mechanisms is not entirely new. See Te Uruwera Act 2014 and Te Awa Tupua Act 2017 as examples where the instrument of legal personality, fundamentally grounded in settler law, has facilitated legal recognition of whakapapa and whanaungatanga, and supported kaitiaki in their roles. See also Laura Hardcastle "Turbulent Times: Speculations about how the Whanganui River's position as a legal entity will be implemented and how it may erode the New Zealand legal landscape" (2014) February – Hui tanguru Māori LR 3.

¹⁰³ Mead, above n 14, at 30 and 270.

settler law and tikanga require an opening to the sequence where the desired or established position is disrupted: in tikanga, this is the take, and at settler law, it is the event that fulfils a recognised cause of action. In response, a process for rebalancing and restoration is undertaken: under tikanga, this is the utu, and in settler law, it is the provision of a remedy. Finally, the sequence closes with restoration: ea is reached under tikanga, and at settler law, commonly, there is the re-establishment of the position had the wrong not occurred.

Despite those broad similarities, there are substantive differences in respect of what each element aims to achieve, their focuses and their manifestation. Each principle in the take-utu-ea cycle is its own distinct principle.¹⁰⁴ Working through the foundations of a new law of remedies requires considering each in turn.

B The Opening: Take

The take is the starting point. It is the cycle's cause, beginning or root.¹⁰⁵ In the context of dispute resolution, the take is an event that brings imbalance and the need for resolution.¹⁰⁶ As it opens the sequence, it occupies a roughly analogous position to a cause of action in settler law. It is the matrix of factors that gives rise to a need for remedy.¹⁰⁷ It is, consequently, the organic starting point in any dispute resolution as, without it, there is nothing to resolve. Despite that structural similarity, there is some distance between the starting points of tikanga Māori and settler law.

At tikanga Māori, the take that opens the cycle is customarily a hara – specifically, a transgression against tikanga or tapu.¹⁰⁸ It is a breach that disrupts ea, impinges on mana or disrupts levels of tapu and noa. In any instance, the events that open the take-utu-ea cycle are assessed in a framework of mātauranga Māori. It therefore requires consideration of whether it is appropriate for a legal system of Aotearoa New Zealand to integrate elements of this process where it is readily conceivable that legally recognised wrongs might not be conceptualised in terms of mātauranga Māori, or perhaps be considered a breach of tikanga, at all. That tikanga Māori is being asked to stretch ought not to be brushed away thoughtlessly.

This concern mirrors that of whether tikanga ought to be integrated at all and consequently the responses are similar. Tikanga flexes and grows, and so long as te mātauranga is upheld, it may

104 At 30.

105 "Take" <www.maoridictionary.co.nz>.

106 Mead, above n 14, at 30.

107 *Letang v Cooper* [1964] 2 All ER 929 (CA) at 934–935; and *Nash v Nelson District Court* [2000] 3 NZLR 702 (HC) at [36]. See also *Dillon v Donald* (1902) 21 NZLR 375 (CA), which defined "cause of action" as "the act on the part of defendant which gives the plaintiff the cause of complaint".

108 Angella Ballara *Taua: 'musket wars', 'land wars' or tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Penguin Books, Auckland, 2003) at 83; and "Hara" <www.maoridictionary.co.nz>.

address new circumstances. Additionally, as emerging law more meaningfully frames itself according to, and reflects, tikanga Māori, concerns as to this process being applied in inappropriate circumstances may abate.

Notwithstanding those concerns, where the core of a take is destabilisation and disruption of a social, religious and legal order,¹⁰⁹ it still sits somewhat comfortably as the opening of a sequence in the operative system, be it tikanga Māori or a new law of Aotearoa New Zealand. In both instances, the opening is a breach of an agreed-upon framework for behaviour.

Giving rise to a separate concern, Mead observes that tikanga Māori requires agreement as to the take before resolution is contemplated.¹¹⁰ It must be accepted by all participants as a "legitimate cause".¹¹¹ On its face, this is discordant with the adversarial settler legal system. It ought not, however, be a barrier to reconciliation. While agreement around take is sometimes reached "summarily" in tikanga Māori, at times it comes only "after much discussion and debate".¹¹² Agreement is not always forthcoming, and correct tikanga practices may themselves be disputed,¹¹³ not incomparably to disputes as to the meaning and understanding of settler law.

Requiring agreement does not preclude the process' application in acrimonious circumstances, nor should it preclude extension. In tikanga Māori, discussions around breaches of tikanga can be uncomfortable, tense and bring significant apprehension.¹¹⁴ Adjudicative processes are not alien. While disputes were commonly resolved amongst parties themselves, "there are many instances of impartial mediators being used".¹¹⁵ Where agreement is not forthcoming, tikanga Māori might require rangatira to pronounce a course of action.¹¹⁶ In those instances, "the whakawa – the accusation, investigation, and decision – were often quite formal and structured".¹¹⁷ It follows that requiring adjudicative processes in a new law need not amount to a rejection or betrayal of tikanga Māori. The agreement, in that instance, is the submission to and abidance by an authority to which the dispute was submitted.

109 Jones, above n 21, at 39.

110 Mead, above n 14, at 30.

111 At 270.

112 Williams, above n 3, at 4–5.

113 Mead, above n 14, at 19.

114 At 19.

115 ET Durie *Custom Law* (unpublished paper for the Te Aka Matua o te Ture | Law Commission towards NZLC SP9, 1994).

116 *Ellis v R*, above n 17, at [104].

117 Durie, above n 115, at 56.

Even as precise manifestations of the dispute resolution process differ from the process under tikanga Māori, adjustment is not precluded. The specific whakahaere around dispute resolution in some ways reflect Williams J's observation that tikanga Māori was initially conceptualised around "small communities in which making peace was as important as making principle".¹¹⁸ Where development or change in tikanga is necessary to apply within the courtroom and to understand how the courtroom must change, those changes may reflect a contextually-grounded reconceptualisation of practice as it grows into this new context, as tikanga Māori is apt to do.¹¹⁹

C As It Should Be: Ea

Ea is the aim of the cycle. It is "the desired outcome"¹²⁰ or the successful closing of a sequence of events that comes with "satisfaction" or "settlement" of the take.¹²¹ Ea is restored with a return to the preferred balanced state of being.¹²² To be able to say, "kua ea", is the driving aim of dispute resolution in tikanga Māori.¹²³ While not precisely the same, it is not antithetical to settler law's aims, where the law observes what *is* and restores what *ought to be*.¹²⁴

Neither system requires complete tranquillity or satisfaction from all parties involved for closure. A state of ea can be reached where parties remain disgruntled.¹²⁵ Even if parties are "still unhappy, and [do] not consider the result 'fair' the matter can still be 'ea'. That is, it has been put to bed and resolved".¹²⁶ This reality is shared by settler law, which often leaves parties aggrieved by the outcome.

