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TO REST IN PEACE: A PROPRIETARY ANALYSIS OF THE TREATMENT OF HUMAN BODIES AFTER DEATH

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I Abstract

This paper deals with the issue of recognising a property right in the human body after death. It advocates that such a right is appropriate given the need for family members to have increased control over the treatment of their loved one's remains. Thus a property right over human corpses is proposed, in favour of the next of kin, for the purposes of ensuring proper burial. This conclusion was reached after consideration of the recent New Zealand Supreme Court case *Takamore v Clarke*, the Gravatt family experience and Toi Moko. Themes present in this paper include the primacy of the wishes of the surviving over those of the dead and the significance of communal decision-making in matters concerning death and grief.

II Introduction

Issues relating to death are undoubtedly some of the most trying and controversial for our legal system, made a practical nightmare thanks to the literally universal application. It is therefore unsurprising that the same debates continue to resurface. This paper fuels that eternal fire by reconsidering the prospect of property rights in the human corpse. However, at the risk of sounding self-serving, the time has never been better for a reconsideration of key contentions. In New Zealand over the past few years the Law Society has held 'Death and the Law' conferences where a myriad of related issues have found interest and provoked critical analysis. In addition, two days ago the Law Commission published an issues paper considering a review on the Burial and Cremation Act 1964.[1] Thus, New Zealand is listening.

Moreover, certain recent events have created ripe opportunity for a new viewpoint on the property in bodies debate. This paper considers specifically; the decision of the Supreme Court in *Takamore v Clarke*,[2] the experiences of the Gravatt family and the Toi Moko. A property right is the strongest form of protection in our common law system, offering the surest form of redress for any wrong. Alas, historically fears of the commodifaction of the human body have negatively affected any debate connecting property rights to the body. The three case studies considered in this paper offer new ammunition for the destruction of fears surrounding the recognition of a property right, ultimately calling for utilisation of the law's strongest form of protection to extend to the remains of the deceased.

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1 Law Commission *The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review* (NZLC IP34, 2013).

2 *Takamore v Clarke* [2012] NZSC 116.

The first part of this paper necessarily digests the relevant historical case law, concluding that there is a legitimate basis on which to advocate for law reform. The age-old rule that the corpse is *nullius in rebus* is rejected. Next, important practical considerations are weighed concluding that a development of the 'quasi-property' approach from the United States jurisprudence would be suitable. Thus a corpse ought to be considered an object of property rights but only for the limited purpose of proper burial. This position is supported by analysis of the importance of ensuring proper burial, not only for public decency reasons but also more significantly as an aid in the grieving process for families.

The next section of discussion focuses on the most appropriate subject in which the property rights ought to vest. This is a particularly controversial inquiry, as identified through the case of *Takamore v Clarke*. Ultimately it is considered prudent that the next of kin ought to be entrusted with the exclusive control of the deceased's remains but that this right correlates with an obligation to consult with all interested parties. This is an extremely important decision in the New Zealand context as it affords the best opportunity for collective decision-making, which is vital to the adherence of tikanga Māori.

The second inquiry outlined in this paper focuses on the potential for recognition of a property right in human remains on the basis of a skilled transformation of those remains. This proposition is considered firstly with reference to the Gravatt family tragedy, which highlights the tension between families and medical professionals with regard to autopsies. And secondly, with regard to modern day museum exhibits such as Toi Moko. The conclusion here is also reached due to influence of tikanga. Primarily the 'skill and labour' argument is not considered convincing or influential in our current jurisprudence. Ultimately though, even if there were to be a property right recognised in regard to tissue used in research or public display, it is imperative that this right be subordinate to that of the whānau's in order to ensure non-interference with proper burial and tikanga.

III Foundational Case Law

A A General Rule that there is No Property in a Corpse

The no property in a corpse rule has been inherited in New Zealand from a long line of English case law dating from the early 19th century. However, it has recently become

clear that the rule is based on a "murky" foundation.[3] It is apt to discuss the relevant case law in a chronological format in order to view how the adoption of the 'no property in the body' rule came to be. It is this author's view that there are distinct leaps and bounds made throughout the foundational cases, based largely on incorrect interpretations of previous authorities.

Haynes' Case[4] is famously heralded as the first authority for the proposition that there can be no property in a human corpse. That case involved the rather gruesome taking of several winding sheets from the cadavers of four buried corpses. The report of the case is brief but the legal question considered is clearly stated: could this be a felony theft? The justices concerned themselves with deducing who owned the winding sheets, as the sheets needed to belong to someone in order for the felony to be made out. It was held that the sheets were the property of whoever owned them at the time of burial. Importantly the justices consequently held that the deceased persons could not be deemed the owners of the winding sheets as "a dead body being but a lump of earth has no capacity"[5] to own property. It is this proposition that has been misconstrued as authority for the general principle that a corpse is *nullius in rebus*. *Haynes' Case* concludes that a dead body cannot be the *subject* in which property is vested. Suggesting that a human body cannot be the *object* of property rights is an entirely different legal question.[6]

This misconception was immortalised by Sir William Blackstone.[7] In his Commentaries on the Laws of England, Blackstone noted, "…the heir may have a property in the monuments and escutcheons of his ancestors, yet has none in his body or ashes." There was no citation given, but the subsequent sentence was made with reference to *Haynes' Case*,[8] and thus the impression given is that Blackstone indeed misconstrued the decision in that case.[9] Importantly though the wealth of jurisprudence following Blackstone's commentary adopted his view. Sir Edward Coke in his periodical reiterated the principle,

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3 Nicola Peart "Immediately Post-death: The Body, Body Parts and Stored Human Tissue" (paper presented to New Zealand Law Society Family Law and Property Law – "Death and the Law" Intensive Conference, May 2012) 115 at 119.

4 *Haynes' Case* [1614] 12 Co Rep 113, 77 E R 1389.

5 *Haynes' Case.*

6 This point has been made in more recent commentary on the issue; see Cordelia Thomas "A Framework For The Collection, Retention And Use Of Human Body Parts" (PhD Dissertation, Victoria University of Wellington, 2006) at 57,

7 William Blackstone *Commentaries on the Laws of England* (15th ed, A Stratham for T Cadell and W Davies, London, 1809) Vol 2 at 429.

8 William Blackstone, above n 7 at 429, n m.

9 Nicola Peart takes the view that it was in fact subsequent cases, which misconstrued Blackstone's commentary in finding that there is no property in a body; see above n 3 at 119.

confirming that "[t]he burial of the *Cadaver* (that is, *caro data vermibus)* is *nullius in bonis* and belongs to Ecclesiastical cognisance."[10]

Judicially the principle was first (appropriately) applied in *R v Sharpe*.[11] *R v Sharpe* involved a son's unlawful attempt to disinter his mother's body from an unconsecrated burial site in order to rebury her in a consecrated ground with his father; the deceased's husband in life. The defendant, Sharpe, had argued that as the deceased's child he had a right to, and in, her corpse.[12] In response to this argument, Justice Erle held unequivocally that "[o]ur law recognises no property in a corpse"[13] and that "there is no authority for saying that relationship [of child to parent] will justify the taking a corpse away from the grave where it has been buried."[14] Unsurprisingly no authority was provided in support of these propositions. However, it does appear that Erle J had a policy objective in mind. Erle J noted "the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment."[15] The indictment Erle J refers to is the action of removing a corpse from its grave. Thus his Honour feared that if the Court were to allow the defendant's defence in this case, the effect of the decision would be to expose common law graveyards to prolific bodysnatching. It was relevant in this case that the deceased's body had been buried in the Churchyard of a Protestant congregation and therefore not on property subject to Ecclesiastical cognisance. Erle J was careful not to "lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters."[16] While the context in which this policy consideration is discussed, is not directly relevant today the intention to avoid a bodysnatching free-for-all is of obvious, continued importance.

Throughout the New Zealand case law the most commonly cited authority for the proposition that there can be no property in a human corpse is the case of *Williams v Williams*.[17] Mr Crookenden, the deceased, had advised his friend Eliza Williams of his express wishes as to the disposal of his remains. Mr Crookenden's instructions were

10 Edward Coke Institutes of the Laws and Customs of England (17th ed, W Clarke, London, 1817) Vol 3 at 203.
11 *R v Sharpe* [1857] 169 ER 959.
12 At [163].
13 At [163].
14 At [163].
15 At [163].
16 At [163].
17 *Williams v Williams* [1882] 20 Ch D 659; first cited in New Zealand in *Murdoch v Rhind and Murdoch* [1945] NZLR 425 (SC) at 427, and most recently in *Takamore v Clarke*, above n 2 at [113] per McGrath, Blanchard and Tipping JJ.

referenced in a codicil to his will. He desired that he be cremated, in accordance with his Roman Catholic beliefs. His ashes were then to be buried in a Wedgwood vase in consecrated ground. The vase had been bequeathed to Miss Williams for this purpose. However at that time of Mr Crookenden's death, cremation was illegal in England. Mr Crookenden's surviving wife had thus had his body interred in a cemetery, with the acknowledgement and authority of Mr Crookenden's executors. Upon this occurrence Miss Williams had applied to the Court to have the body disinterred on the pretence that she intended to relocate it to a consecrated burial site. She was awarded a disinterment licence but instead of relocating the body, she had it transported to Italy to be cremated. Fortunately for the realm of property law scholarship, Miss Williams then had the gall to sue the estate for the cost of the cremation vacation.

In *Williams v Williams* Kay J discussed at length the claims of the parties to the remains. Most notable for the purposes of this discussion, his Honour confirmed *R v Sharpe*, holding that neither Miss Williams, nor the executors owned the remains as there is no property in a dead body.[18] At this stage the general rule appears irrevocably attached to this area of the law. Kay J then went further and outlined the duties and rights that do arise with regard to burial, concluding "after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried."[19] As is characteristic of these early cases the authority on which Kay J based his conclusion as to the custodial rights is somewhat questionable.

