

HIDING IN PLAIN SIGHT: THE LOST TIKANGA AUTHORITIES

Antonia Smith* and Geoff McLay**

The role of tikanga Māori within the law of Aotearoa New Zealand is the central issue facing the contemporary legal system. However, there are few historical authorities on the interaction between common law and tikanga currently in circulation. The aim of this article is to report the existence of a large body of historical cases in which tikanga-based arguments were pleaded before the courts. In many of these cases, tikanga was rejected. In some, the very existence of Māori law was denied. However, in a multitude of cases, over a wide array of legal areas, "native custom" was accepted as relevant and integrated in various ways into judgments and rulings. This article considers Reynolds v Tuangau, recently discussed in a Supreme Court judgment, as well as three other examples of such cases, picked from a pool collected as part of wider historical study. None of the cases discussed, nor any others found so far, provide an easy answer to the tikanga project. Instead, together they present New Zealand's early legal system as complex and shifting, featuring a variety of approaches to tikanga. The large majority of these cases, some of which were included in official law reports, have gone unnoticed since their adjudication. In this way they have been "hiding in plain sight". Uncovering and studying these historical authorities is an important task in terms both the history and law of Aotearoa New Zealand.

I INTRODUCTION

This article argues that "hiding in plain sight" is a collection of mid-19th to early 20th century cases in which settler courts actively took account of tikanga Māori as part of their decision-making framework. We do so by considering cases that are less well known than they ought to be, and in some instances not known at all. Our point is not that the cases discussed here are the only, or even the most

* BA/LLB (Hons), Te Herenga Waka—Victoria University of Wellington.

** Professor and Dean of Law, Te Herenga Waka—Victoria University of Wellington. Geoff acknowledges Antonia as the principal author of the article, and the researcher who discovered the material discussed within it. Both authors acknowledge the support of the Victoria University of Wellington Research Fund and the New Zealand Council of Law Reporting who have funded research reflected in this paper. This paper is part of a much larger project sponsored by the Council to produce a volume of law reports of cases considering the interaction between tikanga Māori and English common law.

important, such cases but that in finding them we can obtain a better understanding of the central story of common law in New Zealand: its friction and intermingling with the existing legal system of the islands. The revival of tikanga Māori in the courts needs to be matched by a greater exploration of that prior interaction.

The February 2024 New Zealand Supreme Court climate change case, *Smith v Fonterra*, has affirmed that traditional interests can be protected by tort. In their judgment, Williams and Kós JJ relied upon an 1866 case called *Reynolds v Tuangau* for the proposition that New Zealand courts have long recognised Māori interests in torts cases.¹ *Reynolds* involves the remarkable story of Simon Tuangau or Haimona Tuakau, who found a great block of pounamu in the Hokitika.² Estimates of the value of the find ranged from £1500 to £2500, the equivalent of about NZD \$210,000 to \$350,000 today.³ After the stone was taken by Pākehā prospector James Reynolds, Tuakau turned to the courts to vindicate his rights, bringing a criminal complaint to the Resident Magistrate at Greymouth.⁴ The pounamu was seized from Reynolds under a Magistrate's warrant and he brought a civil case of detainee to the old Supreme Court.⁵ Two jury trials were held, neither providing a verdict.⁶ The case was sent to the Court of Appeal, where ownership of the stone was finally determined in 1866. The Court of Appeal judgment, alas, appears to have been destroyed and we have only a short report of it published in a contemporary newspaper.⁷ To our eyes and to those of the judges in *Smith*, *Reynolds* is important because Tuakau relied on tikanga Māori to inform the application of English finders law,

1 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [184]–[185].

2 "The Supreme Court" *West Coast Times* (Hokitika, 11 August 1866) at 5 <www.paperspast.natlib.govt.nz/newspapers/WCT18660811.2.15>. The weight of historical material suggests that Tuakau most often used spelling/pronunciation of his name in accordance with the Kāi Tahu mita, the Ngāi Tahu dialect.

3 "Supreme Court—Westland District" *West Coast Times* (Hokitika, 8 August 1866) at 2 <www.paperspast.natlib.govt.nz/newspapers/WCT18660808.2.9>; "Court of Appeal" *Daily Southern Cross* (Auckland, 31 October 1866) at 6 <www.paperspast.natlib.govt.nz/newspapers/DSC18661031.2.23>; and Reserve Bank of New Zealand—Te Pūtea Matua "Inflation calculator" (25 August 2024) <www.rbnz.govt.nz>.

4 "Supreme Court—Westland District", above n 3, at 2.

5 At 2. Before 1980, what is now known as the High Court was named the Supreme Court. What is now known as the Supreme Court replaced the Privy Council as the final court of appeal for New Zealand.

6 "Court of Appeal", above n 3, at 6.

7 *Reynold v Tuangau* SC Hokitika, 7 August 1866 available at <www.victoria.ac.nz/law/nzlostcases/>; "Reynolds v Symons" *Daily Southern Cross* (Auckland, 9 November 1866) at 6 <www.paperspast.natlib.govt.nz/newspapers/DSC18661109.2.36>. The closest to a primary source that can be located for the Court of Appeal judgment, as yet, is a brief note in a civil register: "Civil Register (1 to 641)" (1863–1893), Archives New Zealand, ABIO 7242 R20222263.

an argument which was accepted at trial at the then-Supreme Court by Gresson J and also, implicitly, at the Court of Appeal.⁸

Tuakau's story is not completely unknown to historians but, until *Smith*, was unknown to New Zealand lawyers.⁹ His tale deserves far more historical attention than is provided in *Smith* or indeed this article. It is fitting that he, who pursued his legal rights so persistently through colonial courts, from Hokitika to the fledgling capital of the colony, should play a role in the renaissance that tikanga is currently experiencing in the courts of Aotearoa.

The inclusion of *Reynolds* in a Supreme Court judgment signals a deepening of historical authority for the legal recognition of tikanga. Courts have previously assumed that tikanga should play some sort of role in the common law but the case law foundation for this position has been noticeably thin. In recent judgments, *Baldick v Jackson*, *Public Trustee v Loasby*, and a handful of other native title-related cases are repeatedly cited as authority for the historical use of tikanga in the courts.¹⁰ The almost exclusive reliance on these cases, despite the sometimes-questionable strength of their dicta regarding tikanga Māori, is suggestive of a general lack of historical material and analysis. The almost exclusive reliance on a limited pool of cases, despite the sometimes-questionable strength of their dicta regarding tikanga Māori, is suggestive of a general lack of historical material and analysis. Further, the recent Law Commission report *He Poutama* addresses the relationship between Māori and Pākehā law but—spanning over a century of interplay between the systems, inclusive of statutory developments, and incorporating numerous approaches to issues of contemporary interaction—deals only briefly with the early relationship between the common law and tikanga as "general custom".¹¹

The resurrection of *Reynolds* shows that the courts are perhaps now casting the net a lot wider. The point of this article is to show that *Reynolds* is not alone, that there is a wealth of 19th and early 20th century case law hiding in plain sight. These "hidden" cases are perhaps at least as good, and probably better, sources for the interaction of tikanga Māori and settler courts than the current "go-to" cases. In this article, we will use as examples *Reynolds* as well as three cases we have uncovered

8 *Reynold v Tuangau*, above n 7; "Reynolds v Symons", above n 7, at 6.

9 Katherine Street and Ben Brown must be acknowledged as recognising the significance and uniqueness of Simon's story: see Kathryn Street "The Colonial Reinvention of the Hei Tiki: Pounamu, Knowledge and Empire, 1860s–1940s" (MA thesis, Victoria University of Wellington, 2017) at 31–34; and Ben Brown "The Great Greenstone Trial of 1866" (11 January 2021) Moko Pounamu <www.mokopounamu.co.nz>.

10 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [93]; *Hart v Director-General of Conservation* [2023] NZHC 1011, [2023] 3 NZLR 42 at [112]; *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1384, [2023] 3 NZLR 501 at [25]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [169]; and *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [113]–[117].

11 See Law Commission *He Poutama* (NZLC SP24, 2023) [*He Poutama*] at 142–143. The interaction between the common law and customary property rights is more comprehensively discussed.

(or rediscovered) through an initial sweep of digitalised resources: *Hoanui Heikei and Hone v Hoterene Taipari*,¹² *R v Fetzer*¹³ and *Willoughby v Panapa Waihopi*.¹⁴

II THE TIKANGA PROJECT: WHY LOOK BACK?

The enterprise that we undertake here is one of understanding the past. Others are currently articulating a vision of how that past might be used to shape the law of Aotearoa New Zealand, arguing that tikanga Māori should be considered the first law of Aotearoa, both temporally and in terms of determining what constitutes law. This use of the past is a perfectly legitimate part of what lawyers have always done, but it is not our project. Our project aims to provide a lens on a complex element of New Zealand legal history: how judges and lawyers dealt with the reality of tikanga Māori in the cases that they argued or the decisions that they made. Our view is that the "hiding in plain sight" cases show a complex interaction that is not captured by statements to the effect that tikanga was never, or always, legally relevant.