Despite this similarity, there are differences in what constitutes restoration or closure. Ea takes a broader understanding of restoration than narrower conceptualisations in settler law.

Remedial aims at settler law are shaped by both foundational principles and expediencies. The roots of settler law are commonly understood as being anchored in liberal values of "autonomy of the

118 Williams, above n 3, at 3 and 5. See also Metge, above n 29, at [2.1] and [2.2], observing that "the largest and most important socio-political groups were relatively limited in size".

119 Mikaere, above n 16, at 28.

120 Mead, above n 14, at 30.

121 *Ellis v R*, above n 17, at [60]; Mead, above n 14, at 33; and Durie, above n 115, at 54.

122 *Ellis v R*, above n 17, at [61].

123 Mead, above n 14, at 31.

124 Zakrzewski, above n 13, at 10.

125 *Ellis v R*, above n 17, at [103].

126 At [103].

individual" and individualised or property-based rights,¹²⁷ conceptualised around resource allocation.¹²⁸ From this base, it perceives interpersonal interactions as fundamentally transactional, valuable only to enable individuals' pursuit or protection of personalised aims and positions.¹²⁹ It perceives law as an inappropriate mechanism to litigate *damnum sine injuria*, interpersonal grievances not grounded in (a relatively limited set of) legally cognisable rights.

Additionally, settler law is guided by aims of certainty and predictability, and assumptions of what that requires. The product is that settler law operates primarily along lines of quantifiable harm, rather than harm which is better assessed qualitatively. This has both led to, and been reified by, damages being privileged as a means of remedy, with preferential treatment afforded to "special damages" which can be precisely calculated and pleaded,¹³⁰ or pecuniary harms, where loss can be readily quantified.¹³¹

Expediency also plays a role. Courts are comparatively hesitant to undertake the difficult assessment of harms that are readily qualified but less readily quantified. They shy away from those questions, shutting their eyes to, or only reluctantly recognising, harms predicated on something other than pecuniary loss. They justify a narrow conception of harm through the difficulties and uncertainties that would otherwise arise in accounting for them. This has relegated non-pecuniary harm to a subordinate position, addressed only with diffidence.

Achieving *ea* requires a broader inquiry and is consequently more internally coherent.¹³² It recognises that a fuller picture cannot be confined to opportunity cost but includes other threads that fray when pulled. All must be addressed for *ea*.

Woven into *ea* are other precepts of *tikanga Māori* that inform what must be rebalanced. The inquiry is informed by *whanaungatanga*, as "the glue that ... holds the system together",¹³³

127 Williams, above n 3, at 5; and Ernest Weinrib "Two Conceptions of Remedies" in Charles Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) 3 at 11.

128 Tim Murphy, Simon Roberts and Tatiana Flessas *Understanding Property Law* (4th ed, Sweet & Maxwell, London, 2004) at 1.

129 Weinrib, above n 127, at 9.

130 Pawson, above n 15, at [5]; and *Rakena v Richardson & Co Ltd* [1968] NZLR 915 (CA) at 919.

131 Pawson, above n 15, at [7]. For the unavailability of general damages at contract, see *Bloxham v Robinson* [1996] BCL 781 (CA) per McKay and Temm JJ.

132 This article acknowledges that *tikanga Māori* is still shaped by principle and mediated by pragmatism, but notes that the pragmatism is the consequence of the principle, rather than an exception to it. See Durie, above n 115, at 56; Mead, above n 18, at 10; and Mead, above n 14, at 25–26.

133 Williams, above n 3, at 4; and Te Aka Matua o te Ture | Law Commission, above n 20, at [130].

recognising the need for the maintenance and proper tending of relationships.¹³⁴ In that way, expected relationships must be given effect to, not only for their pecuniary effects, but due to their inherent value, spiritually and as a source of identity, responsibility and mana.¹³⁵ Ea also considers the balance between tapu and noa as a "code for social conduct based essentially on keeping safe and avoiding risk" and a balance between the spiritual and the profane.¹³⁶ Ea cannot be reached while imbalances remain. Similarly, it understands the importance of the maintenance, restoration and growth of mana, of authority, control, prestige, power and psychic force.¹³⁷ Harms sharing qualities of those only reluctantly considered by settler law are central to tikanga Māori.¹³⁸

The substance of what is required for rebalancing is a question of the specific wrong. While it cannot be subject to decontextualised assessment, remedies must universally be cognisant of imbalances along all axes of a relationship. Any remedy aiming to reflect tikanga Māori must recognise that. Any remedial process that fails to consider these additional elements would likely fail to restore balance and bring closure. In a new law, relationships must be understood as more than transactional interactions and the courts' approach must reflect this.

D The Correction: Utu

There are also conceptual differences between tikanga Māori and settler law in respect of the interaction between the remedy and wrong, and how the corrective process is facilitated.

Most fundamentally, utu is informed by reciprocity, return and restoration as part of an ongoing process.¹³⁹ It informs the need to reciprocate or respond to both positive and negative actions, and facilitates dynamic exchanges necessary in a relationship.¹⁴⁰ In dispute resolution, utu is the response to the take through which ea is achieved. It is *how* the sequence is brought to a close, facilitating the maintenance of relationships and restoration of balance between the transgressed and the

134 Williams, above n 3, at 4. In considering the scope of obligations of whanaungatanga, Williams J observed "the point is that whanaungatanga was, in traditional Māori society, not just about emotional and social ties between people and with the environment. It was just as importantly about economic rights and obligations".

135 For a failure of settler law to recognise this inherent value, see Stephen A Smith "Performance, Punishment and the Nature of Contractual Obligation" (1997) 60 MLR 360 at 396.

136 Te Aka Matua o te Ture | Law Commission, above n 20, at [153] and [154].

137 At [137]; *Ellis v R*, above n 17, at [76]; and Mead, above n 14, at 274.

138 For an illustration of that reluctance, see *Cassell & Co v Broome* [1972] AC 1027 (HL) at 1070.

139 Te Aka Matua o te Ture | Law Commission, above n 20, at [156]; Herbert Williams *A Dictionary of the Māori Language* (6th ed, Government Printer, Wellington, 1957) at 471; and Williams, above n 3, at 3.