His Honour referred to *R v Scott* and *R v Fox*, which are in essence the same case.[20] *R v Fox* was a proceeding based on an application brought by the Solicitor-General for the release of a dead body held unlawfully by the defendants. The principal defendant, Francis Scott, had been a gaoler of the prison in which the deceased had been incarcerated at his death. Scott maintained that he was entitled to keep the remains of the prisoner until a debt owed to Scott by the deceased was paid. The Court of the Queen's Bench ordered the release of the body to the executors, but no mention of a right or duty vested in the executors was made. Instead the case turned on Scott's impropriety in obstructing a proper burial.[21] Nonetheless Kay J viewed this case as authority for the position that an executor has a right to possession of the deceased's remains upon death.

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18 *Williams v Williams*, above n 17, at 662–663.

19 At 665.

20 See *R v Fox* (1841) 2 QB 246; *R v Scott* (1842) 2 QB 248. *R v Scott* was the prosecution of the defendant in *R v Fox* on the grounds of misconduct in public office, based on the same set of facts. This is made distinct in *Takamore v Clarke*, above n 2, at [178].

21 *R v Fox*, above n 20, at 247.

The final point of Kay J's reasoning, of considerable importance to the current inquiry, is the treatment of Mr Crookenden's will. Kay J unambiguously held that testamentary instructions as to the disposition of a testator's body couldn't be enforced.[22] Miss Williams was thus not entitled to the costs of cremation, as she had interfered with the executors claim over the body and moreover she had no basis on which to rely on the testator's wishes as enforceable obligations. Thus the general rule established in these foundational cases, unavoidably, is that the human corpse is incapable of being the object of property rights. There is, however a limited right vested in the executor in order to enable proper burial, arguably tantamount to a possessory right and a correlative duty to bury. As will be explored further, the questionable authority on which this base position rests has had obvious effects on the strength of the rule, and its subsequent application through the case law.

B Quasi-Property: The United States

The United States jurisprudence is worth considering separately as it has, from the outset, been more favourable towards recognising property rights in a dead body. In *Renihan et al v Wright et al*[23] the Supreme Court of Indiana directly considered the question of rights in a body for the purpose of burial. The respondents were parents whose daughter had predeceased them. They had instructed the appellants, funeral directors and undertakers, to store the remains of their deceased child until such a time when they were ready to organise her burial. Instead the appellants had in some way disposed of the body and were refusing to explain where it had gone.[24] The basis for the appeal was an application for demurrer of the Wrights' original claim for compensation, which had been upheld in the lower courts. The case is particularly relevant for the purposes of this inquiry as the appellants argued that the Wrights could not maintain any cause of action. The appellants asserted that control of the corpse is a right vested in the executor and not the next of kin.[25] Thus Coffey J was required to make a ruling on the question of a parent's right in the body of their deceased child.

In determination of the issue Coffey J quotes, with glowing confirmation, the flowery language of the Honourable Samuel B. Ruggles on the proper treatment of a body fit for burial. Mr Ruggles explains that:[26]

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22 *Williams v Williams*, above n 17, at 665.
23 *Renihan et al v Wright et al* 125 Ind 536 (1890).
24 The appellants had merely informed the Wrights that their daughter was "in Ohio" at 538.
25 At 537.
26 At 542–543.

> much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose. The dogma of the English ecclesiastical law, that a child has no such claim … no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right … that its adoption would be an eternal disgrace to American jurisprudence.

Delighting in Mr Ruggles' "accurate and elaborate … statement of the law"[27] Coffey J found that "the bodies of the dead belong to the surviving relatives, in the order of inheritance, as other property and that they have the right to the custody and burial of the same."[28] Coffey J was explicit in his policy motivations for ruling as he did. It was considered paramount that the right to protect a loved one's remains from misappropriation and to ensure that proper burial is achieved and maintained ought to be vindicated by the Court.[29] In addition, Coffey J considered the prospect of vesting the right of control in the executor or administrator to be absurd and impractical given the law regarding letters of administration.[30] It was held that the next of kin will generally be more practically and appropriately placed to decide matters of burial and to protect the deceased from disrespect after burial.[31]

Elsewhere in the United States the same sorts of policy considerations resulted in a slightly weaker right for families. The Supreme Court of Rhode Island considered a similar situation in *Pierce v Proprietors of Swan Point Cemetery*.[32] That case specifically involved a determination of the equitable jurisdiction for regulating requests relating to the disinterment and reinterment of cadavers. In dealing with the application though, Potter J made some important decisions in principle that have been cited on numerous occasions. Potter J considered the policy issues that were highlighted as crucial by Mr Ruggles' (as cited in *Renihan*) but nonetheless held that the *nullius in rebus* rule, influential in common law cases, was convincing. Thus the American jurisprudence inherited a 'halfway' approach:[33]

> Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of quasi property, to which certain

27 At 542.
28 At 543.
29 At 540–541.
30 At 541.
31 At 543.
32 *Pierce v Proprietors of Swan Point Cemetery* 10 RI 227 (1872) (RISC).
33 At 11.

> persons may have rights … But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed.

Potter J discusses at length in his judgment the importance of there being a remedy to associate with the right of a family member to deal with the burial of a loved one.[34] This principle is of a similar thread to Coffey J's discussion of the need for the law to protect a family's interest. However there is an inherent fear present in Potter J's judgement of the danger of conferring ownership rights on families with regard to the bodies of their loved ones. Thus the quasi property judgment solution arises as a way to reconcile the danger of conferring ownership privileges on family members and the need for the law to facilitate a family's ability to secure proper burial.[35]

As is almost always the case, the use of the term 'quasi' does nothing to truly clarify the situation. However it is fair to conclude that even this weaker protection of the surviving family's right to control dealings with the corpse is 'property-like'. Numerous cases, all involving differing property and equity frameworks, have considered the exact nature of the family's right since *Pierce v Proprietors of Swan Point Cemetery*.[36] Unfortunately these authorities do little to relieve the confusion as to the parameters of this right, and are not worth direct consideration here. However it is useful to note that the trust-like right has been confirmed as good law at the federal level. What can be fairly garnered from the American jurisprudence is that the Judges are amenable to recognising a property right in a deceased person's body to enable the next of kin to obtain and maintain proper burial for the deceased.[37] Also significant is that this right, from the outset, has been phrased with reference to the deceased's next of kin. Thus it is entirely plausible, and probable, that this will mean a number of relatives will collectively hold the right in some instances.

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34 At 7 and 9.

35 See Cordelia Thomas, "A Framework For The Collection, Retention And Use Of Human Body Parts" (PhD Dissertation, Victoria University of Wellington, 2006) at 64.

36 See for instance *Brotherton v Cleveland* (1991) 923 F 2d 477, 482 (6th Cir); *Whaley v County of Tuscola* 58 F 3d 1111(1995) (6th Cir) and *Arnaud v Odom* 870 F 2d 304 (1989) (5th Cir).

37 Support for this view can be found in Cordelia Thomas, above n 35, at 64-65. This finding may however contradict the finding of the Chief Justice in *Takamore v Clarke*, above n 2, at [69]. This is further outlined below.

C The 'Doodeward' *Exception*

The next case of particular import is the High Court of Australia decision in *Doodeward v Spence* (*Doodeward*).[38] This case signals the second key aspect of the historical jurisprudence, an exception to the nullius in bonis rule. *Doodeward* involved very peculiar facts and fittingly peculiar judgments. The subject matter of the case was a two-headed foetus that had been stillborn and preserved in a jar. The plurality considered that the foetus could be the object of property rights as it was not of the same kind as a mere corpse awaiting burial. Griffiths J held that:[39]

> when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it.

Thus this case was a significant development with regard to the general rule. Griffiths J essentially carved out an exception for situations where the subject matter can be said to have been sufficiently dealt with by the lawful exercise of work or skill, so as to transform it beyond a mere corpse. As is discussed below, the requirement that the corpse be relevantly and sufficiently transformed is vital.

In the United Kingdom the ratio in *Doodeward* was unequivocally confirmed in the case of *R v Kelly, R v Lindsay*.[40] That case concerned the theft of multiple human specimens housed by the Royal College of Surgeons. The question on appeal was whether the remains were subject to the general rule that the body is nullius in rebus, or whether the Royal College of Surgeons could have title in the specimens.[41] Rose LJ applied Griffith J's reasoning from *Doodeward*, concluding that specimens are "capable of being property … if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes."[42] This case deserves specific mention as it concerned specimens and therefore *parts* of a corpse and not the intact body. Rose LJ is careful to extend application of the *Doodeward* exception to parts of a corpse.[43] The conceptual difficulty with an exception for bodies that have been transformed through skill and labour is that it inevitably leads to some fairly arbitrary line drawing as to what constitutes a transformation. It is therefore necessary to directly examine the role of the *Doodeward* exception in any proposed framework for the recognition of property rights in a dead body.

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38 *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406 (31 July 1908).
39 At 47.
40 *R v Kelly, R v Lindsay* [1999] QB 621, [1998] 3 All ER 741, CA.
41 At 623.
42 At 631.
43 At 631.

IV *The New Zealand Picture:* Takamore v Clarke

A Factual Background

The case of *Takamore v Clarke*[44] is by far New Zealand's most comprehensive judicial consideration of the conceptual issues relating to property in bodies after death. The case involved a dispute among family members as to the ultimate burial site of Jim Takamore. Takamore was a native of the Tuhoe tribe in the North Island. However he had resided for the last twenty years of his life in Christchurch with his partner Ms Clarke, the respondent. Mr Takamore and Ms Clarke also had two children who had been raised in Christchurch, entirely separated from their Takamore family in the North Island. Upon Mr Takamore's death Ms Clarke was appointed executrix and determined that her partner's body would be interred at a local cemetery, Ruru Lawn Cemetery.[45] This decision conflicted with the wishes of Mr Takamore's immediate family still living in Kutarere in the Bay of Plenty. As a result the Kutarere family drove half the length of the country with the impetus of obtaining Mr Takamore's remains for reburial at their hapū urupa. This is, in its crudest form, a body-snatching case. However it is important to acknowledge that the taking of a body from one hapū to be buried in the location of another is not considered the negative action under tikanga as it is under the common law.[46]

In the lower courts Ms Clarke succeeded in her application for a licence to have her partner's body returned to her in Christchurch.[47] Before the Supreme Court Ms Clarke argued that she had the legal right to determine the specifics of Mr Takamore's burial by reason of her position as executrix. It was argued that the executrix, where appointed, has the only recognisable duty to ensure proper burial, and that this duty correlated to the remedy of disinterment and remittance where it was interfered with. Ms Clarke characterised her position as executor in the nature of a trust, subject to the supervisory jurisdiction of the High Court.[48] In opposition to this, the Takamore family argued that the dispute ought to be governed by Tuhoe tikanga and not the common law. Tuhoe

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44 *Takamore v Clarke*, above n 2.