There are quite different versions of the "tikanga project" or indeed even what is meant by tikanga being the first law of Aotearoa New Zealand. One version of the project might be to assert that tikanga provides, or ought to provide, the rule of recognition which, according to HLA Hart, determines what is or is not law.¹⁵ Another version might be to fit elements of tikanga within the existing common law structure. A third version might be more genuinely syncretic, what Williams J has termed "Lex Aotearoa".¹⁶ The purpose of this article is not to examine which of these versions of the project should prevail. Our work has a narrower purpose: to point out that tikanga was widely used and sometimes accepted as law in colonial courts. The actual mechanics of the relationship between common law and tikanga remain unclear. We have not discovered much in support of the claim that colonial courts recognised the primacy of tikanga. That failure should not really be a surprise. However, there is a lot of evidence that colonial judges chose to recognise tikanga as having some legal effect, and perhaps even that judges recognised tikanga as law, subject to the common law rule of recognition. There might be some evidence for a more syncretic approach. One preliminary view is that tikanga tended to be relevant in cases involving at least one Māori party.

12 "Maori Habits and Customs" *Daily Southern Cross* (Auckland, 11 October 1873) at 3 <www.paperspast.natlib.govt.nz/newspapers/DSC18731011.2.23>.

13 *R v Fetzer* (1900) 19 NZLR 438 (CA).

14 *Willoughby v Panapa Waihopi* (1910) 29 NZLR 1123 (SC).

15 HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012).

16 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1.

III USE OF HISTORICAL CASE LAW AND STORYTELLING IN THE TIKANGA PROJECT

There are many theories about how to properly describe the common law or its processes. In our view the common law process involves, at a fundamental level, storytelling.¹⁷ Lawyers select facts and arguments that they believe will win a case for their clients. Judges select authorities that legitimise the decisions they make. In the words of Brian Simpson, the common law:¹⁸

... consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts.

In short, law is about determining what arguments will win a legal case. In this system, lawyers and judges draw materials from the past to resolve the disputes before them. Often this process is invisible: lawyers are trained to select materials without a second thought as to why a particular past fits or does not fit the present. But the selection of cases, and the stories that can be created from those cases, can really matter and on occasion can lead to a reimagining of the basis of the law. This is the process that can be seen playing out currently in the Courts of Aotearoa in cases like *Smith*. There is a judicial consensus that tikanga should play a role in New Zealand's law.¹⁹ But to obtain legal credibility, this proposition needs historical footing. It needs a story.

The problem is that the material currently being used to build this story is sparse. Only a limited number of cases appear in court footnotes and the Law Commission's *He Poutama* report.²⁰ Worse, some of these cases do not provide the authority attributed to them.

For example, *Baldick* was described by Cooke J in *Hart v Director-General of Conservation* as "one of New Zealand's first authorities to effectively recognise tikanga".²¹ However, *Baldick* did not really concern tikanga at all, at least perhaps from the perspective of the parties. The subject of the case was a commercial custom practised by Pākehā whalers.²² *Baldick* seems to have come to stand

17 See Geoff McLay "Sir Owen Woodhouse and the Making of New Zealand Law" (2023) 54 VUWLR 857.

18 AWB Simpson "The Common Law and Legal Theory" in AWB Simpson (ed) *Oxford Essays in Jurisprudence, Second Series* (Clarendon Press, Oxford, 1973) 77 at 94.

19 See *Ellis*, above n 10, at [93], [171], [246], [279]; *Trans-Tasman Resources Ltd*, above n 10, at [9]; *Takamore*, above n 10, at [94]; *Hart*, above n 10, at [119]; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [77].

20 See *Ellis*, above n 10, at [93], [171], [246] and [279]; *Hart*, above n 10, at [112]; *Te Rūnanga o Ngāti Whātua*, above n 10, at [25]; *Trans-Tasman Resources Ltd*, above n 10, at [169]; *Takamore*, above n 10, at [113]–[117]; and *He Poutama*, above n 11, at 142.

21 *Hart*, above n 10, at [112].

22 *Baldick v Jackson* (1910) 30 NZLR 343.

for the common law recognition of tikanga because it includes a passing reference to indigenous rights under te Tiriti o Waitangi. In the course of his judgment, Stout CJ stated that an Imperial statute relied upon by the appellants could not be regarded to be in force in the colony. He reasoned that the statute bestowed whaling rights which could not be claimed "without claiming it against the Māori, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with ...".²³ At most, *Baldick* is really a te Tiriti case and even that is just obiter. Rights under te Tiriti were merely used in support of a conclusion already come to as to the development of commercial custom in the colony. Indeed, as a Shetland Islander, the discussion of the law of the Greenland fishery was probably the real heart of the case for Stout.²⁴

Loasby appears more promising. Arete Mahupuku, the wife of a deceased chief, had ordered various goods from the respondent to be used at her husband's tangi.²⁵ At the Magistrate's Court, the respondent had sought to obtain payment for the goods from the Public Trustee, the administrator of the Chief's estate.²⁶ Cooper J held that according to a line of English cases, the respondent had to seek payment from Mahupuku, who could then recover the amount from the administrator.²⁷ However, he affirmed that as with an English funeral, the costs associated with a tangi should be paid out of the deceased's estate.²⁸ The basis for this finding was that such was the Māori custom.²⁹ Cooper J considered three questions: whether the practice existed as a "general custom" of Māori, whether it was contrary to any statute of the Dominion, and whether it was reasonable.³⁰ *Loasby* can thus be relied upon as an example of the precepts of tikanga Māori being upheld in a colonial court, or at least recognised as relevant to the administration of an estate.

However, the usage of *Loasby* in recent judgments, unaccompanied by a review of the wider tikanga case law preceding and following it, is problematic. In *Takamore v Clarke*, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* and *Ellis v R*, *Loasby* was relied upon for providing a general test for tikanga recognition. In these cases, Cooper J's judgment has been

23 At 345.

24 This supposition is supported by the fact that in *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC), Stout CJ ruled in direct contradiction to his obiter in the previous case, that "until there is some legislative proviso as to the carrying-out of the treaty, the Court is helpless to give effect to its provisions": at 1071.

25 *Public Trust v Loasby* (1908) 27 NZLR 801 (SC) at 804.

26 At 804.

27 At 809.

28 At 807.

29 At 805.

30 At 806.

presented as reflecting the legal position as to the role of tikanga in New Zealand.³¹ In fact, in *Ellis*, the *Loasby* "traditional incorporation rules", under which tikanga was to be proved the same way as foreign law, were regarded as so concrete that the majority went to the effort to expressly overrule them.³² But the *Loasby* approach was not necessarily representative of wider colonial jurisprudence. The *Loasby* test does not seem to have been used in any of the Supreme Court cases in which "Native custom" was pleaded in the following years.³³ The earliest case we can find which refers to *Loasby* in relation to Māori was heard in 1940,³⁴ and the *Loasby* "test" was not relied upon at all until the advent of *Huakina Development Trust v Waikato Valley Authority* in 1987.³⁵ *Loasby* thus may not have been regarded as an authority for the law on custom recognition in its own time. Even more concerning, cases such as *Willoughby* and *Te Rangi*, discussed below, employ very different approaches to Māori law despite hailing from the same historical period as *Loasby*.

With this article, we hope to demonstrate that there are untapped reserves of historical cases, like *Reynolds*, with much to offer the storytelling project currently taking place. The cases we have chosen to discuss demonstrate a complex and significant range of treatments of tikanga in settler courts, providing rich material for discussions of the historical relationship Pākehā and Māori law. Crucially, they also suggest the presence of a wider body of related case law still waiting to be uncovered.

IV THE CONTEXT OF THE COLONY: 1860 TO 1900

While revelatory in terms of jurisprudence, the cases discussed in this article are, from a historical standpoint, largely unsurprising. The further in the past a historical judgment becomes, the more the doctrine it is cited as authority for becomes removed from its historical context. However, it should not be forgotten that the creation of law is irrevocably linked with its political, economic, social, cultural and geographical context. Early colonial judges were constrained by the material needs of the parties before them, the resources that they had access to, the administrative support provided by other colonial institutions and the shifting political landscape about them.

The era in which the cases discussed in this article came about was one occupied by a very small legal profession and a large Māori population. Frederick Chapman was the first New Zealand judge

31 *Takamore*, above n 10, at [170]; *Trans-Tasman Resources*, above n 10, at [177]; and *Ellis*, above n 10, at [92].

32 *Ellis*, above n 10, at [21], [116], [177] and [260].

33 See *R v Wharematangi*; *R v Kingi*; *R v Hirini Pita*; *Wai Keretu and Herewini Waata v Rich and Roche and Whakatane County Council*; "The Maori Abduction Case" *Auckland Star* (Auckland, 11 February 1909) at 5 <www.paperspast.natlib.govt.nz/newspapers/AS19090211.2.49>; *R v Kingi* (1910) 29 NZLR 371 (SC); "Native Marriages" *Waikato Argus* (Waikato, 19 November 1909) at 3 <www.paperspast.natlib.govt.nz/newspapers/WAIGUS19091119.2.20.6>; and "A Maori Marriage" *New Zealand Herald* (Auckland, 1 April 1911) at 5 <www.paperspast.natlib.govt.nz/newspapers/NZH19110401.2.15>.

34 *Hamilton v Tuck Brothers Ltd* [1940] NZLR 895 (Workers' Compensation Court) at 899.