140 Tai Ahu, Rachael Hoare and Māmari Stephens "Utu: Finding a balance for the legal Māori dictionary" (2011) 42 VUWLR 201 at 205.

transgressor.¹⁴¹ It undertakes the rebalancing required for *ea*. In this way, the substance of *utu* occupies a space akin to settler law's "remedies".

The notion of rebalancing gives rise to many pathways which *utu* might take.¹⁴² *Utu* may be positive or negative, irrespective of the take's nature; it is possible for *utu* to respond to a negative take by transmuting it into a positive response.¹⁴³ This reflects the conception of how a remedy engages a wrong at *tikanga* Māori. At its core, and tied to *ea*, *utu*'s reciprocity does not *undo* the wrong but instead rebalances the circumstances in light of the wrong's effects. Conceptually, balance being restored does not erase or undo the wrong; it remains part of the background to future interactions. In this way, *tikanga* does not treat a remedied wrong as one that never occurred. Rather, it continues to acknowledge the wrong done and harm suffered, and with that acknowledgment facilitates a movement forward from the wrong in a way which does not forget it with time.

Settler law, by contrast, is largely predicated on, or at least reflective of, corrective justice.¹⁴⁴ Remedies are correlative to the wrong,¹⁴⁵ and are closely tied to the structure and extent of the wrong and the position to be restored.¹⁴⁶ Settler law undertakes "restorative" or "rectificatory" functions that conceptualise remedies as "undoing" a wrong.¹⁴⁷ Settler law's remedies operate under a necessary legal fiction, that perhaps reflects the fungibility of the economic resources with which they primarily deal; a remedy is seen to *undo* a wrong, and after a matter is closed, the harm's effects are considered erased. It neglects the pragmatic reality that parties carry their experiences of harm with them; it shapes their future behaviours, notwithstanding that the law tells them the harm no longer exists.¹⁴⁸

While perhaps not always as closely correlated, the *utu* required under *tikanga* is still informed by the degree of harm done. The extent of harm suffered bears on the extent of what is required to rebalance it, and its form might provide a starting point from which a remedy is constructed.¹⁴⁹ Despite this, *tikanga* Māori's conception of how closure is achieved, alongside the broader-based

141 At 206 and 213.

142 Mead, above n 14, at 33.

143 Te Aka Matua o te Ture | Law Commission, above n 20, at [159].

144 Weinrib, above n 127, at 4–5; and Ernest Weinrib "Corrective Justice in a Nutshell" (2002) 52 University of Toronto Law Journal 349.

145 Weinrib, above n 144, at 351.

146 Weinrib, above n 127, at 4–5.

147 Weinrib, above n 144, at 349–350.

148 As a simple illustration: consider how parties that have suffered a wrong approach future interactions with greater hesitancy or distrust.

149 Jones, above n 21, at 40; and Ballara, above n 108, at 83 and 97.

considerations of what must be considered to achieve *ea*, brings, in some instances at least, greater flexibility in the form a remedy might take.¹⁵⁰

This contrast requires a new law to depart from either, or both, *tikanga* or settler law, in how it philosophically conceptualises the interaction of wrong and remedy. This article argues the understanding at *tikanga* Māori is preferable. It better acknowledges the reality of actions and experiences being irreversible. That they have been addressed does not turn back the clock. Additionally, where the law shifts to incorporate broader-based considerations of what must be rebalanced, the nature of this irreversibility becomes less at odds with the harms considered, compared to narrower, restorable pecuniary resources.

V SETTLER LAW'S DISPARATE ENDS AND TIKANGA AS A UNIFIED FRAMEWORK

Settler law's adherence to its narrow core raises difficulties where it attempts to respond to harms of a diverse character. It leads to principled inconsistency or tenuous reasoning in attempts to justify subordinate remedies made necessary by the gaps left by a primarily compensatory framework. While subordinate remedies are increasingly available, they disrupt any principled cogency and unsettle any unifying principle that the law claims. Simply, the composite elements of settler law's remedies do not tally with its principled core. It makes the development of law uncertain. The broader scope of *tikanga* Māori, by contrast, brings a unifying framework and coherence to settler law's currently disparate ends. Its wider contemplation of what is required to correct imbalances, and why, addresses the effect of wrongs more fully without the same principled inconsistency. Remedies under a new law should reflect this wider and more coherent vision.

A Compensatory Objectives

Compensation is the "cardinal concept" of settler law.¹⁵¹ The primary remedy, a compensatory measure of damages, is available as a matter of course in response to civil wrongs.¹⁵² While

¹⁵⁰ See Ballara, above n 108, at 83–102.

¹⁵¹ Stephen Smith "Substitutionary Damages" in Charles Ricketts (ed) *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) 93 at 93 and 96; and Andrew Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 38. See *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 at 154; *Cassell & Co v Broome*, above n 138, at 1086; and *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA).

¹⁵² *Cassell & Co Ltd v Broome*, above n 138, at 1070; *Blundell v Musgrave* [1956] ALR 1183 (HCA); and *Rakena v Richardson & Co Ltd*, above n 130, at 919.

consequential loss is compensable,¹⁵³ and further categories of damages are available,¹⁵⁴ their roles are constrained. Two measures of compensatory damages are available under the current law of remedies: "value of loss" and "cost of cure". While both ostensibly restore the wronged party "to the position they would have been in had the wrong not occurred",¹⁵⁵ their selective assessment of the types of loss compensated is characteristic of settler law.

"Value of loss" damages aim to compensate, rather than undo, harm suffered. In this way, they put a claimant in a position *analogous* to the position the claimant would have been in, had the wrong not occurred. With aims of restoring value, it considers an economic quantum of infringements in narrow terms and weights non-pecuniary harms conservatively.¹⁵⁶ It cannot be understood as meaningfully restorative in that the harm remains in exchange for payment. A party will receive monetary compensation but will nevertheless be left to work through or otherwise bear the consequences of that harm. While this might reflect a *net* restoration of position in economic terms, adjudged by settler law to be sufficient restoration, it does not reflect that the position is qualitatively different to the position before the harm. The circumstances have not reverted to as they were prior to the harm. It follows that "value of loss" compensation is best understood as a transactional remedy, where the amount proffered frequently compensates inadequately.¹⁵⁷ Even where the quantifiable wrong is sufficiently compensated and the "transaction" deemed fair, the qualitative effects of involuntariness and lack of agency within the transaction are necessarily left unaddressed.