45 While Mr Takamore had never discussed his exact wishes as to burial with his partner, there was evidence led in the High Court that Mr Takamore had intimated to his work colleagues that he would like to be buried in Ruru Lawn Cemetery.

46 Considerable expert evidence as to tikanga was led at the first instance hearing of this case. It was conclusive that the taking of a body after death is considered a boost of the mana, or personal esteem, of the deceased. See *Takamore v Clarke*, above n 2, at [69].

47 See *Clarke v Takamore* [2010] 2 NZLR 525 (HC) and *Takamore v Clarke* [2011] NZCA 587.

48 *Takamore v Clarke*, above n 2, at [6].

tikanga observed by Mr Takamore's hapū is strict on the importance of having members returned in death to the land where their life begun. The maintenance of a strong relationship between people and the land is a crucial aspect of tikanga for all Māori.[49] It was argued that this tikanga principle ought to be incorporated into the common law, with the effect of nullifying any possessory right of Ms Clarke's.[50]

B Elias CJ

The five judges on the Supreme Court were unanimous in their decision to dismiss the appeal and order Mr Takamore's remains to be remitted to Christchurch. However there were three separate judgments delivered and particular consideration of the Chief Justice's speech, in addition to the Majority's, is prudent given her Honour's treatment of the property issues. The question of Ms Clarke having any kind of proprietary right over her husband's remains was carefully considered by Elias CJ but ultimately her Honour held that such a right would be too dangerous. Her Honour documented the nuances of the legal jurisprudence relevant but then, with respect, subsequently refused to recognise any general rule or entitlement as to who decides matters of burial. Instead her decision was made after an assessment on the facts before her; that Ms Clarke ought to determine the resting place of her partner based on what appears to be a balance of factors (or, in reality, a gut instinct).[51]

However, Elias CJ's reasoning does provide a valid analysis of the relevant authorities and useful considerations for the present inquiry. First, Elias CJ appeared to be an advocate for the general proposition handed down from the English authorities that there can be no property in a corpse. Her Honour mentioned Chambers J's judgment from the Court of Appeal, rejecting his views that an executor might be able to maintain an action in conversion or detinue if the corpse of a deceased person under their direction is interfered with.[52] Elias concluded that this could not be good law, as it would result in a direct contradiction of the *nullius in rebus* principle.[53]

Second, when dealing with the question of recognising a specific entitlement in the executor to determine matters of burial, and therefore a concurrent right to the possession of the body, Elias CJ held that such a proposal would lead to a myriad of

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49 *Takamore v Clarke*, above n 2, at [14].
50 At [5].
51 At [12].
52 These views were shared by the majority in the Court of Appeal decision also. See *Takamore v Clarke*, above n 47, [264].
53 *Takamore v Clarke*, above n 2, at [70].

impracticalities.[54] *Inter alia* a will may not always convey the reality of the family circumstances at the time of the death of the testator, as it may be out of date. This eventuality would be "embarrassing" and inconvenient for the family and the courts alike.[55] The flow on from these issues is of course delay which, given the delicacy of the subject matter and the necessary public interest inherent in expedient burial, would be unacceptable.[56] Finally Elias CJ bemoaned the likelihood that family members will wish to challenge the decisions made by the executors, much as is the case on the facts.[57]

In coming to her conclusion the Chief Justice decides to follow the theme in *Jones v Dodd*,[58] a South Australian case. There, Perry J "rejected the view that there is a rule of law that confers the right to determine how the deceased's body is to be treated on a putative administrator."[59] The decision of who was entitled to determine dealings with a body after death was deemed a matter for the Court to decide in all the circumstances of the case, if and when a dispute arises.[60] Perry J paid homage to all of the competing desires and interests present in that case[61] but made a final ruling in accordance with the deceased's choices during his life.[62] Elias CJ's ultimate decision mirrors this approach. The key reason the Chief Justice gave for ordering the remittance of Mr Takamore's body to Christchurch was that it would mirror the decision Mr Takamore made during his lifetime to live with his partner and children, and leave Kutarere behind.[63]

C Tipping, McGrath and Blanchard JJ

The majority judgement in *Takamore v Clarke*, delivered by McGrath J similarly covered the relevant authorities but does not dismiss them as the Chief Justice does. Instead the majority opinion was almost an adoption of the English position. However, McGrath J is sceptical of the historical jurisprudence, noting as has been aforementioned that the judgement of Kay J in *Williams v Williams* relied on a significant misinterpretation of the earlier case law.[64] Nonetheless *Williams v Williams* is held to be the law in New Zealand

54 At [64]–[65].
55 At [65].
56 At [66].
57 At [66].
58 *Jones v Dodd* [1999] SASC 125; confirmed in *Dodd v Jones* [1999] SASC 458.
59 *Jones v Dodd*, above n 58, at [45]–[46] as quoted in *Takamore v Clarke*, above n 2, at [76].
60 *Jones v Dodd*, above n 58, at [51].
61 At [53], [55] and [56]
62 At [60] note that Perry J considers that the relevant cultural factors to uphold where possible are those beliefs held by the deceased. At [64] Perry J notes that the desires of the deceased's surviving family members are important but not determinative.
63 *Takamore v Clarke*, above n 2, at [103].
64 At [177].

to the extent that it was considered and affirmed in *Murdoch v Rhind and Murdoch*.[65] In that case Northcroft J held that the law regarding the treatment of bodies after death is clear:[66]

> Not only has the executor the right, he has the duty, of disposing of the body of the deceased. It is for him to say how and where the body shall be disposed of.

Accordingly the majority's decision focused on the role of the executor in determining matters of burial.

The majority's judgment is motivated by the intention to find a general rule to apply in cases of this sort; specifically cases where there is a disagreement between family members as to disposal of the corpse and one of the parties is the executor.[67] McGrath J considered the decision of the Court of Appeal in *Tapora v Tapora*[68] to be of worthy mention. That case involved an executor on the one hand who intended to enforce the testator's wishes to be buried in the Cook Islands, and the surviving partner on the other hand, who willed for the deceased's body to remain in Auckland. The Court of Appeal confirmed the legal analysis of the lower court, holding that the executor's right to dictate burial matters is primal, to the exclusion of all others, including the widow.[69] The majority considered these decisions as evidence that a general rule, vesting in the executor the right to control matters of burial, is good law in New Zealand. Thus they expressly disagree with the Chief Justice as to her stance that there can be no set rule.[70]

McGrath J's ultimate decision on this point is worth setting out in full as it is an excellent summary of the motivation for having a general rule of some kind:[71]

> We also see the continuation of the rule as to the personal representative's role as highly desirable. It serves the need for a person with authority to decide on the manner and place of disposal of the body when differences arise amongst those who were close to the deceased or who, for other reasons, might be expected in the normal course to make the necessary arrangements. Having such a rule providing for a decision-maker is both practical and convenient. It will often avoid anyone going to court over their differences because the parties accept or acquiesce in what the personal representative decides. In this way, the rule will often serve the desirability of expedition in a matter which is the occasion of feelings of great grief and loss, while also allowing relevant matters to be addressed.

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65 *Murdoch v Rhind and Murdoch* [1945] NZLR 425 (SC).
66 *Murdoch v Rhind*, above n 65, at 427.
67 *Takamore v Clarke*, above n 2, at [118].
68 *Tapora v Tapora* CA206/96, 28 August 1996, cited in *Takamore v Clarke*, above n 2, at [118].
69 *Tapora v Tapora*, above n 68, at 3.
70 *Takamore v Clarke*, above n 2, at [152].
71 At [153].

Beyond what was directly on point in the case at hand, the majority considered the application of a rule, which would preference an executor, to cases where no executor had been appointed, or could be found.[72] This discussion also led to an adoption of the law in England and Wales.[73] In accordance with the finding of the High Court of England and Wales in 2008,[74] the majority here decided the succession law hierarchy ought to be adopted to cover cases of intestacy.[75] Thus, where necessary, the right to control matters of burial will vest in the person with the best claim to the letters of administration.[76] Specifically this matter will be governed by the High Court Rules[77] with the High Court maintaining its ability to appoint an administrator where necessary, as per s 6 Administration Act 1969.[78] Whoever wields the power was deemed to be under an expectation to consult with other interested parties such as friends and family as to their wishes.[79] However the majority held that imposing an *obligation* to do so would be too impractical.[80]

V Analysis and Proposal – Looking Forward

A The Underlying Proposition: a Corpse is Nullius in Rebus?

As examination of the historical case law suggests the general principle that a human corpse is nullius in rebus has no substantial foundation on which to stand. As a general proposition it is surprisingly without substance. Its development is not a story of careful policy discussion and comprehensive, principled analysis.[81] Instead, Blackstone and Coke's commentary has been taken for gospel. As a result, adopting the rule in modern cases requires explanatory caveats describing its murky foundation, as was evidenced in McGrath J's judgment in *Takamore v Clarke*.[82] Thus conceptually, this author struggles to point to a convincing justification for denying a property right ad infinitum.

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72 At [124].
73 For completeness, the law on this point is also the same in Australia. See *Smith v Tamworth Ctiy* Council (1997) 41 NSWLR 80 (SC).
74 *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1225 (QB).
75 *Takamore v Clarke*, above n 2, at [125] and [144]–[147].
76 At [146].
77 High Court Rules, r 27.35(3) and r 27.35(4).
78 *Takamore v Clarke*, above n 2, at [147].
79 At [164].
80 At [164].
81 This can be contrasted with cases that have considered the proposition of recognising property rights in bodies or body parts of the living. See for instance *Moore v Regents of the University of California* [1988] 249 Cal Rptr 494 and *Yearworth v North Bristol NHS Trust* [2010] QB 1 (CA (Civ Div)).
82 *Takamore v Clarke*, above n 2, at [177].