35 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 215.

to have been born in the colony.³⁶ His father, Henry Samuel Chapman, the colony's first puisne judge, sailed to Aotearoa in 1843.³⁷ George Arney, Alexander Johnston, James Prendergast and Robert Stout arrived between 1858 and 1864.³⁸ The colony in which they found themselves was very much still in the throes of contested sovereignty. Further, even as Aotearoa's constitutional situation transformed, it remained in many places very much a Māori country.³⁹ All the judges discussed in this paper lived or worked through the New Zealand Wars.⁴⁰ Māori controlled autonomous regions in Te Urewera and Rohe Potae almost up until the turn of the century, and throughout the country remained selective about which cases they submitted to be dealt with by colonial officials and which they preferred to resolve internally.⁴¹ New Zealand's early jurists were likely aware of the fragility of the jurisdiction under which they acted and the resilience of te ao Māori. This context made necessary some form of accommodation between the needs and expectations of Māori claimants, and the frameworks of the English common law. Further, many of the colony's judges began their careers acting for Māori clients. It is thus unsurprising that they were familiar with tikanga or "customary law" arguments.

The reality of the decline of Māori land ownership, the Māori economy and most terribly, the Māori population itself may have been at least in part responsible for the failure to remember early tikanga developments as they might have been. Another explanation might simply be racism spurred by the decision in *Wi Parata*, which denied not only te Tiriti's legal significance and the role of tikanga in determining the law of the colony, but also the very existence of Māori law.

V EXISTING HISTORICAL SCHOLARSHIP

Some elements of New Zealand's legal history have already been traversed. Of particular importance to this article is the work of Richard Boast and Shaunnagh Dorsett.

36 Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reed, Wellington, 1969) at 48.

37 At 49.

38 At 39, 43 and 45; and "Death of Mr Justice Johnston" *New Zealand Mail* (Wellington, 8 June 1888) at 12 <www.paperspast.natlib.govt.nz/newspapers/NZMAIL18880608.2.36>.

39 Until about 1860, Māori constituted the majority population: see Ian Pool *Colonization and Development in New Zealand between 1769 and 1900: The Seeds of Rangiatea* (Springer, New York, 2015) at 15.

40 James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (2nd ed, Auckland University Press, Auckland, 2015) at 15.

41 Michael King *The Penguin History of New Zealand* (Penguin Viking, Auckland, 2004) at 222; Pool, above n 39, at 236; and Alan Ward *A Show of Justice: Racial 'amalgamation' in nineteenth century New Zealand* (eBook ed, Auckland University Press, 2013) at 189 and 222. See also Steven Webster *A Separate Authority (He Mana Motuhake), Volume I: Establishing the Tūhoe Māori Sanctuary in New Zealand, 1894–1915* (Palgrave Macmillan, Cham, 2020); and Michael Belgrave *Dancing with the King: The Rise and Fall of the King Country, 1864–1885* (Auckland University Press, Auckland, 2017).

Boast has worked through vast amounts of historical material relating to the operations of the Native Land Court, providing invaluable insight into the interaction between customary and common law in regard to property issues.⁴² Dorsett, in her book *Juridical Encounters: Māori and the Colonial Courts 1840–1852*, investigated the relationship between Māori communities and individuals and European legal institutions in the early years of the colony.⁴³ She examined the influence of "exceptionalism" during this period. Exceptionalist policy surrounded the idea that certain groups should be exempted from particular effects of the law.⁴⁴ In New Zealand, exceptionalism manifested in policies which limited the application of English law to Māori "to find some way to bring Māori to British law and to manage the problems of legal order".⁴⁵ The colony's limited judicial body faced a substantial and resilient indigenous population, allowing many disputes between Māori to continue to be governed by tikanga until the "full rigours" of English law could be applied.⁴⁶ This policy underpinned the early operations of the Magistrates' Courts, allowing enough give and take between opposing legal systems to facilitate the expansion of colonial jurisdiction into Māori communities.⁴⁷

Dorsett emphasised that exceptionalism was always intended to be temporary, "a staging post on the way to social and legal assimilation".⁴⁸ Two of the cases discussed in this article, *Hoanui Heikei and Hone v Hoterene Taipari* and *R v Fetzer*, suggest that such assimilation had not been completed by the turn of the century. In both cases, Pākehā judges deferred to tikanga in resolving inter-Māori disputes, much as they did in the Magistrate cases featured in Dorsett's work.

Dorsett showed that tikanga-based rules and procedures were very much part of the early operations of the colonial courts, while Boast revealed how customary principles were dealt with by the Native Land Courts. Both our initial sweep of materials available online, and preliminary search of the archives, suggests a need for similar historical research focusing on the ordinary courts from the 1860s through to 1920. This is an area on which little work has been done but which constitutes a pivotal chapter in New Zealand's legal history.

42 See for example Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008); and Richard Boast *The Native Land Court 1862–1887: A Historical Study, Cases, and Commentary* (Brookers, Auckland, 2013).

43 Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts 1840–1852* (Auckland University Press, Auckland, 2017).

44 At 29.

45 At 29.

46 At 53.

47 At 52.

48 At 52.

VI THE BOUNDARIES OF THIS STUDY

We have chosen the following cases as examples of the variety of ways in which tikanga claims were made and adjudicated before the courts. The point is not that these cases show that tikanga was always treated as dispositive. Our aim is rather to allow insight into a body of jurisprudence and case law which perhaps is much wider and more complex than is currently understood. These cases feature a range of reactions to tikanga arguments. *Reynolds* and *Te Rangi* clearly use tikanga to determine whether or not rights and liabilities had been established. *Willoughby* demonstrates a remarkable, and perhaps unexpected, judicial engagement with tikanga in regard to how it may apply to different kinds of property. *Hoanui Heikei* essentially constitutes the enforcement of a legal argument based on utu and is an example of the numerous late-19th century Resident Magistrates Court cases in which tikanga was directly applied. Lastly, while the judge in *Mangakahia* refused to consider tikanga as part of his decision-making framework, he did so in terms which appeared to recognise the existence and integrity of Māori law. The lines between these different treatments of tikanga are not distinct. Most of the "tikanga authorities" can be read as involving several methods of incorporation. Ultimately, the cases demonstrate differing and experimental approaches to resolving conflicts between customary and common law.

Lastly, we have focused on criminal and private law matters, as colonial jurisprudence regarding issues of descent and native title is the subject of an existing body of robust scholarship.⁴⁹

Importantly, we are not purporting to make any claims as to the historical or contemporary nature of tikanga Māori. There are a number of current projects concerning the operation and proper administration of Māori law.⁵⁰ We are not qualified to speak to those issues. Our concern is with colonial law, with how Pākehā institutions dealt with what was *presented* as Māori custom. Discussion of Māori custom by lawyers, judges and witnesses should not be taken as evidence of any principles or rules of tikanga. The cases below are instead evidence of the common law response to what was understood by Pākehā to be "Māori custom", regardless of how accurate that understanding was.

49 See for example the work of Boast, above n 42; RP Boast "The Omahu Affair, the Law of Succession and the Native Land Court" (2015) 46 VUWLR 841; RP Boast "The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891–1912" (2014) 12 NZJPIL 82; and John William Tate "Pre-Wi Parata: Early Native Title Cases in New Zealand" (2003) 11 Waikato L Rev 12.

50 See the ongoing project led by Māmari Stephens, Dr Carwyn Jones, Paul Meredith and Tai Ahu: Te Rauhi i te Tikanga – A Tikanga Companion. Information about that project can be found at Michael & Suzanne Borrin Foundation "Te Rauhi i te Tikanga – A Tikanga Companion" <www.borrinfoundation.nz>.

A Reynolds v Tuangau

1 *Haimona Tuakau and James Reynolds*

The story of Tuakau, who appeared as the defendant in the case, is central to *Reynolds*. He remains a largely mysterious historical figure, though aspects of his life and character can be garnered from the recollections of various gold prospectors on the West Coast.

It seems likely that Tuakau was born on Te Ika-a-Maui.⁵¹ Accounts of his early life are conflicting, but it is likely that he was born in Hawke's Bay and became part of the "household" of Chief Te Rauparaha as a youth.⁵² He then moved down the country, ending up in Port Levy where he reportedly got in with a group of "trouble-makers".⁵³ One obituary notice suggests that Tuakau underwent a change of character following his move to the gold fields of the West Coast, eventually becoming a lay reader for the West Coast and Church Warden at the Māori Church of St Paul in Arahura.⁵⁴

Some sources describe him as having spent time on whaling boats in his youth.⁵⁵ One prospector, William Martin, seems to have grown close to Tuakau and his wife at the time, Patahi, while staying at their whare on the Hohonu.⁵⁶ Martin wrote that Tuakau was kidnapped and kept aboard a whaler as a boy.⁵⁷ While other sources suggest this version of events is unlikely, Tuakau was certainly reported as being "a very good man in a boat".⁵⁸

One particular incident, a fatal boat accident in 1863, seemed to impress witnesses with the strength of his character. A group of prospectors, along with Tuakau and another Māori referred to as

51 Arthur Dobson *Reminiscences of Arthur Dobson, Engineer, 1841–1930* (Whitcombe and Tombs, Auckland, 1930) at 64; and "Obituary notice" *NZ Church News* (New Zealand, August 1890) at 11.

52 "Obituary notice", above n 51.

53 "Obituary notice", above n 51.

54 "Obituary notice", above n 51; and "Meeting of Parishioners of All Saints' Church, Hokitika" *West Coast Times* (Hokitika, 13 October 1875) at 2 <www.paperspast.natlib.govt.nz/newspapers/WCT18751013.2.8>.

55 Dobson, above n 51, at 61 and 64; and William Martin "A Pioneer's Reminiscences by William Martin, Papatowai 1863", Hocken Collections, MS-0205 at 41.