Settler law's failures stem from its hesitancy to account for, and at times patent rejection of, the subjective value to the wronged party of the rights infringed. It tends to consider an "objective market value" based on a "reasonable person's" valuation.¹⁵⁸ Qualitative values are less frequently considered and are raised only where expressly required by the elements of a cause of action.¹⁵⁹

153 To the extent that it is not "too remote". See *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145 as the leading authority for remoteness in contract. See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) (No 1)* [1961] AC 388 (PC); and *Overseas Tankship (UK) Ltd v The Miller Steamship Co Ptd (The Wagon Mound) (No 2)* [1967] 1 AC 617 (PC) as an early articulation of the rule in tort.

154 As discussed throughout the rest of this article.

155 Pawson, above n 15, at [2].

156 *Rookes v Barnard* [1964] AC 1129 (HL) at 1227–1228; and Burrows, above n 151, at 372.

157 See Smith, above n 151.

158 Burrows, above n 151, at 17. The difference between the subjective and objective value is sometimes called the consumer surplus.

159 See Stephen Todd *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [10.2] where the tort of private nuisance constitutes "an unreasonable interference with a person's right to the use or *enjoyment* of an interest in the land" (emphasis added); and Pawson, above n 15, at [38] where general and non-pecuniary damages are available for breach of contract only where mental satisfaction was an object of the contract.

This constrained recognition underweights or neglects less tangible losses, specific to the individual harmed. It neglects that loss, more often than not, contains non-fiscal considerations, whether disappointment at unmet expectations, lack of trust in future interactions within that relationship, or distress at the loss of an objectively unexceptional, but subjectively valued, object or transaction.¹⁶⁰ It does not acknowledge that the same action does not impact all individuals equally. These unaccounted-for, intangible benefits explain "irrational" transactions, where a party understands that there is no objectively quantifiable financial benefit to be gained from a transaction from the view of a hypothetical "reasonable person", but transacts anyway.

The remedial shortcomings of "value of loss" damages reflect a lens where rights are primarily transactional and do not allow for market engagement with qualitative benefits, which are seen as outside the mandate or capacity of courts to protect. It means that imbalances recognised by settler law do not reflect the imbalances actually created by the harm, and remediation therefore fails. That failure is more pronounced, still, when considering unfulfilled manaakitanga obligations, hara that results through whakapapa connections, or imbalances that come with disruptions to tapu and noa, or mana. In this way, when assessed against tikanga Māori (and a new law), settler law's compensatory rationales fall short both in terms of what a remedy ought to achieve and in recognising the nature and extent of the harm that is to be remedied.

"Cost of cure" damages, by contrast, restore claimants to a position that is comparatively better. Despite this, to the extent that "their aim is to undo or avoid ... the tangible change in the claimant's world that will be, or has already been, brought about by the defendant's breach",¹⁶¹ they misconceive the permanence of that wrong. If, instead, they are seen to recognise that the "simplest" or "natural" way of achieving a compensatory aim is by replacing or repairing the thing lost, and therefore providing a sum which would enable that to occur, they may achieve their goal, but their underpinning rationale and ultimate goal may still be criticised as inadequate.¹⁶² Despite this failure, as a directly substitutive remedy, they aim to allow the wronged party to continue on the path they had been treading before the wrong,¹⁶³ and to reap the value they otherwise would have gained from the transaction. In this way, they restore those unique and unquantifiable benefits, without requiring approximations of value.¹⁶⁴ As with "value of loss" damages, however, they cannot undo that episode or turn back the clock. The wronged party will still carry the experience of that wrong with them.

160 For recognition of the difficulty assessing subjective elements, see *Cassell & Co v Broome*, above n 138, at 1070.

161 Smith, above n 151, at 95.

162 At 96.

163 At 103.

164 Smith, above n 151, at 97.

Additionally, difficulties arise where there is simply no ability to cure the loss. For example, in circumstances where no potential substitute exists, where time renders performance obsolete or where any subject matter has been lost beyond retrieval. It is, at best, a mechanism that sometimes effects better restoration without recognising it does so.

In assessing which measure to apply, the courts take a pragmatic approach.¹⁶⁵ The emphasis is on one of "reasonableness" in all of the circumstances.¹⁶⁶ This article does not suggest that tikanga Māori provides a definitive preference for one measure of damages over the other. Instead, it suggests that, as with any multi-factorial assessment of reasonableness in a new law, a new framework that meaningfully includes tikanga Māori will be necessary. That framework may preserve some factors, while displacing or adding others.

There is some overlap between considerations in settler law and tikanga. Just as the disproportion between the burden of curing a breach and the benefit received from that cure is part of the analysis at settler law,¹⁶⁷ manaakitanga requires assessment of the hardship imposed so as not to simply reverse the imbalance by imposing an inappropriate burden.¹⁶⁸

Alongside that overlap, however, te mātauranga also provides additional considerations that must be included in that framework of analysis. They include assessing the impact of a remedy through a lens shaped by manaakitanga and whanaungatanga, while assessing what is required to achieve ea with reference to the qualitative nature of the harm as understood through tikanga Māori. For example, where the hara has resulted in a dangerous imbalance in tapu, it is necessary to restore levels of tapu and noa. It is unlikely, in those circumstances, that it would be reasonable to allow a measure of damages that would provide insufficient support to effect that rebalancing if to do so would allow dangerous levels of tapu to persist.

It may be that an approach to assessing value with reference to tikanga Māori renders the difference obsolete. Where the value of loss is assessed with reference to tikanga Māori, it may be that the measures are left meaningfully the same. Alternatively, it is arguable that the decision of which measure to apply becomes subsumed by an overarching inquiry of what is necessary to best facilitate a rebalancing of the take, whether that be through compensatory or restitutionary measures.

It is also necessary to note that while tikanga Māori recognises the restoration of ea through non-substitutionary processes, it is justified by a focus on mana, rather than transactional balancing.¹⁶⁹

¹⁶⁵ See *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836 (HC).

¹⁶⁶ See *Ruxley Electronics Ltd v Forsyth* [1996] AC 344 (HL).

¹⁶⁷ *Ruxley Electronics Ltd v Forsyth*, above n 166. See also Tareq Al-Tawil "Damages for the Breach of Contract: Compensation, Cost of Cure and Vindication" (2014) 34 Adel L Rev 351.

¹⁶⁸ Te Aka Matua o te Ture | Law Commission, above n 20, at [160]; and Mead, above n 14, at 32.

¹⁶⁹ *Ellis v R*, above n 17, at [60]; and Jones, above n 21, at 40.