In *Renihan v Wright*, Mr Ruggles commented that many view property as a legal concept capable of attaching to commodities only; that is, things of value, and therefore a corpse is an inappropriate object for property rights to attach.[83] This view appears misguided. In truth, it does not accord at all with the first principles of property law to suggest that an item needs to have a pecuniary value to be the object of property rights. As Felix Cohen instructs "valueless property" is entirely plausible; there are many seemingly worthless things that are protected by property rights, and many valuable things that are not.[84] Thus a doctrine or test that sets market value as the benchmark for attracting property is skewed from the start. Arguably, if property law is going to attach any meaning to the value of a thing, that value ought to be subjective, idiosyncratic. The emphasis on human bodies having a value quite apart from a pecuniary market assessment is key in viewing a place for corpses in the property realm. This paper argues that the quantifiable value in a corpse worth recognising, and protecting at law, is that perceived by the friends and family left behind.

It has been implied from Coke and Blackstone that the motivation historically was a religious precept.[85] That is, the body was considered the temple of the Holy Ghost and to do other than bury it and let it remain buried would be sacrilegious.[86] In the broader sense the fear here is that a property right in the human corpse would allow the right-holder unrestricted use of the body. This then creates the opportunity for actions of a character disrespectful to the dead or insulting to the sanctity of society generally. The risk of socially undesirable outcomes is an unavoidable danger of recognising an entirely unlimited property right in any context, and thus it is common practice to limit general property rights in numerous ways.

The most basic of property rights, the right to own land, is also the clearest example of the normalcy in our society of practical limitations.[87] Thus, this paper proposes that any property right recognised in the human body after death would be constrained by the public decency laws that exist at present. Most appropriately, the requirement in the Crimes Act 1961 to respect the dignity of the dead.[88] This could quite conceivably encompass a prohibition on the true commodification of corpses. That is, laws which prevent the buying and selling of dead bodies and body parts could be maintained. As

83 *Renihan v Wright*, above n 23.
84 Felix S Cohen "Dialogue on Private Property" (1954-1955) Rutgers L Rev 357, at 363-364.
85 *Yearworth*, above n 81, at [31].
86 At [31].
87 Land ownership is governed by common law doctrines such as the torts of nuisance and *Rylands v Fletcher* and also by the Land Transfer Act 1952 and the Property Law Act 2007, among others.
88 Crimes Act 1961, s 150.

Peter Skegg pointed out in 1975, characterisation of the right to ensure burial as a property right "need not bring about very far-reaching changes in the law relating to corpses… The property interest in the corpse could be treated as one which could not be divested."[89] This paper advocates for this conception.[90]

There is also a strong concern that our laws ought to facilitate and ensure proper, timely burial, which may be impeded if a property right is legitimised.[91] Timely burial is undeniably a legitimate policy consideration for public health and safety reasons.[92] However, this author rejects that recognising the existence of a property right in a corpse need necessarily have the causal affect of delaying expedient burial. Firstly because a right-holder who refuses to ensure timely burial with some unnatural motivation, would come under the ambit of s 150 of the Crimes Act, as referred to above. Delaying burial in a manner that degrades public welfare would satisfy s 150(a).[93] Thus attempts do delay of that kind could be swiftly dealt with. Secondly because in cases where there are disagreements among family members, a property right will afford clarity to the situation and prevent disputes form escalating. That is so, as there will be no doubt as to whom is responsible for the decision-making. The case of *Takamore v Clarke* is simply the most recent example of the danger of confusion in areas of the law such as this. It is this author's view that a change in the law that recognised a property right would remove the ability for disputes of the kind in *Takamore v Clarke* to escalate to such a level.

B Recognising a General Rule

Thus this author has no issue conceptually with translating property law concepts to the human body after death. The shaky historical foundation of the current law, creates the opportunity for continued reconsideration of the applicability of a law change for that purpose. This paper advocates for recognition of a property right vested in the next of kin, in order to obtain and maintain proper burial. This approach is an acknowledgement in support of the majority opinion in the Supreme Court decision of *Takamore v Clarke*, to the extent that the justices deemed a general rule necessary. However, as will be exemplified, this author deems it more appropriate to vest this property right in family members rather than in accordance with succession laws, given New Zealand's unique cultural landscape. This approach is most akin to the law in the United States, an

89 PDG Skegg "Human Corpses, Medical Specimens and the Law of Property" (1975) 4 Anglo-Am.L.Rev. 412 at 417.

90 Another important limitation is the ability for coroners to conduct autopsies, particularly in cases of suspicious deaths.

91 *Yearworth*, above n 81, at [31].

92 See *In re Blagdon Cemetery* [2002] 3 WLR 603.

93 Bruce Robertson (ed) Adams on Criminal Law (looseleaf ed, Brookers) at [CA150.01].

uncommon path for our courts to follow, but by no means unheard of. In the avoidance of doubt, this author does conceive the proposed property right as conferring exclusive control over the corpse and therefore proprietary in every sense of the word. As has been mentioned, the 'quasi-property' approach has often been interpreted as less than common law 'property'.

McGrath J's comments outlining the need for a general rule as to who shoulders the responsibility of ensuring proper burial are convincing. An ultimate decision maker is an unavoidable necessity in order for this area of the law to have any sort of clarity and efficiency. Elias CJ's findings were based on a preference for Court guidance on an individual case basis. This author sympathises with such a stance given the difficult facts of *Takamore v Clarke*. Realistically there was an obvious reluctance to set a precedent that may be construed to prefer either the pakeha immediate family or the Māori hapū in these matters. However by characterising her decision as a rejection of both of the parties' submissions, Elias CJ's decision is essentially a 'wait and see' solution. With respect this is unsatisfactory. It means that the court is required to make every decision of this kind and that individuals have no ability to predict for themselves who is in the right. It is the author's opinion that this is an unhelpful stance given the already confused state of the law, a position that serves to leave the door open for further challenges of a similar kind.

The proposed default rule needs to be afforded the strength of a property right. All of the authorities previously discussed agree on one principle matter: that the corpse ought to have proper burial and that *someone* has a duty to ensure that this happens. With this in mind, this author finds the comments made by Potter J in *Pierce v Proprietors of Swan Point Cemetery* illuminating. Potter J discussed the requirement for every right to have a sufficient remedy. At present, the right (however it is characterised) to control burial matters is enforced only upon application for exhumation, as in *Takamore v Clarke*.[94] This paper is not the first to suggest that this is insufficient, and to call for change.[95] By recognising a legitimate property right in the corpse, as opposed to a diluted entitlement to possession, our law would be providing for numerous alternative options for redress in situations where the burial process, or the remains themselves, are interfered with. A claimant could therefore enforce their right through the criminal law or through civil avenues such as the tort of conversion. It is unlikely that there will be many cases in

94 As per Burial and Cremation Act 1964, s 51.

95 See inter alia Peter Skegg, above n 89, at 417–418 and Remigius N. Nwabueze *Biotechnology and the Challenge of Property* (Ashgate Publishing Ltd, Aldershot, 2007) at 225.

which these measures will be utilised, but it is this author's view that the recognition of a property right will have a significant impact on the perception of individuals' roles in the decision-making process. A property right is the strongest protection our law provides, thus it would offer certainty and afford the appropriate level of importance on the right-holder's duty.

It is this author's view that the body of a deceased loved one is exactly the kind of object we ought to be protecting with a property right. In other areas of the law, when assessing a plaintiff's loss in a dispute, the court will quite frequently take into consideration the plaintiff's idiosyncratic value of the thing lost when assessing the appropriate remedy. A proprietary remedy will be considered necessary if a personal liability remedy does not sufficiently recover the plaintiff's damage.[96] That is, if the subject matter is of too great a value so as to render a compensatory award ineffective, a property analysis will kick in to protect the claimant's interest. This logic is most commonly applied to disputes over land, as land is often considered to be the kind of thing to which people attach particular meaning and significance. Following this rationale the body of a loved one arguably satisfies the proprietary analysis perfectly. Arguably there are no stronger connections than those between loved ones, and never are they felt more strongly than in the period after a death.

C A Property Right Vested in the Next of kin

Perhaps the key difference between this paper and other pieces in support of a framework for property rights in the dead[97] is the view that the right should vest in the next of kin and not the executor.[98] As is outlined above, the quasi-property right when first conceived by the American authorities highlighted the next of kin as the one in whom the rights must vest.[99] The reason being that it was the family of the deceased who were considered the most practical decision-makers. In *Takamore v Clarke* both Elias CJ and McGrath J make note that the reality of burial and funeral rites is that they are primarily matters for family and friends.[100] The law should reflect this. There is, in fact, some indication from the statute law that family members are indeed considered to be the relevant subjects for control of the body.

96 *Marlborough District Council v Altimarloch Joint Venture Limited* [2012] NZSC 11 (5 March 2012).
97 See in particular the excellent thesis from Cordelia Thomas, above n 35.
98 Support for this view is advanced by Nicola Peart, above n 3, at 126.
99 *Renihan v Wright*, above n 23, at 542.
100 *Takamore v Clarke*, above n 2, at [2] per Elias CJ and [117] per McGrath, Tipping and Blanchard JJ.

Both the Coroners Act 2006 and the Human Tissue Act 2008 deal comprehensively with the storage, collection and use of the human body or body parts after death. The Coroners Act has numerous provisions, which refer to the rights of family members of the deceased. However it does not mention any entitlement on behalf of the executor.[101] Similarly the Human Tissue Act, which specifically covers consent requirements for the use of body parts for therapeutic purposes, refers to obtaining consent from the deceased's family, not an executor.[102] The Maritime Transport Act 1994 provides at s 25:

> **25. Body and effects of deceased seafarer** –
>
> (1) Subject to subsection (2), every employer of seafarers on a New Zealand ship shall make suitable arrangements for the body and effects of any seafarer who dies in the course of a voyage, which may include the return of the body to the deceased's next of kin or the burial or cremation of that body.
>
> (2) The employer shall endeavour to ascertain the reasonable wishes of the deceased's next of kin and shall, where practicable, comply with those wishes.