56 Martin, above n 55, at 33. Patahi's story appears to be as fascinating as her husband's: see Martin, above n 55, at 37–40; and WM Martin "A Pioneer's Birthday Story" in Carl Pfaff (ed) *The Diggers' Story: Tales and Reminiscences of the Golden Coast* (Wright and Carman, Wellington, 1914) 93 at 97.

57 Martin, above n 55, at 41.

58 Dobson, above n 51, at 61.

Solomon, launched the *Wild Wave* near the mouth of the Grey River.⁵⁹ The schooner capsized. While several of the prospectors drowned, Tuakau managed to swim to shore. Arthur Dobson recorded that after reaching the shore, Tuakau swam back to the boat to collect his swag and "was not in the least discomposed".⁶⁰ William Sherrin reported that "All the men lost their presence of mind with the exception of Simon [Tuakau], who was brave, cool, and collected, all the time that he was within speaking distance of me".⁶¹

Tuakau's discovery of pounamu on the Hohonu is also part of the story of West Coast gold. According to Pākehā reports and evidence provided in *Reynolds*, Tuakau and Samuel Iwipau found gold beneath the very pounamu around which the case revolved.⁶² The discovery seems to have been contemporaneous with others made in the area by Pākehā prospectors.⁶³ However, some, including Martin, have attributed the outset of the gold rush south of the Buller District to Tuakau and Iwipai.⁶⁴

Notably, considering his involvement in the courts and his relationships with various Pākehā actors, Tuakau was reported to have a limited understanding of English.⁶⁵

The extent to which the lives of Tuakau and his wife changed following his success in *Reynolds* is unclear. He was certainly enough of a prominent figure in the 1860s to correspond with Governor Grey and to receive a gift of preserved birds from him.⁶⁶ Patahi seems to have passed away in 1874,

59 Report of William Sherrin in "Fatal Accident on the West Coast" *The Press* (Christchurch, 2 November 1863) at 3 <www.paperspast.natlib.govt.nz/newspapers/CHP18631102.2.14>; and Dobson, above n 51, at 60 and 61.

60 Dobson, above n 51, at 63.

61 "Fatal Accident on the West Coast", above n 59, at 3.

62 "James Reynolds v Simon Tuangau" *West Coast Times* (Hokitika, 9 August 1866) at 2 <www.paperspast.natlib.govt.nz/newspapers/WCT18660809.2.7.1>.

63 "The West Coast Gold Fields" *The Press* (Christchurch, 14 May 1864) at 2 <www.paperspast.natlib.govt.nz/newspapers/CHP18640514.2.10.2>; and "Gold Diggings at the Grey" *Nelson Examiner and New Zealand Chronicle* (Nelson, 12 July 1864) at 5 <www.paperspast.natlib.govt.nz/newspapers/NENZC18640712.2.25>.

64 WA Taylor *Lore and History of the South Island Maori* (Bascands, Christchurch, 1950) at 177; Peter James Quinn "A Digger's Legacy" *New Zealand Geographic* (September–October 2014) <www.nzgeo.com>; and Martin "A Pioneer's Birthday Story", above n 56, at 95. See also Reuben Waite *A Narrative of the Discovery of the West Coast Gold-Fields* (J Hounsell, Nelson, 1869) at 11; Waratah *Tales of the Golden West: Being Reminiscences of Westland from its Settlement by Gold-Seekers and Traders* (WHS Hindmarsh (ed), Whitcombe and Tombs, Christchurch, 1906) at 40; and Len Richardson *People and Place: The West Coast of New Zealand's South Island in History and Literature* (ANU Press, Canberra, 2020) at 23.

65 Martin, above n 55, at 37; "James Reynolds v Simon Tuangau", above n 62, at 2.

66 "Letter to the Te Kawana written at Hokitika", Auckland Libraries Heritage Collections, GNZMA-306. The connection between Tuakau and the Governor is likely through Tuakau's connection to Julius Brenchley who

and in 1890, Archdeacon Cholmondeley expressed "the loss sustained by the Maoris of this diocese by the death of Haimona Tuangau" and "its appreciation of the wholesome influence exercised by him during many years of a good Christian life".⁶⁷ Neither Tuakau's nor Patahi's wills feature any mention of the pounamu. These wills suggest that Tuakau was, by the end of his life, a wealthy figure, and that the stone had been sold.

Tuakau's life thus spanned numerous aspects of Aotearoa's colonial history. Although his legal affairs are of considerable importance to contemporary New Zealand law, his story has much broader historical significance and interest.

Much less can be gleaned about James Reynolds, the plaintiff in *Reynolds*. According to obituary notices, he was likely employed as a railway guard and stationmaster for 38 years and died in Wellington in 1926.⁶⁸ He did not appear to have made his fortune in gold and, considering the value of the pounamu in the case, the outcome of *Reynolds* could have been a transformative event in his life.

2 The case

Sometime in 1864, Tuakau, Patahi (referred to as "Betsy" in the proceedings) and Iwipau discovered the pounamu in Greenstone Creek, a branch of the Hohuna.⁶⁹ They worked the stone in the place they found it over a period of months, leaving it in the care of various people during this time.⁷⁰ By December 1865, Reynolds had "discovered" and begun working on the stone, despite being told it was the property of Māori in the area.⁷¹ That month, William Revell, Warden and Resident Magistrate at Greymouth, visited the area and communicated with Reynolds, telling him that the

travelled to New Zealand with naval officer Herbert Meade: see "Letter to Sir George Grey" (9 August 1865) Auckland Libraries Heritage Collections, GL-B60.

67 "To the Editor of The Wananga" *Te Wananga* (New Zealand, 2 October 1875) at 258; and "Diocesan Synod" *The Star* (Christchurch, 24 October 1890) at 1 <www.paperspast.natlib.govt.nz/newspapers/TS18901024.2.3>.

68 "Obituary" *Greymouth Evening Star* (Greymouth, 24 September 1926) at 3 <www.paperspast.natlib.govt.nz/newspapers/GEST19260924.2.12>; and "Wellington District Notes" *The New Zealand Railways* (Wellington, 15 December 1926) at 92.

69 "James Reynolds v Simon Tuangau", above n 62, at 2; Martin "A Pioneer's Birthday Story", above n 56, at 95.

70 "James Reynolds v Simon Tuangau", above n 62, at 2.

71 "Supreme Court—Westland District", above n 3, at 2.

pounamu was "the property of the Maoris, and he was not to touch it".⁷² Eventually, the parties met and Tuakau asserted his ownership of the stone, refusing Reynolds' offers to break it up.⁷³

Reynolds later returned to the stone and found it "without anyone in possession".⁷⁴ By this time, the pounamu rested beneath boulders in the creek. Allegedly, Reynolds believed that the boulders had been placed so by the flow of water rather than by any human agency.⁷⁵ In March 1866, he broke the pounamu into pieces and sent them in bags from the Teremakau.⁷⁶

The procedural background of *Reynolds* is briefly outlined above. The legal dealings between the parties began with Tuakau laying criminal information against Reynolds with the resident Warden in Greymouth, presumably upon finding the pounamu gone from the creek.⁷⁷ Reynolds was arrested under a warrant issued by the Magistrate and committed for trial.⁷⁸ However, the summons issued to him was incomplete and contained inaccuracies.⁷⁹ Consequently, the case was no-billed.⁸⁰ Despite the dismissal of the charge against him, Reynolds did not recover the pounamu. Subsequently, he brought a civil case to the Supreme Court for the tort of detainee, attempting to reclaim it.⁸¹

The Supreme Court case concerned the law of finders. Under English common law, the finder of a chattel obtains a title to it, good against all persons except its original owner.⁸² Unless the original owner is shown to have intentionally abandoned the chattel, their title to it remains.⁸³ Reynolds' case

72 "Wednesday, August 8" *West Coast Times* (Hokitika, 9 August 1866) at 3 <www.paperspast.natlib.govt.nz/newspapers/WCT18660809.2.7.2>.

73 "James Reynolds v Simon Tuangau", above n 62, at 2.

74 "Supreme Court—Westland District", above n 3, at 2.

75 "James Reynolds v Simon Tuangau", above n 62, at 2.

76 "Supreme Court—Westland District" above n 3, at 2.

77 At 2. A plaintiff could commence proceedings in the Magistrate's Court by submitting a plaint in writing. It appears that Tuakau laid such a plaint with the Magistrate at Greymouth: see Alexander James Johnston *The New Zealand Justice of the Peace, Resident Magistrate, Coroner and Constable* (2nd ed, Government Printer, Wellington, 1870) at 280.

78 "Supreme Court—Westland District" above n 3, at 2. If a defendant was issued a summons to attend a hearing, a Magistrate could issue a warrant directed to a bailiff or constable to apprehend them and bring them to the Court. These are possibly the grounds upon which Reynolds was arrested: see Johnston, above n 77, at 296; and Lowther Broad *The New Zealand Magistrates' Court Guide: A Handbook* (2nd ed, Bond, Finney and Co, Nelson, 1891) at 52.

79 "Supreme Court—Westland District" above n 3, at 2.