While it is ostensibly an analogous remedy operating on a similar fiction to settler law, it is actually a direct remedy. Just as mana may be reduced by the take, it may be restored by utu. It is not constructing a monetary value for rights and effecting a transaction, while asserting a like-for-like exchange. Instead, it effects direct restoration. This is how muru, the stripping of resources,¹⁷⁰ forms utu where affronts pertain to mana and person, rather than property, including accidents of a serious nature that threatened mauri or tapu.¹⁷¹ Similarly, there are accounts of monetary recompense for breach of rāhui.¹⁷² Without asserting that those accounts definitively uphold tikanga Māori, they raise possibilities that remedies such as damages may be able to restore ea. Even without a like-for-like exchange of resources, there may still be appropriate restoration.

This article notes that some tikanga whakahaere also provide directive-based pathways to restoring balance.¹⁷³ It might be that specific remedial actions that are appropriate at tikanga Māori ought to be incorporated into the suite of remedies available at common law which, by their incorporation, allow better remediation. Even without those, however, it provides better recognition of harm done, and consequently a more appropriate level of compensation. The specific shape of those remedies is, however, a matter for a different inquiry.

While compensation may remain a touchstone to restore ea in a new law of Aotearoa New Zealand, unlike at settler law, it cannot take primacy to the exclusion of other objectives. Just as compensation for pecuniary loss is not the only function of tikanga Māori, compensation cannot be determinative in a new law. Other factors must shape this assessment and other pathways must remain open, as discussed throughout the remainder of this article.

B Tenor of the Transgressor's Actions

The motivation or tenor of the transgressor's actions is only ever a subordinate consideration at settler law. Where accounted for, it is in one of two ways: aggravated or exemplary damages.

Aggravated damages still fulfil compensatory aims. They recognise that the manner and motive of a transgressor's conduct may cause additional harm that ought to be compensated.¹⁷⁴ However, their position at law and framing as a distinct measure of damages is somewhat uncertain and their

170 Williams, above n 3, at 5.

171 Mead, above n 14, at 121–132; Ballara, above n 108, at 86; and A Taranaki Veteran "The Great Muru" (1919) 28 *Journal of Polynesian Society* 97.

172 Frederick Maning *Old New Zealand* (Leicester University Press, London, 1912) at 109–110 as cited in Mead, above n 14, at 121 and 128.

173 Mead, above n 14, at 31.

174 *A v B* [1974] 1 NZLR 673 (HC); *Auckland City Council v Blundell* [1986] 1 NZLR 732 (CA); and *Quinn v Television New Zealand Ltd* [1995] 3 NZLR 216 (HC).

usefulness doubted.¹⁷⁵ It has been suggested that a more appropriate treatment is to require the specific pleadings to include those aggravating elements and the resultant harm so as to be included in an overarching assessment of general damages.¹⁷⁶

Exemplary damages, by contrast, look solely to the wrongdoer's behaviour, rather than its effects. They recognise that "malicious, vindictive, high-handed, wanton, wilful, arrogant, cynical, oppressive, [or] contumelious disregard for the plaintiff's rights" might justify private law's pursuit of punitive ends.¹⁷⁷ Their availability is contingent on a conscious appreciation of the risk of harm, in the circumstances in which the risk is being taken.¹⁷⁸ Despite that high threshold, awards are generally "moderate".¹⁷⁹

Exemplary damages are, perhaps, the most controversial measure of damages.¹⁸⁰ They step away from the fundamental rule that "recovery should be no greater than the loss suffered" and pursue different ends: deterrence and disapproval.¹⁸¹ They have been criticised as stepping into the realm of criminal law, and thereby departing from the inherent compensatory jurisdiction of civil law, ultimately being seen as a distasteful addition to remedies at settler law.

Tikanga Māori provides a framework that readily justifies considering the nature of the transgressor's behaviour. A wrongdoer's conduct and motivations bear directly on the extent of the imbalance resulting from a take and, at times, whether a take requires utu at all.¹⁸² It is not unfamiliar to tikanga that "a particularly egregious wrong" might "ratchet up" the level of utu.¹⁸³

This follows naturally from the egregiousness of behaviour bearing on the extent to which relationships are disrupted and becomes relevant by virtue of whanaungatanga. A contumelious

175 *Tairāwhiti District Health Board v Perks* [2002] NZAR 23 (HC) at [19] onwards; and *Attorney-General v Niania* [1994] 3 NZLR 106 (HC) at 111–112.

176 *Tairāwhiti District Health Board v Perks*, above n 175, at [21].

177 *A v Bottrill* [2002] UKPC 44, [2003] 2 NZLR 721 at [25]. See also *Dehn v Attorney-General* [1989] 1 NZLR 320 (CA) at 324; *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC) at 434; *Bottrill v A* [2001] 3 NZLR 622 (CA) at [46]; and *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [15]–[16] and [22].

178 *Bottrill v A*, above n 177; rev'd *A v Bottrill*, above n 177, but affirmed in *Couch v Attorney-General*, above n 177.

179 Burrows, above n 151, at 372.

180 James Edelman "In Defence of Exemplary Damages" in Charles Ricketts (ed) *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) 225 at 231.

181 Burrows, above n 151, at 360; and Edelman, above n 180, at 232.

182 Ballara, above n 108, at 97.

183 Williams, above n 3, at 4–5.

disregard for the mauri, mana and tapu of others and those relationships is a direct affront to manaakitanga and aroha. It directly impacts the mana of those involved: both the wronged and the wrongdoer. The attitude and the purpose for which an action was taken directly impacts the extent of the imbalance that must be restored.¹⁸⁴ In that way, considering the nature of a wrongdoer's conduct is not just uncontroversial but necessary.

That consideration extends to behaviours subsequent to the take. Imbalance is not just assessed at the time of the hara, as is settler law's default position (justified by convenience and a limited assessment of what harms require compensating),¹⁸⁵ but rather as part of the overall sequence. Attitudes and behaviours through remedial processes are relevant. Whanaungatanga, manaakitanga and aroha do more than impose more abstract value on relationships. Rather, they bring direct obligations to develop, maintain and support them. Subsequent behaviours which fail in those obligations can perpetuate and extend imbalances, and so the whole of any sequence of events must be assessed if it is to reach a point where participants can say "kua ea". This position is not entirely alien to settler law – in extreme circumstances aggravated damages have been awarded to reflect an "intransigent and disdainful attitude ... in the course of litigation"¹⁸⁶ – but in a new law it can no longer be relegated to extreme cases on the margins.

Harm to a *transgressor's* mana as a result of their behaviour is also a necessary consideration if a remedy is to fully rebalance the take. To be subject to utu can be as much a mana-enhancing process as being its primary benefactor.¹⁸⁷ In that way, utu must be calculated to restore and rebalance the circumstances as a whole, with consideration of all parties, where a focus on the position of the wronged party alone is not sufficient.