This section is interesting as it exemplifies that the expected position in New Zealand is to have the body returned to the family, and for the family's wishes to be given preference. These provisions seems entirely logical and in accordance with common practice. That said, it begs the question as to why there would ever be cause to advocate for the executor holding the property right?

As is argued throughout the case law and commentary, the motivation for the executor to have the final say is two-fold. Firstly the executor represents the deceased's wishes and can therefore best ensure their intention is made out, and secondly the executor, if a character removed from the family circle, can afford neutrality in the case of disputes. With respect, this author considers neither of these factors to be desirable in the New Zealand context.

1 Subordination of the Deceased's Wishes

It is good law, long established that the deceased's wishes as to burial are unenforceable.[103] However both the core judgements from *Takamore v Clarke* considered the deceased's wishes to be influential considerations on the final decision. Elias CJ arguably imported a decision she hypothesised would have been made by the deceased had he left a will.[104] Additionally there has been a trend recently in cases of this

101 See Coroners Act 2006, ss 18–56.
102 Human Tissue Act 2008, s 12.
103 This is a proposition clearly authorised by *Williams v Williams*, above n 17, at 665.
104 Based on his choices during his lifetime.

nature, to discuss Article 8[105] rights to a private, family life as applying to a person even after life.[106] This author disagrees with any subordination of the family's interests in favour of the deceased. As Thomas Mann says "[i]t is a fact that a man's dying is more the survivors' affair than his own."[107] If a particular family wishes to honour the provisos left by their loved one then that is their prerogative, but the law need not and ought not to step in and give a voice to the dead in this regard.

The primacy of the living over the dead is an incredibly important stance in New Zealand given the need for our laws to be inclusive of tikanga Māori. A guidance paper prepared by the Mauri Ora Associates for the New Zealand Medical Council is of great assistance in conveying the Māori approach to death and grieving (governed by the concept of tangihanga). It is outlined that[108]

> The Māori view of dying and death is quite different from the non-Māori view, as is the Māori way of grieving for the dead. In Māori culture, the past is considered 'in front of' us because we know about it, understand it, and our current actions are based upon it, while the future cannot be seen and is thus considered 'behind' us.

Incorporated in this is the belief that "the dead are the basis of one's very existence in the present and are an important part of current life."[109] Significant importance is therefore placed on the traditions and rituals of the funeral; tangihanga are crucial and very complex.[110] The late Dr Paratene Ngata spoke at length of the importance of Māori funeral customs (tangihanga) to Māori.[111] For our purposes what is perhaps the most crucial aspect of Māori grieving rites is the emphasis on a communal forum in which to grieve.[112]

In an interview documenting how his own whānau commiserated the death of a loved one, Dr Ngata noted that the whole process was a cooperative affair with the sons of the

105 European Convention on Human Rights ETS No 005 (signed 4 November 1950, entered into force 3 September 1953), art 8.
106 See the discussion in *Takamore v Clarke*, above n 47, at [226]–[229] per Glazebrook and Wild JJ.
107 As quoted in Heather Conway "Dead, But Not Buried: Bodies, Burial and Family Conflicts" (2003) 23 LS 423.
108 B Packal and P Jansen Best Health Outcomes for Māori (Medical Council of New Zealand, Wellington, 2006) at 27. Note that Dr Paratene Ngata and Mason Durie were also contributing authors to this report.
109 At 27.
110 At 27.
111 (23 October 2007) 643 HTB 12607 per Tariana Turia, citing Dr Paratene Ngata in the New Zealand Medical Law Journal, 1995.
112 Lucy Middleton "The Writer Who Buried his Father the Māori Way" The New Scientist (online ed, London, 13 October 2007) at 52.

deceased making the coffin and other family members consecrating the cadaver.[113] The setting for the tangi was the communal marae where all friends and family gathered for a significant period so as to share their grief. Dr Ngata explained "[t]ears and grief were expressed openly, everyone sharing in the pain, as is the Māori way."[114] It is interesting that Dr Ngata then added; "I think it's because death is so inclusive and expressive that we see little, if any, grief-related depressive illness among Māoris."[115] In order for this communal process to be a possibility the deceased's wishes have to be subrogated for the collective interest of the whānau and hapū. Thus the deceased's kin and not an executor, acting on a fiduciary duty to the deceased, needs to be given full control of the process. This stance is important in a broader sense to Māori because the collective interest is given priority over individuals generally as a matter of tikanga.[116]

2 The Executor as a Dispute Resolver

The second argument suggested as a motivator for vesting rights in an executor is that they will be able to act as a mediator in the case of a dispute. This author does not see this as an appropriate view of reality. Most commonly an executor will be either a person closely connected with the deceased or a person removed from the family unit but with the appropriate expertise for dealing with wills. If the former then the neutrality argument is dead on arrival, or at best a complex case of dual roles, overlaid with a conflict of interest. This author does not find this argument convincing, particularly considering it depends on the premise that the executor will be able to isolate his or her own emotions at a time of grief and vulnerability.

If, on the other hand, the executor is an individual removed from the family then neutrality of opinion does appear possible. However it is this author's opinion that this is not in fact desirable. Heather Conway outlines the potential for families to be entirely isolated from the decision-making process where the executor is involved.[117] If the executor has been appointed by way of their position as the deceased's lawyer (for example) and not as a result of a connection to the whānau, there is a further danger for

113 Lucy Middleton, above n 112.
114 Above n 112.
115 Above n 112. The author did not find this area particularly well documented. However specific mention has been made that unresolved grief will have an increased affect on Māori in terms of causing depressive disorders, than on non-Māori. This supports the emphasis Dr Ngata places on the "Māori way". See National Advisory Committee on Health and Disability Guidelines for the Treatment and Management of Depression by Primary Healthcare Professionals (National Advisory Committee on Health and Disability, September 1996) at 27.
116 See the relevant discussion from Tariana Turia in the House at (23 October 2007) 643 HTB 12607.
117 Heather Conway "Dead, But Not Buried: Bodies, Burial and Family Conflicts" (2003) 23 LS 423 at 435–436.

Māori. Namely, the executor may be entirely devoid of sufficient knowledge of the hapū or of tikanga in general. This could potentially cause irreparable damage by hindering the grieving process.

D The Inevitable Disputes

The above discussion would be incomplete without the following caveat. As Elias CJ pointed out, any true measure of certainty in this area is likely to prove illusory over time.[118] Thus this author predicts that there will undoubtedly be challenges in the future as to the validity of the property right. It is likely that those challenges will take root in claims as to who is the rightful 'next of kin'. It is expected that the rules as applied in positions of intestacy will be extended to cover the body of the deceased, as they do the assets belonging to the estate. Thus, as has been mentioned earlier there will be occasions where the deceased's body will vest collectively in a number of family members; most commonly, in the parents of a deceased child or the children of a deceased parent.[119] This author does not consider that this will often be a problem. In the large majority of cases a shared right will serve to encourage discussion and cooperation with regard to the decisions to be made, conflict will be ameliorated by the shared desire to respect the dead. However when disputes do arise among equal rights holders it is this author's view that a 'majority rule' approach be adopted, with the proviso that the solution reached is reasonable and that no mutually acceptable solution was possible.

1 Is a Mutually Suitable Option Available?

The above approach is largely construed from the case law considered by Nicola Peart of the New Zealand Law Society.[120] Firstly, in *Fessi v Whitmore*[121] Boggis QC (sitting in the Chancery Division) considered a dispute between the divorced parents of a deceased 12 year old. After the separation the boy had been in father's care in Borth, but had spent most of his life in Nuneaton where his mother was still lived. Each parent wished for the ashes of their son to be interred near them. Boggis QC considered that when faced with a decision of this kind "one takes all of the background into account. One takes into account the views held on both sides and comes to a conclusion which does fairness to both sides."[122] The decision that accorded with fairness in that situation was to adopt the mother's preference. This was justified as Mr Whitmore's father's ashes had been scattered in Nuneaton and thus it was a place regularly visited by Mr Whitmore and his

118 *Takamore v Clarke*, above n 2, at [66].
119 High Court Rules, r 27.35(3).
120 Nicola Peart, above n 3, at 126–127.
121 *Fessi v Whitmore* [1999] FLR 767.
122 At [770].

family. Boggis QC found a solution arguably amenable to both sides. It is appropriate for this approach to be the court's starting point in resolving disputes of this kind.

2 The Right-holder's Intentions Ought not be Unreasonable:

The English case of *Hartstone v Gardner*[123] dealt with a similar set of facts to *Fessi v Whitmore*, and the High Court took a similar approach. However, notably the Court found that the most overarching consideration is that the body must be buried in accordance with public decency and as expediently as possible.[124] Thus a family member's wishes could be discounted if they unreasonably impede expedient burial. As has been established, this author concedes limits on the next of kin's right for this end. However the Court went on to quote the case of *Calma v Sesar*[125] where practical considerations were deemed fatal to the family's wishes. There the Supreme Court of the Northern Territory had ruled that there was no good reason to fly a corpse thousands of miles for a funeral. It is this author's opinion that practical considerations of *this* kind have very little, if any, relevance. Thus there ought to be a line drawn between wishes that will impede expedient burial and jeopardises health and safety and wishes that may seem 'impractical'. Arguably practical concerns are outweighed by the immeasurably more important consideration that the family ought to be able to grieve sufficiently.