80 At 2.

81 At 2.

82 RL Fisher *Laws of New Zealand Finding of Chattels* (online ed) at [15].

83 At [13].

rested upon the contention that Tuakau, as the original owner, had abandoned the pounamu. Tuakau's case was that he had not. Counsel for Tuakau, Mr Harvey, argued that in accordance with customary law, Tuakau had placed a "tapoo" on the pounamu and had thus never relinquished ownership of it.⁸⁴

Harvey, addressing the jury, claimed that "the present was one of those particular cases which do not arise in any place except New Zealand".⁸⁵ He declared that he would bring evidence of "the custom among Maoris as to the rights of finders".⁸⁶ Despite the protestations of counsel for Reynolds, Gresson J determined that this evidence "could be admitted in an English court of law".⁸⁷ Local chief Waita Tainui provided authority on customary finders law, deposing:⁸⁸

If a man found greenstone the same as Simon did, it belonged to the finder. It would be considered to belong to him though he went away and left it. That is the native law.

Interpreter Francis Harris, who had been "amongst the natives twenty-seven years" further, explained:⁸⁹

If a canoe were found unoccupied and with no mark on it, the finder could keep it whether marked with the owner's name or not, although, if he left only a wisp of grass as a mark, it could not be touched.

He identified this practice as "that extraordinary institution, 'Tapoo'".⁹⁰ However, he seemed to be unsure of the customary legal position if a mark placed on an object was later washed away. He concluded:⁹¹

If the person had put a mark on the property, and the same was obliterated by the action of the water—if the finder knew it had been marked, I think he would still have a right to it.

84 "Wednesday, August 8", above n 72, at 2. Mr Harvey was likely George Harvey, who later became a District Judge: Katherine Blakeley "M. P. Harvey" NZ History <www.nzhistory.govt.nz>; and "Obituary, Ex-District Judge Harvey" *Lyttelton Times* (Lyttelton, 21 November 1889) at 6 <www.paperspast.natlib.govt.nz/newspapers/LT18891121.2.55>.

85 *James Reynolds v Simon Tuangau*, above n 62, at 2.

86 At 2.

87 At 2.

88 "Wednesday, August 8", above n 72, at 3.

89 At 3.

90 "James Reynolds v Simon Tuangau" *West Coast Times* (Hokitika, 10 August 1866) at 2 <www.paperspast.natlib.govt.nz/newspapers/WCT18660810.2.7>.

91 "Wednesday, August 8", above n 72, at 3; and "James Reynolds v Simon Tuangau", above n 90, at 2.

Patahi deposed that upon finding the pounamu and moving it to the bank of the creek, they had covered it with branches weighed down with stones.⁹² Another witness, Frederick Chappell, stated that in March of 1866, he saw Tuakau place stones on the pounamu which were later removed by the water of the creek.⁹³ Harvey argued that by placing timber upon it (likely in reference to Patahi's evidence), Tuakau had "tapoo-ed" the pounamu.⁹⁴ Therefore, it could not be regarded as having been abandoned by him, whether or not the covering was later washed away.⁹⁵ In any event, neither of the jury trials seemed to provide a finding on whether the stone had been marked when Reynolds returned to it in March of 1866.

Mr South, counsel for Reynolds, argued: "for a European to be bound by an old custom like the tapoo, would be a most monstrous proposition".⁹⁶ However, in summing up, Gresson J did not direct the jury as to the weight they should place on the evidence brought as to custom, declaring that whether abandonment was shown "was a conclusion that must be arrived at from the evidence adduced".⁹⁷

Ultimately, two jury trials left the issues undecided. At the second, the jury provided a special verdict setting out their determination of some of the facts, including that until its discovery by Reynolds, Tuakau "did no act showing an intention to abandon the stone".⁹⁸ However, they left the final verdict to the judge and the case was sent to the Court of Appeal.⁹⁹ All that can be gathered about the Court of Appeal decision is that Johnston J, in delivering judgment, rejected Reynolds' argument that the pounamu had been abandoned by Tuakau on the basis that "the jury have found to the contrary that he did not abandon it".¹⁰⁰ Judgment was thus given for Tuakau. We are therefore left without a judicial statement as to whether the tapu "placed" on the stone was, in the end, determinative of ownership.

Harvey claimed that in discussing customary practice, he "merely wished to elicit evidence as to any indication or otherwise of an intention to abandon the greenstone".¹⁰¹ Gresson J similarly

92 "Wednesday, August 8", above n 72, at 3.

93 "James Reynolds v Simon Tuangau", above n 90, at 2.

94 At 2.

95 At 2.

96 "James Reynolds v Simon Tuangau", above n 90, at 2.

97 At 2.

98 "Court of Appeal", above n 3, at 6.

99 At 6.

100 "Reynolds v Symons", above n 7, at 6.

101 "Wednesday, August 8", above n 72, at 3.

professed to admit this evidence "as an indication to negative presumption that the property in the stone had been abandoned".¹⁰² However, with the advent of Tuakau's success at the Court of Appeal, the effect of the "tapoo" argument was debatably broader than Harvey and Gresson J were willing to admit. The evidence as to the tapu placed upon the pounamu effectively shaped the application of English finders law. The question before the jury was not merely whether there was evidence of abandonment, but whether it was shown that a tapu, a customary mark of ownership to be respected by Māori and Pākehā alike, had been properly "placed". We do not know the extent of the importance of the customary law issue to the final ruling. However, we do know that Tuakau's claim to the stone was upheld and, thus, that the tapu he had placed was affirmed in the colonial courts.

Reynolds provides rich material for discussions of legal pluralism. Precepts of tikanga were brought into direct jurisprudential contact with those of the common law. The final ruling can be read in two ways. The special verdict and Court of Appeal decision could merely show that general contextual evidence dispelled any presumption of abandonment. Conversely, it is arguable that the interaction between customary and English rules resulted in a modified law: the common law of finders yielded to tikanga practices surrounding ownership, allowing the latter to have functional expression. Either way, the resemblance of *Reynolds* to the attempts of 21st century jurists to find balance between common and customary law is striking. Both are evidence of the struggle of legal professionals to navigate a culturally pluralist society by negotiating between two systems of law.

Interestingly, *Reynolds* is not the only finders law case which raised issues of custom. *McFadyen v Wineti*, a 1908 Supreme Court case better known than *Reynolds*, concerned the same questions of customary ownership.¹⁰³ In that case, a log of totara had been found by Wineti who had marked it with his initials. It was later taken from where Wineti had left it and cut into posts by McFadyen. It was held that by marking it with his initials, Wineti had "so appropriated the log as to make it his own".¹⁰⁴ Chapman J noted that "Native witnesses said that natives who are the principal inhabitants of that part of the river respect such marks".¹⁰⁵ Despite the parallels in the cases and the notoriety of *Reynolds* 50 years previously, no reliance was placed upon it in *McFayden*.¹⁰⁶ This suggests that

102 At 3.

103 *McFadyen v Wineti* (1908) 11 GLR 345 (SC). For example, this case is part of the reading list for first year courses at Te Herenga Waka—Victoria University of Wellington law school.

104 At 346.

105 At 346.

106 In addressing the Jury, Harvey commented that "The plaintiff must have been the only man in New Zealand who had not heard of the discovery; even he ... had heard of it in Dunedin": see "James Reynolds v Simon Tuangau", above n 90, at 2. Further, the case was reported in newspapers across the colony: see "Latest Telegrams" *The Press* (Christchurch, 9 August 1866) at 2 <www.paperspast.natlib.govt.nz/newspapers/CHP18660809.2.9>; "Latest Telegrams" *Lyttelton Times* (Lyttelton, 11 August 1866) at 3

either *Reynolds* had been lost by this point or, if remembered at all, was not regarded or represented as concerning enforcement of tikanga. Ultimately, the absence of *Reynolds* until its inclusion in *Smith* has prevented the study of a unique strand of law in Aotearoa New Zealand.

B Hoanui Heikei and Hone v Hoterene Taipari

Hoanui Heikei was an 1873 Thames Resident Magistrate civil case.¹⁰⁷ It was heard before Warden Frazer (or Fraser) and an unnamed Native Assessor.

The office of the Native Assessor was a creation of Governor George Grey.¹⁰⁸ Native Assessors were usually local rangatira, chosen to sit on Magistrates' Courts around the colony to encourage Māori to bring their disputes before the courts.¹⁰⁹ In this case, the Native Assessor, or Kai Wakawa Māori (Māori magistrate), provided the determinative judgment.

The facts of the case, as well as its outcome, can be found in contemporary newspaper reports.¹¹⁰ Taipari had found his wife, Wikitoria, in Heikei's "tent".¹¹¹ According to *The Evening Post*, Taipari had demanded utu and was persuaded by Heikei's wife to take her husband's "canoe", in which Hone also had a share. Heikei and Hone brought the case to the Magistrate's Court in Thames, claiming the value of the boat. Under cross-examination, Hoanui had admitted that under "native custom", the taking of the property was justified. Frazer gave judgment for Taipari, based on the Assessor's analysis of the facts and the applicable "native custom" or tikanga.

<www.paperspast.natlib.govt.nz/newspapers/LT18660811.2.14>; and "Court of Appeal" *The Evening Post* (Wellington, 25 October 1866) at 2 <www.paperspast.natlib.govt.nz/newspapers/EP18661025.2.9>.

107 "Maori Habits and Customs", above n 12, at 3. Note about the Resident Magistrate's Court proceedings: s 2 of the Resident Magistrates' Courts Act 1858 declared that "Every Resident Magistrate shall have all such powers, unless otherwise specially provided, as now are, or hereafter may be, exercised by any two Justices of the Peace". Many of the powers held by Magistrates can thus be found in the legislation governing the office of the Justices of the Peace. The Justices of the Peace Act 1858 brought into force in the colony Imperial legislation which governed the office of the Justice of the Peace in England. Many of the powers and jurisdiction of Justices of the Peace in the colony are contained within these Acts. We have therefore relied on some of the Magistrates Handbooks available in the colony in the 19th century instead of these various pieces of legislation. These contain comprehensive information on the procedures of the Magistrates' courts.