While directing focus towards the wrongdoer's behaviour might appear punitive, those punitive effects are a collateral result rather than a primary motivation.¹⁸⁸ It is important that the transgressor addresses the harm caused and thereby begins to restore their mana. The moral or philosophical objections made by critics of these damages hold substantially less, if any, sway when engaging in and with a tikanga framework. Tikanga readily justifies such considerations and renders them fundamentally consistent with, and necessary to, the overarching goal of remedies in a law of Aotearoa New Zealand.

184 Ballara, above n 108, at 97.

185 Pawson, above n 15, at [18]. Though it is open for the date of assessment to be adjusted if necessary.

186 *Quinn v Television New Zealand Ltd*, above n 174, at 223.

187 See *A Taranaki Veteran*, above n 171, at 102.

188 See Ballara, above n 108, at 92.

C Declaratory Remedies

Declaratory remedies – whether as a formal declaration or nominal damages with declaratory effect – recognise that rights have been infringed and articulate where the wrong lies, even where "substantive remedies" are unavailable or not forthcoming.¹⁸⁹ Under settler law, declaratory remedies may be sought without intention to pursue substantive remedies¹⁹⁰ or they may be awarded where the court recognises a breach of rights without "substantive harm".¹⁹¹

While all remedies have some declaratory effect, it is the central purpose of nominal damages or declarations. The compensatory aims of settler law afford a comparatively low value to declaratory remedies. Under settler law, declaratory objects are collateral and subordinate to compensation.¹⁹² Declarations in private law are primarily used as a vehicle of clarifying law in dispute, rather than vindicating rights. Where settler law aims to give effect to rules and compensate harms rather than making moral or values-based judgments, declaratory relief is perceived as less desirable than so-termed "substantive remedies".

Under a new law that reflects tikanga Māori, the understanding is different. Declaratory effects could take on new significance. Recognising a wrong and acknowledging where fault lies vindicates a transgressed party and may have substantial effects on the restoration of mana. The recognition of where hara lies, and who perpetrated it, is fundamental to reaching *ea*.¹⁹³ In some instances, that acknowledgment, articulation and acceptance can itself be a mana-restoring or mana-enhancing process.¹⁹⁴ It is not that declaratory judgments will be valued under a new law *despite* having little rebalancing effect, but rather that they will be valued *because of* their substantial rebalancing effect.

This understanding may fundamentally reshape the attitudes of the courts towards declaratory remedies. Despite some causes of action being actionable *per se*, pursuing them for declaratory purposes is currently undervalued. Current attitudes towards pursuing actions which yield no pecuniary remedy are often contemptuous,¹⁹⁵ and declaratory relief is sometimes considered simply a "peg on which to hang costs" rather than a meaningful remedy in its own right.¹⁹⁶ This attitude of

189 For clarity, this article considers declarations that are remedial in the sense that they are sought in response to a wrong suffered, rather than more general or abstract declarations as to existing rights.

190 Declaratory Judgments Act 1908, s 2; and *Re Chase* [1989] 1 NZLR 325 (CA).

191 For awards of nominal damages, see *Baker v Australia and New Zealand Bank Ltd* [1958] NZLR 907 (HC); and *Williams v KF Meates & Co Ltd* (1971) 1 NZCPR 594 (CA).

192 Pawson, above n 15, at [2].

193 *Ellis v R*, above n 17, at [62]–[67].

194 *Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana* 2019, ss 7–9; and Ballara, above n 108, at 91–92.

195 Pawson, above n 15, at [55].

196 *Beaumont v Greathead* (1846) 2 CB 494 (Comm Pleas) at 499.

the courts towards declaratory relief is, at times, reflected in cost awards.¹⁹⁷ Despite the ordinary presumption or principle that costs are borne by an unsuccessful party,¹⁹⁸ the courts are ready to exercise their discretion to withhold awards of cost while still awarding declaratory relief.¹⁹⁹ This suggests, to some extent, that a successful pursuit of a declaratory remedy is not regarded as a meaningfully successful case brought.

A new law could yield greater focus on explicit articulations of rights and harms, alongside the greater value given to the declaratory objects. It would recognise the significance of declaratory relief and the effects of the attribution of that wrong or vindication of that harm on, for example, the respective mana of participants in a dispute. A greater appreciation for declaratory relief and a more appropriate procedural treatment of such matters, this article hopes, would follow.

D Contributory Reductions

Remedies under settler law recognise the primary transgressor may not have entirely caused the imbalance at hand. While the rationale differs, structures upholding this recognition are further justified by tikanga Māori and ought to be preserved.

At settler law, the actions and failures of the claimant may influence remedies. The court imposes an onus to respond reasonably to a wrong,²⁰⁰ and a claimant may not recover remedies for a loss that could have been avoided had they taken reasonable steps.²⁰¹ Under equity, a claimant's conduct forms part of the inquiry: a claimant must come to equity with "clean hands".²⁰² Where the claimant was at least partially responsible for the harm, a court assesses the extent to which each party was responsible.²⁰³ In calculating damages, it apportions the costs of remediation to reflect the extent of each party's contributions.²⁰⁴

These inquiries are justified by the rationale that it would be unjust and unfair to require wrongdoers to compensate loss that is not attributable to their actions, while simultaneously allowing a claimant to escape the consequences of theirs.

197 Pawson, above n 15, at [55].

198 High Court Rules 2016, r 14(1)(a).

199 Pawson, above n 15, at [54].

200 *Lander v Sorensen* [1955] NZLR 219 (CA) at 228. See generally Pawson, above n 15, at [110]–[111].

201 *Lander v Sorensen*, above n 200, at 228.

202 Ricketts, above n 15, at [12]; and *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC).

203 Contributory Negligence Act 1947.

204 Section 3(1).

Tikanga Māori further justifies this position. All parties' actions are relevant to a relationship and therefore are also relevant to any consequent imbalance. All parties are required to act to preserve relationships, as a part of whanaungatanga.²⁰⁵ Kaitiakitanga and manaakitanga bring, inter alia, additional and reciprocal obligations to preserve others' mauri and mana.²⁰⁶ There are obligations to preserve ea, so far as possible, and intervene where an imbalance may result. This obligation is central to tikanga Māori and, consequently, a new law may well reify current structures of contribution and apportionment, albeit with additional justification.