3 Majority Rule

In the spirit of collective decision-making unanimity is of course the ideal, but in the truly difficult cases a majority opinion is suitable. In *Leeburn v Derndorfer and Plunkett*[126] the Supreme Court of Victoria dealt with a conflict between the three children of a deceased who were all executors. The siblings were agreed on cremation, but whereas Leeburn was happy to split the ashes in three parts so as to please everyone, his sisters were disgusted by the idea of splitting the ashes. The sisters went ahead with their plan to bury the ashes all together in a local cemetery plot. Leeburn was not informed. Leeburn contended that his sisters' actions were void by way of not being unanimous. This argument was reasonably rejected. However, the Court held "[g]enerally speaking, the act of any one of multiple executors with respect to estate property will bind the estate."[127] This is an unhelpful stance, as it would undermine the opportunity for collective decision-making that multiple right-holders allows for. Byrne J did however seem swayed by other factors live in that case. In particular, his Honour commented that

123 *Hartstone v Gardner* [2008] EWHC B3 (Ch).
124 At [9].
125 *Calma v Sesar* (1992) 2 NTLR 37.
126 *Leeburn v Derndorfer and Plunkett* [2004] VSC 172.
127 At [15].

he could not "ignore the fact that the majority of the executors have selected this location."[128] In the author's opinion this is indeed a persuasive consideration. Thus this paper calls for a majority decision at least.

4 Obligation of Consultation

The above compromises will not be possible without collective consultation among all right-holders. This paper advocates that an obligation of consultation on the right-holder(s) is of utmost importance. As has been established, a property right is a considerable protection to afford the next of kin, thus a correlative obligation to consult other interested parties seems appropriate. Arguably, the truth of this is exemplified by the *Takamore v Clarke* decision. All of the judges noted the importance of valid consideration of the cultural needs of the Kutarere family.[129] As William Young J concluded Māori custom ought to have been the decisive consideration in that case.[130] Māori commentators have also stressed that consultation with whānau and extended whānau is crucial in these matters.[131] To reiterate, McGrath J considered that the personal representative ought to consult the extended whānau but that this would not be a mandatory obligation of fulfilling the duty.[132] The reason being that it was predicted that the obligation would be impractical in certain circumstances. This author rejects this view. More correctly it will be impractical *not* to consult, when the alternative is to isolate interested parties and incite objections. Moreover the obligation need not be onerous, especially considering any interested parties are likely to be available during the grieving process and therefore available for consultation also. It is this author's opinion that an obligation for consultation could remove the incentive for drastic action such as the Takamore dispute, as all interested parties will comprehend their role in the process, removing the fear of being ignored.

VI The Doodeward Exception Applied

By far the closest the common law world has come to recognising a property right in the human body is the development of the *Doodeward* exception. As discussed above, courts have been more amenable to finding the body capable of being the object of property rights once it has been transformed in some way through the use of skill and labour. This

128 At [32].
129 *Takamore v Clarke*, above n 2, at [81] per Elias CJ, at [156] per McGrath, Tipping and Blanchard JJ and at [213] per William Young J.
130 At [213].
131 See (23 October 2007) 643 HTB 12607 per Tariana Turia, citing Dr Paratene Ngata.
132 *Takamore v Clarke*, above n 2, at [156].

thesis does not depend on a development of the *Doodeward* principle to justify the vesting of property rights in the next of kin. However it is important to consider the effect of the *Doodeward* exception on the property right, as it would stand. The most controversial and interesting aspects of this challenge regard the retention of body parts from cadavers to be used in medical research, and the treatment of specimens as museum exhibits.

A Case Study: The Gravatt Family

The prospect of losing a child is undoubtedly every parent's worst nightmare and when Lance and Jenny Gravatt's son Zachary contracted meningococcal C virus in July 2009 their darkest fears became a reality. To add insult to injury the Gravatts had to wait almost four years before they could properly lay Zac, 22, to rest. The reason being that following the post-mortem the pathologist had withheld several samples of Zac's bodily tissue, including sections of his heart, lungs, kidneys and brain.[133] The Gravatts were never consulted as to this decision and did not discover the truth until Dr Gravatt examined his son's autopsy report many months after Zac's funeral. The Gravatts appealed to the pathologist and were able to receive the remains from the coroner. A second memorial was held so that friends and family could say goodbye to Zac for good. At this point the Gravatts were scandalised to learn that the pathologist had once again retained samples of Zac's bodily tissue, apparently in the name of medical research. Again the Gravatts appealed to the coroner and again they had to endure the sterile procedure of picking up Zac's remains from the local District Court. Dr Gravatt has spoken publicly of the anguish this "harrowing" ordeal caused his family.[134] The Gravatt family ordeal fits nicely into this discussion paper as it reiterates the need families have to grieve in ways suitable for them, and the consequent pain that can ensue when these processes are interfered with. Thus the example provides further support for the existence of a proprietary remedy.

B Background

1 The Green Lane Hospital Scandal

The retention of body parts without the consent of family members is not a new controversy. In the early 2000s parents of children that had died at Green Lane Hospital

133 Martin Johnston "Grieving couple made to fight for son's body parts" (11 April 2013) The New Zealand Herald <http://www.nzherald.co.nz/health/news/article.cfm?c_id=204&objectid=10876791>.

134 Martin Johnston, above. See also (including the comment section) Jeremy Olds "Auckland DHB settles over Gravatt death" (27 June 2013) nzDoctor.co.nz <http://www.nzdoctor.co.nz/news/2013/june-2013/27/auckland-dhb-settles-over-gravatt-death.aspx>

in Auckland discovered that the hospital had been storing the infant hearts for research purposes.[135] This practice dated back to the 1950s and in 2002 the hospital had some 1350 hearts.[136] Some of the organs had been obtained with the consent of the families, however the large majority were covertly detained.[137] The true controversy crystallised with regard to organs taken from 1990 onwards as previously there had been no obligation to seek consent. The Cartwright Report of 1988[138] however, had ensured that the importance of informed consent was undeniably clear.[139] Thus the Green Lane scandal enthralled and enraged many, causing 43 parents to bring suits against the hospital. The litigation was later settled privately on confidential terms. Importantly though it sparked a second consideration of the requirements for informed consent in medical practice, specifically with reference to the treatment of cadavers.

2 Human Tissue Act 2008 (HTA)

The Human Tissue Bill was introduced in Parliament in 2006 in order to:[140]

> address concerns … including a lack of clarity around the informed consent requirements for the collection and retention of tissue; the role of family members in giving consent for the collection and use of tissue from a person who has died, and the lack of individual autonomy in the area.

Thus one of the key themes of the Act is the importance of obtaining informed consent from the family of the deceased. The Act also expressly notes that consideration must be given to the families' cultural or spiritual beliefs.[141] Importantly for the purpose of this discussion, informed consent is not needed for some specified purposes:[142]

> a) the exercise by a person of that person's powers under any law to collect or use tissue without consent, including (without limitation) powers of that kind exercised for either of the following purposes:

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135 TVNZ "Organ scandal spreads to NZ" (27 February 2002) TVNZ News <http://tvnz.co.nz/content/84067/425826/article.html>.

136 NZ Herald "Hospitals legally entitled to keep hearts, says expert" (28 February 2002) The New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=1040702>.

137 Te Aparangi "Green Lane took at least five hearts without consent" (7 March 2002) The Royal Society of New Zealand – science in the news <http://www.royalsociety.org.nz/2002/03/07/health-heart-150/>

138 This report concerned the mistreatment of a group of women who had received abnormal Pap smear results after being tested at the National Women's Hospital. The women were not treated in order to 'test' whether or not the abnormality found did in fact lead to cervical cancer. None of the women were consulted about the experiment. See; Silvia Cartwright *Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters* (Committee for the Inquiry, August 1988), accessible at <http://www.cartwrightinquiry.com/?page_id=29>.

139 See discussion in Te Aparangi, above n 137.

140 (14 November 2006) 635 HTB 6467, as per the Honourable Ruth Dyson.

141 At ss 18 and 42.

142 Human Tissue Act 2008, at s 20.

> (i) the maintenance of the law, including the prevention, detection, investigation, prosecution, or punishment of offences; or
> (ii) the protection of the health or safety of members of the public:
> (d) the performance of a post-mortem of a body that one of the following competent legal authorities has, under one of the following enactments, directed or ordered to be performed:
> (i) a coroner acting under section 31 of the Coroners Act 2006; and
> (ii) the High Court acting under section 41 of the Coroners Act 2006…

However, given the emphasis the Act affords to the family of the deceased it is likely this section is viewed as a situation where public policy justifies implying consent; as opposed to a situation where the family's right can be ignored. As has been mentioned above, such contravention of the next of kin's right is considered reasonable.

Outside of the protection of s 20, the legislation is clear that informed consent must be given in order for the use of body parts to be lawful.[143] These provisions accord with the proposal to vest a property right in the next of kin and it is conceivable that continuation of these practices could be viewed as a bailment or trust relationship. However what is shown by situations like the Gravatt's is that there is still some confusion under the current scheme as to a pathologist's obligation to keep the family or next of kin involved and informed. It is this author's view that the creation of a property right will remove such confusion, as it would solidify the parameters of the medical professional's liberties.

The interesting legal question that must be resolved is of course the effect of the *Doodeward* exception on the rights of families. Namely, if a medical professional were to transform a body part, previously under the family's control, would that body part vest instead in the medical professional? Considering the question of Zac Gravatt's remains, ought the pathologist's actions justify the recognition of a property right in favour of the pathologist, to the detriment of Zac's parents? As is evident given the underlying policy perspective of this paper, the proposed answer is: no. Alternately, and arguably more simply, the property right vested in the Gravatt's ought to render the pathologist's actions an unlawful interference.

C Relevant Case Law Developments

The basic propositions handed down in the *Doodeward* case are outlined above. However for the purposes of this specific inquiry it is useful to also examine the case of *Dobson v North Tyneside Health Authority*.[144] That case involved a patient who had died

143 At ss 19(1)(a) and 22. For a clear description of the legality of use see schedule 1.
144 *Dobson and Another v North Tyneside Health Authority and Another* [1996] 4 All ER 474.

of a brain tumour that went undetected by medical professionals. An autopsy was therefore crucial and the deceased's brain was removed and preserved for the purposes of the autopsy. Three years after the funeral the deceased's family attempted to get the brain returned to them, however it had been destroyed. A claim was then brought in negligence alleging a failure to ensure the safe storage of the organ. When considering the *Doodeward* exception Peter Gibson LJ was critical of its legitimacy[145] and furthermore went on to distinguish *Doodeward* from the facts of the matter at hand. It was held that the pathologist's actions of removing the brain and storing it in paraffin for the purposes of deducing a cause of death was not:[146]

> on a par with … preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak such as a double-headed foetus that had some value for exhibition purposes.