108 Dorsett, above n 43, at 244.

109 At 254–256.

110 "Maori Habits and Customs", above n 12, at 3; and "Tuesday, October 21, 1873" *The Evening Post* (Wellington, 21 October 1873) at 2 <www.paperspast.natlib.govt.nz/newspapers/EP18731021.2.5>.

111 "Tuesday, October 21, 1873", above n 110, at 2.

Significantly, a report of the Assessor's judgment appears in an issue of *The Evening Post*. This judgment describes, and applies, the Māori law surrounding adultery, taua and muru. The Assessor explained:¹¹²

If a person caught the wife of another person committing adultery, he would tell the husband of the wife, and as soon as he heard it he would cause an attack to be made at once by the war party on the settlement of the man who had committed the crime, and it would entirely rest with the husband of the wife whether he would kill the man or not. If he took possession of property instead, the guilty parties would be thankful (or glad), and the man himself would be safe. They would not say a word. That would be a correct way of getting possession of anything according to Maori custom. ... With regard to Whakahu giving the canoe, if it is correct that she gave the canoe at that time, although three or four people might have shares in the said canoe, it was one of their party who gave it up as payment for the offence of their companion. That is a correct act of giving according to Maori custom, and the husband of the woman could not be able to raise any objection, or any other of them who might have a share in it.

Frazer's ruling in this case led one newspaper to claim that he had "proved himself a dangerously incompetent Magistrate" and that "unless his services are forthwith dispensed with, or he is removed to a less responsible post, he is very likely to involve the Colony in serious disaster".¹¹³ However, this episode did not appear to result in his removal as Magistrate.¹¹⁴ The criticism his conduct attracted perhaps calls to mind Audrey Young's 2022 claim that the *Ellis* case had been "hijacked" with tikanga principles.¹¹⁵ Responses to both cases are reminders of the political and cultural tensions which can surround legal developments in this area, regardless of whether or not they are unremarkable in legal policy or precedent frameworks.

Hoanui Heikei can be regarded either as an imposition of the exceptionalist legal policy which guided the activities of the Magistrates' Courts throughout the earlier colonial period or as an amalgam of Pākehā and Māori law. On either reading, it constitutes a significant legal development.

First, *Hoanui Heikei* seems to be an example of an exceptionalist ruling. The litigants were enabled to resolve their dispute within a tikanga framework, rather than a common law one. After giving judgment, Frazer undertook to pay a portion of the case's costs, "in order to encourage Maoris to submit their disputes to English Courts of Law for settlement".¹¹⁶ This suggests the presence of the

112 At 2.

113 "Wednesday, October, 22, 1873" *The Evening Post* (Wellington, 22 October 1873) at 2 <www.paperspast.natlib.govt.nz/newspapers/EP18731022.2.4>.

114 Frazer was reported to hold the same position in 1875: see "Telegraphic News" *New Zealand Times* (Wellington, 13 February 1875) at 4 <www.paperspast.natlib.govt.nz/newspapers/NZTIM18750213.2.27>.

115 Audrey Young "Peter Ellis case: Supreme Court's audacious decision on tikanga" *The New Zealand Herald* (online ed, Auckland, 10 October 2022).

116 "Tuesday, October 21, 1873", above n 111, at 2.

policy considerations which Dorsett has shown to underlie the operations of the Magistrates' Courts in the first decades of the colony, namely a desire to bring Māori within the ambit of colonial jurisdiction. In this way, the case suggests that the colony bore a quasi-dual legal system as late as the 1870s, under which Magistrates would administer either the common law or customary law, depending on the parties before them.

This case could also be regarded as involving a tikanga-based modification of common law rules, as in *Reynolds*. The *Daily Southern Cross* described the ruling in *Hoanui Heikei* as "chiefly remarkable for a blending of English law and Maori custom".¹¹⁷ In a way, the ruling involved a convergence of the common law of gifts and the Māori law of muru or utu.

However, as a Magistrate's Court decision, this case should be understood as the result of continuing jurisdictional negotiation between Pākehā and Māori politics, rather than the integration of tikanga into the common law. Even as an exceptionalist ruling, the comments of contemporary newspapers show that it was not without controversy. Regardless of its underlying political dynamics, it is an example of tikanga playing an operative and explicit role in the Magistrates' Courts well into the 19th century. Further, the judgment of the Native Assessor, as a tikanga-based analysis of a civil case in a colonial court, is a remarkable historical text. Unlike many historical judgments, it does not constitute a common law interpretation of customary principles. It instead expresses an indigenous perspective.

C R v Fetzer

The 1900 Court of Appeal case *R v Fetzer* provides similar evidence of the impact of tikanga in the colonial courts. *Fetzer* concerned a charge of mischief in wounding a horse.¹¹⁸ It is significant because it contains a report of *R v Te Rangi Huia Ruka*, an 1898 criminal jury trial presided over by Prendergast CJ.¹¹⁹ Although the report of *Te Rangi* as contained in *Fetzer* uses the language of "prosecutor" and "prisoner", the Crown served as prosecutor.¹²⁰ In *Te Rangi*, the "accused", Ruka, and the "prosecutor", Walter Cribb, were jointly interested in a piece of land on the Whanganui River.¹²¹ Ruka had fenced an area of the land, which he then cultivated. Cribb's cattle had, on multiple occasions, escaped into this area, damaging the crops there. Ruka shot the animals and subsequently wrote to Cribb to inform him of what had happened. Ruka was found not guilty of mischief in shooting

¹¹⁷ "Maori Habits and Customs", above n 12, at 3.

¹¹⁸ *Fetzer*, above n 13.

¹¹⁹ At 439–440.

¹²⁰ "Wilful Damage" *Wanganui Chronicle* (Whanganui, 5 October 1898) at 2 <www.paperspast.natlib.govt.nz/newspapers/WC18981005.2.35>.

¹²¹ *Fetzer*, above n 13, at 439.

the bullocks, having "an honest and reasonable belief" that he was justified in doing so, which entitled him to an acquittal under the Criminal Code Act 1893.¹²²

According to Stout CJ in *Fetzer*, *Te Rangi* was determined on the basis of "Maori custom":¹²³

It was proved that according to Maori custom "the thing that does the injury should be injured too". On that evidence being given, and seeing that this was a dispute among Maoris, the land and bullocks both being Maori, the then Chief Justice (4th of October, 1898) left it to the jury to say whether the prisoner had an honest and reasonable belief that he was justified in shooting the cattle, and directed them that they must find both an honest and reasonable belief before they could acquit.

In *Fetzer*, Stout CJ distinguished *Te Rangi* from the case before him on the grounds that in *Te Rangi*, the "element of Maori custom in dealing with Maori land and Maori animals came in".¹²⁴ He further explained that although the report of *Te Rangi* did not contain a discussion of "Maori custom", this element of the case was "carefully noted in his Honour's notebook".¹²⁵

We have located the notebook to which Stout CJ referred. It does indeed record evidence given as to tikanga. After recording the facts of the case as explained by Walter and Frederick Cribb, Prendergast CJ wrote in his notebook: "Wife says custom amongst Maori, [?] that the thing that does the injury should be injured too".¹²⁶

In many ways, Prendergast CJ's alleged directions in *Te Rangi* resemble the ruling in *Hoanui Heikei*. In both cases, the rights and responsibilities that parties understood themselves to have under tikanga were determinative in resolving a dispute. However, there are important differences. First, *Te Rangi* was heard almost 30 years after *Hoanui Heikei*. Secondly, it was a Supreme Court case. Thus, *Te Rangi* was not a case in which tikanga was explicitly enabled to resolve an inter se dispute under a policy of exceptionalism. Instead, it seems to be a case in which customary legal concepts were influential in the administration of colonial criminal law. This phenomenon can be seen in numerous 19th century cases.

For example, in 1847, in *R v Rangitapiripiri*, discussed in *Juridical Encounters* and in *He Poutama*, the circumstances in which pounamu earrings would be removed and given away were

122 At 439; and Criminal Code Act 1893, s 307 (2). Section 307(2) provides: "Nothing shall be a crime under any provision contained in this Part unless it is done without legal justification or excuse, and without colour of right."

123 *Fetzer*, above n 13, at 441–442. A similar "local custom" was described in *R v Wi Noka*, an 1881 Supreme Court trial: see "Supreme Court" *New Zealand Mail* (Wellington, 6 April 1872) at 6 <www.paperspast.natlib.govt.nz/newspapers/NZMAIL18720406.2.17>.

124 *Fetzer*, above n 13, at 442.