E Equitable Remedies

At settler law, where damages fail and the common law cannot provide an adequate remedy, equity intervenes. Equity is employed "only when the common law treatment of an area is deficient or inadequate".²⁰⁷ Its substantive doctrinal application is engaged when the rigours of common law would otherwise render unjust results and its remedial operation is justified by the limitations of damages as a remedy. In this way, equitable remedies supplement or "gloss" the common law.²⁰⁸ Rather than giving rise to a debt obligation, as common law damages do, equity acts *in personam* to restrict or compel an individual's behaviour.²⁰⁹ Equitable remedies include specific performance,²¹⁰ mandatory and prohibitive injunctive relief,²¹¹ restitution,²¹² rectification²¹³ and voiding of obligations.²¹⁴

While a preference for damages is justifiable in some instances, equitable remedies' formal and legal relegation results from historical idiosyncrasies in the development of settler law,²¹⁵ to which tikanga Māori has no parallels. To the extent that they currently do "convenient and useful work not done by the common law",²¹⁶ those principled or justifiable purposes for relegation must be

205 Mead, above n 14, at 31.

206 At 32.

207 Paul Perell *The Fusion of Law and Equity* (Butterworths, Toronto, 1990) at 8.

208 Frederic William Maitland *Equity: A Course of Lectures* (2nd ed, Cambridge University Press, Cambridge, 1936) at 18.

209 Ricketts, above n 15, at [8].

210 At [228]–[231].

211 At [206]–[227].

212 At [232].

213 At [248]–[249].

214 At [132]–[160].

215 Maitland, above n 208, at 1–9.

216 At 1.

reconceptualised in the face of a paradigmatically shifted common law. The failures at common law that bring the need for equity's auxiliary jurisdiction may be ameliorated by a different approach to remedies in a new law of Aotearoa New Zealand.

Further, where the substance of a new law is informed by tikanga Māori, *in personam* relief may be the only relief appropriate in response to a particular harm. In situations where tikanga provides an assessment of positions that cannot be restored by analogy, such as around specific and necessarily unique taonga, damages might be inherently inadequate. Alternatively, where a transgressor disturbs an area with high levels of tapu, perhaps in breach of rāhui, and in doing so elevates their own level of tapu to dangerous levels, no provision of damages might undo that. Ea can only be reached by specific actions that decrease tapu and, in that way, equitable remedies may play a substantial role. Whether displaced doctrinally or in a de facto manner by new considerations informing the law, the debate of relegation is rendered largely obsolete under a new law of Aotearoa New Zealand. Despite that, equitable remedies contribute to the discussion at hand.

Equity also provides this article with the basis for a discussion that steps away from the substance of a new law and towards questions of institutional competency. Currently, Aotearoa New Zealand's mainstream courts operate with separate and concurrent equitable jurisdictions.²¹⁷ It has primed them to engage with an unstable touchstone of equity, being unconscionability.²¹⁸ In awarding equitable damages in lieu of other relief, the court must navigate questions of valuation of intangible and unquantifiable factors and arrive at a quantum of damages.²¹⁹ While the task is difficult, it is already one asked of and undertaken by the courts.

In contrast to settler law's relatively open-textured approach to assessing "unconscionability", tikanga Māori provides a substantially more detailed and robust framework as to what must be considered in remedying harm. Having shouldered the arguably more difficult task of assessing unconscionability, however, the courts are primed to transmute different elements into a remedy. While this article does not underestimate the difficulty of such a task, it looks to equitable remedies as a reminder that the courts already undertake an analogous role grappling with elusive and unquantifiable factors. While tikanga Māori brings new considerations with which the courts must grapple, this is part and parcel of the work of recognising tikanga as part of the law. Courts necessarily must come to grips with those new considerations. It is not a burden unique to remedies, as it will similarly factor into courts' assessment of, for example, reasonableness within a new law. Once the

217 Senior Courts Act 2016, s 180; *Day v Mead* [1987] 2 NZLR 443 (CA); *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA); and *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (HC).

218 Ricketts, above n 15, at [2]; and *Day v Mead*, above n 217, at 462.

219 Ricketts, above n 15, at [240]. A similar point may also be made with courts' assessment of general damages, or in their common function of assessing "unreasonableness".

courts have achieved the preliminary work of understanding those different elements of tikanga, their application to assessing a remedy such as damages is within courts' competency.

Equitable damages, assessed in light of unconscionability, have provided courts with experience in working through difficult valuations that require parsing elusive and unquantifiable factors into a compensatory figure, where such a task is unavoidable. Additionally, equitable remedies' *in personam* function provides a mechanism to compel direct restoration of a wrong, where a particular action is necessary. They allow courts to sidestep difficult questions of valuation or allow remediation where monetary compensation might be insufficient. They might also be used to give direct effect to tikanga whakahaere, where tikanga provides a specific directive as to how a hara might be rebalanced.²²⁰ Those contributions make clear that there remains a place for equitable approaches in a new law.

While this article does not suggest or dismiss the possibility that equitable approaches should be adopted wholesale, it recognises that a new law of remedies may more closely resemble equitable remedies. A new law may yield a similar position as found in current equitable jurisdictions, albeit underpinned by different rationale. Questions of manaakitanga might lead to similar hesitations as at settler law around ordering injunctive relief, based on its significant impact on the transgressor.²²¹ Similarly, a contextual assessment of damages would more closely resemble damages in equity than at common law. Despite that, it is an incidental resemblance rather than adoption.

F Additional and (Currently) Rejected Considerations

Tikanga Māori requires considerations that settler law explicitly rejects.

1 Discretion and effect of the remedy on the wrongdoer

Settler law focuses on aiding a wronged party. It considers what was done *to* the wronged party and therefore what must be done *for* them to restore their position.²²² Other than in limited equitable circumstances,²²³ settler law affords no consideration to the effect of remedies on the defendant and focuses exclusively on providing the best remedy for the claimant. This is taken to an extreme. Even where a transgressor's position means they will functionally be unable to give effect to a remedy,

220 An injunction, for example, could operate to compel the performance of particular, required behaviour if to do so were assessed as necessary.