From this decision, the arbitrariness of the *Doodeward* principle is immediately clear. In terms of what constitutes a relevant transformation there seems very little difference between preserving a foetus in paraffin for amusement and preserving a brain for the purposes of continued research and yet Peter Gibson LJ considered the difference to be material. It has been suggested the real motivation for the Court in *Dobson v North Tyneside Health Authority* was a reluctance to develop a precedent that held hospitals responsible for the safekeeping of body parts on the off chance family members would make claims in the future.[147] This practical consideration does seem more convincing.

Peter Gibson LJ went on to explain that there was no practical reason why the brain ought to have been kept, as there was no "sensible" reason to reunite it with the buried corpse[148] and thus its disposal was at the will of the coroner. Perhaps from this comment, it is possible to conclude the principal requirement of the *Doodeward* test is that the transformation must have succeeded in transforming the body part into a thing, which has an inherent value aside from its meaning to the deceased's family. This is of course taking wild liberties with Peter Gibson LJ's judgment. This view of the *Doodeward* test does have some minor judicial support in the obiter dictum of Rose LJ in *R v Kelly; R v Lindsay*.[149] However, even if this was to form the *Doodeward* test it is still questionable whether the slides produced by the pathologist in the Gravatt case would qualify. There is the factual difficulty as to how much transformation has actually occurred in the process of slicing and storing the materials, but moreover there is a conceptual difficulty

145 At 601.
146 At 601.
147 Cordelia Thomas "The retention of body parts -- do the best of intentions excuse ethical breaches?" (2002) 4 BFLJ 33 at 41.
148 At 602.
149 Above n 40, at 631.

as to the worth of the samples. It is accepted that pathologists obtain and retain such material in the hopes that it will prove useful in research, but would this hypothetical value be enough? This difficulty in applying the *Doodeward* exception led Peter Skegg to deem it unworkable.[150]

There is however a very limited number of recent cases that shed light on this question. In *Roche v Douglas*[151] Master Sanderson quoted with approval a passage from Palmer and McKendrick, which speaks favourably of the recognition of a property right in body parts.[152] That case involved a Perth woman's claim over her father's estate. The trouble for Ms Roche was that her paternity had never been proven. The man in question had had tissue removed during surgery, which had been preserved in paraffin wax by a pathology laboratory, and thus Ms Roche applied for a court order requiring the tissue to be tested. A successful application relied on the Master of the Supreme Court electing to exercise his discretion to grant an access order to 'property' for the purposes of a paternity test. Thus the case became one about the nature of the tissue samples, and whether they could be deemed property. Master Sanderson's ultimate decision to grant Ms Roche's order was a very clear recognition of the existence of property rights in body parts.[153]

> it defies reason to not regard tissue samples as property … To deny that the tissue samples are property, in contrast to the paraffin in which the samples are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result.

What is particularly interesting then is that Master Sanderson's judgement was essentially a rejection of the *Doodeward* test. In spite of the facts of the case lending themselves to an adoption of Griffith J's findings, Master Sanderson concluded that the tissue sample was property by its very nature, not by virtue of 'work' done on it and he ordered that the test be done.[154] Fortunately, owing to its unusual facts, this case is directly analogous to the present inquiry. Thus *Roche v Douglas*, while merely being a preliminary judgment, is a good indicator of the degree to which *Doodeward* is likely to be relevant to the current issue.

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150 PDG Skegg "Human Corpses, Medical Specimens and the Law of Property" (1975) 4 Anglo-Am.L.Rev. 412 at 420.

151 *Roche v Douglas as administrator of the estate of Edward John Hamilton Rowan (dec)* [2000] WASC 146.

152 At [19].

153 At [24].

154 Loane Skene "Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws" (2002) 22 LS 102 at 108, citing *Roche v Douglas*, above n 151, at [14]. It is apparent that the Master did not consider the specimens as having been transformed through work or skill as he considered *Doodeward* to of ancillary relevance.

A contrasting view is available on examination of the English High Court case *AB v Leeds Teaching Hospital NHS Trust*.[155] This case involved similar facts to that of the Green Lane scandal. The claimants in the group action were all parents whose children had died and been the subjects of post mortems carried out by the defendant. The claimants alleged that, although they had consented to the post mortems, the organs of the children had been removed, retained and subsequently disposed of without their knowledge and consent.[156] The claimants brought claims against the defendant seeking damages in tort-based actions as a result of the Hospital's interference with their children's organs. Gage J had no difficulty applying the *Doodeward* test to the case before him, holding that the organs stored by the defendants were capable of being the objects of property rights. The pathologists' work and skill applied to the removal of body parts was sufficient to move the organs into the *Doodeward* category.[157] Gage J was unequivocal in his finding that the *Doodeward* exception was, in fact, good law.[158]

In the context of the other authorities on this point though, Gage J's comments serve only to make this area more equivocal. It is this author's view that the balance of the case law comes down on the side of rejecting a *Doodeward* property right in specimens such as those extracted from Zac Gravatt. However, even if the samples were considered to have been relevantly transformed by the pathologist so as to confer a property right on him, this paper advocates for the subordination of that right, in favour of the next of kin's claim. This view would accord with general principles of property law; the pathologist could not gain a better right than the Gravatt's unless and until they divested themselves of their primary claim.

D The Tikanga Māori Influence (Again)

Once again, consideration of tikanga serves to highlight the potential dangers of failing to prefer the family interest, and subsequently the potential benefits of protecting the whānau interest. Speaking during the second reading of the Human Tissue Bill, in 2007, Tariana Turia quoted Māori tikanga expert and Doctor, Paratene Ngata. Ngata explained that for Māori:[159]

> Death and dying, like giving birth and living, are considered natural and normal processes like breathing, eating, sleeping and creating life. Death is also a

155 *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644.
156 At [12].
157 At [148] and [160].
158 At [148].
159 (23 October 2007) 643 HTB 12607.

> transitional process—from Te Ao Marama (the world of light) to Te Ao Pouri (the world of darkness), a normal part of the life cycle … And while contemporary Māori attitudes and beliefs have been significantly influenced by the Christian doctrine, any attempt to intervene in any natural and biological process—like Tane's struggle to conquer death—would generally meet with antagonism, disapproval and vigorous opposition.

The relevance of citing this phrase of Ngata's here was to enable Turia to convey the cultural significance of parting with pieces of one's person.[160]

In her extensive thesis on the topic of property in the body, Cordelia Thomas documents the Māori worldview with comprehensive discussion.[161] Thomas notes that there are numerous tikanga concepts that must be given consideration when discussing issues such as the retention of human tissue. Both Whakapapa and Kaitiakitanga are crucial to understanding the Māori perspective. Whakapapa, meaning both genealogy and the act of making a genealogical connection, is viewed as the linking tool in Māori society, ensuring the continuity of the Māori collective unit.[162] For Māori these bonds extend to connect people with the land and thus reuniting a person with the land upon death is a vital aspect of ensuring continuity of relationships.[163] The retention of certain body parts, however small, without the consent and acknowledgement of the whānau may have disastrous affects on the whakapapa of the individual and the group. Kaitiakitanga loosely translates to the exercise of guardianship by the tangata whenua of an area in accordance with tikanga.[164] With relation to dealing with bodies after death, Kaitiakitanga reiterates the importance of non-interference with multigenerational whakapapa. "There is an obligation on individuals to assume responsibility [for] … the cultural imperative that human remains must be returned to their place of origin and buried."[165] Thomas expressly conveys the fear that retention of human tissue may unsettle and interfere with these customs. "Storage and eventual repatriation are ethical issues as significant to Māori as collection and usage,"[166] and thus the storage of human materials is culturally unacceptable.[167]

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160 Above n 159.
161 Cordelia Thomas, above n 35, at 140–147.
162 At 146.
163 *Takamore v Clarke*, above n 47, at [93].
164 Cordelia Thomas, above n 35, at 147.
165 At 147.
166 Aroha Te Pareake Mead "Human Genetic Research and Whakapapa" in Pania Te Whāiti, Marie McCarthy and Arohia Durie (eds) *Mai I Rangiātea: Māori Wellbeing and Development* (Auckland University Press, Auckland, 1997) at 131.
167 Cordelia Thomas, above n 35, at 147.

The above discussion emphasises the potential for continued injury of the kind experienced by the Gravatts. The most effective way of minimising the danger of harm is to recognise a property right in the corpse, vested in the next of kin from the moment of passing. A pathologist, or other medical professional, will therefore be limited in their interaction with the corpse to the degree stipulated in the relevant legislation. A property right carries with it a certain universal clout that will arguably alter the perception of those medical professionals who continue to ignore the wishes of the families affected. The Māori Party voted down the Human Tissue Bill, as it provided for the deceased's view to trump any objections of the whānau.[168] Thus tikanga confirms that the living family members are the desired decision-makers. "The processes around the collection or use of human tissue … have always [sic] seen as being in the realm of whānau, hapū, and iwi decision-making."[169]

E Public Display: a Place for Museum Exhibits?

The final section of this discussion is not extensive, as the law regarding museum exhibits is far less controversial than the aforementioned issues. However, for completeness it is necessary to discuss the second component of the *Doodeward* exception, namely the recognition of a property right in a corpse for the purposes of public display. Again, this right would require some relevant transformation of the body or part of the body, to have occurred through the use of skill and labour.

1 Toi Moko

Toi Moko are a useful example of this issue arising in modern times; helpfully germane to New Zealand. Toi Moko, Māori tattooed, preserved human heads have a significant and surprisingly poignant place in our history.[170]

> The head of the old-time Maori chief was regarded as a valuable possession whether on or off his shoulders. In pre-pakeha days, when Might was Right and the Maori made inter- tribal war, it was the custom, when possible, for his warriors to secure the heads of their chiefs and other noted men who fell in battle.