125 At 442.

126 "Judge Prendergast" (1896–1898), Archives New Zealand, AAOM W3842 R12727556 at 176–178.

discussed in cross-examination.¹²⁷ In *R v Hori* in 1863, the defendant had been found in possession of items belonging to a man he had allegedly murdered.¹²⁸ Central to the case was the presumption that someone found in possession of stolen articles was responsible for the circumstances under which they were taken.¹²⁹ Hori attempted to rebut this presumption, arguing that it was inapplicable as he had been given the items by someone else, according to customary practice.¹³⁰ Hori was ultimately convicted and sentenced to death.¹³¹ However, the tensions between customary and common law which emerged in the case demonstrate the immediacy of the problem of legal plurality before the judiciary. In 1882, at a Magistrate's Court, six Māori were charged with damaging a schooner which had been stranded on their land.¹³² They were discharged with a caution after arguing that under Māori custom, anything washed ashore is the property of the person owning the land where it is found.¹³³

In these cases, as in *Te Rangi*, tikanga did not modify colonial criminal law but rather framed the extent of the defendants' culpability in the eyes of the judges. Unlike *Reynolds*, these cases do not provide possible evidence for a merged or plural legal system. Instead, they show that the continuing force of *te ao Māori* in indigenous communities forced Pākehā jurists to find measures of compromise in the administration of criminal law. To have excluded consideration of the sorts of practices and rules advanced in *Te Rangi* and *Hori* would have risked absurdity. Tikanga could be dismissed or

127 "Supreme Court Sitings" *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 4 December 1847) at 2 <www.paperspast.natlib.govt.nz/newspapers/NZSCSG18471204.2.4> per witness Tangaru ("... the natives are not in the habit of taking the greenstone out of their ears except to give to their children; sometimes they take the greenstone out of their ears and carry it in a basket"); and Dorsett, above n 43, at 83–91.

128 "Supreme Court—Taranaki" *Daily Southern Cross* (Auckland, 1 August 1863) at 9 <www.paperspast.natlib.govt.nz/newspapers/DSC18630801.2.37>.

129 "Supreme Court—Taranaki", above n 128, at 9 per Arney CJ ("... if a man is found in the possession of articles, shortly after they are stolen, the presumption of law is, that they were stolen by the party in whose possession they are so found, with this additional principle that it is also presumed he came by them under the circumstances attending the taking of them").

130 "Supreme Court—Taranaki", above n 128, at 9 per Hori ("...property taken from the dead man is not kept by the man who takes it, but is given to one of his near relations, to cause him to be brave in war").

131 "Supreme Court—Taranaki", above n 128, at 9.

132 "Helensville R.M. Court" *New Zealand Herald* (Auckland, 15 February 1882) at 6 <www.paperspast.natlib.govt.nz/newspapers/NZH18820215.2.38>.

133 "Untitled" *New Zealand Herald* (Auckland, 15 February 1882) at 4 <www.paperspast.natlib.govt.nz/newspapers/NZH18820215.2.18>; and "Helensville R.M. Court", above n 132, at 6.

ignored in political forums, but a functional legal system seems to have required degrees of receptiveness, at least in regard to evidentiary matters.¹³⁴

Interestingly, *Fetzer* and *Te Rangi* seem to have come to stand as authority for the "colour of right" principle, rather than any tikanga-related point. *Fetzer* appears in a Victoria University of Wellington Law Review case note and *Te Rangi* pops up in a chapter of *Laws of New Zealand*, neither with any reference to customary law.¹³⁵ This, along with Stout CJ's matter-of-fact observations that there exist discussions of tikanga within judicial notebooks, makes *Fetzer* an exemplar of how crucial jurisprudential material can be lost and obscured over time.

Lastly, *Fetzer* demonstrates that over a decade following the supposed complete dismissal of indigenous legal capacity in *Wi Parata v Bishop of Wellington*, Māori custom continued to be cited as something that could affect the outcomes of jury trials;¹³⁶ moreover, the outcomes of jury trials presided over by Prendergast CJ, who for so long has played the part of the villain in New Zealand's legal history.¹³⁷ *Fetzer* thus calls for greater research to be done, both in uncovering forgotten authorities and in supplementing our understanding of the historical parts played by the Pākehā judiciary.

D Willoughby v Panapa Waihopi

Willoughby was heard at the Supreme Court in 1910.¹³⁸ Heni Willoughby, a Māori woman who held plots of land under various forms of title including land "acquired by exchange or by purchase" (ie under freehold), had died intestate.¹³⁹ The case was brought from the Native Appellate Court to the Supreme Court on the point of whether, if the Native Land Court found that there existed "Native custom" applicable to land held under freehold, succession to such land should be governed by that custom or by the "ordinary" law of the colony.¹⁴⁰

134 Criminal cases involving beliefs in "witchcraft" are another rich area of possible study: see Himiona Te Rua's case, "Sentence of Death Passed on Himiona Te Rua" *Te Waka Maori* (New Zealand, 2 May 1876) at 98 <www.paperspast.natlib.govt.nz/newspapers/WAKAM18760502.2.8>.

135 See "Colour of Right: R v Fetzer" (1956–1958) 2 VUWLR 257; and S McCabe *Laws of New Zealand* Death and Injury to Animals (online ed) at [42].

136 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78. In the judgment ostensibly constructed by Prendergast CJ, te Tiriti was described as a "simple nullity" because "No body politic existed capable of making cession of sovereignty, nor could the thing itself exist": see David V Williams *A Simple Nullity? The Wi Parata Case in New Zealand Law & History* (Auckland University Press, Auckland, 2013) at 107.

137 See Grant Morris *Prendergast: Legal Villain?* (Victoria University Press, Wellington, 2014).

138 *Willoughby*, above n 14.

139 At 1125.

140 At 1124 and 1129.

Stout CJ and Williams, Cooper and Chapman JJ in the majority held that succession to freehold lands or personal property of a "Native" should be in accordance with tikanga, where it was found to exist by the Native Land Court.¹⁴¹ Edwards J dissented, arguing that "Native custom" only became applicable through the will of the legislature and that:¹⁴²

Any notion to the contrary has its foundation in the vague and mischievous idea that there is a body of customary law known as "the ancient custom and usage of the Maori people", or as "Native customs and usages", which affects the rights and property of Natives.

This notion, according to Edwards J, should have "received its death-blow" with the advent of *Wi Parata* in 1877.¹⁴³

Willoughby is distinct from the cases hitherto discussed. Its significance is not that it incorporated tikanga elements into colonial law, but that each of its judgments reveals different conceptualisations of "Native custom". For example, Stout CJ seemed open to a more dynamic understanding of custom, holding that:¹⁴⁴

The mere fact that the title has been ascertained, and that it is called land in fee-simple instead of land held according to custom, is not sufficient to authorize a declaration that succession is no longer governed by Native custom.

This is a departure from his judgment in *Izard v Tamahau Mahupuku*, in which he expressed doubt as to whether customs surrounding purchased land could exist because "the purchasing of land by Maoris was unknown to the Maoris before 1840".¹⁴⁵ Williams J considered that the Native Land Court must find that there has been "throughout a continuous and uniform custom" regulating the descent of property, both personal and real before the "ordinary" law of New Zealand was to be usurped.¹⁴⁶ While imposing a high standard for the application of tikanga, this position at least recognised that indigenous customs and practices exist. In contrast, Edwards J went as far as to say:¹⁴⁷

What is really for the most part meant by those who refer to Native custom is the uncertain, varying, and unrecorded practice of the Native Land Court in the administration of the statutes under which that Court

¹⁴¹ At 1123.

¹⁴² At 1142.

¹⁴³ At 1142.

¹⁴⁴ At 1128.

¹⁴⁵ At 1127. See *Izard v Tamahau Mahupuku* (1903) 22 NZLR 418 (SC) at 424.

¹⁴⁶ *Willoughby*, above n 14, at 1132.

¹⁴⁷ At 1142.

derives its authority. That practice, unknown except in that Court itself, is not Native custom, and is of no authority either in itself or by virtue of any statute referring to Native custom.

His judgment thus amounted to a claim that "Native custom" is predominantly a fiction of the Native Land Court.

Most significant by far, however, is Chapman J's judgment. He initially expressed some sympathy for Edwards J's points, admitting that many "of the customs set up by [the Native Land Court] must have been founded with but slight regard for the ideas which prevailed in savage times".¹⁴⁸ However, he espoused a very different understanding of indigenous custom:¹⁴⁹

It is quite certain that, as to the descent of a *mere pounamu* or other weapon or ornament of a chief, the Native Land Court would, as a matter of course, treat itself as quite competent to apply Native custom, and would do so. That is a chattel which has a high value in the eyes of a Native, and a pecuniary value in the hands of a European. If a Native was found to have died possessed of bank shares or corporation debentures the Court might find a difficulty in doing so. Such things were unknown to Maoris in olden times, and are so seldom owned by them now that it is scarcely probable that customs have grown up respecting them. We cannot, however, say that no customs can be found to have grown up with respect to money and cattle, which have been owned and used by Maoris at least since the colonization of New Zealand seventy years ago, even though such property was unknown to the primitive Maoris. Intermediate between these cases are shares in co-operative dairy companies, whether incorporated or not, which Maoris would probably regard as distributable in some way in accordance with the distribution of their shares in the land from which the dairy produce came.

He continued later, "it may be argued that we cannot apply past history to land the title to which has emanated from the Crown", but concluded that "[t]hat, however, is too narrow a way of looking at the matter".¹⁵⁰ The importance of this passage is that it recognised Māori custom as a living and dynamic body of law or practice with the capacity to change and evolve with external circumstances, much like the English common law.

In light of the contemporary debate surrounding the place of tikanga in New Zealand law, it is notable that in a Supreme Court judgment, as early as 1910, tikanga was acknowledged to be an evolving and adaptive body of law or custom. Chapman J seemed to envision "Native custom" applying in a greater range of contexts than native title and descent cases. In the passage above, custom was presented as capable of governing "modern" situations, even if just within the Native Land Courts.