221 Ricketts, above n 15, at [211], [226] and [228].

222 Weinrib, above n 127, at 4.

223 Burrows, above n 151, at 140. See *Day v Mead*, above n 217, at 462: "[t]he assessment will reflect that which the justice of the case requires according to considerations of conscience, fairness, hardship and other equitable features such as laches and acquiescence."

those considerations are excluded or are, at best, controversial.²²⁴ Settler law provides no relief from an over-reaching plaintiff.²²⁵

A new law must reflect an entirely different position. Rights in tikanga may not be exercised unencumbered but are qualified by correlative obligations.²²⁶ Tikanga Māori stresses that, in every instance, manaakitanga must be central.²²⁷ Even where tensions are high and interactions fraught, manaakitanga must be upheld.²²⁸ Where anger and greed militate against this, tikanga Māori judges that failure.²²⁹

Customarily, the "economic standing" of a group responsible for a wrong was relevant in "deciding whether to apply the muru" and the extent to which it was undertaken.²³⁰ Additionally, Mead observed more generally that the procedures required under tikanga Māori "are always subject to what a group or an individual is able to do".²³¹ Tikanga is, in this way, cognisant of the reality in which each individual operates, the resources at their disposal and other practicalities that might impact performance.²³²

When assessing the relief to be made available, this need not always ameliorate particularly severe judgments²³³ – it will always necessarily require balancing against the hara done, the imbalance caused and what is required to remedy that – but any system of law that develops from tikanga must consider the remedy's effect on the wrongdoer. While this is not to say that a transgressor may suffer no hardship, a remedy that goes so far as to exert substantial hara on the wrongdoer simply reverses the imbalance and precludes ea in that way.

224 Ralph Cunningham "The Inadequacy of Damages as a Remedy for Breach of Contract" in Charles Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) 115 at 118 and 129.

225 John Goldberg and Benjamin Zipursky *Recognising Wrongs* (Harvard University Press, Cambridge, 2020) at 356.

226 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 38.

227 Te Aka Matua o te Ture | Law Commission, above n 20, at [160]; and Mead, above n 14, at 32.

228 Mead, above n 14, at 32.

229 At 32.

230 At 127.

231 Mead, above n 18, at 3.

232 Mead, above n 14, at 29.

233 Consider A Taranaki Veteran, above n 171, where the iwi subject to the muru faced substantial hardship even as the matter was brought to a close.

It follows that rights in a new law of Aotearoa New Zealand may not be exercised unencumbered, and, unlike at settler law, no measure of damages can be "available as of right".²³⁴ Discretion must be preserved. Without this, remedies would arise without reference to the wrongdoer. Unlike a system motivated cardinally by compensation, one guided by tikanga Māori might recognise that balance may be restored without transactional positions being totally compensated, if doing so would bring undue hardship to the transgressor.²³⁵ Assessment of damages in a new law should be inherently contextual, with the positions of each party forming part of that context, requiring an approach that a position without discretion cannot provide.

2 *The inherent value of relationships*

Settler law does not recognise inherent value in relationships, separate from the transactional benefits they may produce. Some questions have arisen around "loss of amenity damages" which suggest "that the defendant's failure to perform is itself a loss for which the claimant can be compensated".²³⁶ Such a proposition, however, is limited, has faced substantial criticism,²³⁷ and has never been legally reified.²³⁸ Loss to be compensated is assessed with reference to what the product of that relationship would have been, with no reference to that relationship itself.

Even absent considerations of tikanga, scholars have argued that this is a narrow conception of loss that ultimately leads to "remedial inadequacy", and that a wider conception of harm is more appropriate.²³⁹

Whanaungatanga, as the "glue" of tikanga Māori, provides a wider conception of harm and recognises inherent value in relationships, in and of themselves, without heed to the resultant positions that stem from them. It recognises that, in breaking a relationship, notwithstanding any impact to positions otherwise, there are repercussions in respect of mana that must be rebalanced. In that way, a new law of remedies requires a substantially different conception and evaluative framework of damages in respect of broken relationships.

234 Pawson, above n 15, at [34]. Currently, for example, where special damages are proved they must be awarded: *Rakena v Richardson & Co Ltd*, above n 130, at 919.

235 Conversely, it is also possible that relief against a defendant with plentiful resources at their disposal may be higher than otherwise awarded.

236 Cunningham, above n 224, at 139.

237 At 139.

238 At 120 and 139. Among the closest that settler law has come to recognising such a proposition is in cases of contract where the identity of the individual performing the service has been deemed "of the essence", due to some specific feature or skill possessed: see *Edwards v Newlands & Co* [1950] 2 KB 534 (CA).

239 Cunningham, above n 224, at 139. See also Al-Tawil, above n 167, at 361.

VI CONCLUSION

Despite a history of conflict, erasure and hostility, remedial structures of tikanga Māori and settler law are not irreconcilable. The remedial objects of settler law – compensatory, punitive, restitutionary, declaratory and distributive – are not inconsistent with tikanga Māori's aim towards *ea, ea*. *Ea*, however, can be understood as requiring more expansive considerations of what must be rebalanced before a sequence is closed. Unlike settler law, it weaves objectives together coherently and forms a unified framework of law.

It is not that no adjustment will be necessary or that no difficulties are faced. Some approaches require practical adjustments, where additional considerations may impact remedies available, and other thresholds may require rethinking, in terms of where punitive or declaratory remedies are given substantial weight. Other structures may be incorporated wholly, such as those around apportionment, and yet still, other positions may need to be completely abandoned in favour of others, such as around considerations of the transgressor's position or a relationship's inherent value.

Despite the movement required, this article argues that the gulf between the systems of remedies is assailable. Both systems have sufficient flexibility to allow reconciliation. It is possible to construct a new law of remedies from the fragments of the second, according to instructions of the first. How they fit together will be different, and there will not be room for all those fragments, but they will come together to provide a new law of remedies, fit for application in Aotearoa New Zealand.

Where the courts are asked to grapple with different intangibles and unquantifiables, it is for them to meet that challenge. Despite this, grappling with intangibles is not entirely new. Determining quantum in equity, or calculating a remedy for irreplaceable loss, is undertaken with a substantially less certain framework than that provided by tikanga Māori and primes the courts for the task ahead. While understanding new conceptions and a fundamentally different world view may bring difficulty, as Winkelmann CJ offered, "[they] must find a way to do it".²⁴⁰ The courts have always grappled with changing values. They have demonstrated an ability to move with the times, and, if members of the legal community cannot, it is time to step aside for those who can.²⁴¹

Tikanga Māori's time has come again. As the law of Aotearoa New Zealand is reconstructed, there may be initial uncertainty. It may bring discomfort and existing law may be destabilised. This article proposes, however, that this is exactly what is needed.

²⁴⁰ *Ellis v R*, above n 1, at 71.

²⁴¹ This is not to dismiss the difficulty of the task or to forge ahead heedless of the risk. Despite the imperative that this work be achieved soon, the optimism that it may be achieved stems from recent approaches of the courts to tikanga, and acknowledges the work well underway to ensure that there are worthy successors and a new generation of the legal community that is versed in tikanga Māori: see *Ngā Pae O Te Māramatanga*, above n 16.