When the heads were taken back to the victor's homelands they would be preserved and placed on staffs at the boundary of the marae so as to exemplify the mana of that iwi in their success. Heads of relatives and friends were also considered of great value and it was a gallant act, well regarded, to retain the head of a loved one from the enemy.[171]

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168 Human Tissue Act 2008, s 9.
169 (23 October 2007) 643 HTB 12607.
170 Thomas Edward Donne *The Maori Past and Present* (J.B. Lippincott Company, Philadelphia, 1927) at 149.
171 At 149.

Upon the arrival of the white man a trade in Toi Moko emerged.[172] As Māori realised the worth of Toi Moko the tradition as to 'head accumulation' developed. That is, slaves would be tattooed in the same manner as a chief and then decapitated so as to make a (faux) Toi Moko.[173] From early on there was an attraction in the tattooed heads across European museums; the trade became particularly competitive.[174]

What is evident from the outset is that Toi Moko would easily satisfy the *Doodeward* requirement of transformation. The process of full facial tattooing and herbal preservation was considerably skilled. This is exemplified most obviously by the significant number of Toi Moko as of yet not decomposed. In addition Peter Skegg has mentioned specifically his view that heads of the Toi Moko kind are protected by *Doodeward*.[175] Thus this alternative analysis would support the recognition of a property right. With regard to specimens used in public display, it is likely that there will be less difficulty in applying the *Doodeward* exception. That is owing to the specific mention of the use of body parts for public display, in Griffith J's judgment:[176]

> It is idle to contend in these days that the possession of a mummy, or of a prepared skeleton, or of a skull, or other parts of a human body, is necessarily unlawful; if it is, the many valuable collections of anatomical and pathological specimens or preparations formed and maintained by scientific bodies, were formed and are maintained in violation of the law.

Even Higgins J, in dissent, seemed amenable to the notion that specimens in museums for public exhibition exist outside of the common law general rule. Higgins J noted; "it is urged that there must be property in a mummy. The point has not been tested, I believe, in British Courts; but I assume that there can be property."[177]

The difficulty with applying the *Doodeward* test and outcome to specimens such as Toi Moko is in deciding whom the interest would vest in. There is no doubt that in theory the property right is awarded to him who utilised the skill and labour in the original transformation. However, with the likes of Toi Moko, and the same is probably true of the majority of human remains exhibited, that person is unlikely to be identified. Moreover even if a valid chain of succession could be produced to the original hapū who claims responsibility, there are pressing issues of whether the original owners' interests

172 The first recorded instance of the sale of a Maori preserved head was made on the 20th January 1770, to Joseph Banks, one of the scientists with the Exploring Expedition of Captain Cook, see Thomas Edward Doone, above n 170, at 150.
173 At 151.
174 At 150.
175 Peter Skegg, above n 89, at 419.
176 *Doodeward v Spence*, above n 38, at 413.
177 At 422.

have been legitimately dispensed of over time.[178] Namely, through sale to European traders, at a time predating the prohibition on trade. The difficulty here is naturally exacerbated by the international context in which debates over possession are likely to play out.

This contention has been directly exemplified with regard to the treatment of Toi Moko in French museums and under French law. Earlier this century Te Papa Tongarewa, New Zealand's National Museum commenced efforts to track down Toi Moko still exhibited in museums overseas and bring them home to New Zealand.[179] In France this effort met with direct resistance and the matter came before an administrative tribunal.[180] In 2007 the mayor of the French city of Rouen had agreed with Te Papa staff that the Toi Moko, then held in Rouen's Museum of Natural History, would be returned. However before this agreement could be effected the French Minister of Culture intervened, enforcing a French law that deemed items belonging to a French museum collection to be in the public domain, and therefore inalienable.[181] Thus, the New Zealand Government's claim to possession was entirely rejected. The legal question was framed thus; "[i]s the head a French public good that must be declassified before it can be returned, or is it a body part (and not a work of art) that can be immediately returned in order to be properly buried?"[182] Thus this raises the potential for the New Zealand Government to protect these specimens by denying an application of the *Doodeward* principle, and advocating instead for the recognition of the next of kin's right to proper burial.

Fortunately for those interested parties at home, this decision was later overruled by French legislation, specifically facilitating the return of Toi Moko.[183] The effect of this

178 As the discussion of ownership of three Toi Moko in Wayne Orchiston *Preserved Māori Heads in the Australian Museum Dominion Museum*, Wellington, 1970) shows, this is a considerably difficult question to answer.

179 "As a result of this and earlier initiatives, nearly 360 Maori ancestral remains (including Toi Moko) have been returned to New Zealand since 1987. Returns have occurred from some 13 foreign countries and 55 different institutions. Te Papa currently holds approximately 85 Toi Moko. It has been suggested that there are possibly at least the same number of Toi Moko still remaining in institutional collections outside New Zealand, and repatriation efforts continue." See Robert K Paterson “Heading Home: French Law Enables Return of Maori Heads to New Zealand” (2010) 17 Intl J Cult Prop at 643.

180 See Robert K Paterson “Administrative Tribunal of Rouen Decision (Maori Head case)” (2008) 15 Intl J Cult Prop at 223, and Robert K Paterson “Heading Home: French Law Enables Return of Maori Heads to New Zealand” (2010) 17 Intl J Cult Prop at 643.

181 Robert K Paterson “Administrative Tribunal of Rouen Decision (Maori Head case)” (2008) 15 Intl J Cult Prop at 223.

182 Above n 181.

183 Loi No. 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections. See Robert K Paterson “Heading Home: French Law Enables Return of Maori Heads to New Zealand” (2010) 17 Intl J Cult Prop at 643.

law was to bring the Toi Moko outside of the principle of inalienability applicable to French publically owned exhibits. Robert K Paterson has concluded that the decisions of the Administrative Tribunal (and later of the Administrative Court of Appeal, which confirmed the Tribunal's decision) were the result of a reluctance to conclude on the controversial question of the ambit of the 'no property in the body' general rule.[184] This is understandable given the nuances of the legal discussion internationally. Instead, by enacting special legislation the French Government characterised the tone of negotiations. In terms of engagement with domestic legal principles, requests for the return of specimens held in museums have been conducted in a rather informal way.[185] Without really acknowledging any proprietary interest in the Toi Moko the New Zealand Government has managed to secure international recognition of our inherent right to repatriation. It appears as though this view is developing as a kind of international custom, driven both by a modern conception of state entitlements and historical redress, and a general preference for cooperation. Conceptually this example adds little to the debate on property rights in a corpse, but of particular interest is the general perception that the *Doodeward* exception is unnecessary.

By considering the way in which the New Zealand Government has reacted towards Toi Moko domestically, it is possible to make two judgments in support of the proposed framework for a property right in the next of kin. Firstly, the motivation for the repatriation efforts has been to reunite the Toi Moko with the iwi to whom the person belonged in life.[186] This indicates, primarily, that the relevant right involved is that of the iwi with whom responsibility lies to ensure proper burial. This right appears to now be valued higher than any claim from museums in New Zealand; the option for Te Papa to retain the Toi Moko is discussed only as a temporary measure until the correct whakapapa can be identified. Secondly, the emphasis on returning Toi Moko to the land shoes support for Māori tikanga in such situations, as detailed above. Finally by initiating efforts to secure return of remains hundreds of years after the rest of the body was disposed of, the New Zealand Government supports the conception that the human corpse has an eternal value to loved ones and, indicates that the right to redress for interference with proper burial is similarly continuous. This author views the example of

184 Robert K Paterson, above n 183.

185 Above n 183.

186 See inter alia "Preserved heads given burial rites" The Press (Christchurch, 5 Apr 1999) at 9; Bernadette Courtney "Preserved Head Collection Grows as Tribes Consulted" The Dominion Post (Wellington, 7 June 1999) at 7; Paul Kelbie "Maoris Win Return of Preserved Heads Hidden Away in Museum" The Independent (London, 24 June 2004) at 19 and Nikki Macdonald "Māori Remains Welcomed Home" The Dominion Post (Wellington, 23 Nov 2005) at A2.

Toi Moko as support for the proposition of property rights as has been advocated for in this paper.

VII Conclusion

This paper has conveyed the difficulty with the status quo in its failure to protect the role of the family in the treatment of the body of a loved one. The anguish of the Takamore/Clarke family, along with the Gravatts' difficulty in recovering Zac's remains has exemplified the need for a greater level of clarity with regard to the processes involved after death. Such clarity will not come from more of the same; cases decided on their facts in order to avoid making the big decisions. There is room both practically and principally for a proprietary right in bodies after death and thus the law ought to be reformed accordingly.

In its recent issue paper the Law Commission calls for comments as to whether or not there is room for increased autonomy in matters after death. As this paper has argued, there is room, and the best way to advance this is through the creation and acknowledgment of an exclusive property right. At present the legal framework does not accord with our common conception of the role of the family in the matters after death. The responsibility of dealing with proper burial and managing collective grief falls to the family and yet it is often not possible for family members to exercise their role as they would wish.

The proposal outlined in this paper need not be viewed as a drastic, dangerous descent into the depths of liberalism; the current right conferred on an executor is of much the same kind as is proposed. The difference being, with the recognition of a property right the families will have a more effective method of redress; the strength of the common law's strongest remedy when interference with their right occurs. Moreover this paper has explained how the acknowledgement of a proprietary right will likely have a significant effect on the perceptions of the roles for individuals and groups concerned, which in turn will increase much needed certainty.

The crux of this paper's argument has hindered on the importance of a property right in order to facilitate adherence to tikanga and tangihanga. The status quo often makes the collective decision-making, crucial to Māori society, an impossibility with regard to the treatment of bodies after death. This ought to be resolved and avoided going forward. It is crucial that the wishes of the deceased are not preferred over those of the living, the

proposed framework would allow for family members to revert to the deceased's wishes if this was in fact their wish, but there would be no duty or expectation for this to happen. In addition, following the rules of succession allows for the acceptance of a collective ownership right, an important signal to all (especially Māori) of the value of these matters being dealt with in the collective, whānau group.

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