148 At 1149.

149 At 1151.

150 At 1154.

Further, this framing of tikanga suggests a belief in the right of Māori communities to organise at least some of their affairs within a legal framework with a grounding in their own values and norms.

Willoughby offers important insight into the legal landscape of the colony in 1910. At this time, there was no general theory of the common law in the colony. The breadth of the colony's legal jurisdiction was still being debated in the courts.¹⁵¹ There was little consistent guidance provided by the Privy Council as to what the law of New Zealand was and the extent to which it could differ from Imperial law.¹⁵² It would be remarkable if New Zealand's judiciary, lacking a clear jurisprudential framework even for English law in the colony, was in agreement as to the relationship between customary and common law. *Willoughby* is a reminder that there was no uniform approach to the treatment of tikanga in colonial legal institutions. This may be a hurdle to tidy storytelling, but it provides crucial context for the reading of cases like *Reynolds*, *Hoanui Heikei*, *Te Rangi* and *Fetzer*. Each of these cases displays elements of different treatments of tikanga, each granting different degrees of force to customary concepts. Tikanga Māori was a very real feature of the colony. It was a legal system with which the Pākehā judiciary came into frequent contact and conflict. The cases discussed in this article demonstrate different ways in which this contact played out in the colonial courts. The differing judgments in *Willoughby* are emblematic of this convoluted process.

Willoughby has much to contribute to our understanding of the historical treatment of Māori law. It is thus surprising that it has received such little attention. It features briefly in a handful of cases and articles, and in *He Poutama* as evidence of pre-1975 statutory engagement with tikanga.¹⁵³ However, Chapman J's statements as to the dynamism of custom seem to have been overlooked. *Willoughby* is another important case which, like *Fetzer*, seems to have "fallen through the cracks" of legal scholarship. *Willoughby* could very well have stood, alongside *Loasby*, as authority for colonial approaches to customary law.

151 Henry Samuel Chapman "On the Doctrine of Repugnancy in Relation to Colonial Statutes" (1854) 20 Law Mag Quart Rev Juris 1; *Robinson v Reynolds* (1867) Mac 562 (SC); and *Re the Award of the Wellington Cooks & Stewards' Union* (1906) 26 NZLR 394 (SC).

152 For example, on the point of whether a colonial legislature had extraterritorial jurisdiction, there were two contradictory Privy Council authorities: see *Macleod v Attorney General of New South Wales* [1891] AC 455 (PC); and *Attorney-General for Canada v Cain* [1906] AC 542 (PC).

153 Michael Belgrave, Tom Bennion and Grant Young *Native and Māori Legislation in the Superior Courts, 1840–1980* (Massey University School of Social and Cultural Studies, Albany, 2004) at 37; Richard M Dawson "Artificial Selection in Colonial New Zealand" (1999) 7 Waikato L Rev 73; *Mokena v Riwai Morgan Whānau Trust* [2014] Chief Judge's MB 314 (2014 CJ 314) at [32] and [58]; and *He Poutama*, above n 11. *Willoughby* is discussed more comprehensively in a 1941 New Zealand Law Journal article, though again not with reference to Chapman J's statements: see CE MacCobmick "Native Custom" (1941) 17 NZLJ 173.

VII REJECTION OF TIKANGA IN THE COURTS

In considering the "tikanga authorities" in this article, it must be borne in mind that acceptance of customary law arguments was not certain, or even the norm. There also exists a wealth of cases in which tikanga was rejected and dismissed.¹⁵⁴

One significant example in the Law Reports is *Mangakahia v New Zealand Timber Company Ltd*. This was an 1881 Supreme Court case heard by Gillies J.¹⁵⁵ The plaintiffs were the owners of a plot of land in Whangapoua, a memorial of ownership for which had been issued to them by the Native Land Court.¹⁵⁶ The defendants had constructed a railway over part of the land to transport timber to the shore.¹⁵⁷ The plaintiffs brought a claim against the company for trespass, claiming £500 in damages and an injunction.¹⁵⁸ The defendants argued that the plaintiffs did not possess an estate in the land as would support an action for trespass, the plaintiff's claim being based on title to possession, rather than possession in fact.¹⁵⁹

Gillies J held that the title held by the plaintiffs was ownership according to native custom which was "no title known to English law".¹⁶⁰ While not in possession of a piece of land *in fact*, the holder of a fee simple title under English law can rely on constructive possession to bring a case against a trespasser. Gillies J held that this incident could not attach "to an ownership according to native custom".¹⁶¹ He asserted that Native Land legislation merely "declares the pre-existing rights of the natives as British subjects under the Treaty of Waitangi" and "carefully excludes the idea that the tenure of lands according to native custom is to be equivalent to, or have the incidents of tenure of land according to English law".¹⁶² Thus, the trespass claim was rejected.¹⁶³

The ruling in *Mangakahia* was not a rejection of a tikanga argument because the plaintiffs relied on common law principles rather than customary ones. In fact, in a way, Gillies J purported to uphold

154 See for example *Te Whetu v Tiopera Tawhiao*; *R v Wi Noka*; and "Resident Magistrate's Court" *Poverty Bay Herald* (Gisborne, 23 September 1881) at 2 <www.paperspast.natlib.govt.nz/newspapers/PBH18810923.2.12>.

155 *Mangakahia v New Zealand Timber Company Ltd* (1884) 2 NZLR 345 (SC).

156 At 346.

157 At 346.

158 At 347.

159 At 347.

160 At 350.

161 At 350.

162 At 351.

163 At 351.

the integrity of the customary tenure system. His refusal to recognise the trespass claim rested on the rationale that such a claim was not known under customary tenure. He stated that the "remedy according to native custom was much more simple, speedy, and conclusive, but our law does not recognise these modes of enforcing the incidents of native title" (a seemingly immaterial comment seeing as the plaintiffs were not looking to uphold a "remedy according to native custom" but a remedy under the common law).¹⁶⁴ Lack of actual or accurate engagement with the precepts of customary land management aside, *Mangakahia* does not stand for the proposition that tikanga has no legal force in New Zealand. Gillies J affirmed that art 3 of te Tiriti reserves "full, exclusive and undisturbed" possession of Māori land, asserting that te Tiriti "is no such 'simple nullity' as it is termed in *Wi Parata v The Bishop of Wellington*".¹⁶⁵ However, he did draw a firm line between the customary and common law systems by holding that customary rights had no relevance to the common law claim before him. In this way, his judgment does provide a counterweight to cases like *Reynolds* and *Te Rangi*, in which degrees of concord were found between these systems. As such, *Mangakahia*, like *Willoughby*, serves as a reminder that the relationship between Pākehā and Māori law differed significantly across different judgments of this period.

It should be noted that although *Mangakahia* has been discussed in relation to native title and Native Land legislation, its relevance to the interaction between tikanga and the common law has not yet been explicitly considered in scholarship.¹⁶⁶ It is another example of how historical material with potential contemporary legal relevance can be overlooked.

VIII CONCLUSION

This article does not claim generally how tikanga has been, or should be, treated in the New Zealand common law system. The cases we have discussed can be read multiple ways. They could be seen merely as examples of the use of tikanga as evidence in colonial courts. However, a few can also be regarded as moments in which the New Zealand law adjusted, taking on changes in doctrine according to tikanga-based principles and rules. Some, like *Reynolds*, support the claim that over the years, tikanga and the common law have operated in such proximity in New Zealand's courts as to incrementally create something of a "synchronic law", incorporating elements and rules from both systems. Some of them, like *Mangakahia*, support the opposing claim that in state institutions, these systems have operated in silos.

¹⁶⁴ At 350.

¹⁶⁵ At 350.

¹⁶⁶ See *He Poutama*, above n 11, at 138; Andrew Johnston "To New Zealand for Land: The Timber Industry, Land Law, and Māori Dispossession in Nineteenth-Century New Zealand" (2019) 8 *The Graduate History Review* 56; RP Boast "Sir John Salmond and Māori Land Tenure" (2007) 38 *VUWLR* 831 at 832; John William Tate "The Privy Council and Native Title: A Requiem for *Wi Parata*?" (2004) 12 *Waikato L Rev* 101 at 102; "The Treaty of Waitangi" (1934) 10 *NZLJ* 20 at 20; and "Waitangi Tribunal 'Decision'" [1983] *NZLJ* 136 at 136.

Arguably, most remarkable about these cases is that they have not been remembered, if they have been remembered at all, as being "tikanga cases". In this way, they have been hiding in plain sight. Implicitly, and explicitly in the case of *Fetzer*, they suggest the presence of more forgotten authorities and call for work to be done in rediscovering them. This is a historical and a legal imperative.

The role of the historian is to produce historical material and to illuminate its context. The role of the lawyer is to construct contemporary legal claims out of this material. The rediscovery of the "forgotten" tikanga authorities is important to support a better understanding of the historical relationship between Māori and Pākehā law, and also to facilitate richer discussion within the legal community as to the role of tikanga within modern national law. Cases like *Reynolds* and *Mangakahia* are both important to these functions.

The point is that these cases exist and can provide answers to the questions now being raised, in the course of determining tikanga's contemporary place in New Zealand law, about its historical role in New Zealand law. They certainly demonstrate that current judicial explanations of the historical relationship between tikanga and the common law are incomplete at best and erroneous at worst. The common law in New Zealand did not develop in a vacuum. It was, from the outset, surrounded by a tikanga legal framework. The effect of these legal systems on each other is an essential part of Aotearoa's story. Reconstruction of this narrative is a project significant to national history and national law.

